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Anna Berlee

Access to personal data in public land registers

Balancing publicity of property rights with the rights to privacy and data protection

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When you buy a home, should that also mean you have to inform the whole world where you live, how much you paid for it, and whether you financed the purchase with a mortgage loan? In essence, the Netherlands and England & Wales answer this question in the affirmative. The only thing that stands in the way of anyone accessing this information in the land registry is the payment of a small fee. In Germany, on the other hand, access to this personal data is restricted to the person who can show a legitimate interest in the information.

This study examines the principle of publicity of property rights and how it has developed in light of technological advances made in information collection, processing, and dissemination. How does this publicity principle and its practical application in land registries hold up against the fundamental rights to privacy and data protection?

As such, the study may be of interest to legislators, conveyancing professionals, as well as other researchers.

About the author: *Anna Berlee* is an assistant professor of private law, with a focus on property law. She obtained both her LL.B. (cum laude) European Law School in 2010 and her LL.M. (cum laude) in Dutch Law in 2011 at Maastricht University. She subsequently held a post as a PhD candidate at Maastricht University and was a lecturer at Tilburg Law School. She is currently an assistant professor at the Molengraaff Institute for Private Law of Utrecht University.

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1 Introduction

1.1 Introduction

This is a study on access to information regarding property rights in land.[1] This information concerns details about the person (legal or natural) holding a property right (ownership or limited property right) in land, and the specific object (plot or plots of land) to which it relates. The centralised entity that collects, stores and allows access to this information is the land registry.[2]

There are two seemingly competing interests at stake in determining each of the stages of information processing (collection, storage, and disclosure) in a land registry. The first one is the interest of third parties.[3] Their interests are served by the publicity principle of property law, which advances openness or publicity of information, in order to provide legal certainty to third parties who might be affected by property rights or seek to acquire such rights.[4] The second interest is that of the individuals registered in the land registry. Their interests are protected by the fundamental rights to privacy and data protection. These fundamental rights can be considered to be at odds with the openness promoted by the publicity principle. Data protection rules take the much more restrictive view that personal information should only be processed for a specific purpose and done in a fair and legitimate manner.

As such, privacy and publicity seem to be starting at opposite ends of the spectrum and therefore appear to be incompatible with one another. The topic of this study is if, and how so, these two can be reconciled. This is researched by looking at the legal frameworks for access to land registration information in the Netherlands, England & Wales, and Germany.[5]

1 The research was concluded on 1 September 2017.

2 The land registry should be distinguished from the Cadaster or Land Ordinance Survey, which is the mapping agency.

3 Therefore, the role of information duties between two parties in a contract, for example, is explicitly not part of this study. The focus is on third parties.

4 This topic should therefore also be distinguished from access to documents which are kept by a governmental organisation (national or EU) in a non-public register or non-public document but which must nevertheless be disclosed in certain instances upon request, such as was the case in the CJEU 29 June 2010, ECLI:EU:C:2010:378, Case C-28/08 P (*European Commission v The Bavarian Lager Co. Ltd.*), ECtHR 14 April 2009, 37374/05 (*Társaság a Szabadságjogokért v. Hungary*), CJEU 8 November 2007, ECLI:EU:T:2007:334, Case T-194/04 (*The Bavarian Lager Co. Ltd v. Commission of the European Communities*), and CJEU 23 November 2011, ECLI:EU:T:2011:688, Case T-82/09 (*Gert-Jan Dennekamp v European Parliament*).

5 For more on the methodology, see section 1.3.2.

1.2 Background

1.2.1 The publicity principle

One of the main distinguishing features of property rights, as opposed to personal rights, is their ability to bind third parties. Contractual rights are personal:[6] they are rights that someone has against one or more specific other persons. Property rights are not personal, but they are rights 'against the world' or have an *erga omnes* effect. Their effect is that they are binding upon every person or, at least, binding against more than just one or several specific other persons.[7]

Personal rights, as such, correspond with personal duties, wheareas property rights correspond with duties that in principle bind everyone.[8] The strength of these rights is validated by the legal system by limiting the number and content of these rights (*numerus clausus* principle)[9] and by way of publicising these rights. It is this publicity which justifies the third-party effect of property rights, by ensuring that third parties are able to inform themselves adequately of the existence and content (insofar there is room for deviation from the default) of these rights.[10]

If, in principle, all people can be bound by property rights, does that also mean that the publicity provided regarding property rights should be fully open and accessible to everyone? Should everyone be given access to the information regarding ownership and limited property rights in the land registry? At least two systems seem to answer that question in the affirmative. The Netherlands and England & Wales have an open land registry.[11] German law, on the other hand, restricts access to this information in the land registry by requiring that the person requesting information from the land registry show a legitimate interest in the information.[12]

Even though their access regimes differ, the Netherlands, Germany, and England & Wales all base their access regimes on the same principle: publicity. Reasons for wanting access to information in the land registry based on the publicity principle can be broad. It encompasses, for example, those who wish to engage in financial dealings with others but first require information to assess the risk of default by their counterpart, whereas others need certainty about security so as to make sure that they (would) rank higher than

6 As well as those arising out of tort law or the law of delict.
7 Reid 1997, p. 226–227.
8 Or at least - as already mentioned - more than just one or several specific other persons. Van Erp & Akkermans 2012, p. 51-52.
9 See extensively on the *numerus clausus* principle Akkermans 2008; for a more Dutch perspective Struycken 2007.
10 See extensively section 2.2.
11 There is an access fee.
12 § 12 GBO, see extensively on the German legal system Chapter 8. Also, conditional upon payment of an access fee.

another creditor. Furthering publicity also serves to decrease the amount of fraud cases in matters of ante-dating,[13] but also, more fundamentally, the number of fraud cases where one pertains to have title to an asset when he or she does not have such title can easily be reduced by a public registry of such entitlements.[14] All of these reasons boil down to the same origin. When third parties have the means to find out about the existence and content of these particular property rights, they are afforded some legal certainty in relation to these rights. This legal certainty allows (third) parties to obtain and have the required information to determine their position vis-à-vis the (other) property right holder(s) and/or the property itself.

1.2.2 Publicity in practice

The *methods* to achieve publicity in land have undergone their own development, closely linked to technological advances regarding collection, storage, processing, and disclosure. In Ancient Rome, the way of conveyancing was before witnesses and/or the handing over of a stick (*festuca*), knife, or candlestick to symbolise the transfer.[15] A little later, publicity was provided by declarations made on a message board in town so as to give notoriety to transfers.[16] Modern day conveyancing significantly differs from these older manners of providing publicity about property rights. Land registries have replaced the town message board as the preferred method of giving notice to third parties of property rights in land. These land registries are tasked with the collection, storage, processing, and publication of dealings in land and have been significantly influenced in their methods of processing information by technological developments.

With regard to collection, the electronic delivery of deeds or registrations and the signing of deeds and registration documents have replaced the sending of information to the land registry using the postal system, telegram, and, later, the telephone and telefax.

The duration of data storage has significantly increased, now that paper recording and storage is no longer required but has been replaced by computerised databases,[17] which are less prone to decay.[18] Moreover, such databases take up much less space than paper

13 A practice by which a deed or other transferring document would be ante-dated to establish a chain of transfers that has not actually occurred, or by transferring a property prior to a date at which the transferor lost power to dispose, such as insolvency. This practice would be much easier where the deeds are not kept in the public registry. This is a more prevalent issue where it concerns the registration of claims and security rights in movable assets. See this example used as an argument against the introduction of the fiduciary transfer (which would be non-public), Meijers 1936, p. 284.

14 A good functioning public register that is. See section 2.6.1.

15 Clanchy 2012, p. 38–39, see for a comparative historical overview also the work of Hübbe 1857.

16 Patault 1989, p. 205–208.

17 Initially microfiche and microfilm replaced paper-based recording systems but thesewere replaced, in turn, by the advent and use of the mainframe computer, see for example section 6.2.2.1.

18 Although see Floridi 2014, p. 17–21 who discusses the problems of old formats in new times. See in similar vein Gasser 2015.

documentation, which means that fewer (expensive) storage facilities are required.[19] The processing of the information held by the land registry has been upgraded with technological developments and in particular the advent of the mainframe computer. Rather than having to transpose information from one book to another by hand, this is now automated. This also influenced the way in which one can search for information in the registries, as well as how to connect and link the information to other information elsewhere.[20] Open data[21] regarding the house price index, for example, is currently automatically generated, which would have taken hours if not days to compile when the information was stored in paper-based systems or even those stored on microfiche or microfilm. Finally, the introduction of the internet, and digitisation in general, has enhanced the ease by which one can have access to the information in the land registry. While the content itself has not necessarily changed spectacularly,[22] access thereto has. The geographical scope of publicity of information in the land registry has increased significantly. No longer is information (only) shared with the local community,[23] or all those that have the time and money to travel the distance to the different land registers and await a search in the land registers, but the information is available (in principle) to anyone who is willing to pay a small fee and has a device with an internet connection.[24] From the comfort of my home I have the possibility to know within minutes who owns the house next door and how much they paid for it.[25] The increase in accessibility is wonderful for conveyancing practitioners,[26] however, what are the implications for the privacy of those registered? Does the nature of the information change anything about the ease by which it should be accessible?

Land registries collect and process a vast amount of information concerning land. Information concerning land ownership and rights in a particular plot of land, their existence, transfers of such rights, and disputes regarding rights in land are kept in these registers. A large part of the information collected by the different land registers concerns information about the object. For example, the size of a plot of land, boundaries of land,[27] information concerning the purchase price of the property, whether there are certain restrictions on the use of the land (which may stem from public law or private law), or

19 See on this matter section 5.2.1.

20 On why this might be problematic on its own, see section 5.2.2.

21 Machine-readable (governmental) information supplied free of charge.

22 Apart from quantity, see also section 3.5.3.

23 In a similar vein Nissenbaum 2010, p. 218 regarding public records.

24 Certain information concerning property rights, such as the consideration provided for the right, is even free of charge and made available via open data.

25 This is true for the Netherlands and England & Wales, but not necessarily for Germany on account of their access regime, see Chapter 8.

26 Think of notaries and solicitors, as well as those with frequent dealings regarding land, such as the banks which supply the credit to finance a loan to purchase the property. See for example section 6.2.2.1.

27 Although the boundaries are generally construed by the Cadastre or Ordinance Survey, the mapping agencies of the respective legal systems. In the Netherlands, the legal boundaries are set by the parties, rather than the reference to the plot of land and the Cadastral boundaries, they need not overlap.

restrictions on the disposal of the land,[28] and information about the person holding a (property) right in land.[29]

1.2.3 *Information identified or identifiable to a natural person*

The information collected and processed by land registries concerns more than merely object information. It can also be information which can be linked to an individual: personal data.[30] Personal data, within the EU, is information which is identified or identifiable to a natural person.[31] This means that information regarding the home address, birthdate, birth place, marital status, identity document number (e.g. passport or driver's license number), which are all collected in the registration documentation,[32] but also the purchase price, whether there is a *hypothec* or charge in land registered in the property, and what the (maximum) amount of the claim is that the *hypothec* or charge in land provides security for, all constitute personal data.[33]

This designation of 'personal data' is important as the protection of this type of information is a fundamental right protected by EU law. The processing of personal data is governed by the rules laid down in the 1995 Data Protection Directive.[34] The EU legal framework requires that personal data must be processed fairly, for specified purposes, and on the basis of the consent of the person concerned, or some other legitimate basis laid down by law.[35] With regard to information collected and processed by a land registry, the legal basis for that processing is provided for by law.[36] Within the three legal systems that are examined in this study,[37] the legal basis for processing personal data by the land registry is inspired by the publicity principle and the desire to provide legal certainty in land dealings.

However, legislation as a result of the aforementioned technological advances has concerned itself mainly with facilitating access to the registry by outsiders or the methods

28 For example, in the Netherlands the *Wet voorkeursrecht gemeenten*, a law which provides for a designation of a certain plot of land that will firstly have to be offered up for purchase to the municipality, prior to putting the plot of land up for sale to anyone else.

29 While most of the land registers concerns themselves only with property rights in land, sometimes, personal rights in land are also registered.

30 See for a more elaborate definition section 5.6.4.

31 This is not necessarily true for legal systems outside of the EU, see for example Schwartz & Solove *California Law Review* 102/4, p. 877–916.

32 See for specifics of each of the legal systems under review more extensively Part III.

33 See section 5.6.4.3.

34 To be replaced in 2018 by the General Data Protection Regulation, see section 5.7.

35 Article 8 Charter of Fundamental Rights of the European Union. See Article 6 Data Protection Directive, elaborated upon in sections 5.5.4 and 5.6.7.

36 I only refer to those land registries which are part of the judiciary or are (semi-)governmental bodies. The New South Wales example of a privatised land registry is discussed briefly, but it is not elaborated upon, see section 3.3.4.

37 The Netherlands, England & Wales, and Germany. See on the justificiation section 1.3.3.

by which to supply deeds to the registry. The drafters of the legislation have generally overlooked or underplayed the impact of the extensions of access.[38] Only rarely were questions posed as to whether the methods of facilitating access itself and concerning *what* information could be accessed, now perhaps (far) exceed the goal and what is necessary for publicity in any given case.[39] Thus, the technological developments have not led to a fundamental re-thinking of the need and scope of publicity considering these developments and the privacy of those registered.

1.2.4 State of the Art

The academic discussion on the relevance of data protection law, and its influence on the processing of personal data by land registries, is still at a relatively early stage. Not a lot of ink has been spilled on the topic. This may be attributed to a lack of knowledge on the part of privacy scholars regarding property law concepts, principles, and rules and *vice-versa* on the part of property law scholars regarding the content and extent of privacy law and data protection principles.

When looking at the discussions regarding this topic addressed in academic literature in England & Wales, the Netherlands, and Germany, most of the literature that can be found concerns the German legal system.[40] This is not surprising given the fact that, of the three legal systems mentioned, only Germany has a limited access approach to information in the land registry, which includes data protection considerations.[41] Access to information in the land registries in Germany[42] requires the provision of a legitimate interest by the party seeking access. Moreover, as the land registry is kept by the judiciary in Germany,[43] an appeal of a decision not to grant access is adjudicated by the local court (*Amtsgericht*) and the decision is published.[44] This means that a vast amount of case law exists addressing the question: which interest is deemed a legitimate interest and as such warrants access to a particular piece of information kept by the land registry. This in turn has informed the discussions in the literature and has led to overviews and categorisations of this case law.[45]

38 As Hamwijk remarks: '[A]dvances made in technology have caused the publicity principle to develop into the idea that publicizing security and other proprietary rights is something we should strive for, simply because it seems easily attainable.' Hamwijk 2014, p. 52.

39 See sections 6.2.2.2 and 7.3.4.

40 Which was dominated by Böhringer. Böhringer 1987a 1-8, Böhringer 1987b, p. 181–191, Böhringer 1989, p. 309–313, Böhringer 2001, p. 331–334, Böhringer 2011, p. 710, Böhringer 2014, p. 16–39, Grziwotz *MDR* 67/8, p. 433–436, Grziwotz 1995, p. 97–103, Wudarski/Habdas & Wudarski 2010, Völzmann 2011, p. 164–168, Melchers 1993, p. 310–317, Sarres 2012, p. 294–297.

41 See more extensively section 8.8.2.

42 Unlike the Netherlands and England & Wales, the land registry in Germany is kept locally, not in a centralised land registry where all the information is consolidated. See Chapter 3 for more on this.

43 See section 3.3.1. for more on this.

44 As well as of the higher courts.

45 Böhringer 2014, p. 16–39, Demharter 2014, Hügel 2014.

However, even in Germany, the relationship between the publicity principle, which is still the basis for most legitimate interests,[46] and data protection rules and the constitutional right to data protection referred to as the right to informational self-determination (*informationelle Selbstbestimmung*) was not recognised in the literature for a long time.[47] This can be traced to the fact that the legitimate interest test was devised in early 1900, whereas privacy legislation started to develop some fifty years later, and the constitutional right to data protection was only enacted in 1949, well after the introduction of the legitimate interest test. The two seem to have developed autonomously. As we shall see in section 8.8.2, this changed when the *Bundesverfassungsgericht* noted in 2000 that the interpretation of the access right has changed or evolved.[48] The delimitation of the right to access is in modern terminology the protection of the registered person.[49]

Such discussions as found in German academic literature are the exception rather than the rule. What was already hinted at above is even more prevalent in the other two legal systems and the discussions there concerning access to information in the land registry. The two areas of the law have developed at different times and, after they were influenced by technological developments they now seem to run in parallel and only rarely cross paths in the academic literature.[50] Privacy scholars do raise questions whether a public register needs to be accessible with such relative ease,[51] but often they conclude that there is (probably) a valid legal reason why such information is accessible in this manner. Only a few have remarked that unrestricted access to personal data in the land registry is problematic.[52] Property law researchers that either work together with privacy researchers or are familiar with the legal field,[53] in turn, do note that there may be an issue with unrestricted access to information in the land registry.[54] However, property law scholars seem to either simply note that this might be a problem, and leave it at

46 See section 8.5.

47 Böhringer 1987b, p. 181–191, Böhringer 1989, p. 309–313, Simitis 1984.

48 Not the exact words of the German Constitutional Court. See further section 8.8.2.

49 BVerfG 28.08.2000, *NJW* 2001, 503, 504. 'Dass durch die erweiternde Auslegung des § 12I GBO der Anwendungsbereich der Vorschrift über ihren ursprünglichen Regelungszweck ausgedehnt wird, bedeutet nicht, dass dem herkömmlichen Regelungsziel keinerlei Bedeutung zukommt. Die Eingrenzung des Einsichtnahmerechts dient - in moderner Terminologie - dem Persönlichkeitsschutz der Eingetragenen.' Compare with older literature, which had a narrower interpretation still very much focused on limitations stemming from not taking part in commerce, for example Melchers 1993, p. 311. See extensively section 8.8.2.

50 See for two such exceptions the discussions regarding the introduction of the newly open systems of access to land registration information as advanced by the Law Commission and taken over (eventually) by the English legislator, The Law Commission 1985 see section 7.3.3.9. And for the Netherlands Zevenbergen & De Jong 1993.

51 Gellman/Agre & Rotenberg 1997, p. 193–218, Gellman *Government Information Quarterly* 12/4, p. 391–426, Solove *Minnesota Law Review* 86/6, p. 1192 'Real property information must be made available for certain purposes, but it should not be available for all purposes'.

52 Kohnstamm in: Akkermans 2015, p. 17–21, Overkleeft-Verburg/Zevenbergen & De Jong 1993, p. 27–36.

53 Van Loenen 2002.

54 Berlee 2015, p. 1520–1527, Berlee 2017b, De Jong, Rietdijk & Pluijmers 1997, p. 233, De Jong 1992, De Jong 1999, p. 590–592, Van Loenen, Kulk & Ploeger *Government Information Quarterly* 33/2, p. 338–345, Zevenbergen & De Jong 1993. See also Kloek-Tromp 2017.

that,[55] or reflect on the issue in a more problematic way and interpret the issue in a manner that is too restrictive.[56]

1.3 Research Design

1.3.1 Research Question

While the influence of technological developments in land registration information collection, processing, and disclosure gives rise to a wide array of questions many of which are addressed in this study, the focus of this study is on answering the following question: how can a legal system reconcile the need for the publicity of property rights in land while safeguarding the privacy of those registered in the land registry?

The question assumes a dichotomy between two different interests: those of the registered subjects, protected by privacy and data protection legislation, and those of the third parties, stemming from the publicity principle. From this observation, we can deduce two sub-questions that first need to be answered.

1. While, for the time being, the brief definition of what the publicity principle entails given at the outset of this chapter will suffice, however, in order to assess the need for publicity of property rights in land, it will be necessary to provide a more detailed and clearer understanding of what the publicity principle of property law entails, both in theory and practice, *i.e.* what publicity requires in the context of property rights in land.[57]
2. A similar exercise is required for the delineation of privacy in the context of personal data held by the land registry. What constitutes personal data, why is this in need of safeguarding and what does such safeguarding entail. The choice for safeguarding here is consistent with the wording used by the Data Protection Directive,[58] meaning in compliance with the rules laid down in the Data Protection Directive and as implemented in the legal systems of the Netherlands, Germany, and England & Wales.[59] From the answers to these questions, the necessary elements are obtained to come back to the research question and answer it.

55 Van Velten 2009, p. 9, Van Erp, *European Property Law Journal* 3/1.

56 Sparkes et al. 2016, p. 59, where the authors, for example, use confusing terminology such as 'sensitive', which is a particular subset of personal data, and do not seem to include all personal data in the land registry. More forgiving examples can be found in Dutch scholarly literature around the time the Data Protection Directive was being developed and application of such data protection may extend to property registers, see Besemer/Zevenbergen & De Jong 1993.

57 This necessarily means that personal rights are discussed only sporadically, not systematically. The focus is on property rights in land.

58 See for example recitals 3, 29, 34, 36, 54, 59, as well as Article 6(1)(b), (e) etc.

59 See on the choice for these systems, section 1.3.3 below.

1.3.2 Research Method

To answer the question of how a legal system can reconcile the need for publicity of property rights in land while safeguarding the privacy of those registered in the land registry, I have opted for the functional method of comparative law[60] by comparing the approaches to allowing access to information in the land registries of The Netherlands, England & Wales, and Germany.

The comparative law method used here is not necessarily the 'traditional' use of comparative law:[61] in order to better understand one's *own* legal system by comparing it to another, or by using the comparative method to solve a problem in one's own legal system, nor is it necessarily used to find a basis for international law.[62] This study does not seek to answer the research question for a single legal system.[63] Rather, the starting point taken here is the larger socio-economic problem of the sharing of personal information by land registries and questions raised about the appropriateness of the flow of (personal) information to and in particular *from* land registries.[64] The use of this method allows for a comparison of different systems of land registration, which comprise of highly technical rules that all seek to serve a shared purpose,[65] the publicity principle and the legal certainty it wishes to achieve.[66] Moreover, the shared purpose in safeguarding the privacy of those registered is also a given, as the rules stem from the national implementation of the same EU instrument: the Data Protection Directive. As the manner in which the objectives are achieved may differ, they can be compared in the resulting effect of the granting or the refusal of access to information concerning an individual's land holding.

While the study does not choose one legal system which it seeks to improve or understand better, three different legal systems are nevertheless compared. An attempt is made to treat each of the three systems equally and to provide for an overview of the methods

60 Although Michaels calls the use of the functional method of comparative law a triple misnomer. 'First, there is not one ('the') functional method, but many. Second, not all allegedly functional methods are 'functional' at all. Third, some projects claiming adherence to it do not even follow any recognizable "method".' Michaels/Reimann & Zimmermann 2006, p. 342. See on its origins Graziadei/Legrand & Munday 2003, p. 100–128.

61 Although questions can be raised as to whether there is much consensus about a traditional manner of comparative legal research, Oderkerk 1999, p. 15–29.

62 All functions as ascribed to comparative law by, for example, Siems 2014, p. 2 *et seq.*

63 As much of comparative law does, Glenn/Smits 2012, p. 69. Although it should be noted that the author is aware of the fact that describing 'the law' is not an objective activity and bias(es) stemming from, for example, the legal training enjoyed, may influence the number of examples from the Netherlands, for example. See on this bias in relation to comparative legal research Van Hoecke 2012, p. 27.

64 See on how this already informs the choice for the functional method Siems 2014, p. 26.

65 Siems 2014, p. 26.

66 'The basic methodological principle of all comparative law is that of functionality… the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results.' Zweigert & Kötz 1998, p. 34.

of providing publicity and safeguarding the privacy of those registered and the development that the access regimes have undergone in these legal systems. Whether, and if so how, these access regimes have stood the test of time, in particular how they fared under pressure from technological developments, and the rise of personal data protection legislation will be reflected upon. The conclusion will then serve as an exposé of the different aspects that should be considered when creating or altering an access regime for a land registry within a Member State of the EU. As the study takes the EU Data Protection Directive as the yardstick against which to measure the safeguarding of personal data in land registries, the results are therefore necessarily limited in their application to the three legal systems and perhaps more broadly within the EU. The results may provide guidance to legal systems beyond the EU, but a careful study of the particulars of the legal system and the particular socio-cultural environment in which that system functions and its effects would have to be carried out before the results could be applicable to other legal systems.[67]

1.3.3 Choice of legal systems

The three different legal systems mentioned earlier, the Netherlands, England & Wales, and Germany are chosen because each of these has a different access regime with regard to their respective land registry. The Netherlands exemplifies a centralised approach to dealing with the information flow from the land registry, which is very open. Anyone who wants access and is willing to pay a small fee will be granted such access. This includes the ability to search by name rather than only by object.[68] Moreover, the Dutch system of land registration is characterised as a deeds system. A deeds system is a land registration system in which (notarial) deeds are registered in the land registry rather than title. Thus, ownership is not immediately clear from looking through the land registry itself, but it can be inferred from the chain of deeds.

England & Wales on the other hand has a title-based system of land registration, which means that freehold title, the functional equivalent of the ownership of land, is recorded rather than the deeds.[69] Title need not be inferred as it is provided by the registration itself. In terms of access to information in the land registry, England & Wales is furthermore interesting because it can be positioned between the other two legal systems as it has a very open access regime, but it does not allow anyone to search by name. Moreover, the ability to set up a trust in England & Wales – a trust is void of publicity – and as such shields personal data from being disclosed via the land registry, makes the choice for this legal system all the more valuable.

67 On the many problems with legal transplants: Watson 1974.
68 See on the particulars section 3.6.2.
69 See on the particulars section 3.5.1.

Germany, as the third legal system, is chosen because it embodies an approach that is much more restricted compared, on its face, to the other two legal systems. Access is only provided to those that can show a legitimate interest in the information contained in the land registry.[70] This legitimate interest test limits access to the information in the land registry, however the justification for the legitimate interest test was to serve the publicity principle. This legal system is therefore an interesting one to study, as it seems to adhere to a different idea of what constitutes publicity or at least how it should be given effect. Moreover, similar to England & Wales, it also has a title-based system. It differs from the other two systems in that information collection, processing, and disclosure is not arranged at a centralised level but remains a fragmented effort arranged at the level of the different federal states.

While the focus is on the three legal systems mentioned, at times examples from other legal systems are offered where these provide some valuable insights into the three main legal systems or are necessary for another reason.[71]

The scope of the research is also limited to access to information in *land* registers. The functioning of the publicity principle in relation to property rights in movables has been subject of multiple relatively recent studies.[72] Moreover, it would mean a significant expansion of the research scope to include other registers on account of the particulars regarding movables – their tendency not to stay in one place – create difficulties for the practical implementation of publicity that do not exist in relation to land. The importance of a close examination of the topic of the privacy implications of property registration for movable assets however should not be underestimated.

1.3.4 Outline and Structure of the Research

This study is comprised of three parts, followed by a general conclusion. Part I is concerned with answering the first of the two sub-questions of the research question: what constitutes the publicity principle. Chapter 2 elaborates on the different theories of the publicity principle and elaborates on the functions of the publicity principle. This chapter is concluded with the author's interpretation of the content and scope of the publicity principle. This is followed by Chapter 3 which will delve into the way in which the publicity principle is given practical effect in relation to property rights in land, through

70 § 12 GBO. See extensively Chapter 8. The interpretation of what constitutes a 'legitimate interest' was discerned using a case law overview. The cases were selected by searching the https://beck-online.beck.de database using the keywords: 'grundbucheinsicht' and '§ 12 GBO' '§12 GBO'. The result was the list of cases used, excluding double references.

71 For example, to explain a different approach to privatisation, by means of shadow land registration such as the MERS system in the United States of America, in section 3.3.4, or a brief interlude into the French development of land registration to show how information on land strengthens the position of those who have such information, such as notaries under the *ancien régime*, in section 2.7.

72 In particular Borkhardt 2007, Hamwijk 2014, Zhang 2004.

registration. The different land registration systems are assessed based on who keeps the register(s), a judicial authority, public authority, semi-public authority, or a private party. Likewise, the nature of the registration system is looked at more closely, determining whether they are deeds or title registers. These more thematic expositions are followed by three paragraphs detailing each of the approaches of the respective legal systems to the organisation of the land registry and what is collected, stored, and processed in these registers.

Part II of the study is concerned with privacy and data protection. Chapter 4 tackles the problem of the different notions and theories of privacy. This discussion of privacy is followed by Chapter 5, which is concerned with personal data and data protection legislation. The genesis of the protection of personal data is firstly discussed, which is followed by a careful consideration of the requirements that flow from the Data Protection Directive for the free flow of information while safeguarding the fundamental right to data protection of those involved.

Part III brings the two previous parts together and looks more closely at the manner in which access to information in the land registry can be provided. It does so in three chapters, each representing the approach one legal system takes. They are arranged from open to closed, starting with the Netherlands in Chapter 6, followed by Chapter 7 discussing England & Wales, both pre-1990 and post-1990, which was the point in time when England & Wales went from a semi-closed system akin to Germany to a very open system, more akin to the Netherlands. Chapter 8 concludes Part III and discusses the access regime in Germany with its legitimate interest test which is dissected by looking at the more than 120 cases that have delineated the scope of what constitutes a legitimate interest in Germany. The study is concluded by providing an answer to the research questions.

1.4 Relevance of the Study

In section 1.2.4 above, it was mentioned that very little has been written about the balance or *prima facie* dichotomy between privacy and publicity in land registration, even though from both sides of the aisle, property and privacy scholars agree that this might be an issue worth studying. This study seeks to fill part of that void and provide an overview of how access to land registration information is given shape in three different legal systems and what lessons can be learned from these different approaches. Moreover, the discussions regarding publicity and privacy have been conducted by either privacy scholars *versus* property scholars, or property scholars amongst one another, and privacy lawyers amongst one another. In order to facilitate the discussion, this study seeks to achieve a mutual understanding between privacy and property lawyers. The chapters on publicity and registration can as such be informative for privacy scholars, who are more familiar

with the content discussed in the chapters on privacy and data protection legislation. The same is true in reverse for property scholars. The study is then continued in Part III, which scrutinises the different access regimes of the Netherlands, England & Wales, and Germany with both property law and privacy law in mind.

The chapter on publicity may furthermore be relevant as it contributes to the development of a theory regarding the publicity principle, especially its scope and content. The principle is heralded as a fundamental principle of property law, but discussions about the principle are often opened and closed with the finding that the publicity principle entails that, because property rights have a third-party effect, these third parties should have the ability to get access to information concerning the existence and content of these rights. A more detailed dissection of the principle as provided in Chapter 2 may therefore further academic debate.

Part I
PUBLICITY

2 The publicity principle

2.1 Introduction

What do the following have in common: (1) placing a heavy stone with an inscription on a plot of land to indicate that it is a mortgaged property,[1] (2) throwing a rod (*festuca*), knife, or candlestick from one person to another to symbolise a transfer,[2] and (3) writing on a town message board?[3] They were all practical embodiments of one and the same principle of property law: the publicity principle. This chapter is concerned with understanding the nature and content of this principle. It focusses on the justification and scope of the publicity principle and how these are affected, if at all, by technological developments in the digitisation of record keeping. More regarding the specific way in which publicity is given effect with regard to land is the subject of Chapter 3.

Much like the notion of privacy, as we shall see in Chapter 4,[4] there are definitional problems surrounding publicity and 'making public'. Publicity is a 'vague' notion[5] and, rather than expounding on its meaning, the definitional issues are generally left behind in scholarly literature. It follows that for something that is characterised as anything from (1) a fundamental principle of property law,[6] (2) a general principle of property law,[7] (3) an element of the type of property right (*normaaltype zakelijk recht*)[8] to (4) a principle at

1 Finley 1982, p. 63–64.

2 Clanchy 2012, p. 38–39, see for a compartive historical overview also the work of Hübbe 1857.

3 Patault 1989, p. 205–208.

4 See section 4.1 and 5.1.

5 'Im gegensatz zu den übrigen Sachenrechtsprinzipien ist das Publizitätsprinzip begrifflich unklar.' Füller 2006, p. 244, Hamwijk 2014, p. 53. Or as Hedinger notes: 'Die Aussage, dass dingliche Rechte als absolute Rechte allen Dritten gegenüber wirksam seien und deshalb auch erkennbar sein sollten, ist klar, einprägsam – und weit – gehend inhaltslos', Hedinger 1987, p. 7.

6 If a principle is classified as a fundamental principle of property law in a particular legal order, it will have consequences in private international law. See for example where incompatibility with the publicity principle, exemplified by 'silent securities', might lead to problems in accepting foreign property rights in the Dutch legal order; Asser/Kramer & Verhagen 10-III 2015. The principle of specificity is also acknowledged here. If a right is not specific, then it will lead to problems in PIL situations. Van Erp consistently refers to publicity as a fundamental principle of property law, see section 2.2. The United Nations Working Group on Security Interests even referred to it as 'a universal principle of publicity and transparency'; United Nations Commission On International Trade Law 2002, p. 16. To some extent see also Johow in his Begründungen to the GBO draft, where he considers the publicity principle to control the entire property law. Johow 1982, p. 305.

7 Suijling 1940, p. 94–95. See the positive commentary about the fact that the principles are written down, but critical about the resulting selection: Struycken 2007, p. 785–786. Struycken himself considers the publicity principle as one of seven principles of property law, and one of the three principles that carries more weight than the other four, Struycken 2007, p. 787.

8 Meijers 1948, p. 266. See criticism on this approach of types: Rank-Berenschot 1992, p. 56–57. Schoordijk is not very critical but does ask questions as to its value as a tool for the legislator, Schoordijk 1964, p. 4–5.

the basis of different areas of private law,[9] it is still relatively unclear what exactly publicity is. This chapter lays bare these definitional issues and advances a way to discuss matters of publicity by considering publicity as transaction-relevant information regarding the subject-right-object relationship.[10]

The discussion begins with the justifications for publicity, which can be found in the third-party effect that property rights have. The justification is followed by elaborating on the link between publicity and legal certainty, which is the subject of section 2.3. The link between publicity and specificity – another principle of property law – is discussed next in section 2.4. After this understanding of the background and functions of publicity, a closer look at the scope of publicity is provided by way of section 2.6 which also looks at publicity from a more law and economics perspective. After having established the reasons and justifications for publicity and its scope, section 2.7 examines publicity from the perspective of the person who has access to the information sought by others. How publicity has, in the past, given rise to information monopolies by certain professions and the dangers thereof is also addressed. The penultimate section, section 2.8, deals with the way in which technology has influenced the publicity principle. The chapter is concluded with the advancement of a new way of thinking about publicity which clarifies the different elements of publicity.

2.2 Publicity and Third-Party Effect

Discussions in scholarly literature regarding publicity often start (and end) with an explanation as to the reason(s) *why* there is publicity. They focus on the justification of the publicity principle. This justification is often found in the third-party effect that property rights have and how this differs from the effect of personal rights that arise from the law of obligations.[11]

The law of obligations deals with personal rights and obligations; a third party cannot generally be held to such an obligation or right without accepting it.[12] For example, an agreement between two neighbours to mow each other's lawns every other weekend only binds them and not a future acquirer of one of the plots of land. On the other hand, the

9 Struycken 2007, p. 792 'Een groot gedeelte van het Nederlandse vermogensrecht kan worden geordend op basis van het publiciteitsbeginsel'. Einsele describes two aspects of 'offenkundigkeit' one of which is property law publicity, the other more directed at the law of agency and representation 'Stellvertretungsrecht'. Einsele 1990, p. 1005–1014.

10 A theory which expounds on the theory of looking at the publicity principle from a law and economics point of view, advanced by Walz, and describing publicity as providing transaction-relevant information. Walz *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 73/3/4, p. 374–405. See extensively section 2.2.

11 Note, personal rights may also concern an object. The distinction between property and personal rights is not in the object concerned.

12 Burn & Cartwrigth 2011, p. 4, Van Erp & Akkermans 2012, p. 38, Reid 1997, p. 225–245.

hallmark of a property right is its 'ability to bind strangers to its creation'.[13] Property rights can generally bind not only the initial parties creating the right, but they can also have an effect on any successor in title as well as other third parties. As such, an agreement to allow the owner of the neighbouring property to cross one's land, when made in the form of a servitude or easement,[14] *does* bind any successor in title to the land.[15] It is within this third-party effect, sometimes referred to as *erga omnes* effect,[16] that the justification for publicity is found. As property rights have such a third-party effect, third parties should be able to, or must be able to,[17] ascertain the existence and the content of these rights.[18] For example, the successor in title of the ownership of land burdened by a servitude will be bound by that servitude and should therefore have the opportunity to become familiar with the existence and content of that right on the property he will acquire.

However, the statement that property rights, on account of their absolute nature, have an effect against third parties and therefore require some form of publicity, is as Hedinger notes: clear, memorable – and largely meaningless.[19] Similar to what we shall see in Chapter 4 regarding privacy, the notion of publicity in property is vague. Moreover, the lack of an explanation of the content of the principle contributes to the vagueness of the

13 Swadling/Burrows 2013, p. 174.

14 Or more specifically an *erfdienstbaarheid* in Dutch law, or a *Grunddienstbarkeit* in German law, and an easement in English & Welsh law.

15 The successor in title of the dominant land may make use of the servitude or easement, and the successor in title of the servient land will be bound by it as well.

16 An effect *against the world*. Arruñada 2014, p. 211, Van Erp/National And Kapodistrian University Of Athens, Faculty Of Law 2009, p. 1517–1533, Van Erp 2006, Ginossar 1979, p. 291, Gretton *Rabels Zeitschrift fuer auslaendisches und internationales Privatrecht* 71/4, p. 812, Moreno *European Review of Private Law* 19/5, p. 586, Sagaert 2005, p. 983–1086. Sagaert advances that the distinction between property rights and personal rights is not as strict as is commonly adhered to. But, in his discussion on arguments in favour of a *numerus clausus*, he refers to the *erga omnes* effect of property rights.

17 On the distinction between publicity as a requirement for third-party effect, or even whether the right is a property right at all, see further section 2.2.

18 Van Erp 2006 expressed that this is generally true within Europe. See also Van Erp/National And Kapodistrian University Of Athens, Faculty Of Law 2009, p. 1517–1533, Von Staudingers Kommentar zum Bürgerlichen Gesetzbuch 2012, Einl. zum SachenR, Rn. 56, Hamwijk 2014, Heilbron *VA* 8/2, p. 42, Martinek *Archiv für die civilistische Praxis* 188/1, p. 576, Merrill & Smith *The Yale Law Journal* 110/1, p. 1–70, Asser/Bartels & Van Mierlo 3-IV 2013/462, Wieling 2007, p. 8, Zhang 2004. See Füller who notes that publicity should not be limited to absolute rights, Füller 2006, p. 250. There are absolute rights without publicity and publicity in rights that are not absolute. Füller 2006, p. 252. Lord Wilberforce in National Provincial Bank Ltd v Ainsworth [1965] AC 1175, 1247-8 stated: 'Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.' BVerfG 28.08.2000, *NJW* 2001, 503, 505: 'Die Wirkungsweise der (Immobiliar-)Sachenrechte als gegenüber jedem wirkende Rechte bedingt es, dass die am Rechtsverkehr Beteiligten auch von diesen, möglicherweise auch ihnen gegenüber wirkenden Rechtspositionen Kenntnis erhalten. Hierauf kann sich der im Grundbuch Eingetragene auch einstellen.' See also Kozolchyk & Rogers *Southwestern Journal of Law and Trade in the Americas* 12/2, p. 253–254.

19 'Die Aussage, dass dingliche Rechte als absolute Rechte allen Dritten gegenüber wirksam seien und deshalb auch erkennbar sein sollten, ist klar, einprägsam – und weitgehend inhaltslos.' Hedinger 1987, p. 7.

notion itself.[20] However, this need not be a problem, as we are dealing with a principle and not a rule.[21] Rules require a clear definition, principles are inherently vague. However, the lack of clearly defined lines leaves room for far-reaching distinctions, as the publicity principle is given body with rules based on the principle. As we shall see in Part III of this study, all three legal systems are reviewed on their rules regarding access to information in the land registry. Each of the systems bases its rules regarding access on the publicity principle, however there are discrepancies between them in their implementing rules. Moreover, the relative vagueness also means that it is difficult, if not impossible, to discern a publicity principle which applies to each of the objects of property law. The relative 'strength' of publicity differs depending on the type of object of property law concerned.[22]

Where publicity is generally adhered to across the different legal systems in a strict manner with regard to immovables, *i.e.* land and rights in relation to land,[23] for movables the publicity requirement is much more relaxed as the manifestation of publicity here is not (only) through public registration but also possession, a flawed means of providing publicity.[24] For intangibles, the means of publicity is even more fraught with difficulty. Notice of assignment or vesting a limited property right in a claim for example, to the debtor only notifies that party but not others. Some legal systems, such as the Netherlands, also allow assignment or vesting of a limited property right by way of registration, but they do so in a register void of any publicity.[25] The focus of this study is on rights in

20 Hamwijk implies that it is not necessarily the notions of 'making public' and publicity themselves that are vague, but '[i]n many cases, it is not made clear by the writer what he means by publicity and in what respect publicity is pursued'. As there are multiple interpretation and views that can be taken, Hamwijk argues that 'arguments based on one view may be used to rebut positions taken on the basis of the other and vice versa', Hamwijk 2014, p. 53.

21 Van Erp 2006, p. 15. 'The above brief analysis of the two leading principles of property law [*numerus clausus* and transparency, AB] shows, first of all, that what was discussed are, principles and not rules, as they shed light on when a right can be qualified as a property right, without giving a decisive answer'.

22 Wieling 2007, who notes that publicity for objects is only consequently adhered to in land matters, where it concerns movables the principle stands 'in principle' but is is 'durch Ausnahmen durchbrochen'. Similarly Hedinger 1987 considers the principle of publicity in relation to land to be something different from that when it comes to movables.

23 Although it should be noted that possession as a means of publicity still plays a role in immovable property acquisition and loss in the context of acquisitive prescription. In relation to the exercise of a right of retention by builders regarding immovable property publicity and possession also align. Neither form is however discussed in the context of this study where publicity by way of a land registry is the focus.

24 See extensively on this topic the work of Hamwijk 2014, Zhang 2004. It is flawed in part because possession can only really say something about the fact that someone is exercising control over an object, not whether this is based on a property right or a personal right or no right whatsoever.

25 Some have characterised this as 'weak' publicity. Snijders & Rank-Berenschot 2001: 'Die eisen [van publiciteit, AB] kunnen zwak zijn (zoals bij het zogenaamde stille pand) of sterk (zoals bij de hypotheek).' However, without access to information concerning the right(s) other than by the parties, I do not consider this to be publicity at all.

land and therefore a discussion regarding the publicity principle in relation to these other objects of property law is left for other researchers.[26]

As third parties may be affected by property rights, they should be provided with information about the existence and content of these property rights, so that these third parties can make arrangements accordingly. This is directly tied with legal certainty and discussed next.

2.3 Publicity and Legal Certainty

While the specific rules created in relation to, and based on, publicity may differ between the legal systems discussed in this study,[27] there is a consensus that the goal of the publicity principle is to serve legal certainty.[28]

The importance of legal certainty is almost self-evident. As Max Weber put it in his Economy and Society:[29]

> [T]he rationalization and systematization of the law in general and, (…) the increasing calculability of the functioning of the legal process in particular, constituted one of the most important conditions for the existence of economic enterprise intended to function with stability and, especially, of capitalistic enterprise, which cannot do without legal security.

While we cannot do away with legal uncertainty entirely, we can diminish it to an acceptable level.[30] Predictability of rules and rights, as part of legal certainty, has always been held in high regard in property law.[31] Predictability in relation to property rights affords all those affected by the property rights, which includes the aforementioned third parties,

26 Already taken up by Hamwijk 2014, Hedinger 1987, Zhang 2004.

27 Those of the Netherlands, England & Wales, and Germany.

28 Struycken 2007, p. 793, Verstijlen 2004, p. 7–8.

29 Trubek *Wisconsin Law Review* 1972/3, p. 739–741, Weber 1978, p. 883.

30 MacCormick 2005, p. 11 'As a philosopher of law among the ranks of lawmakers, I always had a certain inclination to remind colleagues that certainty is unattainable, and that the most one can do is aim to diminish uncertainty to an acceptable degree. What degree is acceptable depends on the fact that other values, including justice in the light of developing but currently unforeseen situations, are at stake.'

31 Rose *Stanford Law Review* 40/3, p. 577: 'Property law, and especially the common law of property, has always been heavily laden with hard-edged doctrines that tell everyone exactly where they stand. (…) In a sense, hard-edged rules like these-rules that I call "crystals" -are what property is all about. If, as Jeremy Bentham said long ago, property is "nothing but a basis of expectation," then crystal rules are what property is all about. If, as Jeremy Bentham said long ago, property is "nothing but a basis of expectation,"' then crystal rules are the very stuff of property: their great advantage, or so it is commonly thought, is that they signal to all of us, in a clear and distinct language, precisely what our obligations are and how we may take care of our interests. Thus, I should inspect the property, record my deed, and precisely what our obligations are and how we may take care of our interests'.

the opportunity to act accordingly. In more common parlance, as Rose put it, what we want is that:

> I know where I stand and so does everyone else, and we can all strike bargains with each other if we want to stand somewhere else.[32]

It is the publicity principle that provides us with the knowledge required that helps us to 'know where we stand'. As such, publicity can be characterised as the facilitator of information and in turn of legal certainty. Or, as Van Erp states:

> given the nature and effect of property rights as rights against the world, others must be able to know about these rights, because of their binding nature. **Information is therefore a vital aspect of a property right**.[33]

Publicity can therefore be understood as (the provision of) information about a property right.[34] Walz provides for a law and economics approach to what that information should be:

> Publizität bedeutet Offenlegung der transaktionsrelevanten Informationen zwecks Senkung der Transaktionskosten, der negativen Externalitäten und der Streitbewältigungskosten. Das Grundbuch erfüllt diese Funktion in nahezu idealer Weise.[35]

Publicity hence provides transaction-relevant information. As for the purpose of providing this information, as described by Walz, to limit the transaction costs, see more extensively section 2.6.2. The specific information can be relevant depending on the context.

We have therefore discerned that publicity concerns transaction-relevant information. However, this only tells us something about the external factor of publicity, the 'making public' part, if you will. It fails to tell us which information is 'relevant' to the transaction. The type of information needs to be determined first.

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32 Rose *Stanford Law Review* 40/3, p. 577.

33 In Van Erp 2006, p. 14–15 (emphasis added) Van Erp at 14–15 ('The second principle I mentioned above is the principle of transparency. This principle has two aspects: given the nature and effect of property rights as rights against the world, others must be able to know about these rights, because of their bidning nature.'). Although generally, Van Erp describes the transparency principle to encompass not only the principle of publicity but also specificity. Van Erp *European Property Law Journal* 4/1, p. 59 'The common principles concern *numerus clausus* or the limited number of property rights and transparency, which includes the principle that it must be clear as to which object a property right exists and the principle that a property right, in order to be justified as a right "against the world", must be made public.' Van Erp *European Review of Contract Law* 9/4, p. 314 'the transparency principle, demanding that objects of property rights are clearly defined (specificity requirement) and that any property right resting on those objects is clear to the outside world (publicity requirement)'.

34 See in similar vein: Bell & Parchomovsky *Columbia Law Review* 116/1, p. 237–286, starting their contribution with 'Very few concepts affect our property system as profoundly as information about property rights'.

35 Walz *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 73/3/4, p. 388.

2.4 Publicity and Specificity

Legal certainty requires that the information made available is useful, accurate and adequate. The reasons for needing 'information' do not elaborate on what information is subject to the principle of publicity. Is it (only) information regarding the existence of a right[36] or does it entail more? And what exactly comprises as information relating to the existence of a property right? In short, how specific does this information need to be? This question is answered by the specificity principle of property law discussed next.

In determining what must be made public, we may observe an interplay between publicity and specificity.[37] Often the two are discussed consecutively as principles of property law,[38] and they are so closely related that some authors even prefer to refer to the two under the heading of the transparency principle.[39]

In order to observe this interplay between specifity and publicity, an explanation of the content of the specificity principle is required and provided in section 2.4.1. Here the leading definition of specificity which focuses on specificity in the right-object relationship is challenged and a more extensive interpretation of the principle, one that includes the subject-right relationship, is advanced. Section 2.4.2 continues by looking at specificity as a procedural requirement after which section 2.4.3 shows the interplay between publicity and specificity in the specific rules on the interpretation of deeds whereby an increase in publicity requires a corresponding increase in specificity.

36 Jansen 2014, p. 282 '[d]at beginsel eist dat van het bestaan van een zekerheid een waarneembaar teken bestaat'.

37 Snijders 1995, p. 181 '[w]il men een soepel en vlot lopend rechtsverkeer mogelijk maken dat aan deze onbeperkte vrijheid tot verruiming van telkens weer anders afgegrensde onroerende zaken recht doet wedervaren, dan moet men, voor wat betreft de identificatie van de zaak, de feitelijke omschrijving van de zaak in de akte van overdracht beslissend maken. (…). De enige eis die men hier moet stellen is dat ook voor derden precise duidelijk is wat volgens de akte waarvan inschrijving heft plaatsgevonden, precise is overgedragen, eventueel aan de hand van wat blijkt uit de plaatstelijke situatie, waarbij de omschrijving aanknoopt. Men kan zeggen dat specialiteitsbeginsel en publiciteitsbeginsel hier in elkaar grijpen.' See also Bartels 2004b, p. 5, Verstijlen 2004, p. 9: '[i]n de zaak Lagero staat de vraag centraal of met de onjuiste aanduiding van de vordering aan het bepaaldheidsvereiste is voldaan, een vereiste dat verwantschap vertoont met het publiciteitbeginsel'.

38 Baur, Baur & Stürner 2009, Johow 1982, p. 304, Tweehuysen 2016, p. 164–167, Wieling 2007, Asser/Van Mierlo 3-VI 2016/244, Snijders & Rank-Berenschot 2001 para. 80-81. Specifically in relation to PIL rules: Asser/Kramer & Verhagen 10-III 2015.

39 Akkermans 2008, p. 5, Van Erp/National And Kapodistrian University Of Athens, Faculty Of Law 2009, p. 1517–1533, Morell & Helsen *European Review of Private Law* 22/3, p. 393–438 (who use publicity and transparency interchangeably), Van Velten 2015, p. 34.

2.4.1 Specificity

Property rights demand a specific thing for their existence and exercise.[40] Property rights cannot exist in a quantity of unspecified objects.[41] These types of rights presuppose an independent, isolated object.[42] Hence, the starting point is that, for a property right to exist, the object in relation to which this right is held has to be specified.[43] A property right, as Gretton considers, is like a label glued to a particular thing.[44] Or as Lord Mustill stated in the *Goldcorp case* regarding non-ascertainable goods:

> Approaching these situations a priori common sense dictates that the buyer cannot acquire title until it is known to what goods the title relates. (…) It makes no difference what the parties intended if what they intend is impossible: as is the case with an immediate transfer of title to goods whose identity is not yet known. (…)[45]

This is true 'by what Lord Blackburn called "the very nature of things"'.[46] This leading interpretation of the specificity principle focuses on the object and the right-object relationship.

This leading interpretation of specificity however disregards, incorrectly, the link between the right holder and the right. Is there no specificity required as to the person who holds the right?[47] Is it possible to have a right without a person holding that right? Generally speaking, it is not.[48] Property rights exist in the patrimony of a person, be it a legal or natural person. They are *held by* a person. This does not require the knowledge of having such a capacity by the right holder. An owner might very well not know that he owns a

40 Baur, Baur & Stürner 2009, p. III § 4, Rn. 17. Swedish property law, in which the traditional ownership terminology has to a large extent been abandoned, 'ownership' itself only means that the claim of ownership is for specified property and not generically defined property'. See Hessler 1973, p. 64, Martinson 2006, Struycken/Weide & Westrik 2011, p. 79. For Finland see Kuusinen/Faber 2008, p. 346.

41 Van Vliet 2000, p. 27–28, Faber & Lurger 2008, p. 19. See extensively on the topic also Johansson 2009, p. 88 *et seq*.

42 Bouckaert 2010, p. 46, Mincke/Maanen & Walt 1996, Sagaert 2003, p. 10, p. 651–668, Aubry, Rau & Esmein 1961, p. 87.

43 Libecap 1994, p. 1, who defines property rights as 'the social institutions that define or delimit the range of privileges granted to individuals to specific assets'. This applies to common law and equity alike, see Goode/McKendrick 2010, p. 207.

44 Gretton International & Comparative Law Quarterly 49/3, p. 606.

45 Goldcorp Exchange Ltd & Ors v Liggett & Ors [1994] UKPC 3, [1995] 1 AC 74 per Lord Mustill.

46 Lord Mustill referring to Blackburn stating: 'The first of them that the parties must be agreed as to the specific goods on which the contract is to attach before there can be a bargain and sale, is one that is founded on the very nature of things.' Blackburn 1845, p. 122.

47 Person here meaning either natural or legal.

48 See for a notable exception the Quebec trust in which rights and obligations in a trust patrimony are without holders. See more extensively Popovici *European Review of Private Law* 24/6, p. 932 *et seq*.

particular plot of land,[49] but that does not mean the object is a *res nullius*. A *res nullius* is an object without an owner, not because the owner is unaware of his right of ownership, but because there is no ownership right and therefore there is no owner.

Therefore, I put forth that specificity can be viewed as broader than is generally understood, to encompass not only the right-object relationship but also the person-right relationship. This also provides us with a better understanding of what publicity entails in context.[50] Publicity 'makes public' one or more aspects already determined by the specificity principle. It can mean the publication of information containing the object, the right, or the right-holder, or any combination thereof. Registration in a public registry allows for information to be made known about all aspects of the property relationship. We can record and release information about the right holder, the right and its content, and the object it concerns. Possession can only definitively tell us something about the person and the object,[51] not the right, as it may be a personal right of bailment, or a property right of ownership or pledge.

As such, a fully working publicity principle relies on a mechanism that not only can provide information concerning the object and the person holding the object, but also the right and its contents. This does not require that this information should always be *made available*, but it does require the information be available if need be.[52]

Going back to the example above, while the owner, being unaware of his capacity as owner, might not be an issue of specificity, in the case of the owner that knows he owns something but fails to prove which 'thing', however, causes a problem. This more procedural aspect of specificity is discussed next.

2.4.2 Specificity as a procedural requirement

Specificity as a procedural requirement is not related to the right itself but to the legal action that 'protects' it. If one is unable to specify the object in this relation, the right itself still exists, however one is unable to prove it. The clearest example of this concerns the issues of commixture and mixing. In the Netherlands, this topic caused some consternation in the 1960s after the leading judgment in the *Teixeira de Mattos* case, concerning the commixture of certificates of shares.[53] In England & Wales reference can be made to the case of *in re Goldcorp*.[54] In both cases, parties were unable to revindicate their property, as they were

49 Not uncommon in inheritance matters.

50 On contexts see section 4.3.

51 See on the role of possession and its drawbacks Walz *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 73/3/4, p. 405, Arruñada/Chang 2015, p. 207–234, Merrill/Chang 2015, p. 27–34, Hamwijk 2011.

52 See section 2.6.

53 HR 12 January 1968, ECLI:NL:HR:1968:AC2286, *NJ* 1968, 274, with note by H. Drion (*Mulder cs/Teixeira de Mattos*).

54 Re Goldcorp Exchange Ltd [1994] UKPC 3, [1995] 1 AC 74.

unable to ascertain the goods from a collection of identical objects stored in the same place. This led to the result that the only people with a valid ownership right or title were unable to effectuate their right and as such lost their means of getting it back.[55]

In *Texeira de Mattos*, Mulder and Peijnenburg, handed over paper certificates of shares to the bank Texeira de Mattos for safekeeping. Texeira de Mattos was supposed to keep an administration of which certificate (they were uniquely numbered) belonged to Mulder and which belonged to Peijnenburg, however they failed to do so. Moreover, the bank traded in these certificates of shares. When the bank became insolvent and the insolvency administrator (*curator*) was appointed there were four certificates of shares in the vault of Texeira de Mattos, the exact number that Mulder and Peijnenburg had left there for safekeeping. The insolvency administrator however refused to hand over the certificates to Mulder and Peijnenburg because they could not prove the certificates were the same as those which they had left there earlier. The question was brought before the Dutch Supreme Court which ruled that:[56]

> […] as these shares, which form part of the general stock of shares of Teixeira, which also in respect of the objects under dispute was constantly subjected to change, and which cannot be proven to be the same as deposited by Mulder and Peijnenburg for safekeeping or that Teixeira went on to keep these for Mulder and Peijnenburg either individually or cumulatively, should be construed as property of Teixera.

Consequently, in the spirit of legal certainty, the detentor (here the bank) is presumed to be the possessor who in turn is considered to be (primary) right holder.[57] This is not a (new) way of acquiring ownership, seeing as the ownership remains with Mulder and Peijnenburg, but it does have that effect.[58] As a result, the line between substantive specificity discussed above and procedural specificity, as evident from *Texeira de Mattos* and *Goldcorp*, is a very thin one. However, maintaining the distinction helps in clarifying the different aspects of specificity.

This matter of commixing is strictly a problem of the law of movables. Commixture issues are not a problem with regard to immovables.[59] The interplay between specificity

55 In both cases the matter of revindication came up after an insolvency procedure had been opened and, as such, relying on contract law to get back similar goods would not work, as the purported owners would be unsecured creditors.

56 Translation by the author.

57 Later laid down in articles 3:109 and 3:119 BW.

58 See also Drion in his annotation in *NJ* of the judgment, and Wichers 2002, p. 155.

59 For immovables, the matter of fixtures, or buildings in general, that accede to immovable property is also worthy of exploration in this regard. However, this is outside the scope of this study, see more extensively on this topic Van Vliet *Edinburgh Law Review* 6/1, p. 67–84, Van Vliet *Edinburgh Law Review* 6/2, p. 199–216. Specifically, for the Netherlands, see Van Der Plank 2016.

and publicity in immovables can be observed when looking at the example of interpreting deeds of transfer of immovable property.[60] These are discussed next.

2.4.3 Interpretation of Deeds

Different from movables, there is no natural boundary to land. All boundaries of land are artificial.[61] Hence individualisation, specificity, ascertainability, or determinability, however it is called, must be done by an individual[62] and, therefore, mistakes can be made. The legal issues that follow are of ascertaining boundaries. The same thing that makes land so flexible, the possibility to divide it up endlessly into pieces, small and large,[63] causes uncertainty about boundaries and, as such, legal uncertainty,[64] at least in the Netherlands.[65]

Specificity as to land is generally effectuated by reference to the cadastral map or Ordinance Survey.[66] Each plot of land is documented on the (cadastral) maps of the various countries. The clear demarcation of land as provided by the surveyors can be incredibly precise, sometimes down to the centimetre.[67] Consequently, this cadastral map provides for a great way to specify the object, in this case land.

Reference to the cadastral plot number is also commonplace in the Netherlands, and it is even a mandatory requirement for registration.[68] However, the Dutch legal system

60 And of deeds creating a limited property right or the extinction of these rights.

61 Bartels 2004b, p. 6 '[b]ij grond geldt de bijzonderheid dat er - anders dan bij roerende zaken - van nature geen grens is. De aardbol is een aaneengesloten stuk grond, soms bedekt door water'. See also his references to H.D. Ploeger, Grond en grenzen; erven en percelen, in: De Jong et al. 2003, p. 65.

62 Leaving out national, municipal borders and boundaries.

63 Snijders 1995, p. 181 '[o]nroerende zaken hebben de eigenaardigheid dat zij vrijwel zonder beperking op telkens weer andere wijze kunnen worden gevormd of gesplitst en daartoe afgegrensd. (…) Men spreekt wel van 'vast' goed, maar eigenlijk is die uitdrukking misleidend: onroerende zaken zijn, wat hun begrenzing betreft, in wezen vlottend, (…)'.

64 Bartels 2004b, p. 6.

65 This is much less of a problem in Germany, as there the reference to the plot(s) in the *Liegenschaftskatasters* determine the boundaries. Wilhelm 2010, p. 253. In England & Wales the use of general boundaries creates the necessary fuzziness to avoid conflict. Exact boundaries can be determined by the parties, and issues may arise in such determination, or exact boundaries can be established by the First-Tier Tribunal's Property Chamber when the parties fail to agree.

66 Reehuis & Slob 1990, p. 4 '[i]n de eerste plaats heeft het kadaster het mogelijk gemaakt dat door middel van de kadastrale aanduiding van onroerende zaken aan het beginsel van specialiteit, dat ten grondslag ligt aan het in ons land viegerende stelsel van openbare registers, kan worden voldaan en dat de openbare registers met vrucht kunnen worden geraadpleegd'.

67 Not all boundaries have been measured using modern GPS technology, and some still rely on measurements taken decades ago, at a time when the equipment was not as precise as it is today. Moreover, inaccuracies can also come by way of natural occurrences such as earthquakes, land increase or decrease by water, or rivers that change course.

68 Art. 20(1) jo. 23 Kw. Asser/Bartels & Van Mierlo 3-IV 2013/298.

differs from other legal systems in one major regard.[69] In the Netherlands, parties are free to decide the boundaries of what is to be transferred,[70] in the sense that, if this party agreement is specified in the deed of transfer drawn up by the notary and the boundary chosen by the parties is different from the cadastral boundaries, it will be the description in the deed that prevails.[71] Here a tension with specificity arises.[72] In the event of a dispute regarding a boundary, which the parties refer to the court, how should this deed be interpreted? Or what if there is no dispute, but a potential purchaser of the land requests the deed from the registry to ascertain the boundaries, how should the provisions in the deed be interpreted?[73]

Generally, for contractual provisions in written agreements between two or more specified persons, the interpretation follows the parties' intentions. A subjective interpretation of the provisions is preferred over a literal interpretation.[74] However, what would be the solution when more people are affected by the deed and its provisions? This is especially important for this study:[75] what are the consequences of a notarial deed of transfer of land?[76] The effect of provisions recorded in such a deed not only influence the parties, but they can affect third parties as well.

The rules on the interpretation of deeds of conveyance therefore differ from those of other deeds.[77] For the interpretation of the notarial deed of transfer,[78] the rule is that:

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69 In England & Wales, the parties are also able to determine the exact boundaries themselves, however in transfers the general boundaries are part of the title plan and more commonly used.

70 Snijders links this for the Netherlands to the aforementioned ease by which land can be divided up into different plots, plots which can be changed – at will – in size and shape, in light of pursuing smooth and swift transactions, parties' agreement should prevail. Snijders 1995, p. 181 '[w]il men een soepel en vlot verlopend rechtsverkeer mogelijk maken dat aan deze onbeperkte vrijheid tot verruiming van telkens weer anders afgegrensde onroerende zaken recht doet wedervaren, dan moet men, voor wat betreft de identificatie van de zaak, de feitelijke omschrijving van die zaak in de akte van overdracht beslissend maken. Een kadastrale indeling kan daarbij alleen een hulpmiddel zijn, maar de vrijheid van partijen om de grens te bepalen zoals hun goed dunkt niet beperken'.

71 Asser/Bartels & Van Mierlo 3-IV 2013/299.

72 What Hansmann & Kraakman consider a coordination and an enforcement issue, see section 2.6.2.2.

73 Compare to the verification rules as discussed in section 2.6.2.2.

74 In the Netherlands, the *Haviltex*-norm prevails, which explains contractual provisions by party intentions. It states: 'De vraag hoe in een schriftelijk contract de verhouding van pp. is geregeld en of dit contract een leemte laat die moet worden aangevuld, kan niet worden beantwoord op grond van alleen maar een zuiver taalkundige uitleg van de bepalingen van dat contract. Voor de beantwoording van die vraag komt het immers aan op de zin die pp. in de gegeven omstandigheden over en weer redelijkerwijs aan deze bepalingen mochten toekennen en op hetgeen zij te dien aanzien redelijkerwijs van elkaar mochten verwachten. Daarbij kan mede van belang zijn tot welke maatschappelijke kringen pp. behoren en welke rechtskennis van zodanige pp. kan worden verwacht.' HR 13 March 1981, ECLI:NL:HR:1981:AG4158, *NJ* 1981, 635, with note by C.J.H. Brunner (*Ermes cs/Haviltex*).

75 Compare to the HR 20 September 2002, ECLI:NL:HR:2002:AE3381, *NJ* 2002, 610, with note by C.E. du Perron (*ING Bank/Muller q.q.*)

76 This should be taken to include any notarial deed for the establishment of a limited property right in land as well.

77 So much so that some have even purported it to be a separate class upon which separate interpretation rules apply. See Biemans *MvV* 13/6, p. 159–168. Whereas others have advocated that party intentions should also prevail in these instances. Voogd 2002, p. 244–255, and again in Breedveld-de Voogd, Pleidooi voor de

> In answering that question, it boils down to the party intentions as expressed in the notarial deed of delivery which have to be deduced from the description of the transferred immovable property as recorded in this deed, which have to be explained according to objective criteria in light of the entire content of the deed.[79]

This is a difficult way to state that the interpretation must be an objective one. The reason for this objective interpretation rather than a subjective one is found in the interlocking of specificity and publicity.[80] The Dutch interpretation rules show a correlation between publicity and specificity. The more people have access to information, as it may affect them,[81] the more important specificity becomes. Lack of specificity when publicity is strongly adhered to, such as in a publicly accessible land registry, leads to uncertainty.[82] An objective interpretation of a deed of conveyance is logical when it is considered that anyone can access the deeds of conveyance and, recalling Rose, make use of its contents to determine where they stand 'and everyone else, so as to strike bargains with one another'.[83]

The role of specificity and the legal certainty it serves comes under pressure when the pool of people who are allowed access increases without more attention being given to

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geobjectiveerde Haviltex-uitleg bij overdracht van onroerende zaken, in: Milo & Bartels 2009, p. 63–72, Memelink is somewhat convinced by Breedveld-de Voogd, Memelink/Castermans et al. 2010, p. 14–20.

78 The Netherlands has a deeds system, see extensively section 3.4.1. See extensively on the topic of what to do when there is a discrepancy between sales agreement and deed of delivery: Van Vliet 2001, p. 238–242.

79 'Bij de beantwoording van die vraag komt het aan op de in de notariële akte van levering tot uitdrukking gebrachte partijbedoeling die moet worden afgeleid uit de in deze akte opgenomen, naar objectieve maatstaven in het licht van de gehele inhoud van de akte uit te leggen omschrijving van de over te dragen onroerende zaak.' Translation by the author.

80 Bartels 2004b, p. 5, Biemans *MvV* 13/6, p. 163, Snijders 1995, p. 181 'Men kan zeggen dat specialiteitsbeginsel en publiciteitsbeginsel hier in elkaar grijpen'. See also for example AG De Vries Lentsch-Kostense's Opinion in HR 8 December 2000, ECLI:NL:PHR:2000:AA8901, *NJ* 2001, 350, with note by W.M. Kleijn (*Stichting Eelder Woningbouw*): 'In verband met het voor registergoederen geldende stelsel van publiciteit en het specialiteitsbeginsel is voor de beantwoording van de vraag op welke onroerende zaak de levering betrekking heeft (wat het voorwerp van de levering is) uitsluitend beslissend — zoals het middelonderdeel terecht betoogt — de in de transportakte tot uitdrukking gebrachte partijbedoeling, dat wil zeggen de in de transportakte opgenomen omschrijving van het desbetreffende perceel.' See also for appartment rights splitting documents HR 1 November 2013, ECLI:NL:HR:2013:1078, *NJ* 2013, 522 (*De Prinsenwerf*) r.o 3.4.2 'De rechtszekerheid vergt dat voor de vaststelling van hetgeen tot de privégedeelten respectievelijk tot de gemeenschappelijke gedeelten behoort, slechts acht mag worden geslagen op de gegevens die voor derden uit of aan de hand van de in de openbare registers ingeschreven splitsingsstukken kenbaar zijn'.

81 A dispute over the interpretation of an interest clause in a *hypothec* however will not affect third parties, the clause is a personal one and therefore should be interpreted according to the general *Haviltex*-norm. See HR 8 July 2016, ECLI:NL:HR:2016:1511, *NJ* 2016/325 (*Goede/Goede-Martina*), r.o. 4.2.2-4.2.3.

82 For a different view, see the use of floating charges in England & Wales. These general security rights are void of specificity but have publicity, see s. 876 Companies Act 2006. See on the historical development of (other) general security rights, Van Hoof 2015.

83 See section 2.3.

specificity. For example, by introducing the interoperability of land registers in Europe, legal certainty for foreign buyers is at stake.[84]

The close link between publicity and specificity can also explain why there is virtually no specificity in deeds required that establish the silent pledge in the Netherlands.[85] The silent pledge, as the name suggests, is registered, however not in a public register. Apart from the parties themselves and the tax authority, no one has access to these deeds establishing such pledges. At its introduction, the silent pledge had to adhere to relatively (compared to now) strict interpretation rules and specificity. These rules have since been relaxed to the point of non-existence.[86] By doing so, the Netherlands introduced something akin to a general security right, not unlike the floating charge in England & Wales. A floating charge however differs in two major respects. First, it is a public security right, and second, while the security right might encompass all the assets of a company, the floating chargee may not avail of all the proceeds of the assets subject to the floating charge in the event of a crystallisation of the floating charge.[87] A part of the proceeds will

84 Van Velten notes that, partly on account of the Dutch Cadastre's partnership in EULIS, see section 2.8.2, in which foreign banks are facilitated in their cross-border investigations into cadastres, a correct depiction of land holding with as few mistakes as possible in the register is of great importance. Van Velten 2009, p. 39. See more extensively on the relationship between interoperability and legal certainty section 2.8.2.

85 Consider the discussion between Kortmann and Faber on the one hand and Struycken on the other. See also, Kortmann & Faber 1998, p. 518–520, Kortmann & Faber 1999, p. 750–753, Struycken 1999, p. 577–582, Veder 2012, p. 455–460, Verdaas 2002, p. 791–794, Verstijlen 2004. See also Du Perron in his note to HR 20 September 2002, ECLI:NL:HR:2002:AE3381, *NJ* 2002, 610, with note by C.E. du Perron (*ING Bank/Muller q.q.*): '[d]e verwerping van de objectieve uitlegmethode ligt voor de hand, omdat bij een stil pandrecht de akte — uiteraard — niet bedoeld is om het pandrecht aan derden bekend te maken. De akte en de registratie daarvan dienen vooral om fraude (antedatering van pandrechten) tegen te gaan. De methode van uitleg dient op dat doel te zijn toegesneden: het heeft geen zin een uitlegmethode te volgen ter bescherming van derden als de uit te leggen tekst niet voor publiciteit jegens derden is bestemd. (…) De objectieve uitlegmethode kan wel voorgeschreven zijn indien, in plaats van het vereiste van voldoende bepaaldheid dat de Hoge Raad afleidt uit art. 3:84 lid 2 BW, leverings- of vestigingseisen gelden die wel (mede) op publiciteit zijn gericht. Zo ten aanzien van de uitleg van een transportakte HR 8 December 2000', ECLI:NL:HR:2000:AA8901, *NJ* 2001, 350, with note by W.M. Kleijn (*Stichting Eelder Woningbouw*). Compare with United Nations Commission On International Trade Law 2002, p. 17 '[m]oreover, it was stated that absolute secrecy with respect to secured transactions meant absolute power of secured creditors over debtors, since the creditor with intimate information about a borrower with whom that creditor had a long-standing relationship effectively controlled and thus deprived that debtor of the benefits to be derived from the access to competitive banking markets'.

86 In a series of cased by the Dutch Supreme Court starting with HR 14 October 1994, ECLI:NL:HR:1994:ZC1488, *NJ* 1995, 447, with note by W.M. Kleijn (*Spaarbank Rivierenland/Gispen* q.q.) and ending with HR 3 February 2012, ECLI:NL:HR:2013:BY4134, *NJ* 2012/261, with note by F.M.J. Verstijlen (*Dix q.q./ING*), see also Van Buchem & De Man *Onderneming en Financiering* 20/2, p. 5–15. HR 1 February 2013, ECLI:NL:HR:2013:BY4134, *NJ* 2013/156, with note by F.M.J. Verstijlen (*van Leuveren/ING*). Currently, the only thing that is required is that there is *ex-post* specificity, insofar as it is possible to deduce which claims were pledged.

87 The floating charge has two stages. Prior to crystalisation, it can be said that the floating charge hoovers over all the assets of a company like a cloud and does not attach to a specific object. However, upon a triggering event, often the insolvency of the floating chargor or being in arrears for a certain amount of time, the floating charge crystalises. Crystalisation means that the 'cloud' comes down on all the assets of the debtor

be set aside for the benefit of the unsecured creditors in a ring-fenced fund.[88] This is not unlike the German measure against *Übersicherung* (excessive security),[89] which requires that part of the security provided by the debtor will be released by the creditor if the security can be considered 'excessive'.[90] No such protection mechanisms for the other (unsecured) creditors – it could be argued also for the protection of the debtor – exist in Dutch law. There is no such release of assets or proceeds of sale for other creditors and the security right is void of any publicity.

The lack of publicity in these silent pledges also shows that publicity in property rights is interpreted and given shape and form in different ways depending on the object,[91] as mentioned earlier.[92] For land registration, a high level of publicity and hence specificity is required, whereas for security rights in claims and movables, there are property rights without publicity and only after the fact specificity.

The existence of property rights without specificity and/or publicity, yet *with* the coveted third-party effect, is in direct contrast to the justification of publicity, that of third-party effect of property rights, which warrants knowledge about these rights. However, as mentioned earlier,[93] publicity and specificity are principles of property law, but they are not hard and fast rules. Questions could be raised considering that the exceptions have not been so many that it warrants a rethinking of the principles as 'fundamental' to property law, at least for objects other than land.

2.5 Publicity an Effect or a Requirement?

The foregoing shows that there is a different way in which publicity is given shape depending on the object. When it concerns land, publicity seems to be adhered to much more stringently in the rules regarding the creation and transfer of property, whereas for movables, and especially claims, this is much less evident. Even when looking at property rights in land, certain differences can be noted. Can publicity be considered an effect or a requirement? *Should* property rights have publicity because they have a third-party effect or *must* there be publicity of property rights for there to be a third-party effect? In short, is publicity a consequence or a requirement for a third-party effect of property rights or

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and attaches to all assets of the debtor, effecively becoming specific. See on the floating charge in general, Gullifer/Ringe, Gullifer & Théry 2009, p. 17–44.

88 s. 176A Insolvency Act.

89 BGH 27.11.1997, *NJW* 1998, 671.

90 The crucial line for oversecuritisation is at 150% of the secured obligation. See extensively on the topic of *Übersicherung* in German law, Wilhelm 2010, para. 2411 *et seq*. Critical of the success of such a measure in the context of insolvency, see Zwalve 2006, p. 349–358.

91 Snijders & Rank-Berenschot 2001, para. 81.

92 Section 2.1.

93 Section 2.4.

even the classification of a right as a *property* right? Below, three ways of looking at this question are described.

1 Publicity is an effect of a right being designated a property right, not a requirement for such a designation

Can a property right be a property right without having any publicity? Yes. This is more often the case for movable and intangible property,[94] than for immovable property. However, even for immovable property, property rights can go from one person to the next without publicity in the land registry. The fact that these rights are not registered in the land registry, the manner in which publicity is provided for in practice with regard to property rights in land, does not negate their nature as a property right. Ownership of a plot of land in Germany is inherited by operation of law, not registration. Ownership is not ownership because it is publicised, it is publicised because it is ownership. Whether a particular right is considered a (limited) property right is a matter for the *numerus clausus* of a particular system to determine.[95] The consequence of falling within the rubric of property rights is that they are to be given publicity. However, what can be noted is that publicity, as it is so closely linked with the third-party effect of property rights, that certain legal systems make the third-party effect contingent upon providing some sort of publicity. In that way, publicity becomes a requirement for third-party effect.

2 Publicity as a requirement for third-party effect

A property right which is void of publicity, but still can be considered a property right, is a property right which works only between the parties, some legal systems purport.[96] These types of property rights are more common in consensual systems, when a relative transfer of ownership (*i.e.* between the parties) already occurs upon agreement.[97] In consensual systems, publicity can be directly tied with third-party effect. Publicity here is not a requirement for the *creation* of a property right, nor does it answer the question of whether a right is a property right at all. Rather it is tied to the third-party *effect* a property right can have.[98]

94 Think of the Dutch silent pledge in claims which are void of publicity and the transfer of ownership for security purposes in Germany, which is also not recorded. See furthermore, GS Vermogensrecht, art. 3:16 BW, aant. 8. In England & Wales there are beneficial interests which are not recorded in the land registry, the most prominent being the rights of the beneficiary of a trust. See section 3.5.1.1.1.

95 See on the *numerus clausus* Akkermans 2008. For a critical note: Sagaert 2005, p. 983–1086.

96 If validly created of course.

97 Examples are: France and Spain. For a discussion on whether the system should become consensual or tradition in Germany see the *Verhandlungen des vierzehnten Deutschen Juristentages* 1878.

98 See also Van Maanen 1996.

3 Publicity is a mandatory requirement for the creation or transfer of a property right in land

A third manner in which publicity plays a role is when it is a constitutive requirement for the *creation* or *transfer* of such a particular property right.[99] This is different from the previous example, as in this situation the property right does not come into existence at all without publicity.[100] In the previous example, the right did come into existence but only worked between the parties and publicity provided for the third-party effect. Here, the creation of the right itself depends upon some form of publicity, in land: recording it in the land registry. This is sometimes also referred to as the *booking principle*:[101] the intended legal effect will not take place without registration in the land registry. For a property right in land to exist, the right must be registered.[102] The registration itself constitutes the creation of the right,[103] or the presumption of no right without registration.[104]

Publicity as a constitutive requirement for the creation of a specific property right in land should not be confused with publicity as a constitutive requirement for a right *being* a property right. Ownership in land can only be validly created and transferred in the systems which will be discussed futher on (The Netherlands, Germany, and England & Wales) by registration in the land registry, however, this does not mean that ownership itself is contingent upon publicity. However, if one wishes to establish or transfer ownership in relation to a plot of land it will have to be registered and, in that sense, it is a requirement.

2.6 Publicity and its Scope

From all the foregoing, we understand publicity as transaction-relevant information regarding the subject-right-object relationship. The information concerned is determined by the specificity principle working together with publicity. It is the specific information

99 Sometimes referred to as the transfer or conveyancing function of publicity, see Baur, Baur & Stürner 2009. Zhang 2004, p. 20 who refers to these not so much as functions, but more as effects or 'Wirkungen'. See also Martinek *Archiv für die civilistische Praxis* 188/1, p. 576, who discusses publicity principle as a function of the *traditionsprinzip*. Similar to Martinek in this regard see Struycken 2007, p. 792, who states 'wat deze categorie rechtsregels betreft valt het leveringsbeginsel ten dele samen met het publiciteitsbeginsel'.

100 There may be various other requirements that also need to be fulfilled, publicity is not the *only* (constitutive) requirement.

101 From putting it in the books.

102 See Article 3:89(1) BW, there are exceptions, see for the Netherlands for example GS Vermogensrecht, art. 3:16 BW, aant. 8.

103 As is true for title systems such as Germany and England & Wales. See for the presumption function of publicity for example § 891 BGB. This coincides with what Bell & Parchomovsky refer to as the obstructive function of publicity, that they strengthen the owner's powers of exclusion by deterring involuntary takings or uses of the assets. See Bell & Parchomovsky *Columbia Law Review* 116/1, p. 11.

104 For negative registration system, such as the Netherlands.

regarding the subject-right-object relationship which is 'made public' through land registration. However, to whom should this information be made available? Legal certainty requires that third parties affected by the property rights should have access to this transaction-relevant information. This means that the specific transaction determines which information is 'relevant'. As such, publicity has a scope and a limited one at that.

The next two sections look at the scope and reach of publicity itself and how it affects dealings in property rights. Section 2.6.1 starts by showing how a proper functioning system of publicity by using a land registry can increase the value of land for the owner and increase the scope of publicity. Section 2.6.2 continues by looking at publicity from a more law and economics point of view, whereby different groups of third parties are also distinguished.

2.6.1 An increase in scope by using a registration system

The scope of publicity of property rights in land is significantly increased by a proper functioning land registration system. This can best be seen by looking at systems which do not have such a proper functioning land registration system in place and in turn (have to) rely on the extralegal sphere. This topic has been explored extensively by Hernando De Soto.[105]

In the Netherlands, Germany, and England & Wales no one would contemplate transferring a home without going through the proper motions of visiting a conveyancing specialist (notary or solicitor) and drawing up the necessary paperwork. This is because it is so engrained in our idea of how one buys or transfers a home, but it is also because we often need a loan from the bank to finance the purchase of such a property. A bank requires a *hypothec* or charge in land to secure the repayment of the loan and for that the bank requires proof of ownership. The bank, which does not know the client in the same way as friends and family would, and therefore has no proof that the client will 'keep his word' to pay back the loan, will not trust the client merely saying he will pay back the loan. However, the bank does trust the system of land registration in place. We are dealing accordingly in impersonal trade. The parties trading with one another, the potential purchaser and the loan facilitator, are unknown to one another. This is however not necessarily the way in which loans are concluded everywhere in the world. Hernando De Soto explained that concerning dealings in ownership of homes in third world countries the situation is very different. In some of those countries, there is no proper functioning land registration system, or it is a cumbersome process to have one's land ownership recorded in the register. As a consequence, the dealings in land are carried out outside of this legal framework; they are personal, as opposed to impersonal. It follows

105 De Soto 2001.

that the scope of publicity is less wide where dealings in land are carried out by way of personal trade than in a system which facilitates impersonal trade.

In his seminal work 'The Mystery of Capital', De Soto explains why the world's poor resources are held in 'defective forms'. He states: 'houses [are] built on land whose ownership rights are not adequately recorded' and therefore 'these assets cannot readily be turned into capital, cannot be traded outside of narrow local circles where people know and trust each other, cannot be used as collateral for a loan and cannot be used as a share against an investment'.[106] Here, registration fulfils a function of creating a basis for trust, which does not rely on knowledge gathered by being in close proximity to the debtor, but rather by replacing trust in individuals with 'trusting' the registration system.

Registration allows plots of land to be individually 'represented in a property document that is the visible sign of a vast hidden process that connects all these assets to the rest of the economy'.[107] By such representation, the assets 'can lead an invisible, parallel life alongside their material existence' and may be used as collateral for debt, easily traded and can be a foundation for the creation of securities, such as mortgage backed securities, and can be traded on secondary markets.[108] In short, these assets can generate surplus value.[109] Lacking a registration system, these assets and land will be un(der)capitalised according to De Soto. Without the representation in a property document that is registered, these assets are in essence 'dead capital'.[110] 'People cannot draw economic life from their buildings (or any other asset) to generate capital'.[111] The function of publicity here is in facilitating impersonal trade.[112]

The poor in these countries 'have houses but not titles; crops but not deeds; businesses but not statutes of incorporation'.[113] They are the 'man and woman who have painstakingly saved to construct a house for themselves and their children and who are creating enterprises where nobody imagined they could be built'.[114] De Soto considers this the mystery of capital; the comprehension of, and gaining access to, 'those things we know exist but cannot see'.[115] Here a representational system helps, and we have incorporated it in many facets of our lives; a clock to represent time, writing in general to represent thoughts and music, but also in Western countries a property document to represent the

106 De Soto 2001, p. 6, see also Arruñada 2012, p. 15.
107 De Soto 2001, p. 6–7.
108 De Soto 2001, p. 7.
109 De Soto 2001, p. 38.
110 De Soto 2001, p. 7. The total value of the real estate held but not legally owned by the poor of the Third World and former communist nations in 2001 was at least $9.3 trillion, according to De Soto and his team. De Soto 2001, p. 32.
111 De Soto 2001, p. 37.
112 See extensively on the topic of impersonal trade and registries Arruñada/Brousseau & Glachant 2014, p. 58–77, Arruñada 2012.
113 De Soto 2001, p. 7.
114 De Soto 2001, p. 34.
115 De Soto 2001, p. 8.

capital in land and a house on that land. The abstract concept of capital as 'the potential' held by the accumulated stock of assets to deploy new production requires a conversion process into a fixed, tangible form in order for it to be useful.[116] This tangible form is the property document.

However, the system in place cannot be one that is long and winding, because then a large part of the people will live outside the formal legal system, in 'extralegal' systems. These extralegal systems make rules and arrangements in a social contract upheld by the community as a whole and are enforced by that same community.[117] As such, they have created 'a vibrant but undercapitalized sector, the center of the world of the poor', as De Soto explains.[118] These extralegal systems grew in popularity as the legal route was difficult and exhausting.[119] De Soto showed that, to acquire a piece of land legally and build a house on it, in several third world countries, several administrative hurdles would have to be crossed. He and his team attempted to acquire land legally in several of these countries and often encountered well over 50 bureaucratic hurdles, and they had to have patience to endure these proedures for more than two years, sometimes extending to 19 years.[120] As an example, in Egypt at the time, it could take anywhere between six and eleven years of 'bureaucratic wrangling' to build a legal dwelling on former agricultural land. This, De Soto states, attributes to the reason why some 4.7 million Egyptians have chosen to build their dwellings illegally.[121] As Arruñada explains: '[w]hen parties know each other well, they suffer less information asymmetry about the value of each other's promises; hence, conflicts are less likely'.[122] The lack of an adequately functioning public record is therefore either not a problem to begin with or it is solved by personal trade. However, such '[r]eliance on personal exchange precludes profitable exchanges between unknown parties and limits specialization opportunities and efficient reallocation of resources, reducing economic growth'.[123]

To expand the scope of transactions and fully exploit the benefits of comparative advantage, and a global marketplace, both De Soto in practice and Arruñada in the abstract advance that parties must be able to trade without any knowledge of personal characteristics, therefore allowing for impersonal trade. This requires making contractual performance independent of such characteristics, a feat that can only be achieved by granting acquirers rights directly against the acquired assets instead of against the sellers,

116 De Soto 2001, p. 40. Here De Soto finds support in the work of Simonde de Sismondi, the 19th Century Swiss economist.

117 De Soto 2001, p. 23.

118 De Soto 2001, p. 23.

119 Sometimes they started within the formal system and were legal initially, but 'dropped out' because 'complying with the law became too costly and complicated'. De Soto 2001, p. 28.

120 That was for Haiti, see De Soto 2001, p. 20.

121 De Soto 2001, p. 20.

122 Arruñada 2012, p. 15.

123 Arruñada 2012, p. 17. Compare this with the increased use of private registration systems such as MERS, see section 3.3.4.

that is, rights *in rem* instead of *in personam*,[124] which is exactly what land registers facilitate.

Publicity here then fulfils what Bell & Parchomovsky refer to as an enabling function.[125] Specifically, registries can fill the role of informing owners of their rights and thereby enable owners' use of their property.[126] The increase in publicity of the property rights, through a land registry, therefore allows for the rights to affect third parties in a much broader manner than when the property rights function in the extralegal sphere.

2.6.2 Justifying publicity with transaction and information costs

Next to the approach of justifying the existence of publicity by referring to third-party effect, another more elaborate explanation can be found in law and economics.[127] Already hinted at by the reference to Walz earlier, information about property rights is useful and desired because it reduces information costs. As Walz describes:

> Die Rechtsordnung soll aber nicht nur helfen, die Transaktionskosten zwischen den Parteien zu senken. Sie soll auch negative externe Effekte reduzieren, die von einer vollzogenen Verfügung auf nicht beteiligte Dritte ausgehen. Das sind im wesentlichen Täuschungsrisiken. Der traditionell wichtigste sachenrechtliche Ansatz dazu ist der Grundsatz der Publizität der Verfügung.[128]

These information costs can be divided into the (more) traditional transaction costs approach as elaborated on by Merrill and Smith and Walz on the one hand and the verification theory as advanced by Hansmann & Kraakman. Each will be discussed next.

2.6.2.1 Transaction Costs

An explanation and justification for publicity in law and economics is often found in the reduction of transaction costs it affords. As advanced by Coase,[129] and taken up by others,[130] it is considered that, as long as transaction costs are low (enough), the market or markets can be relied upon to achieve an efficient allocation of property. The initial allocation of resources is therefore of limited importance,[131] as it can be corrected by the

124 Arruñada 2012, p. 17.
125 Bell & Parchomovsky *Columbia Law Review* 116/1, p. 259.
126 Bell & Parchomovsky *Columbia Law Review* 116/1, p. 259.
127 See on other different interpretations the overview by Rossato/Pradi 2015, p. 15–38.
128 Walz *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 73/3/4, p. 384.
129 Coase 1960, p. 1–44.
130 See in particular the work of Arruñada 2012, see also Rossato/Pradi 2015, p. 15–38 for an overview.
131 Compare with the work below by Hernando De Soto, section 2.6.1.

market.[132] However, this initial allocation should 'clearly define the underlying assets and rights in them'.[133]

Very influential in this area is the work of Merrill and Smith, in particular their work on optimal standardisation and the *numerus clausus* principle. While the work itself focusses on the *numerus clausus*, parallels between the classes of people which require information and the extent of the publicity principle are important.

Merrill and Smith consider the root of the difference between property's restricted limited number and standardised forms (*numerus clausus*) to lie in the third-party effect and transaction costs associated with the expenditure of time and resources to determine the attributes of the property rights.[134] They explain that when individuals encounter property rights, they 'face a measurement problem' a reflection of information costs. I will use the latter so as to avoid any confusion.[135]

> When individuals encounter property rights, they face a measurement problem. In order to avoid violating another's property rights, they must ascertain what those rights are.[136] In order to acquire property rights, they must measure various attributes, ranging from the physical boundaries of a parcel, to use rights, to the attendant liabilities of the owner to others (such as adjacent owners). Whether the objective is to avoid liability or to acquire rights, an individual will measure the property rights until the marginal costs of additional measurement equal the marginal benefits. When seeking to avoid liability, the actor will seek to minimize the sum of the costs of liability for violations of rights and the costs of avoiding those violations through measurement. In the potential transfer situation, the individual will measure as long as the marginal benefit in reduced error costs exceeds the marginal cost of measurement.[137]

The standardisation of rights through a *numerus clausus* decreases the transactional costs for all parties involved. The opposite is also true, by deviating from the *numerus clausus*, by allowing a single person 'to create an idiosyncratic property right, the information processing costs of all persons who have existing or potential interests in this type of

132 See on the importance and manner in which the initial allocation of resources (by government) is done, the work of Calabresi & Melamed *Harvard Law Review* 85/6, p. 1089–1128.

133 Bell & Parchomovsky *Columbia Law Review* 116/1, p. 250.

134 Merrill & Smith *The Yale Law Journal* 110/1, p. 1–70.

135 Even though the terms can usually be used interchangeably for the purposes of the article. Merrill & Smith *The Yale Law Journal* 110/1, p. 26.

136 Compare with Bell & Parchomovsky *Columbia Law Review* 116/1, p. 256, they refer to this as the obstructive function of information regarding property rights. '… just as a registry conveys (and potentially certifies) information, it necessarily denies and discredits other information that is inconsistent with the information contained in the registry. Registries enable third parties to know who does not have rights in an asset'.

137 Merrill & Smith *The Yale Law Journal* 110/1, p. 26.

property right go up'.[138] This is because allowing a single person to create a new (idiosyncratic) property right would have affects beyond the parties themselves. 'Parties who create new property rights will not take into account the full magnitude of the [information costs, AB] they impose on strangers to the title'.[139] They might account for a rise in information costs for themselves, but not the costs to other market participants. The example of a hypothetical time-share right in watches is advanced.[140]

> Suppose one hundred people own watches. A is the sole owner of a watch and wants to transfer some or all of the rights to use the watch to B. The law of personal property allows the sale of A's entire interest in the watch, or the sale of a life estate in the watch, or the sale of a joint tenancy or tenancy in common in the watch. But suppose A wants to create a "time-share" in the watch, which would allow B to use the watch on Mondays but only on Mondays (with A retaining for now the rights to the watch on all other days). As a matter of contract law, A and B are perfectly free to enter into such an idiosyncratic agreement. But A and B are not permitted by the law of personal property to create a property right in the use of the watch on Mondays only and to transfer this property right from A to B.

Accepting a 'Monday right' as a property right would inflict a heavier information burden on all current and potential future right holders or interests in this type of property right,[141] in particular any *other* right holders of watches. This is evidenced by the need to investigate whether *any particular* watch does not include Monday rights in the event of a transfer of ownership.[142]

Hence, it is not necessarily the parties that create the new property right that experience the higher burden of information costs, although they might in future transactions,[143] rather it is all the other market participants, with similar or equal rights in property, that will have to accept the increased burden of information that comes with finding out whether there is in fact such a right created that burdens the property.

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138 Merrill & Smith *The Yale Law Journal* 110/1, p. 27.

139 Merrill & Smith *The Yale Law Journal* 110/1, p. 26–27.

140 This may work differently in France for example, see Cour de Cassation, 3e Civ., 28 January 2015, pourvoi n° 14-10.013, Bull. 2015, III, n° 13 (*Maison de Poésie*).

141 Merrill & Smith *The Yale Law Journal* 110/1, p. 32.

142 Merrill & Smith *The Yale Law Journal* 110/1, p. 27.

143 As advanced by Hansmann & Kraakman *Journal of Legal Studies* 31/2, p. 373–420, Merrill & Smith *The Yale Law Journal* 110/1, p. 1–70, as the latter consider that this is factored into the initial price of a Monday right. As such, there is then no externality to the initial party that sold the Monday right. The same costs to potential successors in interest are mediated through the price mechanism, see Merrill & Smith *The Yale Law Journal* 110/1, p. 30.

Accepting that property rights can exist in an indefinite set of types will raise information costs.[144] This refers not only to costs to the individuals, which are internalised,[145] but to social costs as well,[146] as explained by Merrill and Smith:

> To return to our hypothetical world of one-hundred watch owners, suppose the value of creating the Monday-only right to A is $10, but the existence of this idiosyncrasy increases processing costs by $1 for all watch owners. The net benefit to A is $9, but the social cost is $90. As this example suggests, idiosyncratic property rights create a common-pool problem.[147]

This means that any extension of the number of types of rights which may be called property rights will increase the social cost. The number of types that a *numerus clausus* will accept can be increased by the device of registers for real property and interests in land. Merrill and Smith consider that the notice costs of registers allow for an 'alternative method of lowering information costs'.[148] However, a register cannot replace a closed system of property rights, according to Merrill and Smith.[149]

In their critique of Epstein, who advances that notice by registration can give rise to third-party effects of contracts,[150] Merrill and Smith state that Epstein's focus is on the parties who create the new idiosyncratic rights and their successors in title, but it over-

144 Merrill & Smith *The Yale Law Journal* 110/1, p. 32.

145 By adjusting the price accordingly.

146 See generally on social costs Coase 1960, p. 1–44. To some extent the costs of setting up a register and keeping it should also be included in the costs. However, here the benefits are generally considered to outweigh the costs. See Baird & Jackson *Journal of Legal Studies* 13/2, p. 305, Walz *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 73/3/4, p. 385. In the discussions on the establishment of a registry for security rights in movables, the UN Working Group also noted that: '[i]t was also observed that the fact that some of the least developed countries in the world had established and operated registry systems, such as the one described in the draft Guide, was a clear indication that it was cost-efficient.' United Nations Commission On International Trade Law 2002, p. 17.

147 Merrill & Smith *The Yale Law Journal* 110/1, p. 32. On the common-pool problem, see literature cited at footnote 124 of Merrill & Smith *The Yale Law Journal* 110/1, p. 32–33.

148 Merrill & Smith *The Yale Law Journal* 110/1, p. 40–41. An argument whether there should be a decrease of types of estates in England & Wales or a registration of rights around 1889, see Thornhill *The Law Quarterly Review* 5/1, p. 11–14, see more generally on registration in England & Wales section 3.5. See also Martínez Velencoso *Journal of Civil Law Studies* 6/1, p. 155.

149 Compare with Epstein who stated in his 1981 article that '[w]e should accept as a basic proposition that contract terms shall be binding on the original parties and on all third parties who take land with record notice of the restrictions in question'. Epstein *Southern California Law Review* 55/6, p. 1368. Epstein happily concedes that limiting the number of property rights to a minimum would work and make matters much simpler. He also refers to such a measure as 'Draconian'. Note that the measure of reduction he proposed was to a single right in land, the fee simple, whether he considers a *numerus clausus* of some more rights than the one also to be draconian is not clear. Epstein *Southern California Law Review* 55/6, p. 1355. See also Hansmann & Kraakman *Journal of Legal Studies* 31/2, p. 373–420 who draw upon the work of Epstein.

150 His focus is on servitudes and contractual provisions attached to servitudes, the reasoning can be and is extended to property law as a whole Epstein *Southern California Law Review* 55/6, p. 1353–1368.

looks the impact these rights have on the 'other market participants', *i.e.* other property holders, either actual or potential, of similar rights without the idiosyncrasies.[151]

Gathering information about the existence and content of fancies or contractual clauses laid down in a register, as well interpreting the content of the clause will already increase transaction costs. Moreover, this is not only the case on the part of the person accessing the register, but also that of the creators of the idiosyncrasy or fancy, who will need to consider the content carefully so as to avoid unclear terms etc.[152] Acceptance of idiosyncratic servitudes, such as the ones advanced by Epstein, or other fancies, will lead to higher information costs than when they are prohibited.[153]

2.6.2.2 Verification

Hansmann & Kraakman, it should be noted first, reject the notion that 'the distinguishing feature of a property right is that it is an *in rem* right that is "good against all the world" in that it permits its holder to exclude all other persons from using the asset in question.'[154] Their problem with such a definition is that it fails to distinguish between contract and property rights in the same way that the law treats them. They state:

> In general, contract rights, like property rights, are "good against all the world" inasmuch as any third party who intentionally interferes with a contractual right commonly faces liability for tortious conduct to the holder of the right.[155]

Their definition of a property right as 'a right that runs with the asset' focusses on voluntary transfers.[156] As such, the heavy focus on tortious interference, that they attribute to Merrill & Smith, is set aside by Hansmann & Kraakman. The focus is on voluntary transfers. If a buyer:

> wishes to buy rights in the asset, he must learn who currently owns those rights. But in all other circumstances, third parties need to know only one thing to show respect for a stable set of property rights: that the asset and all of its attendant use rights belong to other persons and not to them. Thus, if a person is to avoid trespassing on land, it is sufficient for that person to know that she owns no rights in the land.

151 Merrill & Smith *The Yale Law Journal* 110/1, p. 44.
152 'Investments by the writer of the clauses in precommitting not to write in traps' for example; Merrill & Smith *The Yale Law Journal* 110/1, p. 26.
153 Merrill & Smith *The Yale Law Journal* 110/1, p. 45.
154 Hansmann & Kraakman *Journal of Legal Studies* 31/2, p. 409.
155 Hansmann & Kraakman *Journal of Legal Studies* 31/2, p. 410.
156 Hansmann & Kraakman *Journal of Legal Studies* 31/2, p. 410.

Therefore, they already distinguish between at least two different types of third parties: those that wish to engage in a voluntary transfer and those who are affected by the property rights, because they wish to avoid trespassing on land. The content of the information relevant for both types of third parties differs.

In any event, distinguishing the manner in which Hansmann & Kraakman consider property rights is important, as it deviates from the previous way in which we discussed property rights. Nevertheless, even they, when discussing their theory of verification rules and how registries provide notice, distinguish between categories and types of third parties to which these rules and for whom these rules should apply.

Hansmann & Kraakman considered that Merrill and Smith were focussing on a problem of communication between parties, while, according to them, they should have have been focussing on the problem of *verification*. For Hansmann & Kraakman it is not so much that we ought to have an effective means to communicate information between parties, but rather the ability to *verify* the understanding of the parties' respective rights[157] so as to verify that both parties share a common understanding of the rights involved.[158] Also, in the event there is a problem in this understanding, a third-party enforcer, such as a judge, has a method of verifying the parties' understanding of their respective rights.[159]

For contract law, this verification is relatively simple, as the parties can 'verify that their respective rights are common knowledge between them' from the very contract they entered into.[160] The interpretation rules for judges, as discussed above in section 2.4.3, focus on these party intentions. However, for property rights, this is much more difficult as there is no privity of contract there. They advance the following to exemplify the verification problem posed by property law:

> [S]uppose that A sells most of his rights in an asset to B, while retaining some partial rights in the asset for himself. The common understanding between A and B, expressed in the contract of sale between them, is that B can transfer all of B's rights in the asset, but that B does not have authority to transfer any of A's rights, so that A's rights will be good against any future transferee of B's interest in the asset. Subsequently, B sells his rights in the asset to a third party C. How is A to verify that C shares A's understanding of his rights, rather than, for example, having been misled about those rights by B, who misrepresented A's rights out of mistake or opportunism? And how is C, in turn, to verify the

157 Hansmann & Kraakman *Journal of Legal Studies* 31/2. Consider the boundaries issue in the Netherlands as described earlier in section 2.4.1.

158 What Hansmann & Kraakman deem the coordination issue. Hansmann & Kraakman *Journal of Legal Studies* 31/2, p. 382.

159 What Hansmann & Kraakman call the enforcement issue which requires verification. Hansmann & Kraakman *Journal of Legal Studies* 31/2, p. 383.

160 Hansmann & Kraakman *Journal of Legal Studies* 31/2, p. 383.

> nature of any rights retained by A, rather than, for example, having been misled about the nature of those rights (or even their existence), intentionally or unintentionally, by B? In short, how are both A and C to verify that C was accurately informed about the nature of the rights retained by A? And, whatever the personal understandings of A and C, how is an enforcing court to verify those understandings?[161]

To solve these issues, verification rules have been created. These verification rules set out the conditions under which a particular right in an object will have '*droit de suite*' or 'run with the asset' and, as discussed above, can therefore be considered a property right.[162] Therefore, they reject the notion of a *numerus clausus* or the optimal standardisation of property rights, which is advanced by Merrill & Smith. Rather, Hansmann & Kraakman consider that property rights *can* be created outside of this *numerus clausus*, with very high user costs associated with their creation.

This can be explained by looking at registries.[163]

> In short, a registry regime […] offers flexibility in the structure of rights, highly reliable verification, and a low cost of establishing rights. On the other side of the ledger, it involves relatively high costs of two types. The first is the cost of establishing and maintaining the registry. The second is the cost imposed on all […] purchasers of searching the registry (or, if they choose not to search, of remaining uncertain concerning the scope of their rights).

When we look at the costs associated with a registry, there are certain categories, as distinguished by Hansmann & Kraakman. There are the (1) user costs, which are those costs associated with the establishment of the right, which fall on those seeking to create it – the 'user'.[164] Thereafter there are the (2) non-user costs, which are the costs that a verification rule imposes on persons 'who seek to acquire or sell assets that are not governed by the right in question. These include the costs of assuring that a proffered asset is not burdened by the right and the costs of bearing the risk that one is mistaken in this respect.'[165] The potential purchasers and those that seek to establish a limited property right in relation to the object fall under this category. Then there are the (3) system costs, which are more or less fixed and concern the costs of setting up and maintaining the

161 Hansmann & Kraakman *Journal of Legal Studies* 31/2, p. 383–384.
162 See section 1.2.1.
163 While the registry example pertains to intellectual property rights, the example is also applicable to land registries.
164 Hansmann & Kraakman *Journal of Legal Studies* 31/2, p. 396.
165 Hansmann & Kraakman *Journal of Legal Studies* 31/2, p. 396.

particular system, for example the registry. Where it concerns a registry, these system costs are relatively high.

Hansmann & Kraakman note that, in general, low user costs correspond with relative high non-user and system costs. They advance the following cost-benefit test.

> [I]t is efficient to alter a property rights regime to provide more accommodating verification rules for a particular type of property right only if the resulting reduction in user costs, plus the increase in the aggregate value of assets that results from more extensive use of the right in question, exceeds the concomitant increase in the sum of nonuser costs and system costs.

An example of the reverse might help explain this. Where it concerns a contractual right, the user costs associated are relatively high, as all of the information and dealings are governed in the particular contract. To get the parties on the same page, as it were, the coordination costs are relatively high. However, there are no system costs associated with such a system or, if there are, they are only relatively low (see the aforementioned interpretation rules). This is very different for property rights in a registry, such as the land registry. Here, the user costs are relatively low, registering a right is not cheap, but the certainty it provides also means that its costs are not high.[166] However, for non-users who will have to consult the registry, there are costs associated with such a verification rule[167] and the system costs are understandably high. Therefore, Hansmann & Kraakman continue:

> That cost-benefit test is most likely to be met for rights that have high value to their users and will be used frequently under the new, more accommodating regime. In contrast, it is obviously not worthwhile to adopt an accommodating verification rule, with its concomitant large nonuser and system costs, just to facilitate creation of a right that will have little value or will be infrequently used.

Rights in land, such as ownership, have a high value to their users and will be used frequently under the registry systems.[168] The cost-benefit analysis weighs in favour of registration.

If we look at the explanations for having a land registry based on the analysis of property rights regimes and verification rules as advanced by Hansmann & Kraakman, it becomes clear that a high demand for access, either by the users themselves or by non-users, to such a registry is part of the very reason for having a registry in the first place.

166 Although see Schmid et al. 2007, p. 7. For a cross-border perspective on transaction costs see Schmid, Hertel & Wicke 2005, p. 99.

167 Which do not exist, or only in limited fashion, with regard to contracts.

168 See the way in which the ease of access to information increased the demand for such information in the Netherlands, when the notaries gained network access to the land registry, section 6.2.2.1.

This means that the high demand for information, either recording or requesting it, in the land registry validates the very reasons for setting up such a registry.[169]

Accordingly, while there are significant differences in the approaches to property rights by Merrill & Smith on the one hand and Hansmann & Kraakman on the other, what becomes evident is that publicity, and in particular when viewed as transaction-relevant information, is not absolute in the sense that there are different classes and groups of third parties. Hansmann & Kraakman, for example, distinguish between the need for information by those people that seek to avoid trespass on land and those that wish to engage in a voluntary transfer, for example the potential purchaser. Merrill & Smith refer to the latter as 'other market participants' *i.e.* other property holders, either actual or potential. What they have in common is that the authors appear to agree that, from the very nature of property rights, the publicity associated with such rights – call them measures to decrease information costs or verification rules – are not absolute in the sense that they require that *everyone* should have access. Rather, publicity is inherently restricted to certain classes or groups of third parties; it is not absolute.

2.7 Publicity and Information Monopolies

When considering publicity as a requirement to provide information, it is also important to discuss the power associated with such information. This section describes how an information monopoly can lead to an information and power imbalance.

In modern times, it is generally the state that has the information monopoly when it concerns transactions in land,[170] although there have been some movements in recent years towards the privatisation of land registries. In particular, we can note the recent lease of the land registry in New South Wales[171] and the multiple (failed) attempts at privatisation in England & Wales in 2014 and 2016.[172]

When the information is in the hands of the State, however, it is also the State that decides on the collection, storage, and dissemination of information. In adhering to publicity, this information is then available to all parties who need this information. As such, publicity acts as an equalizer; all parties have access to the same information regarding the transaction in land. When, however, the information is collected and stored (secret)

169 However, again, here we should note that Hansmann & Kraakman consider this cost-benefit analysis to be in favour of registration, even if they only consider it applicable to the situation of voluntary transfers. If one would adhere to the notion that one of the main features of property rights is that they have a third-party effect and are indeed 'good against the world', a notion which Hansmann & Kraakman reject, even then the cost-benefit analysis would weigh in favour of registration. See also Hansmann & Kraakman themselves acknowledging something similar, Hansmann & Kraakman *Journal of Legal Studies* 31/2, p. 401–402.

170 Although, look at the private initiatives discussed under section 3.3.4.

171 s. 4(2) Land and Property Information NSW (Authorised Transaction) Act 2016 No 46.

172 See for a more extensive discussion of these, section 3.3.2.

with one party who also has a vested interest in the (land) transaction following through to completion, such as a notary, solicitor or a bank, a power imbalance will be significant.

The information monopoly concerning information on rights in land used to be in the hands of individuals, such as the notaries in France's *ancien régime* and the solicitors in England & Wales.[173] These parties decided on who would be granted access to the information. As these parties were not very forthcoming with facilitating information requests, this led to a lack of publicity in land transactions. Such a lack of publicity can lead to an imbalance between the parties. In a more modern-day example, non-public security rights, such as the Dutch silent pledge described above, also create an undesirable imbalance between parties. As put forth at the first session of the UNICTRAL Working Group VI (Security Interests) in May 2002:[174]

> '(…), it was stated that absolute secrecy with respect to secured transactions meant absolute power of secured creditors over debtors, since the creditor with intimate information about a borrower with whom that creditor had a long-standing relationship effectively controlled and thus deprived that debtor of the benefits to be derived from the access to competitive banking markets.'

Here the example of France and the situation prior to and post the French Revolution will be presented. In the time of the *ancien régime* social prestige was largely based on status and the position held by a person. At the top of the social pyramid was the nobility. Early on, the nobility was only devoted to the military,[175] but in the seventeenth century, nobility gradually came to include the middle-class families that rose in the civil service of the royals.[176] Their need for secrecy in relation to their financial position as a whole, and security rights in particular, was prevalent. Being part of the nobility came with a high expense account. The luxurious houses and the large plots of land they lived in and on had to be maintained. Next to that, their class came with the implied requirement of showing off your position, a certain pride,[177] and hence, keeping up appearances and keep making them.

To finance their lifestyle, the nobility had to borrow tremendous amounts of money. Their own capital was largely tied up in land that required the large investments in the first place.[178] The only way in which they could use their estates was to offer them as security for a loan, provided that this loan, as well as the security given for it, was kept

173 See to some extent also the notaries in the time prior to the GBO in what we now refer to as Germany, Mascher 1869, p. 510 *et seq*, and Mittmaier *Archiv für die civilistische Praxis* 18/1, p. 150.
174 United Nations Commission On International Trade Law 2002, p. 17.
175 Olivier-Martin 1951, p. 242.
176 Van Den Bergh 1978, p. 8.
177 Olivier-Martin 1951, p. 244.
178 Mengin 1791, p. 7–8.

secret. Secrecy was key to the nobility.[179] To the outside world, their wealth seemed their own, while they were in fact largely living off the loans of their lenders.[180]

The creditors of the nobility often came from the lower classes. Suppliers and financiers at the time were not generally part of the nobility and while they would benefit from publicity they did not seek it. More information and publicity would benefit them in order to gain a better understanding of whether the given security was enough to satisfy the loan if it became default, or if they were the seventh – *i.e.* the seventh in line – to be given a right of hypothec which was considered to be as secure as having no security at all.[181] To counter these negative effects of a lack of publicity, the creditors, amongst themselves, talked and shared what they knew.

The lack of publicity made it easier for land owners to acquire capital, which was also to the benefit of those who gave out the credit – the traders or speculators as they are sometimes referred to.[182] This meant that the credit regime in place benefitted the land owner and the creditors. It failed to benefit those doing the work on the land itself.[183] Moreover, it can be argued that financing land owners with credit upon credit, whereby the one loan would be paid off with another loan, was far from ideal for the creditors.

Changing the system would be difficult as that very same nobility was either part of the legislature or exercised great influence therein. They did not want the situation to change.[184] More publicity was not considered desirable from the perspective of the nobility.[185] Attempts to introduce more publicity were met with significant resistance and often did not become law.[186]

For example, in March 1673, the French minister of finance under King Louis XIV, Jean-Baptiste Colbert, issued an 'Edict for the establishment of a registry for registration of oppositions of the hypothecary creditors'.[187] The edict was established in order to decrease the costs of finding out whether the creditor's debtor was solvable, increasing legal certainty.[188] According to Colbert, the French people largely depended on the establishment of security in hypothecs for their wealth. To facilitate this, and decrease legal fees, the registry would make known all the *hypothecs* that were encumbering the goods of the debtor.[189] Anyone with a hypothec would then have four months, or six if the

179 Patault 1989, p. 208.
180 Van Den Bergh 1978, p. 8.
181 Fenet 1856, p. 227.
182 Mengin 1791, p. 6–8.
183 Mengin 1791, p. 8.
184 On other factors that should be taken into account, such as fiscal aspects of the proposals, Van Hoof 2015, p. 178.
185 Patault 1989, p. 209. See also Arruñada 2012, p. 48–49.
186 Sagnac 1899, p. 205. See also for example the failed initiative by Colbert in 1673.
187 Édit du Roi, portant établissement de greffes pour l'enregistrement des oppositions des créanciers hypothécaires, see Bacqua 1861, p. 691, Grenier 1833, p. 321–326.
188 Linking this knowledge to legal certainty: Vallens 2000, p. 375–381.
189 Preamble Édit 1673 Édit du Roi, portant établissement de greffes pour l'enregistrement des oppositions des créanciers hypothécaires Grenier 1833, p. 321.

person lived outside of the Kingdom, to register their hypothec.[190] Only those who registered would retain their privileges.[191]

The edict was removed only thirteen months later by another edict[192] because of, according to Colbert, the amount of difficulties in its execution.[193] While that might very well be true, the difficulties also stemmed from severe opposition from both the nobility, who preferred secrecy in relation to their significant debts over legal certainty, and notaries who feared that this would diminish their prerogatives.[194] It would be nearly one hundred years before the project was revisited in 1771 when the 'Edict establishing a registrar of hypothecs on real immovable and *fictifs*, and repealing voluntary decrees' was introduced.[195] It revived the 1673 project with a view to make the procedure envisaged in the earlier edict easier and less time consuming, thereby increasing its chances of success.[196] The 1771 Edict gave the opportunity to everyone to extinguish the privileges and hypothecs on an immovable property upon sale. In order to achieve this, one would have to register a letter of ratification (*lettre de ratification*),[197] which would extinguish all the encumbrances on it, after some time had passed.[198] Those who wished to keep their hypothecs or privileges would have to register them with the registrar.[199] After such a registration, these rights would not be purged, for a duration of three years.[200] A ranking of the creditors was also provided for in the Édict, which was a novelty compared to the 1673 edict. Nevertheless, the Édict was not all-encompassing; certain legal hypothecs, such as those of the wife on her husband's patrimony for the duration of his life and

190 Article 23 Édit du Roi, portant établissement de greffes pour l'enregistrement des oppositions des créanciers hypothécaires.

191 Article 24 Édit du Roi, portant établissement de greffes pour l'enregistrement des oppositions des créanciers hypothécaires.

192 Édit du Roi, portant suppression des greffes d'enregistrement des oppositions pour conserver la préférence aux hypothèques. Grenier 1833, p. 327.

193 Édit du roi, portant suppression des greffes d'enregistrement des oppositions pour conserver la préférence aux hypothèques. Grenier 1833, p. 327.

194 'à une vive opposition conjuguée de la noblesse, préférant la clandestinité à la sécurité juridique afin de ne pas révéler au grand jour son endettement hypothécaire, et du notariat, craignant un remise en cause de ses prérogatives', see Simler & Delebecque 2012, Vallens 2000, p. 375–381.

195 Édit du Roi, Portant création de conservateur des hypothèques sur les immeubles reels et fictifs, et abrogation des décrets volontaires. Grenier 1833, p. 316–320.

196 Preamble to the Édict: 'ant de motifs d'utilité pour nos sujets nous ont déterminé, en abrogeant l'usage des décrets volontaires, à ouvrir aux propriétaires une voie facile de disposer de leurs biens, et d'en recevoir le prix pour l'employer aux besoins de leurs affaires, et aux acquéreurs de rendre stable leur propriété, et de pouvoir se libérer du prix de leur acquisition, sans être obligés de garder long-temps de deniers oisifs; nous avons cru ne pouvoir prendre, pour cet effet, de meilleur modèle que l'établissement des offices de conservateurs des hypothèques des rentes sur les tailles, aides et gabelles, et autres rentes par nous constituées, dont le public retire une utilité que le temps et l'expérience ne font que rendre plus sensibles.' Grenier 1833, p. 316.

197 Article 2 Édict 1771.

198 Articles 6 and 7 Édict 1771.

199 Article 15 Édict 1771.

200 After which they would nevertheless be purged, unless they are renewed for three years, according to Article 16 Édict 1771.

those of the children on their parents, did not have to be registered.[201] Also, certain feudal rights, held by feudal lords or *censiers* were excluded from registration.[202]

These attempts do not explicitly mention publicity, yet, they link the open access to information, in particular information needed to assess the solvability of the debtor, thereby lowering information costs and leading to a beneficial outcome for everyone.[203]

In 1798, the Law on the Regime of Hypothecs was enacted.[204] The law follows the regime as developed in the customary law prior to the Revolution.[205] It spoke of giving ranking effect to hypothecs only *after* registering the hypothec in the public register.[206] No publicity by means of registration would generally mean no hypothec with an effect against third parties.[207] The hypothec would still exist, but only *inter partes*.[208] This strong publicity regime was stripped of much of its power with the introduction of the Code Civil in 1804, which replaced the 'Brumaire'-law.[209] It is not known whether this last reduction of publicity was influenced by stakeholders.

What *is* known is that this type of opposition to stronger publicity by stakeholders who had a stake in keeping the information to themselves was not something limited to France. Opposition to stronger publicity was also present within Germany from the aris-

201 Article 32 Édict 1771.

202 Article 34 Édict 1771.

203 In particular the 1673 Édict was clear with this goal: 'L'amour paternel que nous avons pour nos sujets nous obligeant de pourvoir à leurs intérêts particuliers, et l'application que nous y avons apportée nous ayant fait connaître que la conservation de leurs fortunes dépend principalement d'établir la sûreté dans les hypothèques, et d'empêcher que les biens d'un débiteur solvable ne soient consumés en frais de justice, faute de pouvoir faire paraître sa solvabilité: nous n'avons point trouvé de meilleur moyen que de rendre publiques toutes les hypothèques, et de perfectionner par une disposition universelle ce que quelques Coutumes de notre royaume avaient essayé de faire par la voie des saisines et des nantissements. C'est pourquoi nous avons résolu d'établir des greffes d'enregistrement, dans lesquels ceux qui auront des hypothèques pourront former et faire enregistrer leurs oppositions; et ce faisant, seront préférés à ceux qui auront négligé de le faire: et par ce moyen, on pourra prêter avec sûreté, et acquérir sans crainte d'être évincé; les créanciers seront certains de la fortune de leurs débiteurs, et ne seront ni dans la crainte de les voir périr, ni dans l'inquiétude d'y veiller; et les acquéreurs seront assurés de n'être plus troublés dans leur possession par des charges ou hypothèques antérieures.' See for an overview of the legislative efforts and their successes or failures, as well as an extensive discussion on the link with publicity, Van Hoof 2015.

204 Loi sur le régime hypothécaire. Du 11 Brumaire, an 7 de la République, un & indivisible. Du 24 Thermidor, an 6. See Janson 1798.

205 Patault 1989, p. 209.

206 Article 1(2) Loi sur le régime hypothécaire, save for those exceptions as laid down in Article 11(3), which were expenses incurred for illnesses which are terminal and are in their last phase, and burial costs.

207 Article 26 Loi sur le régime hypothécaire. Du 11 Brumaire, an 7 de la République, un & indivisible. Du 24 Thermidor, an 6: 'Les actes translatifs de biens & droits susceptibles d'hypothèque, doivent être transcrits sur les registres du bureau de la conservation des hypothèques dans l'arrondissement duquel les biens sont situés. Jusque-là ils ne peuvent être opposés aux tiers qui auraient contracté avec le vendeur, & qui se seraient conformés aux dispositions de la présente'.

208 See also Patault 1989, p. 209–210. Compare the above.

209 Konings 1990, p. 18.

tocracy who, like their French counterparts, did not want the world to know they were living off borrowed money.[210]

In England & Wales, solicitors voiced their opposition to measures that would increase publicity, as they too were the ones who could be considered the information brokers of that time, with regard to information concerning rights and interests in land. Offer describes it as follows:

> The official lawyers' monopoly of conveyancing came about almost inadvertently, as a consequence of the mounting fiscal pressure created by Britain's eighteenth-century wars. (…) The monopoly provided lawyers with an indispensable and remunerative role in the management of landed and urban society and was much more valuable to the profession than the sum of transfer fees. In a notoriously imperfect market it gave them privileged access to current information on property values and placed them in an ideal position to serve as brokers between buyers, sellers, auctioneers and surveyors, builders and financiers. As entrepreneurs, mortgage brokers, trustees, executors and property managers they operated in the market on their own account.'[211] As such, the 'conveyancing monopoly to solicitors went beyond the income from scale fees'.[212]

Offer in his later work considers what he wrote in *Property and Politics* to be an example of what Stiglitz denotes as a *principal-agent* problem.[213] The principal, purchaser or seller here, contracts with an agent, the conveyancing expert *i.e.* solicitor, to undertake actions on his behalf, which included at the time access to information and an analysis of that information. Offer explains that the central issue here is an asymmetry of information. The solicitor has more knowledge or information than the principal.[214] However, the problem here is when conveyancing was carried out by virtue of a deed, there was no easy way to 'monitor' whether the agent, here the solicitor, carried out his duties 'without jeopardy to the principal's interest, and that the charges represent fair market value for the services'.[215] It was therefore also in the interest of the solicitor to retain this position. Opposition to measures to increase publicity, such as the introduction of HM Land Registry in England & Wales in 1862,[216] was therefore voiced by these solicitors. This con-

210 Mascher 1869, p. 510 *et seq*., Mittmaier *Archiv für die civilistische Praxis* 18/1, p. 150 *et seq*.
211 Offer 2010, p. 19.
212 Offer *Oxford Journal of Legal Studies* 14/2, p. 274.
213 Offer *Oxford Journal of Legal Studies* 14/2, p. 274. Referencing the work of Stiglitz, who was one of the pioneers of the problem, Stiglitz/Eatwell, Milgate & Newman 1989, p. 241–253, whilst the term is generally attributed to Ross, Ross *The American Economic Review* 63/2, p. 134–139.
214 As Offer also explains, this is of course the reason why there is an agent to begin with. Offer *Oxford Journal of Legal Studies* 14/2, p. 274.
215 Offer *Oxford Journal of Legal Studies* 14/2, p. 274.
216 Pollock 1883, p. 166.

tinued against further efforts to simplify conveyancing in 1925[217] and efforts to make the whole of England & Wales subject to compulsory registration.[218]

As remarked at the beginning of this section, the information monopolies of individuals are gone. In France, Germany, England & Wales, it is no longer the notary or the solicitor who (only) keeps the information regarding land transfers.[219] These have (generally) been replaced by the State, which, by way of the land registry, now controls the information concerning land transactions. It is therefore the State that governs and controls the information flow from and to the land registry through their access regimes. The advantage then becomes that, in general, the information balance is restored, as the State is a somewhat neutral party in the private dealings in land and has no interest in keeping the information from the parties to a transaction in land.[220] The information imbalance between the creditor and debtor, or creditors amongst one another is no longer present when all parties rely on the information contained in the land registry. Publicity can as such function as an equalizer.

2.8 Publicity Increased by Technological Developments

This chapter started by providing examples of how publicity was given effect in practice, by referring to methods of throwing knives and candlesticks and carving entitlements into stone.[221] These methods are now generally restricted to disgruntled (ex-)partners throwing clothes out of the house, often followed by the hurling of obscenities, and children carving their names into their precious toys. They are no longer used for providing publicity to property rights in land. Old methods have been supplanted by new technologies,[222] and this is clear in the publicity provided for by means of registration. Most of these changes are highlighted and discussed in light of the access regimes as present in the Netherlands, England & Wales, and Germany, in Chapters 6-8 respectively. This section will discuss how technological developments on the whole can and have influenced publicity, in particular in relation to its scope.

217 See on this in particular the critical comments of Anderson *Current Legal Problems* 37/1, p. 69–73. See also the review by Offer of Anderson's book Anderson 1992, Offer 2010.

218 Compulsory registration would mean that the entire country would be recorded in the land registry and, as such, would eliminate the information monopoly, regarding rights in land, of the solicitors. Anderson 2010, p. 210, Holdsworth 1927, p. 308, 317. See on the historical development of the land registry as explained through the development of the inspection rights also section 7.2 and further.

219 They, of course, still maintain their own records.

220 This should not be taken to mean that it is very forthcoming with sharing the information it collects. Loenen, Zevenbergen & De Jong 2006.

221 See above section 2.1.

222 However, the practice of registering on paper is not out of fashion and still used in certain states in Germany, albeit not for long, see section 3.7.3.

2.8.1 Digitisation and ease of access

What separates the recording of information concerning land today from how it was done decades or centuries earlier is the increase in *availability* of this information and the ways in which the information can translate into wealth for those parties that process the data.[223] Technology has influenced not only the quantity of information that may be collected concerning an object or an individual, but also the way in which the information is made 'ready for use' for the purposes for which it was collected or for other reasons. This has led the collection of information to be much more valuable, as the information can, in principle,[224] be categorised in any way that the data processor wants.[225] See how this was put to practical use in the development of new information products in the Netherlands in section 6.2.2.

Technology has also increased the possible storage duration. Where the paper format takes up tremendous amounts of physical space, the more extensive reports (such as court documents or property deeds) or other types of (public) records become, the more expensive the storage of such documents also becomes. Keeping paper documentation for centuries on end simply takes up too much space.[226] The destruction of paper documents and archives has not been uncommon. The digitisation of paper documents enables an increase of the number of documents that may be retained[227] and, furthermore, it negates the necessity for large storage facilities and the destruction of documents for reasons of lack of storage facilities. In a sense, the question has changed from 'what to destroy' to 'what to keep'.[228] There is now such a vast amount of information available, which may be kept in storage, that we can wonder whether keeping it all is not a problem in and of itself. This is especially the case when this concerns information about an individual.[229] Digital documentation however is also subject to aging technology. Storing all files on floppy discs or microfilm may have sounded like a good idea 30 years ago, but this is not the case these days.[230] These technologies have also become obsolete and accessing, reading, and transcribing this informaton to newer file formats becomes a costly affair.

223 See on this also section 2.7 above.

224 Disregarding software limitations.

225 This is of particular interest for discrimination purposes.

226 See section 6.2.2.1 where it was one of the reasons why in the Netherlands the use of the microfiche and mircrofilm was welcomed and later on the computerised record keeping of property documents.

227 Much like 'when advance was made in the art of writing, and the importance of preserving a permanent record of transactions of this nature was universally felt, the custom of written deeds was introduced' in England & Wales, see Blyth *Law Quarterly Review* 12/4, p. 355.

228 Floridi 2014, p. 20–21. See in particular in this context the discussion regarding 'the right to be forgotten', in section 5.6.7.4.

229 See section 5.6.7.4 on the right to be forgotten.

230 Floridi makes a point of noting that 'ICTs have a kind of forgetful memory. They become quickly obsolete, they are volatile, and they are rerecordable. Old digital documents may no longer be usable because the corresponding technology, for example floppy drives or old processing software, is no longer available'. Floridi 2014, p. 17–18.

The *access* to information by others than the entity collecting the data has also dramatically changed due to the digitisation of information in databases, which were subsequently connected to a mainframe computer and, later on, the internet. Here the example of public records is telling. Public records are (often governmental) records which are accessible to the public. Many jurisdictions also include property registers among this type of records. Until relatively recently, (personal) information in public records was still relatively private. Accessibility to information in public records was limited or at least difficult.[231] Furthermore, even if a large number of (personal) information was available, it was scattered in different places and databases. Information was hidden in 'practical obscurity'.[232] Whoever was willing to spend the time and money to go to the local offices of the (governmental) agencies to queue, write up a request for information, pick up the phone, or a combination of these, would be able to find out a great deal of information about another person and their property. However, he or she would have to know where to look.[233] Compare this with the modern way of accessing certain land registries.[234] For certain legal systems, the same search can now be done from the comfort of one's own home or office within the timespan of a couple of minutes.

These developments have an impact on publicity. We should understand that a legal system that advanced publicity and established fully open registers in 1700, or even 1900, meant something entirely different than having a fully open and accessible register in 2018. Under the older systems 'it is easier to maintain to a principle of full publicity, because the downsides of such a system only were felt in a singular case'.[235] This is no longer the case. With registers which are accessible via an internet connection, making that information available to all that are willing to pay the fee to get access to information via the internet, the downsides are system-wide rather than singular. This issue is only enlarged by the linking of the land registries of different legal systems, as is led by efforts within the European Union by the European Commission.

231 See for property records De Jong, Rietdijk & Pluijmers 1997, p. 225.

232 See on the use of 'practical obscurity' also *Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749 (1989) at 762, 780. See extensively on this section 5.2. This is no longer an accurate way to describe government agencies and courts gathering and holding data, state Larson & Belmas *South Carolina Law Review* 58/4, p. 993. Solove 2004, p. 143.

233 This was already deemed a problem by Sir Francis Bacon, the then Lord Keeper, who, in 1617, published a Royal Letters Patent to establish 'The Office of Generall Remembrace of Matters of Record', the object of which was to assist purchasers and others in their searches, by establishing a central office in London, where the necessary information as to all matters of record likely to affect them might be obtained at once, 'instead of leaving them to explore the various offices or places throughout the country in which such matters then lay scattered'. Letters Patent 1617, Sanders 1850, p. 233.

234 See extensively Chapters 6-8. See also Overkleeft-Verburg/Zevenbergen & De Jong 1993, p. 31.

235 De Jong, Rietdijk & Pluijmers 1997, p. 225.

2.8.2 Interoperability

An increase in the scope of the publicity principle can also be noticed by looking at the efforts of the European Union. These efforts are led by the European Commission and its e-Justice portal and the EULIS and IMOLA projects, which consist of an online portal enabling access into land registries across European borders. By establishing such a portal, the scope of publicity is increased.[236] The principle of publicity itself is not altered but its reach is, as the linking of these registers makes the information in a land registry available to a larger audience. It does so in the same way that centralisation of the land registry within a local legal system did away with practical hurdles to accessing information in the land registry/registries.

The linking of the different land registries,[237] however, runs into difficulty when they are connected in such a way that interoperability is intended.[238] Interoperability, as defined by Palfrey and Gasser in the context of information technologies is 'the ability to transfer and render useful data and other information across systems, applications, or components'.[239] While Palfrey and Gasser describe interoperability on a technical level, the implications reach beyond the mere technical. It is not simply a matter of creating a link between the different registers. Palfrey and Gasser consider that interoperability functions on four layers of complex systems:

1. a technological layer, which means in the most basic sense that a connection can be established between the systems;
2. a data layer, which is closely related to the former differs nonetheless in that here we are not talking about signals being passed from one end to another, but rather that this is comprehendible to the receiving system; *i.e.* that a piece of data can be read and no 'file error' pops on the screen, for example.[240] For land registration we can think of the use of land registration documentation being sent via paper, PDF, XML, or other file formats.
3. the human layer. Here language comes into play. It is one thing to see the word 'ownership'; it is quite another to understand it in the same way that the other party understands and uses it.[241]

236 See extensively on the EULIS project, Laarakker & Gustafsson 2004, p. 47–58, Ploeger & Van Loenen *European Review of Contract Law* 12/3, p. 379–387, Van Velten 2008a, Van Velten 2008b.

237 Although land registry here should be interpreted in the broad sense and includes or is perhaps restricted to the Main Registry such as the Netherlands, see more extensively on this section 3.6.2.1. Ploeger & Van Loenen *European Review of Contract Law* 12/3, p. 379–387.

238 Exemplified by the IMOLA project, on this see the website of ELRA. https://www.elra.eu/imola/.

239 Palfrey & Gasser 2012, p. 5.

240 Palfrey & Gasser 2012, p. 6. See on this in the land registry context, *ISA Work Program – Access to Base Registries* 2014, p. 102.

241 Palfrey & Gasser 2012, p. 6. This is exactly what the IMOLA project ran into, the need for a glossary, in which terms are explained. While different legal systems may use similar terminology such as the lease or

4. the institutional layer, as described by Palfrey and Gasser as 'the most abstract layer', may be interpreted as for instance the legal institutions.[242] If two conveyancing professionals in different countries want to collaborate, they must share a common understanding of property law and registration law. This need not mean that the two legal systems have to be identical, however there has to be enough in common that the interests of both are protected.[243]

The role of specificity, and with it the legal certainty it serves, is put under pressure when there is an increase in accessibility without (more) attention being paid to specificity. For example, by introducing the interoperability of land registers in Europe, legal certainty for foreign buyers is at stake.[244] The understanding by foreign purchasers of land regarding the institutional and human layer in land transactions differs from their understanding of how land transactions function within their own legal system. Compare the different approaches to land boundaries as mentioned in section 2.4.1. Technical interoperability therefore is only one step which opens up the registers to a larger audience. Without an adequate explanation of what can be found in these registers, which in turn informs the parties wishing to engage in transactions regarding land, technical interoperability creates more problems than solutions. Moreover, without placing restrictions on access to information, the scope of the publicity principle is significantly extended when land registers are connected.

2.9 Conclusion

The publicity principle has been widely acknowledged as a (fundamental) principle of property law. There is consensus on the fact that publicity should follow the third-party effect that property rights have. It is however a principle and not a rule and, as such, it is not a requirement for a property right to exist. Publicity is often explained by elaborating on *why* we have publicity, rather than stating what publicity exactly *is*. This question of why we have publicity is a matter of justification. Whether they want to or not, third

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usufruct the content of the rights within the specific legal system may differ. See on this issue also Ploeger & Van Loenen *European Review of Contract Law* 12/3, p. 382, 384.

242 See on interoperability in law also Santosuosso & Malerba *Law, Innovation and Technology* 6/1, p. 51–73.

243 Palfrey & Gasser 2012, p. 6–7. Who use the example of two companies wanting to do cross border business, but do not necessarily have a similar understanding of contract law.

244 Van Velten notes that it is of great importance that there is a correct depiction of land holding with as few mistakes as possible on the register, in part on account of the Dutch Cadaster's partnership in EULIS, see section 2.4 in which foreign banks are facilitated in their cross-border investigations into cadasters. Van Velten 2009, p. 39.

parties can be bound by property rights and therefore they *should* have the means to find out about the existence and the content of these property rights.

When third parties have the means to find out about the existence and content of these property rights, they are afforded some legal certainty in relation to these rights. This legal certainty allows (third) parties to obtain and have the required information to determine their position and possible bargaining power in relation to the particular property and the property right holder. In essence, this information can be referred to as transaction-relevant information.

More specifically, publicity can be considered transaction-relevant information concerning the subject-right-object relationship. If we look at publicity in this manner, as providing transaction-relevant information in relation to subject-right-object relationship(s), it splits up publicity into different dimensions (an internal and external dimension). Transaction-relevant information concerns itself with the external dimension of publicity: the question of what information should be provided *to whom*. It is therefore necessarily contextual. What constitutes 'transaction-relevant information' is determined by the transaction. Publicity is not absolute, as it seeks to provide legal certainty to those parties (possibly) affected by the property right. This is an inherently limited pool of people. When we speak of third parties, we are not concerned with *everyone* else, rather, with other 'parties'. There should therefore be some sort of 'transaction', as in the (legal) relationship one wishes to engage in with a person or an object. These can be transactional parties, such as the person seeking to acquire the property or the successor in title, but also the (potential) creditor of the owner of a plot of land. These have in common the (potential) transactional relationship with the property right holder. Another, with no transactional relationship to the property right holder, need not have access to information which does not concern him. Access to that information would then not be based on publicity or the legal certainty it seeks to facilitate, but must instead be based on something else.

When such a (legal) relationship does exist, the specifics of the transaction will determine the information need and, as such, what is considered information 'relevant' to the transaction. It is as such context dependant. If one simply wants to know whether they are allowed to walk over a particular property, the amount of information required (contact details of owner(s) would suffice) is different, than, for example, if a bank is interested in facilitating a loan to a debtor. Whereas transaction-relevant information tells us something about the *context* in which the information is provided, it is an empty shell until we know the specific information concerned. This relates to the second part of the definition of publicity: information concerning the subject-right-object relationship. This provides the *content* for this context: what specific information is provided. As such, it is concerned with the internal aspect of publicity, which is governed by the principle of specificity.

The principle of specificity not only lays down requirements for how specific the right-object relationship needs to be, but also that of the subject-right relationship. This does not however mean that this information about the subject, the person holding the right, should also be provided in all instances, but only when such information is relevant to the transaction. Unrestricted access is nevertheless provided by some legal systems.[245] It therefore may very well be that a potential creditor only requires information as to the existence of other security rights in relation to the object to know that they will not have a first right of *hypothec* for example without needing information as to the person holding such a limited property right. Nevertheless, the fact that information about the holder of the right is so very closely linked to the property right itself, does require that the information *can* be relevant to the transaction and therefore should be collected. The most common and efficient manner in which such information can be collected and disposed of is by way of a land registry. The way in which the land regristry functions in the various legal systems and is set up will be discussed in the next chapter.

245 See the Netherlands (section 6.4) and England & Wales (section 7.3.5), for a more limited approach, see Germany (section 8.7).

3 Registration

3.1 Introduction

This chapter elaborates on the way in which publicity is given effect in land transactions: by way of registration in a land registry. The focus is on the organisation and *content* of the land registries of the Netherlands, England & Wales, and Germany. It is restricted to the collection and storage of information in the land registry.

The chapter is structured as follows. Section 3.2 starts with the reasons for registration. While advancing legal certainty in land transactions is still one of the main reasons for having a land registry, it is (no longer) the only reason.[1] Section 3.3 continues with comparing four different manners in which the land registry can be governed. The question of who keeps the land registry is answered in this paragraph. Additionally, a brief look at the development towards a more private registration system, as can be noted in the US, is addressed in section 3.3.4. Before delving into the particulars of the three different legal systems concerning the content of their land registries, section 3.4 looks at the type of registration system adhered to, whether it can be classified as a title system or as a deeds system.

The chapter then turns to the different land registration systems of England & Wales (section 3.5), the Netherlands (section 3.6), and Germany (section 3.7). An overview of the different types of registers and indices is provided and what information can be found in these registers. This will then form the basis for looking more closely at who can access this information, which is discussed in Chapters 6-8.

The similarities and differences between the systems are compared in the conclusions to this chapter in section 3.8. While the systems are structured differently, they are all roughly based on the same reasons for registration, their governing bodies are almost exclusively public authorities, and the content and structure of the indices and registers themselves, as well as the (personal) data registered, is more alike than one may expect.

3.2 Reasons for Registration

It should not come as a surprise that the main reason for having a land registration system which records transactions or rights in land is to give shape to the publicity

1 As the reasons for having a registration system are important for data protection purposes, a certain amount of overlap is to be expected and the consequences of the adding of new goals and purposes for which information in the land registries is collected and processed is discussed more in detail in the relative chapters in Part III.

principle.[2] As elaborated on in Chapter 2, a proper functioning system of land registration[3] reduces the uncertainty surrounding a transfer of ownership or title[4] and the establishment of limited property rights therein. As such, it provides legal certainty in land transactions.[5] It protects the rights of those registered and the interest of third parties in registered land.[6]

However, to fulfil its task(s) properly in providing legal certainty in land transactions, the land registry is collecting a vast amount of data concerning land, its owners, and other right holders in the land.[7] This information can also be used to generate other benefits than those that legal certainty provides. Some of these have been signalled by the Land Administration Guidelines of the UN Economic Commission for Europe. This commission stated that a good land administration system should produce benefits, some of which cannot necessarily be quantified in monetary terms.[8] It signalled the following benefits:[9]

1. Guarantee of ownership and security of tenure;[10]
2. Good land records will improve efficiency and effectiveness in collecting land and property taxes by identifying landowners and providing better information on the performance of the land market, for example by identifying the current prices being paid for property and the volume of sales;
3. Certainty of ownership and knowledge of all the rights that exist in the land should provide confidence for banks and financial organisations to provide funds so that landowners can invest in their land;[11]
4. The introduction of a cheap and secure way of transferring land rights means that those who wish to deal in land can do so with speed and certainty;[12]
5. Protect State lands;

2 Von Staudingers Kommentar zum Bürgerlichen Gesetzbuch 2012, Vorbem zu §§ 873 ff, Rn. 3. Baur, Baur & Stürner 2009, § 14, Rn 11-13, who only discuss publicity under the heading 'overview of functions of the Grundbuch'.

3 See for some consequences if the system is poorly designed, section 2.6.1.

4 Baird & Jackson *Journal of Legal Studies* 13/2, p. 305, Epstein *Southern California Law Review* 55/6, p. 1356, because of the greater certainty it creates.

5 'Whereas it is expedient to give certainty to the title to real estates, and to facilitate the proof thereof, and also to render the dealing with land more simple and economical.' Preamble to 1862 Land Registry Act, see more on this act section 7.2-7.3.1. This in turn leads to an increase in investment in property, see for a good example Figure 1 in Feder & Nishio *Land Use Policy* 15/1, p. 28.

6 Paragraph 16 Explanatory Notes to the Land Registration Act 2002.

7 As well as facts that (can) influence the legal status of the property, as was mentioned explicitly by the Drafter of the New Dutch Civil Code, Algemene Opmerking Afdeling 2 Openbare registers Meijers 1954, p. 172.

8 Economic Commission For Europe 1996, p. 15.

9 Economic Commission For Europe 1996, p. 15–18.

10 See on the benefits of registering as advanced at the beginning of land registration in England & Wales, Pollock 1883, p. 165.

11 Arruñada & Garoupa *The Journal of Law and Economics* 48/2, p. 709. See also section 2.6.1.

12 Rose 1994, p. 205. See on the law and economics explanation of the benefits of registration, section 2.6.2.

6. Reduce land disputes;
7. Facilitate rural land reform;
8. Improve urban planning and infrastructure development;
9. Support environmental management; and
10. Produce statistical data.[13]

These benefits are accrued from more than merely facilitating legal certainty. The myriad of ways in which the information may be useful has been linked with opportunities for the land registry to generate new information products which could yield a higher income for the land registry.[14] An increase in purposes for the land registry that stem from the sheer volume and possibilities that the information contained in the land registry allows for should be distinguished from those instances in which the tasks of the land registry are supplemented by law. An example of the latter can be seen in Germany where the demand for information concerning public law limitations increased leading to an expansion of the tasks of the land registry.[15] With such increases in tasks, the position of the land registry within society is ever more solidified as it becomes the 'go to place' for information regarding land.[16]

However, as information is provided to and from the land registry in more and more instances, this also influences the rationale behind the collection, storage, and dissemination of information. No longer is it to serve publicity and legal certainty, but rather it extends beyond the original purposes of the collection of the information. This has certain consequences when the information concerns personal data. This is elaborated on in section 5.2.

13 Such as those required by Council Regulation (EC) No 2494/95 of 23 October 1995 concerning harmonised indices of consumer prices. See also Commission Regulation (EU) No 93/2013 laying down the detailed rules for implementation of the Council Regulation.

14 See section 6.2.2.

15 This provides a signalling function for the land registry. Stöber and Stöber note that with the development of public land law in Germany, in particular with the Building code of 1987, the role of land registration was expanded to include a warning and protective function (*Warn- und Schutzfunktion*). These public laws contain both substantive provision as well as procedural rules on registration, (such as pre-emption rights) though sporadically and imperfectly. Schöner & Stöber 2012 para. 3. This could lead to a conflict between private and public law in relation to land and, as such, influence certainty in land transactions. Schöner & Stöber 2012 para. 3. See also Kuntze & Eickmann 2006, p. 53–54. Kuntze & Eickmann consider that registering all the different types of public law limitations and rights in relation to land would overwhelm the land registry, but for constitutional reasons 'it is necessary to protect purchasers against public interventions that are not known to them or could not have been known to them'. As such, the land registry could fulfil a warning function. Kuntze & Eickmann 2006, p. 53–54.

16 'Ofschoon in verschillende aspecten tot uitdrukking komende, komt het in hoofdzaak hierop neer dat het kadaster thans in het maatschappelijk gebeuren als primaire taak heeft te fungeren als informatiebron betreffende gegevens omtrent onroerende zaken en daarop gevestigde rechten. In het voorliggende ontwerp is in artikel 3, eerste lid, dan ook deze primaire taak scherp omlijnd weergegeven. Daarnaast is tevens rekening gehouden met in gang zijnde en in de toekomst mogelijk zich voordoende nieuwe maatschappelijke ontwikkelingen. Het tweede lid van voornoemd artikel laat namelijk de mogelijk open dat bij andere wetten enz. of bij besluit van de eerste ondergetekende aan de Rijksdienst nieuwe taken worden opgedragen.' Reehuis & Slob 1990, p. 6.

3.3 Who Keeps the Register

The organisation or organisations in charge of registering rights, privileges, contracts, or facts relating to land are diverse. For Germany, it is a judicial affair, and the land registry is the responsibility of the district courts and, as such, it is a more local system, whereas the English & Welsh as well as the Dutch system operates at a national level and their governing bodies are not part of the judiciary branch but rather they are governmental entities.[17] Each will be discussed below according to the type of authority in charge of land registration. The efforts of privatisation in the area of land registration, and registration of mortgages in particular, is discussed in the last section, where the efforts of MERS in the US of circumventing fees for registering a change in mortgage holder, raise questions, and sometimes answers, on the need for a land register to be kept by a public or judicial authority, or whether privatisation might be an alternative.

3.3.1 Germany: Judicial Authority

In Germany, the organisation and design of the land registry is laid down in the land registration Regulation (*Grundbuchordnung*, GBO). The land registry (*Grundbuchämter*) falls squarely within the responsibility of the district courts (*Amtsgerichten*).[18] All the land that is part of the territory of the district falls within the scope of their land registry.[19] The land registry is a division of the district court and has sole jurisdiction in land registry cases.[20]

When the GBO was introduced, it was the judges who oversaw the transactions in the land registry. However, to relieve the case load of the judges and for fiscal reasons, the judges had slowly started handing down responsibilities to specialised, and independent,[21] civil servants. By 1957, a large part of the functional tasks of the land registry were carried out by these so-called (senior) judicial officers (*Rechtspfleger*), making them the most important organ within the land registry.[22] These judicial officers are now tasked with all of the tasks of the District Court that are carried out by the judge in accordance with the statutory provisions in land register cases, the register of ships and

17 They still have local offices, but the organisation of the land registries is done nationally.

18 § 1 GBO.

19 Special provisions have been made for Baden-Württemberg where the notaries have a greater role in maintaining the land registry, see § 1(1) GBO & Hügel 2014 Rn. 3.

20 With the exception of cases in which the division of responsibilities within the court has gone awry, then another court, not the one attacked has jurisdiction. See also: Baur, Baur & Stürner 2009, where a good example of such a case is given.

21 § 9 RPflG.

22 Hügel 2014, Rn. 15 & 18, this devolution of powers started in 1921 with the 'Reichsentlastungsgesetzes von 11.3.1921' and was completed in 1957 with the 'Gesetz über Maßnahmen auf dem Gebiete der Gerichtsverfassung und des Verfahrensrechts (Rechtspflegergesetz) von. 8.2.1957'.

register of ships under construction cases, as well as cases of the register for liens in aircraft. The devolution of powers from the judges to the judicial officers provided for by the Act on Senior Judicial Officers (*Rechtspflegergesetz*), is what is referred to as the *Vollübertragung*.[23]

The GBO explicitly leaves open the option to maintain the registry still in the old-fashioned bound books, although this practice has been disposed of and the loose-leaf collection of folios was more popular since the 1930s.[24] This loose-leaf collection has now been largely superseded by a computerised version of the land registry, which is currently the most popular way of maintaining the land registry.

3.3.2 England & Wales: Public Authority

Her Majesty's Land Registry (HM Land Registry) was established by the 1862 Land Registry Act (LRA)[25] and is a non-ministerial government department,[26] falling under the ministerial responsibility of the Secretary of State for Business Innovation & Skills (BIS). HM Land Registry is furthermore a trading fund[27] as well as an executive agency[28] that makes no call on monies voted by Parliament. It is self-supporting and relies on its income from fees to cover all its expenditures under normal operating conditions.

The head of HM Land Registry is the Chief Land Registrar,[29] who is appointed by the Secretary of State for BIS,[30] but, in carrying out his specific operation, functions under the 2002 LRA and is not subject to any ministerial control or management.[31] The Chief Land

23 See also Hügel 2014 Rn. 18-22. See §(1)(h) RPflG (Vollübertragung), translation via http://www.gesetze-im-internet.de. For matters in which the *Rechtspfleger* puts a case before the judge, see § 5 RPflG.

24 Hügel 2014, Rn. 92.

25 With the repealing of the 1862 Act, by the 2002 LRA, the continuation of the land registry was secured by s. 1 LRA 2002.

26 Although prior and after its institution, there was a discussion about whether or not it should perhaps be led by a private entity. Royal Commission On Registration Of Title 1857, Strachan *Law Quarterly Review* 57/1, p. 15–23. Sugden was even afraid a governmental body leading the land registry would lead to civil war and considered housing all the important information in one centralised building would make it vulnerable to hostile take-over or destruction, see Sugden 1852, p. 11–12.

27 A trading fund is a governmental department, or department for which a Minister of the Crown is responsible, which remains a public agency but is made responsible for its own finances. It is in particular, 'so managed that the revenue of the fund would consist principally of receipts in respect of goods or services provided in the course of the operations in question.' s. 1(1)(a) Government Trading Funds Act 1973, as amended by the Government Trading Act 1990. HM Land Registry has been such a trading fund since April 1993.

28 Since July 1990.

29 S. 99(2)(a) LRA 2002. He may of course delegate certain task, s. 100(1) LRA 2002.

30 This used to be a power of the Lord Chancellor, but it has been amended by Sch. 2, s. 4(2)(e) of the Transfer of Functions (Her Majesty's Land Registry, the Meteorological Office and Ordnance Survey) Order 2011. See S. 99 (3) LRA 2002.

31 He is accountable to Parliament for the use of public funds under his position as Accounting Officer for the Trading Fund.

Registrar is subject to court supervision through the court's judicial review jurisdiction. With the 2002 Land Registration Act coming into force, electronic conveyancing was given the legal framework it needed. All the main stages of a conveyancing transaction are to be conducted electronically.[32]

In recent history, there have been two efforts of privatising the HM Land Registry,[33] in 2014 and 2016. Neither was successful. The 2014 efforts of the UK government were aimed at making the HM Land Registry a 'service delivery company',[34] which would be a separate company that would be responsible for the performance of the service delivery functions, while a separate Office of the Chief Land Registrar would be created and retained by the Government.[35] After the consultation, the government decided 'that further consideration would be valuable',[36] and the process was put to a stop in Parliament,[37] only to be taken up again in 2016.[38] The 2016 efforts heavily focused on the short term gains that could be accrued by the sale of the Land Registry.[39] It was met with heavy criticism in the consultation responses and led to online petitions.[40] Months later, the project was shelved again.[41]

HM Land Registry provides annual data regarding the amount of information it has disclosed to those seeking access. The following numbers regarding (official) searches and

32 With a simple five sections in LRA 2002: ss. 91-95 and one Schedule, Sch. 5 LRA 2002.

33 There have been other instances in history where a private land registry was proposed, but none made it. See above footnote 26 and section 7.3.3.2.

34 'The Land Registry service delivery company would be responsible for the processes relating to land registration whereas the Office of the Chief Land Registrar would primarily perform regulatory and fee-setting functions to ensure that customers' interests continue to be protected.' Department For Business Innovation & Skills 2014a, p. 5. The government considered 'that it would benefit from a separation of policy and delivery, a greater focus on service delivery, greater flexibilities to operate around pay, recruitment and possibly provide other services and a more clearly defined relationship with Government.' Department For Business Innovation & Skills 2014a, p. 12.

35 Department For Business Innovation & Skills 2014a, p. 13.

36 Department For Business Innovation & Skills 2014b, p. 17.

37 Syal 2014.

38 Department For Business Innovation & Skills 2016. Even though the land registry had a surplus.

39 'Where there is no compelling case for keeping an asset in public ownership and there are clear advantages to considering alternatives it is right to explore a change. There are benefits to moving Land Registry into the private sector in return for receipts that can be used to reduce public debt or fund other public spending. The key test is therefore whether or not there is a strong case for continued public ownership. In Land Registry's case, the Government believes that, with the right protections in place, there is no need for the core functions of the Land Registry to be delivered by civil servants. Subject to a value for money assessment, the balance lies in favour of a sale, releasing resource that can be used elsewhere for the public benefit. This is the primary driver for change.' Department For Business Innovation & Skills 2016, p. 5, 11.

40 https://you.38degrees.org.uk/petitions/stop-privatisation-of-the-land-registry which was signed 321,430 times. https://weownit.org.uk/public-ownership/land-registry, which was signed 19,171 times, and even had people up in arms on Facebook, https://www.facebook.com/savethelandregistry/.

41 'Following consultation the government has decided that HM Land Registry should focus on becoming a more digital data-driven registration business, and to do this will remain in the public sector. Modernisation will maximise the value of HM Land Registry to the economy, and should be completed without a need for significant Exchequer investment.' HM Treasury 2016, para. 1.66.

inquiries from 2015/2016 may be of interest. The total number of official searches[42] in the land registry was 2,424,335, of which 99.4% was done via the electronic portal. The number of official copies given out was 13,882,149, of which 99.1% was done via the electronic portal. The total number of register views was 5,325,027, the number of title plan views was 957,449, and the total number of document views 73,125, all of which were conducted online. Telephone enquiries amounted to a total number of 682,991.[43]

3.3.3 The Netherlands: Semi-Public Authority

The Netherlands' Cadastre, Land Registry and Mapping Agency is a non-departmental public body (*zelfstandig bestuursorgaan, ZBO*) which operates under the ministerial responsibility of the Minister of Infrastructure and Water Management.[44] The Cadastre, Land Registry and Mapping Agency has only been a ZBO since 1994,[45] some five years after a new legislative framework was created with the Duch Civil Code of 1992. The semi-privatisation is perhaps a little bit strange, considering the parliamentary discussions regarding the new Dutch Civil Code and the Law on the Cadaster (*Kadasterwet*), which would govern the Cadastre, Land Registry and Mapping Agency. In these parliamentary discussions, it was deemed 'almost self-evident' that the government would be tasked with running the land legistry.[46] It was no longer the case several years after. Services which were not deemed part of the departmental core would be placed 'at a distance' and in one way or another made more autonomous. The Cadastre, Land Registry and Mapping Agency's services were considered a prime example of deserving more autonomy; furthermore it would impact the efficiency of the Cadastre, Land Registry and Mapping Agency positively, which had come under pressure some years prior when it was told to become self-sufficient in 1982.[47]

The keeping and maintaining of the land registry is part of the tasks of the Cadastre, Land Registry and Mapping Agency. The head of the Land Registry is the Head Land

42 See section 7.3.5 on official searches.

43 HM Land Registry 2016.

44 See also Asser/Bartels & Van Mierlo 3-IV 2013/471.

45 Verzelfstandiging van de Rijksdienst van het Kadaster en de Openbare Registers (Organisatiewet Kadaster), *Stb.* 1994, 125.

46 'Het in ons land vigerende stelsel van openbare registers voor registergoederen beoogt een instrument te zijn om de rechtszekerheid ten aanzien van deze goederen te bevorderen. Het is dan ook bijna vanzelfsprekend dat de overheid, als beschermster van het algemeen belang – waartoe ook de rechtszekerheid en de rechtsbescherming van de individuele (natuurlijke en rechts-)persoon behoren – belast is met het houden van die openbare registers.' Reehuis & Slob 1990, p. 3.

47 KST II 1992-1993, 23 007, nr. 3, p. 3. 'Ter uitvoering van een in 1982 in de ministerraad genomen besluit, is bij het Kadaster gefaseerd het beginsel van kostendekkendheid ingevoerd, met als sluitstuk volledige bedrijfseconomische kostendekkendheid in 1988. Het werken op basis van kostendekkendheid leidt echter tot een aantal beheersmatige knelpunten, waardoor de doelmatigheid in het gedrang komt. Door verzelfstandiging, met daaraan gekoppeld een eigen regime voor het financieel en personeel beheer, zal de doelmatigheid kunnen worden vergroot'.

Registrar (*Hoofdbewaarder*) who is chosen from among his peers of land registrars by the board of the Cadastre, Land Registry and Mapping Agency.[48] The land registrars are tasked with the registration of the deeds in the land registry.[49] As there are less than 10 land registrars today, they are allowed to delegate certain tasks, such as the actual processing of the deeds offered for registration,[50] which concerned 403,200 deeds and 340,300 *hypothec* deeds and documentation, in 2015.[51]

Currently the land registry is fully electronic, although deeds may still be delivered in paper, even if it has lost favour in face of electronic delivery. Access to the registries held by the Land Registry, except for the registration of airplanes,[52] is available electronically. The Cadastre, Land Registry and Mapping Agency provides annual data regarding the amount of information it has disclosed to those seeking access. The following numbers regarding searches and inquiries concerning 2015 may be of interest. The total number of information products delivered via My Cadastre (*Mijn Kadaster*), the online portal which requires a subscription, was 24.4 million. The total number of online information products 'for the citizen' that were delivered was 132,000.[53]

3.3.4 Privatised Land Registration: New South Wales

While the efforts in England & Wales have not been successful,[54] New South Wales' (NSW) efforts to privatise its land registry have been. In April 2017, the NSW Premier Berejiklian announced the sale of a lease to run NSW's land registry to 'Australian Registry Investments Pty Ltd.', which is a consortium of private companies. It was not a popular measure.[55] The lease is for no longer than 35 years and cost the consortium $2.6 billion.[56] Even though the land registry will be managed by the consortium, the State will continue to guarantee title, which in essence makes the government liable for mistakes in the land registry that is managed by a private company.

48 Article 7(3) Kw.
49 Article 7(1) Kw.
50 Article 7(2) Kw.
51 Dienst Voor Het Kadaster En De Openbare Registers 2015, p. 20.
52 Digitisation is underway.
53 Dienst Voor Het Kadaster En De Openbare Registers 2015, p. 21.
54 See section 3.3.2.
55 A month before the winning bid was announced, a Land and Property Information NSW (Authorised Transaction) Repeal Bill 2017 was introduced in Parliament. See for the outrage the measure generated, among a former Surveyor General, the Institution of Surveyors NSW, the Law Society NSW, https://perma.cc/AX2S-S2V5 and the Public Service Association, a public sector union, https://perma.cc/425R-QSA7.
56 Australian dollars. $1 billion would be spent on the upgrading sports stadiums and the remaining $1.6 billion will be invested in other infrastructure projects.

3.3.5 *Private Registration System: MERS*

Next to the 'official' land registries, there are also private initiatives to effectively create a new, linked but distinctly separate land registration system. The prime example being the way a consortium of banks in the United States of America have taken it upon themselves to create a private registration system of mortgage deeds.[57]

The Mortgage Electronic Registration System, Inc (MERS) is a company set up by several banks around 1993.[58] It was conceived as a way of reducing costs for sellers of mortgage-backed securities.[59] Slesinger and McLaughlin, both at the Mortgage Banker's Association of America at the time, explained it as follows:[60]

> Thirty years ago, stock and bond registration and trading were primarily paper-based. Similar to the use of assignments in transferring mortgage rights, stock and bond certificates were issued to investors to evidence ownership of securities. Each time a security was bought or sold, the original paper certificate was destroyed and a new certificate was issued to the buyer. As trading volumes increased over time, the paperwork became unmanageable, causing delays in trade settlement dates. Because of these problems, the securities industry began to implement book entry systems to streamline the process, eventually reducing costs by over 90 percent.

When a person seeks out a loan from a bank to finance the purchase of their home or a property, and the bank considers that you qualify for the loan, it will be granted. However, the bank requires a security interest in the plot of land to secure the loan: a mortgage.[61] Upon registration of the mortgage deed establishing the mortgage, the register will not state that Bank [X] holds a mortgage over property [Y] from person [Z], but rather that MERS holds a mortgage over property [Y] from person [Z]. The public records therefore reflect that MERS is the mortgagee. However, MERS acts as a nominee for the bank. Only in the private records of MERS will the link be made between a mortgage note and the lender, which is one of the banks part of MERS. A mortgage note is the note evidencing a loan for which the land has been offered as security. In the public records, one can therefore search for the lender but will only find MERS, whereas in the private records of MERS the actual lender who holds the beneficial interest in the mortgage note is listed.[62]

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57 On whether this is perhaps a system that might also be used in Europe, Van Erp *European Property Law Journal* 3/2, p. 107–108.

58 Slesinger & Daniel McLaughlin *Idaho Law Review* 31/3, p. 812–813.

59 See on this history of MBSs, which started around 1970s, Burkhart *Missouri Law Review* 64/2, p. 273–285.

60 Slesinger & Daniel McLaughlin *Idaho Law Review* 31/3, p. 807.

61 In civil law terminology: a *hypothec*.

62 Compare this with the problem of the information imbalance between the principal and agent as discussed in section 2.7. See also on this issue Levitin *Duke law journal* 63/3, p. 680 *et seq*. who compares it to models that operate in a similar manner, which *do* have statutory validity such as the Depository Trust Company.

This is problematic in several respects. First, a nominee is a form of agency, meaning that MERS would act as an agent for a principal: here the lender, a bank. However, if this were the case, it is questionable whether MERS can be recorded in the land registry, because it is not in fact the mortgagee, the lender is.[63] The reverse is equally confusing. If MERS is the mortgagee, it can be recorded in the public registry as such, but it would also have to be entitled to the claim which the mortgage secures, the mortgage note. However, in relation to the mortgage note, MERS only claims to be nominee for the bank. The bank is entitled to the claim. This is problematic because of accessority. A security right such as a mortgage is attached to the claim it secures, the mortgage note. Where the one goes, the other follows. This makes it difficult to assert, as MERS does, that it is both the principal when it concerns the mortgage, but an agent (nominee for the lenders, *i.e.* banks) when it concerns the mortgage note. If the mortgage cannot be separated from the mortgage note, MERS cannot be both principal and agent at the same time.[64] In the wake of the mortgage crisis in the United States, the question of whether MERS can foreclose in its own name or whether the bank can, or neither, has led to a steady stream of case law.[65] The second way in which this practice of MERS is problematic is its implications for public registers.

A big advantage for banks using MERS is that, if they want to transfer a portfolio of mortgage backed securities,[66] they would only have to alter the books at MERS, not in the public record. MERS remains the mortgagee even after subsequent transfers of the mortgage note.[67] As such, the banks could escape the fees associated with making changes in the public registry. However, this also effectively impedes the search of public records, as these do not reflect actual control over the mortgage note.[68] Furthermore, it

> removes the incentives for [MERSs] members to retain and aggregate the legal documentation pertaining to such transfers for any given piece of property, astronomically increasing both the likelihood of broken chains of title and the difficulty of detecting fraudulent claims in the absence of documentation showing the legitimacy of prior transfers.[69]

There is no legal framework in place for the manner in which MERS operates, that is not to say it is illegal, but there are no specific rules in place, where these might be warranted. See also Whitman *Missouri Law Review* 78/1, p. 1–76.

63 Peterson *William and Mary Law Review* 53/1, p. 118. See for a similar conclusion in the Netherlands that an agent cannot be recorded on the registry because it would impede the public and transparent nature of the land registry; HR 16 March 1984, ECLI:NL:HR:1984:AB7952, *NJ* 1984, 556 (*Modehuis Nolly*).

64 Weber *American Bankruptcy Law Journal* 85/3, p. 243.

65 See extensively on this the overview provided by Whitman and Milner. Whitman & Milner *Arkansas Law Review* 66/1, p. 21–63.

66 Bonds covered by a portfolio of mortgage notes.

67 Peterson *William and Mary Law Review* 53/1, p. 116. Reiss et al. 2015, p. 9.

68 Heekin *Quinnipiac Law Review* 33/1, p. 190.

69 Reiss et al. 2015, p. 9.

Banks were successful in reducing their transaction costs for assigning large portfolios of mortgages, however, in doing so, they undermined the legal certainty that the public registration of mortgages sought to achieve. By avoiding the 'costly' process of getting the documentation in order and recording the chain of titles in a public register, was compromised, leading to a slew of case law of difficulties in foreclosure procedures.[70]

Or as Singer put it:

> Because the banks combined new procedures with sloppy record keeping,[71] the courts now find themselves between a rock and a hard place. Traditional rules were intended to clarify property titles, but the banks' combination of cleverness and incompetence means that property titles will be clouded whether the courts strictly enforce the statute of frauds or relax its formality requirements. The traditional rules and requirements created a legal infrastructure that enabled property markets to work well. The banks' wilful evasion of those practices and laws created precisely the results the tradition would have predicted: titles have become clouded and even unmarketable.[72] But, contrary to first instincts, we cannot solve the problem simply by strictly enforcing the traditional rules. The evasion of property law was so pervasive that rigid enforcement of the statute of frauds would destabilize property titles as badly as relaxing it would do.[73]

The MERS system and its private record keeping should not be confused with the private record keeping of title insurers. In the development of land recording and registration in the United States, an increase in population and resulting transactions in land put stress on the recording system leading it to become increasingly difficult to search in the land registries of the different counties.[74] Attaining legal certainty regarding interests in land therefore 'usually is an onerous, expensive, and time-consuming process.'[75] This led to

70 As the bank seeking to foreclose would have to prove they were in fact entitled to do so. See also the scholarly comments on whether or not MERS can foreclose, Hunt *Ohio State Law Journal* 75/1, p. 155–198, Juster 2013, p. 1–46, Robinson *Cardozo Law Review* 32/4, p. 1621–1654. Compare with the verification rules discussed in section 2.6.2.2.

71 'A transfer within the MERS system involves voluntary self-reporting and nothing more and therefore fails to incentivize timely, accurate reporting. There are no formalities to a transfer in the MERS system. As a result, MERS may not in fact know who its principal is within the common-agency arrangement at any given point in time because MERS is relying on reporting from its members.' Levitin *Duke law journal* 63/3, p. 680.

72 See on the problems the MERS system created after the subprime mortgage crisis and the foreclosures that ensued, Juster 2013, p. 1–46, Kochan *Arkansas Law Review* 66/1, p. 267-316, Peterson *University of Cincinnati Law Review* 78/4, p. 1359–1407.

73 Singer *Connecticut Law Review* 46/2, p. 504–505. Compare this with what Hansmann & Kraakman mean with the problem of enforcement and verification rules, see section 2.6.2.2.

74 Szypszak *Whittier Law Review* 24/1892, p. 665–667.

75 Johnstone *Valparaiso University Law Review* 22/3, p. 506.

the practice of title insurance becoming popular after 1868,[76] to offset the possible risks associated with such an uncertain system of land registration.[77] The insurers would carry out the difficult process of searching the public registers and take on the risk of an incorrect title. To diminish their risk as much as possible, these insurers became experts in title searches and are one of the major customers of title record information from the counties. Rather than rely on the public record-keeping system, title insurance companies in effect copied the public records and establish their own database(s) of title records.[78] The public record however remained intact, there was no shadow record-keeping system as is the case of MERS. Hence, the two should be distinguished.

3.4 What Type of Registration System

Generally, two different types of land registration systems can be distinguished: (1) title registration, which registers rights and (2) deeds registration, where only the deeds are registered and rights have to be inferred. The Netherlands has a deeds registration system, whereas England & Wales and Germany adhere to a title based registration system. The next sections serve as an introduction to the two types as they function within the three legal systems,[79] as the choice for these systems can have consequences, for example, regarding the duration of storage of information.

3.4.1 Deeds Registration Systems

In its simplest form, a deeds registration system can be described as a system whereby a (public) registry collects deeds of transfer and of vesting property rights, rather than register rights. The rights will have to be inferred from the chain of deeds. These deeds

76 After the case of *Watson v. Muirhead*, 57 Pa. 161 (1868), which materialised the risk of title searches and showed the 'public record system pertaining to land in Philadelphia was in an appalling state.' Roberts *Indiana Law Journal* 39/1, p. 6.

77 Peterson *University of Cincinnati Law Review* 78/4, p. 1366. Johnstone *Valparaiso University Law Review* 22/3, p. 506–507. See on the development of title insurance Roberts *Indiana Law Journal* 39/1, p. 5–10.

78 By use of so-called title plants. 'Title plants are kept up to date by the expensive procedure of making daily take-offs of all new additions to the public records and incorporating these additions into the private plants. Each plant typically includes records on every land parcel in the county, and some plants cover all transactions back to the origin of recognized titles in the county. Some plants are extensively automated. Most large title plants are owned and operated by title insurers and are used for making searches on parcels for which title insurance orders have been received.' Johnstone *Valparaiso University Law Review* 22/3, p. 507–508. See also Whitman *The George Washington Law Review* 42/1, p. 58–61. See on the fact this is still a current problem, Whitman *Western New England Law Review* 24/2, p. 245–270.

79 It is explicitly *not* meant as a complete dissection of the types of systems and their consequences. And no two deeds systems are the same, neither are title systems. The varieties among them mean this can only be an introduction as applicable to these specific legal systems.

represent evidence of transaction(s) having taken place,[80] not whether such a transaction was a *valid* transaction.[81] England had a system of deeds registration, introduced by statute in the early 1700s for Yorkshire and Middlesex. They were maintained for two hundred years, but they eventually closed down in 1940 and 1976.[82]

The Netherlands still has such a deeds system. The system of land registration in the Netherlands is a mix of a land registry, which is a deeds registry, and the Main Cadastral Registry(*Basisregistratie Kadaster, BRK*), which, in this context, serves as the index of the land registry. The land registry itself is nothing more than the collection of deeds ordered chronologically. The deeds in the land registry are not organised based on plot or name. The BRK unlocks the land registry by plot (cadastral designation)[83] and name of the right holder.[84]

Upon receiving the notarial deed for registration, the registrar[85] will check whether the deed fulfils the registration requirements.[86] When checking the deed, the registrar is considered passive (*lijdelijk*) in the sense that he only checks the accuracy of the registration formalities, not whether the transaction is valid.[87] The registrar's passive role is only in relation to the recording in the land registry. Where it concerns the BRK registration, his role is an active one. As the BRK is the starting point for any search of the land registry, the one influences the other in a positive way.[88] The (mandatory) use of a notary during the process,[89] who carefully checks matters such as the power to dispose of the seller,[90] means that the validity of the transaction is checked before the deed is sent to the land registry. Therefore, the passive role of the registrar is mitigated by the active role of the notary.[91]

80 This need not mean that it was a *valid* transaction.

81 See on this also Zevenbergen 2002, p. 56.

82 Simpson 1976, p. 48. Cooke 2003, p. 46. See on the general discussions on whether England & Wales should become a deeds or a title system, The Registration And Conveyancing Commissioners 1850, see also section 7.2.

83 Article 48(1) Kw.

84 Article 48(2) Kw. See for more on this section 3.6.2.

85 Or rather an employee to whom he has delegated this task. See section 3.3.3 above.

86 Article 18 jo. 20 Kw.

87 Although, when obvious things are missing that are not his or her duty to check, such as for example, the purchase price of the property, he will generally notify the notary who drafted the deed and suggest he sends in a revised version or a correction of the deed. See also Article 3:19(4) BW. See on the passive and active role under the old law Berretty 1969b.

88 Pun intended. See on this Asser/Bartels & Van Mierlo 3-IV 2013/488.

89 Article 3:89(1) jo. 3:84(1) (jo. 3:98) BW, requires that for a valid transfer and or of a limited property right (Article 3:89 in general and Article 3:260 specifically for *hypothecs* BW) a notarial deed is drafted by the parties and recorded in the land registry. As such it is a constitutive/manatory requirement for a consensual transfer and creation of a limited property right in land. See on what constitutive requirements mean for publicity being an effect or requirement of transfer, section 2.5.

90 Article 11 Verordening beroeps- en gedragsregels 2011 and Reglement rechercheren registergoederen. See on the role of the notary in the proceedings, Asser/Bartels & Van Mierlo 3-IV 2013/488. As well as sources cited there.

91 See extensively on this interplay between the notaries and registrar Huijgen 2003, p. 381–384, Jong e.a. 2003, Timmer 2011.

Nevertheless, the system is characterised as a negative land registration system. This means that the only inference – that is protected by law – one can draw from the land registry is that, when a deed is *not* registered, the right it aims to create or transfer cannot have had that legal effect. A third party can only rely on the fact that something is not registered.[92] The reverse is not true. Presence of a deed does not mean the presence of a right. This is because we are dealing with a deeds system, not a rights system.[93]

The fact that the Netherlands adheres to a deeds system has not made the system any less accurate. Rather the opposite is true. Academics are in consensus that the land registry in the Netherlands is very accurate[94] and trustworthy.[95] Furthermore, the system of protecting the third-party acquirer,[96] in combination with a very active notary in the conveyancing process, has led certain scholars to suggest that the Netherlands might be a deeds system but it can perhaps be characterised as a semi-positive sytem, or quasi-positive, rather than a negative one.[97]

3.4.2 Title Registration Systems

In a system that can be classified as a title registration system, the land registry registers rights and confers title by way of registration.[98] The land registry records property rights in land. Ownership or title need not be inferred, but it is immediately clear from the registration, as it is recorded there. Moreover, one can rely on the accuracy of the registry, meaning that, if the register reflects that [A] is the owner of plot [X], then [C] may rely on the fact that [A] is the owner of plot [X]. Power to dispose[99] therefore need not be inferred from a sequence of deeds,[100] but rather it is a given by the fact that [A] is registered as the owner of plot [X].

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92 Article 3:24(1) BW. See also HR 7 June 1946, *NJ* 1946, 465, 'dat ons wettelijk stelsel van openbaarmaking der zakelijke overeenkomsten betreffende onroerend goed, door in- of overschrijving in de openbare registers zich hierdoor kenmerkt dat - hoewel zonder deze openbaarmaking zekere rechtsgevolgen uitblijven - de bekendmaking in het register niet medebrengt, dat daardoor op bindende wijze vaststaat dat de rechtstoestand inderdaad is, zooals het register aangeeft, noch dat voor derden, die op het register vertrouwen, hetgeen staat ingeschreven, als bestaande wordt aangenomen, ook al blijkt de bekendmaking onwaar te zijn'.See also Straaten 1992, p. 17-18.

93 See also on this for the older law Berretty 1969a, p. 58 and Berretty 1969b.

94 Snijders 1995, p. 184, 186. Snijders & Rank-Berenschot 2001.

95 Van Velten 2015, p. 321. See also Asser/Bartels & Van Mierlo 3-IV 2013/488-489 who conclude that the land registration in the Netherlands functions as a highly reliable system. The best we can expect, Henriquez/de Haan et al. 1982, p. 153.

96 For inaccuracies in relation to what is registered, see Articles 3:25 & 3:26 BW. For good faith acquisition by a third party for value, Article 3:88 BW. See on this also Bartels 2004b, p. 12, Struycken 2007, p. 682.

97 Asser/Bartels & Van Mierlo 3-IV 2013/487, Jong e.a. 2003, Zevenbergen 1996, p. 727–731.

98 See on the distinction between the categorisation of the England & Wales system as one of registration *of* title or title *by* registration, Dixon *The Conveyancer and Property Lawyer* 2002/5, p. 349–354.

99 Barring any problems with the power to dispose such as legal incapacity.

100 Compare with the deeds system as described above in section 3.4.1.

The land registration systems of Germany and England & Wales can be considered title registration systems.[101] An overview of both is provided in order to introduce the two systems.

The registration of a property right in the land registry in Germany carries with it the presumption that the right exists.[102] If a (property) right has been entered into the land registry with [A] as the right holder, then it is presumed that [A] is entitled to the right.[103] Such a presumption is tied to the public faith principle that is at the heart of the land registry.[104] Public faith is interpreted in favour of the person who acquires a property right in land; the contents of the land registry are *presumed* to be correct, unless an objection to such accuracy is recorded or the acquirer has knowledge of the incorrectness of the registration.[105] Acquisition or loss of property rights by operation of law are excluded from this principle.

The system of land registration in England & Wales is slightly more complicated on account of the fact that there are two registration systems in place. There is the old land registration system which is still applicable the 12% of the land which is still unregistered land, and there is the system that is applied to the other 88% of land which is registered.[106] It was never the intention that the two systems would operate at the same time, however the process of the registration of land[107] took longer than expected. The result of this is that, from 1925 onwards, there were two different types of registration systems.[108] A registered title system, and the unregistered title system by which title is deduced historically. The focus here is on the system that applies to the 88% of the land which is registered. That system of land registration is also considered a title registration system and has the following characteristics:

i. Registration vests the legal title in the registered proprietor, irrespective of the validity of the transfer to him.[109] The registration therefore does not provide a history of titles.[110] Moreover, the conferring of title upon registration means the system should be considered title by registration rather than registration of title.[111]

101 Although, again, these are rough categorisations, the two differ in their specifics, compare sections 3.5.1 and 3.7.

102 § 891 BGB, Münchener Kommentar zum BGB 2015, § 873, Rn. 106.

103 It can be rebutted, but it means that the person making the claim that [a] is in fact *not* entitled has the burden of proof.

104 As codified in §§ 892-893 BGB.

105 § 892(1) BGB. This presumption means that Snijders 2003 therefore considers the German system not to be a 'positive system' in the truest sence, as we are dealing with a *presumption* of accuracy and of a right.

106 HM Land Registry 2016, p. 8.

107 Which for a long time was not compulsory, see sections 3.5.2 and 7.2.

108 On the difference between the two in the registration mechanisms, see section 7.2.

109 Megarry & Wade/Harpum, Bridge & Dixon 2012 para. 7-001.

110 See on the importance of this in relation to data protection regulation 5.6.7.4. However, the history of title is often present. Megarry & Wade/Harpum, Bridge & Dixon 2012, p. 7–123.

111 Dixon *The Conveyancer and Property Lawyer* 2002/5, p. 349–354. See also Megarry & Wade/Harpum, Bridge & Dixon 2012, paras. 7-115-117.

ii. The register is supposed to reflect the accurate legal situation with regard to property rights in land ('the mirror principle'). This best reflects the goal of attaining legal certainty as comprehensively as possible.[112]
iii. While certain equitable interests can be subject to registration in the land registry,[113] this is not true for all equitable rights. The equitable interest in a trust is not recorded in the land registry.[114] The 'curtain principle' captures the idea that certain equitable interests in land 'should be hidden behind a "curtain" of special types of trusts.' You need not look 'behind the curtain of the trust or worry about any equitable rights of ownership that might exist'.[115] For example, an acquirer of land held on trust need not concern himself with the equitable rights when acquiring the legal title to the land from the trustee. 'This means that these equitable rights will not negatively impact the enjoyment of the land therefore.'[116] Allowing otherwise would lead to overreaching of these equitable interests.[117]
iv. Lastly, a registered title is guaranteed by the State and, in the event of a mistake in the register which causes a person to suffer loss in consequence, the Land Register will indemnify that person for the loss.[118] This is sometimes called the 'insurance principle'.[119]

3.5 English system of Registered and Unregistered land

As mentioned above, there are two different systems in place for land registration in England & Wales. There is the system of registered land and the system of unregistered land. Even though the whole of England and Wales has been subject to compulsory registration since 1 December 1990,[120] some 12% of the land still has to be registered in the new system of land registration.[121] Completing registration however is not done *ex officio* by HM Land Registry, but it requires a particular trigger event, like a transfer of the unregistered land. Until 100% of land is registered, there remain two distinct types of registration systems in place in England and Wales. The system for registered land is

112 Dixon 2002, p. 30–31.
113 See section 3.5.1.1.1.
114 This also means that we cannot infer from HM Land Registry who has beneficial ownership of land held on trust. Nevertheless, this information may be gathered from the newly established UBO-registers. A register of Ultimate Beneficial Owners, which has to be set up in accordance with the Fourth Anti-Money Laundering Directive. This EU Directive includes a provision requiring the registration of the ultimate beneficial owner of a trust that acquires land, see Article 31 of the Directive.
115 Dixon 2002, p. 31.
116 Dixon 2002, p. 31–32.
117 Jackson *The Modern Law Review* 69/2, p. 214–241, on overreaching in registered land in general.
118 s. 103 LRA 2002.
119 Lees/Apers et al. 2015, p. 117–134.
120 SI 1989/1347.
121 HM Land Registry 2016, p. 7.

discussed first, followed by the system of unregistered land. The term 'unregistered' here means nothing more than the title to the land is established by using title deeds and not registered in the register of titles itself. It does not mean there is no registration system in place. The differences between the two systems do not only affect the machinery of conveyancing, but they are also substantive in nature.[122]

Currently, the only register that is applicable, irrespective of the 'nature' of the land,[123] is the Local Land Charges Register and, up until February 2015, the only registry that was not yet held by HM Land Registry.[124] This register, although it is applicable in both systems will be discussed under the registered system.

3.5.1 Land Registration of Registered Land

As explained above,[125] the nature of land registration in England and Wales is the registration of title, not deeds. Title is no longer deduced from a chain of deeds but it is recorded in HM Land Registry. With the enactment of the Land Registration Act 2002 (LRA 2002), and its framework of e-conveyancing, it seems it has even gone from registration *of title* to *title by* registration.[126] Before delving into what exactly may be registered, the composition of the registries under the LRA 2002 is described. This will provide the background to what is registered where and will later help in better understanding the different subset of rules applicable to access to the different types of registries and *indices*.[127]

The different registers can be grouped in the following way. There are two different types of registers held by the land registry (the title register and register of cautions against first registration) and three different *indices* (the Index; the Index of Proprietors' Names; and the Day List). Each will be discussed below.

122 Megarry & Wade/Harpum, Bridge & Dixon 2012 para. 7-001. See for this the enumeration in section 3.5.3.

123 To some extent the register of pending actions that is discussed below, in section 3.5.2.1.2 also is linked to both, as for a registration of a pending action where it concerns a petition of bankruptcy, the registrar also has certain duties to make alterations in the registries specifically set up under the LRA 2002.

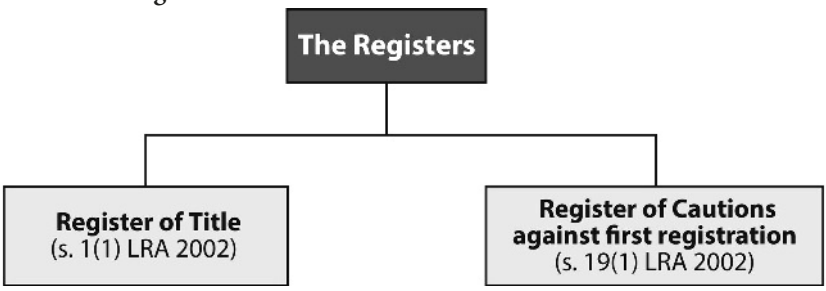
124 This changed with the 2015 Infrastructure Act, see 3.5.2.1.1.

125 See section 3.4.2 title registration and section 7.2 on the historical development.

126 Dixon *The Conveyancer and Property Lawyer* 2002/5, p. 349. The moment of application and registration coincide, see s. 93(2) LRA 2002.

127 See section 3.5.1.1 & 3.5.1.2.

3.5.1.1 The Registers



The land registry keeps two different types of registers. Firstly, the title register[128] is (perhaps) the most important register. The register of title includes an individual registration for each registered estate vested in a proprietor that is either an estate in land or a rentcharge,[129] franchise, manor or profit à prendre in gross.[130] Each of these individual registers has a title number, which is either a distinguishing number or series of letters and numbers.[131] Under this title number, there are three different parts. A property register, a proprietorship register and a charges register. Secondly, there is the register of cautions against first registrations, discussed in section 3.5.1.1.2.

3.5.1.1.1 The Title Register

The title register comprises three different parts. First, there is a property register,[132] which contains a title plan,[133] that is a description of the registered estate and refers to a plan based on the Ordinance Survey map. The title plan however, cannot be relied upon to determine the exact line of a boundary.[134] They are general boundaries.[135] Then, where appropriate, the property register also includes easements, rights and privileges benefiting

128 s. 1(1) LRA 2002. It may be kept in electronic or paper form, r. 2(1) LRR 2003, however, in practice this is done electronically.

129 Which is an annual sum of money (called rent) issuing and payable out of land. Moreover, payment is secured (charged) by a right of distress. These were commonly used for the financing of sales of titles to land, although they have gone out of fashion with modern day secured financing. Swadling/Burrows 2013, p. 199–200.

130 r. 2(2) LRR 2003. A right to take something from the land of another, which must literally be 'from' the land. Think of minerals or crops. Swadling/Burrows 2013, p. 199. See on the origins and development of the franchise, copyhold, and manor, Nugee *Law Quarterly Report* 124/4, p. 586–607.

131 r. 4(1) LRR 2003.

132 r. 4(2) LRR 2003, further governed by rr. 5-7 LRR 2003.

133 r. 5(a) LRR 2003.

134 s. 60(2) LRA 2002.

135 It is possible to apply for a determination of the exact line of a boundary, rr 118-121 LRR 2003.

the registered estate and other similar matters,[136] the inclusion (or exclusion) of mines and minerals in or from the registration under rule 32 of the Land Registration Rules (LRR) 2003.[137] Furthermore, all exceptions, or reservations,[138] arising from the enfranchisement of formerly copyhold land are also included.[139] If the registered estate concerns a leasehold, then sufficient particulars of the registered lease to enable that lease to be identified should also be included,[140] and if there are any prohibitions or restrictions on the dispositions of the leasehold estate, they must also be entered into the property register.[141] Should the registered estate be an estate in a rentcharge, franchise or profit à prendre in gross, then wherever practicable, the property register *must*, if the estate was created by an instrument, also contain those particulars to enable the instrument to be identified.[142]

Second, under the title number, there is also a proprietorship register,[143] which contains, where appropriate (1) the class of title,[144] (2) the name of the proprietor, or where it concerns a registered company or limited liability partnership, its registered number,[145] (3) a postal[146] address for service of the proprietor,[147] (4) any restrictions (of transfer),[148] (5) also notices of pending bankruptcy in relation to the registered estate are included,[149]

136 r. 5(b)(ii) LRR 2003. This has been included by the Land Registration (Amendment) Rules 2008/1919 Sch. 1 para 1(b).

137 r. 32 LRR 2003 denotes that: 'Where, on first registration of an estate in land which comprises or includes the land beneath the surface, the registrar is satisfied that the mines and minerals are included in or excluded from the applicant's title he must make an appropriate note in the register'.

138 The reservation option was included by the Land Registration (Amendment) Rules 2008/1919 Sch. 1 para 1 (c).

139 r. 5(b)(iii) LRR 2003. Copyhold is a historic form of tenure of land by which a person held land from the lord of a manor. All copyhold land has been converted to freehold (the functional equivalent of ownership) through a process known as enfranchisement. See on the enfranchisement of copyhold, Nugee *Law Quarterly Report* 124/4, p 587-592.

140 r. 6 LRR 2003.

141 Not the content, but rather a general announcement is entered into the property register stating: 'the lease prohibits or restricts dispositions of the estate'. See r. 6(2) LRR 2003. See for definitions above.

142 r. 7 LRR 2003.

143 r. 8(1) LRR 2003.

144 r. 8(1)(a) LRR 2003. These are for the titles to freehold estates, the absolute title; qualified title (where title is only established for a limited period or subject to reservations which cannot be disregarded, Sparkes 2003 para. 11.10. and the possessory title (where the claimant actually occupies the land, or is in receipt of rents and profits, and no other class of title is appropriate, Sparkes 2003 para. 11.09., see s. 9(1) LRA 2002. For leasehold estates, they comprise the absolute title; good leasehold title (where the leaseholder cannot prove the title held by his landlord); qualified title; and possessory title, see s. 10(1) LRA 2002.

145 r. 8(1)(b) LRR 2003.

146 r. 198(3) LRR 2003.

147 r. 8(1)(c) LRR 2003.

148 r. 8(1)(d) LRR 2003. On the nature of restrictions see s. 40 LRA 2002. This also includes the restrictions placed on transfer which arise from bankruptcy under s. 86(4) LRA 2002.

149 r. 8(1)(e) LRR 2003.

(6) as well as certain covenants.[150] Where practicable, the price paid or value declared for the registered estate is entered.[151]

Third, there is also a charges register which contains, where applicable, the details of leases, charges, and any other interests which (adversely) affect the registered estate existing at the time of first registration of the estate or created thereafter,[152] and any dealings with the aforementioned interests.[153] Sufficient details to enable any registered charge to be identified,[154] including the name of the proprietor,[155] and a postal address for service of the proprietor of any registered charge,[156] and again any restrictions on transferring the property including a bankruptcy or a notice of a bankruptcy are also registered.[157]

Notices more in general are registered under the third part, the charges register.[158] The LRA 2002 defines a notice as an entry in the register in respect of the burden of an interest affecting a registered estate or charge.[159] The interest which is the subject of a notice need not be valid, but, were it to be valid, then the notice protects the priority of the interest.[160] There are also interests which require registration to have legal effect; for these, there is generally also the compulsory entry of a notice of the new estate or interest on the register of the estate which it binds.[161] Interests which do not require registration in order to have legal effect, nor are excluded from s. 33 LRA 2002, may be protected by a registered notice. Examples of such interests are estate contracts, equitable leases, mortgages, easements, and restrictive covenants which are not made between a lessor and lessee.[162] Section 29 provides for the effect of such a registered notice; it affords the

150 Entered under rules 64 or 65 LRR 2003. r. 8(1)(f) LRR 2003. Also r. 8(1)(g) LRR 2003 denotes that details of any modification of the covenants implied by paragraphs 20(2) and (3) of Schedule 12 to the Act entered under rule 66, are included. As well as details of any modification of the covenants implied under the LPA (Miscellaneous Provisions) Act 1994 entered under rule 67(6) LRR 2003, see r. 8(1)(h) LRR 2003.

151 r. 8(2) LRR 2003. This continued rule 247 under the LRR 1925. It is interesting to note here that there was a period between 1976 and 2000 in which the price paid was not registered 'whenever practicable', but only 'if the proprietor so requests'. The restriction was introduced with The Land Registration Rules 1976, S.I. 1976/1332 and was repealed and restored to the old 'whenever practicable' on 1 April 2000 with The Land Registration (No. 3) Rules 1999, S.I. 1999/3462.

152 r. 9(a) LRR 2003.

153 Including anything that affects their priority and are capable of being noted on the register, r. 9(b).

154 r. 9(c) LRR 2003.

155 Where this is a registered company, or a registered LLP, their registration number, see r. 9(d) LRR 2003.

156 In accordance with rule 198 LRR 2003, see r. 9(e) LRR 2003.

157 r. 9(f)-(g) LRR 2003.

158 Although this does not concern *all* notices. For example, notices of interests under a trust of land or settlements under the Settled Land Act 1925 (c. 18), and a leasehold estate granted for a term of years less than three years from the date of the grant. The restrictive covenants between lessor and lessee, an interest capable of being registered under the Commons Registration Act 1965 (c. 64), and interests in any coal or coal mine, under certain sections of the Coal Industry Act 1994 (c. 21) are also excluded. See extensively, s. 33 LRA 2002.

159 s. 32(1) LRA 2002.

160 For the purposes of sections 29 & 30. S. 32(3) LRA 2002.

161 MacKenzie & Philips 2014, p. 106. Compare with section 2.5.

162 MacKenzie & Philips 2014, p. 106.

interest priority,[163] and protection. If notice of these interests is not registered, the acquirer will take the registered estate free of these interests, unless they are overriding interests which are not registered. To reduce the number of unregistered overriding interests,[164] s. 37 LRA 2002 provides that, if it appears to the registrar that a registered estate is subject to an unregistered interest which is overriding and is not excluded by aforementioned section 33 LRA, the registrar may enter a notice in the register in respect of this interest.[165] The registrar must then also give notice of such an entry made in the register to the registered proprietor[166] and to any person who appears to the registrar to be entitled to the interest protected by the notice or whom he deems appropriate to notify.[167]

Furthermore, in the charges register, anything that might be registered elsewhere, but the registrar deems more conveniently be entered in the charges register, also is to be registered there.[168]

3.5.1.1.2 Cautions Against First Registration

The cautions against first registration are registered separately from the title register in the Register of Cautions against First Registration. These types of registrations are a procedural mechanism by which a person who has an interest in an unregistered legal estate may apply for a caution.[169] The purpose of such a registration is to ensure that, upon the first registration, the interests will be protected in the register.[170] Should such a first registration come into being, then these cautioners will be notified of the application, after which they can object to registration unless their rights are appropriately protected in the register.[171]

Cautions, however, cannot be lodged in the case of a first registration of a freehold estate by the owner of that estate,[172] or a leasehold estate, granted for a term of which

163 s. 29(2)(i) LRA 2002.

164 And may still bind all transferees or grantees of any rights whatsoever in relation to the land. Therefore, these interests 'provide a trap for transferees', and their number has been reduced over the years. They include for example leases not exceeding seven years, property rights of those in actual occupation of the land, (see on this Hill *The Modern Law Review* 63/1, p. 113–119) and implied easements and profits. Swadling/Burrows 2013, p. 297.

165 s. 37 LRA 2002.

166 s. 37(2) LRA 2002, jo r. 89(1)(a) LRR 2003, unless the registered proprietor consented to the (application of the) notice itself.

167 r. 89(1)(b) LRR 2003, unless the person applied for the registration of the notice, or consented to it, or their contact details are not set out in the individual register in which the notice is entered. See r. 89(3) LRR 2003.

168 r. 9(i) LRR 2003.

169 s. 15 LRA 2002. Other than notification, it carries *no effect* and does not influence priority or validity of any interest of the cautioner in the legal estate to which the caution relates, see s. 16(3) LRA 2002. It also does not protect a landowner against adverse possession of land, see Megarry & Wade/Harpum, Bridge & Dixon 2012, para. 7-045.

170 Burn & Cartwrigth 2011, p. 1079.

171 s. 16 LRA 2002. See also Bridge 2002, para. 7-044.

172 s. 15(3)(a)(i) LRA 2002.

more than seven years have not expired, by the owner of that estate,[173] or a superior reversionary title (be it freehold or leasehold) by the owner of a leasehold estate granted for a term of which more than seven years have not expired.[174] The reason for these limitations is to ensure that 'if a person owns a legal estate that can be registered with its own title, he protects it by registering the title to it'.[175]

The register itself comprises of an individual caution register for each caution against the registration of title to an unregistered estate.[176] These individual registers also contain a caution title number, which is distinguished by a number, or series of letters and numbers.[177] The individual caution register is further divided into two parts: the caution property register and the cautioner's register.[178]

The first part, the caution property register, contains a description of the legal estate to which the caution relates as well as a description of the relevant interest.[179] Where such a legal estate concerns an estate in land, a rentcharge, or an affecting franchise, the description will refer to a *caution plan*, which is based on the Ordnance Survey map.[180]

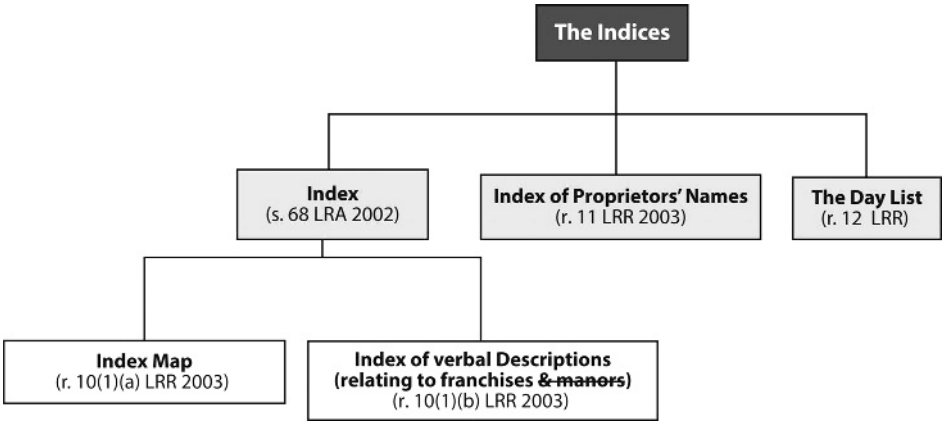
The second part of the individual caution register, the cautioner's register, contains the name of the cautioner,[181] an address for service,[182] and, where appropriate, the details of any person consenting to the lodging of the caution under rule 47, which means that he has confirmed in writing that he consents (which is produced to the registrar) to the caution being lodged.[183] The right is exercisable by application to the registrar.[184]

The registers are a vast collection of titles and cautions. As the registration is on title number, searching through them without knowing the title number will be a long process. This is why the indices are so important. They provide an overview of what was registered every day, on whose name, and in relation to which plot of land. These will be discussed next.

173 s. 15(3)(a)(ii) LRA 2002.
174 s. 15(3)(a)(ii) LRA 2002. See also Megarry & Wade/Harpum, Bridge & Dixon 2012, para. 7-045.
175 Megarry & Wade/Harpum, Bridge & Dixon 2012, para. 7-045, referencing The Law Commission & HM Land Registry 2001 para. 3.58.
176 r. 40(2) LRR 2003.
177 r. 41(1) LRR 2003.
178 r. 41(2) LRR 2003.
179 r. 41(3) LRR 2003.
180 r. 41(4) LRR 2003. The application itself should contain sufficient details, either by plan or otherwise, so that the extent of the land to which the caution relates can be identified clearly on the Ordnance Survey map, as indicated by r. 42 LRR 2003.
181 Where it concerns a registered company or a LLP, its registered number, see r. 41(5)(a) LRR 2003.
182 In accordance with rule 198 LRR 2003, see r. 41(5) LRR 2003.
183 r. 41(5)(c) LRR 2003 jo r. 47 LRR 2003.
184 s. 15(4) LRA 2002.

3.5.1.2 The Indices

Next to the registers there are also three indices. These are (1) the Index, which is further divided into the Index Map and the Index of Verbal Descriptions; (2) the Index of Proprietors' Names, and (3) the Day List. They are all discussed below.



3.5.1.2.1 The Index Map and Index of Verbal Descriptions

These indices are created to give information regarding certain matters in relation to land,[185] the content of which is then to be found in the different registers. It is a starting point for a search and gives certain information relating to land. The Index Map[186] has information in relation to a plot of land, in particular *whether* there is, *not the content* thereof, (1) a pending application for first registration (other than of title to a relating franchise),[187] (2) a pending application for caution against first registration,[188] (3) a registered estate in land,[189] (4) a registered rentcharge,[190] (5) a registered profit à prendre in gross,[191] (6) a registered affecting franchise,[192] or (7) a caution against first registration.[193]

Next to the Index Map there is also an Index of Verbal Descriptions and title numbers arranged by administrative area,[194] of matters concerning relating franchises, in particular: (1) pending applications for first registration;[195] (2) pending applications for cau-

185 s. 68 LRA 2002.
186 r. 10(1)(a) LRR 2003.
187 r. 10(1)(a)(i) LRR 2003.
188 Unless in relation to a franchise. r. 10(1)(a)(ii) LRR 2003.
189 r. 10(1)(a)(iii) LRR 2003.
190 r. 10(1)(a)(iv) LRR 2003.
191 r. 10(1)(a)(v) LRR 2003.
192 r. 10(1)(a)(vi) LRR 2003.
193 Unless in relation to a franchise. r. 10(1)(a)(vii) LRR 2003.
194 r. 10(1)(b) LRR 2003.
195 r. 10(1)(b)(i) LRR 2003.

tions against first registration,[196] (3) registered franchises which are relating franchises,[197] (4) already registered manors,[198] and (5) cautions against first registration.[199]

3.5.1.2.2 The Index of Proprietors' Names

There is also the Index of Proprietors' Names which shows for each individual register the name of the proprietor of any registered estate or charge and the title number.[200] This index makes it possible to acquire a list of all the registered estates or charges in relation to a particular person.[201]

3.5.1.2.3 The Day List

The last index is the Day List. The Day List comprises of a record of all the pending applications under the LRA 2002,[202] excluding network access requests,[203] and any request for information itself.[204] An exception is made for requests to designate a particular document as an 'exempt document'; they are put on the day list.[205] Any application that does not fall under any of the foregoing exclusionary categories is then held in queue, ranking in chronological order of the applications to HM Land Registry.[206]

3.5.1.3 Local Land Charges Register

The different registers and indices are held by the national land registry, next to which there are also local land registers. However, the Local Land Charges Register was recently usurped by HM Land Registry, with the enactment of the Infrastructure Act 2015,[207] the practical details of which are still being worked out.[208]

The Local Land Charges Registers have been set up under the Local Land Charges Act 1975. A number of charges or burdens placed on the land can be found in these registries.[209]

196 r. 10(1)(b)(ii) LRR 2003.
197 r. 10(1)(b)(iii) LRR 2003.
198 Specifically, already registered, as manors may no longer be registered, this was possible under LRA 1925, but no longer under LRA 2002 see also The Law Commission & HM Land Registry 2001 para. 3.21. See r. 10 (1)(b)(iv) LRR 2003.
199 r. 10(1)(b)(v) LRR 2003.
200 r. 11(1) LRR 2003.
201 See for the limitations placed on searching this particular index, section 7.3.5.3.
202 r. 12(1) LRR 2003.
203 More specifically, an application for a network access agreement under paragraph 1(4) Schedule 5 LRA 2002, see r. 12(4) LRR 2003.
204 Which are governed by Part 13 on 'Information etc.' of the LRR 2003.
205 See rule 136 LRR 2003 and section 7.3.5.4 on exempted documents.
206 Sparkes 2003 para. 8.41.
207 Infrastructure Act 2015, s. 34 & Schedule 5.
208 See on the updates https://www.gov.uk/government/publications/local-land-charges-local-authority-pre-digitisation-and-migration-guide.
209 s. 1 LLCA 1975 lists the charges which may be registered locally, and S. 2 LLCA 1975 provides for those types of burdens which are excluded from registration.

For example, a search of these registers might uncover that the plot of land is in a smoke control zone, or that council tax has not been paid and the local authority has a claim against the land, or that there are certain planning restrictions put in place.[210]

Registration of these charges or burdens on the land is not a constitutive requirement.[211] Failure to register shall not affect the enforceability of the charge, however it may lead to a compensation claim.[212] Such a claim for compensation may arise where a person has purchased any land affected by a local land charge, but the charge was not registered and therefore did not show up when the acquirer searched the register. The effect of registration for some specific charges falling under s. 1(1)(a) LLCA 1975[213] is that they 'take effect as if it had been created by a deed of charge by way of legal mortgage within the meaning of the Law of Property Act 1925, but without prejudice to the priority of the charge.'[214]

3.5.2 Land Registration in Unregistered Land

Land registration for unregistered land is organised differently from that of registered land, both substantively and formally. Substantively the system of unregistered land resembles a deeds system more than a title system. Title is deduced rather than granted via registration.[215] Formally the systems differ as the registers are kept and categorised separately. The law applicable to unregistered land is also more scattered and relies heavily on old doctrines that characterised dealings with land before the great reforms, as Dixon states.[216] It is also a dying breed of land registration in England and Wales, as the number of estates that falls under the system of unregistered land has decreased and will slowly, but inevitably, be usurped by the LRA 2002 regime.[217] Nevertheless, as 12% of the land in England and Wales is still unregistered, it is not yet obsolete. Dispositions of unregistered

210 MacKenzie & Philips 2014, p. 41.

211 It is excluded from the list of dispositions required to be registered to 'operate at law', S. 27(5)(c) which reads: 'This section applies to dispositions by operation of law as it applies to other dispositions, but with the exception of the following – (c) the creation of a legal charge which is a local land charge'.

212 s. 10(1) LLCA 1975. The claim is against the registering authority, according to s. 10(4) LLCA 1975.

213 Which concerns a charge that binds successive owners of the land obtained under another Act than the LLCA 1975 *i.e.* certain financial charges.

214 s. 7 LLCA 1975. This concerns a mortgage as a limited property right, not a mortgage which can be characterised as a transfer of ownership for security purposes.

215 Proof of title with assistance of the Limitations Acts, need only date back, for practical purposes, to the previous 15 years. See also s. 23 LPA 1969.

216 Dixon 2012, p. 98.

217 Compulsory registration of land was gradually extended across the country and since late 1990 it covers the whole of England and Wales, with the entry into force of the Registration of Title Order 1989 (SI 1989 no. 1347).

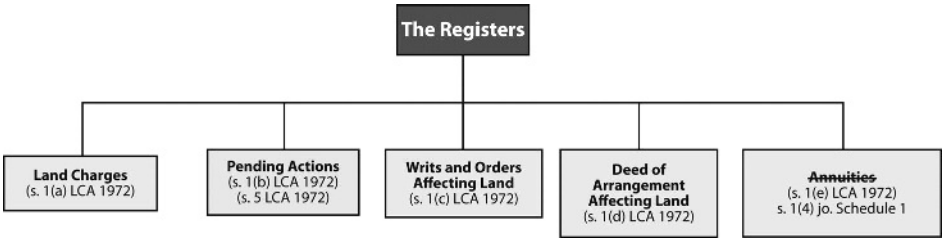
land that do not fall within the requirement of compulsory registration are, for example, the surrender of a lease which results in the immediate reversion.[218]

Therefore, it will remain necessary to investigate the title, by deduction, of every plot of unregistered land for a minimum of one time prior to the plot being placed on the register. Such an investigation requires the understanding of the layout of the system, which will be discussed in the following paragraphs.

Under the 1972 Land Charges Act (LCA) there are five registers set up and one index for all registers is kept by the registrar. Next to these registers, the Local Land Charges Register remains important. The Local Land Charges Register is not set up under the LCA but under a separate Act.[219] Before discussing briefly the index, an overview of the registers is provided.

3.5.2.1 The Registers

There are five registers under the LCA 1972.[220] The Land Charges Rules 1974 supplements the 1972 Act with specific rules of procedure. These are the register of land charges; a register of pending actions; one of writs and orders affecting land; of deeds of arrangement and one of annuities. The content of each will be discussed briefly. The registries are kept in the Land Charges Department of HM Land Registry at Plymouth. Searching through them can be done electronically.[221]



218 s. 4(4)(b) LRA 2002. Other examples include the transfer of land to a nominee or by that nominee to the transferor and the transfer is made neither as a gift nor for any consideration (s. 4(7) LRA 2002), the transfer of mines and minerals held apart from the surface (s. 4(9) LRA 2002), and as the creation of incorporeal hereditaments, such as an easement or a profit à prendre was not included in the list of triggering dispositions, these too are excluded. This was more certain under s. 123(3)(a) LRA 1925, where these were explicitly excluded, such an explicit exclusion is not continued under the LRA 2002. Profits à prendre may still be voluntarily registered, under s. 3(1)-(4) LRA 2002. Megarry & Wade/Harpum, Bridge & Dixon 2012, para. 7-017. Burn & Cartwrigth 2011, p. 1040.

219 See more extensively 3.5.1.3.

220 s. 1(1) LCA 1972. They were not new but initially found in the Land Charges Act 1925. They were continued, with some exceptions, in the LCA 1972.

221 See further section 7.3.6.

3.5.2.1.1 The Register of Land Charges

The Register of Land Charges is considered the most important register.[222] Charges on or obligations affecting land that fall into one of the six Classes described under s. 2 LCA 1972 may be registered in the register of land charges as land charges of that class.[223]

Class A Land Charges- Class A charges consist of charges on land which are imposed by some provision of any Act of Parliament,[224] not by deed, but only come into existence when an application is made.[225] Which should be done as soon as it arises.[226] Examples are those arising from S. 34(2)(b) Land Drainage Act 1991,[227] or Sch. 1, para. 7 Landlord and Tenant Act 1927. Upon registration, the charge takes effect as if it had been created by a deed of charge by way of a legal mortgage, without prejudice to the priority of the charge.[228]

Class B Land Charges- Class B charges are charges on land (not being a local land charge)[229] of any of the kinds described in Class A, however they are created otherwise than pursuant to the application of any person. The charge is imposed automatically by statute.[230] As such, their registration requires short particulars of the effect of the charge to be furnished with the application to the register.[231] However, these charges are void as against a purchaser of the land charged with it or of any interest in such land, unless the land charge is registered in the appropriate register before the completion of the purchase.[232] An example of a Class B charge is a charge on land recovered or preserved for an assisted litigant under s. 10(7) Access to Justice Act 1999.

Class C Land Charges- Class C charges are listed in s. 2(4) LCA 1972. There are four classes and only one of them is not a mortgage. All of those that are a mortgage require registration for a penalty of being void as against a purchaser of the land charged with it.[233]

First, a puisne mortgage[234] will be addressed, which for the purpose of this categorisation is a legal mortgage not protected by a deposit of documents relating to the legal

222 Megarry & Wade/Harpum, Bridge & Dixon 2012, para. 8-068.
223 s. 2(1) LCA 1972.
224 Not being a rate.
225 s. 2(2) LCA 1972.
226 s. 4(2) LCA 1972.
227 Which is a sum to be paid in respect of the commutation of any obligation under s. 33 which gives the Agency the power to commute the obligation to do any work in connection with the drainage of land (whether by way of repairing banks or walls, maintaining watercourses or otherwise). S. 33(1) Land Drainage Act 1991.
228 s. 4(1) LCA 1972. Except when it is a land improvement charge registered after 31 December 1969.
229 Which are created in a similar fashion, see section 3.5.1.3.
230 s. 2(3) LCA 1972.
231 s. 3(5) LCA 1972.
232 s. 4(5) LCA 1972. This is a restricted formula and Dixon has explained extensively that this means that a lot of situations fall outside of its scope. Dixon 2012, p. 113–115.
233 s. 4(5) LCA 1972. For the estate contracts see s. 4(6) LCA 1972.
234 A puisne mortgage is a second or subsequent mortgage. The title deeds of this mortgage are generally retained by the first mortgagee.

estate affected.[235] If created before 1 January 1926, it may be registered as a land charge even before any transfer of the mortgage is made.[236]

Second, a limited owner's charge is an equitable charge acquired by a tenant for life or statutory owner under any statute by discharging inheritance tax or other liability, and to which the statute gives special priority.[237]

Third, a general equitable charge is any equitable charge that is not secured by a deposit of documents relating to the legal estate affected and does not arise from a trust of land or settlement and is not otherwise included in any other class of land charge.[238] It is a catchall provision for residual equitable charges.[239] It includes equitable annuities, such as rentcharges for life,[240] an unpaid vendor's lien,[241] and equitable mortgages of a legal estate if not protected by a deposit of title deeds and if not limited by the owner's charges.[242]

Fourth, and lastly, an estate contract is also a Class C land charge. This is a contract, in writing,[243] by an owner of a legal estate or by a person entitled at the date of the contract to have a legal estate conveyed to him, to convey or create a legal estate, including those conferring, either expressly or by statutory implication, a valid option to purchase a right of pre-emption or any other like right.[244]

Prior to 1926 many equitable interests depended on the doctrine of notice, leading to holders living in fear of the loss of their interest to a purchaser and buyers on the other hand fearing that they were confronted with undiscovered rights.[245] Hence the introduction of the requirement to register in 1925, which is continued in the 1972 LCA Act and is intended to alleviate these fears.

These estate contracts include contracts of sale, mortgage, and lease.[246] It also applies to options, options to renew leases, and rights of pre-emption to the extent that they are proprietary.[247] It does not apply to contracts where an authorising agent is used. A tricky

235 s. 2(4)(i) LCA 1972.

236 s. 3(3) LCA 1972.

237 s. 2(4)(ii) LCA 1972. Megarry & Wade/Harpum, Bridge & Dixon 2012, para. 8-073.

238 The latter two are overreached on a conveyance to a purchaser and hence there is no question that these may be enforced.

239 General equitable charges are excluded which are charges given 'by way of indemnity against rents equitably apportioned or charged exclusively on land in exoneration of other land and against the breach or non-observance of covenants or conditions', s. 2(4)(iii)(c) LCA 1972. Other charges on *the proceeds of sale* of land are also excluded, such as the agreement to share the proceeds, or the estate agent's commission on these proceeds. These are treated similarly to the charges that arise out of settlement or trust and as such are excluded.

240 When created after 1925. See also section 3.5.2.1.5.

241 Megarry & Wade/Harpum, Bridge & Dixon 2012, para. 8-074.

242 See Megarry & Wade/Harpum, Bridge & Dixon 2012, para. 8-074.

243 s. 2 LP(MPA)A 1989.

244 s. 2(4)(iv) LCA 1972.

245 Sparkes 2003, para. 21.13.

246 See more extensively Megarry & Wade/Harpum, Bridge & Dixon 2012, para. 8-075.

247 Sparkes 2003, para. 21.13.

aspect of these types of registrations is that when A contracts to sell Blackacre to B who then contracts to sell it to C, it is against A, not B, that C should register the estate contract, as A is the *current* legal owner.[248] This causes a difficulty for sub-purchasers, as it is often unknown to the last one in the chain that they contract with a sub-vendor who is not an estate owner (yet). The situation is different when B already has some sort of estate in the land, as was the case in *Sharp v Coates*. Here B held a yearly tenancy from A. Therefore when B agreed with C that if he acquired the freehold he would grant his sub-tenant a lease for 10 years, this would be considered an estate contract and therefore registrable as a Class C land charge.[249]

Class D Land Charges- Class D land charges are also divided into three further categories. Failure to register might carry with it the penalty of being void against a purchaser.[250] First a Revenue charge is a Class D charge under the Capital Transfer Act 1985.[251] The application to the register of such a charge shall state the tax in respect of which the charge is claimed and, so far as possible, also defines the land affected. These particulars are entered or referred to in the register.[252]

Second, a restrictive covenant or agreement (save for those between a lessor and lessee)[253] which restrict the user of land are charges on land of Class D.[254]

Third and last, an equitable easement will qualify as a Class D land charge where it is a right or privilege over or affecting land,[255] and it is merely an equitable interest.[256] It is characterised as a vague provision of which the boundaries are unclear.[257] For example,

248 Megarry & Wade/Harpum, Bridge & Dixon 2012, para. 8-076. Sparkes 2003, para. 21.13.

249 Sharp v Coates [1948] 2 All E.R. 871.

250 s. 4(6) LCA 1972 reads: 'An estate contract and a land charge of Class D created or entered into on or after 1st January 1926 shall be void as against a purchaser for money or money's worth (or, in the case of an Inland Revenue Charge, a purchaser within the meaning of the Capital Transfer Tax Act 1984) of a legal estate in the land charged with it, unless the land charge is registered in the appropriate register before the completion of the purchase'.

251 s. 2(5)(i) LCA 1972.

252 s. 3(6) LCA 1972.

253 Even where they relate to adjoining land of the lessor. Dartstone Ltd v Cleveland Petroleum Co Ltd (No. 2) [1969] 3 All E.R. 668. See also Oceanic Village Ltd. v United Attractions Ltd. [2000] Ch. 234, where the Court stated that even though '(…) it does seem most unsatisfactory if a tenant under a lease of 21 years with the benefit of a landlord's covenant, restrictive of the user of other land, is unable to protect his position as against subsequent owners or tenants of that land. Mr. Fancourt suggested that this is such an unsatisfactory result that it justifies implying words into the exception to the effect that it only applies to covenants (whether by the landlord or the tenant) which relate to the demised land, and does not extend to covenants which relate to other lands. Although I was attracted to that argument, I have come to the conclusion that it should be rejected. (…) it would involve giving a form of words in section 50(1) of the Land Registration Act 1925 a different meaning from that given to precisely the same form of words dealing with the same matter in the contemporaneous Land Charges Act 1925 in the Dartstone case, a decision, which, while it has had its critics, has stood for over 30 years'.

254 s. 2(5)(ii) LCA 1972. These have to be entered into on or after 1 January 1926.

255 Created on or arising after 1 January 1926.

256 s. 29(5)(iii) LCA 1972.

257 Megarry & Wade/Harpum, Bridge & Dixon 2012, para. 8-080, Sparkes 2003, para. 21.16. Wade even stated: 'It has always been rather a mystery what equitable easements are. Contracts to create easements can just as

an equitable easement granted by contract or one for life would qualify as a Class D land charge.[258] It does not, however, include a tenant's rights to remove fixtures at the expiration of the lease,[259] nor equitable rights of re-entry.[260] The latter was decided in *Shiloh Spinners Ltd v Harding* in 1973. From the House of Lords (now Supreme Court) judgment:

> In 1961 the plaintiffs assigned their leasehold interest in mill premises to T Ltd. By the assignment, T Ltd. covenanted on their own behalf and that of their successors in title to observe and perform certain stipulations as to fencing and support of buildings retained by the plaintiffs. On failure to observe or perform any covenant the plaintiffs had a right to re-enter and to retake the premises. That right was not registered as a land charge.[261]

The question put before the House of Lords was whether such a right required registration to bind the successor in title or whether the doctrine of notice should follow. Lord Wilberforce recalled the decision of the Court of Appeal in *E.R. Ives Investment Ltd v. High*,[262] in which a right by estoppel or acquiescence was deemed not to fall within the reach of Class D (iii). He then continued, noting that, for the purposes of this case, a plain and ordinary interpretation of Class D (iii) should be given, which would appear to be confined to rights in the nature of easements and profits,[263] and that this would not include equitable rights of entry.[264] Consequently, the courts rejected the notion that *all* equitable interest would fall under Class D (iii). Since *Lord Denning MR* in *E.R. Ives Investment v. High* a narrow interpretation has been given to the provision however inconsistent it may be with the plain wording of the text.[265] In providing such a narrow scope of the provision, an advantage is created over the 'defects of the legislation'[266] and as such achieve 'a just solution'.[267]

Class E Land Charges- The penultimate class of land charges enumerated in section 2 LCA 1972 are the annuities created before 1 January 1926, which have not been regis-

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well be registered as estate contracts. What else is left?' Wade *The Cambridge Law Journal* 14/2, p. 225–226. See extensively on equitable easements and their background Pulleyn 2012, p. 387–405.

258 Megarry & Wade/Harpum, Bridge & Dixon 2012 para. 8-080.

259 Poster v Slough Estates Ltd [1969] 1 Ch. 495; [1968] 3 All E.R. 257.

260 Shiloh Spinners Ltd. Appellants v Harding Respondent [1973] A.C. 691.

261 Shiloh Spinners Ltd. Appellants v Harding Respondent [1973] A.C. 691.

262 ER Ives Investment Ltd v High [1967] 2 Q.B. 379; [1967] 1 All E.R. 504.

263 Megarry & Wade/Harpum, Bridge & Dixon 2012, para. 8-080.

264 Shiloh Spinners Ltd. Appellants v Harding Respondent [1973] A.C. 691.

265 ER Ives Investment Ltd v High [1967] 2 Q.B. 379; [1967] 1 All E.R. 504.

266 Megarry & Wade/Harpum, Bridge & Dixon 2012, para. 8-081.

267 Sparkes 2003, para. 21.16.

tered in the register of annuities. These are referred to as Class E land charges and are a dying breed of land charges. See further section 3.5.2.1.5.

Class F Land Charges- The last enumerated class of land charges is Class F land charges, which are charges affecting any land by virtue of Part IV of the Family Law Act 1996. An example is the right of occupation of a dwelling house given to a spouse or a civil partner. The so-called 'home rights'.[268] Non-registration of these land charges carries with it the penalty of being void as against a purchaser of the land charged with it or any interest in such land.[269]

Not only are the local land charges as mentioned in section 3.5.1.3 registered elsewhere, certain company charges are as well. A land charge for securing money created by a company prior to 1 January 1970 or a floating charge (at any time created), if registered,[270] will be sufficient instead of registration under this act, and they have the affect as if they are registered under the LCA 1972.[271] Furthermore, there are also unregistrable interests, for example the pre-1926 equitable mortgages where there is either a deposit of title deeds or there has been no transfer since 1925, they may still be governed by the old doctrine of notice and do not require registration.[272] Furthermore, first mortgages are also not registered, as the mortgagee of unregistered land who has a first mortgage holds the title deeds as security.

The registration of land charges is done in the name of the estate owner whose estate is intended to be affected.[273] Such a register can fail to be useful when the system 'is old enough for names, against which charges may be registered, to lie behind the root of title, [the title deed that proves that the transferor has title, AB] for then the purchaser inspecting the title may have no means of discovering the name against which he must search', argued Wade.[274] The Committee on Land Charges 1956 agreed and called the fact that they were unable to find out the names, but still were deemed to have actual notice of the charges because they were registered, problematic. This problem became much more pressing when the period for showing a (good) title was reduced from 30 years to at least 15 years.[275] A similar problem had occurred earlier with leases.[276] In practice, however, there is a carrying forward with the title deeds of the results of previous searches made on the register, which means the names, and therefore also the charges themselves, would be

268 s. 30(2) FLA 1996.
269 s. 4(8) LCA 1972.
270 Under the Companies (Consolidation) Act 1908, s. 79 Companies Act 1929, s. 95 Companies Act 1948 or SS. 395-398 Companies Act 1985.
271 s. 3(7) & (8) LCA 1972.
272 Megarry & Wade/Harpum, Bridge & Dixon 2012, para. 8-099.
273 s. 3(1) LCA 1972.
274 Wade *The Cambridge Law Journal* 14/2, p. 218.
275 '[T]itle must start from a document known as a good root of title, and it will only be by chance that such a document amongst the title deeds will be exactly 15 years old. Normally therefore only a document that is more than 15 years old will suffice.' Megarry & Wade/Harpum, Bridge & Dixon 2012, para. 15-077.
276 Megarry & Wade/Harpum, Bridge & Dixon 2012, para. 8-088.

easier to discover.[277] Futhermore, in 1969 a compensation scheme was put in place for those purchasers affected by undiscoverable land charges.[278]

Registration of any land charge under the LCA 1972 requires the particulars of the charge,[279] (Full) Name and address of the person on whose behalf the application is made,[280] name and address of the estate owner whose estate is affected. Form K1, the application for registration of a Land Charge form, is to be filled out for *each* estate owner against whom the land charge is to be registered.[281] The form also asks for the 'Title, Trade or Profession' of the estate owner.[282]

3.5.2.1.2 The Register of Pending Actions

The register of pending actions is used for the registration of disputes pending in court relating to title to land or a proprietary interest.[283] S. 5 LCA 1972 divides these into two categories: (1) pending land actions, or *lis pendens*, means any action or proceeding pending in court relating to land or any interest in or charge on land,[284] and (2) a petition in bankruptcy filed on or after 1 January 1926.[285] The definition of 'relating to land' is broad and a variety of actions fall within its margins, although not all cases.[286] For ex-

277 Megarry & Wade/Harpum, Bridge & Dixon 2012, para. 8-089.
278 Law of Property Act 1969.
279 See for the specifics Sch. 1 LCR 1974.
280 See also the requirement of S. 3(1) LCA 1972.
281 See Explanatory Notes no. 6, Form K1.
282 Even though this is not mentioned in Sch. 1 LCR 1974.
283 Dixon *The Conveyancer and Property Lawyer* 2002/5, p. 116.
284 s. 5(1)(a) jo. S. 17(1) LCA 1972.
285 s. 5(1)(b) LCA 1972.
286 Not included are a summons under s. 17 of the Married Women's Property Act 1882 in which an order for the sale of the matrimonial home is sought and a declaration that the woman is entitled to half the proceeds of the sale, is *not* relating to land but rather in relation to the monies from the proceeds and thus not registrable under s. 5(1)(a) LCA 1972, pursuant to Taylor v Taylor [1968] 1 All E.R. 843. An undivided share in land cannot be registered as a pending land action. Megarry & Wade/Harpum, Bridge & Dixon 2012, para. 8-064. Referencing Perry v Phoenix Assurance Plc. [1988] 1 W.L.R. 940. per Browne-Wilkinson V.C. 'If they were made registrable as land charges the effect would be to bring onto the Land Charges Register orders affecting only beneficial interests, which under normal conveyancing procedure now take effect only behind a trust, and do not appear on the title to the land.' Neither is a summons in the Companies Court to restrain a liquidator from disposing of certain land belonging to a company, as it only seeks to restrain a disposition of land, and no proprietary right was claimed. Calgary and Edmonton Land Co Ltd v Dobinson [1974] Ch. 102; [1974] 1 All E.R. 484. And although Sir Robert Megarry V.-C, left considerable room for future cases in this matter, he concluded that a claim for a sum of money and a charge on the land if the claim succeeds, is not an action that is 'relating to land' and thus is not registrable. Stating, 'The only hesitation I feel on the point is that the arguments put before me did not explore the subject in any great depth; but on the arguments the were advanced, and upon my reflections on the matter, I have reached the conclusion that the claim that there is a pending land action is altogether too tenuous to support the registration, and that the entry should be vacated.' Haslemere Estates Ltd. and Another v Baker and Others [1982] 1 W.L.R. 1109. And as a last example, a right to specific performance of access to land with the intention of erecting a fence on the land is a *contractual* right of access and is not characterised as giving anyone a proprietary interest in the land and cannot be the matter of a pending land action. Albany Construction Company Limited & Anr v Cunningham [2004] EWHC 3392 (Ch).

ample, disputes relating to the existence of an easement,[287] or a wife's claim to the house in a divorce proceedings,[288] an action against the executors of a deceased's will, in respect of certain property,[289] an application for leave to commence an action in respect of breaches of repairing covenants,[290] are all matters which were considered pending land actions and as such could be registered under s. 5(1)(a) LCA 1972.

The content of the application for the registration of a land action is laid down in Sch. 1 under 2 of the Land Charges Rules (LCR) 1974. It reads that the following is to be registered: (i) Name and address of person on whose behalf application is made. (ii) Nature of action or proceeding. (iii) Court in which and day on which action or proceeding was commenced or filed and title of action or proceeding. (iv) Name and address of estate owner whose estate is intended to be affected. (v) County and district, or unitary authority area, in which land affected is situated together with short description identifying land so far as practicable. (vi) Official reference number of priority notice (if any) pursuant to which application is expressed to be made.[291] Here too, the register registers the particulars in the name of the estate owner or other person whose estate or interest is intended to be affected.[292] Up until registration, a pending land action does not bind a purchaser without express notice of it.[293]

As soon as reasonably practicable, the Chief Land Registrar is notified by the court of the filing of a petition in bankruptcy, together with a request that it may be registered in the register of pending actions.[294] Up until the point of registration, the purchaser of a legal estate in good faith, for money or money's worth, is not bound by the petition in bankruptcy.[295] The following information is required for a registration of a petition of bankruptcy to be registered in the pending actions register: (i) Name and address of petitioner. (ii) Court in which and day on which petition was filed. (iii) Name, address and description of debtor, and, in case of debtor firm, of each partner.[296]

287 Greenhi Builders Ltd v Allen [1979] 1 W.L.R. 156; [1978] 3 All E.R. 1163.

288 '(…) [T]he fact that a wife who is claiming under section 24 may not have an existing proprietary right capable of protection by mandatory injunction is in no way inconsistent with the proposition that her claim under section 24 is a claim to a proprietary right which is registrable as a pending land action.' Whittingham v Whittingham v National Westminster Bank Ltd., Intervener [1979] Fam. 9.

289 Norman v Hardy [1974] 1 W.L.R. 1048; [1974] 1 All E.R. 1170.

290 Selim Ltd. v Bickenhall Engineering Ltd. [1981] 1 W.L.R. 1318.

291 Sch. 1(2)(a) LCR 1974.

292 s. 5(4) LCA 1972.

293 s. 5(7) LCA 1972. See extensively on the matter, and how restricted the formulation really is: Dixon 2012, p. 113–115.

294 r. 6.13 Insolvency Rules 1986. Rule 13.2 Insolvency Rules 1986 defines 'the court' in the aforementioned provision.

295 s. 5(8) LCA 1972. The handover between the court and the land registry does not always go very smoothly, see St John Poulton's Trustee in Bankruptcy v Ministry of Justice [2010] EWCA Civ 392 [2010] 3 W.L.R. 1237.

296 Sch. 1(2)(b) LCR 1974.

3.5.2.1.3 The Register of Writs and Orders Affecting Land

The register of writs and orders affecting land contains the details of orders and writs affecting land, such as a charging order securing a debt on the debtor's land, which binds all persons if registered.[297] S. 6 LCA 1972 considers the following to be registrable writs and orders: (i) any writ or order affecting land issued or made by any court for the purpose of enforcing a judgment or recognizance,[298] (ii) any order appointing a receiver or sequestator of land,[299] (iii) any bankruptcy order, whether or not the bankrupt's estate is known to include land,[300] and lastly (iv) any access order under the Access to Neighbouring Land Act 1992.[301] In *Clayhope Properties Ltd.* v *Evans and Another*, Nicholls L.J, stated in 1986 that: 'Section 59 of the Land Registration Act 1925 manifests a clear intention that every writ and order, which in the case of unregistered land may be registered in the register of writs and orders affecting land, may in the case of registered land be protected by a caution against dealing…'[302] However, this view is not continued as s. 6 LCA 1972 does not include writs employed to start an action relating to land which would fall under the former register of pending actions.[303] Neither are writs or orders affecting an interest under a trust of land registrable.[304] Non-registration of the writ or order, save for certain exceptions, is void as against a purchaser of the land unless the writ or order is for the time being registered under s. 6 LCA 1972.[305]

For every estate owner or person whose land is affected by the writ or order, such a writ or order is registered.[306] This means that the following information is to be supplied upon the application for the registration of a writ or order in the register: (i) Name and address of person on whose behalf application is made. (ii) Nature and date of writ or order. (iii) Court by which writ or order was issued or made and title of action or matter. (iv) Name and address of estate owner whose land is affected. (v) County and district, or unitary authority area, in which land is situated together with short description identifying land so far as practicable. (vi) Official reference number of priority notice (if any) pursuant to which application is expressed to be made.[307]

297 Dixon 2012, p. 116.
298 s. 6(1)(a) LCA 1972. Megarry & Wade give the example of a court order charging the land of a judgment debtwor with payment of the money due, stemming from the Charging Orders Act 1979. Megarry & Wade/Harpum, Bridge & Dixon 2012, para. 8-066.
299 s. 6(1)(b) LCA 1972.
300 s. 6(1)(c) LCA 1972. See for the consequences for non-registration s. 6(5) & (6) LCA 1972.
301 s. 6(1)(d) LCA 1972.
302 Clayhope Properties Ltd. v Evans and Another [1986] 1 W.L.R. 1223.
303 Megarry & Wade/Harpum, Bridge & Dixon 2012, para. 8-066.
304 s. 6(1A) LCA 1972.
305 s. 6(4) LCA 1972.
306 s. 6(2) LCA 1972.
307 Sch. 1 under 3 LCR 1974.

3.5.2.1.4 The Register of Deeds of Arrangement Affecting Land

Deeds of arrangement are defined in the Deeds of Arrangement Act 1914 from which the LCA 1972 takes its definition.[308] The register holds deeds executed by a bankrupt in settlement with their creditors. A common example arises when a debtor assigns all assets to a trustee with his creditors as the beneficiaries.[309] Such a deed is registered in the name of the debtor, on the application of a trustee of the deed or a creditor assenting to, or taking the benefit of, the deed.[310] Non-registration carries with it the penalty of being void as against a purchaser of any land included in it or affected by the deed of arrangement.[311]

The information required for registration consists of:[312] (i) Name and address of person on whose behalf application is made. (ii) Date of deed and names of parties, or, where creditors are numerous, of at least three creditors. (iii) Name, address and description of debtor whose land is affected. (iv) Where practicable, county and district, or unitary authority area, in which land is situated together with short description identifying land. (v) Official reference number of priority notice (if any) pursuant to which application is expressed to be made.

3.5.2.1.5 The Register of Annuities

An annuity is defined as 'a rentcharge or an annuity for life or lives or for any term of years greater estate determinable on a life or on lives and created after 25th April 1855 and before 1st January 1926, but does not include an annuity created by a marriage settlement or will'.[313] For example, I will pay you £1000 right here and now, but in return, you pay me £100 every year until you die.[314] The register of annuities holds registrations of pre-1926 annuities that do not fall under Class C (iii) Land Charges (see above under section

308 s. 17(1) LCA 1972.The full definition is as follows: '(1) A deed of arrangement to which this Act applies shall include any instrument of the classes hereinafter mentioned whether under seal or not—(a) made by, for or in respect of the affairs of a debtor for the benefit of his creditors generally;(b) made by, for or in respect of the affairs of a debtor who was insolvent at the date of the execution of the instrument for the benefit of any three or more of his creditors: otherwise than in pursuance of the law for the time being in force relating to bankruptcy.

(2) The classes of instrument hereinbefore referred to are—(a) an assignment of property;(b) a deed of or agreement for a composition;and in cases where creditors of the debtor obtain any control over his property or business—(c) a deed of inspectorship entered into for the purpose of carrying on or winding up a business;(d) a letter of licence authorising the debtor or any other person to manage, carry on, realise or dispose of a business with a view to the payment of debts; and (e) any agreement or instrument entered into for the purpose of carrying on or winding up the debtor's business, or authorising the debtor or any other person to manage, carry on, realise or dispose of the debtor's business with a view to the payment of his debts'.

309 See Megarry & Wade/Harpum, Bridge & Dixon 2012, para. 8-067.

310 s. 7(1) LCA 1972.

311 s. 7(2) LCA 1972.

312 See Sch. 1 under 4 of the LCR 1974.

313 s. 17(1) LCA 1972.

314 See also Swain 2015, p. 158–160. See more extensively on the use of annuities Campbell *The Law Quarterly Review* 44/4, p. 473–491.

3.5.1.1.1). Modern day annuities are necessarily equitable and, as such, can be registered as Class C (iii) Land Charges.

Schedule 1 of the Land Charges Act 1972 explains why the register of annuities is a 'dying register' and that it shall be closed when all the entries in the register have been either vacated,[315] or the prescribed evidence of satisfaction, termination or discharge of all the annuities has been furnished.[316] Furthermore, the first rule under the Schedule states that no further entries are made in the register.[317]

3.5.2.2 The Index

Unlike the several different indices enumerated under the LRA 2002 (see section 3.5.1.2), the index for the five registers under the Land Charges Act 1972 consists of only one, simply referred to as the index which allows for the entries in any of those registers to be traced.[318]

3.5.3 Conclusions on English Land Registration

The two-fold system of land registration in England & Wales, broken down into its basics, is similar in its foundation and comprises registers and an index, or in the plural indices, which make the registers more easily accessible.[319] Searching, as such, can be done by way of property, proprietor or chronologically. However, as the registers in the unregistered system are all registered against the *name* of the estate owner at the time, there are ramifications for easily ascertaining which interests there are in the land. This also ties in with the inherent limitation in a title deeds system, rather than a title system as the LRA 2002 advances. Interests older than 15 years might very well be registered, however, as these are registered on the name, not on the plot of land, it could be that they would not appear on the title deeds, which go back 15 years. When this is the case, the doctrine of notice kicks in, and the purchaser is deemed to be notified, even though he really had no way of knowing. This problem in law is mitigated by the practice of carrying forward the results of previous searches in the register, effectively including the names of the proprietors of registered charges older than 15 years.[320] The system of land registration in place for registered land is not hindered by such problems, as a simple search on the index map will show the registered estates, dispositions or other interests in the land. These differences arise out of the greatest of the differences between the two, the differ-

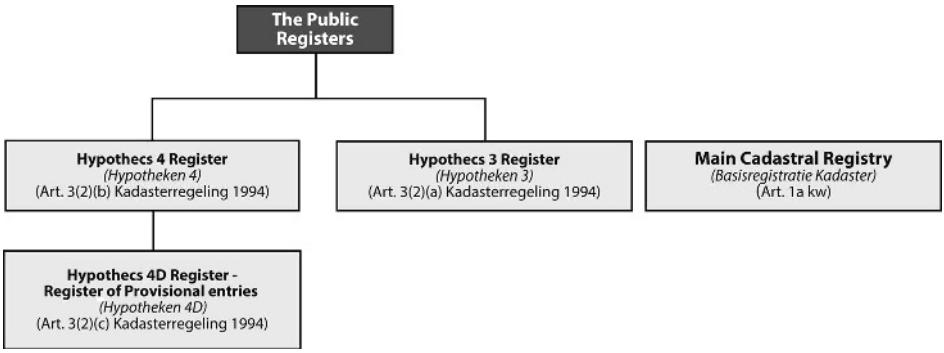
315 Sch. 1 under 2 LCA 1972.
316 Sch. 1 under 3 LCA 1972.
317 Sch. 1 under 1 LCA 1972.
318 s. 1(1) LCA 1972.
319 See more on the accessibility of all registers and indices, section 6.3.3.
320 See more extensive, section 3.5.2.1.1.

ence between title deeds which require the checking of historical title deeds and the modern registration by which registration determines title and no historical searches into title deeds is required.

In terms of the content of the land registry system of registered land we can see that this includes information regarding the person holding the right in land, as well as details concerning the land itself and 'wherever practicable' the purchase price of the property.

3.6 The System of Land Registration in The Netherlands

The system of land registration in the Netherlands is of a dual nature. There are public registers and also the Main Cadastral Registry (*Basisregistratie Kadaster, BRK*) which 'opens up' the public registers. As such, the BRK also functions as an index.[321] The rules applicable to the registers and those that are applicable to the BRK differ, in particular as to the role of the registrar, who is passive in the former and whose role can be described as active when it concerns the BRK.[322] Moreover, it also has consequences for third parties who rely on the register, as they may only (in limited form) rely on the content of the public registers, *not* the BRK.[323] This section first addresses the Registers and then discusses the BRK.



3.6.1 *The Registers (De Openbare Registers)*

As mentioned earlier, the registration is characterised as a deeds system. The registration of these deeds is done in the public registers (*openbare registers*). As we shall see, these registers are organised chronologically. Therefore, there is also the BRK which 'opens up'

321 Article 48(1) Kw.
322 See section 3.4.1.
323 See section 3.6.1.

the public registers. The BRK then functions as an index.[324] It is however *not* part of the public registers.[325] The Dutch system no longer has a Day List.[326] It was removed with the overhaul of the registration system in 1992.

Article 3:16 BW denotes that there are public registers in which facts are recorded that are of importance for the legal status of a registrable thing.[327] The manner in which these registers are organised and managed is laid down further in the Law on the Cadastre (*Kadasterwet*) and the Cadastral Regulation 1994 (*Kadasterregeling 1994*).[328] Only the register of provisional entries is explicitly mentioned in the Civil Code itself;[329] the others are referred to by their overarching category: the public registers (*de openbare registers*). There is no need for further specification as to the particular register in which deeds are registered, as the only thing required is offering the deed or other document to be registered to the registrar,[330] who will then record it and further process the document in the correct register. The advantage of such a system is that it is flexible in its organisation. The organisation itself, as mentioned above, is left to the Cadastre, Land Registry and Mapping Agency (hereinafter: the land registry), the chief registrar, and his registrars.[331]

There are three registers, which still carry names that are reminders of the older system.[332] There is *Hypothecs 3*, in which debts are registered, such as a deed creating a *hypothec* and those that relate to the seizing of property or attachments. *Hypothecs 4* deals with the recording of all other deeds and documents, and has more to do with the interests and rights than debts. For example, a deed of transfer of ownership is registered here. Then there is the register of provisional entries, or *Hypothecs 4D*. All of them are discussed below, before turning to the way in which the registers are made available, the Main Cadastral Register.

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324 Article 48(1) Kw.

325 This is important in relation to third-party protection rules and may have consequences for the applicable rules for the processing of personal data from these registers.

326 It was no longer required as the registration can be almost immediate. Asser/Bartels & Van Mierlo 3-IV 2013/491.

327 Definition of a registrable object can be found in Article 3:10 BW, which concerns any right for which registration is a constitutive requirement in order establish in a particular thing.

328 To some extent also the Kadasterbesluit.

329 Article 3:20 BW.

330 Which can be done electronically, since 2005, Herzieningswet Kadasterwet I, Stb. 2005/107. See on the electronic delivery of deeds Louwman 2003, Louwman 2005, Van Velten 1993, p. 145. Van Velten 2002, p. 595–599, also compares it with similar trend on electronic registration in England & Wales, see on this also section 7.3.5.1.

331 See section 3.3.3 above.

332 This older system for a while also had a *Hypothecs 1* which was the Day List and *Hypothecs 2* which was aimed at providing an overview of the immovable property that a person possessed and of all the property rights in relation to that land. However, according to Konings, the structure of this register was considered unpracticable. It was no longer kept up to date from 1929 onwards, see Konings 1990, p. 29. See also Konings 1990, p. 18-19 for an overview of the registers in place between 1812 and 1838; 7 in total, and Konings 1990, p. 25-26 for an overview of the registers set up in 1838, which totalled 11.

3.6.1.1 Registrable facts, rights and interests

In *Hypothecs 3* and *4*, every fact and legal act that is of importance for the legal status of a registrable thing, in this case land, is recorded. Legal acts here specifically refer to private law legal acts[333] and are of a proprietary nature.[334] This means that *Hypothecs 4* records the transfer of ownership deeds[335] or the deed of division of ownership into apartment rights.[336] Also included are deeds for the creation of a limited property right in relation to land,[337] for example a *superficies* right (*recht van opstal*),[338] a servitude (*erfdienstbaarheid*),[339] and an *emphytheusis* (*erfpacht*).[340] The right of *hypothec*, which also requires registration is recorded separately in the *Hypothecs* 3 register. Thus, the creation, destruction, division in shares, and transfer of property or proprietary rights in relation to land are recorded in these registers. If for these rights the registration is also a mandatory requirement, the so-called 'booking principle' (*boekingsprincipe*) applies,[341] which entails that without recording the legal effect will not materialise.[342]

Next to property rights, other deeds indicative of interests in land and certain facts[343] are also recorded in the public registers. The list of what can be registered is found in Article 3:17 BW. It enumerates the deeds and documents that can be recorded in the public register, in addition to those deeds, facts or documents which may already be recorded under other provisions in the Civil Code,[344] or in other statutory provisions.[345]

From the foregoing, we can conclude that, for a particular document, fact, right or interest to be registrable, it has to fall into one of the following categories:

1. It is explicitly mentioned as a registrable fact under Article 3:17(1) BW;
2. It is explicitly mentioned as a registrable fact under any other statutory provision;
3. There is a statutory provision which creates personal rights that carry with it a third-party effect and relate to land or affects land, but the provision is not explicit as to whether it is registrable or not. It might fall under Article 3:17(1)(a) BW if it is not explicitly excluded under Article 3:17(2) BW.

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333 Article 3:32 BW.
334 Although see section 3.6.1.2.
335 Article 3:89(1) BW.
336 Article 5:109(1) BW.
337 For a description of all these rights in detail and also discussed from a comparative perspective, see Akkermans 2008, Struycken 2007.
338 Article 5:101 BW.
339 Article 5:70 BW.
340 Article 5:85 BW. Registered under *Hypothecs* 4.
341 See section 2.5.
342 This is true for property rights in land.
343 For example, under Article 3:17(1)(k) BW jo. Article 36(4) Kw; the laying and removal of a network consisting of one or more cables.
344 Examples are the explicit references to the possibilty of registration in public registers in Articles 6:252(2) (qualitatitve duty in notarial deed), & 7:3(1) BW (deed of sale of a property). See more extensively section 3.6.1.1.2.
345 An example of the latter may be found in Article 3 Wet kenbaarheid publiekrechtelijke beperkingen onroerende zaken.

3.6.1.1.1 Enumerated list of registrable facts in Article 3:17(1) BW

Article 3:17(1) BW lists the following as registrable:[346]

a. Legal acts which modify the legal status of registered property or which in any other way affect it.[347] This entails the deeds which seek to transfer the object, create or terminate a limited property right in land etc. These legal acts must have a proprietary character and cannot be solely personal rights. Personal rights may only be considered registrable, where there is a specific statutory provision allowing registration.[348] Depending on their nature, they are recorded in either *Hypothecs 3* or *4*.
b. Successions involving registered property,[349] including those by the State,[350] and the surrender of registered property to the State.[351] In such an event, an authenticated transcript of a notarial declaration of succession is offered to the Registrar, which will be registered.[352] These are recorded in *Hypothecs 4*.
c. The fulfilment of a condition of a registered conditional legal act can also be registered.[353] For example, the fulfilment of a resolutive or suspensive condition, with or without a determined date is registrable. Thus, non-payment of the purchase price, in the event payment was a resolutive condition, is a registrable fact.[354] This requires an authenticated transcript of a notarial deed containing a declaration that the person seeking registration appeared before the notary and that the condition has been fulfilled. Attached to the deed is evidence of the fulfilment of the condition or appearance.[355] Depending on the nature of the right, the deed is recorded in *Hypothecs 3* and/or *4*.

   The death of a usufructuary is also a registrable fact, as the death is a resolutive condition of a usufruct.[356] An authenticated transcript of a notarial deed similar to the one above for the suspensive condition is submitted to the registrar, including the time of death of the usufructuary and whether the usufruct is destroyed or it has passed on to another.[357] These will be recorded in *Hypothecs 4*.

346 For the translation, I leaned heavily, though not entirely, on the work *The Civil Code of the Netherlands* 2009. See extensively on the topic Straaten 1992, p. 78-100.
347 Article 3:17(1)(a) BW. See for a full list Van der Plank, *GS Vermogensrecht*, commentaar op artikel 17 Boek 3 BW aant. 4.1. See also Straaten 1992, p. 80-81.
348 Article 3:17(2) BW. For example, Article 6:252 BW which concerns qualitative duties which run with the land but have a personal character. Extensively on these types of rights Van Oostrom-Streep 2006. See also Asser/Bartels & Van Mierlo 3-IV 2013/494, Van Velten 1993, p. 905–906.
349 Article 3:17(1)(b) BW. See extensively the report Kolkman e.a. 2012, p. 29–78.
350 Pursuant to Arts. 4:189 & 226(4) BW.
351 Pursuant to Art. 4:226(1) & (2) BW.
352 Article 27(1) Kw.
353 Article 3:17(1)(c) BW.
354 Article 3:17(1)(c) BW.
355 Article 30(1) Kw.
356 Article 3:203(2) BW. See also Straaten 1992, p. 79, 85.
357 Article 30(2) Kw.

d. By-laws and other rules established between two or more people with joint interests in the registered property.[358] Examples of these are the arrangements that can be made under Article 3:168(1) BW regarding the enjoyment, use and management of joint property or the petitioning of a claim in support of the joint interest of the registered property.[359] It does not include the arrangement of apartment owners, for this is registered as part of the deed of division (*splitsingsakte*) under 3:17(1)(a) BW.[360] If the by-laws or rules are determined by a court, then an (authenticated) copy of the ruling is provided to the registrar.[361] In the event the rules or by-laws were created by a legal act (*rechtshandeling*) then an authenticated transcript (*afschrift*) of a notarial declaration,[362] containing a declaration of the person seeking registration that the legal act has taken place, its content, and attached proof of such a legal act are registered.[363] These are registered in *Hypothecs 4*.
e. Judicial decisions pertaining to the juridical status of registered property or the power to dispose of such a property[364] are judicial decisions[365] that directly relate to the property itself, for example the institution of a revindication claim,[366] or a judicial alteration of the duration of a right of *usufruct*,[367] or the change in the content of a servitude,[368] a right of *superficicies*,[369] or *emphytheusis*.[370] Next to that, there are also judicial decisions which influence the power to dispose of the registered property.[371] A declaratory decision indicating an acquisitive prescription is also included,[372] and expropriation.[373] For example, a declaration of insolvency,[374] or being placed under guardianship (*onder curatele stellen*) are also registerable here.
   The decision, however, has to either be provisionally enforceable (*uitvoerbaar bij voorraad*), or no ordinary legal remedy remains against them,[375] or three months

358 Article 3:17(d) BW.
359 Article 3:171 BW.
360 See for an overview, Van der Plank, *GS Vermogensrecht*, commentaar op artikel 17 Boek 3 BW aant. 7.
361 Article 31(a)jo. 25 Kw.
362 In conformity with Article 37 Kw.
363 Articles 31(b) jo. 26(1) & (3) Kw.
364 Article 3:17(1)(e) BW, see also Art. 25 Kw. See also Straaten 1992, p. 162–163.
365 They may be declatory decisions or a condemnatory judgment, Van der Plank, *GS Vermogensrecht*, commentaar op artikel 17 Boek 3 BW aant. 8.1.
366 Article 5:2 BW.
367 Article 3:218 BW.
368 Articles 3:78-81 BW. See critical notes by De Jong 2009.
369 Article 5:104(1) BW.
370 Article 5:97 BW.
371 See for a similar discussion Asser/Bartels & Van Mierlo 3-IV 2013/493. Pitlo/Reehuis et al. 2012, p. 53. See also Straaten 1992, p. 88-89.
372 KST II 1981-1982, 17 496, Nr. 5, p. 62. Whether an extinctive or acquisitive prescription itself without a judicial decision can also lead to registration, is not entirely clear, see Bartels 2016, p. 6–8.
373 See also Article 54f, 54m Onteigeningswet. Van der Plank, *GS Vermogensrecht*, commentaar op artikel 17 Boek 3 BW aant. 8.2.
374 Article 23 Fw. Also included is the *surséance of payment* KST II 1981-1982, 17 496, Nr. 5, p. 61.
375 Given by declaration of the clerk of the court.

have passed since the decision and the clerk of the court is unaware of any ordinary legal remedies or appeals that have been instituted.[376] Because of the difficulty of determining whether the judicial decision is final, which remains the preferred status of a decision that is registered, the legislator introduced this provision of a declaration by the clerk of the court.[377] Depending on the content of the judicial decision, it is recorded in *Hypothecs 3* and/or *4*.

f. The institution of legal actions and the filing of petitions to obtain a judicial decision pertaining directly to the legal status of a registered property, are registrable.[378] This means that a summons or a writ in relation to registered property can be registered.[379] The immediate consequence of such a registration is that good faith acquisition in case of a lack of power to dispose is blocked,[380] even in the event that the judicial decision confirming a lack of power to dispose is issued *after* the acquisition by the third party.[381]

   The request for an executorial auction with the court is not registered.[382] If the summons or writ is followed up and a judicial decision has been issued, or after an extended period of time no such decision has been issued, the registrar can request that parties apply for a cancellation of the registration.[383] Registration is done in *Hypothecs 4*.

g. Executory and conservatory attachments on registered property are registrable.[384] Registration is a constitutive requirement for these attachments.[385] Non-registration carries with it the nullity of the attachment. Both types of attachment are registered in *Hypothecs 3*.[386]

376 Article 3:17(1)(e) BW. See for the specific registration requirements Article 39 Kw.

377 KST II 1981-1982, 17 496, Nr. 5, p. 62-64.

378 Article 3:17(1)(f) BW. See also Straaten 1992, p. 86-87.

379 This means that only the institution of legal actions with the aim of establishing a difference in the legal status of the registered property itself, and not those that influence the power to dispose of the owner or right holder of the registered property, are registrable. Asser/Bartels & Van Mierlo 3-IV 2013/493, Pitlo/Reehuis et al. 2012, para 58. Plank, *GS Vermogensrecht*, commentaar op artikel 17 Boek 3 BW aant. 9.

380 Therefore when [A] transfers Blackacre to [B] but it turns out that [B] acquires Blackacre deceitfully, [A] could institute a claim to avoid the sales agreement between [A] and [B]. If this claim is instituted and registered prior to [B] transferring Blackacre to [C], [C] cannot rely on good faith acquisition of Article 3:88 BW, when the claim is granted by the court. See also Van der Plank, *GS Vermogensrecht*, commentaar op artikel 17 Boek 3 BW aant. 9.

381 Van der Plank, *GS Vermogensrecht*, commentaar op artikel 17 Boek 3 BW aant. 9, see also the reference to Parl. Gesch. MvT Inv. p. 1158.

382 Louwman 2000.

383 See also KST II 1981-1982, 17 496, Nr. 5, 48.

384 Article 3:17(1)(g) BW.

385 Pursuant to Article 505(1) Rv for executory attachment, and Article 726 jo. 505(1) Rv for conservatory attachment.

386 Article 3(2)(a)(2) Kadasterregeling.

h. Name changes involving persons entitled to registered property. This involves both the change of name of a natural person as well as of a legal person.[387] It includes first, last and every type of name in between. Furthermore, it includes the person entitled, or his or her legal representative,[388] to a personal right that qualifies for registration, such as the person entitled to a qualitative right.[389] Such a change will be registered in the same register where the old name was featured; this can be in *Hypothecs 3* or *4*.
i. Prescription resulting in the acquisition of registered property or the extinction of a limited right which itself qualifies as registered property can be registered.[390] Registration is not a constitutive requirement.[391] Where it concerns a declaratory judgment of such a prescription having taken place, it will fall under the aforementioned provision, Article 3:17(1)(e) BW. Prescriptions under the heading here require an authenticated transcript of a notary which includes, next to the normal formal requirements, which require both parties to be present and *agree*,[392] specifically also the following: (i) specification of the registered good or the limited property right in relation to the registered good; (ii) against whom the prescription takes effect, when known; (iii) what has led to the prescription; and (iv) whether it is disputed or not by the person against whom it takes effect, if known.[393] Should the prescription be disputed, an agreement between parties is not present and the notarial deed will be refused in *Hypothecs 4* and it will be registered in *Hypothecs 4D*.[394]
j. Orders and decisions that annul, repeal decisions made by government orders and decisions (*overheidsbeschikkingen*) which have already been registered pursuant to a special statutory provision.[395] These are not registrable under Article 3:17(1)(a) BW, as they are not private law legal acts, but public law legal acts. Therefore, this provision was included to remove any doubts as to the registrability of decisions in relation to already registered public law decisions.[396] A transcript of the decision is sent by the public authority to be registered.

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387 See Hommes & Klaasse 1995, on whether a name change for German women after marriage is possible, *i.e.* not the registration of the maiden-name, but rather that of her partner.

388 Van der Plank, *GS Vermogensrecht*, commentaar op artikel 17 Boek 3 BW aant. 11.

389 Article 6:252(2) BW. The article concerns a qualitative duty.

390 Article 3:17(1)(i) BW. See extensively on the topic of prescription and registration (and the role of the notary), Bartels 2016, p. 6–8 Heyman 1999, p. 732–736, Klaasse 1996, Kleyn 1998, Kleyn 2003, Verstappen 2005.

391 See the report Kolkman e.a. 2012, on research into the desirability of making such a registration constitutive. See the link with Article 24(2)(e) BW, where third party protection for non-registered facts is explicitly excluded.

392 Article 37 Kw.

393 Article 34 Kw.

394 See also Heyman 1999, p. 732–736, Van der Plank, *GS Vermogensrecht*, commentaar op artikel 17 Boek 3 BW aant. 12.

395 Asser/Bartels & Van Mierlo 3-IV 2013/493.

396 MvT Inv. Parl. Gesch. Inv., p. 1074. On the effect of what such a registration might have and not have for third parties, see De Vrey 2006.

k. Gaseous substances, energy or information can be registered.[397] This is a relatively new provision, introduced in 2007, after the Supreme Court ruled in 2003 in two cases that such a network is not a movable object, as many assumed, rather it was part of the ground and, by virtue of Article 5:20, the codification of the *superficies solo cedit* rule that anything on and in the ground is part of the ownership of the land. As a consequence, Article 5:20 was adapted, and paragraph (k) was added,[398] so as to include the registration of such a network. The registration requires that the notary who first registers the network will have to attest that he is convinced that the person who registers the network is the qualified installer of the network (*bevoegde aanlegger*).[399] This is a tremendous undertaking, for the mere reason that the networks are often long and span sometimes several thousands of plots of land. This means that, for each of these plots of land, the notary will have to convince himself that either prescription has taken place, that there were *superficies* rights established or certain other arrangements were made.[400] Such a network is registered in *Hypothecs 4*.

3.6.1.1.2 Other statutory provisions that allow for registration

As briefly mentioned earlier, next to the enumerated list of registrable rights, interests and facts under Article 3:17(1) BW, there are also other statutory provisions that explicitly provide a legal basis for registration in the public registers. One such example is the qualitative duty, which is an agreement not to do or tolerate something in relation to registered property belonging to that person, which will also bind successors in title.[401] It is different from a servitude in the sense that here a person in his personal capacity, as owner, is entitled, and therefore it is different from the Dutch servitude, which does not allow for this.[402] It is therefore qualified as a personal right and would not normally be registrable.[403] However, for such a qualitative duty to carry with it third-party effect, it must be recorded in a notarial deed and registered in the public registries.[404] These are registered in *Hypothecs 4*.

Another example is the sales agreement of immovable property. A written sales agreement creates personal rights and duties for the parties; it does not have third-party effect. However, since 2003, the (provisional) sales agreement is registrable.[405] This registration is often called the *Vormerkung*, a nod to the German *Vormerkung*.[406]

397 Article 3:17(1)(k) BW.
398 Paragraph 2 was added which states that these networks belong to the qualified layer of the network.
399 Article 36(4) jo. 26 Kw jo. Article 5:20(2) BW.
400 Van Velten hinted in 2005 that this would put a great strain on the notaries involved, Van Velten 2005.
401 Article 6:252 BW. See also Straaten 1992, p. 82.
402 In a servitude it is the land, not the owner, which has a new access route.
403 Article 3:17(2) BW. See section 3.6.1.2.
404 Article 6:252(2) BW.
405 Article 7:3 BW.
406 See extensively on the registration of the provisional sales agreement, Bartels 2004a who provides a good overview of the *Vormerkung*: Nieskens-Isphording 1997. And on the recent changes, since 2016, Ekkelkamp 2015, and Straaten 2016.

3.6.1.2 Registration of personal rights in the registers?

In 1995 the question arose of what to do with a very specific type of mandate (*privatieve lastgeving*),[407] in which for the period the mandate was given the mandator may not use his rights which were mandated. The provision that introduced this in the legislation also states that these mandated powers may in such an event *also* not be exercised against third parties.[408] The Chief Land Registrar noted that he would consider such a mandate to be registrable,[409] because even if it is a contract which in principle does not have any third-party effect, this is a particular type of mandate which could establish certain third-party effects.[410]

Another example where the question arose whether a personal obligation can be registered is in relation to perpetual, or chain clauses (*kettingbedingen*).[411] These are contractual arrangements laid down in a deed of conveyance by which the acuirer takes on two contractual obligations:[412] (1) to perform a specific (generally) positive duty in relation to the land,[413] and (2) also to make sure that, in any future transfer where he is the transferor, he will maintain the perpetual nature of the clause and make sure to bind the future acquirer to the same obligations.[414] During the drafting of the New Dutch Civil Code and the Law on the Cadastre, the question was posed whether such a clause, if relating to land, could also be registered separately. The answer was negative. As these clauses are purely obligatory in nature, and not proprietary, the registrar does not have to register them.[415] However, when placed in a deed of transfer of ownership of the property, the registrar simply records the entire deed. The registrar does not have to refuse the deed for registration because this provision is included in the deed.[416] However, if a specific separate deed is created for the purpose of creating a chain clause, then the registrar will refuse the application for registration. Therefore, while contractual arrangements that concern the land are not registrable on their face, if they form part of a deed otherwise registrable, they can be found in the register.

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407 The question arose and was discussed in Klaasse 1994, p. 350–350, Van Velten 1993, p. 905–906, and Van Velten 1994, p. 350–351.

408 See on the topic also, Christiaans & Wechem 1995, p. 587–590.

409 Supported by: Hommes & Klaasse 1995.

410 Louwman 1995, p. 762.

411 See on the topic, Van Oostrom-Streep 2006, p. 63–70, Du Perron 1999, Akkermans 2008, p. 311–315.

412 Enforced with a penalty clause.

413 Therefore, it cannot be part of a servitude, as the property right would have a third-party effect.

414 Which always occurs, because the notary must cooperate with ensuring that such a clause is perpetual, since Hof Amsterdam 24 May 2011, *JOR* 2012/86 with note by N.W.A. Tollenaar. See for a criticism about this mandatory cooperation of the notary and inclusion of personal rights in property law, Wibier 2012, Van Oostrom-Streep 2012. See further for the content of the duties of the notary HR 3 April 2015, ECLI:NL:HR:2015:831, *NJ* 2015, 479, with note by S. Perrick. (*Novitaris*).

415 See also Straaten 1992, p. 82.

416 KST II 1986-1987, 17 496, nr. 23, p. 30. See also, HR 17 May 1985, ECLI:NL:HR:1985:AG5024, *NJ* 1986, 760, with note by C.J.H. Brunner, W.M. Kleijn (*Curaçao/Erven Boyé*).

3.6.1.3 General formal requirements and contents of a deed

An application for registration of any of the foregoing requires the following information to be present upon application, where it concerns a notarial deed and where it concerns other types of documents, unless the law dictates otherwise:[417] (i) name, first name, birthdate and birthplace, residence place and address, and marital status of natural persons who act as parties to the deed; (ii) where it concerns legal persons who act as parties to the deed; their legal form, name, residence place and address, (iii) the same information regarding those that represent any natural or legal person, except for marital status and their address in some cases.[418] If it is not *possible* to supply this information then the reasons as to why it is not possible should be recorded.[419] Where it concerns a deed drafted by the notary, the deed must also include, based on the law applicable to notaries, the identification document and number of the document.[420] The inclusion of this information is therefore not a registration requirement and, as such, its omission is not part of what the registrar should check, however it is nevertheless always present in a deed. The same is true for the purchase price of a property,[421] which must be recorded in a deed, not based on the formal registration requirements, but rather based on the law applicable to notaries.[422] Failure to include the purchase price however does not invalidate the deed and, as such, does not affect the transfer or creation of a limited property right.[423]

3.6.1.4 Hypothecs 4D Register

Hypothecs 4D records the preliminary registrations.[424] The documents are numbered consecutively.[425] It is the only specific registration that is mentioned in the Civil Code, in particular in relation to a refused registration.[426] When a notarial deed or other document does not comply with the requirements for registration of the document, it will not be recorded in *Hypothecs 3* or *4*, but it will be placed 'on hold', as it were, in the *Hypothecs 4D* register,

417 Article 18(1) Kw deals with the content prescribed for a notarial deed, and Art. 18(2) Kw states that, for all other documents, the information provided should encompass, where possible, the same information as paragraph 1. See Article 18(2) Kw.

418 See extensively on this, section 6.3.1.

419 See on whether this leaves room for the notary to omit certain information where it is considered sensitive, section 6.3.1.

420 Article 39 Wna.

421 The purchase price need not be included for the provisional registration of the sales contract, Van Velten 2005, p. 451–452.

422 Article 46 Wna. Even if this information is unimportant to the transfer, where it concerns a transfer or the vesting of a property right, this information must be included.

423 Asser/Bartels & Van Mierlo 3-IV 2013/297.

424 Article 3(2)(c) Kadasterregeling 1994.

425 Article 4(2) Kadasterregeling 1994.

426 Article 3:20 BW.

pending possible rectification of the issue.[427] The register contains the day, hour, and minute at which the document was presented for registration,[428] as well as the nature of the document,[429] and, insofar as is known, the name, place and residence address of the person presenting the document.[430] Moreover, the registration also contains the reasons why it has been placed in this register as opposed to *Hypothecs 3* or *4*.[431] Lastly, the date of cancellation of the document when it is subsequently registered in *Hypothecs 3* or *4*,[432] and a reference to the register and document information number are also included.[433]

As mentioned earlier, the Dutch registration system is a negative one.[434] One can only rely on the registers in a negative sense; if a deed is not registered, the effect as desired from the deed or document cannot be considered to exist. One can only rely on the registers for what is *not* registered in that sense. There is an exception (or expansion if you will) regarding this 'negative' publicity for deeds registered in the preliminary register of *Hypothecs 4D*. According to Article 3:20(5) BW, a fact that is *only* registered in *Hypothecs 4D* is not a 'fact that is known from consulting the registers'. Thus, a notarial deed of conveyance that was registered in *Hypothecs 4D*, because there was a problem with the deed, will not be held against the person who consulted the registers. It will not prevent anyone from claiming good faith acquisition.

3.6.2 The Main Cadastral Register (Basisregistratie Kadaster)

The Main Cadastral Register (*Basisregistratie Kadaster, BRK*) is a separate registration which functions as an index to the land registry (*openbare registers voor registergoederen*). It is a register which is in nature a public law register, as opposed to the land registry, which has a private law nature. This has certain consequences. Therefore, while they each cannot function without the other, they are to be kept separate.[435]

3.6.2.1 Nature of the Main Cadastral Register (BRK)

The BRK forms part of the system of Main Registers introduced to modernise the government. There are twelve Main Registers in the Netherlands.[436] A main registry is an

427 Where it concerns a notarial declaration and there is an issue with the registration requirements, it will also not be recorded in *Hypothecs 3* or *4*, but again only on *Hypothecs 4D*.
428 Article 4(1)(a) Kadasterregeling 1994.
429 Article 4(1)(b) Kadasterregeling 1994.
430 Article 4(1)(c) Kadasterregeling 1994.
431 Article 4(1)(d) Kadasterregeling 1994.
432 Article 4(1)(e) Kadasterregeling 1994.
433 Article 4(1)(f) Kadasterregeling 1994.
434 Section 3.4.1.
435 Asser/Bartels & Van Mierlo 3-IV 2013/478.
436 BRP (Main Register of Persons); HR (Companies Register); BAG (Main Registration of Addresses and Buildings); BRT (Main Topography Register); BRK (Main Cadastral Register); BRV (Main Vehicles Regis-

official registration which holds data that all governmental institutions are required to use in their execution of public duties. In practice, this means that when the land registry enters a specific property in the land registry and in the BRK, they will have to make use of the Main Register of Persons (*Basisregistratie Personen, BRP*) to check whether the names used are the same. Any discrepancy will raise a flag in the BRK system. The idea is that, rather than having to collect the information from the citizen or by other means every time a governmental authority deals with a particular citizen, this can be simplified and, as such, would create 'excellent service, less rules, a decrease in administrative burdens'.[437]

> 'The system of main registers realizes a leading and efficient information supply for the entire government, which also contributes to strengthening the social economic structure, because the data is also available to third parties, with the exception of privacy sensitive data'.[438]

It is a public law register in which rights are recorded based on plot and name. It does not contain deeds, as the land registry, but rather the conclusion drawn from those deeds (X transferred ownership of plot Z to Y. Y is registered as owner of plot Z). It accordingly serves as an index of the land registry.

3.6.2.2 The Main Cadastral Register as an Index

As the land registry is nothing more than a collection of deeds sorted in chronological order, it is important that there is some sort of searching mechanism available: a mechanism which allows the person searching to get an overview of all deeds in relation to a plot of land, or are registered in a person's name. This is what the indices are for. In the Netherlands, the index is the BRK. It 'unlocks' (*ontsluit*) the deeds registration.[439] It does so in two ways: (i) by way of cadastral designation, *i.e.* the cadastral plot number, a unique number denoting a current or historical plot,[440] and (ii) by the name of the owner of, or right holder of, a limited property right in land.[441]

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ter); BLAU (Main Register of Wages, Employment relationships and benefits); BRI (Main Income Register); WOZ (Main Immovable Property Value Register); BGT (Main Register of Large Scale Topography); BRO (Main Underground Register).

437 KST II 2009-2010, 29 362, nr. 176, p. 1.

438 Translation by the author. KST II 2009-2010, 29 362, nr. 176, p. 1 See also the report of the Netherlands Court of Audit (tasked with checking how public funds are spent and conducts policy as intended); Algemene Rekenkamer 2014. From this report, it became clear that there are also downsides to such a widespread system. See on the issue of privacy sensitive data in the BRK, Chapter 6 .

439 Artikel 48 Kw.

440 Thereby preserving the possibility to track old plots, and do historical research.

441 Excluding those that are right holders of a servitude, see also Article 48(7) Kw.

The BRK contains the following:

i. The national cadastral map, which contains the cadastral plots and their designation.[442]
ii. The cadastral designation of immovable property and of apartment rights;[443]
iii. Name, first names, address, birthdate and marital status of the owner of an immovable property.[444] Including the share in such rights.[445] The same details are registered of a limited property right holder and a person who served a writ of attachment on an immovable property.
iv. The legal designation of any limited property rights (right of *hypothec*, or usufruct etc.), or attachments that have been placed on/against the object or limited property right therein.[446]
v. The cadastral size of a plot.[447]
vi. Public law limitations in relation to the immovable property, which have been duly registered based on the Law on public law restrictions on immovable property (*Wet kenbaarheid publiekrechtelijke beperkingen onroerende zaken*).[448]
vii. Data provided to the Netherlands' Cadastre, Land Registry and Mapping Agency based on another law which shall be registered in the land registry and/or BRK.[449]
viii. Where the right concerns a right of *hypothec*, the value of the claim it secures or where this is not known, the maximum amount that the *hypothec* secures, and where known the interest rate.[450]
ix. Factual data regarding the immovable property or the limited property rights or attachments in relation to that property, insofar as they are relevant for the national cadastral map or legal dealings (*het rechtsverkeer*).[451]

3.6.3 Conclusions on Land Registration in the Netherlands

The system of land registration in the Netherlands has two types of registration in place, which are closely related but are kept separate. There is the land registry itself which is what the law in the Netherlands refers to as 'the public registers' (*de openbare registers*) which holds all deeds containing legal facts about a particular property and their right holder(s). This is the register that is of importance in (private) dealings in land, as regis-

442 Article 48(3)(a-b) Kw.
443 Article 48(2)(a) Kw.
444 Martial status can indicate that power to dispose is shared for example.
445 Article 48(2)(k) Kw.
446 As well as that of a qualitative burden as described in Article 6:252 BW. Article 48(2)(c) Kw.
447 Article 48(2)(d) Kw.
448 Article 48(2)(e) Kw.
449 Article 48(2)(f) Kw.
450 Article 48(2)(i) Kw.
451 Article 48(2)(j) Kw.

tration in this register is a constitutive requirement for the transfer, creation and termination of property rights.[452] As the land registry contains the deeds drafted by notaries, the requirements for deeds have essentially become requirements for registration, as the deeds are registered. This means that information that should be collected by and for the notary, such as the ID-number of a natural person is also recorded, even though it is not a registration requirement. The purchase price and the maximum amount the *hypothec* secures are also requirements for the notary; they are not registration requirements. A registrar who comes across a deed without the purchase price or ID-number of a natural person will have to register the deed, even if the notary by supplying that deed did not fulfil his duty. This is because the registrar is passive with regard to his role as keeper of the land registry. He may only check whether the registration requirements are fulfilled. He cannot alter the deed that is delivered to the land registry. The Registrar's position is different in relation to the BRK system. There the Registrar is active and responsible for the accuracy of the information.[453]

The BRK is the registration that sorts the information in the deeds by plot and name. It functions as the index to the land registry. The BRK is an easily accessible system that provides the most probable guess as to who owns a plot of land. One may not, however, rely on this guess. Third-party rules are limited to the information that is in the land registry. If a deed creating a limited property right is registered in the land registry but for some reason does not show up in the BRK overview, third-party protection rules will not help those that relied on the BRK. They only protect against deeds not registered in the land registry, not the BRK. This is not only a consequence of the fact that the land register is categorised as a deeds registration system, which inherently does not come with a State guarantee.[454] Rather, here it concerns the problem that the public law nature of the BRK means that for private dealings in land, for example the purchase of a property, the BRK is perhaps the starting point, but cannot be more than that. If the BRK states that person [A] is the owner and, as such, has the power to dispose, there is a tremendously high probability that this is indeed true, but one can only be certain after an examination in the land registry.[455]

452 Where it concerns termination, this is not always the case. Where it concerns a *hypothec* for example, the discharging of the claim it secures would result in the *hypothec* to terminate by virtue of law, on account of it being an accessory property right, which follows the right to which it is accessory (Article 3:82 BW). Cancellation of the *hypothec* in the land registry is not required.

453 See on issues regarding this split in responsibilities of the data in the land registry and the BRK and personal data Berlee 2015, p. 1520–1527.

454 See section 3.4.1.

455 See also Hof Amsterdam 10 November 2009, ECLI:NL:GHAMS:2009:BL5667. Critical about this point of view Van der Plank, *GS Vermogensrecht*, commentaar op artikel 23 Boek 3 BW aant. 5.3.

3.7 The System of Land Registration in Germany

The set of rules in relation to registration in the land registry of Germany, called the *Grundbuch*, are to be found for the most part in the German Civil Code (BGB),[456] the Land Registry Act (GBO),[457] and the Land Registry Rules (GBV).[458] However, as mentioned earlier,[459] the *Grundbuch* is kept in Germany in different shapes and forms throughout the country. Each *Land*, or federal State, has its own way of keeping the land registers (*Grundbücher*), be it in loose-leaf form, bound or electronically.[460] The fact that the registers are kept locally[461] does not mean that the rules and regulations applicable to land registration are also local. The content of land registration is predominantly a federal matter. The combination of the BGB, GBO and GBV,[462] all federal laws, cause a general application of substantive land law and formal land registration. Certain formal matters are however left to the states. These include, but are not limited to, the maintenance of the register in paper or electronic form,[463] the formation of different types of registers (*Grundbuchër*), indices and the application of older rules in existence on a local level in relation to property rights discontinued in the BGB.[464] For example, arrangements made in respect of the *emphytheusis* right, called *Erbpacht*, were not continued in the BGB.[465] These are relics of the days before the BGB, or specific minor rules not related to the content as such, and are therefore not discussed further.[466] In the next sections, the contents of the land registry are explored in more detail.

456 *Bürgerliches Gesetzbuch*.

457 *Grundbuchordnung*.

458 *Grundbuchverfügung*. See for other specific legislation, either those cited below or in general the list as enumerated in Von Staudingers Kommentar zum Bürgerlichen Gesetzbuch 2012, Vorbem zu §§ 873 ff, Rn. 28.

459 See section 3.3.1.

460 It is up to the state governments to decide the extent to which the land registry is kept in electronic form. § 126 (1) GBO.

461 § 2 GBO, which states that the *Grundbücher* are organised by district (*Bezirke*).

462 And other more specific legislation, see further Chapter 8.

463 Or both, see Demharter 2014, § 128 GBO, Rn. 1. Although, with the entry into force of the Datenbankgrundbuch, the idea is that all 16 states will move towards the new system and will all be kept electronically in machine-readable form, XML. See interview with Walther Bredl, the project leader. https://perma.cc/MH58-UVBF.

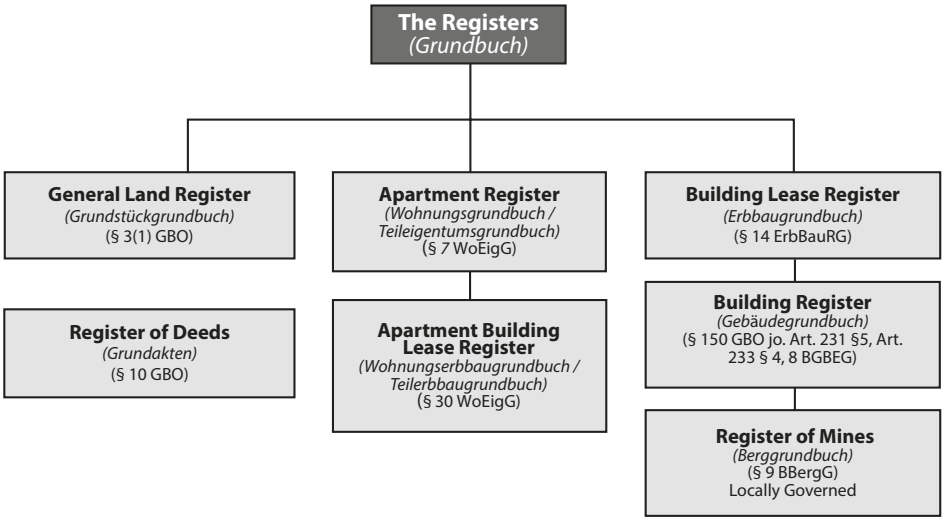
464 See Title 3 EGBGB on the relationship between the Civil Code and the states' legislation. See for an overview: Schöner & Stöber 2012, para. 31-39.

465 § 63 EGBGB. The provision had been repealed, however, with the new publication of the draft law of 1994, it came back. However, this should not be taken to mean that the repealed law is in force again. See Münchener Kommentar zum BGB 2015, note on Article 63 EGBGB. See on the older property rights that existed prior to the entry into force of the BGB and their continuation at the Länder level, Akkermans 2008, p. 235–236.

466 See for the continuation of specific (old) formal requirements in the *Länder* in certain cases: § 143 GBO jo. § 94 GBV.

3.7.1 The Registers

The general rule is that, for the creation,[467] termination,[468] and alteration[469] of a right of ownership of land or a limited property right in relation to land registration, a declaration of conveyance (*Auflassung*)[470] is required.[471]



The organisation of the land registers is by plot of land, or *Grundstücke*.[472] For each of these plots of land there is a *Grundbuchblatt*, which translates into a *sheet* or *leaf* in the land registry.[473] In the event one person owns several plots of land within the same district, a sheet based on person rather than land may be created, as long as this does

467 § 873 BGB.

468 § 875 BGB where it concerns a cancellation of right, ie. *Aufhebung eines Rechts*.

469 § 877 BGB.

470 § 925 BGB. Generally, this forms part of the property agreement (*dingliche Vertrag*) of § 873 BGB.

471 Schöner & Stöber 2012, para. 1. See on the similar treatment of ownership and limited property rights Von Staudingers Kommentar zum Bürgerlichen Gesetzbuch 2012, Vorbem zu §§ 873 ff, Rn. 6c. See in general on the necessity to register and the lack of party autonomy to come up with different means to transfer or create a property right in relation to land: Von Staudingers Kommentar zum Bürgerlichen Gesetzbuch 2012, § 873, Rn. 5.

472 Von Bar however considers the *Grundstück* term to comprise more than its mere physical construction. He considers *Grundstücke* also to be a normative thing, a 'product of imagination', and 'their individualisation is a consequence of legal intervention'. Von Bar 2014, p. 7. Where the literal translation refers to a piece of land, Von Barr notes that, in the legal sense of the word, the *Grundstück*, properly understood, according to Von Barr, refers to 'a space'. Von Bar 2014, p. 10. This explanation can also be useful when looking at *Erbbaurecht* or a building lease, which, when registered, requires a new *Grundbuchblatt* or *Grundbuch*. See section 3.7.1.3. See on the definition also Von Staudingers Kommentar zum Bürgerlichen Gesetzbuch 2012, § 873, Rn. 5.

473 As such, the wording refers more to the traditional old way of keeping the land registry in loose-leaf form, than the more modern method of electronic registration.

not lead to any confusion.[474] These sheets are kept together in what is called the *Grundbuch*. Any mention of the *Grundbuch* in the BGB should be read as a reference to the specific *Grundbuchblatt* for that *Grundstück*.[475]

Each plot of land held privately is therefore individually represented in the land registry.[476] However, German law also has certain types of rights which it treats in an equivalent manner to a *Grundstück*. These equivalent rights are referred to as *Grundstücksgleiche Rechte*.[477] As each plot of land warrants its own representation in a sheet in the land registry, each of the equivalent rights is therefore also represented in a separate sheet, which is referred to as a specific type of *Grundbuch*, depending on the nature of the equivalent right.[478]

Next to the *Grundstücksgleiche Rechte*, a separate sheet is also created for apartment ownership (*Wohnungseigentum*)[479] and, as such, there is also a separate *Grundbuch* for apartment rights entitled *Wohnungsgrundbuch* or *Teileigentumsgrundbuch*. These are not characterised as equivalent rights, but (co-)ownership itself[480] and they are in principle also subjected to the applicable rules in relation to *Grundstücke*.[481] This also means that it is possible to establish a building lease on apartment ownership. When such a right is created, it is registered in the *Wohnungserbbaugrundbuch* or Apartment Building Lease Register.[482]

In conclusion, this means that there are at least six registers that can exist and, accordingly, there are at least six different types of *Grundbücher*, while the states are free to create more. The most important one is the *Grundbuch* that carries with it no specific title, although it is sometimes referred to as the *Grundstücksgrundbuch*. I refer to this register as the general land register, to avoid confusion with the other specific types of registers. Each will be discussed below, but the characteristics common to all of the registers are discussed under the general land register.

474 § 4 (1) GBO.

475 § 3(1) GBO. This carries with it the consequence that when something is registered on the incorrect *Grundbuchblatt* it is still considered to be in the *Grundbuch*. See on this matter: Schöner & Stöber 2012, para. 81.

476 The plots of land owned by the federal government, state, local or other municipal organisations, as well as churches, monasteries and school, water courses, public roads and those plots of land that are dedicated to public transport serving the railway company, are only registered upon request. They are thus not necessarily registered in the *Grundbuch*. § 3(2) GBO.

477 Often specified separately in specific legislation. See also Von Staudingers Kommentar zum Bürgerlichen Gesetzbuch 2012, Vorbem zu §§ 873 ff, Rn. 23.

478 This means that there is a *Erbbaugrundbuch* or a register of building leases and, when the state so desires, there is also a similar register entitled the *Gebäudegrundbuch* which is a register of buildings. Furthermore, there is also the possibility of a *Berggrundbuch*, which is a register of mines. See also Von Staudingers Kommentar zum Bürgerlichen Gesetzbuch 2012, Vorbem zu §§ 873 ff, Rn. 23.

479 Which Baur/Stürner discuss under the heading '*grundstücksgleiche Rechte*', see Baur, Baur & Stürner 2009, para 15, Rn. 26.

480 Schöner & Stöber 2012, para. 6.; see Von Staudingers Kommentar zum Bürgerlichen Gesetzbuch 2012, Vorbem zu §§ 873 ff, Rn. 23 who consider it almost as a *sui generis* right ('Als grundstücksgliches Recht eigener Art').

481 Demharter 2014, § 3, Rn. 6. See also, BayObLG, 14.01.1988, NJW-RR 1988, 592.

482 § 30 WoEigG.

Not all rights in relation to land are considered registrable. For example rights that are not considered *property rights* but are still (personal) rights in relation to land are excluded.[483] For example, the purely personal rights in relation to land, such as the lease in Germany, which is not characterised as a property right,[484] personal *Treuhand*-relationships,[485] or the legal right of way not being a servitude are not registered.[486] Furthermore, public law taxes and burdens (*öffentliche Lasten*) are also excluded, unless there is a specific provision that calls for such registration.[487]

3.7.1.1 General Land Register (*Grundstücksgrundbuch*)

On the title sheet, the denotation of the type of *Grundbuch* can be found. It also states the district which has jurisdiction over the plot of land or G*rundstück*.

3.7.1.1.1 The Grundbuchblatt

Each *Grundbuchblatt* contains an inscription (*Aufschrift*), an index or inventory (*Bestandsverzeichnis*) and three separate sections.[488] Each are discussed below.

In more general terms, the ranking of the registration in any section is determined by the time of registration.[489] When registrations are carried out at the same time, either intentionally or by accident, the *Grundbuch* will state that they were registered at the same time.[490]

Notification of an entry[491] is made to the submitting notary, the applicant, and those who are on the register already and are affected by the registration.[492] This '*wörtlich wiederzugeben*' is a transcript of the registration containing the name(s) of the land owner(s)

483 Berger et al./Stürner 2014, § 873, Rn. 2.

484 Similar to the Dutch right of lease (*huur*), yet unlike the English lease, which *is* a property right. Münchener Kommentar zum BGB 2015, § 873, Rn. 9., see also RGZ 54, 233, 234 f. Not to be confused with the *subjektiv-persönliche rechten*, such as the servitudes *ex* § 1018 BGB, or the real burdens or pre-emption rights which are all registerable. See Von Staudingers Kommentar zum Bürgerlichen Gesetzbuch 2012, Vorbem §§ 873 ff, Rn. 11-14, 166.

485 OLG Stuttgart BWNotZ 1977, 90.

486 The *Notweg*. Berger et al./Stürner 2014, § 873, Rn. 2. See for an extensive list of non-registrable rights, including this one, Münchener Kommentar zum BGB 2015, § 873, rn. 8-11, 16.

487 § 54 GBO. If they can be registered, § 93a GBV denotes this is done in the second section of the *Grundbuchblatt*.

488 § 4 GBV.

489 § 879 BGB. See more extensively on the topic Böttcher 1988.

490 § 45(1) GBO.

491 Excluding interim injunctions (*Zwischenverfügungen*) or rejections (*Zurückweisungsbeschlüsse*), Demharter 2014, § 55, Rn. 2. See on those § 18 GBO and § 41 GBV when it comes to electronic registration. Notification of interim injunctions is done by way of adding the note 'Dieses Schreiben ist maschinell erstellt und auch ohne Unterschrift wirksam', (§ 42(2) GBV). See extensively Demharter 2014, § 18, Rn. 35. No notification is made when the *Grundbuch* is built up from scratch, see § 69(2) GBV.

492 § 55(1) GBO. When it concerns an ownership registration, this includes those who are entitled to a right of *Hypothec, Grundschuld, Rentenschuld, Reallast* or a right on such a registered right. See extensively on who does and does not belong to any of the foregoing categories Demharter 2014, § 55, Rn. 10-17.

and, in the event of a change in ownership, also the name(s) of the previous owners.[493] When the *Grundbuch* is kept electronically,[494] the transcript need not be signed.[495] If it is a written transcript, then a signature is required.[496] The notification can be partially or entirely waived.[497] When the plot of land exceeds the borders of one district, either of the responsible registrars is allowed to notify.[498] No notification of the person concerned is required when the registrar has to inform courts, authorities, or other entities.[499]

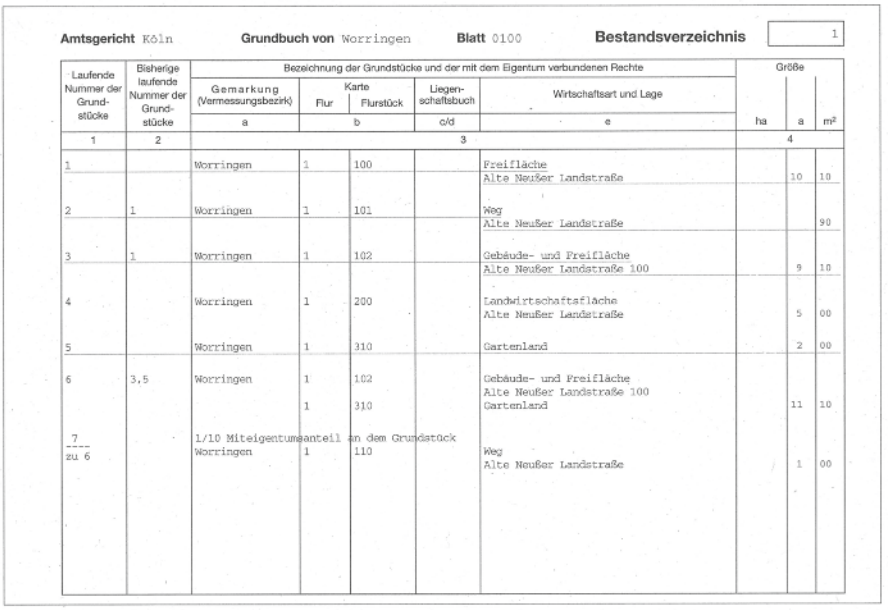
3.7.1.1.2 Inscription (Aufschrift)

Figure 1 Picture by Grundbuch.de

The inscription on the *Grundbuchblatt* contains the name of the magistrates' court (*Amtsgericht*), the district (*Grundbuchbezirk*) and the number of the bound volume, if kept in books, and the number of the sheet.[500] When the *Grundbuch* is kept in electronic form, then notification of the date of transfer from paper to electronic form is also noted down.[501] The same holds true for a change to the *Databankgrundbuch* or database land registry.[502]

493 § 55 (6) GBO.
494 See § 140 GBO.
495 § 42 GBV.
496 Demharter 2014, § 55, Rn. 6.
497 § 55 (7) GBO.
498 § 55a GBO.
499 § 55b GBO.
500 § 5 GBV.
501 § 70 GBV.
502 § 71a (3) GBV.

3.7.1.1.3 Index (Bestandsverzeichnis)

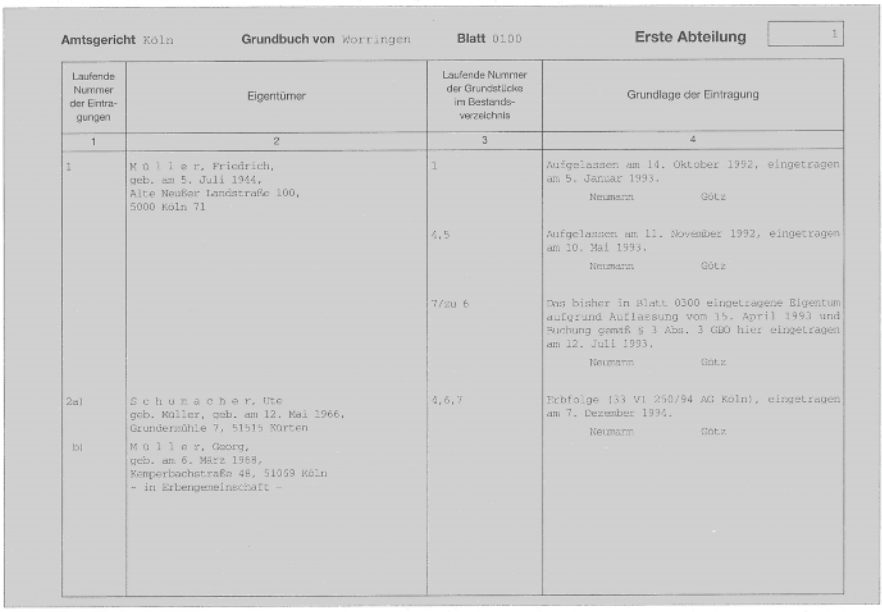


Amtsgericht Köln **Grundbuch von** Worringen **Blatt** 0100 **Bestandsverzeichnis** 1

Laufende Nummer der Grundstücke	Bisherige laufende Nummer der Grundstücke	Bezeichnung der Grundstücke und der mit dem Eigentum verbundenen Rechte					Größe		
		Gemarkung (Vermessungsbezirk)	Karte Flur	Karte Flurstück	Liegenschaftsbuch	Wirtschaftsart und Lage	ha	a	m²
		a	b		c/d	e			
1	2	3					4		
1		Worringen	1	100		Freifläche Alte Neußer Landstraße		10	10
2	1	Worringen	1	101		Weg Alte Neußer Landstraße			90
3	1	Worringen	1	102		Gebäude- und Freifläche Alte Neußer Landstraße 100		9	10
4		Worringen	1	200		Landwirtschaftsfläche Alte Neußer Landstraße		5	00
5		Worringen	1	310		Gartenland		2	00
6	3,5	Worringen	1 1	102 310		Gebäude- und Freifläche Alte Neußer Landstraße 100 Gartenland		11	10
7 zu 6		1/10 Miteigentumsanteil an dem Grundstück Worringen	1	110		Weg Alte Neußer Landstraße		1	00

Bestand und Zuschreibungen		Abschreibungen	
Zur laufenden Nummer der Grundstücke		Zur laufenden Nummer der Grundstücke	
5	6	7	8
1	Aus Blatt 0200 am 5. Januar 1993. Neumann Götz	2	Nach Blatt 0301 am 15. April 1993. Neumann Götz
1,2,3	Lfd. Nr. 1 geteilt und fortgeschrieben gemäß VN Nr. 100/93 in Nrn. 2 und 3 am 15. April 1993. Neumann Götz		
4,5	Aus Blatt 0250 am 10. Mai 1993. Neumann Götz		
3,5,6	Lfd. Nr. 5 der Nr. 3 als Bestandteil zugeschrieben und unter Nr. 6 neu eingetragen am 9. Juni 1993. Neumann Götz		
7 zu 6	Aus Blatt 0300 am 12. Juli 1993. Neumann Götz		

The *Bestandsverzeichnis*, or index of the *Grundbuchblatt*, is divided into eight columns (*Spalten*) which contain a reference to the ordinance survey or cadastral map.[503] It also contains the nature of the piece of land, whether it is a commercial property, residential property, a road etc. It also contains the location, i.e. street, number, and other customary designation.[504] The size of the *Grundstück* as described in the Cadastre in ha, ar & m^2.[505] It also records the date and time of registration, the number of the previous sheet, etc.[506] It includes attributes of the different *Grundbuchblätter* in the event they were merged[507] and any notices made regarding previously separate plots of land, unless these are already put on another sheet.[508] If the particular *Grundstück* is a dominant tenement of a servitude, then registration *may* take place here, although this is not required for the dominant tenement.[509] Information in relation to the cancellation of *Grundstücke*, which are then no longer part of the *Grundbuch*, is also registered.[510] The creation of apartment rights on the land and therefore the closing of the *Grundbuchblatt* for the *grundstück* is also registered here.[511]



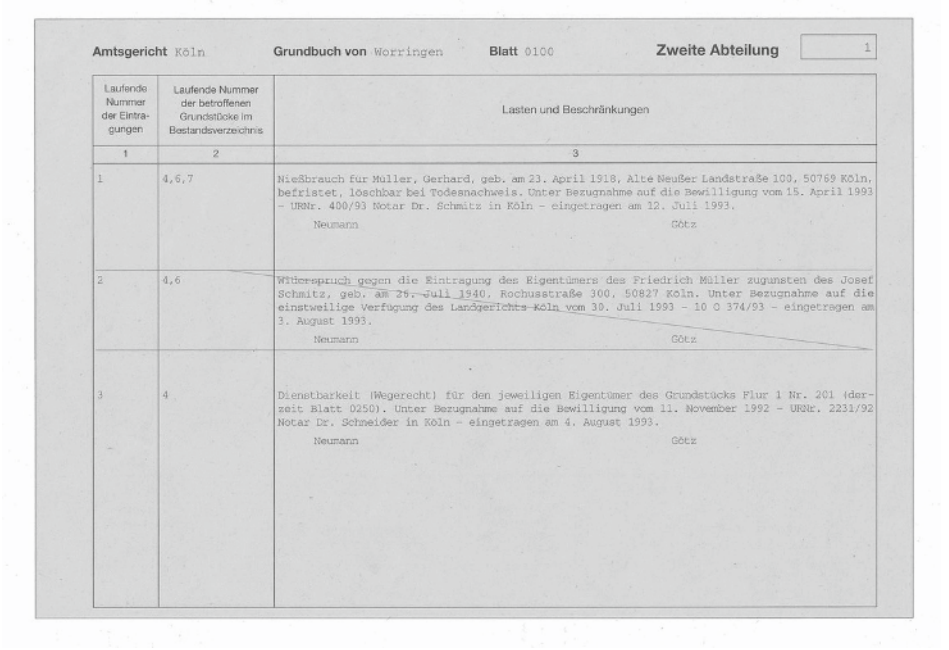
Amtsgericht Köln **Grundbuch von** Worringen **Blatt** 0100 **Erste Abteilung** 1

Laufende Nummer der Eintragungen	Eigentümer	Laufende Nummer der Grundstücke im Bestandsverzeichnis	Grundlage der Eintragung
1	2	3	4
1	M ü l l e r, Friedrich, geb. am 5. Juli 1944, Alte Neußer Landstraße 100, 5000 Köln 71	1	Aufgelassen am 14. Oktober 1992, eingetragen am 5. Januar 1993. Neumann Götz
		4,5	Aufgelassen am 11. November 1992, eingetragen am 10. Mai 1993. Neumann Götz
		7/zu 6	Das bisher in Blatt 0300 eingetragene Eigentum aufgrund Auflassung vom 15. April 1993 und Buchung gemäß § 3 Abs. 3 GBO hier eingetragen am 12. Juli 1993. Neumann Götz
2a)	S c h u m a c h e r, Ute geb. Müller, geb. am 12. Mai 1966, Grundermühle 7, 51515 Körten	4,6,7	Erbfolge (33 VI 250/94 AG Köln), eingetragen am 7. Dezember 1994. Neumann Götz
b)	M ü l l e r, Georg, geb. am 6. März 1968, Kemperbachstraße 48, 51069 Köln - in Erbengemeinschaft -		

503 § 6(3a-4) GBV jo. § 2(2) GBO.
504 § 6(3a) under 4 GBV.
505 § 6(5) GBV.
506 § 6(6)(a) GBV.
507 § 6(6)(c) GBV.
508 § 6(6)(d) GBV jo § 7(1) GBO.
509 Or more generally § 1018 BGB.
510 § 6(7) GBV.
511 § 7(1) WEG jo. § 6 WGV. See further on apartment rights section 3.7.1.4.

3.7.1.1.4 Section 1 Grundbuchblatt

The first section of the *Grundbuchblatt* contains ownership information. If the list contains previous owners, they will be underlined in red.[512] Column 4 concerns information as to the basis for the registration which is also mentioned with the date, under column 4.[513] This can be a simple transfer by *Auflassung*, a succession (*Erbfolge*), etc.[514] Ownership rights or equivalent rights therefore make up the first section of the *Grundbuchblatt*.



Amtsgericht Köln Grundbuch von Worringen Blatt 0100 Zweite Abteilung 1

Laufende Nummer der Eintragungen	Laufende Nummer der betroffenen Grundstücke im Bestandsverzeichnis	Lasten und Beschränkungen
1	2	3
1	4,6,7	Nießbrauch für Müller, Gerhard, geb. am 23. April 1918, Alte Neußer Landstraße 100, 50769 Köln, befristet, löschbar bei Todesnachweis. Unter Bezugnahme auf die Bewilligung vom 15. April 1993 - URNr. 400/93 Notar Dr. Schmitz in Köln - eingetragen am 12. Juli 1993. Neumann Götz
2	4,6	Widerspruch gegen die Eintragung des Eigentümers des Friedrich Müller zugunsten des Josef Schmitz, geb. am 26. Juli 1940, Rochusstraße 300, 50827 Köln. Unter Bezugnahme auf die einstweilige Verfügung des Landgerichts Köln vom 30. Juli 1993 - 10 O 374/93 - eingetragen am 3. August 1993. Neumann Götz
3	4	Dienstbarkeit (Wegerecht) für den jeweiligen Eigentümer des Grundstücks Flur 1 Nr. 201 (derzeit Blatt 0250). Unter Bezugnahme auf die Bewilligung vom 11. November 1992 - URNr. 2231/92 Notar Dr. Schneider in Köln - eingetragen am 4. August 1993. Neumann Götz

3.7.1.1.5 Section 2 Grundbuchblatt

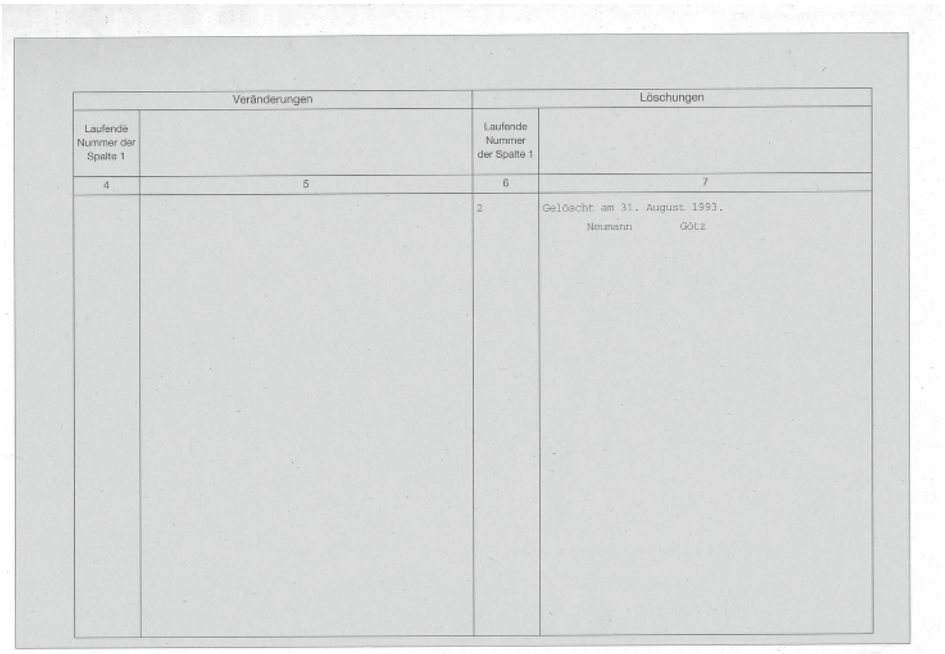
The second section of the *Grundbuchblatt* contains the different burdens in relation to the *Grundstück*, with the exception of those that are registered in section 3; the *Hypothecs* (*Hypotheken*), land charges (*Grundschulden*) and annuity charges (*Rentenschulden*), and the provisional registrations (*Vormerkungen*) as well as any objections against them (*Widersprüche*).[515]

The limitations of the power to dispose of the owner (*Verfügungsrechts*) including the provisional registrations and objections regarding ownership are included in the registration under section 2.[516] This means that the real burdens (*Reallasten*),[517] servitudes

512 § 16 GBV.
513 § 9(d) GBV.
514 The renunciation (*Verzicht*) of ownership as described in § 928 BGB is also included.
515 § 10 (1)(a) GBV.
516 § 10(1)(b) GBV.
517 § 1105 BGB.

(*Grunddienstbarkeit*),[518] usufruct (*Nießbrauch*),[519] the priority notice (*Auflassungsvormerkung*),[520] bankruptcy notices, notes concerning the execution of wills (*Testamentsvollstreckungen*), etc. are registered under section 2 of the *Grundbuchblatt*.

Here too, columns divide the information. The third column contains the specifications of the burden, the type of burden, the date of registration, and the notary's details. Furthermore, the name of the rightholder is also registered, including the address and birthdate when it concerns a right specific to a person such as the usufruct (*Nießbrauch*) or the same details of the person objecting to a particular registration.



Veränderungen		Löschungen	
Laufende Nummer der Spalte 1		Laufende Nummer der Spalte 1	
4	5	6	7
		2	Gelöscht am 31. August 1993. Neumann Götz

Limitations placed on the rights enumerated in columns 1-3 which fall under § 9 GBO, which concern those limited property rights which presuppose a servient and dominant land, such as a servitude (the *subjectiv-dingliche Rechte*) are also registered in column 5.[521] Column 7 records the cancelation (*Löschungen*) of rights and their full date,[522] and finally column 6 gives the corresponding number of the right or burden which is cancelled.[523]

518 § 1018 BGB. Whereby registration in the relevant *Grundstück* is required, it may also be registered in the dominant *Grundstück*, but then in the index (*Bestandsverzeichnis*).

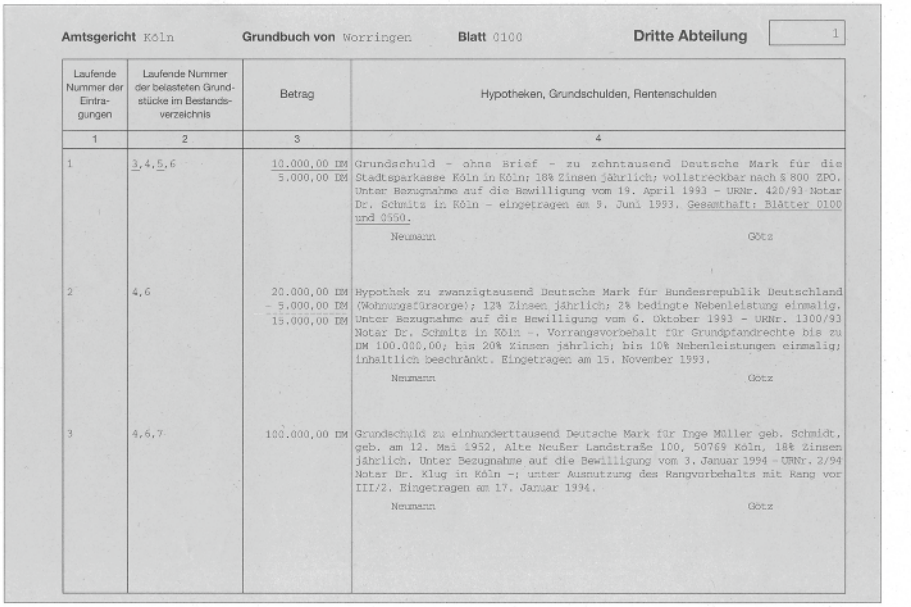
519 § 1030 BGB.

520 Hence, not when they concern one of the excluded categories mentioned above. See on the Vormerkung § 883 BGB.

521 § 9(3) GBO jo. § 10(5) GBV.

522 § 10(6) GBV.

523 § 10(7) GBV.



Amtsgericht Köln Grundbuch von Worringen Blatt 0100 Dritte Abteilung 1

Laufende Nummer der Eintragungen	Laufende Nummer der belasteten Grundstücke im Bestandsverzeichnis	Betrag	Hypotheken, Grundschulden, Rentenschulden
1	2	3	4
1	3,4,5,6	10.000,00 DM 5.000,00 DM	Grundschuld - ohne Brief - zu zehntausend Deutsche Mark für die Stadtsparkasse Köln in Köln; 18% Zinsen jährlich; vollstreckbar nach § 800 ZPO. Unter Bezugnahme auf die Bewilligung vom 19. April 1993 - URNr. 420/93 Notar Dr. Schmitz in Köln - eingetragen am 9. Juni 1993. Gesamthaft: Blätter 0100 und 0550. Neumann Götz
2	4,6	20.000,00 DM - 5.000,00 DM 15.000,00 DM	Hypothek zu zwanzigtausend Deutsche Mark für Bundesrepublik Deutschland (Wohnungsfürsorge); 12% Zinsen jährlich; 2% bedingte Nebenleistung einmalig. Unter Bezugnahme auf die Bewilligung vom 6. Oktober 1993 - URNr. 1300/93 Notar Dr. Schmitz in Köln -. Vorrangsvorbehalt für Grundpfandrechte bis zu DM 100.000,00; bis 20% Zinsen jährlich; bis 10% Nebenleistungen einmalig; inhaltlich beschränkt. Eingetragen am 15. November 1993. Neumann Götz
3	4,6,7	100.000,00 DM	Grundschuld zu einhunderttausend Deutsche Mark für Inge Müller geb. Schmidt, geb. am 12. Mai 1952, Alte Neußer Landstraße 100, 50769 Köln, 18% Zinsen jährlich. Unter Bezugnahme auf die Bewilligung vom 3. Januar 1994 - URNr. 2/94 Notar Dr. Klug in Köln -; unter Ausnutzung des Rangvorbehalts mit Rang vor III/2. Eingetragen am 17. Januar 1994. Neumann Götz

3.7.1.1.6 Section 3 Grundbuchblatt

Section 3 contains the burdens on land notably missing from section 2 of the *Grundbuchblatt*. The different forms of *hypothec* that exist in Germany are the following: the *hypothec, Rentenschuld*, and *Grundschuld*. It also includes the rights of provisional registration and objection in relation to these rights.[524] The section is divided into ten columns. Column 3 contains the amount due that is secured by the specific security right. it contains the redemption sum (*Ablösungssumme*) for the annuities.[525] Column 4 contains a description of the right that is registered. This includes specifics such as the interest rate, personal details of the person who holds the right,[526] including the full first name and family name, full birthdate,[527] as well as academic title and former surnames such as a maiden name.[528] If the right holder is a company the name of the firm and its seat are

524 § 11(1) GBV jo. § 12(1)(c) GBV for the provisional registration and § 12(1)(c) jo. 12(2) GBV for the objection (*Widerspruch*).

525 § 11(4) GBV.

526 Note here that even when a person is holding a right as an insolvency administrator, in the event of, for example, a forced collateral *hypothec Zwangssicherungshypothek*, this specification is not registered. It therefore seems from the land registry records that it is the insolvency administrator in person who holds the right. See OLG München, 18.06.2012, *FGPrax* 2012, 154. The difference in patrimonies is not clear from the land registry records, only perhaps in the underlying deeds.

527 In the event the birthdate is not known from the underlying deeds, and is otherwise not known to the registrar, the place of residence is noted. § 15(1)(a) GBV.

528 § 15(1)(a) GBV.

recorded.[529] The details of the notary and the date of creation of the record are also included. The rights registered here include restrictions placed on the power to dispose of such a right when the restriction arises at a later date.[530] Column 6 contains the amount in EUR of the changes or alterations made as described under Column 7.[531] These alterations or changes made to the rights recorded[532] are described in similar details as under Column 4, including personal data,[533] and specifications as to the interest rate, the notary, and date. Column 9 contains the amount in EUR or DM, which the cancellation represents.[534] The cancellation of the rights described under columns 3-4 and 6-7 is contained in column 10.[535] The specifics here include the date of registration and the amount, if it is not the full amount, for which the right is cancelled.

3.7.1.2 Apartment Register (*Wohnungsgrundbuch* / *Teileigentumsgrundbuch*)

Apartment ownership is registered in a separate *Grundbuch*, the so-called *wohnungsgrundbuch* or *teileigentumsgrundbuch*, the Apartment Register. The specific regulation that deals with the apartment register is called the *Wohnungsgrundbuchverfügung* or WGV.[536] The law that deals with the apartment right is the Wohnungseigentumsgesetz (WoEigG).[537] The WGV regulation establishes that, in general, the rules governing the general land registry, the GBV, apply *mutatis mutandis* to the apartment register, save for the deviations laid down in the WGV itself. These differences are discussed next.[538]

Firstly, the inscription of the apartment ownership register is different from the general land register, as it contains the title *'Wohnungsgrundbuch'* or *'Teileigentumsgrundbuch'*, or when it concerns an apartment as well as a non-residential premises it can be denoted as *'Wohnungs- und Teileigentumsgrundbuch'*.[539]

Second, the content of the index or (*Bestandsverzeichnis*) is slightly different from the general land register's index, in that the entire third column is used to write down the division of co-ownership in fractions in numerical form,[540] the type or designation of the

529 § 15(1)(b) GBV. See for specifics on partnerships and the difficulties OLG Frankfurt a.M. 18.12.2012, *NJOZ* 2013, 765, also BayObLG 31.10.2002, *NZG* 2003, 26. See for nameless partnerships or firms, due to being created by oral agreement rather than written down: 2012 OLG München, 27.11.2012, *NJOZ* 2013, 843. See on the identification role that registration in § 15 GBV plays: OLG Naumburg, 08.02.2013, *NJOZ* 2013, 1485.

530 § 11(5) GBV.

531 § 11(8) GBV.

532 § 11(6) GBV.

533 § 15(1) GBV. Including first, and last name, birthdate insofar as known from the registration documents.

534 § 11(8) GBV.

535 § 11(7) GBV.

536 Verordnung über die Anlegung und Führung der Wohnungs- und Teileigentumsgrundbücher, BGBl.I S. 134.

537 Gesetz über das Wohnungseigentum und das Dauerwohnrecht, BGBl. I S. 175, ber. S. 209.

538 § 1 WGV.

539 § 2 WGV.

540 § 3(1)(a) WGV. The fraction is also written out in brackets.

land and the address,[541] the communal areas of ownership that are associated with the apartment ownership, and the limitations of the joint ownership stemming from the other co-ownership, with reference to the other *Grundbuchblätter* where these other apartment rights are registered.[542]

The specific limitations, such as negotiated sales restrictions (*vereinbarte Veräußerungsbeschränkungen*),[543] that have to be fulfilled before apartment ownership may be transferred are also noted down in the register, in column 3.[544] The remainder of the index is structured in the same manner. Columns 4-8 contain the same information as they do in the General Land Registry.[545]

The content of the different sections is also adapted for specific cases resulting from keeping an apartment ownership register. Certain rights do not exist in relation to apartment ownership, for example the right of way (*Wegerechte*), but they are nevertheless registrable, but when registered they burden the *entire grundstück* and are therefore registered under the third column in the second section. To recall, the second section deals with burdens (excluding *hypothecs* etc.), the third column contains information as to the specifics of the burdens. Such rights have to be recorded in all the *Grundbuchblätter* that are affected by the burden, *i.e.* all other co-owners of the burdened land, whereby each of them refers to the remaining entries.[546] The same holds true for restrictions which apply to the land as a whole that can be registered.[547]

The only difference for the burdens that are laid down in the third section, *i.e. hypothecs* and the like, is that the description of the right should also include that the burdened object concerns an apartment right.[548]

The remainder of the contents of the register is similar to the contents of the general land register. This also means that the governing rule for denoting personal data in the apartment register is the same as for the general land register, *i.e.* § 15 GBV.[549] Thus, whenever a rightholder is recorded in the apartment register, the following information is recorded, for natural persons: their first, last, and former surname. Their academic title is also recorded. Lastly, the birthdate if known either from the registration documents or if this is unknown and the place of residence are recorded. For legal persons, the name of the firm,[550] as well as their seat are recorded.[551]

541 § 3(1)(b) WGV.
542 § 3(1)(c) WGV.
543 § 12 WEG.
544 § 3(2) WGV.
545 Compare § 3(3-7) WGV with § 6 GBV.
546 § 4(1) WGV.
547 § 4(2) WGV.
548 § 5 WGV.
549 See also for exampe OLG München 28.07.2014, *BeckRS* 2014, 17103 where § 15 GBV was discussed in relation to the apartment register.
550 See here too the cases dealing with no-name partnerships and firms. OLG Frankfrut a.M. 18.12.2012, *NJOZ* 2013, 765, OLG München 27.11.2012, *NJOZ* 2013, 843.
551 § 15 GBV.

3.7.1.3 Building Lease Register (Erbbaugrundbuch)

The building lease register is governed by the Erbbaurechtsgesetz (ErbbauRG).[552] The building lease itself is a *superficies* right, by which a *grundstück* can be burdened in such a manner that the person who has the *Erbbaurecht* can erect a building on or underneath the surface of the land of the *grundstück*.[553] It follows from § 11 ErbbauRG, and the fact that the *Erbbaurecht* is considered an equivalent right (to a *Grundstück*),[554] that similar rules apply to the creation and in particular the registration of the *Erbbaurecht*. This also means that, unless specifically derogated by way of the ErbbauRG, the rules of the GBO and GBV, the governing rules of the general land registry, apply. The specific derogations as formulated in the ErbbauRG are as follows.

First, the inscription of the apartment register is different from the general land register, as it contains the title '*Erbbaugrundbuch*'.[555] Second, the register also includes the current and subsequent owners of the *grundstück* on which the *Erbbaurecht* is registered.[556] For database registers, this may be done automatically if the specific State wants to keep a database-*Grundbuch*.[557]

The rules on the notification of an entry made in the Building Lease Register follow those of the General Land Register as discussed above, see section 3.7.1.3.[558] Every registration requires a notification of the owner of the *grundstück*.[559] The creation of an *Erbbaurecht* is also recorded in the index (*Bestandsverzeichnis*) of the respective general land register or apartment register.[560]

There are no other provisions that derogate from the general land register rules and regulations. As such, §15 GBV dealing with the provisions on the personal details to be recorded in the building lease register applies fully. This means that the following personal data is recorded: *hypothec* price, full name, academic title, and, if no birthdate is given, the city of residence.[561]

552 Gesetz über das Erbbaurecht, RGBl.S. 72, ber. S. 122. The *Erbbaurecht* itself is also found in the BGB, see for instance §§ 556; 632a; 916; 1361b; 1568a and 1666a BGB. Though the ErbbauRG remains the most important piece of legislation dealing with the *Erbbaurecht*.

553 § 1(1) ErbbauRG reads: 'Ein Grundstück kann in der Weise belastet werden, daß demjenigen, zu dessen Gunsten die Belastung erfolgt, das veräußerliche und vererbliche Recht zusteht, auf oder unter der Oberfläche des Grundstücks ein Bauwerk zu haben (Erbbaurecht). For the content of the right see § 2 ErbbauRG. Created in 1919 to combat the housing shortage and the increasing land value, see Gaier in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, ErbbauVO, Rn. 2. See also in general Akkermans 2008, p. 211–214.

554 See on this section 3.7.1.1.

555 § 14(1) ErbbauRG.

556 § 14(1) ErbbauRG.

557 § 14(4) ErbbauRG.

558 Demharter 2014, § 55, Rn. 19.

559 § 17 ErbbauRG.

560 See for more on an *Erbbaurecht* on an apartment right section 3.7.1.2.

561 § 15(1) GBV, see also more extensively also Chapter 8.

3.7.1.4 Apartment Building Lease Register (*Wohnungserbbaugrundbuch / Teilerbbaugrundbuch*)

A building lease on an apartment right is also possible and this is recorded in the *Wohnungserbbaugrundbuch / Teilerbbaugrundbuch*. This separate register is set up by § 30 WoEigG, which allows for the creation of a building lease right on an apartment right.[562] For each of these building leases, therefore for each apartment right, a new *Erbbaugrundbuchblatt* is created. This creates a *Wohnungserbbaugrundbuch / Teilerbbaugrundbuch* or Apartment Building Lease Register.[563] The rules concerning the Apartment Building Lease Register, follow those of the Apartment Register,[564] not that of the Building Lease Register.[565]

In short, this means that the index (*Bestandsverzeichnis*) records information as to the different fractions of the apartment rights and the limitations placed on the transfer of the right; the limitations which concern the communal area are recorded in another section and for *hypothecs* and other burdens, the fraction is noted. Thus, a *hypothec* on a building lease on an apartment right will be recorded there as well, with the fraction. For a full overview see section 3.7.1.2.

The recording of personal data follows the general rules of §15 GBV.

3.7.1.5 Building Register (*Gebäudegrundbuch*)

With the unification of Germany, federal land registration rules were introduced in the former DDR states. In the land registration arrangement of these former DDR states, there are remnants of the old system, in particular the registration of building ownership, separate from the land. The *superficies solo cedit* rule applies, *i.e.* everything on or in the land is part of the ownership of the land.[566] § 295(1) DDR-ZGB reiterated that rule.[567] However, the second paragraph of § 295 DDR-ZGB allowed for a specific type of *super-*

562 It states in full § 30 WoEigG: (1) Steht ein Erbbaurecht mehreren gemeinschaftlich nach Bruchteilen zu, so können die Anteile in der Weise beschränkt werden, daß jedem der Mitberechtigten das Sondereigentum an einer bestimmten Wohnung oder an nicht zu Wohnzwecken dienenden bestimmten Räumen in einem auf Grund des Erbbaurechts errichteten oder zu errichtenden Gebäude eingeräumt wird (Wohnungserbbaurecht, Teilerbbaurecht). (2) Ein Erbbauberechtigter kann das Erbbaurecht in entsprechender Anwendung des § 8 teilen. (3) Für jeden Anteil wird von Amts wegen ein besonderes Erbbaugrundbuchblatt angelegt (Wohnungserbbaugrundbuch, Teilerbbaugrundbuch). Im übrigen gelten für das Wohnungserbbaurecht (Teilerbbaurecht) die Vorschriften über das Wohnungseigentum (Teileigentum) entsprechend.

563 Which should thus not be read as to mean that there is a lease on an apartment building as a whole, but rather a building lease burdening an apartment right.

564 § 1 WGV. With the addition of either *Wohnungserbbaugrundbuch / Teilerbbaugrundbuch* added to the title sheet.

565 Save for the mention of the register in § 14(3) ErbbauRG, requiring a reference on the *Erbbaugrundbuch*.

566 § 295(1) DDR-ZGB.

567 § 295(1) DDR-ZGB: 'Das Eigentum am Grundstück umfasst den Boden und die mit dem Boden fest verbundenen Gebäude und Anlagen sowie die Anpflanzungen'.

ficies right.[568] This created the *Gebäudeeigentum* in the DDR. A manner in which people still could hold private ownership of the building, as the land was '*volkseigentum*'. This type of right to ownership of a building was continued,[569] insofar as the specific State had made the rules establishing such a right as referenced in § 295(1) DDR-ZGB.[570] In 1994 the *Gebäudegrundbuchverfügung* (GGV) came into force and governs the Building Register, for either type of *Gebäudeeigentum*.[571]

The rules concerning the Building Register are a combination of the general land register rules, those derogations made for the Building Lease Register, and the derogations as laid down in the GGV.

The creation of the *Grundbuchblatt* follows the same formalities as those of the Building Lease Register, with a title sheet denoting '*Gebäudegrundbuch*' instead of '*Erbbaugrundbuch*'.[572] For the remainder, the rules concerning the Building Lease Register apply (see section 3.7.1.3), including the registration of the price. Furthermore, the more general rules of the General Land Register apply, including the applicability of §15 GBV dealing with the personal data of the right holder.

3.7.1.6 Register of Mines (*Berggrundbuch*)

The register of mines contains the ownership of mines and is locally governed. Not every State necessarily has a Register of Mines, but if they do, the Register of Mines contains the ownership of mines (*Bergwerkseigentum*). The *Bundesberggesetz* (BBergG) is the federal law that deals with the ownership of mines etc. The remainder of the rules can be found locally in the various states.[573]

Ownership of a mine (*Bergwerkseigentum*) arises with the handing over of the awarding certificate (*Berechtsamsurkunde*) to the applicant. This is an awarding certificate of the right to exploit a mine and a copy of the management plan. The certificate contains at least: (1) the name and place of residence of the owner; (2) the name of the mining

568 § 295(2) DDR-ZGB: 'Durch Rechtsvorschriften kann festgelegt werden, dass selbstständiges Eigentum an Gebäuden und Anlagen unabhängig vom Eigentum am Boden bestehen kann. Für die Rechte an solchen Gebäuden und Anlagen sind die Bestimmungen über Grundstücke entsprechend anzuwenden, soweit nichts anderes festgelegt ist'.

569 § 150 GBO. See more extensively Demharter 2014, § 150, Rn. 10.

570 Next to this form of Gebäudeeigentum, there is also the separate Right to a building ownership without a property use right (*Gebäudeeigentum ohne dingliches Nutzungsrecht*) as laid down in Article 233, § 2b EGBGB, the Introductory Act of the Civil Code. For the creation of a *Grundbuchblatt* for the Gebäudeeigentum stemming from Article 233, § 2b EGBGB, the same procedure as described above is followed, with the exception that it is stated that here it concerns the '*Gebäudeeigentum* gemäß Artikel 233 § 2b EGBGB auf …' or '*Gebäudeeigentum* gemäß Artikel 233 § 8 EGBGB auf …'. § 3(7) GGV.

571 § 1 GGV.

572 § 3(3) GGV.

573 For example for Baden-Württemberg: Verordnung der Landesregierung über die Bestimmung der zuständigen Behörden nach dem Bundesberggesetz (BBergGZuVO), GBl. S. 4. Or Verordnung zur Übertragung von Ermächtigungen zum Erlaß von Rechtsverordnungen nach dem Bundesberggesetz, Amtsbl. S. 350, for Saarland.

property, (3) the precise location and size of the mine; (4) the names of the communities/ municipalities (*Gemeinde*); (5) the name of the mineral resource to which the ownership applies, and (6) the date of the deed, seal and signature.[574] The particulars of the manner in which the *Berggrundbuch* is kept is left to the individual states. At the very least, it is assumed that the personal data contained in the *Berechtsamsurkunde* will form part of the register of deeds, discussed next.

3.7.1.7 Register of Deeds (*Grundakten*)

Grundakten are the deeds that form the basis for the registration.[575] Although the different registers (*Grundbücher*) shape the title registration, the underlying documentation for the registration is not discarded, but it kept.[576] Certain documents are kept on the basis of the law, § 10 GBO in particular, whereas others are kept by virtue of a discretionary decision of the land registrar (*Rechtspfleger*).[577]

The form in which they are kept varies. For closed *Grundbücher*, the underlying deeds can also be kept on a durable (electronic) medium.[578] Between 1993 and 2009 it was also possible to keep the underlying deeds in a form other than paper,[579] as the storing these documents in paper or microfilm took up too much space.[580] However, because no state had made use of this option because of the costs associated with it, it was limited again in 2009 to only the closed Grundbücher.[581]

Not all deeds need to be kept.[582] Only those documents which are necessary for registration according to the formal *Grundbuchrecht* (*formellen GBRecht*).[583] This includes any deed or documentation to support the public faith principle of the German land registry.[584] These documents *have to* be kept, but whether the remainder of the documentation is kept or discarded is up to discretion of the *Grundbuchamt*. The following presents an overview of the different categories of documents and deeds which have to be kept because they are considered to support the public faith principle of the registry. The categorisation is as presented by Demharter.[585]

574 § 17(2) GGV.
575 § 10(1) GBO.
576 § 10 GBO.
577 See on their role in the organisation, section 3.3.1.
578 § 10a GBO.
579 RegVBG, 20.12.1993, BGBl. I 2182.
580 Demharter 2014, § 10a, Rn. 1.
581 ERVGBG, 11.08.2009, BGBl. I 2713.Demharter 2014, § 10, Rn. 18 and Demharter 2014, § 10a, Rn. 1.
582 To lighten the burden of the land registry, Demharter 2014, § 10, Rn. 12.
583 Demharter 2014, § 10, Rn. 3.
584 BayObLG Rpfleger 1975, 360.
585 Demharter 2014, § 10.

First, it includes deeds that contain necessary explanations (*notwendige Erklärungen enthalten*) for registration,[586] *e.g.* the request for registration,[587] the request for a change due to an incorrect registration,[588] or registration approval (*Eintragungsbewilligung*),[589] as well as those documents which replace such a statement,[590] such as the declaration of intent for the purpose of entering it in a register in the event of provisionally enforceable judgments.[591] Also included are those documents which Demharter calls 'legitimatisation documents' (*Legitimationsurkunden*), such as a declaration of succession, testaments, powers of attorney, and the like.[592]

The second and last category of documents which require registration in the register of deeds are documents that are not already kept under any of the other categories, but are referenced in the registration. These deeds have to be kept, as they form a part of the registration itself.[593]

Which documents do not fall under any of the foregoing categories and need not be kept by the land registry? One such example are those documents dealing with the legal transaction(s) that are at the basis of the registration approval (*Eintragungsbewilligung*). These agreements stem from the law of obligations and need not be kept. Formerly they were required to be kept under the now discarded § 10(3) GBO. An example of such a deed is the (written down) sales agreement. This deed need not be kept but may be kept at the discretion of the *Rechtspfleger*.[594] However, the notarial deed of transfer, the *Auflassung* (§ 925 BGB), will often times include, either expressly or implicitly,[595] the required registration approval (*Eintragungsbewilligung*) and therefore fall under the first category of deeds described above that must be kept.[596] Furthermore, there is no legal basis for keeping documents related to the *hypothec* notes, land charge notes, and annuities notes themselves, which are always returned after registration.[597] Only if these notes are made unusable, are they kept.[598]

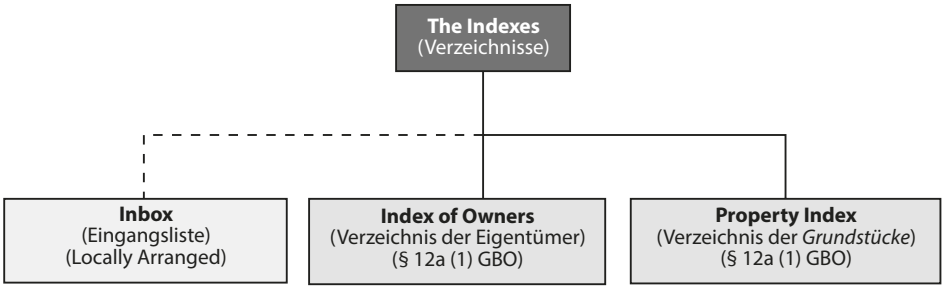
The *Grundakten* are arranged in chronological order,[599] preferably written on double-sided paper.[600] If the specific deed forms the basis for multiple registration, a cross-

586 Demharter 2014, § 10, Rn. 4.
587 § 13 GBO.
588 § 20 GBO.
589 § 19 GBO.
590 Demharter 2014, § 10, Rn. 5.
591 § 895 ZPO.
592 Demharter 2014, § 10, Rn. 6.
593 Demharter 2014, § 10, Rn. 8.
594 However, compare with Baur, Baur & Stürner 2009, § 15, Rn. 57, in which they state that the sales agreement is part of the *Grundakten*.
595 See Demharter 2014, § 20, Rn. 2.
596 See also § 20 GBO, which requires an *Eintragungsbewilligung* next to an *Aufslassung*. See on the link between *Auflassung* and *Eintragungsbewilligung*: Schöner & Stöber 2012, Rn. 97.
597 In accordance with §§ 41-42 GBO.
598 § 53 GBV.
599 For example, in Bayern; § 3(1) AktO. See § 55(2) for the provision on co-ownership and notification.
600 § 24a GBV, 'sollen tunlichts doppelseitig beschrieben sein'.

reference is made; it is not copied.[601] As the *Grundakten* are linked to the individual *Grundbuchblatt*, the systems work in parallel. For states that maintain a loose-leaf land registry, inspecting the deeds register is made easier by the *Handblatt*,[602] a word-for-word copy of the corresponding *Grundbuchblatt*. It is an administrative tool and its contents are not part of the public faith principle in the land registry.[603] It relieves the *Rechtspfleger* of the strenuous task of going back and forth between the registry of deeds and the corresponding *Grundbuchblatt*. For electronically held land registers, such a *Handblatt* is not needed nor required.[604]

Where a public authority wishes to make a declaration or request on the basis of which a registration should be carried out, and it does so in electronic form, the following should be present in the request: (1) the document containing the name of the issuing person and revealing their authority, (2) the title of the officer issuing an electronic signature in compliance with the law relating to electronic signatures, and (3) the signature of the underlying qualified certificate or an associated qualified attribute certificate that reveals the authority of the signatory.[605]

3.7.2 The Indices



Next to the different types of registers, there are also a number of indices. In sections 8.7.1, 8.7.2, 8.7.3, the access to these indices is explained, but first the content of these indices is explained in the following sections.

The keeping of an index of owners and of property is governed by § 12a GBO, which entered into force on 2014.[606] Prior to that the obligation to keep these indices was a State

601 § 24(2) GBV, see also § 24(3) GBV.
602 § 24(4) GBV. Used to also be known as a 'Blattübersicht, Hilfsblatt or Tabelle', Schöner & Stöber 2012, Rn. 78.
603 See for example OLG Köln, 23.03. 1998 · Az. 2 Wx 67/97.
604 § 73 GBV.
605 § 137(2) GBO.
606 Introduced with the Gesetz zur Einführung eines Databankgrundbuchs (DaBaGG).

affair.[607] From then on, however, the maintenance of an index of owners and a property index was elevated to a federal law affair, giving preference to an index in electronic form. The states that had arranged their land registry in loose-leaf form have the option of maintaining their indices in the same form or can start to keep the registry electronically.[608] State level rules continue to govern the content of the indices.[609]

Indices are different from the registers in that the main purpose of the indices is administrative. They are not covered by the public faith principle in the registers, and there is no recourse to an outdated index. Keeping the indices up to date is not necessary.[610] The primary reason for keeping indices is to find the relevant *Grundbuchblatt* quickly.

What remains an entirely local affair is the maintenance of an inbox of deeds for land registry matters (*Eingangsliste*), such as held by North Rhine-Westphalia.[611]

3.7.2.1 The Ownership Index (*Eigentümerverzeichnis*)

An index of owners contains an overview of the patrimony in land held by a person or a company in that particular region. The land registry is not required to have such an index,[612] but, when it does, it is not required to keep it up to date.[613] It simplifies the search for a particular plot of land when the designation is otherwise unknown, but the name of the owner is known.[614]

The index is organised in alphabetic order and contains the family name, first name, birthdate, and place of residence of the owner for natural persons and the exact name.[615] For both legal and natural persons, the reference to the particular *Grundbuchblatt* is made. The ownership index does not fall under the § 893 BGB public faith principle and therefore also do not fall under the access regime of § 12 GBO, which is discussed extensively in Chapter 8. Rather, specific provisions for accessing this index are made.[616]

607 As such, it seems to be a deviation from the standard, that the formalities of keeping the land registry would generally be left to states, as envisaged after the second reading of the GBO in 1894. See Jakobs & Schubert 1982, p. 352.

608 Demharter 2014, § 12a, Rn. 3.

609 Such as exemplified by § 21(8) AktO Nordrhein-Westfalen. See also § 126 GBO for electronically kept land registries.

610 § 12a(1) GBO.

611 § 21(6) AktO of Nordrhein-Westfalen. Full name of inbox: *Eingangsliste für Grundbuchsachen*.

612 § 12a(1) GBO speaks of 'dürfen' which is translated to *may* not *shall*.

613 § 12a(1) GBO second sentence. Therefore, there is no claim for compensation or otherwise in the event the information in the index is not up to date.

614 Or holder of an equivalent right or of an apartment right is known. Demharter 2014, § 12a, Rn. 2.

615 § 21(8) AktO of Nordrhein-Westfalen. Demharter 2014, § 12a, Rn. 2.

616 See for more on this, section 8.7.2.

3.7.2.2 The Grundstücke Index (*Gründstucksverzeichnis*)

The index based on plot of land is called the Grundstücke Index. The use of the index is limited, as the General Land Register is already organised by their cadastral designation.[617] With the authorisation of the State judiciary (*Landesjustizverwaltung*), the cadastral index (of plots) may also be used as an index.[618]

3.7.2.3 The Inbox (*Eingangsliste*)

The keeping of an inbox is a local affair, for which each State makes its own arrangements. An example of such an arrangement is provided by the State of North Rhine-Westphalia. In its *Aktenordnung* (AktO), it details the maintaining of the inbox,[619] also referred to as *Liste 10*.[620] Here the documents are organised in the order in which they are brought to the *Grundbuchamt* and, as such, monitors the timely processing of the applications to the land registry.[621] Each document is given a number,[622] and mentions the day on which the document was executed,[623] date of receipt,[624] and also the value of the object.[625]

3.7.3 Conclusions on German Land Registration

The land registration system in Germany is represented by fragmented picture, not only due to the fact that the registration itself takes place at a local State level leading to differences between states, for example in their level of digitising the land registry, but also in their manner of organising their registers. There are, next to the General Land Register, six registers, in which a variety of (often connected) property rights in land are registered. Reference to the different other registers does occur, meaning they are connected and a full picture can still be attained of rights in a particular plot of land, by going through all of the registers.

In terms of the information contained in the register, German land registration follows the general scheme of the other two systems. It concerns information regarding the holder of the property right, or right affecting the property right, and information about the object and right itself. One difference here is that the purchase price of the property is

617 § 2(2) GBO.
618 § 12a GBO. Demharter 2014, § 12a, Rn. 2.
619 Based on § 21(6) AktO.
620 It is the 10th out of 62 different lists, see Anlage II of AktO of Nordrhein-Westfalen.
621 Schöner & Stöber 2012, Rn. 75.
622 Anlage II, AktO of Nordrhein-Westfalen under 1a.
623 Anlage II, AktO of Nordrhein-Westfalen under 6.
624 Anlage II, AktO of Nordrhein-Westfalen under 5.
625 Anlage II, AktO of Nordrhein-Westfalen under 7. Unless the value is not above 10,000 EUR, or when an order to omit the value is given by the President of the Apellate Court (*Oberlandesgerichts*), see explanatory memorandum, under List 10, at 9.

not recorded in the land registry, but it can be found in the underlying deeds (*Grundakten*). The additional information regarding academic title that is recorded in the registers is a German peculiarity.

3.8 Conclusion

After looking at the way in which the land registry in the Netherlands, England & Wales, and Germany is given shape, certain conclusions may be drawn.

The organisational structure of the three land registries differs the most in terms of the legal embedding of the land registry itself. As section 3.3 above has shown, the land registry of Germany is part of the judicial branch, whereas the land registry in England & Wales and the Netherlands is embedded within the executive branch and is considered to be a public authority or semi-public authority, which comes with ministerial instructions on certain matters. The way in which the land registry is embedded in the legal system has consequences for their financing structure. Both in the Netherlands and England & Wales, the land registry must be self-sufficient and is expected to at least 'break even' from the proceeds of the fees paid by parties providing and requesting information to and from the land registry. In the Netherlands, the change of structure of the land registry from a governmental entity to an independent governing body came with the express incentive to develop new information products to increase the revenue of the land registry.

The content, in terms of personal data,[626] does not seem to differ significantly in the three legal systems under review. They all collect and store information required for the identification of the persons exercising (property) rights in land. They also require and provide detailed information concerning the object itself.

The difference between the type of registration systems, whether it be a deeds system or a title system, does not seem to have a significant effect on the *content* kept at the land registry. All three of the land registries under review keep roughly the same type of information regarding land and the property rights therein, as well as information regarding the person holding such rights. The differences between the systems are directed at *where* the information is registered rather than *what* is registered. For example, the purchase price of a property is recorded in all three land registries. However, in Germany, this information is found in the deeds, rather than in the registration, the *Grundbuch*, itself. Generally, only the amount for the *hypothec(s)* are recorded in the *Grundbuch* itself,[627] and consultation of the underlying deeds is required to find out the purchase price of the property itself.[628] In the Netherlands and England & Wales, this information

626 For an explanation of what constitutes personal data, see section 5.6.4.
627 This of course changes over time and therefore generally is only accurate for a limited period of time.
628 See on the requirements for access to this information, section 3.7.1.7.

is put front and centre on the title sheet (England & Wales) and the *kadastraal bericht eigendom* (The Netherlands) the extract from the Main Cadaster Register. This difference in *where* to place the information in the land registry has consequences for the access regimes put in place, especially for those systems that adhere to a layered structure of access as will be addressed in Chapters 6-8. There are furthermore differences with regard to information concerning the person. In particular, the requirement of recording the document identification number of an individual in the Netherlands (often passport or ID-card number) and recording the academic title in Germany.

A peculiarity of the England & Wales system of land registration concerns the lack of a requirement to register beneficial interests under a trust HM Land Registry. Where land is held on trust, the trustee is recorded as the legal owner and no reference is made to the beneficial owner of the property. The beneficial interest cannot be recorded in the land registry.[629]

In terms of the organisational structure of the registers themselves, and their indices, there are also differences, which are more cosmetic rather than substantial. The land registries of the Netherlands, England & Wales, and Germany all adhere to a system of registers and indices. All of the systems have an index, which arranges the land registry information by plot and also makes searching based on the name of right holder possible.

A difference between the registers can be seen in the duration for which the information in the deeds remains relevant. For the Netherlands, this is necessarily longer than for Germany and England & Wales, as rights in land have to be deduced from a chain of titles and this chain should be checked. This entails the necessity to access older deeds as well. In systems such as Germany and England & Wales, where the State guarantees the accuracy of the registry, there is no need to check the underlying deed to determine that a right exists as it is already registered.

The starting point for the modern method of registration of land in the three legal systems is the plot of land, *i.e.* the object rather than person. Organisation according to the person is still possible, however, it is done by way of the indices. Each of the three legal systems also stores and records the different property rights in separate registers (the Netherlands and Germany) or on different parts of the same register (England & Wales). The choice for these different registers can be explained by their historical origins.

The ease by which the registers can be searched and sorted is in large part facilitated by the fact that these registries are now digitised or they are in the process of being digitised. Making use of digitised databases, rather than (handwritten) books, increases efficiency. The introduction of a digitised delivery of deeds and applications for registration has also required some legal changes to be made. In the Netherlands, this was done

629 See section 3.5.1.1.1 above. The specific case of the German *Briefrechte* is also interesting here, which concerns *hypothec* certificates that may be assigned separately, without a corresponding alteration in the land registry and, as such, allows the transfer of a property security right without publicity provided in the land registry, see § 1113 BGB, and Hügel 2014, § 39, Rn. 11.

gradually, whereas in England & Wales the 2002 LRA made way for the electronic registration of land transactions.[630] Germany has the option for the individual states (*Länder*) to keep their land registry in an electronic format, and now all states allow automated online access for some parties,[631] however the facilitation of online access to the land register to submit registrations has not been introduced throughout all of the states as of yet.[632]

This ease of searching not only increases efficiency, but it also has drawbacks with regard to privacy. In particular, the fact that some of the information in the land registries of the Netherlands, England & Wales, and Germany can be considered personal data, has privacy implications. A special (legal) regime applies to the processing of such personal data. This link between privacy and data protection regulation (which is concerned with the processing of personal data) will be elaborated upon further in the next part of this study.

630 See more extensively on this also 7.3.5.1.

631 For example, notaries, see § 133 GBO, and section 8.5.1.

632 All states now allow automated online access, however, for the delivery of registrations, there is a more fragmented overview. See for an overview: https://perma.cc/L274-9L5M.

Part II
PRIVACY

4 Privacy

4.1 Introduction

To assess how privacy relates to land registration, the concept of privacy must first be explored. Whether the privacy rights of those registered even come into play, requires a closer look at the scope and content of privacy as a concept and as a right.[1] The concept of privacy seeks to explain what privacy entails and what its value is, whereas the right to privacy concerns the way in which privacy is and should be protected by law.[2] This Chapter provides a description of different theories of privacy and focusses on a specific species of privacy: informational privacy or the protection of personal data. As such, it provides the theoretical background for a discussion of the specific data protection rules discussed in Chapter 5.

The exploration that follows in the next few sections shows that the development of and theorising about both the right as well as the concept of privacy can be characterised as a discussion about scope and content and how these two influence one another. This discussion and development of the right to, and concept of, privacy is driven, in part at least, by the development of new technologies that raise questions of possible interference with privacy not thought of before.

A singular all-encompassing definition of privacy is not possible.[3] The increased scope of privacy, for example considering privacy rights to encompass information next to physical privacy, has altered the content of the right in such a way that a one-size-fits-all approach is not a viable option.[4] This has led some authors to question whether privacy can be usefully addressed at all,[5] as nobody really knows what it means,[6] because there is a conceptual disarray[7] or even chaos.[8] For want of a singular definition, it is tempting to

1 See on the difficulty and imporantance of distinguishing between right, concept, and value of privacy, Hildebrandt/Claes, Duff & Gutwirth 2006, p. 44–46.

2 Solove & Schwartz 2011, p. 40. The legal view of privacy is necessarily narrower. See also Chapter 2 of DeCew 1997.

3 On the difficulty of defining privacy: Moore *Journal of Social Philosophy* 39/3, p. 411–428. Westin's influential work 'Privacy and Freedom' starts with '[f]ew values so fundamental to society as privacy have been left so undefined in social theory or have been the subject of such vague and confused writing by social scientists.' Westin/Solove 2015, p. 5.

4 Solove 2009, p. 103. It is 'elusive and ill defined' says Richard A. Posner. Posner *Georgia Law Review* 12/3, p. 393. Cohen *Harvard Law Review* 126/7, p. 126. Cohen calls it 'dynamic' and states that privacy cannot 'be reduced to a fixed condition or attribute (such as seclusion or control) whose boundaries can be crisply delineated by the application of deductive logic'.

5 Post *The Georgetown Law Journal* 89/6, p. 2087.

6 Thomson *Philosophy & Public Affairs* 4/4, p. 295.

7 Bloustein *New York University Law Review* 39/6, p. 963. See also Miller 1971, p. 25.

8 Inness 1996, p. 3.

consider privacy to be an umbrella term, encompassing a wide range of interests.[9] Considering privacy as an umbrella term leaves room for the variety of vastly different acts to fall within the rubric of privacy and invasions thereof: from a targeted advertisement online to a discussion about bodily privacy, such as the right to have an abortion or whether a body scanner at an airport consitutes a privacy invasion, but also drones with camera's flying over urban areas and Google Street View cars taking 360° pictures of the (public) road and homes. This vagueness over what constitutes privacy has not impacted the efforts to curtail it into a theory or definition. The following is an (chronological) overview of major technological advances that have given rise to a response by lawyers and – coming with that – new views on what privacy entails and what privacy protects.[10]

The chapter starts with the right to be let alone addressed in section 4.2, introduced and devised as a reaction to the rise in popularity of the instant camera, which could take pictures of people without their consent and knowledge. Section 4.3 discusses the theory of looking at privacy as exercising control over information. This theory reacted to the importance of the mainframe computer and the increased surveillance (gathering information without the knowledge of the subject) that such new devices made possible. Section 4.4 concerns the theory of privacy as secrecy or concealment of information about an individual, and section 4.5 elaborates on the value of privacy in discussing the identity building or personhood theory. The chapter is concluded by looking at two wider approaches, namely privacy as a taxonomy in section 4.6 and privacy seen in context and the theory of contextual integrity in section 4.7.

4.2 The Right to be Let Alone

One of the first ground-breaking contributions to modern conceptions of privacy as a legal right of the individual[11] was made in the United States by Warren and Brandeis in an article in the 1890s.[12] They considered privacy to be a special case of 'the right to be let alone'.[13] Warren and Brandeis explained that the law adapts to '[p]olitical, social, and economic changes' which bring about the recognition of new rights.[14] They then consid-

9 DeCew 1997, p. 1.

10 It is not exhaustive, but it seeks to provide an overview which can serve as the basis for understanding legislative considerations in the next chapter, which to some extent rely on concepts and thoughts described in this chapter. These theories are therefore chosen for their relevance to understanding the theoretical background of the rules discussed in the next chapter and in some respects to counter common misconceptions of privacy, such as the 'privacy as secrecy' approach, discussed in section 4.4.

11 Westin/Solove 2015, p. 390.

12 Although Westin states that the claim to modern privacy derives 'first from man's animal origins and is shared, in quite real terms, by men and women living in primitive societies'. See extensively Westin/Solove 2015, p. 5. Chapter 1 on 'The Origins of Modern Claims to Privacy'.

13 Referring to a term used by Judge Cooley some years earlier. Cooley 1888. See for criticism Gavison/Schoeman 1984, p. 357.

14 Warren & Brandeis *Harvard Law Review* 4/5, p. 193.

ered that the right to privacy should be the next right to be legally recognised. Thus, rather than being credited with establishing privacy, Warren and Brandeis should be considered as one of the first proponents for a legal right to privacy which may be protected by tort law.[15]

> Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops."[16]

Why did the issue of privacy come up at that time? It was the advent of consumer photography. Up until that time, taking photographs required a studio, patience and a high level of skill.[17] That changed when the Eastman Company, later known as Kodak, invented a way to take photographs that no longer required instant and on site developing, leading to a surge in amateur photography.[18] Skill was no longer required.

This also meant that pictures could be taken of people unbeknown to them.[19] Print media made frequent use of these amateur photographs, capturing 'people in the act' and used it to feed their gossip pages.[20] According to Warren and Brandeis, the '[g]ossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers.'[21] They stated that the right to be let alone could protect individuals and could be construed as 'a general right to the immunity of the person, the right to one's personality.'[22] It was 'common law [that] secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others'.[23]

The introduction of this 'instantaneous photography' and the innovation in microphone and dictaphone around the same time and the telephone a decade earlier, Westin remarked, 'brought the capacity for invading privacy into the *informal* arenas of conver-

15 They proposed that the remedy can be found in tort. See Warren & Brandeis *Harvard Law Review* 4/5, p. 219. Prior to that time, it was difficult to get a legal remedy for 'emotional harms', a category in which privacy might fall. See DeCew 1997, p. 15.

16 Warren & Brandeis *Harvard Law Review* 4/5, p. 195.

17 See for a historic overview of how and when photographs were used in court rooms: Mnookin *Yale Journal of Law & the Humanities* 10/1, p. 7–14.

18 See also New York Times 'Taking pictures for fun. the increasing army of amateur photographers.' 11 November 1883, p. 5.

19 See Mnookin *Yale Journal of Law & the Humanities* 10/1, p. 13. See on this also Westin/Solove 2015, p. 378–379.

20 Solove 2004, p. 57. See extensively on the relationship between privacy and photography in the early days Mensel *American Quarterly* 43/1, p. 24–45.

21 Warren & Brandeis *Harvard Law Review* 4/5, p. 196.

22 Warren & Brandeis *Harvard Law Review* 4/5, p. 207.

23 Warren & Brandeis *Harvard Law Review* 4/5, p. 198.

sation and action.' Relying on protection of the physical site by admonishing and punishing physical invasion or protecting physical records from unreasonable seizures, as hitherto were the privacy protecting mechanisms, no longer sufficed.[24] Hence, the scope of privacy protection should be broadened, with the corresponding legal right to be let alone.

Privacy as a right to be let alone has been met with criticism.[25] Gavison considers the right to be let alone no more than an umbrella term.

> The great simplicity of this definition gives it rhetorical force and attractiveness, but also denies it the distinctiveness that is necessary for the phrase to be useful in more than a conclusory sense. This description gives an appearance of differentiation while covering almost any conceivable complaint anyone could ever make.[26]

However broad the term, it is not broad enough to cover all situations. For example, is it possible to have a situation in which someone is let alone but one could still speak of a situation where privacy is at stake? Take the example of heat sensors used by police. These sensors can establish if someone is home and (roughly) what they are doing. Someone making use of these sensors might find the occupant of the house to be catatonic in front of the television or heavily engaged in physical activity in the bedroom on a fitness machine. If an off-duty police officer takes one of these sensors home with him and uses it on his neighbours, they are let alone but still violated in their privacy. Here the right to be let alone cannot account for the lack of privacy.[27]

Thomson, who used a similar example to make the aforementioned point, also stated that the reverse also poses a problem. In her own words: 'If I hit Jones on the head with a brick I have not let him alone. Yet, while hitting Jones on the head with a brick is surely violating some right of Jones', doing it should surely not turn out to violate his right to privacy.'[28]

24 Westin/Solove 2015, p. 379.

25 Prosser, in 1960s, suggested that Warren and Brandeis were wrong in the number of torts of privacy; and suggested that there were four of them, rather than the one envisaged by Warren and Brandeis. Prosser *California Law Review* 48/3, p. 383–423. Bloustein was critical of Prosser, stating that 'the much vaunted and discussed right to privacy is reduced to a mere shell of what is has pretended to be' and that Prosser fails to show a distinctive single value or interest behind these individual torts, 'in fact, they protect three different interests, no one of which can properly be denominated an interest in privacy'. Bloustein *New York University Law Review* 39/6, p. 965. See also for the uselessness of such a term for lawyers: Debeuckelaere/Debeuckelaere et al. 1988, p. 17. See also Kalven *Law and Contemporary Problems* 31/2, p. 326–341.

26 Gavison/Schoeman 1984, p. 357.

27 See also Thomson *Philosophy & Public Affairs* 4/4, p. 295. See also Gavison/Schoeman 1984, p. 357.

28 Thomson, *Philosophy & Public Affairs* 4/4, p. 295.

Although privacy as the right to be let alone was very influential, especially in US jurisprudence[29] and can still be considered the historical roots of some of the US states' privacy torts,[30] it would slowly but surely take a back seat to new theories and concepts of privacy that were put forth in the 1960s and later. As the example illustrated above, formulating privacy as the right to be let alone does not provide an answer to more modern-day intrusions of privacy. The article by Warren and Brandeis nevertheless continues to inspire scholarship and the judiciary, and not only in the United States.[31] Partially, this continued influence stems from the prescient nature of linking matters of privacy with technological developments.[32]

4.3 Privacy as Control (of information)

In the 1960s, the advent of another new type of technology, the (mainframe) computer, and in particular the rapid pace of computer development and usage throughout society,[33] led to another wave of interest in privacy.[34] Information that could be gleaned from using this new technology led to the start of 'informational privacy'.[35] The terms 'information privacy' and 'informational privacy' started to appear in literature by the end of the 1960s and 70s respectively and have become popular terms since then.[36] The concept of privacy extended beyond the physical intrusions[37] into the gathering of information for 'life-long dossiers' and allowed for a 'computerisation of information processing'. This computerisation is one of two developments that can attribute to information practices becoming a

29 Starting with the 1928 case of *Olmstead v. United States*, 277 U.S. 438 (1928) going on to *Katz v. United States* 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

30 Solove 2009, p. 16.

31 CJEU 13 May 2014, ECLI:EU:C:2014:317, C-131/12 (*Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González*).

32 The right to be let alone was also mentioned in the Explanatory Memorandum to the OECD Guidelines as the definition of the right to privacy. *Explanatory Memorandum to OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* 1980, p. 2. 'Generally speaking, there has been a tendency to broaden the traditional concept of privacy ("the right to be left alone") and to identify a more complex synthesis of interests which can perhaps more correctly be termed privacy and individual liberties'.

33 Westin/Solove 2015, p. 410.

34 Although this was not the only advance in technology, Westin showed, this also included physical surveillance that increased significantly, penetrating the privacy of homes, offices, and vehicles, as well as those people moving about in public places and those that monitor the basic channels of communication by telephone, telegraph, radio, television, and 'data line'. Westin/Solove 2015, p. 409–410.

35 See more extensively Chapter 5.

36 For this see the Google NGram, which provides statistical data on the use of words or word combinations in books it has catalogued. The comparison of the two terms may be found here. Using Google NGram for these purposes is not original. See Schwartz & Solove *New York University Law Review* 86/6, p. 1825.

37 Floridi 2014, p. 102. Floridi further distinguishes physical privacy, which is the 'freedom from sensory interference or intrusion', restricting others' ability to have bodily interactions with another or invade their 'personal space'. Secondly, he refers to mental privacy, which is the 'freedom from psychological interference or intrusion' by way of restricting the access and manipulation of someone's mental life. Compare with the four categories of Allen/Rothstein 1996 & Allen *Connecticut Law Review* 32/3, p. 866.

social or political – and later on – a legal issue.[38] The second is the 'increase in record-keeping activities', as Regan notes, to handle the ever-increasing complexity of social relationships which organisations developed with their clients and customers.[39] The combination of the two, record keeping by making use of computers, led to an interest in the effect these technologies had on the private life of citizens. In the United States this led to the theory of privacy as control. Westin was one of its staunchest proponents. He described the right to privacy as 'the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others'.[40] Miller considered that a basic attribute of the right to privacy was 'the individual's ability to control the circulation of information relating to him – a power that often is essential to maintaining social relationships and personal freedom.'[41] Fried also defined, to some extent, privacy as 'control over knowledge about oneself'.[42] Fried considers control over information as an aspect of personal liberty.[43] A person who can grant or deny access to him, or information about him, is someone who has privacy, according to Fried.[44] Others agreed and privacy as 'control-over-information conception'[45] has become very prevalent in the literature.

The focus of the theory is on *information* and the changes in relation to the collection and availability of such information. Miller explained it in 1970 as follows:[46]

> Until recently, informational privacy has been relatively easy to protect: (1) large quantities of information about individuals traditionally have not been collected and therefore have not been available to others; (2) the available information generally has been maintained on a decentralized basis and typically has been widely scattered; (3) the available information has been relatively superficial in character and often has been allowed to atrophy to the point of uselessness; (4) access to the available information has not been easy to secure; (5) people in a highly mobile society have been difficult to keep track of; and (6) most people have been unable to interpret and infer revealing information from the available data.

38 Regan 1995, p. 69.
39 Regan 1995, p. 69. See similarly Miller 1971.
40 Westin/Solove 2015, p. 5, whose influence also extended across the pond; he influenced some of the discussions held at the time the OECD contemplated its Guidelines as well as when the Council of Europe were working on their own Convention. González Fuster 2014, p. 83.
41 Miller 1971, p. 25.
42 Fried 1971, p. 141.
43 Fried 1971, p. 141.
44 Fried 1971, p. 140.
45 See also Miller 1971.
46 Miller 1971, p. 26.

He concluded that this is no longer the case, and 'it becomes clear that individuals are less able today than ever before to control the quantitative and qualitative flow of data about themselves'.[47] In particular, the individual loses control over the access as well as the accuracy of his informational profile.[48]

The theory of privacy as control has also attracted critique. Schoeman, a philosopher, has problems with looking at privacy as control over the access to information about an individual.[49]

> We can easily imagine a person living in a state of complete privacy but lacking control over who has access to information about him. For instance, a man shipwrecked on a deserted island or lost in a dense forest has unfortunately lost control over who has information about him, but we would not want to say that he has no privacy. Indeed, ironically, his problem is that he has too much privacy. To take another example, a person who chose to exercise his discretionary control over information about himself by divulging everything cannot be said to have lost control, although he surely cannot be said to have any privacy.

As this theory is very much linked to information, Solove considers this concept of privacy to be 'too narrow, for it excludes those aspects of privacy that are not informational, such as the right to make certain fundamental decisions about one's body, reproduction, or rearing of one's children'.[50] This limitation itself is not a problem here, as we are dealing with informational privacy. However, Solove's second critique does hold true, as he considers privacy as control to be a theory that is 'too vague', as there is no differentiation made regarding 'the types of information over which individuals should have control'. There is hardly a limitation placed on what constitutes the scope of information, nor is there an adequate explanation given for what constitutes 'control'.[51] Is it perhaps akin to a property right in information?[52] Furthermore, this theory considers privacy primarily from the perspective of the person and, as such, is too individualistic.

Focussing on the value of privacy for individuals does not take into account the importance privacy has as a common, collective, and public value.[53] Privacy is collective, as

47 Miller 1971, p. 26.

48 Miller 1971, p. 26–38. See for similar concerns and the legal rights to avoid or remedies against inaccuracy of information and access, section 5.2.

49 Schoeman/Schoeman 1984, p. 3.

50 Solove 2009, p. 25.

51 Solove 2009, p. 25–26. See for similar concerns Allen *Connecticut Law Review* 32/3, p. 861–875.

52 See extensively on this topic Purtova 2011. See also Miller 1971, p. 211–216.

53 Regan 1995, p. 221. Schoeman, has further problems with privacy as control as it 'begs the question about the moral status of privacy. It presumes privacy is something to be protected at the discretion of the individual to whom the information relates. Furthermore, although this characterization informs us that privacy is morally significant, we have not been told what it is that is so significant. We still need a characterization of what the right to privacy is about.' Schoeman/Schoeman 1984, p. 3.

the benefits are shared among the people living in a society where they may develop and express their creativity and may enjoy an independent mind.[54] Privacy is furthermore public as it is important for key institutions of democracy, such as the assumption of autonomy in promoting healthy democratic elections.[55] Thus, even if a person does not value privacy as much in a particular context, or indeed, if a large number of people do not, that still does not negate the value of privacy in that context, as it 'serves other crucial functions beyond those that it performs for a particular individual.'[56]

Therefore, privacy as control, although useful,[57] has 'grown incomplete'[58] and as such suffers a similar fate as the 'right to be let alone'; it no longer can be the only part of our understanding of privacy, as Cate noted in 2000.[59]

4.4 Privacy as Secrecy or Concealment

Richard Posner attempted to 'avoid the definitional problem', which is not uncommon for discussions on privacy,[60] by simply noting that one aspect of privacy is the withholding or concealment of information.'[61] He often uses privacy as secrecy as a starting point for his articles. This particular aspect of privacy, seeing privacy as secrecy, is no more than that, an aspect. It does not provide a fully-fledged explanation of what constitutes privacy. It is not uncommon to hear the phrase 'if you aren't doing anything wrong, then you have nothing to hide'. This idea that secrecy is the reason for wanting to protect privacy, or wanting privacy at all, is nonsensical.[62] We do not require privacy for only those things that we deem are wrong. When I confide in a friend revealing a personal detail about myself, and I expect privacy, that does not mean that I would like privacy because I am doing something wrong. However, Posner's conception of privacy as secrecy should not be limited to the aforementioned 'nothing to hide' argument,[63] but it appears more akin to privacy as control.[64] He considers concealment a means by which one may control anothers' perceptions about them, which he considers a means by which one's character may be misrepresented.[65]

54 Regan 1995, p. 227.
55 Regan 1995, p. 225.
56 Regan 1995, p. 221. See also for a similar critique Cate *Connecticut Law Review* 32/3, p. 878. Schwartz *Connecticut Law Review* 32/3, p. 815–859.
57 And even served as the basis of the definition used by the Principles for Providing and Using Personal Information, issued by the Clinton administration's Information Infrastructure Task Force, see Kang *Stanford Law Review* 50/4, p. 1205.
58 Cate *Connecticut Law Review* 32/3, p. 877–878.
59 Cate *Connecticut Law Review* 32/3, p. 878.
60 Regan 1995, p. 4.
61 Posner *Georgia Law Review* 12/3, p. 393.
62 Bruce Schneier calls it '[t]he most common misconception about privacy is that it's about having something to hide'. Schneier 2015.
63 Which is expressed more in popular media than in scholarly writings.
64 See Posner *Georgia Law Review* 12/3, p. 395.
65 Referring to Goffman 1956.

Where those people have a right to conceal, Posner continues, 'others have a legitimate interest in unmasking the deception'.[66] He calls this 'prying',[67] which 'enables one to form a more accurate picture of a friend or colleague, and the knowledge gained is useful in one's social or professional dealings with him'.[68] He provides the example of a friend. In choosing our friends we want to know whether we can trust this person, if he or she is 'discreet or indiscreet, selfish or generous'.[69] These personality traits are not immediately known when one is introduced to another. In that sense, the theory also embodies features of contextual privacy (see section 4.7 below), and the difference between types of actors involved and the circumstances under which information is shared. However, the consequence of sharing information is very different.

When something is no longer secret, privacy protection also falls away. Privacy in this theory is accordingly viewed as 'coextensive with the total secrecy of information.'[70] There is no privacy in public with this theory.[71] This theory is very prevalent in the United States, especially in relation to its Fourth Amendment jurisprudence, which concerns the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, which is generally considered the closest the US Constitution comes to protecting privacy.[72] Although the US Supreme Court seems deeply divided about the matter,[73] in which the key determinant for a privacy violation, and resulting in privacy being considered as a right, is a breach of a 'reasonable expectation of privacy'. Any reasonable expectation is missing if the information could be 'gleaned from a public vantage point'.[74] Much of the privacy legislation in the US is based on this idea of a reasonable expectation of privacy.[75] This notion has however been under scrutiny in the US, in particular, because it seems to be an ill-equipped technique for

66 Posner *Georgia Law Review* 12/3, p. 395–396.

67 The term prying is used 'without any pejorative connotation'.

68 Posner *Georgia Law Review* 12/3, p. 395.

69 Posner *Georgia Law Review* 12/3, p. 395.

70 See also the comments of Solove 2009, p. 22–23.

71 See on problems associated with that idea on that idea Byrne *Legal Reference Services Quarterly* 29/1, p. 1–21, Givens 2002, p. 1–7 Nissenbaum 1998, p. 559–596, Rosen *Cardozo Studies in Law and Literature* 12/1, p. 167–191, Zimmer *Ethics and Information Technology* 12/4, p. 313–325.

72 *Katz v. United States* 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). *State v. Williams* 73 Ohio St.3d 153 (1995). *United States v. Miller* 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976). Although in specific contexts, the Courts seem to step away from the secrecy paradigm, and apply more specific and apt tests, such as in *Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749 (1989). See extensively Solove *Minnesota Law Review* 86/6, p. 1175 *et seq.*

73 Solove *Minnesota Law Review* 86/6, p. 1179.

74 Under these auspices, privacy is given protection in the law. Although the right of privacy is not explicitly mentioned in the US Constitution, it nevertheless is read into the Fourth Amendment which in turn reads: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized'.

75 Solove *Minnesota Law Review* 86/6, p. 1172. Slobogin & Schumacher *Duke Law Journal* 42/4, p. 727–775.

privacy protection in the Information Age.[76] The harm of disclosure is not so much in the revealing of a secret, but rather the spreading of information beyond the expected boundaries.[77]

4.5 Privacy as Identity Building or Personhood theory

A different approach to viewing privacy is advanced by the theory of personhood or considering privacy as a necessity for identity building. Hildebrandt considers that 'the core of privacy is to be found in the idea of identity'.[78] The 'process of identity-building is what is at stake in privacy'.[79] We are not born as individual persons, but rather we 'develop into persons as they relate to their environment and interact with others'.[80] Identity is not static, but rather it is a process.[81] For this process to take place, we require some form of autonomy or 'real contact like intimacy and some space to rebuild the self in accordance with one's past while anticipating one's future.'[82] In this sense, '[p]rivacy concerns the freedom from unreasonable constraints that creates the freedom to reconstruct one's identity'.[83] There the words of Warren and Brandeis are echoed, showing the overlap between the different theories. The right to be let alone also encompassed the principle of 'an inviolate personality' which protected the right to one's personality[84] or, as Bloustein puts it in terms of what constitutes an invasion of privacy: 'An intrusion on our privacy threatens our liberty as individuals to do as we will, just as an assault, a battery or imprisonment of our person does.'[85] Therefore, 'an invasion of privacy is an injury 'to our individuality, to our dignity as individuals.'[86]

Thus, in this theory, privacy extends beyond wanting to keep matters secret or confidential. It is used to exercise self-determination; individuals are 'part authors of their

76 Solove *Minnesota Law Review* 86/6, p. 1173. Solove 2004, p. 8. Bloustein has argued that this theory of privacy as secrecy fails to recognise group privacy and is therefore too narrow, Bloustein 2003, p. 123 *et seq*. See for an overview Solove 2009, p. 23.

77 See Karst *Law and Contemporary Problems* 31/2, p. 344. Solove 2009, p. 23. Strahilevitz *The University of Chicago Law Review* 72/3, p. 919–988. See also section 4.7.1 below.

78 Hildebrandt/Claes, Duff & Gutwirth 2006, p. 43–58. For an overview of identity construction in different areas such as sociology; philosophy and media theory, see Roosendaal 2013, p. 20 *et seq*.

79 Hildebrandt/Claes, Duff & Gutwirth 2006, p. 7.

80 Hildebrandt/Claes, Duff & Gutwirth 2006, p. 8.

81 Burkert/Agre & Rotenberg 1998, p. 138.

82 Hildebrandt/Claes, Duff & Gutwirth 2006, p. 9.

83 Hildebrandt/Claes, Duff & Gutwirth 2006, p. 13. See also Schwartz *Vanderbilt Law Review* 52/6, p. 1655.

84 Warren & Brandeis *Harvard Law Review* 4/5, p. 205. See also Floridi, who puts forth his 'self-constituting interpretation of privacy' which 'stresses that privacy is also a matter of construction of one's own identity'. Floridi 2014, p. 124.

85 Bloustein *New York University Law Review* 39/6, p. 1002.

86 Bloustein *New York University Law Review* 39/6, p. 1003.

lives' who 'substantially shape their existence through the choices they make'.[87] The dystopian view depicted in George Orwell's *1984* of the 'Thought Police' which could be watching you at any moment comes to mind here.[88] The 'Thought Police' here are reminiscent of Jeremy Bentham's design of the Panopticon,[89] which was made famous by Michel Foucault's *Discipline and Punish: The Birth of a Prison*.[90] The Panopticon is a circular prison construction with all cells having windows facing inward towards the heart of the construction where a tower stands tall, the *inspector's lodge*.[91] The inspector is in the position to see without being seen himself.[92] He would have a perfect view of each cell and prisoners, but the prisoners would not be able to see whether or not the inspector was looking at them. This creates an atmosphere in which all prisoners are under the impression that they are, or could be, monitored at any given point, which affects their decision-making process and, as such, their identity building. Continuous surveillance leads to self-censorship and inhibition. It has a chilling effect on identity building.[93]

As this theory is more directed at showing the value of privacy,[94] or how privacy and why privacy protection is important, it serves as a basis for the different theories above, which do not necessarily answer the question of *why* we should protect privacy, but rather what privacy itself entails or how it may be exercised. Each of the theories discussed thus far assumes privacy *should* be protected, and this theory helps explain why this should be the case.[95]

4.6 Privacy as a Taxonomy

As the foregoing shows, explaining what constitutes privacy and boiling it down to a single concept is a task that has not been successfully completed yet. What Solove therefore purports is a taxonomy of privacy in which he acknowledges the idea that not every privacy issue has one thing in common with another, but rather that they all share some similar characteristics but not necessarily all characteristics, analogous to Wittgenstein's notion of family resemblances.[96] Hildebrandt considers this viewpoint of privacy seen in a 'dynamic

87 Schwartz *Vanderbilt Law Review* 52/6, p. 1655. See also Feinberg *Notre Dame Law Review* 58/3, p. 445–492 and Cooke *Philosophy & Social Criticism* 25/1, p. 23–53, Henkin *Columbia Law Review* 74/8, p. 1410–1433, Kupfer *American Philosophical Quarterly* 24/1, p. 81–89.

88 Also in Schwartz *Vanderbilt Law Review* 52/6, p. 1656.

89 See Božovič 1995.

90 Translated title. The original was: *Surveiller et punir: Naissance de la prison*. Foucault 1977.

91 Foucault 1977, p. 35.

92 Foucault 1977, p. 43.

93 Solove 2009, p. 108, Richards/Sarat 2014, p. 55–56. See also The FDR Group 2013, p. 6.

94 See in general on the value of privacy Cohen *Harvard Law Review* 126/7, p. 1904–1933 See also the edited volume by Schoeman 2007.

95 Criticism on the theory can be found in Rubenfeld *Harvard Law Review* 102/4, p. 750 *et seq.*

96 Solove 2009, p. 42–44. Wittgenstein 2009, p. 67.

sense'.[97] We can attain a better understanding of privacy by setting aside the idea that we must find an essence of privacy, but rather we should look at it dynamically.[98]

According to Solove we should attempt to understand the 'complicated network of similarities overlapping and criss-crossing,'[99] by focussing more specifically on the 'various forms of privacy and recognize their similarities and differences'.[100] This taxonomy focuses on the problems privacy encounters 'rather than on what constitutes a private matter or activity'.[101]

Solove groups 'harmful activities' into four basic groups:[102] firstly, information collection, which entails both the gathering of information by way of surveillance and interrogation. Secondly, information processing, which is the use, storage, and manipulation of data that has already been collected, and contains matters such as aggregation, identification, insecurity, secondary use of the data, and exclusion by not being informed about how that data is used or exerting any influence over how it is used. Thirdly, information dissemination deals with issues concerning spreading the information and raises problems such as breach of confidentiality, (public) disclosure, exposure, increased accessibility, blackmail, appropriation, and distortion; and fourth and finally, invasions, which do not necessarily involve information. Invasions can encompass both intrusion and decisional interference, *i.e.* governmental interference concerning decisions made by people concerning certain matters in their life, such as whether or not to use contraceptives.[103]

When taken in the context of the publicity of property rights by way of registration, many, although not all, of these privacy harms may be incurred. For instance, at an information collection level, we may already question the amount of information to be deposited by any person registering a property under the guise of it being 'required' for property law purposes. The more obvious examples however of possible tension between publicity and privacy can be found in the processing of the information after its collection and the dissemination. These will all be discussed individually in Chapters 6-8.

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97 Hildebrandt likens the notion of Wittgenstein's family resemblances as one evidence of understanding 'privacy in a dynamic sense'. She then dismisses it because the 'concept of privacy simply refers to both more and less than each of these concepts; the challenge is to taste and probe the complex network of relations between these terms to find out how and in which cases and contexts they are related to what we call privacy.' Hildebrandt/Claes, Duff & Gutwirth 2006, p. 3. See also Gerety *Harvard Civil Rights-Civil Liberties Law Review* 12/2, p. 235 ftnt. 12. Karas *American University Law Review* 52/2, p. 428.

98 Hildebrandt/Claes, Duff & Gutwirth 2006, p. 3.

99 'Und das Ergebnis dieser Betrachtung lautet nun: Wir sehen ein kom-pliziertes Netz von Ähnlichkeiten, die einander übergreifen und kreuzen. Ähnlichkeiten im Großen und Kleinen. 67. Ich kann diese Ähnlichkeiten nicht besser charakterisieren, als durch das Wort "Familienähnlichkeiten";' Wittgenstein 2009, p. 66–67.

100 Solove 2009, p. 44.

101 Solove 2009, p. 102, this is in a way similar to what Prosser has done in 1960 with his four categories of privacy problems, however this is a more contemporary attempt.

102 Solove 2009, p. 103.

103 Solove 2009, p. 166, also making reference to case law of the US Supreme Court in *Whalen* v. *Roe* 429 U.S. 589 (1977), where the Court stated that 'The Court recognizes that an individual's "interest in avoiding disclosure of personal matters" is an aspect of the right of privacy'. Brennan in his concurring opinion.

4.7 Privacy in Context

Nissenbaum puts forth a compelling argument that privacy should be looked at in context.[104] It is a right to an *appropriate flow* of personal information. According to her, '[w]hat people care most about is not simply restricting the flow of information but ensuring that it flows *appropriately*'.[105] This is the starting point of her contextual privacy theory in which contextual integrity, *i.e.* the acceptance of a certain level of privacy (or lack thereof), is assessed or determined based on the specific context at issue. Nissenbaum sees privacy as a 'right to *context-appropriate* flows' of information.[106] The expectations of what is considered 'appropriate' are called 'context-relative informational norms'.

4.7.1 Context-relative informational norm: Four Parameters

Context-relative informational norms are those norms associated with the flow of personal information in general and are called informational norms when they are context-specific.[107] They preserve the integrity of the social contexts in which we live our lives and facilitate and further the end, purpose, and values surrounding the orientation of these contexts.[108] These informational norms, within a *context*, regulate the flow of a certain *type* of information concerning a data-subject from one social *actor* to another according to certain *transmission principles*.[109] This entails that these informational norms have four key parameters, as Nissenbaum puts forth.

104 Although she is certainly not the only one, see also Post *California Law Review* 77/5, p. 981. Rosen uses context, but in relation to being 'judged out of context', and therefore it seems akin to, but it is not necessarily in line with contextual integrity, Rosen 2000, p. 4. Solove is sceptical of such an approach, while agreeing that the context is necessary to balance contrasting values, but a theory of privacy, according to him, must do more than appeal to context; it should also provide 'sufficient direction for making policymaking or legal decision' which 'depend upon making generalizations'. He states that generalisation is required which he finds lacking in the contextual integrity theory. Solove 2009, p. 48–49. Compare with the approach of the GDPR and the Data Protection Directive, which are general instruments, and which make use of open norms, directed at contexts, and as such provide more guidance for policy and lawmakers. See extensively Chapter 5.

105 Nissenbaum 2010, p. 2. See also, Solove stating 'I suggest that privacy must be understood as an expectation to a limit on the degree of accessibility of information.' Solove *Minnesota Law Review* 86/6, p. 1173.

106 Nissenbaum 2010, p. 187. See to some extent also Rosen 2000, p. 8, specifically talking about context in relation to aggregation, see section 5.2.2.

107 See to some extent also the manner in which Hildebrandt 'invites contextual precision instead of reductive generalisation' with regard to the conceptualisation of privacy, Hildebrandt/Hildebrandt & Gutwirth 2008, p. 312.

108 Nissenbaum 2010, p. 186.

109 Nissenbaum 2010, p. 141.

Contexts

First, we will address contexts. For this idea, Nissenbaum relies on philosophy and sociology theory in which the 'robust intuition' exists that individuals engage with one another not simply as two (or more) individuals, but they (as social actors) do so in certain capacities (social roles), within different social structures.[110] Within each of these different social structures, or contexts, there is a different expectation of privacy. This expectation is what Nissenbaum reflected on to be what we consider to be an 'appropriate flow'. Contexts are therefore, according to her, 'structured social settings characterised by canonical activities, roles, relationships, power structures, norms (or rules), and internal values (goals, ends, purposes).'[111]

Actors

The second key parameter of context-relative informational norms are the actors. These are the parties involved in the particular context. In terms of informational privacy, they can generally be further subdivided into senders, recipients, and subjects of information.[112] In light of the publicity of property rights and registration thereof, we can think of the subject as being the person registered as the owner or right holder in the registry, a sender of the information here can be the registrar, and the information recipient any person seeking access to the information, for example a credit facilitator or notary.[113] Specifying the roles these actors play, *i.e.* in which capacity they seek access for whatever reason, is *crucial* to establishing the informational norm.[114] In doing so, the framework of contextual integrity, as Nissenbaum describes it, provides 'a more expressive medium for highlighting variables that are relevant to privacy.' It is the specific social role that one plays, and the variables in actors, that can shift the dynamic of the situation immediately. A study on the preferences for sharing information[115] showed that people have different comfort levels of sharing information with a particular person based on their social relationship with that person.[116] From the results of the study, the researchers made up

110 Nissenbaum 2010, p. 130. See also the work of Martin *American Journal of Sociology* 109/1, p. 1–49 on field theory, which relies heavily again on Pierre Bourdieu's work in this area. Here 'social fields are differentiated, structured social systems in which individuals are defined by their position in the field.' Nissenbaum 2010, p. 130. Nissenbaum refers to these social structures as 'contexts' but other sociologists refer to this as 'fields', whereas others give these the term 'institutions', see DiMaggio & Powell *American Sociological Review* 48/2, p. 147–160.

111 Nissenbaum 2010, p. 132. See on the importance of notions of privacy shifting between cultures, Altman *Journal of Social Issues* 33/3, p. 66–84, Whitman *The Yale Law Journal* 113/6, p. 1151–1222 to some extent also see: Schwartz & Solove *California Law Review* 102/4, p. 877–916, Solove 2009, p. 183–187.

112 Nissenbaum 2010, p. 141.

113 These are only examples; there are many different actors in the context of registration of publicity rights.

114 Nissenbaum 2010, p. 141.

115 See for a similar study where the focus was on the type of information where the actor did not change. See in particular the figure on Leon et al. 2013, p. 6. which shows the reluctance to share an address with and have it stored by an advertising company for 30 days.

116 Olson et al. 2005, p. 1985–1988.

clusters of people that were treated similarly, with regard to information sharing, such as close relatives, and work-related people were grouped together. The spouse was all alone in its own cluster and a competitor was treated roughly the same as a salesperson.[117]

One might be willing to share one's health issues with a physician, although that same person might be very hesitant with regard to sharing the same information with the physician's receptionist when making the appointment or an assembly of doctors in training that have asked to be present during the consultation. We might be very accepting of sharing our tax information with the government, but it seems wholly inappropriate that a stranger would call and ask for that same information. Thus, as Nissenbaum states, 'when we mind that information about us is shared, we mind not simply that it is being shared but that is shared in the wrong ways and with inappropriate others.'[118] Inappropriate others here refer to the various actors, and who they might be; the inappropriate ways refer to the next key parameter in contextual informational norms, the transmission principles.

Transmission principles

Transmission principles are the specific requisites by which information ought to, or ought not to, be transferred from one actor to another within a specific context.[119] For instance, a secret shared with a friend is shared under the condition of confidentiality and the sharing of that information with another would break the confidentiality and consequently the specific transmission principle. This ties in with the problems that secondary use poses for informational privacy.[120] Secondary uses of information pose a threat to privacy, as the data is used for other purposes unrelated to the purpose of its first collection. As an example of this, a phone number is collected to have the contact details for the delivery of a package but the information is then sold on to a telemarketer and used for another purpose.[121] In particular, secondary uses are problematic if they occur without the consent of the data-subject. Other instances of transmission principles may include reciprocity (if you share the name of your crush, I will share the name of mine), entitlement to the knowledge of the information, being mandated or compelled to share information, or a need to know the information.[122] Furthermore, these transmission principles might require consent, notice, or both. They may include that the information may or may not be bought, leased, licensed, sold, or even bartered etc.[123]

117 See in particular Figure 1, Olson et al. 2005, p. 1985–1988.

118 Nissenbaum 2010, p. 142.

119 Nissenbaum 2010, p. 145.

120 See on secondary uses Solove 2009, p. 131 *et seq*. For more on secondary use see section 5.6.7.3.

121 Compare with section 5.6.7.3. As such, it is closely related to 'Actors' as described above.

122 Nissenbaum 2010, p. 145. Compare with section 6.3.2 where Overkleeft-Verburg notes the importance of the fact that the information in the land registry is provided by the registrered person because it is legally obliged to provide the information.

123 Nissenbaum 2010, p. 145.

Attributes of the information

Attributes of information types make up the last key parameter of informational norms. Here we deal with the content of the information itself. Not *about* whom, shared under what *conditions*, but *what* about them. What does the information concern: physical well-being, financial status, address, name, credit card number, last embarrassing moment, clothing faux-pas, or social security number? If the transmission principles remain the same and the actors do not change, what type of information is then appropriate to be shared between the actors. This relates to the type, nature, or attribute of the information.

As information can be infinite, categorisation as to the type of information might be useful. For example, distinguishing information along the lines of the level intimacy or sensitivity may be useful,[124] but it cannot be the defining feature of an 'attribute'. Nissenbaum contends that 'it is not simply that one discusses intimate matters with friends and impersonal matters with, say, co-workers, because in many societies it is inappropriate to discuss salaries and financial standing with close friends but appropriate to do so with one's boss and one's bankers.'[125] Distinguishing the information along the lines of intimacy or sensitivity therefore does not suffice, because it negates the importance of the context, the actors involved and the manner in which the information is shared.

A combination of parameters

The foregoing four key parameters all work in unison and influence one another. If a context is changed but the actors remain the same, as does the type of information, then the transmission principles might be altered due to a change in context. The transmission principles might also need to be changed when the actors differ, but the context remains the same as well as the information. Finally, a difference in the type of information also requires a change in transmission principles and with it the informational norm. Consequently, only when they are taken together can the parameters, each with their own subset of divisions and characteristics, make an informational norm that serves as a benchmark for privacy.[126]

4.8 Conclusion

When looking at the foregoing brief overview of different ways of thinking about privacy, we can draw some tentative conclusions. Privacy, as a concept and as a right, protects the

124 Such as, what the Data Protection Directive describes under the heading of the special category of personal data, such as personal data relating to race, ethnic origins, political preference, trade-union membership etc. See Article 8 Data Protection Directive, section 5.6.4. the Data Protection Directive triggers more stringent transmission principles as soon as the information is part of the special category of personal data.

125 Nissenbaum 2010, p. 144.

126 Nissenbaum 2010, p. 140, in terms of informational norms being a benchmark for privacy.

private sphere not only in the physical sense, *i.e.* protection against someone taking a photograph without consent or, in the extreme, stalking, but it also includes the protection of information regarding the individual. This subset of privacy is referred to as 'informational privacy' in the United States, and the protection of personal data in the European context.

This acceptance of privacy (rights) in information is not a new concept, but it has had strong impetus from the development of new technologies, from the telephone, to instant photography, the computer, computer networks, and the internet. Technology has played a pivotal role in understanding and giving shape to privacy. As Regan notes, while it was possible to invade privacy 'before a particular technology was used, debate about technology and privacy inevitably revisited the question about the importance of technology.' Was the technology the cause of the privacy invasion or did it facilitate and, as such, exacerbate the already existing threats to privacy? Or, in a more technology neutral way, did the technology provide a way in which privacy could be protected or invaded depending on who was pushing the buttons?[127]

The first modern conception of privacy, as provided by Warren and Brandeis, was devised because of the development of the telephone, microphone, Dictaphone, and the instant camera.[128] These technologies allowed for the invasion of privacy in a manner which would not fall under the protection of hitherto existing law(s).[129] Their idea of a 'right to be let alone' sought to provide such a legal basis. As such, it extended the scope of what was to be understood with privacy and therefore also its content and the right to privacy or the right to be let alone. This idea of protecting privacy by way of tort law was later taken up by Prosser with his privacy torts.[130] While formulated in broad terms, the protection of privacy was still linked to the specific technology. Not because it explicitly mentioned the technology, which it did not, rather because this right and the protection by these torts were devised in an era in which large scale information gathering and processing was done by hand.[131] It would not provide adequate protection against the possible threats the mainframe computer could provide, where an individual is 'let alone' but still has his privacy invaded.

The theory of privacy as control attempted to provide an answer to the privacy risks associated with these new technologies. Still influential, this theoretical underpinning of privacy focusses on the power of the individual about whom the information is collected, processed and disclosed. As will be shown in Chapter 5, this forms the basis of the consent requirement and the data subject's rights to check the accuracy of the information

127 Regan 1995, p. 10–11.
128 See section 4.2.
129 Protection against physical intrusion or unwarranted searches would not yield any results in this case.
130 Prosser *California Law Review* 48/3, p. 383–423.
131 Although arguably this was no longer the case when Prosser wrote his article.

collected about him or her, as well as his or her other rights to exercise control over their personal data prevalent in the European legislative framework.

Nissenbaum's theory of contextual integrity does not focus on the individual's rights but rather takes a broader view. This theory emphasises the importance of the context in which the information is shared about a person. This may be because of consent by the party or it may be because the law demands that such information be shared with that other party (or actor in Nissenbaum's theory).[132] The (social) setting in which the information is shared also influences the appropriateness of the information flow. However, not only the setting matters, the actors involved, the conditions under which the information is shared (*i.e.* transmission principles), and the nature of the information itself (name, social security number, income, address etc.) are also relevant. Only after looking closely at these four parameters and their interplay can we assess whether the information flow from one party to another is appropriate. As will be shown in the next chapter as well, this focus on the context in which the information is shared is also prevalent in for example the case law of the European Court of Human Rights.[133]

132 See section 4.7.1.
133 See section 5.5.2.

5 Data Protection

5.1 Introduction

Whereas the previous chapter focused on the development of informational privacy and privacy theories, this chapter looks at how informational privacy is given shape in specific rules and regulations. It provides the legal framework for the protection of privacy in information. This legal framework comprises three components. The first component concerns the protection of the right to privacy, and the protection of personal data, as a human right[1] in international and European treaties and the instruments derived from those treaties. This human rights' component is supplemented by the second component comprising of specific regulation in the EU contained in the Data Protection Directive, which is to be replaced by the General Data Protection Regulation on 25 May 2018. The third and final component concerns the national legal framework for the protection of personal data.[2]

The structure of the chapter is therefore as follows. Before discussing the content of the legal framework, the technological challenges posed to data protection are described in section 5.2. This brief overview is followed by contrasting briefly the approach of the European Union to that of the United States to legislating data protection in section 5.3. This contrast helps to understand the approach chosen by the European institutions, one that is all-encompassing, rather than sectoral. Furthermore, one final sidestep is taken. The discussion also touches upon non-binding instruments, such as the OECD Guidelines addressing data protection (section 5.4) and the Universal Declaration of Human Rights addressing the right to respect for private life (section 5.5). This is done because these instruments were at the forefront of privacy protection and data protection and, as such, heavily influenced the legally binding instruments that followed.

While some of the older human rights instruments, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights do not include data protection, they do make mention of the broader right to privacy. Since especially the Universal Declaration served as an inspiration for the later European Convention on Human Rights, which was the basis for Convention 108, the first instrument dealing specifically with data protection, they are also discussed briefly in section 5.5.

The legal framework of processing personal data as laid down in the Data Protection Directive is discussed in section 5.6. The discussion of this framework provides the necessary general introduction into data protection law within the EU and the three legal

1 See below, the fundamental right to the protection of personal data flows from the EU Charter and not explicitly from the international treaties.

2 This is discussed in the respective chapters concerning the Netherlands, England & Wales, and Germany.

systems under review in this study, after which a closer look at the different access regimes to information in the land registries can be studied in Chapters 6-8.

5.2 Technological challenges posed to data protection

As Schwartz and Solove stated about (informational) privacy: '[f]ew areas of law are more closely intertwined with our world of rapid technological innovation.'[3]

Technological advances have not only made it easier but also more profitable to locate and access information, to link information, and to create large aggregated databases that can create digital profiles of people which are then sold by data brokers to interested parties, from both the public and private sector. The technologies that encroach upon personal data protection can also be wielded to protect personal data in databases by creating robust de-identification or anonymisation techniques. The way in which the advances in technology have impacted informational privacy is discussed in the following sections.

5.2.1 Increased availability of information

Personal data can have many different sources. An individual may for instance offer up the information themselves when asked or by sharing personal information on a publicly available social media profile. Personal information may also stem from sources surrounding the individual. For instance, family, friends, or foe, can offer up information about an individual. Public authorities also have a wealth of information concerning an individual in their own (separate) databases, which they start to collect from the first week after birth, by issuing a birth certificate as a person's first registration, all the way to their death, and a lot in between (such as personal data pertaining to tax records, house purchases, benefits, education, marital status). Private companies have also kept records of visitors, purchases, loans, comments, searches made by individuals, and the like.

What separates the recording of information concerning individuals today from how it has been done decades or centuries earlier is the increase in *availability* of this information and the ways in which the information can translate into wealth, not (only) for the data subject, but especially for those parties that process the data. Former EU Consumer Commissioner, Meglena Kuneva, was not far off when she stated in 2009 that 'personal data is the new oil of the internet and currency of the digital market'.[4]

3 Solove & Schwartz 2011, p. 2. See also Tene *International Data Privacy Law* 1/1, p. 15. Mayer-Schönberger/ Agre & Rotenberg 1997, p. 219–241. DeVries 2003, p. 283. 'digital technology has drastically changed the privacy landscape', Roessler/Philips, Honig & Dryzek 2006, p. 695. Floridi calls it one of the most 'obvious and pressing issues in our society'. Floridi 2014, p. 115.

4 March 2009, See Roosendaal 2013, p. 5.

Availability of information can mean different things. Technology has influenced not only the quantity of information that may be collected concerning an individual, but also the way in which the information is made 'ready for use'.[5]

Where the paper format takes up tremendous amounts of physical space, the more extensive reports such as court documents or property deeds or other types of (public) records become, the sheer volume alone of the documentation becomes a topic worth discussing. Keeping paper documentation for centuries on end, simply takes up too much space. Therefore, the destruction of paper documents has not been uncommon. What technological developments did in this area is clear: the digitisation of paper documents enables an increase of documents that may be retained; furthermore, it negates the necessity for large storage facilities and the destruction of documents due to a lack of such storage facilities.[6] This has, furthermore, made the collection of information more valuable, as the information can, in principle,[7] be categorised in any way the processor of the information wants.[8] Digital documentation, however, is also subject to aging technology. Storing all files on floppy discs, or microfilm, might have sounded like a good idea 30 years ago, but this is not the case these days.[9]

The *access* to information by others, other than the entity collecting the personal data, has also dramatically changed due to the digitisation of information in databases, which were subsequently connected to a mainframe computer and later on the internet. Here the example of public records is telling. Public records are (often governmental) records which are accessible to the public. Among this type of records, many jurisdictions also include property registers. Until relatively recently, personal information in public records was still rather private. The accessibility of information in the public records was limited or at least difficult.[10] Furthermore, even if a large amount of personal information was available, it was scattered in different places and databases. It was the proverbial needle in a haystack;[11] information was hidden in 'practical obscurity'.[12] Whoever was

5 See on this also Westin/Solove 2015, p. 176–177.

6 See on this also Westin who stated that 'the inevitable result [of the use of 'giant computer'] is that the investigator acquires two or three times as much personal information from respondents as was ever collected before because of the physical or cost limits of acquisition.' Westin/Solove 2015, p. 176.

7 Disregarding software limitations.

8 This is of particular interest for discrimination purposes, sans negative connotation.

9 Floridi makes a point of noting that 'ICTs have a kind of forgetful memory. They become quickly obsolete, they are volatile, and they are rerecordable. Old digital documents may no longer be usable because the corresponding technology, for example floppy drives or old processing software, is no longer available'. Floridi 2014, p. 17–18.

10 See for property records De Jong, Rietdijk & Pluijmers 1997, p. 225. 'In such a situation it is easier to maintain to a principle of full publicity, because the downsides of such a system only were felt in a singular case' See also Nissenbaum 2010, p. 218.

11 Solove 2004, p. 143.

12 See on the use of 'practical obscurity' also *Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749 (1989) at 762, 780. This is no longer an accurate way to describe government agencies and court's gathering and holding of data, state Larson and Belmas: Larson & Belmas *South Carolina Law Review* 58/4, p. 993.

willing to spend the time and money to go to the local offices of the (governmental) agencies to queue, or write up a request for information, or a little later pick up the phone, or a combination of these, would be able to find out a great deal of information about another person, however, he or she would have to know where to look. Compare this with the modern way of accessing certain land registries.[13] For certain legal systems, the same search can now be done from the comfort of one's own home or office within the time-span of a couple of minutes.[14]

It is clear that the access to public records has been affected by technological advances. Access to these types of records is no longer geographically restricted,[15] nor financially unattainable or time consuming. The increased availability of information stemming from individuals themselves, or those near to them, by virtue of disclosure on public social media, as well as the increased accessibility of information from public records, and the technological means to combine these sources of information, and make them ready for a vast number of uses, has created a multi-billion-Euro industry of personal data brokerage and the creation of 'digital profiles' of individuals.[16]

Furthermore, the expansion of access to personal data in public records, has led to policy questions surrounding the desirability of such an expansion, as well as the development of a means to protect personal data without limiting the flow of information.[17] The following sections will deal with the potential (realised or not) effects that technological advances have on the further processing – linking and aggregating – of personal data.

5.2.2 Interoperability and aggregation

Information breeds more information. By way of deduction from two separate sets of information, it is sometimes possible to gain new information by way of linking the two together. For instance, if your friend Mike told you that there is a girl he has had a crush on for the past month, but he does not yet reveal her name to you, but she has just told him that she is having a baby with another man, and the next day your other friend Gaby tells you that when she told Mike of her pregnancy the other day he all of a sudden turned grey and excused himself, you can deduce that Gaby was the girl that Mike had a

13 See also Overkleeft-Verburg/Zevenbergen & De Jong 1993, p. 31.

14 See extensively on this Chapter 6.

15 Byrne *Legal Reference Services Quarterly* 29/1, p. 4. See the brief discussion between De Jong, who sees this as reason for a reframing of the issue, and Besemer who states that the centralisation actually increases the threshold for getting access, and further noting that you simply cannot stop technological developments. This means the question should be: how easy do you want to make access? In: Besemer/Zevenbergen & De Jong 1993, p. 37.

16 See extensively on digital profiles; Solove 2004 and the resulting profiling that can ensue, the edited volume Hildebrandt & Gutwirth 2008, Roosendaal 2011, p. 125–130 Zuiderveen Borgesius 2015.

17 For the particular application in terms of land recordation see Chapters 6-8.

crush on. The more information there is, the more can be inferred from it. The gathering of information concerning a person is also referred to as 'aggregation'.[18]

Where aggregation relates to the product, the gathering of personal information, interoperability is concerned with the method. Interoperability comes into play when linking not just the pieces of information but rather linking the information systems in which the information is stored.[19] The data protection issues that may arise from interoperability are linked to the nature of interoperable systems and the fact that they have more points of (open) access to data.[20] These points of access 'render systems vulnerable for bad actors'. Interoperability itself here is not the issue,[21] rather the exploitation of security flaws and inadequate privacy controls.[22] This is a consequence of what interoperability makes possible, Palfrey and Gasser argue.[23] A perfectly interoperable system is possible, without anyone's privacy being violated at all, and in some instances it might even be possible that privacy-enhancing techniques are used resulting in an even higher level of protection.[24] However, Palfrey and Gasser also state that 'in practice, that is not usually the case'.[25] They continue that 'it is a foregone conclusion that we will have less privacy and security in a highly interoperable world. But we need to be vigilant about how [interoperability] is introduced, in what degrees, and *by whom*, in order to ensure that we do not give up more than we gain as we progress'.[26]

The 'by whom' here is interesting. When they elaborate further on what they consider to be the 'largest problem' with interoperability and privacy, Palfrey and Gasser mention specifically the data brokers that link personal (they use: consumer) data without asking anyone for permisison.[27] They consider that these large aggregation firms do not wish to

18 Kuhn 2007, Oboler, Welsh & Cruz *First Monday* 17/7, p. 1–14, National Research Council 2007, Schwartz *Wisconsin Law Review* 2000/4, p. 743–788, Solove *Minnesota Law Review* 86/6, p. 1137–1209.

19 See also the earlier discussion on interoperability and its different facets, also in relation to an increased scope of publicity, section 2.8.2.

20 Palfrey & Gasser 2012, p. 75.

21 'Interoperability does not automatically make systems less secure.' Palfrey & Gasser 2012, p. 77.

22 Palfrey & Gasser 2012, p. 75–76. See in this respect also the CJEU in *Manni* where the insertion of article 17*bis* to Directive 2009/101/EU was discussed. This article stated that the Data Protection Directive was also applicable in the context of companies registers set up under Directive 2009/101/EU. While the article only had declatory effect, the inclusion was deemed useful as 'the European Commission stated at the hearing, the EU legislature considered it useful to recall that fact in the context of the legislative changes introduced by Directive 2012/17 and aimed at ensuring interoperability of registers of the Member States, since those changes suggested an increase in the intensity of the processing of personal data.' CJEU 9 March 2017, ECLI:EU:C:2017:197, C-398/15 (*Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni*) at 36.

23 Palfrey & Gasser 2012, p. 77–81.

24 Compare this with the idea of transmission principles which seek to facilitate contextual integrity, see section 4.7. Where there is an extension of the number and type of actors that have access to the information, the transmission principles, the conditions upon which such information may be shared may change as well.

25 Palfrey & Gasser 2012, p. 81.

26 Palfrey & Gasser 2012, p. 86, emphasis added.

27 Palfrey & Gasser 2012, p. 86.

design their systems to protect consumers, but rather have 'other drivers in mind'.[28] For interoperability here to have the least possible negative effect on privacy, the fourth layer of interoperability should be employed. The law can provide 'reasonable rules' against the backdrop of which 'companies can and should design interoperable systems that do not create these [privacy and security] problems in the first place'.[29] Such rules within Europe are provided by the data protection legislative framework.[30]

However harmless the individual pieces of information are, there is an invisible threshold at which point the totality of the individual pieces of information presents a problem.[31] Consolidating personal data in aggregate can 'begin to paint a portrait of a person's life', a 'digital biography' or 'digital profile'.[32]

Slowly but surely, the idea that aggregation itself can pose a threat to privacy has also trickled down to the Courts in the various jurisdictions. In the United States, for example, the Supreme Court stated in *United States Department of Justice v. Reporters Committee for Freedom of the Press* that:[33]

> [T]he issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information. Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.

In the EU, the Court of Justice, in *Google Spain v. AEPD*, explained that a search engine might:[34]

> affect significantly the fundamental rights to privacy and to the protection of personal data when the search by means of that engine is carried out on the basis of an individual's name, since that processing enables any internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet — information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have

28 See more on data brokers section 5.2.3. Palfrey & Gasser 2012, p. 87.
29 Palfrey & Gasser 2012, p. 88.
30 See extensively sections 5.5 and 5.6.
31 See in similar vein: Solove *Minnesota Law Review* 86/6, p. 1140.
32 See extensively on this topic of 'digital profiles' and 'digital persons/personae': Roosendaal 2013 Solove 2004.
33 *Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749 (1989) at 764.
34 CJEU 13 May 2014, ECLI:EU:C:2014:317, C-131/12 (*Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González*) at 80.

> been only with great difficulty — and thereby to establish a more or less detailed profile of him.

This idea of a 'more or less detailed profile' of a particular person was at the heart of Solove's book The Digital Person, in which he explained how businesses and governments progressively share more personal information, resulting in digital dossiers about nearly every individual, concerning a vast amount of information about that person.[35]

The information ranges from addresses, your credit rating, property ownership information, outstanding debts, medical history, to which shampoo you buy the most often, and who your favourite author is, based on recent purchases. The problem with this is not so much that it is terrible that some company knows that you love *Andrelon*'s Curly Hair Shampoo, rather, it is the whole of the information combined, aggregated together, that poses a threat.[36] These bits of information, even if all collected by the same person or company, do not paint a full picture of a person.

It is a mere sampling of what you do with your time and money; it is you as a digital person, *in part*.[37] To a certain extent, the knowledge collected about a person helps predict their behaviour, such as their shopping preferences and, indeed, whole businesses have centred their business around this possibility.[38] Yet, not all human behaviour can be explained by some of their past actions or particular information about them. As Cohen puts it:[39]

> [s]ome relevant information is inherently incapable of measurement or prediction. Human motivation is internal, partly emotional, and often adventitious. The question is whether systematically ignoring this dimension of human behaviour, and human potential, produces policy consequences that we would rather avoid.

The problem here is one of standardisation. The 'digital dossier', or 'digital biography' of a person that exists online and in (offline) databases is a compromise of what the information we have shared (voluntarily or involuntarily), and inferences are drawn from this information, based upon which people are placed in categories.

In conclusion, from purchasing several books on pregnancy, a couple of magazines on gardening, some gardening gloves, and browsing different baby cots for outside, one might infer that I am pregnant and have a garden. Based on this information, combined

35 Solove 2004, p. 2.
36 Solove *Minnesota Law Review* 86/6, p. 1140, 1180 Solove 2009, p. 146.
37 Solove 2004, p. 45.
38 See on targeted advertising: Zuiderveen Borgesius 2015.
39 Cohen *Stanford Law Review* 52/5, p. 1405.

with my age and my inferred marital status, I might be put in a standardised group of 'thirty-something single mothers', 'people with a garden', 'women in their 30's with [X] amount spending capital',[40] and 'women with green fingers'.

This standardisation is, as Solove calls it, *reductive*, in the sense that it reduces people to categories,[41] which makes it easier to target people based on their (supposed) values, habits, and lifestyle.[42] It can sometimes also be discriminatory[43] or incomplete.[44] This is not limited to private companies, and it is not solely used for targeted advertising; governments also collect all sorts of information on their citizens and visitors,[45] in some instances to see whether they could pose a threat for national security or whether they perhaps are flagged for a tax audit, or are eligible for a particular benefit.

On the one hand, the reductiveness of the information can be overcome by collecting more information, which would make predictions more accurate, but it will not suffice to overcome the idea that the information gathered will never be enough to overcome what Cohen referred to earlier as the other dimension of human behaviour in which motivation is fed internally, partly based on emotions and often adventitious. Moreover, diminishing the reductiveness of the information available by increasing the amount of information *collected* appears counter-intuitive.

5.2.3 Role of data brokers

Data brokers, sometimes referred to as information brokers,[46] or data aggregators,[47] are commercial entities that mine data through the aggregation of public records, combine this information with information bought from private records kept by other companies, and merge this with their own information, creating large databases. This vast collection of

40 Particularly if deduced from my credit rating, amount of the mortgage, income either guessed or calculated.

41 See also Simitis *University of Pennsylvania Law Review* 135/3, p. 719.

42 Solove 2004, p. 46.

43 Which ties in with algorithmic discrimination. For instance, Sweeney's research into a discrepancy in Google ads for Instant Checkmate, a data broker, found that searching Google for people with distinctively black names (in her case the difference between searching for Latanya vs searching for Tanya) was 25% more likely to produce an ad suggesting the person had an arrest record irrespective of whether they did. Sweeney *Communications of the ACM* 56/5, p. 44–54. See also Gandy *Notre Dame Journal of Law, Ethics & Public Policy* 14/2, p. 1099–1101.

44 For more on that see section 5.6.7.4.

45 Barber *Saint Louis University Public Law Review* 25/1, p. 63–121, Byrne *Legal Reference Services Quarterly* 29/1, p. 1–21, Cate *Harvard Civil Rights-Civil Liberties Law Review* 43/2, p. 435–489, Foschio *Communications and the Law* 6/1, p. 14-20, Gellman *Government Information Quarterly* 12/4, p. 391–426, Givens 2002, p. 1–7.

46 For example: Byrne *Legal Reference Services Quarterly* 29/1, p. 6 Givens 2002, p. 6, Nissenbaum 2010, p. 100, Ohm *Southern California Law Review* 88/5, p. 1149, Whittington & Hoofnagle *North Carolina Law Review* 90/5, p. 90.

47 Acquisti, Taylor & Wagman *Journal of Economic Literature* 54/2, p. 473–474, Gomez-Velez *Loyola Law Review* 51/3, p. 437, Kuhn 2007, p. 1.

information pertaining to individuals is then (re-)sold as the aforementioned digital profiles of individuals or classes of individuals to other companies or government agencies. For instance, some employers seeking to hire a particular individual require a 'background check' or a quickly generated summary of whether a person is 'reliable' on their face. For this, they may rely on the services of these data brokers. Other companies who want to increase their advertising yield make use of data brokers to send out targeted advertising via direct mailing lists to potential customers, lists generated by these data brokers.

What is particularly prevalent in the United States in terms of data brokers is their symbiotic relationship with government authorities.[48] Private actors such as data brokers rely, in part, on public records collected (and maintained) by local, national or supranational authorities. These public records are amassed in large private databases where they are combined with information garnered from other sources. If the identifier in these large data sets is an individual, these databases can create 'digital profiles' of people.[49] Such digital profiles are valuable not only to other private actors, such as credit facilitators or advertisers, or employers, but also to state actors.[50] In particular, US law enforcement and the Internal Revenue Service are known to purchase information concerning citizens from these data brokers.[51] The information is even tailored to the government agency's specific needs.[52]

In the United States, the sectoral approach to privacy legislation has shown a weakness here. Because there is no specific legislation dealing with data brokers as a whole, nor the sale of information from a commercial data broker to a government agency in general, certain discrepancies may arise. For example, the flow of information from a government agency to a commercial data broker falls under the scope of the US Privacy Act, yet the reverse is not true. A database of information that originates from a (commercial) data broker does not trigger the legal requirements of the Privacy Act.[53] This means that, while the US government is prohibited from creating mass databases for themselves, there is no such prohibition against private businesses doing so. Combined with allowing

48 Cohen has even described private collection, in the context of commercial surveillance, to enable the state and private actors 'to play a mutually beneficial game of regulatory arbitrage', see Cohen 2015.

49 Again here, the identifier may also be an individual behind an IP address. It need not be linked to a name necessarily. See more extensively on the EU concept of personal data section 5.6.4.

50 'Increasingly, these dossiers of fortified public record information are sold back to government agencies for use in investigating people.' Solove *Minnesota Law Review* 86/6, p. 1140.

51 See extensively on this topic, the result of the FOIA request by EPIC mid-2001 on access to government records regarding companies that sell personal data to the US Government, which was summarised and analysed by Hoofnagle *North Carolina Journal of International Law and Commercial Regulation* 29/4, p. 595–637. See for the documentation itself: http://perma.cc/S3KP-EA4Z.

52 Hoofnagle *North Carolina Journal of International Law and Commercial Regulation* 29/4, p. 611.

53 Paraphrased from Hoofnagle *North Carolina Journal of International Law and Commercial Regulation* 29/4, p. 623.

the US government to purchase information from these businesses,[54] a practical work-around to get the information is created.[55] Referred to as 'dataveillance'.[56]

US Scholars have tried to argue that this practice is still illegitimate as it goes against 'the spirit of the law'. Their counterparts in Europe are not faced with this particular problem, as the European black letter law is clear. This is due to the omnibus approach to data protection legislation, which translates into the scope of the Directive that is in place. The Data Protection Directive applies to both the public and private sector, reducing any discrepancy between them to a minimum.[57] Prior to the framework established by the Data Protection Directive, however, the regulatory framework on national levels resembled the US approach much more, and general exemptions to the application of data protection legislation existed in greater numbers among Member States.[58]

5.2.4 The Dangers of Wrong Information

The former part relied on the idea that the data collected, processed, and disclosed, was accurate. This does not have to be the case.[59]

Take as an example, which serves multiple purposes, the failed project 'Lotus MarketPlace'. In early 1990, an initiative to create a set of CD-ROMs of consumer household data, for direct marketing purposes, including: address, dwelling type, estimated household income, shopping habits, name, marital status, age range, and gender, was shot down due to privacy concerns.[60] This product, Lotus MarketPlace: Households, outraged a great number of people, as it made the aforementioned information available to be purchased by 'legitimate businesses'.[61] Online protests and frequent negative publicity in national and local newspapers resulted in the cancellation of Lotus MarketPlace, making sure it never saw the light of day.[62] One salient detail here, however, is that all this information is currently easily accessible from a wide range of data brokers.

One of the issues with the Lotus MarketPlace, at the time, was its way of handling the data. The data was to be distributed on CD-ROMs, which would not allow for the data recorded there to be modified later. Thus, if a particular data subject would be incorrectly

54 See extensively on this Hoofnagle *North Carolina Journal of International Law and Commercial Regulation* 29/4, p. 623.

55 See also extensively McCain *Public Contract Law Journal* 38/4, p. 935–953.

56 Kuhn 2007, Lynskey *International & Comparative Law Quarterly* 63/3, p. 597, Pasquale 2015, p. 21.

57 Save for some exceptions, such as for law enforcement. See section 5.6.

58 Dutch law, for example, provided for a general exemption to public registries in the application of the data protection.

59 See on this issue also Karst *Law and Contemporary Problems* 31/2, p. 353–359.

60 Even though it had hired renowned privacy expert Alan Westin as a consultant for all of Equifax's (the partner of Lotus) credit services, Gurak 1997, p. 20.

61 Lotus never specified what it considered 'legitimate businesses' who were, according to the company, the only people who, after a 'screening process', would have access to the product. Gurak 1997, p. 21.

62 For an extensive overview of the protests in print and online media, see Gurak 1997.

reflected in the data of Lotus MarketPlace, the only way in which the misspelling of a name or the change in household income, address or in any other area could be remedied was by requesting this to be done at Lotus and Equifax (the partner of Lotus in this project) and hoping that *any and all* businesses would opt for the update-package by Lotus.[63] If they did not, the false personal information would remain.

Here we can note two issues: firstly, a database is copied and distributed, resulting in the circulation of many different (and possibility incorrect) datasets. Secondly, the data subject is unaware of possible mistakes or the existence of the product at all,[64] unless the information is used. Even when the information is used, the inaccuracy of the information might not come up. This is particularly the case with the use of personal data for algorithms to determine search results, credit reports or the like. For example, the use of algorithms upon which the rejection or acceptance of a loan application is based[65] are veritably impenetrable black boxes. As Pasquale notes 'Reputation. Search. Finance. These are the areas in which Big Data looms largest in our lives'.[66] And all of these areas are heavily shrouded in secrecy and opaqueness,[67] leading to a lack of accountability in relation to the algorithms. We do not know how a credit score is calculated,[68] or why someone might be ranked as 'high risk' for a loan application, we can only guess why Facebook shows us the updates of certain friends and obscures those from others, but we cannot be sure.[69] Therefore, attempting to correct any incorrect information about oneself is made almost impossible.

That the consequences of incorrect information being stored concerning an individual can be vast and dire are clear.[70] Data quality principles, as well as the rights awarded to

63 Gurak 1997.

64 See also Acquisti, Taylor & Wagman *Journal of Economic Literature* 54/2, p. 473–474, on unwareness of personal data markets and their information being traded.

65 By Dixon & Gellman 2014, p. 1–90, Jentzsch 2003.

66 Pasquale 2015, p. 5.

67 Companies and institutions fencing off calls for transparency of algorithms with terms such as 'trade-secrecy' and 'national security'.

68 Citron & Pasquale *Washington Law Review* 89/1, p. 1–33.

69 Eslami et al. 2015.

70 Such as in *Boris v Choicepoint Services, Inc*., 249 F.Supp.2d 851 (D.C. W.D Kentucky 2003) in which a woman was denied, on numerous occasions, insurance coverage as she was deemed high risk, based on a credit rating report by ChoicePoint, which was incorrect. Even after numerous attempts to correct the report, it still reflected the incorrect information, even at the time of the trial. Or in *Ewbank v. ChoicePoint* an offer of employment to Mrs. Ewbank was withdrawn after an incorrect report of ChoicePoint suggested she had a conviction for possession of a controlled substance. Even after correcting the mistake in the report, after which it showed no such meniton, the employment offer was still withdrawn, *Ewbank v. Choicepoint Inc*., 551 F. Supp. 2d 563 (D.C. ND Texas 2008). In *Apodaca v. Discover Financial Services*, a woman had difficulty in purchasing a house, as the credit report on her contained information of someone else with a similar, though not identical, name. This other person had filed for bankruptcy, moreover she had several debts past due or discharged in bankruptcy, *Apodaca v. Discover Financial Services*, 417 F.Supp.2d 1220 (D.C. D. New Mexico 2006). See for more instances, *Joiner v. Revco Discount Drug Centers, Inc*., 467 F.Supp.2d 508 (D.C. W.D. North Carolina 2006). See also Algemene Rekenkamer 2014. Also see ECtHR 18 October 2011, 16188/07 (*Khelili v. Switzerland*), section 5.5.2.

data subjects to correct information that is inaccurate, are therefore broadly supported and carried.[71]

5.2.5 *De-identification & re-identification*

The aforementioned influences of technology largely had a negative impact on the protection afforded to the data subject. However, technological advances in cryptography and de-identification techniques or anonymisation techniques have also shown that technology can also *increase* informational privacy. In particular, the de-identification techniques are of interest here, as there is a long-standing discussion on their use and effectiveness.

What de-identification or anonymisation techniques (attempt to) do is find a solution to the issue of a data processor wanting to release a version of its private data with (scientific) guarantees that the data subjects cannot be re-identified, while making sure that the data remains practically useful. For instance, the advantages of sharing health records and treatment details with other health professionals are clear, but the negative impact on patients if they are identified are equally clear.[72]

Anonymisation techniques are hotly debated because the computer techniques that are used to create a means of making personal data anonymous are developed just as fast as the techniques and computing power advances to *re*-identify people.[73] Paul Ohm is a fervent critic of the promises of anonymisation of personal data.[74] He strikes down the promises of anonymisation by three well-known examples where anonymisation could not yield the preferred result,[75] because the anonymised data set could be unlocked by linking this data set with another data set, finding 'pockets of surprising uniqueness' which were not removed by the data administers who released the 'anonymised data-set'.[76] Nevertheless, robust anonymisation techniques are in general (for a while at least) a good way to protect personal data, by stripping it of its personal nature.

71 See sections 5.5.3 and 5.6.7.1.

72 There are several techniques which are more robust to criticism, such as *k*-anonymity or differential privacy, but even these are not seen as the Holy Grail of anoymisation techniques. Bambauer, Muralidhar & Sarathy *Vanderbilt Journal of Entertainment & Technology Law* 16/4, p. 701–755, Chin & Klinefelter *North Carolina Law Review* 90/5, p. 1417–1455. On *k*-anonymity Sweeney *International Journal of Uncertainty, Fuzziness and Knowledge-Based Systems* 10/5, p. 557–570, on differential privacy see Dwork/Bugliesi et al. 2006, p. 1–12.

73 Article 29 Data Protection Working Party 2014.

74 Ohm *UCLA Law Review* 57/6, p. 1701–1777.

75 Narayanan & Shmatikov 2008, Malin, Sweeney & Newton 2003.

76 Ohm *UCLA Law Review* 57/6, p. at 1723 suggesting removing of obvious personally identifiable information would not be sufficient.

5.2.6 *Privacy by design*

The principle of privacy by design entails that privacy and data protection are 'embedded' in information and communication technologies (ICT), already at the planning stage of information-technological procedures and systems. The ICT 'should not only maintain security but also be designed and constructed in a way to avoid or minimize the amount of personal data processed'.[77] As such, it is part of the data minimisation principle already embodied in the Data Protection Directive.[78]

A difficulty with privacy by design is that 'most of the scientific advances did not arise through efforts to develop instruments for invading the privacy of the citizenry'.[79] It is/was not thought about at all. Rather these inventions grew out of research to solve a particular problem, which could be as broad as space travel and communication or medical research. This was noted by Westin in the late 1960s. Whether such an argument would still hold true, in a time where awareness of data protection is much greater, may be questioned.[80]

5.3 Legislating Data Protection: Sectoral vs omnibus approach

In the United States, the approach to legislating privacy has been a sectoral one. For each new instance of a (grave) privacy invasion that was not protected by any specific legislation, new legislation was created, if the issue garnered enough attention in the press.[81] The Video Privacy Protection Act of 1988, which protects video rental records, was directly related to a leak of such records of the then Supreme Court Justice nominee Robert Bork. Judge Bork was asked about privacy on numerous occasions during his confirmation hearing and remained firm in his position that there was no general constitutional right to privacy to be found in US law,[82] only privacy protection conferred by specific legislation. A journalist named Michael Dolan came upon the video rental records of the judge.[83] He published these in an article called 'The Bork Tapes' with the list and analysis thereof, as a 'poke at the judge'.[84] The video rentals list did not expose anything embarrassing. 'If anything, Robert Bork ought to be nominated for Supreme Couch Potato'.[85] Nevertheless, the publication was considered a privacy invasion and within a year the Video Privacy Protection Act of 1988 came to be. It is striking in this case that it sparked

77 Article 29 Data Protection Working Party 2009, p. 44–47.
78 It is however ascribed an independent status. Article 29 Data Protection Working Party 2009, p. 44.
79 Westin/Solove 2015, p. 411.
80 Consider the June 2015 Eurobarometer on Data Protection; European Commission 2015.
81 See extensively on anecdotal accounts of privacy invasions influencing legislation: Regan 1995, p. 202–209.
82 See also Bork 1991, p. 95–100.
83 The video rentals were in his wife's name. Dolan 1987, p. Sept. 25-Oct. 1.
84 He explains at his website: http://www.theamericanporch.com/bork3.htm.
85 Dolan 1987, p. Sept. 25-Oct. 1.

exactly the type of privacy protection that Bork was referring to: a specific act and not protection afforded based on a general constitutional right. Bork was proven right.[86] Another such example of an incident sparking specific privacy legislation is the murder of Rebecca Schaeffer by her stalker, which sparked the Driver's Privacy Protection Act of 1993. The stalker hired a private investigator to find out Ms. Schaeffer's home address, which the private investigator found in the then public records at the Department of Motor Vehicles.[87]

In other instances, it was not a single event that struck a chord with legislators, but rather a vast amount of complaints they received on a range of privacy related matters, such as in the case of Senator Ervin.[88] The thousands of complaints that he received about polygraphs and background checks moved him to convene hearings on activities of federal agencies which in turn led to an advisory committee to be set up by the secretary of the Health, Education and Welfare Department, that led to the very important 'Records, Computers and the Rights of Citizens' reports which established the Fair Information Practices.[89]

Privacy protection in the United States is therefore fragmented within the law. Each sector has its own set of privacy rules and rights, which means that certain lacunae may exist.[90] This is different from the approach taken by the EU and its Member States. There we find the opposite. The European Union's approach has been one of generality, evidenced by the wide scope of its most important legislation: the Data Protection Directive. The material scope of the Data Protection Directive is any processing of personal data, see section 5.6.3.[91] It is not restricted to a particular area. Certain specific legislation still

86 He was not, however, confirmed.

87 What is odd about this piece of legislation is that it still would not prevent the same from occurring again, as licensed private agencies still fall under the 'permissible uses' heading and can still attain the information. See Title 18 U.S. Code § 2721 (b)(8). Although subsection (c) does put restrictions on the resale or redisclosure of the information.

88 Regan 1995, p. 205.

89 Secretary's Advisory Committee On Automated Personal Data Systems 1973. The Principles in short are as follows: (1) There must be no personal data record-keeping systems whose very existence is secret. (2) There must be a way for an individual to find out what information about him is in a record and how it is used. (3) There must be a way for an individual to prevent information about him that was obtained for one purpose from being used or made available for other purposes without his consent. (4) there must be a way for an individual to correct or amend a record of identifiable information about him. (5) Any organisation creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take precautions to prevent misuse of the data. Secretary's Advisory Committee On Automated Personal Data Systems 1973, p. xx, for the full recommendations see p. xxii.

90 For example, the use of data brokers for law enforcement purposes. As there is no general provision, an FBI employee wrote: 'you may use ChoicePoint [a data broker, AB] to your heart's content'. See Hoofnagle *North Carolina Journal of International Law and Commercial Regulation* 29/4, p. 619.

91 There are some exceptions, such as the private use exception. Meaning that the birthday calendar on the toilet is not subject to the Data Protection Directive.

exists however; matters of the State in areas of criminal law for example do not fall under the purview of the Directive and are arranged separately in national legislation.[92]

5.4 OECD Guidelines

The Organisation for Economic Co-operation and Development (OECD) adopted its Guidelines on the Protection of Privacy and Transborder Flows of Personal Data in 1980.[93] The work on these Guidelines had already started eleven years earlier, in 1969.[94] These Guidelines were the first successful international effort of principles governing the processing of data.[95] They were specifically drafted not to constitute general privacy protection principles but rather focus on 'the building-up and use of aggregates of data which are organised for retrieval, decision-making, research, surveys and similar purposes'.[96]

The OECD's interest in setting up these Guidelines came as a response to the fear that the nascent national legislation concerning data protection would create barriers to the free flow of information and, as such, would be capable of limiting growth.[97] The national legislators were indeed thinking about putting up such barriers or had already restricted the export of any data outside of their national borders, in their belief that, as González Fuster states, if they did not do so 'those processing data might be tempted to escape national regulation by surreptitiously transferring data to countries with less stringent protection', the so-called 'data havens'.[98]

González Fuster also shows that, in the discussions within the OECD at the time, there 'was a consensus on the idea that individuals should generally have access to personal data held about them'; there were however diverging views on how this should be put in words.[99] Data protection here suffers from similar growing pains as did the right to privacy.[100] As will become clear in section 5.5.1, there was an agreement on the need for privacy protection in

92 Although this is to be harmonised somewhat with the Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection, or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, which has to be transposed into national law no later than 6 May 2018.

93 OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data.

94 Explanatory Memorandum to OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data 1980, p. 16.

95 See also González Fuster 2014, p. 76.

96 Explanatory Memorandum to OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data 1980, p. 38.

97 Organization For Economic Cooperation And Development 2011, p. 10. Similar concerns were voiced in different terms by the drafters of the Council of Europe Convention 108. See section 5.5.3.

98 González Fuster 2014, p. 77. See also the Preface of the OECD Guidelines. OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data.

99 González Fuster 2014, p. 78.

100 Compare with section 4.1.

the International Covenant on Civil and Political Rights, but writing this down in a legally binding Covenant in clear and certain terms proved difficult.[101] Similar problems occurred here with the OECD Guidelines. Eventually, the OECD managed to come up with its Guidelines, which were acceptable to all that signed them in September 1980. The nature of the Guidelines is broad and attempts to reflect the legislative efforts of the Member countries.[102]

The main part of the OECD Guidelines contains eight Basic Principles outlined in Part Two of the Guidelines.[103] These principles are:

1. A Collection Limitation Principle, which requires limits to the collection of personal data to only those obtained 'by lawful and fair means', preferably with consent;[104]
2. A Data Quality Principle, which means the personal data collected should be relevant to its use and accurate, up to date and complete;[105]
3. A Purpose Specification Principle, that entails the purpose for which the data is collected be specific;[106]
4. A Use Limitation Principle, which means that the personal data collected should only be disclosed or otherwise made available for the purpose it was collected, unless there was consent by the data subject or such disclosure is done by authority of law;[107]
5. A Security Safeguards Principle, which mandates that the personal data be protected by 'reasonable security safeguards';[108]
6. An Openness Principle, which may be considered as a 'prerequisite' for the next principle.[109] The Openness Principle requires there to be a policy at the data controller of what they are doing with the data and how the developments are in that area;[110]
7. An Individual Participation Principle, which is regarded as perhaps one of the most important safeguards,[111] means that the data subject has certain rights to obtain in-

101 See on this 5.5.

102 Explanatory Memorandum to OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, p. 2.

103 They found these principles to be present in much of the national efforts in the area of data protection as well. Explanatory Memorandum to OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, p. 5.

104 Paragraph 7 OECD Guidelines.

105 Paragraph 8 OECD Guidelines. Under this heading already a 'purpose test' may be construed. The next paragraph deals with the specificity of the purpose. See Explanatory Memorandum to OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data 1980, p. 53–54.

106 Paragraph 9 OECD Guidelines.

107 Paragraph 10 OECD Guidelines. 'For instance, it may be provided that data which have been collected for purposes of administrative decision-making may be made available for research, statistics and social planning.' Explanatory Memorandum to OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data 1980, p. 55.

108 Paragraph 11 OECD Guidelines.

109 Explanatory Memorandum to OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data 1980, p. 57.

110 Paragraph 12 OECD Guidelines.

111 Explanatory Memorandum to OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data 1980, p. 58.

formation on whether and if so, what personal data the data controller has of him;[112] and lastly

8. The Accountability Principle, simply meaning that the data controller should be held accountable for his (non)compliance with the other principles.[113]

The basic principles also influenced later developments of data protection and it is evidenced from the Explanatory Memorandum that the OECD Guidelines also took into account the efforts of the Council of Europe's work,[114] in particular the adoption of two Resolutions dealing with privacy of individuals and electronic data banks.[115]

Both the OECD Guidelines and also, as will be clear later, the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108), pay specific attention to the free flow of information. As mentioned above, one of the reasons the OECD Guidelines came to be was to make sure that the free flow information across borders would not be hindered. It should therefore not come as a surprise that, next to the Basic Principles, the Guidelines also devote a number of articles to ensuring that the flow of information is not hindered by national data protectionism.[116] The OECD's objective was to balance the free flow of information and the protection of personal data.[117]

5.5 Fundamental Rights

The development of privacy and data protection as a fundamental right is discussed in the following sections. Similar to the OECD Guidelines with regard to data protection, the non-binding Universal Declaration of Human Rights was at the forefront of privacy protection and, as such, heavily influenced the legally binding instruments that followed. The Universal Declaration of Human Rights specifically protects the right to privacy in Article 12.[118] It does not have a provision for data protection like the EU Charter of

112 Paragraph 13 OECD Guidelines.
113 Paragraph 14 OECD Guidelines.
114 See more extensively section 5.5.3.
115 See extensively 5.5.3.
116 Part Three of the OECD Guidelines, Articles 15-18. See also extensively the deliberations in the Explanatory Memorandum to OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data 1980, p. 4–9.
117 Explanatory Memorandum to OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data 1980, p. 25. In 2013 the OECD updated its Guidelines to include an approach which is grounded in risk management, and include the dimension of 'improved interoperability'. For interoperability, see 5.2.2.
118 Article 12 UDHR states: 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks'.

Fundamental Rights (EU Charter) does.[119] Considering the Universal Declaration was adopted on 10 December 1948, this omission of a fundamental right to data protection is not surprising.[120] The Declaration, however, does not carry with it any *legal* obligations to ensure these freedoms. Its principles and rights, adopted by consensus, did influence the drafting of later instruments that would create such legal effects. For example, the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights, discussed below, drew great inspiration from, and even mirrored, many of the provisions in the Declaration.

5.5.1 International Covenant on Civil and Political Rights (ICCPR)

Until 1953, when the discussions and drafting of the ICCPR were well on their way, there was no provision included on privacy in the ICCPR draft. It was only introduced in the 9th Session of the Commission on Human Rights by the delegation of the Philippines.

On 16 December 1966, the General Assembly of the United Nations adopted the International Covenant on Civil and Political Rights. It would take another ten years to enter into force. The ICCPR echoed in Article 17 ICCPR, although not exactly, the provision on the protection of privacy as mentioned in the UDHR.[121] The difference in wording however did not reflect a difference of opinion as to the principle.[122] Instead, it reflected the concerns of some on whether or not such a general principle, as laid down in the Universal Declaration, could be translated 'into precise legal terms, especially in the form of a brief article of the Covenant to be applicable to all legal systems of the world.'[123] The problem of privacy being too broad and vague, as mentioned earlier, was prevalent here too.[124] This also explains the initial lack of an article on privacy in the earlier ICCPR drafts. However, a group of delegates felt strongly that 'the Covenant should not fail to include an article on these elementary rights of the individual'.[125] Their arguments prevailed and led to the insertion of Article 17 on privacy protection.

The United Nations General Assembly furthermore adopted resolution 45/95 of 14 December 1990 concerning the UN Guidelines for the Regulation of Computerized Personal Data Files. These guidelines mirrored much of the work done by the OECD and the Council of Europe, and it contained three pages which enumerate 'minimum guar-

119 See section 5.5.4. Article 8 EU Charter.
120 Compare the development of privacy in relation to information in Chapter 4 with the Universal Declaration's timing.
121 Article 17 ICCPR states: '1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks'.
122 Report of the Ninth Session of the Commission on Human Rights. E/2447. E/CN.4/689 (1953), p. 67.
123 Report of the Ninth Session of the Commission on Human Rights. E/2447. E/CN.4/689 (1953), p. 67.
124 See section 4.1.
125 Report of the Ninth Session of the Commission on Human Rights. E/2447. E/CN.4/689 (1953), p. 67.

antees that should be provided in national legislations', containing principles of: (1) lawfulness and fairness; (2) accuracy; (3) purpose-specification; (4) interest-person access;[126] (5) non-discrimination;[127] (6) power to make exceptions;[128] (7) principle of security (of data); (8) supervision by a designated authority which has the option of handing out sanctions; (9) protection of transborder data flows;[129] which should be applied to (10) public and private computerised files and to manual files by means of optional extension.[130]

5.5.2 *European Convention for the Protection of Human Rights and Fundamental Freedoms*

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was adopted in Rome on 4 November 1950 and entered into force on 3 September 1953. Currently the Convention has 47 Treaty Parties, including all 28 Member States of the European Union. The European Court of Human Rights (ECtHR) was established with the ECHR and hears cases concerning alleged violations of the ECHR, either by individual application or State application. It should be noted that the ECHR establishes the absolute *minimum* of human rights protection.

The close affinity that exists between many articles of the ECHR and the ICCPR is not present when it concerns article 8 ECHR,[131] due the very late introduction of Article 17 ICCPR.[132] A close relationship between Article 8 ECHR and Article 12 UDHR on the other hand *does* exist. Article 12 was mentioned frequently in the preparatory works on Article 8 ECHR.[133] Also, in earlier drafts, the proposed Article 8 ECHR even referred directly to Article 12 UDHR. There is therefore not a direct but rather a more familial relationship between Article 17 ICCPR on privacy and Article 8 ECHR, as they both draw on Article 12 UDHR.[134]

126 'Everyone who offers proof of identity has the right to know whether information concerning him is being processed and to obtain it in an intelligible form, without undue delay or expense, and to have appropriate rectifications or erasures made in the case of unlawful, unnecessary or inaccurate entries and, when it is being communicated, to be informed of the addressees.' UN Guidelines, pp. 1-2.

127 Sensitive data about the subject which could be used to discriminate based on race, ethnic origin, colour, sex life, political opinions, religious or philosophical beliefs, and membership of an association or trade union, should not be compiled. UN Guidelines, p. 2.

128 In case of national security, public order, public health or morality etc. UN Guidelines, p. 2.

129 Compare with OECD guidelines.

130 See UN Guidelines, pp. 1-3.

131 Secretariat Of The European Commission Of Human Rights 1956, p. 9.

132 See section 5.5.1.

133 Secretariat Of The European Commission Of Human Rights 1956.

134 See also the preamble to the ECHR which reads: 'Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948; Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared'.

Article 8 ECHR

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 8 of the ECHR confers the right to respect for private and family life.[135] At the time of the entry into force of the ECHR, the issue of data protection had not come up yet. Therefore, the focus of the drafters in relation to Article 8 ECHR was directed at privacy and private life in a broader sense, not data protection.[136] It should not be gleaned from the initial omission of data protection being read into Article 8 that the ECHR and the cases that deal with this Article are unimportant. The case law of the European Court of Human Rights (ECtHR) on matters of data protection is extensive.[137]

The ECtHR has explained on numerous occasions that the ECHR is 'a living instrument' 'which must be interpreted in the light of present-day conditions',[138] these present-day conditions include the encroachment on the private life by means not imagined earlier. Thus, from 1978 onward, starting with the *Klass* case[139] the ECtHR has built a body of case law dealing with the protection of personal data.

The case law is clear that protection of personal data falls within the scope of Article 8 ECHR. In *Z* v. *Finland* the ECtHR has stated that 'the protection of personal data (…) is of fundamental importance to a person's enjoyment of his or her right to respect for

135 Article 8 ECHR states: '1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

136 Privacy and private life should not be conflated. As Hildebrandt notes: 'Legally speaking, privacy is not the same as private life, even though the protection of private life is one of the legal tools to protect privacy, *e.g.* Article 8 of the European Convention of Human Rights. To reduce privacy to private life would disregard the public nature of privacy and turn it into a commodity to be traded within the private sphere.' Therefore, Hildebrandt notes that privacy is also protected by other human rights such as 'due process, probation of unlawful detention and inhuman or degrading treatment'. Hildebrandt/Hildebrandt & Gutwirth 2008, p. 311. See on confusing privacy and private also remarks by Westin on the Warren & Brandeis article, Westin/Solove 2015, p. 389.

137 Spanning well over 70 cases.

138 ECtHR 4 February 2005, 46827/99 and 46951/99 (*Mamatkulov and Askarov v. Turkey*) at 121. See extensively on the matter of the ECHR being a 'living instrument': Letsas/Føllesdal, Peters & Ulfstein 2013, p. 106–141.

139 ECtHR 6 September 1978, 5029/71 (*Klass and Others v. Germany*).

private and family life as guaranteed by Article 8 of the Convention'.[140] Moreover, in other cases, the ECtHR has made clear that it considers 'the concept of private life [to extend] to aspects relating to personal identity, such as a person's name or picture',[141] and of other means of personal identification and of linking to a family. Also included in the protection of personal identity in Article 8 ECHR are fingerprints and DNA profiles.[142] Telephone calls from business premises are *prima* facie covered by the notion of 'private life' and 'correspondence',[143] and from that the ECtHR has concluded that it 'follows logically' that this would also extend to e-mails sent from work, as well as the monitoring of personal internet usage.[144] In the context of monitoring actions of an individual using photographic equipment, the recording and 'systematic or permanent nature of the record' might also give rise to considerations under Article 8 ECHR.[145] The ECtHR has also considered on numerous occasions that 'both the storing of information relating to an individual's private life and the release of such information come within the scope of Article 8 § 1'.[146] This includes not only information that is kept private from the outset, but it could also include public information, 'where it is systematically collected and stored in files held by the authorities'.[147] In the case of *M.G.* v. *The United Kingdom*,

140 ECtHR 25 February 1997, 22009/93 (*Z v. Finland*) at 95. In ECtHR 21 June 2011, 30194/09 (*Shimovolos v. Russia*) at 58 the ECtHR implicitly accepted that registration of a name in a 'Surveillance Database' and consequent 'collection of personal data about him by the police' would amount to a consideration under Article 8 ECHR, which suggests that the Court would consider personal data under the remit of Article 8 ECHR. Initially, the ECtHR was hesitant and tried to stay clear of inclusions on a general level of access rights to documents for example, see ECtHR 07 July 1989, 10454/83 (*Gaskin v. The United Kingdom*) at 37.

141 ECtHR 5 October 2010, 420/07 (*Köpke v. Germany*) at 1. Applicability of Article 8; ECtHR 24 June 2004, 59320/00 (*Von Hannover v. Germany*) at 50.

142 See on a case concerning these types of data ECtHR 4 December 2008, 30562/04 and 30566/04 (*S. and Marper v. The United Kingdom*) at 68–75.

143 ECtHR 25 June 1997, 20605/92 (*Halford v. The United Kingdom*) at 44; ECtHR 16 February 2000, 27798/95 (*Amann v. Switzerland*) at 43.

144 ECtHR 3 April 2007, 62617/00 (*Copland v. The United Kingdom*) at 41, ECtHR 12 January 2016, 61496/08 (*Barbulescu v. Romania*), accessing personal messages on a Yahoo Messenger account set up for work purposes.

145 ECtHR 25 September 2001, 44787/98 (*P.G. and J.H. v. The United Kingdom*) at 57, ECtHR 28 January 2003, 44647/98 (*Peck v. The United Kingdom*) at 58–59; ECtHR 17 July 2003, 63737/00 (*Perry v. The United Kingdom*) at 38. Relevant in this context is also whether the individual was targeted or not by the particular monitoring measure, see ECtHR 4 May 2000, 28341/95 (*Rotaru v. Romania*) at 43–44, ECtHR 28 January 2003, 44647/98 (*Peck v. The United Kingdom*) at 59, ECtHR 17 July 2003, 63737/00 (*Perry v. The United Kingdom*) at 38.

146 ECtHR 13 November 2012, 24029/07 (*M.M. v. The United Kingdom*) at 187; ECtHR 26 March 1987, 9248/81 (*Leander v. Sweden*) at 48, ECtHR 16 February 2000, 27798/95 (*Amann v. Switzerland*) at 65–70; ECtHR 4 May 2000, 28341/95 (*Rotaru v. Romania*) at 43, ECtHR 4 December 2008, 30562/04 and 30566/04 (*S. and Marper v. The United Kingdom*) at 67, ECtHR 18 October 2011, 16188/07 (*Khelili v. Switzerland*) at 55.

147 ECtHR 24 September 2002, 39393/98 (*M.G. v. The United Kingdom*) at 187; ECtHR 4 May 2000, 28341/95 (*Rotaru v. Romania*) at 43, ECtHR 25 September 2001, 44787/98 (*P.G. and J.H. v. The United Kingdom*) at 57; ECtHR 6 June 2006, 62332/00 (*Segerstedt-Wiberg and Others v. Sweden*) at 72, ECtHR 18 November 2008, 22427/04 (*Cemalettin Canli v. Turkey*) at 33, ECtHR 18 October 2016, 61838/10 (*Vukota-Bojic v. Switzerland*) at 58.

the ECtHR considered this is 'all the more true where the information concerns a person's distant past'.[148]

The mere storing of data relating to the private life of an individual already amounts to an interference of Article 8 ECHR;[149] the 'subsequent use' of the personal data has no bearing on that finding.[150] However, for each individual case, it will have to determined, as the ECtHR stated in the case of *S. and Marper* v. *The United Kingdom*:[151]

> whether the personal information retained by the authorities involves any of the private-life aspects mentioned above, [in this determining act, AB] the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained.[152]

The analysis that results from having due regard to the specific context may conclude that the infringement was one that was in accordance with the law and necessary in a democratic society, and hence does not constitute a violation of Article 8 ECHR.[153]

Of the more than 70 cases the ECtHR has ruled on that deal with matters of personal data, the following categorisation can be made. Most of these cases concern techniques employed during a police or terrorism investigation,[154] in particular phone tapping.[155]

148 ECtHR 24 September 2002, 39393/98 (*M.G. v. The United Kingdom*) at 187 citing: ECtHR 4 May 2000, 28341/95 (*Rotaru v. Romania*) at 43. ECtHR 18 November 2008, 22427/04 (*Cemalettin Canli v. Turkey*) at 33. Compare with CJEU 13 May 2014, ECLI:EU:C:2014:317, C-131/12 (*Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González*).

149 ECtHR 26 March 1987, 9248/81 (*Leander v. Sweden*) at 48.

150 ECtHR 16 February 2000, 27798/95 (*Amann v. Switzerland*) at 69.

151 ECtHR 4 December 2008, 30562/04 and 30566/04 (*S. and Marper v. The United Kingdom*) at 67.

152 Compare with the contextual integrity approach advanced by Nissenbaum, see section 4.7.

153 Article 8(2) ECHR.

154 ECtHR 12 January 2016, 37138/14 (*Szabó and Vissy v. Hungary*), here a general legal framework on surveillance not related to a particular crime was concerned.

155 ECtHR 4 December 2015, 47143/06 (*Roman Zakharov v. Russia*), ECtHR 6 September 1978, 5029/71 (*Klass and Others v. Germany*) concerning the monitoring of postal and telephone communications. ECtHR 2 August 1984, 8691/79 (*Malone v. The United Kingdom*), on the 'metering' of telephones and again interception of postal and telephone communications. ECtHR 26 March 1987, 9248/81 (*Leander v. Sweden*), on the use of a secret police-register in the assesment of eligibility for employment in national security. ECtHR 24 April 1990, 11801/85 (*Kruslin v. France*), dealing with telephone tapping. ECtHR 28 October 1994, 14310/88 (*Murray v. The United Kingdom*) concerning a terrorism suspect whose personal details were recorded and photographed without consent. ECtHR 31 January 1995, 28/1994/475/556 (*Friedl v. Austria*) case concerning a participant in a demonstration who had been photographed. Other cases later on that also deal with telephone interception during criminal investigations are: ECtHR 25 June 1997, 20605/92 (*Halford v. The United Kingdom*). ECtHR 24 August 1998, 88/1997/872/1084 (*Lambert v. France*), notably *locus standi* here was refused as the tapped telephone line was of a third party, not the applicant. ECtHR 16 February 2000, 27798/95 (*Amann v. Switzerland*). ECtHR 25 September 2001, 44787/98 (*P.G. and J.H. v. The United Kingdom*) next to telephone monitoring, also devices to monitor conversations in a flat were used and recordings were made while at the police station. ECtHR 22 October 2002, 47114/99 (*Taylor-Sabori v.*

Especially, in the beginning of the ECtHR dealing with personal data, these types of cases were the most prevalent. Later cases about unauthorised access or disclosure of health records or health information were decided upon by the ECtHR.[156] Then came several cases dealing with the photographs being taken of a person, either in the context of a criminal investigation[157] or for publication in the press.[158]

There are some miscellaneous cases that deal with a range of topics. One such case concerns a twelve-year-old boy whose personal information, including his age, picture, and telephone number,[159] was put on a dating site which claimed he was looking for an intimate relationship with a boy his age or older 'to show him the way'.[160] As malicious representation was not one of the offences for which an internet service provider could be obliged to divulge the information of the person behind the posting of the ad, the police were unable to find out the identity of the perpetrator. The ECtHR considered this to be a violation of (the positive duty to protect, flowing from) Article 8 ECHR of the applicant,

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The United Kingdom) dealing with interception not of telephone conversations but pager messages; ECtHR 29 March 2005, 57752/00 (*Matheron v. France*) telephone tapping conducted during separate proceedings, in relation to which the applicant had not been a party. ECtHR 3 April 2007, 62617/00 (*Copland v. The United Kingdom*), ECtHR 21 June 2011, 30194/09 (*Shimovolos v. Russia*).

156 ECtHR 25 February 1997, 22009/93 (*Z v. Finland*), concerning the seizing of medical records during a criminal investigation and the publication of her identity and HIV status during trial proceedings and the court judgment. ECtHR 27 August 1997, 72/1996/691/883 (*Anne-Marie Andersson v. Sweden*). ECtHR 27 August 1997, 74/1996/693/885 (*M.S. v. Sweden*), both cases dealt with the lack of a means to challenge the decision to hand over medical records to the social services authority before a court; ECtHR 10 October 2006, 7508/02 (*L.L. v. France*) concerning the use of medical records without consent during court proceedings. ECtHR 17 July 2008, 20511/03 (*I. v. Finland*) unauthorised access to medical data discovering her HIV status by colleagues (nurses).

157 ECtHR 28 October 1994, 14310/88 (*Murray v. The United Kingdom*), ECtHR 31 January 1995, 28/1994/475/556 (*Friedl v. Austria*), ECtHR 5 November 2002, 48539/99 *(Allan v. The United Kingdom*), use of covert video surveillance in a prison cell and the visiting area.

158 ECtHR 24 June 2004, 59320/00 (*Von Hannover v. Germany*), ECtHR 7 February 2012, 40660/08 and 60641/08 (*Von Hannover v. Germany (No. 2*); ECtHR 11 January 2005, 50774/99 (*Sciacca v. Italy*), a picture of a woman was taken in the course of a tax investigation and shown at a press conference. ECtHR 10 May 2011, 48009/08 (*Mosley v. The United Kingdom*), former president of the governing body for Formula One saw still photographs in a newspaper and a video published on the internet of him participating in sexual activities; ECtHR 5 July 2011, 41588/05 (*Avram and Others v. Moldova*), five women in a sauna with police officers found this secretely taped footage broadcasted on national television; ECtHR 28 January 2003, 44647/98 (*Peck v. The United Kingdom*), CCTV images of the applicant with a knife in hand just before an attempted suicide were not blurred and ended up in the media; ECtHR 2 October 2012, 7259/03 (*Mitkus v. Latvia*), a convict alleged he became infected with HIV and hepatitis C while in prison and one of his complaints was that a newspaper article disclosed his HIV infection and published a photo of him. ECtHR 7 February 2012, 39954/08 (*Axel Springer AG v. Germany*), a publication in a daily newspaper of a cocaine possession arrest of a famous television actor at a beer festival in Munich. See to some extent also ECtHR 10 November 2015, 40454/07 (*Couderc and Hachette Filipacchi Associés v. France*), on a publication with pictures of Prince Albert of Monaco and his illegitimate child and a frank interview with the mother of the child.

159 Incorrect, save for one digit.

160 ECtHR 2 December 2008, 2872/02 (*K.U. v. Finland*) at 7.

the young boy.[161] Another miscellaneous case that the ECtHR was confronted with was the case of *Khelili* v. *Switzerland*.[162] Ms. Khelili, a French national, was checked by the police in Geneva in 1993. During a search, the police found Ms. Khelili to have certain calling cards with her that read: 'Nice, pretty woman, late thirties, would like to meet a man to have a drink together or go out from time to time.' The card included her telephone number. The Geneva police then entered her name in their records as a prostitute, despite her insistence that she had never been a prostitute.[163] In 2001, she came into contact with the police again for some allegations that had been made against her. She then found out that she was still registered as a prostitute in the police records. In 2005 they added the profession 'dressmaker' to her record but had not removed the 'prostitute' label from the records. This information could be given to potential future employers, which was Ms. Khelili's main concern. The ECtHR agreed, especially as the information would be subject to automatic processing, hence facilitating access to, and distribution of, such data.[164] The Court found a violation of Article 8 ECHR.[165]

One case is of particular interest here, where the applicant, a famous person, complained that her Article 8 ECHR rights were violated not because of a publication of her photograph but rather her address.

The Case of Alkaya v. Turkey

The case of *Alkaya* v. *Turkey* of 2012 is interesting as it concerns the publication of a residential address in a national newspaper. In this case a Turkish comedienne and theatre performer had been a victim of a burglary in her home in Istanbul. The national newspaper *Aksam* published an article about the burglary, accompanied by a picture of the applicant. The article also mentioned the exact address of the applicant, indicating the area where she lived, the name and street number, as well as the number of her apart-

161 *Id*. at 49–50 reads: '49. The Court considers that practical and effective protection of the applicant required that effective steps be taken to identify and prosecute the perpetrator, that is, the person who placed the advertisement. In the instant case, such protection was not afforded. (…) Without prejudice to the question whether the conduct of the person who placed the offending advertisement on the Internet can attract the protection of Articles 8 and 10, having regard to its reprehensible nature, it is nonetheless the task of the legislator to provide the framework for reconciling the various claims which compete for protection in this context. Such a framework was not, however, in place at the material time, with the result that Finland's positive obligation with respect to the applicant could not be discharged (…) 50. The Court finds that there has been a violation of Article 8 of the Convention in the present case'.

162 ECtHR 18 October 2011, 16188/07 (*Khelili v. Switzerland*).

163 ECtHR 18 October 2011, 16188/07 (*Khelili v. Switzerland*) at 8–9.

164 ECtHR 18 October 2011, 16188/07 (*Khelili v. Switzerland*) at 35.

165 ECtHR 18 October 2011, 16188/07 (*Khelili v. Switzerland*) at 71. See also ECtHR 10 February 2011, 11379/03 (*Dimitrov-Kazakov v. Bulgaria*), on registration of applicant in police register as an 'offender', although he was never indicted but only questioned in a rape case. Later he was questioned in other rape complaints. Lack of a remedy also meant an Article 13 ECHR violation read in conjunction with Article 8 ECHR.

ment.[166] She claimed damages based on a violation of her Article 8 ECHR rights. She purported that the State had failed to protect her against the invasion of her privacy.[167] The District Court had however stated that, because Ms. Alkaya was a celebrity, and consequently a public figure, that the disclosure of her address could not be considered an infringement of her rights under Article 8 ECHR.[168] The ECtHR did not agree. After reiterating that the notion of private life is very extensive and that an exhaustive definition cannot be summed up,[169] the Court proceeded by affirming that Article 8 is primarily intended to ensure the development of the personality,[170] without outside interference, of each individual in relationships with others.[171] This means that even public figures have a 'legitimate expectation' of protection and respect for his or her private life.[172]

The Court continued by reaffirming that Article 8 also included a right to respect for a person's home, which is normally understood as a physical space. Nevertheless, the right to respect for a person's home also includes the peaceful enjoyment of this place.[173] Whether the address also falls under the auspices of Article 8 ECHR was considered as follows:[174]

> In this respect, [the Court] considers it useful to note that the choice of the place of residence is a quintessentially private decision, and the free exercise of this choice is an integral part of the sphere of personal autonomy, protected by Article 8 of the Convention. A person's home address constituted personal

166 ECtHR 9 October 2012, 42811/06 (*Alkaya v. Turkey*) at 7.

167 That Article 8 ECHR could give rise to positive obligations on the State to protect the rights of its inhabitants had already been accepted earlier in ECtHR 13 June 1979, 6833/74 (*Marckx v. Belgium*) at 30.

168 ECtHR 9 October 2012, 42811/06 (*Alkaya v. Turkey*) at 9–10, see also the Government's defence: paras 21-22.

169 ECtHR 9 October 2012, 42811/06 (*Alkaya v. Turkey*) at 28 citing ECtHR 17 July 2003, 63737/00 (*Perry v. The United Kingdom*) at 61.

170 Compare with the identity building theory as expressed in section 4.5.

171 The judgment is only in French and reads: 'La Cour rappelle également que la garantie offerte à cet égard par l'article 8 de la Convention est principalement destinée à assurer le développement, sans ingérences extérieures, de la personnalité de chaque individu dans les relations avec ses semblables,' ECtHR 9 October 2012, 42811/06 (*Alkaya v. Turkey*) at 28.

172 ECtHR 9 October 2012, 42811/06 (*Alkaya v. Turkey*) at 28, 31. See also extensively on the matter of public figures and Article 8: ECtHR 24 June 2004, 59320/00 (*Von Hannover v. Germany*), ECtHR 7 February 2012, 40660/08 and 60641/08 (*Von Hannover v. Germany (No. 2*). Note the similarity with the US Supreme Court doctrine of a 'legitimate expectation of privacy' under the US Constitution, Fourth Amendment jurisprudence.

173 ECtHR 9 October 2012, 42811/06 (*Alkaya v. Turkey*) at 29.

174 ECtHR 9 October 2012, 42811/06 (*Alkaya v. Turkey*) at 30. The official French version reads: 'A cet égard, elle estime utile de souligner que le choix du lieu de résidence est une décision essentiellement privée et que le libre exercice de ce choix fait partie intégrante de la sphère d'autonomie personnelle, protégée par l'article 8 de la Convention. L'adresse domiciliaire d'une personne constitue en ce sens une donnée ou un renseignement d'ordre personnel qui relève de la vie privée et qui bénéficie, à ce titre, de la protection accordée à celle-ci. C'est donc au regard des exigences de la protection de la vie privée que la Cour procédera à l'examen de la présente affaire'.

> data or information which fell within the scope of private life and as such was eligible for the protection granted to the latter.

The Court then had to establish whether a fair balance had been struck between the rights under Article 8 ECHR and those dealing with the right of the newspaper to freedom of expression under Article 10 ECHR.[175] It is important to note here that Ms. Alkaya had never requested that the article concerning her burglary would not be published; she was only opposed the disclosure of her home address, which she deemed was not of public interest.[176]

After reiterating the importance of the press and freedom of expression,[177] the Court stated that, while the public has a right to be informed, 'articles aimed solely at satisfying the curiosity of a particular readership regarding the details of a person's private life, however well known that person might be, could not be deemed to contribute to any debate of general interest to society'.[178] The Court then turned to the reasoning of the national court. This reasoning was flawed, as the domestic court did not take into account the potential impact on the life of the applicant the disclosure in a national newspaper might have.[179] This claim by applicant should have been strengthened when the domestic court learned of the inappropriate behaviour of the people who waited on her front step, which had caused Ms. Alkaya to feel very insecure.[180] This lack of an adequate assessment of the interests involved by the domestic court meant that the State failed in its positive obligation under Article 8 ECHR and led the ECtHR to conclude there had been a violation of the right to privacy of Ms. Alkaya.[181]

The current body of case law of the ECtHR is extensive in relation to personal data; this was different around the late 1960s. The Council of Europe wondered around that time whether Article 8 ECHR was ready for a world in which automated processing was becoming commonplace.[182] This led to efforts being undertaken by the Council of Europe that would result in the Convention for the Protection of Individuals with regard to the Processing of Personal Data.

175 ECtHR 9 October 2012, 42811/06 (*Alkaya v. Turkey*) at 32.
176 *Id.* at 34.
177 *Id.* at 35 The essential role that informing the public plays in a democratic society.
178 *Id.* at 35, see also ECtHR 24 June 2004, 59320/00 (*Von Hannover v. Germany*) at 65. Compare also with the German approach to access to information in the land registry, section 8.8.2.
179 ECtHR 9 October 2012, 42811/06 (*Alkaya v. Turkey*) at 38.
180 *Id.* at 39.
181 *Id.* at 40–41.
182 Recommendation 509 (1968) on human rights and modern scientific and technological developments at 8.

5.5.3 *Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention no. 108)*

The first international legally binding instrument that *explicitly* dealt with data protection was the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention no. 108). In 1968, the Parliamentary Assembly of the Council of Europe started the developments that would lead to the Convention by issuing Recommendation 509 which requested a study be undertaken into the invasion of the right to privacy protected by Article 8 ECHR by 'the use of modern scientific and technical methods'.[183] The Council of Europe's initial focus was clear when it adopted Resolution (73) 22 on the protection of the privacy of individuals vis-à-vis electronic data banks in the private sector,[184] followed a year later by a resolution on privacy protection in electronic data banks in the public sector.[185] While both Resolutions still very much spoke of privacy and 'information relating to the intimate private life of persons'[186] in the Explanatory Report to Convention no. 108 the two Resolutions are referenced as having 'established principles of data protection'.[187]

The Resolutions were at the beginning of a wave of data protection legislation at a national level.[188] However, the desire for an international instrument to reinforce the national rules 'by means of a binding international agreement' remained.[189] The two Resolutions were not specific in the way in which the goal of privacy protection should be attained. The national legislation that flowed from these Resolutions therefore differed in their way of trying to achieve these goals. Consequently, there were worries that when the 'automatic processing of personal data' concerned individuals from different jurisdictions, the results could differ and the level of protection would not be similar.[190] This then could lead data processors to transfer data to jurisdictions which have more favourable rules for them, creating the aforementioned 'data havens'.[191] Furthermore, the

183 Recommendation 509 (1968) on human rights and modern scientific and technological developments at 8.
184 Resolution (73) 22 on the protection of the privacy of the individuals vis-à-vis electronic data banks in the private sector (1973). See extensively on the matter: González Fuster 2014, p. 84–86.
185 Resolution (74) 29 on the protection of the privacy of individuals vis-à-vis electronic data banks in the public sector.
186 Annex to Resolution (73) 22 on the protection of the privacy of the individuals vis-à-vis electronic data banks in the private sector (1973), under 1.
187 Explanatory Report to Convention no. 108.
188 The Resolutions themselves established principles, but they left the specifics up to the national legislators. Within five years after the second resolution, national data protection laws were enacted in seven Member States, and in several other Member States national legislation was in an advanced state of prepration, see Explanatory Report to Convention no. 108 at 5.
189 Explanatory Report to Convention no. 108 at 12.
190 The Convention therefore comprises principles that it wants to see achieved, but it leaves the manner of implementation to national legislation. Explanatory Report to Convention no. 108 at 20.
191 See section 5.4.

Council of Europe understood that information techniques were rapidly evolving[192] and would not restrict themselves to national borders. For these reasons, an international approach was considered 'desirable'.[193]

To facilitate the process, the Committee of Experts on Data Processing, supported by the European Committee for Legal Co-operation, was instructed to prepare a convention.[194] They did not have to do this on their own. During the preparation for the Convention, the Committee of Experts worked closely with the OECD,[195] as well as some of its members non-European members.[196] Furthermore, the Commission of the then European Communities, later simply the European Commission, was also an observer and kept in close contact with the Council of Europe. This was because the European Communities were at the time investigating their own potential legislative action on the matter and would like to see the outcome of the work of the Council.[197] In April 1980, another Committee of Experts made revisions to the text that was drafted and presented this version to the Committee of Ministers who adopted it.[198] Convention no. 108 was open for signatures on 28 January 1981.

The purpose of Convention no. 108[199] is to ensure respect for the rights and fundamental freedoms of every individual in a contracting party and 'in particular his right to privacy, with regard to automatic processing of personal data relating to him ("data protection").'[200] This is one of the first instances we see data protection used as a term in a legally-binding document. Furthermore, the Convention is explicitly not referred to as a 'European Convention', as the Council of Europe allows for non-European states to also become signatory parties to the Convention.[201]

192 Explanatory Report to Convention no. 108 at 11.

193 Explanatory Report to Convention no. 108 at 11. Mirroring almost exactly the reasoning for the OECD Guidelines.

194 Explanatory Report to Convention no. 108 at 13.

195 The similarities between the OECD Guidelines and the Convention are clear. See also the Explanatory Memorandum to the OECD Guidelines which makes reference to many of the transborder flows of data issues also discussed in the Convention Explanatory Report.

196 Australia, Canada, Japan, and the United States.

197 Explanatory Report to Convention no. 108 at 14-16. See secton 5.6.

198 Explanatory Report to Convention no. 108 at 17. By this time the EU Parliament was also invited to 'direct its attention to how action within the framework of the European Communities could most effectively strengthen the principles and provisions to be embodied in the convention on data protection of the Council of Europe' resolution 721 (1980) on data processing and the proteciton of human rights.

199 Specifically not referred to as 'European Convention' because it should be open to states outside of the EU as well.

200 Council of Europe, Convention for the protection of individuals with regard to automatic processing of personal data (1981).

201 Uruguay, for example, is subject to the Convention since 1 August 2013. The Explanatory Report explains that only relying on Article 8 ECHR for data protection would 'not seem advisable', because the ECHR is 'a "closed" instrument, which does not permit the participation of non-European and non-member States.' Explanatory Report to Convention no. 108 at 19.

Convention no. 108 sets out basic principles for data protection to which each party to the Convention has to give effect.[202] The Guidelines of the OECD, which had very similar principles, are therefore given legal effect for the Parties to the Convention. The basic principles make up the core of the Convention and attempt to both protect and facilitate the free flow of information, while at the same time preserving the privacy of the data subjects.[203]

The basic principles require first, a certain quality of the data, which includes a provision on the data being accurate, up to date, and not stored for longer than necessary.[204] Second, appropriate security measures are required,[205] so that no accidental loss or unauthorised access, alteration or dissemination may take place.[206] Third, they provide rights to the data subject to check whether their information is (still) being stored and rights to check and correct the personal data for any inaccuracies.[207] Lastly, any breach of these provisions should be sanctioned.[208] Other Chapters of Convention no. 108 deal with co-operation between the Contracting States.[209]

The influence of Convention no. 108 is still clear today. Not only is the Convention still in force,[210] it has been very influential in legislation that followed it. In particular, the close relationship the Council of Europe and what now is called the European Commission and European Parliament have been very fruitful. The basic principles of the Convention were given substance and are amplified by the Data Protection Directive, which will be discussed in section 5.6.

202 Article 4(1).

203 The commitment to the free flow of information is evidenced by the Preamble: 'Reaffirming at the same time their [the Member States of the Council, AB] commitment to freedom of information regardless of frontiers; Recognising tha tit is necessary to reconcile the fundamental values of the respect for privacy and the free flow of information between peoples,' and the Explanatory Report to the Convention, which includes among other statements: 'By undertaking to apply these principles the Parties tend mutually to renounce restrictions to transborder data flows and thus they avoid that the principle of free flow of information would be jeopardised by any form of protectionism.' *Id.* at 20 and 'Chapter III (concerning transborder data flows) aims at reconciling the simultaneous and sometimes competing requirements of free flow of information and data protection, the main rule being that transborder data flows between Contracting States should not be subject to any special controls.' *Id.* at 21 See also Article 12(2) Convention which states: 'A Party shall not, for the sole purpose of the protection of privacy, prohibit or subject to special authorisation transborder flows of personal data going to the territory of another Party'.

204 Article 5 Convention.

205 Compare with the OECD Guidelines which required that the data be 'protected by reasonable security safeguards', Article 11.

206 Article 7 Convention.

207 Article 8 Convention.

208 Articles 9-10 Convention.

209 Chapters IV and V.

210 Currently a total of 51 ratifications and accessions to the Convention, with Tunesia being the last one to accede to the Convention on 11 January 2017. See for an overview: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108/signatures.

Declarations Made to the Convention

Both the Netherlands and the United Kingdom made use of the possibility in Article 3(2)(a) of the Convention to give notice by a declaration that it will not apply Convention no. 108 to certain categories of automated personal data files.[211] The Netherlands made a declaration at the time of ratification on 10 February 1988, explicitly stating that the Convention does not apply in certain enumerated personal data files, such as 'personal data files which are established and to which public access is required by law',[212] under which definition the land registry would also fall. In 2001, with the implementation of the Data Protection Directive, the government stated that it should withdraw this declaration, but it is not clear from the Convention website that records all declarations that the Netherlands has indeed withdrawn that declaration.[213]

The United Kingdom made a similar Declaration in 1987, stating that 'The Convention will not be applied to (…) (c) information publicly available by law: personal data which must be publicly available under an enactment'. This exemption includes the United Kingdom's land registration systems as well.[214] In 2001 the UK withdrew the Declaration, but maintained it in respect of Jersey, Guernsey and the Isle of Man.[215] Nevertheless, the Declaration also included a provision that the Convention would only apply with respect to 'personal data which are not processed automatically but which are held in a relevant filing system.'[216] As such, the land registries of the Netherlands and England & Wales fall outside of the scope of Convention no. 108.

5.5.4 Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union (EU Charter) lists the fundamental freedoms and rights recognised by the European Union. It was adopted in 2000 and given legally binding effect with the Lisbon Treaty in 2009.

What the Charter does differently from the previous instruments is to consider the right to protection of personal data separately from the right to respect for someone's private and family life, home and communications. The previous instruments all saw data protection as a subset of privacy, the Charter is the first instrument to recognise the

211 Wording from Article 3(2) and 3(2)(a).
212 See https://perma.cc/AE58-RKH3.
213 KST II 1998–1999, 26 410, nr. 3 (MvT), p. 6.
214 See https://perma.cc/AE58-RKH3.
215 See https://perma.cc/AE58-RKH3.
216 '"Relevant filing system" means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.' See the Declaration contained in a letter from the Secretary of State for Foreign and Commonwealth, dated 18 January 2001, registered at the Secretariat General, on 26 January 2001.

protection of personal data as a fundamental freedom on equal footing with the right to privacy.[217]

Overlap of ECHR and the Charter

Article 52(3) of the Charter reads that 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'[218] In a case concerning rights of custody, *J. McB. v. L.E.* in 2010, the CJEU stated that the wording of Article 7 of the Charter and 8(1) of the ECHR are identical other than the use of the expression 'correspondence' instead of 'communications'. Due to this similarity, 'it is clear that the said Article 7 contains rights corresponding to those guaranteed by Article 8(1) of the ECHR. Article 7 of the Charter must therefore be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights.'[219]

While it is a relatively 'young' instrument, it has been very influential in the area of data protection law. In the case law of the CJEU, the EU Charter has proven to be imperative in the interpretation of the Data Protection Directive and the protection afforded by that instrument.[220]

5.6 Data Protection Directive

Arguably the most important legal instrument with regard to data protection, currently in force in Europe,[221] is Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive). This

217 See also on this recognition: De Hert & Gutwirth/Gutwirth et al. 2009, p. 7. See on this development of recognising data protection as an autonomous fundamental right also the example of: Council of Europe, The Consultative Committee of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (ets No. 108) 2012, p. 2.

218 Art. 52(3) Charter of Fundamental Rights of the European Union (OJ C 364/1).

219 CJEU 5 October 2010, ECLI:EU:C:2010:582, C-400/10 (*McB. v L.E.*) at 48.

220 In particular, see the striking down of the data retention directive by CJEU 8 April 2014, ECLI:EU:C:2014:238, Joined Cases C-293/12 and C-594/12 (*Digital Rights Ireland Ltd (C-293/12) v. Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, Commissioner of the Garda Síochána, Ireland, The Attorney General*) and the introduction of the 'right to be forgotten' by the, CJEU 13 May 2014, ECLI:EU:C:2014:317, C-131/12 (*Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González*).

221 It is to be replaced on 25 May 2018 with the General Data Protection Regulation, see section 5.7.

section explores very briefly its origins,[222] before elaborating on the content of the Directive and some of the specific rules laid down in it.[223]

5.6.1 Similarities and differences with other instruments

We saw already in section 5.5.3 that the efforts by the Council of Europe in drafting what would later become Convention no. 108 sparked the interest of the Commission of the European Communities. Their interest was sparked because the Commission was working on its own legislative efforts in the area of data protection, the result of which would be the Data Protection Directive.[224] Similarities between the two legal instruments are therefore to be expected.

The background of Convention no. 108 and the OECD Guidelines was the diverging national legislative action that was taken to protect personal data in the context of the automated processing of data. This divergence in national laws had the effect that it provided an obstacle to the free flow of information and, as such, these differences constitute an obstacle to the pursuit of economic activities at the European level[225] and distort competition. The objective of Convention no. 108 and the Guidelines was therefore to remove these obstacles by attempting to acquire an equal level of data protection throughout its Member States. This objective is no different in the Data Protection Directive.[226]

The Data Protection Directive attempts to reconcile the free flow of information with high personal data protection by approximation of the national data protection laws.[227] If the standard of protection is equal, then the information may flow anywhere, without diminishing the protection afforded to the individual; or so goes the reasoning. In such a way, it would appear that the protection of personal data is subordinate to a free flow of information. The Commission however has stated that they are both on equal footing.[228]

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222 See for a more extensive overview: Hondius 1975, Sieghart 1976, De Graaf 1977, Flaherty 1989, Nugter 1990, Mayer-Schönberger/Agre & Rotenberg 1997.

223 Critical on whether these are specific and clear enough especially in the early years after the introduction of the Data Protection Directive, see the evaluations of the implementing law in the Netherlands, Zwenne et al. 2007, Winter et al. 2008.

224 For an extensive overview of the history of the Data Protection Directive see, González Fuster 2014, p. 111–129.

225 Recital 7 Data Protection Directive.

226 See Recitals 5-8 Data Protection Directive. The objective of the Data Protection Directive is laid down in Article 1 Data Protection Directive: '(1) In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data. (2) Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1'.

227 The Directive does allow the Member States some leeway in the implementation of certain provisions.

228 Commission, First report on the implementation of the Data Protection Directive (95/46/EC) COM (2003) 265 final 3 (2003) See also Recital 3.

A further similarity between the Data Protection Directive and the OECD Guidelines and Convention no. 108 is the use of data protection principles and the content of these principles.[229] All of the principles laid down by the OECD Guidelines and Convention no. 108 are featured in the Data Protection Directive. They are expanded on in section 5.6.7.

It is therefore clear that the basis for the Data Protection Directive itself builds upon the earlier work conducted by the OECD and the Council of Europe. What makes the efforts of the European Union stand out is the extensiveness and detailed nature of the Directive. Convention no. 108 and the OECD Guidelines laid down *principles*, and the Data Protection Directive also does this, but it goes one step further and elaborates on these principles. With that, the Directive therefore goes beyond a mere set of principles and establishes rules for the legal processing of personal data.

5.6.2 Article 29 Working Party

Before turning to the content of the rules expressed in the Directive, one more institution should be introduced. To make sure that data protection rules are adhered to and enforced, the Data Protection Directive requires that each Member State institute a data protection authority.[230] Furthermore, a representative of each of these national data protection authorities also sits in an independent advisory body instituted by Article 29 of the Data Protection Directive: the Article 29 Working Party. The EU institutions have their own Data Protection Supervisor, an authority established by a Regulation.[231]

The Working Party issues many influential opinions on the interpretation of the Directive, for example on the concept of personal data[232] and has, as such, contributed tremendously to the understanding of Data Protection in the European Union and the uniform application thereof.[233]

229 Compare sections 5.4 with 5.6.7.1.

230 Article 28 Data Protection Directive. See also CJEU 9 March 2010, ECLI:EU:C:2010:125, Case C-518/07 (*European Commission v. Federal Republic of Germany*), CJEU 8 April 2014, ECLI:EU:C:2014:237, Case C-288/12 (*European Commission v. Hungary*) & CJEU 16 October 2012, ECLI:EU:C:2012:631, CJEU 16 October 2012, ECLI:EU:C:2012:631, Case C-614/10 (*European Commission v. Republic of Austria*) on the need for an independent supervisory authority.

231 Article 41 of Regulation (EC) 45/2001 on personal data processing by the Community institutions and bodies.

232 Article 29 Data Protection Working Party 2007.

233 Blas 2001, p. 4, Kuner 2003, p. 9.

5.6.3 Scope

Article 3 of the Data Protection Directive provides the scope of the Directive. It states that the Directive 'shall apply to the processing of personal data wholly or partly by automatic means, (…)'.[234] This means there are at least[235] three elements that need to be present for the Directive to apply. Each will be elaborated on in sections 5.6.4. Note that it is not important whether the information is gathered by a public or private body.[236]

If we are dealing with a (partly) automated processing of personal data, the Directive might still not apply in two instances. The first exception is if the processing is done in the course of an activity that falls outside the scope of EU Law.[237] The second exception is if the processing is carried out by a natural person in the course of a purely personal or household activity.[238] For example, if you log your own weight in a spreadsheet on a daily basis, then you do not have to adhere to the Data Protection Directive. In 2014, the CJEU had to rule in the *Ryneš* case on whether video surveillance equipment that was intended to cover a private space, but partly covered a public area, could fall under this exception. The answer was negative. The CJEU stated that, because the camera also covered (in part) a public space, 'it cannot be regarded as an activity which is a purely 'personal or household' activity for the purposes of the second indent of Article 3(2) of Directive 95/46'.[239]

5.6.4 First element: personal data

Not all data is personal data. Article 2(a) of the DPD provides for the definition of personal data.

It states:

> 'personal data' shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be

234 The full text states: 'shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system'.

235 There is also the geographical scope that needs to be taken into account.

236 Compare with section 5.5.3.

237 Article 3(2), first indent Data Protection Directive. See als CJEU 16 December 2008, ECLI:EU:C:2008:724, Case C-524/06 (*Heinz Huber v Bundesrepublik Deutschland*) at 45, in which the CJEU states that 'while the processing of personal data for the purposes of the application of the legislation relating to the right of residence and for statistical purposes falls within the scope of application of Directive 95/46, the position is otherwise where the objective of processing those data is connected with the fight against crime'.

238 Article 3(2), second indent, Data Protection Directive.

239 CJEU 11 December 2014, ECLI:EU:C:2014:2428, Case C-212/13 (*František Ryneš v. Úřad pro ochranu osobních údajů*) at 33. Nevertheless, the activity may still be allowed because there was a legitimate interest pursued by the controller, 'such as the protection of the property, health and life of his family and himself, as is the case in the main proceedings', at para. 34.

> identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

This is a very wide definition, as was the intention of Parliament[240] and of the Commission.[241] It also mirrors the definition of personal data in the OECD Guidelines and Convention no. 108.[242]

The definition of personal data can be broken down into four different pieces. We have to be concerned with 'information', which 'relates to', an 'identified or identifiable', 'natural person'. Each of these will be discussed. The order is slightly reversed for simplicity's sake.

5.6.4.1 Natural person

It has to be a *living* natural person to which the information relates. The dead are not protected under the Data Protection Directive.[243] However, information on the dead may also relate to the living and therefore still fall under the rules of the Directive.[244] The Article 29 Working Party provides the following example:[245]

> For instance, the information that the dead Gaia suffered from haemophilia indicates that her son Titius also suffers from the same disease, as it is linked to a gene contained in the X-chromosome.

As such, it may also relate to another, living, individual, and as such be subjected to data protection rules.

Secondly, *natural* persons are at issue, not legal persons.[246] Again here, the protection might be in other legislation and the CJEU has stated that nothing in the Directive precludes the Member States from extending the scope of the Directive,[247] for example to also cover legal persons, but in principle it is not covered by the Directive. However, ownership of a company is again information that may relate to an individual, also if

240 Amended proposal for a Council Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data. COM(92) 422 final, 28.10.1992, at 9.

241 Amended proposal for a Council Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data. COM (92) 422 final, 28.10.1992, at 10.

242 Article 2(a) Convention 108, and Article 1(b) OECD Guidelines both read: '"personal data" means any information relating to an identified or identifiable individual ("data subject")'.

243 It might very well be covered by other (national) legislation.

244 Article 29 Data Protection Working Party 2007 at 22–23.

245 Article 29 Data Protection Working Party 2007 at 22.

246 See also recital 24 of the Directive which reads: 'Whereas the legislation concerning the protection of legal persons with regard to the processing data which concerns them is not affected by this Directive'.

247 CJEU 6 November 2003, ECLI:EU:C:2003:596, Case C-101/01 (*Bodil Lindqvist*) at 98.

the natural person has given his name to the legal person.[248] Accordingly, here too, much like the dead, the information might say something about a natural, living person and, as such, fall within the scope of the Directive.

5.6.4.2 Any information

The wording 'any information' signals a willingness to interpret the provision very broadly.[249] The information relating to the person need not be accurate,[250] nor objective. A statement about another person's character will also fall under this heading. A person's blood type, their (current, or past) hair colour(s), whether they are 'hot' or 'not', if they are 'good for their money', are at a high risk of defaulting on their loan, have worked [x] hours that week,[251] are 'not expected to die soon',[252] etc. would all fall under the definition.

The format of the information, be it in written form, in binary code, spoken word etc. does not matter. In that sense, the Directive is technologically neutral.[253] The Directive does distinguish between types of information. For example, data that is considered 'sensitive' in nature is then subjected to even stricter rules.[254] Sensitive data includes data about health, political opinions, ethnic or racial origin, sex life and data concerning health. The latter, data concerning health, has been considered by the CJEU in the *Lindqvist* case, where someone uploaded information about his colleagues online, including the presence of a cast on the injured foot one of his colleagues. The CJEU was asked whether this information would fall under Article 8(1) as being 'data concerning health'. The CJEU stated that:

> In the light of the purpose of the directive, the expression 'data concerning health' used in Article 8(1) thereof must be given a wide interpretation so as to include information concerning all aspects, both physical and mental, of the health of an individual.

248 See also Article 29 Data Protection Working Party 2007 at 24. See also CJEU 9 November 2010, ECLI:EU:C:2010:662, Joined Cases C-92/09 and C-93/09 (*Volker und Markus Schecke GbR (C-92/09), Hartmut Eifert (C-93/09) v. Land Hessen*).

249 Article 29 Data Protection Working Party 2007 at 6.

250 On the disasters this brings it, see section 5.2.4.

251 CJEU 30 May 2013, ECLI:EU:C:2013:355, Case C-342/12 (Worten – Equipamentos para o Lar SA v v. Autoridade para as Condições de Trabalho (ACT)) at 22.

252 Article 29 Data Protection Working Party 2007 at 6.

253 See also recital 14 Data Protection Directive. Compare in that sense also with section 4.3 on the lack of technology-neutral language during the development of the right to privacy.

254 See Article 8(1) Data Protection Directive. Different 'transmission principles' apply when the type of information is considered 'sensitive'. Compare with section 4.7.1.

Personal data therefore includes information regarding the fact that an individual has injured her foot and is working part-time on medical grounds.[255]

As stated, the information need not be correct or proven. The data controller[256] should strive for such accuracy, however, as is clear from Article 6 (d) of the Data Protection Directive.[257] If the information is incorrect, then the data subject has the right to have his personal data be rectified.[258]

5.6.4.3 Relating to

In general terms, information may be considered to 'relate' to an individual when it is *about* that individual.[259] For example, any information in an employee file is about that person, as is the case with a patient's medical file, or a still or video image of a person. However, sometimes this link is not very self-evident, where it concerns information about an object for instance. The object, however, can be owned by someone,[260] and then the information concerns an object which indirectly states something about an individual. The Article 29 Working Party gives the example of the value of a house:[261]

> Example No. 5: the value of a house.
> The value of a particular house is information about an object. Data protection rules will clearly not apply when this information will be used solely to illustrate the level of real estate prices in a certain district. However, under certain circumstances such information should also be considered as personal data. Indeed, the house is the asset of an owner, which will hence be used to determine the extent of this person's obligation to pay some taxes, for instance. In this context, it will be indisputable that such information should be considered as personal data.

For the Netherlands, this assertion of the Article 29 Working Party was confirmed, during the implementation of the Directive. The Dutch Minister of Security and Justice at the

255 CJEU 6 November 2003, ECLI:EU:C:2003:596, Case C-101/01 (*Bodil Lindqvist*) at 50–51.

256 This means 'the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law', see Article 2 (d) Data Protection Directive.

257 Which concerns the provision that Member States must provide that the personal data is 'accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified'. See also section 5.6.7.

258 Article 12 (b) Data Protection Directive.

259 Article 29 Data Protection Working Party 2007 at 9.

260 A natural person, not a legal person.

261 Article 29 Data Protection Working Party 2007 at 9.

time stated that that all information in the Dutch land registry therefore constitutes personal data.[262]

5.6.4.4 Identified or identifiable

The last aspect that is required for data to be considered personal data is that the natural person is either identified or identifiable. Someone is identified when they can be distinguished from others. A person is identifiable when there is a possibility to identify, without actual identification having occurred. This means that anonymised data is by definition *not* identifiable.[263]

Article 2(a) DPD states that 'an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity'. For example, a social security number uniquely identifies one person. A DNA profile does the same, as does a telephone number or any 'combination of significant criteria which allows him to be recognised by narrowing down the group to which he belongs (age, occupation, place of residence, etc.)'.[264] This means that not every use of a name will be considered personal data. For example, the most popular names for new-borns in the Netherlands in 2016 were 'Daan'[265] and 'Anna'.[266] Used in this context, the names 'Daan' and 'Anna' are not personal data, they are simple statistical data and are not identified or identifiable to a natural person. However, when specified to a friend of yours saying: 'We called our daughter Anna', then the name is identifiable to a specific person, namely, the daughter of your friend. The context of the data here is hence important.[267]

Someone can be indirectly identified when information can be linked with other information after which a person maybe can be identified. For example, a seemingly anonymised set of records in which an individuals' hair colour are key coded with a unique randomised number, and hence they are not personal data, will become identifiable if the same person is in possession of the list of names with their corresponding numbers (the key codes).[268] The linking of these two files will then create the possibility to identify the persons on the 'anonymised' list relatively easily. This does not necessarily mean that all the information required for the identification of the individual needs to be in the hands of one person.[269]

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262 KST II 1998/99, 25 892, nr. 9, p. 1. For more on this see section 6.3.3.
263 See also Recital 26 Data Protection Directive.
264 COM(92) 422 final, 28.10.1992, p 9.
265 https://perma.cc/8VZ5-APDK.
266 https://perma.cc/8VZ5-APDK.
267 See also Article 29 Data Protection Working Party 2007 at 13. See section 4.7 on contextual integrity.
268 See further on this topic of pseudonymisation and anonymisation section 5.2.5.
269 CJEU 19 October 2016, ECLI:EU:C:2016:779, C-582/14 (*Patrick Breyer v. Bundesrepublik Deutschland*) at 43. The fact that, for the identification of an individual behind an IP address, information from two different sources was required did not mean it could not be considered personal data.

Moreover, identification need not necessarily be through name or social security number or even IP addresses.[270] Rather, identification 'singles someone out'.[271] The prime example here is in the area of behavioural targeting.[272] Behavioural targeting is:[273]

> A technique used by online publishers and advertisers to increase the effectiveness of their campaigns. Behavioral targeting uses information collected on an individual's web browsing behavior such as the pages they have visited or the searches they have made to select which advertisements to be displayed to that individual. Practitioners believe this helps them deliver their online advertisements to the users who are most likely to be influenced by them.

Here the advertiser has no knowledge of who the individual is, nevertheless it can identify that person because it identified the machine he or she is browsing on.

Recital 26 DPD elaborates on the means that can be used for information to fall within the remit of 'identifiable'. It states that:[274]

> (…) whereas, to determine whether a person is identifiable, *account should be taken of all the means likely reasonably to be used either by the controller or by any other person* to identify the said person; whereas the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable; (…)

This means that there is a threshold in place for what constitutes identifiable, and it is limited to the reasonableness of the method employed. This excludes those methods which are prohibited by law to employ, and those methods which are practically impossible on account of the fact that they require a disproportionate effort in terms of time, cost and man-power.[275] The latter would lead to hypothetical identification, which is not

270 CJEU has stated that identification may be by 'identifying them by name or by other means, for instance by giving their telephone number or information regarding their working conditions and hobbies' CJEU 6 November 2003, ECLI:EU:C:2003:596, Case C-101/01 (*Bodil Lindqvist*) at 27. On IP addresses being personal data: CJEU 24 November 2011, ECLI:EU:C:2011:771, Case C-70/10 (*Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*) at 51. Although, see critically on whether IP addresses can be considered personal data: Zwenne 2013, p. 5, Zwenne 2015, p. 216–221. See also CJEU 19 October 2016, ECLI:EU:C:2016:779, C-582/14 (*Patrick Breyer v. Bundesrepublik Deutschland*).

271 Article 29 Data Protection Working Party 2007 at 14.

272 See extensively on the topic Zuiderveen Borgesius 2015.

273 Interactive Advertising Bureau United States, Glossary. Which can be found here: https://perma.cc/KC2W-SBJW. See also Zuiderveen Borgesius 2015, Chapter 2.

274 Recital 26 Data Protection Directive, emphasis added.

275 CJEU 19 October 2016, ECLI:EU:C:2016:779, C-582/14 (*Patrick Breyer v. Bundesrepublik Deutschland*) at 46 referencing the AG's opinion. AG Opinion 12 May 2016, ECLI:EU:C:2016:339, C-582/14 (*Patrick Breyer v. Bundesrepublik Deutschland*) at 68.

identification.[276] Nonetheless, what was once a hypothetical may at some point in time become a reality. The means of identification should consequently take into account the state of the art in technology.[277] This means that if identification of data may not be the case today, a data controller who intends to keep data for 10 years should consider the possibility of identification that may occur also in the ninth year, which would make it personal data at that time.[278]

5.6.5 Second element: which is processed

Application of the Data Protection Directive furthermore requires that the personal data is processed. The definition of processing personal data is provided for in Article 2(b) as follows:

> 'processing of personal data' ('processing') shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

This is a very wide definition of what constitutes 'processing', and it entails all phases of the taxonomy of privacy infringements described by Solove earlier.[279] The use of 'such as' in the definition signals that the enumeration is not exhaustive. The definition was intended to cover 'everything from the collection to the erasure of data', so as to better ensure that individuals are protected.[280]

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276 Article 29 Data Protection Working Party 2007 at 15.

277 Article 29 Data Protection Working Party 2007 at 15. Compare with anonymisation techniques, see section 5.2.5.

278 Paraphrased from: Article 29 Data Protection Working Party 2007 at 15. Compare with the ECtHR viewpoint on possible future interference of Article 8 ECHR in ECtHR 4 December 2008, 30562/04 and 30566/04 (*S. and Marper v. The United Kingdom*) at 71, which concerned DNA profiles: 'The Court maintains its view that an individual's concern about the possible future use of private information retained by the authorities is legitimate and relevant to a determination of the issue of whether there has been an interference. Indeed, bearing in mind the rapid pace of developments in the field of genetics and information technology, the Court cannot discount the possibility that in the future the private-life interests bound up with genetic information may be adversely affected in novel ways or in a manner which cannot be anticipated with precision today. Accordingly, the Court does not find any sufficient reason to depart from its finding in the Van der Velden case'.

279 See section 4.6.

280 Amended proposal for a Council Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data. COM(92) 422 final, 28.10.1992, p 9, is an amendment on the request of Parliament.

5.6.6 *Third element: wholly or partly by automatic means, or are a part of an existing or intended filing system*

The personal data which is processed should be processed in part or wholly by automatic means. This element is relatively easily fulfilled as well. In *Lindqvist*, for example, the CJEU was asked the question whether the placing of personal information on a website constitutes a processing of personal data by wholly or partly automatic means. The CJEU responded that '[i]n that connection, placing information on an internet page entails, under current technical and computer procedures, the operation of loading that page onto a server and the operations necessary to make that page accessible to people who are connected to the internet. Such operations are performed, at least in part, automatically'.[281]

Thus, one of the few instances in which the processing would not fulfil the third element is if the collection is done manually and processed on paper. Yet, where this recording or processing is then filed in a filing system, it would still fall under the scope of the Directive. This is to ensure that (generally old) filing systems which have not been computerised would not be excluded from the application of the directive.

The definition of processing personal data for the purposes of the Data Protection Directive is a very wide one. It regards almost any and all action taken in relation to *any* information independent of the format, which relates to a natural, living, person who may be identified or is identifiable by name or other means. Thus, the scope of application of the Data Protection Directive in terms of data is a very wide one, although it is not so wide that it includes anonymised data or any data that falls under the exceptions of Article 3(2) DPD.

After having established what the processing of personal data entails, the question turns on what the conditions are for the processing of such data. These are laid down in the principles of Data Protection, which are explained next.

5.6.7 *Conditions for the processing of personal data*

After having established that the specific data is personal data which is processed, the question turns on whether the processing fulfilled all the requisite requirements as laid down in the Data Protection Directive which seeks to ensure the fundamental right to data protection. The following sections provide an overview of some of the most important requirements that have to be fulfilled for the lawful processing of personal data.[282]

The conditions for the processing of personal data stem from the principles of data protection. The principles themselves are also laid down in the Directive. This concerns

281 CJEU 6 November 2003, ECLI:EU:C:2003:596, Case C-101/01 (*Bodil Lindqvist*) at 25–26.
282 The processing of personal data which can be categorised as sensitive are not discussed further.

the information and participation rights of the data subject[283] and security principles, which require that 'appropriate technical and organizational measures to protect personal data against accidental or unlawful destruction' are in place and loss or access by someone who is unauthorized.[284] Next to these, there are also data protection principles in place which govern the processing of the personal data itself. They are formulated in general terms so as to 'be applied to a large number of very different situations'.[285] However, this does not mean that everything is open for debate and suggestive interpretation.[286]

5.6.7.1 Data Protection Principles

Most of the principles of data protection are listed in Article 6 of the Data Protection Directive.[287] Article 6 (1) requires that the Member States provide that personal data be:

a. 'fairly and lawfully' processed,[288]
b. collected only for a specific, explicit and legitimate purpose and not further processed in a way incompatible with those purposes,[289]
c. adequate, relevant and not excessive in relation to the purpose for which it is collected and/or further processed,[290]
d. accurate and up to date,[291] and finally
e. kept in a form which permits identification of data subjects for as long as necessary, and not longer than that.[292]

5.6.7.2 Fair and lawful processing of personal data

The most general of the data protection principles concerns the principle laid down in Article 6(1)(a) DPD that personal data must be processed fairly and lawfully. This provision entails that the processing of personal data has to be in accordance with the rules laid down by the law. Any breach of the Data Protection Directive which relates to the processing of personal data is therefore automatically also a breach of this particular data

283 Which include the right of access to information about which personal data is processed about the data subject, and for what purpose; Articles 10 and 11 Data Protection Directive.
284 Article 17 Data Protection Directive.
285 *Id.* at 83, compare with CJEU 24 November 2011, ECLI:EU:C:2011:777, Joined Cases C-468/10 and C-469/10 (*ASNEF*) at 35.
286 Which was a recurring issue in the development of a coherent, not too extensive, or too restrictive theory of privacy (in information) as discussed in Chapter 4. The complicated nature of data protection law in that sense should not be exaggerated. Zuiderveen Borgesius 2015, para. 4.2.
287 Compare with the OECD and Convention principles, see sections 5.4 and 5.5.3.
288 Article 6(1)(a) Data Protection Directive.
289 Article 6(1)(b) Data Protection Directive.
290 Article 6(1)(c) Data Protection Directive.
291 Article 6(1)(d) Data Protection Directive.
292 Article 6(1)(e) Data Protection Directive.

protection principle. The rules laid down for what constitutes a fair and lawful manner of processing are also represented by the other data protection principles, and therefore this principle is manifest in all the other data protection principles.[293]

The principle is given more shape by Articles 7 and 8 of the Data Protection Directive, which lay down the grounds exhaustively for processing personal data. Personal data may only be processed when:[294]

a. the data subject has unambiguously given his consent; or
b. processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;[295] or
c. processing is necessary for compliance with a legal obligation to which the controller is subject; or
d. processing is necessary in order to protect the vital interests of the data subject; or
e. processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed;[296] or
f. processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1 (1).[297]

Where it concerns the processing of personal data in the context of land registration, the legal basis for processing is generally a legal provision in a specific statute. As noted in section 3.3, the land registry is a public authority which would only be allowed to act where there is a legal basis for such action. Hence the appropriate legal basis for processing personal data here would be Article 7(c), (e) or (f) DPD.[298]

293 Bygrave 2002, p. 58.
294 Article 7 Data Protection Directive.
295 On whether factoring agreement could fall under this provision; CJEU 22 November 2012, ECLI:EU:C:2012:748, Case C-119/12 (*Josef Probst v mr.nexnet GmbH*).
296 Processing data for statistical purposes cannot, on any basis, be considered to be necessary within the meaning of Article 7(e) Data Protection Directive, see CJEU 16 December 2008, ECLI:EU:C:2008:724, Case C-524/06 (*Heinz Huber v Bundesrepublik Deutschland*) at 68.
297 See CJEU 13 May 2014, ECLI:EU:C:2014:317, C-131/12 (*Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González*) at 74 and 80-81.
298 Under the General Data Protection Regulation, the processing based on Article 6(f) GDPR, which corresponds to the current Article 7(f) DPD, 'shall not apply to processing carried out by public authorities in the performance of their tasks'. See also section 5.7.

Where the information concerns one of the special categories of data, as enumerated in Article 8(1) DPD, the legal basis for processing is more stringent and is in principle prohibited unless one of the stricter requirements enumerated in Article 8(2) DPD applies. This special category of personal data includes racial or ethnic origin, political opinion, religious or philosophical beliefs, trade-union membership, or personal data regarding health or sex life.

Next to 'lawful', the processing must also be 'fair'. From Recital 38 of the Data Protection Directive we can deduce the link between the 'fair' processing of data and transparency:

> Whereas, if the processing of data is to be fair, the data subject must be in a position to learn of the existence of a processing operation and, where data are collected from him, must be given accurate and full information, bearing in mind the circumstances of the collection;

For there to be fair processing of personal data, the data subject has to be in a 'position to learn' about the processing of his personal data. This concerns the link between fair processing and rights of the data subject, laid down in Article 12 DPD. These rights in Article 12 concern access and rectification rights by the data subject of their personal data processed by the controller. In essence, this is a transparency requirement.[299] It requires transparency regarding the processing and data protection mechanisms in place.[300] Moreover, fair processing also seems to indicate the requirement of proportionality, *i.e.* balancing the rights of the data subject and those rights of the controller.[301]

5.6.7.3 Purpose limitation

Article 6(1)(b) DPD concerns the purpose limitation principle. This principle of data protection limits the freedom of processors and controllers of personal data,[302] by restricting their use of personal data only to that processing which is compatible with the purpose for which they collected the information. As such it allows some leeway for the controllers to use the data in a manner which is 'compatible' with the purpose for which they were collected. Assessing whether such further use, is compatible with the purpose for which it was initially collected,[303] requires a case-by-case analysis.[304]

299 In a similar vein: Purtova 2011, p. 52.

300 Therefore, this type of transparency must be distinguished from transparency as described in Chapter 2 relating to publicity.

301 See below section 5.6.7.6.

302 See for their definition Article 2 (d) and (e) Data Protection Directive.

303 Article 29 WP: 'The prohibition of 'incompatibility' in Article 6(1)(b) does not altogether rule out new, different uses of the data – provided that this takes place within the parameters of compatibility.' See Article 29 Data Protection Working Party 2013, p. 4.

304 Article 29 Data Protection Working Party 2013, p. 4.

Article 6(1)(b) DPD reads that the personal data is to be collected only for a specific, explicit and legitimate purpose[305] and not further processed in a way incompatible with those purposes.[306] Where it concerns the fulfilment of a legal duty, as is often the case with public authorities, such as the land registry, this explicit purpose is generally found in a statutory provision.

The problem for public authorities in general is that personal data is used not only for one specified purpose, but it is collected and processed (further) at many different levels of the State for a variety of reasons.[307] For example, the personal data in the land registry is used for ensuring legal certainty regarding land transactions by providing an accurate account of ownership of land and other property rights in land.[308] However, the information used in these registers is also processed for generating statistical data, for tax purposes, and other means. In order to ensure compatibility with Article 6(1)(b) of the Data Protection Directive, each purpose has to be specified in 'enough detail to be able to assess whether collection of personal data for this purpose complies with the law'.[309] This dictates that the description of the purpose may not be too vague or too general. The Working Party remarks that, in relation to population registers, a vague umbrella provision such as 'the facilitation of legal certainty in land transactions' would suffice,[310] however, it continues by raising concerns about the use of these types of registries for e-government services, stating:[311]

> With increasing tendencies towards government data sharing, it is becoming more and more important that clear, specific and proportionate legal rules are in place to clarify how information contained in population registers and other government databases may be used, shared, and safeguarded. The challenge is

305 Reminiscent of the requirement of Article 8 (2) ECHR, that any interference with the right to private life requires a legal basis for such interference and the specification 'of a legitimate purpose as a precondition to assess the necessity of the interference' Article 29 Data Protection Working Party 2013, p. 8, see also section 5.5.2. See also Article 8(2) EU Charter.

306 As such, it also provides for a link with transparency. Here transparency about the specified purpose 'ensures predictability and enables user control'. The link with the data subject's rights to access then again come to mind, see Article 29 Data Protection Working Party 2013.

307 See for similar problems in 'ubiquitous computing' Cas/Gutwirth e.a. 2011, p. 153. In relation to Big Data see for example Tene & Polonetsky *Northwestern Journal of Technology and Intellectual Property Volume* 11/5, p. 240–273. Mayer-Schönberger & Cukier 2014, p. 152 *et seq*.

308 See section 3.2.

309 Article 29 Data Protection Working Party 2013, p. 16.

310 In its example about population registers it states: 'Although broad umbrella provisions often appear in those laws, such as 'information can be used for any public task', they also contain detailed legal provisions to provide legal certainty. These provisions specify in what situations and for what purposes the data may be used, and who may have access to it'.

311 Article 29 Data Protection Working Party 2013, p. 54. See Chapter 6-8 for a closer look at the specific development of this principle in relation to land registries in the Netherlands, Germany, and England & Wales.

> to define these rules in such a manner that they provide sufficient legal certainty without being overly rigid.

Member States are allowed to restrict the scope of these rights in accordance with Article 13 of the Data Protection Directive,[312] however when they do, they must ensure that such a restriction constitutes a *necessary* measure to safeguard certain important interests as enumerated in that article (*e.g.* national security; defence; public security; an important economic or financial interest of a Member State; or the protection of the data subject or of the rights and freedoms of others).[313]

5.6.7.4 Adequate, relevant, and no longer than is necessary nor excessive in relation to its purpose

Article 6(1)(c) DPD contains the requirement that the personal data shall be 'adequate, relevant and not excessive in relation to the purpose for which it is collected and/or further processed'. This is closely linked with the purpose limitation principle as set out above. Here, too, the current state of affairs must be taken into account. In particular, information which may have been very relevant ten years previously, may have become irrelevant today. As the CJEU stated in the *Google Spain* case:[314]

> It follows from those requirements, laid down in Article 6(1)(c) to (e) of Directive 95/46, that even initially lawful processing of accurate data may, in the course of time, become incompatible with the directive where those data are no longer necessary in the light of the purposes for which they were collected or processed. That is so in particular where they appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed.

312 They do not *have to* restrict, but they are allowed to when it is necessary, see CJEU 7 November 2013, ECLI:EU:C:2013:715, C-473/12 (*Institut professionnel des agents immobiliers (IPI) v. Geoffrey Englebert, Immo 9 SPRL, Grégory Francotte*) at 32.

313 It is settled case law of the CJEU that the protection of the fundamental right to privacy requires that derogations and limitations to that fundamental right must apply only in so far as is strictly necessary, see CJEU 1 October 2015, C-201/14 (*Smaranda Bara and Others v Casa Nationala de Asigurari de Sanatate and Others.*), at 39-41. CJEU 16 December 2008, ECLI:EU:C:2008:727, C-73/07 (*Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*) at 56. In relation to Article 13, the CJEU reiterates in CJEU 7 November 2013, CJEU 7 November 2013, ECLI:EU:C:2013:715, C-473/12 (*Institut professionnel des agents immobiliers (IPI) v. Geoffrey Englebert, Immo 9 SPRL, Grégory Francotte*) at 48, it is for the Member State to decide whether they consider it necessary to provide in their legislation for an exception such as provided for by Article 13 Data Protection Directive.

314 CJEU 13 May 2014, C-131/12 (Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González) CJEU 13 May 2014, ECLI:EU:C:2014:317, C-131/12 (*Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González*) at 92.

Timing is therefore an important factor in determining whether the information is still relevant today. This is furthermore confirmed by Article 6(1)(e) DPD, which requires that the personal data be 'kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed'.

Articles 6(1)(c)-(e) were the subject of interpretation by the CJEU in the *Google Spain* case. This case concerned the so-called 'right to be forgotten' or 'right to erasure'. This right, which is codified in Article 17 the General Data Protection Regulation, which will enter into force in May 2018, is not explicitly laid down in the Data Protection Directive. The *Google Spain* case made clear that, from the reading of Articles 6 and 12 of the Data Protection Directive, in light of the fundamental rights of the data subject under Articles 7 and 8 of the EU Charter, the right to be forgotten does exist.

In this case, the personal data in question concerned a link on Google's search results page which would appear if you searched for a Mr. Mario Costeja González. The search resulted in two links to a newspaper announcing in an article (on two separate dates) a real-estate auction connected with attachment proceedings for the recovery of social security debts which were the subject of these proceedings.[315] These search results, which contain information from more than one decade earlier, still show up when a search is carried out on Costeja González' name. He wanted to have this information removed from the search results based on the right to be forgotten in light of the aforementioned Articles 6 and 12 of the Data Protection Directive and 7 and 8 of the EU Charter. The CJEU agreed.[316]

Whether information is still relevant and adequate when it concerns the insolvency listings of an individual, which still haunts the individual several years later, while he wants to set up a new business, was put before the CJEU in the *Manni* case.[317] Salvatore Manni is the sole director of *Italiana Costruzioni Srl*, a building company which was awarded a contract for the construction of a tourist complex. The sale of the properties in the complex was not going very well, which Mr. Manni blamed on the fact that it showed in the companies register that he had been the sole director and liquidator of a building company which had been declared insolvent in 1992 and struck off the companies register following liquidation proceedings in 2005.[318] He wanted this information, which he deemed no longer relevant, to be removed. The question posed to the CJEU, in short, was whether there is such a thing as a right to be forgotten in the companies register, set up in accordance with

315 CJEU 13 May 2014, ECLI:EU:C:2014:317, C-131/12 (*Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González*) at 14.

316 For more extensive overview of the case and dissecting of the ruling see Kuner *Maastricht Journal of European and Comparative Law* 22/1, p. 158–164, Lynskey *Modern Law Review* 78/3, p. 522–534, Zwenne 2015, p. 9–17. Criticism in relation to the freedom of expression see also Kulk & Borgesius *European Journal of Risk Regulation* 5/3, p. 389–398.

317 CJEU 9 March 2017, ECLI:EU:C:2017:197, C-398/15 (*Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni*).

318 CJEU 9 March 2017, ECLI:EU:C:2017:197, C-398/15 (*Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni*) at 23-24.

the First Company Directive.[319] In order to answer that question, the CJEU first had to examine what purpose was served by the collection and subsequent disclosure of the information in the companies register. This assessment is required in order to establish whether the information in the companies register can still be considered 'relevant' after (several years) after winding up the company. The Court already settled in several earlier cases that the purpose of the First Companies Directive was to

> guarantee legal certainty in relation to dealings between companies and third parties in view of the intensification of trade between Member States following the creation of the internal market and that, with that in mind, it is important that any person wishing to establish and develop trading relations with companies situated in other Member States should be able easily to obtain essential information relating to the constitution of trading companies and to the powers of persons authorised to represent them, which requires that all the relevant information should be expressly stated in the register.[320]

The Court stated that it is not possible to limit third parties to a certain category, such as only creditors of the company;[321] the disclosure of information 'is intended to enable any interested third parties to inform themselves of these matters, without having to establish a right or an interest requiring to be protected'.[322]

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319 Article 2 jo. 3 First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, OJ L 65, p. 8–12. The questions were: '(1) Must the principle of keeping personal data in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed, laid down in Article 6(1)(e) of Directive 95/46, transposed by Legislative Decree No 196 of 30 June 2003, take precedence over and, therefore, preclude the system of disclosure established by means of the companies register provided for by Directive 68/151 and by national law in Article 2188 of the Civil Code and Article 8 of Law No 580 of 29 December 1993, in so far as it is a requirement of that system that anyone may, at any time, obtain the data relating to individuals in those registers? (2) Consequently, is it permissible under Article 3 of Directive 68/151, by way of derogation from the principles that there should be no time limit and that anyone may consult the data published in the companies register, for the data no longer to be subject to "disclosure", in both those regards, but to be available for only a limited period and only to certain recipients, on the basis of a case-by-case assessment by the data manager?'.

320 CJEU 9 March 2017, ECLI:EU:C:2017:197, C-398/15 (*Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni*)CJEU 9 March 2017, C-398/15 (Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni), at 51. CJEU 12 November 1974, C-21/74 (Friedrich Haaga GmbH.) at 6.

321 CJEU 4 December 1997, ECLI:EU:C:1997:581, C-97/96 (*Verband deutscher Daihatsu-Händler v Daihatsu Deutschland*) at 19, 20 and 22. CJEU 12 November 1974, ECLI:EU:C:1975:24, C-21/74 (*Friedrich Haaga GmbH.*) & CJEU 23 September 2004, ECLI:EU:C:2004:552, Joined Cases C-435/02 and C-103/03 (*Springer*). CJEU 4 December 1997, C-97/96 (Verband deutscher Daihatsu-Händler v Daihatsu Deutschland)

322 CJEU 9 March 2017, ECLI:EU:C:2017:197, C-398/15 (*Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni*) at 51.

The question then turned to the relevance of the information after the dissolution of a company. The Court stated that:

> 53 (…) even after the dissolution of a company, rights and legal relations relating to it continue to exist. Thus, in the event of a dispute, the data referred to in Article 2(1)(d) and (j) of Directive 68/151 may be necessary in order, inter alia, to assess the legality of an act carried out on behalf of that company during the period of its activity or so that third parties can bring an action against the members of the organs or against the liquidators of that company.
> 54 Moreover, depending in particular on the limitation periods applicable in the various Member States, questions requiring such data may arise for many years after a company has ceased to exist.
> 55 In view of the range of possible scenarios, which may involve actors in several Member States, and the considerable heterogeneity in the limitation periods provided for by the various national laws in the various areas of law, highlighted by the Commission, it seems impossible, at present, to identify a single time limit, as from the dissolution of a company, at the end of which the inclusion of such data in the register and their disclosure would no longer be necessary.

The information therefore could still be considered relevant. Finally, the Court ruled that this interpretation does not result in a disproportionate interference with the fundamental rights of the persons concerned, *i.e.* those registered. The Court bases this on three reasons:

1. The disclosed information regarding the individual is limited and concerns only 'those relating to the identity and the respective functions of persons having the power to bind the company concerned to third parties and to represent it or take part in the administration, supervision or control of that company, or having been appointed as liquidator of that company.'[323]
2. The only safeguards that joint-stock companies and limited liability companies offer to third parties are their assets, and therefore the Court considers it 'justified that natural persons who choose to participate in trade through such a company are required to disclose the data relating to their identity and functions within that company, especially since they are aware of that requirement when they decide to engage in such activity'.[324]

323 CJEU 9 March 2017, ECLI:EU:C:2017:197, C-398/15 (*Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni*) at 58.

324 CJEU 9 March 2017, ECLI:EU:C:2017:197, C-398/15 (*Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni*) at 59.

3. The Court leaves open the option of Article 14 Data Protection Directive, which concerns the right to object against processing. In this specific case, the Court interprets this article as follows, namely that it leaves room in 'specific situations in which the overriding and legitimate reasons relating to the specific case of the person concerned justify exceptionally that access to personal data entered in the register is limited, upon expiry of a sufficiently long period after the dissolution of the company in question, to third parties who can demonstrate a specific interest in their consultation'.[325]

In short, only a limited amount of personal data is disclosed in the companies register, which is justified given the fact that a person chooses to conduct business using a limited liability company. Moreover, the person knew it was subjecting itself to a higher degree of publicity, by conducting business using a limited liability company. Lastly, from the foregoing, it may be clear that, *in general*, the disclosure of personal data from the companies register is compatible, but such processing might nevertheless be incompatible with the fundamental rights of an individual where the circumstances of a specific case may exceptionally tip the balance in favour of limiting access to the personal data after the company has long since been dissolved. In such a case, the individual may claim limited access based on the right to object as laid down in Article 14 of the Data Protection Directive, when there are no national provisions to the contrary.

5.6.7.5 Right to rectify, erase or block

When processing personal data is no longer relevant, necessary, or adequate, the personal data should be erased or rectified. Article 6(1)(d) DPD adds to that list that the personal data must be accurate and, where necessary, kept up to date. Where it is not accurate or up to date, every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified.[326] This is a duty of the controller. Next to this duty of the controller that flows from Article 6(1)(d) *jo.* Article 6(2) DPD,[327] the Directive also provides an independent right to the data subject to have such information removed. Article 12(b) DPD provides the right to the data subject to claim the rectification, blocking, or erasure of the infor-

325 CJEU 9 March 2017, ECLI:EU:C:2017:197, C-398/15 (*Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni*) at 60.

326 CJEU 13 May 2014, ECLI:EU:C:2014:317, C-131/12 (*Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González*) at 72. See also Article 6(2) DPD.

327 Considering this is a duty of the controller, it may be considered remarkable that, in the aftermath of the Google Spain case, a sort of notice-and-takedown procedure was developed, which requires action by the data subject before action by the controller. From Article 6(2) of the Data Protection Directive, it would normally flow that, where the information became irrelevant, such as in the case of Mr. Costeja González, it would be a job of the controller to remove this information independently. Considering the immense burden this would place on the controller in the case of a search engine, the outcome is not so surprising.

mation directly from the controller.[328] This Article 12(b) DPD right of the data subject extends beyond merely the rectification of incorrect or incomplete personal data. It also concerns the option to block, have erased, or rectify any processing of his or her personal data which 'does not comply with the provisions of this Directive'. To make use of such a right, effectively, again transparency of the processing of personal data is to be provided for, and hence the access right as laid down in Article 12(a) DPD[329] and rectification right are directly related.[330] The same connection exists between the access right and the right to object.[331]

5.6.7.6 Right to object

Where the right to rectify applies when the processing of personal data is incompatible, the data subject also has a right to object in case the processing of personal data is compatible, but the individual circumstances of the case dictate that it should nevertheless not have taken place. Article 14 of the Data Protection Directive provides this right to object.[332] This is another of the rights of the data subject. As recital 45 of the Data Protection Directive explains:

328 Article 12(b) Data Protection Directive Member States shall guarantee every data subject the right to obtain from the controller: (b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data.

329 Which reads as follows: Article 12(a) Data Protection Directive: Member States shall guarantee every data subject the right to obtain from the controller: (a) without constraint at reasonable intervals and without excessive delay or expense: - confirmation as to whether or not data relating to him are being processed and information at least as to the purposes of the processing, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed, - communication to him in an intelligible form of the data undergoing processing and of any available information as to their source, - knowledge of the logic involved in any automatic processing of data concerning him at least in the case of the automated decisions referred to in Article 15 (1)'. The controller may request payment for such an overview, it is not required to do so, nor may the fees be excessive, CJEU 12 December 2013, ECLI:EU:C:2013:836, Case C-486/12 (*X*), a summary may suffice CJEU 17 July 2014, ECLI:EU:C:2014:2081, Joined Cases C-141/12 and C-372/12 (*YS (C-141/12) v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel (C-372/12) v M and S*).

330 See also CJEU 7 May 2009, ECLI:EU:C:2009:293, C-553/07 (*College van burgemeester en wethouders van Rotterdam v. M.E.E. Rijkeboer*) at 51.

331 A right to access should not be confused with the access under the publicity principle of property law. Access here concerns access of the data subject to information regarding the processing of their personal data by the data controller.

332 Article 14 Data Protection Directive: Member States shall grant the data subject the right: (a) at least in the cases referred to in Article 7 (e) and (f), to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data; (b) to object, on request and free of charge, to the processing of personal data relating to him which the controller anticipates being processed for the purposes of direct marketing, or to be informed before personal data are disclosed for the first time to third parties or used on their behalf for the purposes of direct marketing, and to be expressly offered the right to object free of charge to such disclosures or uses. Member States shall take the necessary measures to ensure that data subjects are aware of the existence of the right referred to in the first subparagraph of (b).

> Whereas, in cases where data might lawfully be processed on grounds of public interest, official authority or the legitimate interests of a natural or legal person, any data subject should nevertheless be entitled, on legitimate and compelling grounds relating to his particular situation, to object to the processing of any data relating to himself; whereas Member States may nevertheless lay down national provisions to the contrary.

The data subject may object to processing even when such processing is lawful, because his personal circumstances dictate that the processing should not take place. Member States may nevertheless lay down national provisions to the contrary.[333] Article 14(1) of the Data Protection Directive requires that Member States shall grant the data subject the right to object 'at least in the cases referred to in Article 7 (e) and (f)'. It does not mention the processing of personal data based on Article 7 (c) of the Data Protection Directive, the processing of which is necessary for compliance with a legal obligation. Member States may extend the right to object to cover processing based on this legal basis as well.

Moreover, there have to be compelling and legitimate grounds to object against such processing. For example, in *Manni*, the CJEU explained that no such compelling argument was brought forth by Mr. Manni:

> [i]n that regard, it should be pointed out that the mere fact that, allegedly, the properties of a tourist complex built by Italiana Costruzioni, of which Mr Manni is currently the sole director, do not sell because of the fact that potential purchasers of those properties have access to that data in the company register, cannot be regarded as constituting such a reason [to warrant the right to object, AB], in particular in view of the legitimate interest of those purchasers in having that information.

A right to object also exists when the processing is for direct marketing purposes. An objection against direct marketing does not require a compelling or legitimate ground to object, other than the fact that the personal data is processed for (anticipated) direct marketing (Article 14(2) of the Data Protection Directive).

5.6.7.7 Proportionality

While not explicitly mentioned in the Data Protection Directive, the principle of proportionality[334] applies to the processing of personal data. It manifests itself in general in the

333 See for example section 6.3.3.

334 On the principle of proportionality in general in EU Law see Article 5 (4) TFEU. Craig 2012, p. 591 *et seq*. That the principle also applies indirectly to Member States when implanting EU law, see CJEU 12 July 2001, ECLI:EU:C:2001:420, Case C-189/01 *(Jippes and Others*) at 80 *et seq*. and where acts of Member States limit or regulate rights or freedoms guaranteed by EU Law, see CJEU 18 June 1991, ECLI:EU:C:1991:254, Case

requirement that personal data is processed 'fairly',[335] in that it requires a balancing between the rights of the data subject and the interests of the controller. More specifically, the requirement of proportionality is inferred from the data protection principle's requirement that the processing of personal data is not 'excessive' in relation to its purpose, as discussed above in relation to Article 6(c) DPD.[336]

5.7 General Data Protection Regulation

The Data Protection Directive was enacted in 1995, when the internet was still in its infancy,[337] cloud computing was still called storing information on a computer elsewhere, and behavioural targeting was still discussed in relation to the patient-doctor relationship as a means of therapy rather than what we have come to know it as now: a sophisticated advertising method.[338]

And while the Data Protection Directive has become, in practice, 'the international data protection metric against which data protection adequacy is measured',[339] as early as 2009 the process of amending the framework started to tackle the challenges posed by rapid technological developments and globalisation.[340] This eventually led in 2016 to the adoption of the General Data Protection Regulation (GDPR).[341] The GDPR will apply from 25 May 2018 onwards.

C-260/89 (*ERT and DEP*) See Hofmann/Barnard & Peers 2014, p. 204. Craig & Búrca 2015, p. 111–112, 229–231. See for application, in part, in data protection matters CJEU 17 October 2013, ECLI:EU:C:2013:670, Case C-291/12 (*Michael Schwarz v Stadt Bochum*).

335 Bygrave & Schartum/Gutwirth e.a. 2009, p. 162–163.

336 See also CJEU 20 May 2003, ECLI:EU:C:2003:294, Joined Cases C-465/00, C-138/01 and C-139/01 (*Rechnungshof v. Österreichischer Rundfunk and Others*) at 91.

337 Tene *International Data Privacy Law* 1/1, p. 15–27 who also explains that, not only the technology has changed, but also the individuals using the technology, which for Tene is a reason why the 'right to oblivion', which is referred to here as 'the right to be forgotten', is all the more pressing.

338 Although the first inclinations were there, see Worldwide Electronic And Broadcast Audience Research Symposium 1994, p. 100. See extensively on the topic of behavioural targeting Zuiderveen Borgesius 2015.

339 De Hert & Papakonstantinou *Computer Law and Security Review* 28/2, p. 131.

340 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: A comprehensive approach on personal data protection in the European Union, 04.11.2010, COM(2010) 609, p. 2.

341 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119. Next to the Regulation, also the Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119/89, entered into force, which has to be transposed into national law no later than 6 May 2018.

The changes brought about by the GDPR are in general as follows.[342] The general description of the data protection principles remains the same, and they have been supplemented by the integrity and confidentiality requirement, which entails that the processing is done 'in a manner that ensures appropriate security of the personal data'.[343] The rights of the data subjects are strengthened, for example in relation to the concept of consent,[344] and 'new' rights such as the right to be forgotten, are explicitly laid down in the GDPR.[345] A new right is the right to data portability.[346] This will allow the data subject to get their personal data from the controller in a machine readable format and transport this to another service, for example taking your Facebook timeline to a competitor of Facebook. This allows for 'system interoperability', and provides a response to those e-commerce operators seeking to 'lock in' consumers to their system.[347]

The obligations for controllers and processors is increased, as is their corresponding accountability, which may include the requirement to have a Data Protection Officer[348] and perhaps the requirement to carry out a data protection impact assessment.[349] Moreover, the notification obligation of processing personal data to the DPA is replaced with a documentation obligation.[350] A notification obligation in relation to a data breach is still in place.[351]

Failure to comply with the provisions of the GDPR could result in a hefty fine, up to 20 million EUR, or in the case of a company, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher.[352]

One aspect that has changed, which is of particular interest in relation to this study, is an alteration of the lawful processing requirements, enumerated exhaustively in Article 6 GDPR. Article 6(1) GDPR reads (emphasis added):

342 This enumeration is not exhaustive. A careful study of the GDPR however falls outside of the scope of this study, which is focused on the current legal framework.

343 An obligation which is currently found in Article 16 Data Protection Directive.

344 The newly introduced Article 7 GDPR, which puts the burden of proof on the controller rather than the data subject.

345 Article 17 GDPR.

346 Article 20 GDPR.

347 De Hert & Papakonstantinou *Computer Law and Security Review* 28/2, p. 137–138. In particular, this provision has competition (law) effects, see on this in more detail Engels *INTERNET POLICY REVIEW Journal on internet regulation* 5/2, p. 1–17.

348 Article 37 GDPR.

349 Article 35 GDPR.

350 Article 30 GDPR.

351 Articles 33-34 GDPR.

352 Article 83(5) GDPR. The extent of these fines is so large, that some have viewed these fines as having deterring effects for example in relation to free speech. As Keller notes, 'The risk that lawful speech will be suppressed through cautious overcompliance is increased when an [Online Service Providers] – rather than the speaker herself – decides how to interpret an unclear regulation.' Keller 2017, p. 34.

> 1. Processing shall be lawful only if and to the extent that at least one of the following applies:
> a. the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
> b. processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
> c. processing is necessary for compliance with a legal obligation to which the controller is subject;
> d. processing is necessary in order to protect the vital interests of the data subject or of another natural person;
> e. processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
> f. processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.
>
> **Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks.**

The emphasised sentence is new in relation to the legitimate grounds for processing under the Data Protection Directive. Recital 47 sheds some light on this particular sentence:

> Recital 47: (…) Given that it is for the legislator to provide by law for the legal basis for public authorities to process personal data, that legal basis should not apply to the processing by public authorities in the performance of their tasks. (…).

This means that a public authority which processes personal data, such as a land registry, may not process personal data under the GDPR when such 'processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party'. It therefore appears that both the legitimate interests of the public authority, *as well as* the legitimate interests pursued by a third party,[353] have to be incorporated in the law that provides the legal basis for processing personal data under Article 6(1)(c) or (e) GDPR.[354]

353 Compare this with Manni where the CJEU sided with the AG that the legal basis for processing was not only Article 7(c) and (e), but also (f) DPD. This would no longer be possible under the GDPR. CJEU 9 March 2017, ECLI:EU:C:2017:197, C-398/15 (*Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni*) at 42.

354 See on the difficulty of determining what a 'third party' is under the Data Protection Directive, which generally would not change under the General Data Protection Directive, Salom *International Data Privacy Law* 4/3, p. 177–188. See on some legitimate interests described in the GDPR, Recitals 47-50 GDPR.

Moreover, this legal basis 'should be clear and precise and its application should be foreseeable to persons subject to it, in accordance with the case law of the Court of Justice of the European Union (the 'Court of Justice') and the European Court of Human Rights.'[355]

With regard to Article 6(1)(c) or (e) GDPR further stipulates in Article 6(3) GDPR that:

> The basis for the processing referred to in point (c) and (e) of paragraph 1 shall be laid down by:
>
> a. Union law; or
> b. Member State law to which the controller is subject.
>
> The purpose of the processing shall be determined in that legal basis or, as regards the processing referred to in point (e) of paragraph 1, shall be necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. That legal basis may contain specific provisions to adapt the application of rules of this Regulation, inter alia: the general conditions governing the lawfulness of processing by the controller; the types of data which are subject to the processing; the data subjects concerned; the entities to, and the purposes for which, the personal data may be disclosed; the purpose limitation; storage periods; and processing operations and processing procedures, including measures to ensure lawful and fair processing such as those for other specific processing situations as provided for in Chapter IX [which has provisions relating to specific processing situations, AB]. The Union or the Member State law shall meet an objective of public interest and be proportionate to the legitimate aim pursued.

The newly added paragraph 3 of Article 6 GDPR therefore provides some guidelines as to what the specific legal obligation could and should entail.

5.8 Conclusion

This part of the study started with the difficulty of explaining the concept of privacy, a term that is inherently vague and can mean as many different things as the number of people you ask. The legal definitions of privacy and data protection, which were the topic of this Chapter, all rely in one way or another on some of the theories discussed in

355 Recital 41 GDPR.

Chapter 4. Alan F. Westin's notion of privacy as control was very influential during the drafting periods of the OECD Guidelines and Convention no. 108, which translates into the visible role of the data subject who has the option, or better said, the right to right a wrong with regard to mistakes in his personal data. Nissenbaum's theory of privacy as contextual integrity, while it was developed much later, is also visible in many of the Court cases, where general rules are applied in specific circumstances, all taking into account the different factors that make up the case put before the Court.[356] And Hildebrandt's theory of privacy as identity building is supported in the cases of the ECtHR, which time and again links the necessity for privacy to the development of a person's identity.

Privacy is seen by many as the mother of data protection rules. Therefore, a brief exploration of privacy had to be undertaken, before delving into the concept of informational privacy or data protection.

The objective of all data protection legislation in place has hinged on two ideas: the protection of fundamental freedoms of the data subject which, when approximated in all states, should remove the obstacles to a free flow of information across borders.

Achieving such approximation was initially attempted by setting up broad principles of data protection, leaving a bigger margin of appreciation to signatory states in their implementation efforts, but it was given 'body' with the Data Protection Directive, which expanded on the principles and provided for rules for the lawful processing of personal data. The CJEU then went one step further in strengthening the position of the data subject by relying on the Charter to give force to the proportionality principle in data protection.

As a final note of comparison, it should be emphasised that, while the Data Protection Directive took over the principles of Convention no. 108 and elaborated on them, the Convention should not be disregarded. The material scope of the two instruments might be similar, but it is the openness of the Convention that makes it still very relevant today. Where the Data Protection Directive is a 'closed' instrument, open only to the Member States, the Council of Europe noted that the international nature of the issue – technology knows no bounds – should also be reflected in the possibility of becoming a signatory party to the Convention. All who want to join, can.

A general overview of the EU Data Protection Directive concluded this chapter. The legal framework regarding the processing of personal data in the Data Protection Directive is intended to ensure the free movement of personal data, while guaranteeing a high level of protection for the rights and interests of the individuals to whom such data

356 See ECtHR 4 December 2008, 30562/04 and 30566/04 (*S. and Marper v. The United Kingdom*), cited above in section 5.5.2.

relates.[357] Where data can be considered personal data which is processed, the Data Protection Directive requires that the information be lawfully and fairly processed. Lawful and fair processing of personal data includes the placing of limitations on processing based on: the purposes for processing, the duration of storing the personal data, and only where such processing is necessary, relevant, adequate and the personal data is accurate. While these requirements are placed on the controller, the data subject also has rights to claim rectification, blocking, or the erasure of his personal data in certain instances. To make use of these rights effectively, a certain degree of transparency in relation to the processing of the data subject's personal data is and must be granted. This concerns transparency regarding data protection mechanisms in place and must therefore be distinguished from transparency as described in Chapter 2 in relation to publicity.

Part III will review the three different legal systems in their application of both frameworks in the situation of land registration.

357 Recitals 2 and 10 Data Protection Directive, reiterated by the CJEU in CJEU 6 November 2003, ECLI:EU:C:2003:596, Case C-101/01 (*Bodil Lindqvist*) at 96, CJEU 20 May 2003, ECLI:EU:C:2003:294, Joined Cases C-465/00, C-138/01 and C-139/01 (*Rechnungshof v. Österreichischer Rundfunk and Others*) at 97-99. CJEU 6 October 2015, ECLI:EU:C:2015:650, C-362/14 (*Schrems v. Data Protection Commissioner et al.*) at 39.

Part III
ACCESS

6 A fully open system: The Netherlands

6.1 Introduction

Of the three approaches to providing access to land registration information, the Netherlands is by far the most liberal. As will be shown, there are no restrictions, other than the payment of a fee, to accessing information about individual plots of land, nor on requesting access to the underlying deeds, which includes plenty of personal data, including passport number, birthdate and place, and a person's marital status. The Netherlands has furthermore very few restrictions on searching by name. How this system came to be this open is explained by providing a very brief historical overview in section 6.2, which starts as far back as in the early 1500s. To explain how the Dutch Civil Code in 1838 opted for a very liberal system of access to information in the land registry, a historical look back further than 1838 is required.

Ever since 1838, the technical developments gradually extended the ease by which the information in the land registry was collected and further processed. This increased openness did not lead to any legislative changes. Neither the first comprehensive data protection legislation in the Netherlands nor the new Dutch Civil Code in 1992 changed anything about the legislative framework of access to land registration information. There were some minor bumps in the road, as we shall see, but overall the course of action seemed steady, and it was headed towards simplifying and extending the access regime.

As will be elaborated on in section 6.3.3, this really only changed with the implementation of the Data Protection Directive, which required the application of data protection safeguards not only to private parties, but also governmental entities alike. The special (exclusionary) position the land registry held under the older data protection legislative framework was removed and a set of safeguards was implemented. These included facilities to monitor bulk access to data (section 6.3.3.5), a legal basis to provide options for individuals to request their information be shielded (section 6.3.3.6), and a more general application of data protection principles, such as purpose limitation (section 6.3.3). The effect of these provisions has however been lacking, and the Netherlands remains, to this day, the most open of the three systems, which is largely due to the fact that there are very few limitations placed on searching by name and the limited efforts to implement the actual safeguards, all of which will be discussed in section 6.3.

6.2 Brief historical overview

Understanding how the modern access regime to the land registry, as well as the division and interlinking of the Cadastre and the land registry came to pass, we must have a brief look at its history. Starting as early as the 1500s and ending with the New Dutch Civil Code of 1992 a very brief overview shows us how the Dutch system became so open. As a large part of the earlier Dutch Civil Codes, and the system of land registration in particular, was based on French law, a brief overview of the French development of publicity by way of registration is also provided first.[1]

The Edict of Charles V of 10 May 1529[2] prescribed that the transfer of property rights in land (specifically directed at *hypothecs*) required a 'command' by the courts and registration of the transfer (inscription in the protocols) at the district court.[3] At that time, the principle of publicity was shaped in a way that registration was linked to the *erga omnes* effect of a particular type of *hypothec*. Not all *hypothecs* were subjected to this method of publicity, nor were these protocols a fully public register for that matter.[4] Therefore, reliance upon the debtor for information, rather than a 'public' register, was still very much needed.[5] Irrespective of its flaws, the method of registration at the district courts in the protocols is considered the precursor of the modern public registers.[6] This continued and developed for some hundreds of years, and it was continued to some extent in the Napoleonic Code for the Kingdom of Holland, enacted by its King, Louis Napoléon, the brother of then emperor Napoléon Bonaparte.[7]

The 1809 Napoleonic Code for the Kingdom of Holland opened up the possibility for an authority other than the courts to deal with the registration,[8] however failed to give effect to that option and, once again, resorted to giving this power to the courts. The Code itself resembled more the old law rather than the development that had occurred over the centuries, which favoured registration, and had almost considered the registration a '*conditio sine qua non*' for the transfer of immovable property and the vesting of limited property rights of enjoyment on immovable property'.[9] The Code therefore was in essence more of the same, rather than a step towards publicity by way of registration.

Soon after, however, on 1 March 1811 the *French* Civil Code (*Code Napoléon*) entered into force in the entire Netherlands, when it was again annexed by France.[10] The Code

1 See also section 2.7.
2 For Holland. For Utrecht, it was with the 23 July 1545 Edict.
3 See Van Den Bergh 1978, p. 6, Konings 1990, p. 15.
4 Van Den Bergh 1978, p. 6.
5 See extensively also Herman 1914, p. 3 *et seq*.
6 Konings 1990, p. 15.
7 See more on the origins of the Dutch Civil Code and the structure, Berlee/César 2013.
8 Stating that the authority would be determined later on by the King.
9 Konings 1990, p. 16.
10 Left of the bank of the river Rhine from 1 January 1811 already and 1 March 1811 onwards for the rest of the Netherlands. Berlee/César 2013, p. 289.

Napoléon would stay in force – even after sovereignty was restored two years later – until a New Dutch Civil Code would be enacted twenty-five years later on 1 October 1838.[11]

6.2.1 The Dutch Civil Code of 1838

When, in 1811, the Netherlands was subjected to the French *Code Civil*, as well as its system of transfer of immovable property and the creation of limited property rights therein, the *Code Civil* was met with 'general condemnation'.[12] The disapproval was focused on the lack of publicity and resulting legal uncertainty.[13] In the years that followed,[14] the drafters searched to find a way to restore the publicity that was lacking in the French *Code Civil* and succeeded with their work in drafting the 1838 Dutch Civil Code.

However, leading up to that Civil Code, is the genesis of the linking of the land registry and Cadastral Registry. With the annexation of the Netherlands to France in 1811, the cadastre was also introduced. The cadaster was to be responsible for giving an account of all land enjoyment based on plot, so that taxes could be collected.[15] The mapping of the country by plot was done by the cadaster and its land surveyors. The visit of a surveyor to see, and ask, who had the use and enjoyment of the land had nothing to do with private law relations, but it was to see which person would would have to pay taxes. Land ownership and taxes were not necessarily linked at the time.[16] The two were considered separate institutes, one set up for fiscal reasons (cadastre) and the other to advance certainty about rights in land (land registry). In 1815, the Select Committee, established exactly one year earlier,[17] published its report and advanced a system not unlike the Prussian Government had in place,[18] whereby the land registries were organised by way of plot. As the Cadastre already had such an organisational structure, they opted to link the two different types of registries. This link was made in 1828 and[19] their connection

11 For the province of Limburg this would be only on 1 January 1842. Berlee/César 2013, p. 289, Konings 1990, p. 17.

12 Konings 1990, p. 19. Similar dissaproval existed in Prussia and later on Germany, see Mascher 1869, p. 132–133.

13 See on this matter also section 2.7.

14 See for an elaboration on all that happened between 1811 and 1838 Konings 1990, p. 19–25, Van Nieuwkuyk 1922, p. 10 *et seq*.; especially for models of the registers at the time De Vos 1902, p. 77 *et seq*.

15 Napoleon noticed issues in France and required that the whole of the country would be split up into parts, plots, which would then be subject to taxes.

16 Nakken 1965a, p. 98. Therefore, it might very well be that someone bought a house, moved in, had not yet become the owner but did have to pay taxes on the property. Ownership boundaries and cadastral boundaries did not necessarily match.

17 15 july 1814 established by Royal Decree of 15 July 1814, nr. 76. See on the discussion regarding publicity at that time Nakken 1965b, p. 112.

18 See on the German development and the importance of the Prussian Government in relation to access to the land registry, section 8.2.

19 Royal Decree of 1 August 1828, *Stbl. 29*, see Konings 1990, p. 24.

was cemented with the 1838 merging of the housing of two separate institutions.[20] As such, access to the land registry by way of the cadastre was introduced.[21]

When it finally did come into existence in 1838,[22] the Civil Code (*Burgerlijk Wetboek*, BW) of the Netherlands reflected the disapproval of its French counterpart. Publicity returned to a level not dissimilar to the approach in France prior to the 1804 *Code Civil* under the Law Brumaire.[23] Rather than a meaningless formality, publicity was placed at the heart of the transfer of immovable property. It became a constitutive requirement that the notarial deed[24] had to be transcribed (*overschrijving*) in the land registry.[25] The 1838 Civil Code also provided for the access regime to the land registry. Article 1265 BW stated that the land registry was open to any interested party, introducing full access to the deeds recorded in the land registry.

Article 1265 read:[26]

> De bewaarders der hypotheken zijn gehouden om aan **alle degenen die zulks verlangen** inzage te geven van hunne registers, en een afschrift uit te leveren van de akten welke op hunne registers zijn overgeschreven, en van de bestaande inschrijvingen en aanteekeningen, of wel een getuigschrift dat er geen bestaan. In allen gevalle, zijn zij verpligt, bijaldien bevorens inschrijvingen op het goed hebben bestaan die naderhand zijn doorgehaald, van die daadzaak, zonder verdere bijzondere aanduiding, melding te maken op het door hen te geven afschrift of getuigschrift.

This meant that anyone who wanted access was given access. Access here would constitute not only access as in seeing the particular registration,[27] but also the furnishing and

20 Royal Decree of 8 August 1838, *Stbl. 27*, see Konings 1990, p. 25, De Vos 1902, p. 150 *et seq*. See for the development of the Cadastre itself Konings 1990, p. 56–61, Kruizinga/ de Vries et al. 1997, p. 22, De Vos 1902.

21 See also Article 1219 BW (oud) which stated that 'De akte waarbij hypotheek wordt gevestigd moet bevatten een bijzondere opgave van het bezwaarde goed, en van deszelfs aard en ligging, naar aanleiding der kadastrale indeeling' which continues today with Article 20(1) Kadasterwet. See also on the development Nakken 1965c.

22 There were some problems with Belgium between 1811 and 1838 that hindered the codification process. Questions were later raised whether this intertwining of the two types of registers was such a good idea, see in particular Berretty 1969c, Luijten & Nakken 1971a, Luijten & Nakken 1971b, Nakken 1966a, Nakken 1996b.

23 See section 2.7.

24 Which was required based on Article 671a BW (oud).

25 Article 671 'De levering of opdragt van onroerende zaken geschiedt door de overschrijving van de akte in de daartoe bestemde openbare registers'.

26 Translation of the most important first sentence: 'The keepers of the hypothecs are required to provide access to its register to all who desire it, and give a copy of the deeds which have been transcribed on their registers, and of current registrations and notes, or a certificate that there are none'.

27 Compare with Reehuis & Slob 1990, p. 14 'In dit verband wijzen de ondergetekenden nog eens op het feit dat het kunnen raadplegen overigens niet wil zeggen dat de belanghebbenden de registers in handen moeten

receiving of a copy of the registration, as well as a declaration that there are no burdens on the land. This starting point has not been significantly changed since then. Since 1838, the land registry therefore has been public.

6.2.2 Towards the new Dutch Civil Code and the focus on information

Soon after the enactment of the 1838 Civil Code, there was criticism on the sloppy drafting of the Code.[28] This criticism did not result in any fundamental revision efforts over the years to come, although the Code underwent many small changes and amendments.[29] Attempts at a complete overhaul of Dutch private law had been made, but all without any result.[30] A partial revision had also been attempted, but again, without much result.[31] In 1938, on the occasion of the centennial celebration of the Civil Code,[32] Meijers proposed a complete revision of the Civil Code, calling it a matter of honour in which a small country can be great as well.[33]

On 25 April 1947, it was requested of Meijers,[34] then a professor of Law at Leiden University, to draft a design for a 'New Civil Code'. This would be a major revision of the Civil Code that had been in force since 1838. While the discussions were going on about the Dutch Civil Code itself, the role of the Cadastre and Land Registry was also examined more closely. The drafters agreed that the original task of the Cadastre, which had been for fiscal reasons, was no longer its only task, rather it had grown into an institution that is a massive source of information regarding land.[35] It was even stated that the primary task of the Cadastre and Land Registry in society was to act as a source of information regarding immovable property and rights therein.[36] This opened up the possibility that

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kunnen hebben. De openbaarheid bestaat hierin dat de belanghebbende er recht op heeft dat de betrokken ambtenaar hem mededeelt wat hij wenst te weten'.

28 This section is taken from earlier published work in: Berlee/César 2013, p. 290.

29 Already in 1843, the first amendment was enacted, which did away with overly formalistic *Code civil* provisions. See further: E.A.A. Luijten, "146 jaar Burgerlijk Wetboek: Inleiding," in *146 jaar Burgerlijk Wetboek – Het jubileum van het 150-jarig Wetboek en zijn invoering in het Hertogdom Limburg op 1 januari 1842*, ed. E.A.A. Luijten (Deventer: Kluwer 1989), p. 10.

30 In 1880 there was a committee Van Meerbeke which resigned 18 years later with nothing more to show than a draft that never became more than a draft for a revision of Books 1 and 2 of the Dutch Civil Code.

31 After an overwhelming majority at the Dutch Lawyers Association (*Nederlandse Juristenvereniging*) requested such partial revision of the Civil Code, a new committee was constituted.

32 See extensively on the 1838–1938 period: Florijn 1994.

33 'een eerezaak… waarin ook een klein volk groot kan zijn'. Scholten and Meijers, *Gedenkboek*, 63.

34 Due to his death in 1954, the work was not finished, after which Drion, Eggens and De Jong continued it.

35 Reehuis & Slob 1990, p. 4. See also Claessen, who, when focussing on the Cadastre (*not* the land registry) and the its role in supplying real estate information, still found some room for improvement. Claessen 1982.

36 Reehuis & Slob 1990, p. 6 'Ofschoon in verschillende aspecten tot uitdrukking komende, komt het in hoofdzaak hierop neer dat het kadaster thans in het maatschappelijk gebeuren als primaire taak heeft te fungeren als informatiebron betreffende gegevens omtrent onroerende zaken en daarop gevestigde rechten'.

the formally delineated tasks of the land registry could be altered to suit societal needs.[37] Later on, in 2001, this flexibility was used when the implementation of the Data Protection Directive required a more precise description of the purposes and tasks of the Cadastre and Land Registry.[38]

6.2.2.1 Technical developments in between the Civil Codes

At the time of the discussions about the New Dutch Civil Code, the technological development had also progressed. Up until 1 April 1950 the copying of registrations from one register to another,[39] and from deed to register, was done by hand, repeated word for word.[40] However, the development of the microfilm[41] changed the way in which the registers were copied.[42] Slowly but surely, the paper registers were mechanically copied[43] and kept on these microphotos which would make a microfilm.[44] Around the 1970s the government decided that this was not enough and, from that point on, a wave of computerisation came over the land registry.[45]

37 'In het voorliggende ontwerp is in artikel 3, eerste lid, dan ook deze primaire taak scherp omlijnd weergegeven. Daarnaast is tevens rekening gehouden met in gang zijnde en in de toekomst mogelijk zich voordoende nieuwe maatschappelijke ontwikkelingen. Het tweede lid van voornoemd artikel laat namelijk de mogelijk open dat bij andere wetten enz. of bij besluit van de eerste ondergetekende aan de Rijksdienst nieuwe taken worden opgedragen'. Reehuis & Slob 1990, p. 6–7 See also on the desire for flexible goals; Bogaerts/Zevenbergen & De Jong 1993, p. 12. See also on this the speech by the deputy Minister at the installation of the *Stichting Studiecentrum Vastgoedinformatie*, stressed this societal importance of the Cadastre, as well as advancing the idea that in future laws an informationparagraph (*informatieparagraaf*) should be added, 'Uitvoering van wettelijke en bestuurlijke maatregelen steeds meer 'opgehangen' aan goede openbare informatievoorziening', *Stcrt*. 1980/4, p. 4–5.

38 See section 6.3.3.

39 See Stb. 1947, 66 and the resulting Ministerial Order (*Ministeriële beschikking*). Vervanging van de woordelijke overschrijving van stukken in de openbare registers, gehouden ten hypotheekkkantore, door het in bewaring nemen van afschriften van die stukken, Stcrt. 1949, 222. This order also included a form that should be used for the transcriptions. It was not to be folded (Article 2(1)) and the transcript is produced by typewriter, and only in limited circumstances to be written on by pen (Article. 2(5) jo. 2(4)).

40 Although certain parts of the copying done was replaced by *vlakdrukreproductie*. Van Den Berg 1949, p. 234.

41 A mechanical reproduction made of microfoto's which are stored on a reel, which '[i]n spite of many advantages, it must be recognized that microfilm is a more delicate record medium than paper'. Noll *The American Archivist* 13/2, p. 129.

42 See also Hartman 1953, p. 43 and more extensively Van Den Berg 1949.

43 And changes in the law were made to accomodate this development, see Wet van 28 oktober 1964, houdende vervanging van de inhoud van ten hypohteekkantore gehouden openbare registers door mechanische reprodukties, Stb. 1964, 452. Mechanical reproductions would have the same legal evidentiary effect as the original content of the registers, see Article 2(2).

44 These would then also be the official replacement of the originals according to ministerial ordinance. Konings 1990, p. 34. The microfilms were still around when the new Law on the Cadastre was discussed. This meant that the second paragraph of the proposed Article 100 was so open, in the sense that it left the way in which information was disclosed up to the Minister to decide, having in mind the different forms in which the data was held. See Reehuis & Slob 1990, p. 312.

45 Konings 1990, p. 83.

When the land registry was transferred from the Ministry of Finance to the Ministry of Housing and Environmental Planning (*Volkshuisvesting en Ruimtelijke Ordening*),[46] the computerisation efforts gained new impetus.[47] The cadastre and land registry were to be computerised in what would become a twenty-five-year long project, leading up to *Automatisering Kadastrale Registratie* (AKR),[48] or Computerisation of the Cadastral Registration and the computerised form of the land registry; the *Automatische Hypothecaire Registratie* (AHR),[49] when it was finally complete, the newly computerised registry was accessible by object and subject[50] and searchable by plot name, and even address.[51]

In 1985, in the midst of the AKR project, the land registry started with a test to provide notaries with *direct* access to the AKR.[52] By 1994, there were almost 1100 connections to the network, 700 of which were direct connections by notaries.[53] Only four years later in 1997 this number had almost doubled to 2070 connections.[54] When, in 1996, the land registry centralised all requests for information and made available an electronic portal for requests for information,[55] the information provided surged even more.[56] The Cadastre noted that the year the telefax was introduced, the number of requests for information increased by 50% as opposed to the previous year, not only because of an economic upturn, but also in part because the notaries started to use the telefax.[57] The availability and ease of access to information consequently created an increase in the volume of information requests.

46 Currently Ministry of Infrastructure and Water Management (*Ministerie van Infrastructuur en Waterstaat*).

47 Berkers 2001, p. 60–62 mentioning that, under the Ministry of Finance any change, however small, was subjected to lenghty bureaucratic procedures. The focus now included 'efficiency, openness and innovation'.

48 Which took a while, so long in fact that there was talk of using another way of innovating the methods of the Cadastre, as proposed by Joosten in Joosten 1947 as there were very few experts in computerisation at the time at the new ministry that the Cadastre was subordinated to, and the process did not go as fast as hoped. Berkers 2001, p. 63, 67–68.

49 See extensively on the difficult history of the project that came close to death on numerous occasions, but finally came to fruition: Berkers 2001, p. 57–83.

50 Although for the AHR the search by name was not direct. Rather, firstly, one searches by name in AKR, that would provide the plot number, which was how you could then search AHR.

51 By virtue of integration with the PAP-file (Plot/Address/Place coordinates) (*Perceel-Adres-Plaatscoördinaat*).

52 Berkers 2001, p. 79 Then by virtue of using the telephone line.

53 Berkers 2001, p. 172.

54 Berkers 2001, p. 172. Here the composition was still only 800 notaries, 450 banks, 400 realtors and others. See on how the computerisation could fulfil the wishes of 'certain large customers (banks, insureres and realtors). These wishes concern the availability of statistical overviews of data in a way that is not relatable to an individual', Reehuis & Slob 1990, p. 329 'Dit maakt het tevens mogelijk op eenvoudige en flexibele wijze te voldoen aan bij sommige grote klanten (banken, verzekeringsmaatschappijen en makelaardij) levende wensen. Deze wensen betreffen het kunnen beschikken over statistische overzichten van gegevens in niet op personen herleidbare vorm'.

55 The portal was centralised. People could, and still can, visit the local offices of the land registry to be personally informed of registrations.

56 In the fall of 1997, the millionth electronic message or information product was recorded. A mere six months after that, this number had doubled. Berkers 2001, p. 173.

57 The Royal Dutch Association of Civil-law Notaries made the use of the telefax mandatory in 1986 in part based on a ruling of the Dutch Supreme Court in 1981. Prior to this Supreme Court case a notary would only call the land registry prior to authenticating the deed of transfer to inquire if there were any type of

The new methods of processing[58] as well as disclosing information also meant that the land registry could develop new products,[59] by linking the data it had.[60] This resulted in the possibility to not only extend their services to existing clientele, but with these new products could also find new customers. This was especially welcome because in 1982 it was made clear that the land registry should be able to be cover their own costs. However, it was stated that the increase in quantity of information should not be at the detriment of the quality of the data, as noted by Berkers:[61]

> the quantitative growth of the provision of information should go hand-in-hand with care for the quality of AKR. The user-friendliness should be increased. The output – wholesale or individual – should be offered in clearer and more legible form. **Only information that was asked for should be provided and nothing more**.

However, the implicit proportionality argument made here, while it could be construed in a favourable light in terms of the protection of personal data, was motivated much more by reasons of cost-efficiency, rather than privacy. Providing more information than requested was also more expensive.

6.2.2.2 Privacy considerations leading up to the New Civil Code

What we saw in section 4.3 was that in general questions of privacy came into play when computers were being used on a massive scale by governments, and to some extent also

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encumbrances on the land since he last checked. If the registrar answered in the negative he would authenticate the deed and pay out the money which was deposited with the notary. This however meant that payment preceeded registration. The Supreme Court considered the notary to be liable for any sequestration which happened *after* the phone call and prior to registration. HR 30 January 1981, ECLI:NL:HR:1981:AG4140, *RvdW* 1981, 25 (*Baarns beslag*). This case led to the requirement to check in threefold prior to payment to the seller. Breedveld & Kelterman 2007, p. 912–916. The telefax could be used to get documents to the land registry quicker than post, which would diminish the risk of a sequestration prior to registration of the deed of transfer. See also 'Telefax kadaster' *WPNR* 5770, p. 91. See further also Straaten 1992, p. 68.

58 Not only at the disclosing level, but also at the delivery of the notarial deeds, significant technological improvements have been made over the years. In 1999 the first notarial deed in electronic form reached the land registry, and it is now commonplace. Moreover, significant standardisation efforts, especially in the KIK-deeds area, which are *hypothec* deeds delivered in XML form are worth mentioning here. See more extensively Louwman & Vos 2009a, Louwman & Vos 2009b, Louwman 2007, Vos 2011.

59 See also Reehuis & Slob 1990, p. 328.

60 Bogaerts/Zevenbergen & De Jong 1993, p. 6–7.

61 Berkers 2001, p. 82 emphasis added. 'Uitdrukkelijk stelde men echter dat kwantitatieve groei van de informatieverstrekking hand in hand moest gaan met aandacht voor de kwaliteit van AKR. De gebruikersvriendelijkheid moest groter worden. De output – massaal dan wel individueel – moest overzichtelijker en duidelijker leesbaar worden aangeboden. Er moest slechts informatie worden verstrekt waarnaar gevraagd was en geen overtollige gegevens'.

individuals. General discussions about privacy and processing of personal data, were absent in the discussions leading up to the New Civil Code, and the Law on the Cadastre (*Kadasterwet*). Apart from an off the cuff remark or an article on the dangers of computers for privacy in general,[62] the topic was hardly discussed in relation to the land registry and its processing of personal data.[63] In part, this lack of discussion about data protection issues and the land registry can be attributed to the legal framework for processing personal data at the time.[64] For a while, the fact that land registration information could be personal data did not enter into the mind of the controllers of such information.[65] De Jong offers a similar explanation, but she links this much more with the fact that then the use of computers was new and the fact that the consequences of using these computers were not really fully grasped at the time.[66] Moreover, there was no need to consider data protection law, because the data protection law in place at the time specifically excluded the land registry from its scope of application.

That data protection law in place at the time was the Law on Registrations of Persons of 1988 (*Wet persoonsregistraties*, Wpr). The Wpr governed the processing of personal data and laid down the ground rules for the legitimate processing of personal data. It was the precursor of the law implementing the Data Protection Directive that would be adopted later on.[67] The law dealt with the processing of personal data, but it explicitly *excluded* 'public registers established by law'.[68] The land registry was such a public registry that was established by law, and therefore it did not fall within the scope of application of the Wpr.[69] This exclusion was only briefly mentioned in the introduction to the

62 Kunneman 1982 briefly mentioned the non-applicability of data protection legislation to the land registry at the time, but it was more focused on computers in general.

63 Although see the work of De Jong, and in particular her inaugural address; De Jong 1992, p. 35 where she briefly mentions that privacy in real estate information is of interest to her. See also her interview Den Boer & Lemmens 1992, p. 518. Boneschansker & Hoogteijling 1991, p. 58 mentions privacy, but only in relation to the registration of persons, not property, even though it was part of the comparison in the study.

64 Article 10 of the Dutch Constitution protects privacy, but it allows for deviations by law, as the Kadasterwet provides. It is therefore not discussed further. And Article 2(2) Wpr explicitly excluded the application of the Wpr to public registers, such as the Cadastre and Land Registry.

65 Zevenbergen/Zevenbergen & De Jong 1993, p. 41 'De belangstelling voor de privacybescherming bij de beheerders van vastgoedregistraties is over het algemeen wat laat op gang gekomen. Dit kwam onder andere doordat men in het begin dacht dat vastgoedgegevens geen persoonsgegevens waren.' See further on this also the empirical study carried out by De Jong, Rietdijk & Pluijmers 1997, p. 246–249 There is no general lack of knowledge regarding data protection and real estate information, however, it is neither complete nor consistent. De Jong, Rietdijk & Pluijmers 1997, p. 254.

66 De Jong 1999, p. 590 See also De Jong, Rietdijk & Pluijmers 1997, p. 225. See also the note by Overkleeft-Verburg, who stated in 1993 that the DPA had extensive talks with the *Raad voor Vastgoedinformatie* and discussed their many concerns in light of the *structuurschets vastgoedinformatievoorziening*, of which only very little was taken over, as can be seen in the brief mentioning in the reports. Overkleeft-Verburg/Zevenbergen & De Jong 1993, p. 35 and the brief mention in the report: RAVI 1992, p. 19.

67 See more extensively section 6.3.2 and in particular Overkleeft-Verburg 1995.

68 Article 2(2) Wet persoonsregistraties: 'Deze wet is níet van toepassing op openbare registers die bij de wet zijn ingesteld'.

69 On what constitutes a 'public registry', the discussions at the time for the overhaul of the Civil Code show that what is required is (1) that it is established and governed by a public authority, *and* (2) that it is open for

Explanatory Memorandum on the Law on the Cadastre, and it was never referred to again during the drafting phase.[70] As such, privacy concerns were considered to be irrelevant.

The protection of personal data, and how this was affected by a land registry that was in the middle of a transition into the computerised processing of its data, was not a part of the discussions on the legal framework of the land registry.[71] However, there was passing thought given to a different way of approaching publicity in the drafting stages. Although the drafters never wavered from the idea that the access regime, as put in place with the 1838 Civil Code, was to be continued under the new law, they did briefly touch upon the alternative option, a more closed off system. In discussing the four fundamental principles underlying the system of land registration,[72] the drafters noted the following on publicity (emphasis added):

> Third, the principle of publicity not only means that any change in the legal status of a registrable object needs to be registered in order to obtain the intended effect, but also that everyone may take cognizance of the content of the public registers, **whether or not upon the condition that the person seeking access should be able to prove that he is entitled to such access as an interested party** (publicity principle).[73]

This shows that the drafters were at the very least *aware* of alternatives to the *status quo* of having a fully open registry,[74] but they did not entertain the idea further in relation to

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inspection by *any interested party*. Reehuis & Slob 1990, p. 14. The land registry was however subjected to the Governmental Instructions regarding the protection of personal data in computerised systems in which personal data are recorded. Aanwijzingen inzake de bescherming van de persoonlijke levenssfeer in verband met geautomatiseerde systemen waarin persoonsgegevens zijn opgenomen bij de Rijksoverheid, vastgesteld bij besluit van de Minister-President op 7 maart 1975, Stcrt. 1975, 50. Which still, even after the entry into force of the Wet Bescherming Persoonsgegevens, has not been repealed. See extensively on the instruction; Overkleeft-Verburg 1995, p. 375 *et seq*.It is important to note here that the municipal registries which got their information directly from the land registry, and handed this out to companies and individuals, *did* fall within the scope of application of the Wpr. See on the issues that it brought about for a city like Rotterdam; Bogaerts/Zevenbergen & De Jong 1993, p. 11–14.

70 Reehuis & Slob 1990, p. 311.

71 See on the matter in more detail, also De Jong, Rietdijk & Pluijmers 1997, p. 191–202.

72 The others being the booking principle; the permission principle, and the principle of specificity.

73 Reehuis & Slob 1990, p. 18. 'In de derde plaats is er het beginsel van publiciteit dat niet alleen inhoudt dat elke verandering in de rechtstoestand van een registergoed moet worden ingeschreven om het beoogde rechtsgevolg te doen intreden, maar ook dat een ieder van de inhoud van de openbare registers kennis kan nemen, al dan niet onder voorwaarde dat degene die inzage verlangt, moet kunnen bewijzen daartoe als belanghebbende gerechtigd te zijn (publiciteitsprincipe).' Translation by the author.

74 Compare with Germany. See section 8.2.

the land registry.[75] Rather, the fully open access system in place was given more body with a series of articles detailing the public nature of both the information contained in the land registry and Cadastre.[76]

Article 99(1) Kadasterwet reads:[77]

> The land registrar provides access, upon request, to the public registers of Article 8(1), and provides for, or sends, a certified copy or excerpt of the registered, or booked, documents from these registers, including certificates regarding the (non-)existence of registrations or provisional remarks regarding a registrable object or person.

The old access regime was maintained and the land registry remained open. Access was provided to the different registers, held in books, on paper, microfiches, or already available in computer databases. Access was provided to *anyone* regardless of their motive for wanting the information.[78] The only requirement was the payment of a sum of money.[79] The discussions on the article in Parliament did not feature a reconsideration of how public the registry should be in light of the computerisation efforts that had come to pass and the ease of access that it brought with it; rather the discussion was focused on whether or not the word 'immediate' (*onverwijld*) should be added.[80]

What is interesting to note is the slightly different approach taken to the opening up of the Main Cadaster Register (BRK). A separate article, Article 102 Kadasterwet (nowadays Article 100 Kadasterwet), governed the access regime to Cadastral information, such

75 In terms of the connection with other registrations, the matter of privacy did come up, especially in the linking of the GBA and AKR, and the problems this might provide for adequate privacy protection. See for more on this link between numbers and privacy, RAVI 1996 also, De Jong, Rietdijk & Pluijmers 1997, p. 188–189.

76 In line with what the State Committee devised in its Article 6, see Staatscommissie Inzake Het Kadaster 1965, p. 45 'Artikel 6.(1) Desverlangd geeft de Rijksdienst inzage van de openbare registers en verstrekt hij een afschrift van de in de openbare registers ingeschreven bescheiden alsmede van de aantekeningen, of een getuigschrift betreffende inschrijvingen of aantekeningen, met dien verstande, dat indien het getuigschrift betreft een perceel of appartement ten aanzien waarvan inschrijvingen hebben plaatsgevonden, die reeds zijn doorgehaald, hiervan op het getuigschrift melding wordt gemaakt. (2) Onze Minister regelt de vorm van de afschriften en van de getuigschriften en de wijze van raadpleging van de openbare registers.' Which corresponds to the old Article 1265 (oud) BW, which was all the Commission added in its Memorandum, Staatscommissie Inzake Het Kadaster 1965, p. 62.

77 'Desverlangd verleent de bewaarder inzage van de openbare registers, bedoeld in artikel 8, eerste lid, en geeft hij voor eensluidend gewaarmerkte afschriften of uittreksels van de in deze registers ingeschreven dan wel geboekte stukken, alsmede getuigschriften omtrent het al dan niet bestaan van inschrijvingen dan wel voorlopige aantekeningen betreffende een registergoed of een persoon of zendt deze toe.' Translation by the author.

78 The same was true of the Cadastral registration; Article 100 today, and 102 Kadasterwet at the time. Reehuis & Slob 1990, p. 313–317.

79 Nowadays € 2.40.

80 So that the text would read that the access was provided immediately, as the notaries were asking for. Reehuis & Slob 1990, p. 312–313.

as maps, as well as the documents that formed the basis of these maps, the draft surveys (*veldwerken*). One important difference in the access regimes land registry and BRK is that, in order to access the underlying documentation of the BRK information, such as the draft surveys, 'a demonstrable reasonable interest' in the information was required.[81]

6.3 Data protection legislation and the Land Registry after the new Dutch Civil Code

While there was an almost complete lack of interest in issues of privacy and data protection in the discussions leading up to the new Dutch Civil Code, shortly after its enactment, the matter was taken up by scholars and received enthusiastically by practice.[82] In particular, the colloquium organised at Delft University by De Jong & Zevenbergen on 'Real Estate Registration and Privacy Protection' put the issue front and centre.[83] This is discussed in section 6.3.2. However, before the colloquium, there was some discussion, and even a summary judgment, on the requirement of detailing the personal data of notaries' employees as authorised agents/representatives. This is discussed first.

6.3.1 The 'pervert'-article

As often happened in practice, an employee of a notary acts as an authorised representative (as established by the same deed) for one of the parties.[84] When this happened, they would have to provide all sorts of personal data. As required by Article 18 Kw, the personal data that had to be recorded in the deed included their full name, address, birthdate and place. This deed would then subsequently be registered at the land registry,[85] after which the information would be publicly available, on account of Article 99 Kw. This requirement led the notaries to call Article 18 Kw the 'pervert-article' ('*vieze mannetjes*'-

81 Article 102(3) Kadasterwet stated that rules regarding the requirements for access were to be established by the Minister, but the drafters stated themselves that the idea would be that they would have to show 'a demonstrable reasonable interest' (*een aantoonbaar redelijk belang*), although in that same paragraph they also refer to it as a reasonable demonstrable interest *(een redelijk aantoonbaar belang* which gives a slightly different meaning to what should be reasonable; the fact of the interest or the fact that the interest should be reasonable), see Reehuis & Slob 1990, p. 316–317 also compare with current Article 100(2) Kadasterwet. See also Article 35 Kadaster.

82 'Door de grote opkomst [100+ aanwezigen] kon worden vastgesteld worden dat het onderwerp als maatschappelijk relevant en voor de praktijk van belang werd geacht.' J. de Jong in: Zevenbergen & De Jong 1993, p. 1.

83 For a report on the colloquium, see Zevenbergen & De Jong 1993.

84 On the importance of the difference between 'according to the deed' (*blijkens de akte*), see Marck 1992, p. 16. Different opinion is voiced by Preller, Preller 1992, p. 58 as well as by Kooijman Kooijman 1992, p. 429–430.

85 Article 26(2)(3o) Wet op het Notarisambt.

artikel).[86] The notaries were not pleased with this provision, as it meant that, in the many situations when an employee of the notary's office would represent a client, they would have to give up all this personal information.

In order to circumvent the requirement of Article 18 Kw, some notaries tried to omit the information and in its place simply state in the deed that they had verified the identity of the representative and that they knew them (seeing as they worked for them).[87] This was a reasoning akin to what Article 18 Kw allows in the event the information regarding identity *cannot* be obtained, not if they do not *want* the information to be provided.[88] The exception is not available for notaries wanting to protect the personal data of their employees.[89] This was confirmed in a preliminary ruling on such a case, where the land registry refused a deed in which the notary tried to circumvent the requirements of Article 18 Kw, because according to the Registrar the deed did not have the required information.[90] The Court was clear, if you do not want to provide the information, do not act as a representative; there are other means to represent a client.[91] The hands of the Registrar are tied, they have to make sure that this information is present if it can be established, as this would increase legal certainty, with the result that whoever accesses the information in the deed can find out for themselves whether the parties had legal capacity and is not, for example, a minor who could not conclude such a legal act.[92]

In the proceedings before the court, the claimant initially also stated that the provision requiring the personal data of the representative, in this case the employee of the notary, was contrary to Article 8 ECHR as well as the Wpr. However, it was withdrawn later on, and therefore the court unfortunately did not rule on this compatibility. Brouwer, in his case note, did consider the compatibility and found that there was an interference with Article 8 ECHR on privacy, but that this interference was justified pursuant to Article 8 (2) ECHR, as it was in accordance with the law and necessary in a democratic society. He did not check whether the amount of information required was in proportion to the goal pursued, which is in my view the most interesting and difficult question of all. Brouwer carefully described the difficulty that would arise in the event that the Registrar would allow the circumvention, as was at the heart of the case here.[93] Firstly, it would mean that anyone (other than the notary at the time) wanting to check the legal capacity of the representative would have to go to the notary directly, who is bound by confidentiality and may not disclose the information. Secondly, a floodgates argument was made. If we

86 Brouwer 1992, p. 903.

87 Or to refer to the representatives in their capacity (i.e. working for notary [x]'s offices), see the suggestion by Preller. Preller 1992, p. 58, Kooijman 1992, p. 429–430.

88 Brouwer 1992, p. 904–905.

89 Brouwer 1992, p. 904.

90 Rb. Breda 16.06.1992, *NJkort*, nr. 54, p. 39.

91 The legal person could be represented by their own legal or statutary representatives for example. Rb. Breda 16.06.1992, *NJkort*, nr. 54, p. 39.

92 See also: Brouwer 1992, p. 904, KST II 1987-1988, 17 496, Nr. 3 *(MvT)*, p. 6.

93 Brouwer 1992, p. 905.

allow this for notaries, why not for other types of representation? In any event, this would seriously hinder the legal certainty for third parties.[94] The matter of compatibility of the provision and the Wpr is easily countered, as Brouwer also mentions, on account of Article 2 Wpr which tells us that public registries fall outside of the scope of the Wpr. To conclude, the notaries' discomfort with having to record the personal data of their employees, when they act as representatives for their clients, persisted unless there was a change in the law.

The change came in 1999, when Article 18 Kw was modified to include Article 18(1)(3) Kw which allowed for the employees of notaries to no longer require their own address to be recorded, but rather that of their offices. Also, their marital status would no longer be required, but only their full names and birthdate and place.[95] There was no recalling of the floodgates-argument made at its introduction.

6.3.2 The 1993 Colloquium

On 28 January 1993, Delft University and the Association of Real Estate Information hosted a colloquium on 'Real Estate Registration and Privacy Protection'. While all the speakers agreed on the importance of adequate data protection laws, all but one stated that the current legal framework was just fine as it was, and, if anything, it could be relaxed a bit more.[96] Besemer, the head of the Cadastre and Land Registry at the time, considered that there were safeguards in place that ensured that, to a large extent, the land registry was in line with the Wpr, even if it was not applicable to the land registry.[97] Besemer argues that there are three categories of provisions in the *Kadasterwet* that give meaning to privacy protection. First, he considers the provisions which denote the *type* of information that can be registered, either in the cadastral registry or land registry. The type determines the content of the registrations. He correctly notes that these provisions specifically state which information is registered.[98] This includes information about a person, their registered rights, and data about the object.[99] He continues that, in relation to the personal data (name, first-name, date of birth, place of residence with address, profession,[100] and marital status), only this information can be provided upon request,

94 Brouwer 1992, p. 905.

95 *Stb.* 1999, 190.

96 In relation to the legal rules governing municipalities giving out information, Bogaerts/Zevenbergen & De Jong 1993.

97 Besemer/Zevenbergen & De Jong 1993, p. 18.

98 Besemer/Zevenbergen & De Jong 1993, p. 19–20.

99 He incorrectly notes that the information solely about the object is not personal data. This is to be disputed in light of the ease by which the information can be related to a person. See for more on this section 5.6.4.3. See also Overkleeft-Verburg who noted in the same colloquium that, with this statement, Besemer jumped to conclusions. Overkleeft-Verburg/Zevenbergen & De Jong 1993, p. 29.

100 Introduced in order to mirror the expected change in the Law on Notaries, *TK 1990-1991, 21 830, Nr. 3 (MvT)*. Later this was removed, with Article 119 Wet op het notarisambt, *Stb.* 1999, 190. and the require-

nothing more. What he however fails to note is that the land registry also provided copies of the underlying deeds with information regarding purchase price, whether or not a *hypothec* was registered and the amount that the *hypothec* secures. As Overkleeft-Verburg also notes, this is generally considered data that people do not like to share.[101]

Second, Besemer considers the fact that there is an enumerated list of required personal data for the *registration* of the deeds. The requirements for registration of the deed are checked by the registrar and comprise of the same personal data he mentioned earlier, with the addition of the birthplace.[102] As such, there is an overlap between the registration requirements and the information recorded in the registries. Moreover, he refers to the overlap between what the notary is required to put in the deed and the registration requirement. While there is a significant overlap, the registration requirements and requirements for a deed drawn up by a notary are not identical. The law only stipulated which personal data is *at least* required for the registration to be accepted. Nonetheless, if the notary adds more personal data in the deed than required for registration, as he is required to do by law,[103] the land registry is not allowed to refuse the registration of the deed. As such, the underlying deeds that supply the information can contain much more personal data.[104] In the event that a person requests a copy of the deed, the land registry will provide the deed in full, without anonymisation of personal data for which there is no legal basis to record it in the deed.

His third argument can be qualified as a data quality argument and one regarding the rights of the data subject. There are provisions in the *Kadasterwet* that stipulate that anyone registered can object to an incorrect recording of personal information at the Cadastre and Land Registry.[105]

Where Besemer focused on the gathering of information, Overkleeft-Verburg – interim-head of the Dutch Data Protection Authority at the time – showed a particular inter-

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ment of an ID-number was added with the Law on Identification Duty, (*Wet op de identificatieplicht*) *Stb.* 1993, 660. See Article 39 Wna.

101 Overkleeft-Verburg/Zevenbergen & De Jong 1993, p. 29 'Uit artikel 13 [Uitvoeringsregeling Kadasterwet] blijkt dan dat in de kadastrale registratie nogal wat gevoelige informatie zit. In de eerste plaats gegevens omtrent de koopsom, informatie die wij Nederlanders liever niet in [sic] aan de grote klok hangen. Het moge bekend verondersteld worden dat de financiële privacy de Nederlander dierbaar is, dit in tegenstelling tot de Verenigde Staten waar iemands financiële positie wordt gezien als de maatstaf van maatschappelijk success'. Compare with section 4.7 on privacy in context.

102 Article 18 Kadasterwet at the time. See Besemer/Zevenbergen & De Jong 1993, p. 20.

103 ID number and purchase price are both requirements for the notary to put in the deed, but they are not required for the deed to be registered.

104 Under modern law this would mean anything in the deed is considered personal data, because it is directly related to the person.

105 Besemer/Zevenbergen & De Jong 1993, p. 20, whereby I wonder if this at the time also included incorrect information contained in the deed and recorded in the land registry. The land registry is not allowed to modify the deeds themselves.

est in the disclosure of the information.[106] Looking at disclosure of the information, Overkleeft-Verburg notes the different ways in which access to the information can be provided. She shows that, concerning the access regime of the Cadastre and Land Registry, there might be a differentiation as to (target) groups, but that in the actual rules governing the provision of access to these groups there is 'hardly any differentiation'[107] and none whatsoever where it concerns the disclosure of different information elements or the purpose for which one requests the information.[108]

Especially in terms of this lack of purpose-bound disclosures, Overkleeft-Verburg noted some concerns. Already in 1993, there was wide-spread use of the (personal) data that the land registry and Cadastre held. This extended beyond the disclosure of information directly related to the purpose for which it was initially gathered: *i.e.* to serve publicity from a property law perspective and legal certainty.[109] For example, for realtors who doubled as insurance brokers, the information gathered could be used for different purposes[110] and also people less directly involved and companies were interested in the information, for example the difference between the purchase price and the maximum *hypothec*,[111] as well as information that could be used for purposes such as direct marketing.[112] That the information was processed well beyond the purposes for which it was gathered could become a legal issue when the Data Protection Directive was to be adopted, which explicitly *would* be applicable to public registries, Overkleeft-Verburg warned.[113]

She continued that this information was not given up freely by the people that owned a plot of land, knowing that this information would be used for these purposes. On the contrary, it *had* to be provided, otherwise it is impossible to become the owner of a plot of land or to get a *hypothec* to finance the purchase of the home. And that, the compulsory nature of the disclosure (*dwangverstrekking*) to the land registry, should be taken into

106 Overkleeft-Verburg/Zevenbergen & De Jong 1993, p. 27.

107 'Met de Regeling massale gegevensverstrekking uit de kadastrale registratie kan alle informatie daaruit over de toonbank. Er wordt niet gedifferentieerd naar grootschalige verstrekking of incidenteel verzoek van de informatievrager, noch naar de verschillende categorieën van gegevens.' Overkleeft-Verburg/Zevenbergen & De Jong 1993, p. 29.

108 '(…) Dit laat zien dat het openbaarheidsregime bij het Kadaster weliswaar verschillende doelgroepen kent, maar in z'n uitwerking nauwelijks gedifferentieerd is. Zelfs helemaal niet waar het gaat om de verstrekking van verschillende informatie-elementen of het doel waarvoor men die informatie vraagt.' Overkleeft-Verburg/Zevenbergen & De Jong 1993, p. 30. Compare with Germany, and in particular section 8.5. Repeated later that her criticism in relation to the Cadastre was almost entirely directed at the lack of any rules about the disclosure process and that the logging of such disclosures should be properly governed, as well as the commercialisation of the data Overkleeft-Verburg in: Zevenbergen & De Jong 1993, p. 40.

109 See section 5.6.7.3.

110 Overkleeft-Verburg/Zevenbergen & De Jong 1993, p. 32.

111 Which tells somehting about the financial position of the buyers.

112 Overkleeft-Verburg/Zevenbergen & De Jong 1993, p. 30.

113 Overkleeft-Verburg/Zevenbergen & De Jong 1993, p. 32 It was by that time clear that the Data Protection Directive would adhere to a strict purpose-bound processing.

account when assessing the land registry and the BRK disclosure of information in light of data protection rules.[114]

A possible solution to the problem was put forth in the written questions posed to the speakers: would a legitimate interest test, such as adhered to in Germany, be a solution to the problem? The only two people that answered[115] were Besemer (head of the Cadastre and Land Registry at the time) and Remmers (of the Rotterdam municipality). Both took issue with the requirement of evidence to support a legitimate interest. Anyone with ill will could still have access to the information by 'making up a good story' they stated.[116] While they are correct in thinking that someone without a legitimate interest could still get access if they had such intentions and applied good forgery techniques, it would not however be 'easy'. Moreover, their second argument was based on the idea that a more German approach would hinder, or bring a halt to, the technological developments. In part, again, they are right. The use of personal data would be limited; however, this does not mean that all innovation is lost or hindered. One can still make useful products for the market based on anonymised data or with limited access to personal data.[117]

The colloquium is perhaps characteristic of the time when it was held. It showed the discrepancy between the viewpoints held by those that worked with the data – the people from the cadastre – and the opinions on the matter by the data protection expert. Where the former group was aware of some possible encroachments upon privacy and data protection[118] and appeared eager to learn more about the subject, they were quick to dismiss an alternative[119] manner of disclosure of information which would solve many of the issues the data protection expert reiterated.[120]

In 1997, the Cadastre did implement a regulation on personal registrations held by the Cadastre. Its scope however was limited to all registrations which were *not* the land registry or BRK. Rather, it applied to the registration of internal (employees *etc.*) files.[121]

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114 Overkleeft-Verburg/Zevenbergen & De Jong 1993, p. 33.

115 According to the written report of the meeting.

116 As we shall see in section 8.6, this assumption was based on a false reading of the requirements to show a legitimate interest under German Law.

117 See more extensively on anonymisation, section 5.2.5.

118 See also on a more global level the Land Administration Guidelines in 1996 which stated that 'Increasingly as registers are computerised and linked into wide area networks, the ownership and protection of the data within the registers become important. The law needs to lay down rights of access to the data, who is authorised to change entries on the registers, and who may use the information in ways or for purposes other than those for which it was provided. The law should define: (…) The extent of rights of privacy over land and property information; (…) Who may have access to data; (…). Economic Commission For Europe 1996, p. 33.

119 The German way of having a legitimate interest test. See Chapter 8.

120 They did introduce a privacy-code shortly thereafter, which meant that parts of the AKR, at the level of the individual, would no longer be supplied to private persons or companies. See De Jong 1999, p. 591. At some point they left this, as currently it is possible for the individual to get this type of access, as is for companies.

121 Rectificatie Regeling persoonsregistraties Kadaster, Stcrt. 1997, 167, Regeling persoonsregistraties Kadaster, Stcrt. 1997, 123. See on this also Asser/Mijnssen & de Haan 3–I 2001/419 '(…) ging de toelichting er in de

6.3.3 *The Implementation of the Data Protection Directive*

On 1 September 2001, the implementing law of the Data Protection Directive, the *Wet bescherming persoonsgegevens* (Wbp),[122] entered into force.[123] The introduction of the law meant that data protection legislation would be directly applicable to the land registry, as the exemption for public registers, as existed under the Wpr, was removed. The advent of the new regime meant some changes had to be made to the access regime.[124] What follows is a description of the changes made to the access regime in the course of the implementation of the Data Protection Directive.

6.3.3.1 What personal data is in the Land Registry?

Implementing the Data Protection Directive meant that the Dutch legislator had to provide for a legal framework to secure the fair processing of personal data. As this was the first time that data protection legislation was to be applied to land registration, the question arose, what personal data is held and processed by the land registry?

The Minister of Justice answered the question whether the information in the land registry was deemed personal data, by stating the following:[125]

> The cadaster [and land registry, AB] contains data about immovable property, buildings, plots, but also about ownership and the value of objects, including the extent to which these have been burdened by a hypothec. In social and economic life, this data is used for transactions in relation to immovable property and decisions about financing and taxation. That this data can be denoted in part as object-data is not decisive. If the concerned owner is a natural person, then this data also tells us something about this person and is therefore personal data for the purposes of the WBP. After all, in the Cadastre anyone can find out who the owner is of a certain building.

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eerste alinea wat al te vanzelfsprekend vanuit, dat onder de uitzondering van de openbare registers in Article 2 lid 2 van die wet [Wpr, AB] ook registraties zouden zijn te begrijpen'.

122 *Stb*. 2000, 302.

123 *Stb*. 2001, 337.

124 The whole of which was categorised in the drafting phase by De Jong as 'not dramatic' in terms of the changes brought about in the publicity regime of the Cadastre. De Jong 1999, p. 592.

125 'Het kadaster bevat gegevens over onroerende zaken, panden, percelen, maar ook over eigendommen en de waarde van objecten, alsmede de mate waarin deze zijn bezwaard met een hypotheek. In het maatschappelijk verkeer worden deze gegevens gebruikt voor transacties met betrekking tot onroerend goed en beslissingen over financiering en belastingheffing. Dat deze gegevens ten dele kunnen worden aangemerkt als objectgegevens is niet beslissend. Als de betrokken eigenaar een natuurlijk persoon is, vertellen deze gegevens tevens iets over deze persoon en zijn daarom persoonsgegevens in de zin van de WBP. In het kadaster kan immers ieder nagaan wie eigenaar is van een bepaald pand.' KST II 1998-199, 25 892, nr. 9, p. 1.

Thus, the personal data in the land registry includes the information about the person (full name, birthdate and place, marital status, and passport number,[126] and any documents that provide evidence of a lack of legal capacity). Moreover, it also includes purchase price,[127] as well as information about the burdens on land, and where it concerns security rights, the (maximum) value of the loan the security right is attached to.[128]

That all the information in the cadastre and land registry is personal data does not necessarily mean that any processing of information about an immovable property is automatically also a processing of personal data.[129] According to the legislator, where it concerns purely object-data, there is no processing of personal data. This includes data which identifies immovable property.[130] The fact that immovable property can be related to an individual by way of a public register such as the Cadastral registration does not change this. However, it would become personal data where the disclosure of the information would happen by way of, for example, a CD-ROM,[131] which included an overview of the plots of land and houses with additional information about their size, for example, and it included in the data-set data about names,[132] which would 'make it possible to search by name'.[133]

It therefore *seems* that the legislator distinguishes between data-sets which include names and those where the only link between the individual and the property can be made by way of the cadastre and land registry. This distinction is in line with the third element of assessing whether data is personal data, whether it is 'identified or identifiable',[134] and in particular Recital 26 of the Data Protection Directive which states that, in order 'to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person;' (…). This begs the question whether cross-referencing the data-set containing information about immovable objects with the information held by the cadastre and land registry, so as to link it to an individual, is considered within the

126 See section 3.6.1.3.

127 See section 3.6.3. In particular, Article 29 Data Protection Working Party 2007, p. 9.

128 See also De Jong, Rietdijk & Pluijmers 1997, p. 230.

129 De Jong, Rietdijk & Pluijmers 1997, p. 175–180, who provide an overview of the different types of data in relation to different types of objects.

130 KST II 1997-1998, 25 892, nr. 3 (MvT), p. 47.

131 Perhaps a more modern example would be the provision of the information in an excel-sheet.

132 Compare with the Lotus case in the US, section 5.2.4. See also CJEU 16 December 2008, ECLI:EU:C:2008:727, C-73/07 (*Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*) and ECtHR 27 June 2017, 931/13 (*Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*).

133 'Hetzelfde geldt voor gegevens die onroerende zaken of andere registergoederen identificeren. Het feit dat deze zaken via een openbaar register zoals de kadastrale registratie tot een individuele natuurlijke persoon kunnen worden herleid, doet hieraan op zichzelf niet af. Het zou anders zijn indien bij een verstrekking van dergelijke objectgegevens (bijvoorbeeld overzichten van panden en erven met aanvullende informatie over de omvang en de aard ervan) op CD-ROM, een aanvullend gegeven omtrent personen is verbonden, waardoor de zoekbaarheid op personen mogelijk wordt.' KST II 1997-1998, 25 892, nr. 3 (MvT), p. 47. See also Asser/Bartels & Van Mierlo 3-IV 2013/534 'Dit is anders indien gezocht kan worden op personen'.

134 For more on this see section 5.6.4.4.

'means likely reasonable'. Whether or not such cross-referencing will be considered 'means likely reasonable' will depend on the context, which includes the factor of cost.[135]

Also, an important factor here is the time at which this question arises. Particular information which at a particular moment in time was not 'reasonably' identifiable, because the search would demand the use of disproportional means and effort in order to link the two', might become a piece of cake with advances made in information technology.[136] The tipping point will depend on the possibilities of the technology in the specific circumstances.[137]

Consequently, not all information regarding an object is personal data, however, all information about an object that is contained in the land registry *is* personal data.

6.3.3.2 Limited application of the Wbp; no access log and no legal recourse

Article 107a(1) Kw was introduced as an implementation of the Data Protection Directive. The Article excludes the application of Article 35 Wbp which concerns the data subject's right to access, as described in Article 12(a) of the Data Protection Directive.[138] This right of access and the right to be informed (upon request) of whether or not the data relating to the data subject are being processed and to whom the data are disclosed, has been excluded on the basis that the legislator considered that 'this flows from the nature of the Articles 99 and 100 Kw', *i.e.* the public nature of the land registry and Cadastral registration.[139] However, this implies a confusion between the public nature of the register and the rights of the data subject to subsequently see to whom access has been granted. The two are not mutually exclusive.

The exclusion of Article 12(a) of the Data Protection Directive also means that there is no access log requirement for the land registry.[140] However, it has been argued that set-

135 'The cost of conducting identification is one factor, but not the only one. The intended purpose, the way the processing is structured, the advantage expected by the controller, the interests at stake for the individuals, as well as the risk of organisational dysfunctions (e.g. breaches of confidentiality duties) and technical failures should all be taken into account.' Article 29 Data Protection Working Party 2007, p. 15.

136 KST II 1998-199, 25 892, nr. 9. See also Article 29 Data Protection Working Party 2007, p. 15–16. See also CJEU 19 October 2016, C-582/14 (*Patrick Breyer v. Bundesrepublik Deutschland*)

137 KST II 1998-199, 25 892, nr. 9. See more extensively on this section 5.6.4.4.

138 Article 12(a) reads: Member States shall guarantee every data subject the right to obtain from the controller: (a) without constraint at reasonable intervals and without excessive delay or expense:
- confirmation as to whether or not data relating to him are being processed and information at least as to the purposes of the processing, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed,
- communication to him in an intelligible form of the data undergoing processing and of any available information as to their source,
- knowledge of the logic involved in any automatic processing of data concerning him at least in the case of the automated decisions referred to in Article 15 (1).

139 KST II 1997-1998, 25 892, nr. 3 (MvT), p. 158. See also KST II 1998-1999, 26 410, nr. 3 (MvT), p. 47.

140 Compare with Germany section 8.8.1. It is questionable whether such an access log will not also be required under the GDPR, in particular in relation to the documentation duty of Article 30 GDPR, see section 5.7.

ting up an access log can also be based on another article, which is not excluded from application: Article 16 of the Data Protection Directive concerning confidentiality and security of processing.[141]

Moreover, Article 107a(1) Kw is at odds with the lack of any action being undertaken in light of Article 107b Kw. This will be discussed further in section 6.3.3.6. For want of any implementing legislation based on Article 107b Kw which would provide an option to individuals to shield their information, the legal regime in place is Article 36 Wbp, which governs the rectification right, as laid down in Article 12(b) of the Data Protection Directive. The data subject, the person to whom the personal data relates, has the right to rectify, erase or block the data processing where it does not comply with the provisions of the Directive, for example where the processing by means of disclosure is disproportionate to the purpose for which it is collected.[142] As is perhaps already clear from their place within the Directive, the access right (Article 12(a)) and the rectification right (Article 12 (b-c)) of the data subject are closely related to one another.[143] There is no possibility to rectify with third parties any incorrect information processed if you cannot ascertain to whom the information has been provided. The suggestion made by the legislator that there is no need for a right of access to the manner of processing and to whom the information has been disclosed therefore does not hold up. This is especially the case when later on the same legislator underscores the need for the implementation of safeguards for bulk disclosures of information held by land registry.[144] It is therefore remarkable that the legislator has opted out of keeping a log for access provided to information in the land registry.[145]

Article 107a(2) Kw states that *a denial* of the request to provide access to the land registry or Cadastral registry will be considered a decision within the meaning of Dutch administrative law which leaves open the recourse to objecting and possible appeal.[146] The legislator specifically limited the appeal procedure to denials of requests to provide access and not an appeal against the granting of access. The reasons for this were twofold. First, the Cadastre is required by law, if there are no impediments to provide the information, to provide the information as soon as possible. Objections and appeals after the fact are therefore useless. Second, the legislator weighed the 'chance that third-parties would be hurt in their interests by a positive decision [to be] nil. The rights of third

141 Articles 16 and 17 Data Protection Directive, implemented in Articles 13 and 15 Wbp. See also the case note of Overkleeft-Verburg in CJEU 7 May 2009, ECLI:EU:C:2009:293, C-553/07 (*College van burgemeester en wethouders van Rotterdam v. M.E.E. Rijkeboer*), *Jurisprudentie Bestuursrecht* 2009/159 m.nt Overkleeft-Verburg para. 5.

142 See section 5.6.7.3 on purpose limitation and section 5.6.7.6 regarding proportionality.

143 See extensively on this also the CJEU consideration in CJEU 7 May 2009, ECLI:EU:C:2009:293, C-553/07 (*College van burgemeester en wethouders van Rotterdam v. M.E.E. Rijkeboer*) at 51-52.

144 See section 6.3.3.5.

145 See on this matter also Paapst, Klingenberg & Bröring 2010, p. 20–22 who conclude that 107a Kw is incompatible with the Data Protection Directive.

146 A decision to reject a request for information is a decision (*besluit*) to which administrative law applies.

parties are only affected where it concerns the disclosure of personal data in bulk in digital form.'[147] And for that situation there is a specific procedure envisaged in Article 107c Kw, the legislature noted. As we shall see, there is no such special procedure as of yet.[148] Here too, the lacuna left by the lack of any action taken up by the Minister, in light of Article 107b Kw, means that the argument that interests of third parties, which include those registered, is questionable. Perhaps it would have been better to only allow this Article 107a(2) Kw to take effect after the introduction of implementing measures in relation to Article 107b and 107c Kw.

6.3.3.3 Purpose bound disclosures and specificity

The Data Protection Directive requires that personal data is collected only for specific, explicit, and legitimate purposes and not further processed in a way incompatible with those purposes.[149] This was implemented into Article 6 Wbp. The problem at the time of implementing this requirement was that the law had not fully, nor explicitly, laid down the purposes for which the information was collected and processed.[150] If anything, the purposes were left explicitly vague, in order to facilitate the development of new products where society / the market required them.[151] The very opposite of what the Data Protection Directive required.

The newly created Article 2a Kw was introduced to provide these more specific goals for processing.[152] For inspiration in the drafting of these goals, the legislature looked at other Dutch national laws and legislative discussions about these laws,[153] but also the goals and purposes that were described in the *Land Administration Guidelines*, published

147 'De reden hiervoor is dat de Dienst – indien er geen belemmeringen zijn om informatie te verstrekken – wettelijk verplicht is binnen een gegeven de omstandigheden zo kort mogelijke termijn, de gevraagde inlichtingen te geven. Bezwaar en beroep heeft in die situatie geen betekenis meer, terwijl bovendien de kans dat derden-belanghebbenden door een positieve beslissing in hun belangen worden geschaad als nihil moet worden beschouwd. Slechts waar het gaat om verstrekking in bulk van persoonsgegevens in digitale vorm, dreigen rechten van derden te worden aangetast.' KST II 1998-1999, 26 410, nr. 3 (MvT), p. 47.

148 See section 6.3.3.5.

149 Article 6 Data Protection Directive, see section 5.6.7.3.

150 See somewhat differently De Jong, Rietdijk & Pluijmers 1997, p. 180–181, who state that the different registration within the real estate information 'field' were set up with a 'strong goal-orientation'. They seem to mean in a broader sense.

151 See section 5.6.7.3. This was also in line with the idea that came about in the 1970s of having a system of Main Registers.

152 KST II 1998-1999, 26 410, nr. 3, p. 3. Article 3a Kw refers to 2a Kw and makes explicit that these are the purposes for which the Office (*Dienst*) collects personal data as referred to in Article 1(a) Wbp. Article 3a Kw. 'De Dienst verzamelt persoonsgegevens als bedoeld in artikel 1, onderdeel a, van de Wet bescherming persoonsgegevens voor de doeleinden, genoemd in artikel 2a, onverminderd het bepaalde in andere wettelijke voorschriften.' Compare with section 6.3.2 and the comments by Bogaerts.

153 In particular, the legislature notes they looked at the *Kadasterwet*, the *Organisatiewet Kadaster*, and some 'provisions of laws and drafts of laws' (*en van enkele bepalingen van wetten en wetsvoorstellen*). See also the extensive list provided in KST II 1998-1999, 26 410, nr. 3 (MvT), p. 43–44.

by the Economic Commission for Europe of the United Nations.[154] Moreover, the legislature looked at what the lack of having (re)strict(ed) purposes had yielded,[155] most likely to see whether certain results should be codified.

The purposes, as laid down in Article 2a Kw, are as follows.[156] The purpose of the cadastre and land registry is the advancement of legal certainty in relation to property subject to compulsory registration:[157] (1) in judicial matters; (2) trade (*economisch verkeer*);[158] and (3) in administrative dealings between citizens and public authorities.[159] Fulfilling these tasks includes, but is not limited to; the production of statistical data,[160] as well as supporting environmental control.[161] The purposes further include the suitable or efficient (*doelmatige*) provision of information by the government to support a proper fulfilment of public functions and the fulfilling of statutory obligations by public authorities,[162] such as raising taxes, and keeping track of the development and 'monitoring' of the immovable property market and parts thereof.[163] Moreover,[164] the purpose of the cadastre and land registry is to support and advance 'economic activity'. As the government explains, a proper functioning land registry is a prerequisite of a proper functioning immovable property market and an efficient financial system, which includes credit facilitation of banks and investments made by pension funds and insurers.[165] The government explicitly included the registration of the value of *hypothecs* and the purchase price of the property in order to make this market more 'transparent'.[166] Finally, it was considered that this information, when coupled with other cadastral informa-

154 Economic Commission For Europe 1996.

155 KST II 1998-1999, 26 410, nr. 3, p. 43–44.

156 With the Wet aanpassing van doeleinden en taken van de Dienst voor het kadaster en de openbare registers alsmede enkele andere wijzigingen, Stb. 2003, 410 which moved the Topographical Service (*topografische dienst*) of the Ministry of Defence to the Cadastre, required the inclusion of the purpose as laid down in Article 2a(2)(b) Kw. These tasks used to be also found in Article 2b *Kadasterbesluit*, but they were removed from there to avoid redundancy, now that they were part of the *Kadasterwet*. See Article I.C. Stb. 2006, 59.

157 Here the legislator stressed legal certainty for the primary sector (agriculture), the secondary (industry) and tertiairy sector (trade and commerical services sector). No mention of individuals, which are perhaps sorted under 'trade'.

158 Which included security in relation to credit facilitation for investments. KST II 1998-1999, 26 410, nr. 3 (MvT), p. 44.

159 Article 2a(a) Kw.

160 It should be remarked here, if it contains aggregated data that cannot be related to an individual, we are no longer referring to personal data.

161 KST II 1998-1999, 26 410, nr. 3 (MvT), p. 43–44.

162 Article 2a(c) Kw.

163 KST II 1998-1999, 26 410, nr. 3 (MvT), p. 43–44.

164 As mentioned, there is another purpose that, not the land registry, but rather the Topographical Service branch of the Cadastre serves, see 6.3.3 above.

165 KST II 1998-1999, 26 410, nr. 3 (MvT), p. 45.

166 KST II 1998-1999, 26 410, nr. 3 (MvT), p. 45. Note, the requirement of the purchase price is a requirement for the notarial deed, for notaries, not a registration requirement for the deed itself. A deed without a purchase price will still have to be registered by the land registry.

tion, such as address and postal code,[167] would serve a different 'general public interest' than legal certainty, as it facilitates the economic interests of trade, industry and the provision of services because it can provide a (closer) look at the financial solvability of 'partners in business'.[168]

The purposes of the cadastre and land registry are furthermore served by the enumeration of the tasks of the Cadastre in Article 3 Kw, which prominently displays as the first task 'the keeping of the public registries' and under (k) the 'advancement of accessibility and exchangeability of the information' therein.

It is interesting to note here that the requirement of purpose limitation as ascribed to in Article 6 of the Data Protection Directive and the purpose as described in the *Kadasterwet* are the same: to serve legal certainty, in part by creating transparency. Where the land registry is concerned, transparency is provided by having a public land registry which is accessible to all and, where it concerns the processing of personal data, transparency can be found to have specified visible purposes which ensure predictability and hence provide the individuals with the knowledge of what to expect. The way in which their data is processed will be predictable, which in turn brings legal certainty to data subjects.[169] Legal certainty, as advanced by the Data Protection Directive, is however directed at the processing of personal information, whereas the legal certainty advanced by the public registers is different in nature and is directed at legal certainty concerning legal relationships with, and in relation to, land.[170]

Whether 'advancing legal certainty' as a purpose for the land registry is specific or precise enough to comply with Article 6 of the Data Protection Directive is questionable. According to the Article 29 Working Party (Article 29 WP), the purpose 'must be detailed enough to determine what kind of processing is and is not included within the specified purpose, and to allow that compliance with the law can be assessed and data protection safeguards applied.'[171] Here, one could argue that 'improving legal certainty' is simply not detailed enough. However, the Working Party continues: 'the degree of detail in which a purpose should be specified depends on the particular context in which the data are collected and the personal data involved.'[172] The Working Party provides some guidelines and practical examples to illustrate their interpretation of the purpose limitation. In their example on population registers, which comes the closest to our example of the land registry, they mention that broad umbrella provisions often appear in those laws; they also frequently contain detailed legal provisions to provide legal certainty.[173] Legal

167 PAP-data, the relationship between cadastral denotation, address with postal code-coordintation of plots of land.

168 KST II 1998-1999, 26 410, nr. 3 (MvT), p. 45–46.

169 See more extensively on this Article 29 Data Protection Working Party 2013, p. 13.

170 See on that section 2.3.

171 Article 29 Data Protection Working Party 2013, p. 15. See also section 5.6.7.3.

172 Article 29 Data Protection Working Party 2013, p. 16.

173 Annex 3, Article 29 Data Protection Working Party 2013, p. 54.

certainty here concerns the legal certainty in relation to the processing of personal data.[174] Considering that there are similar provisions available in the *Kadasterwet*, the degree of specificity might not be such an issue.[175] However, the Working Party makes one final comment in relation to these government population registers:

> The registries also form the basis for e-government services. With increasing tendencies towards government data sharing, it is becoming more and more important that clear, specific and proportionate legal rules are in place to clarify how information contained in population registers and other government databases may be used, shared, and safeguarded. The challenge is to define these rules in such a manner that they provide sufficient legal certainty without being overly rigid.[176]

What once was enough, might no longer be. The line between being sufficiently specific without being overly rigid, as the Working Party calls for, is perhaps a precarious one.

6.3.3.4 Purpose bound disclosures and secondary use

The principle of purpose limitation however includes a second element, namely the notion of compatible use.[177] This requires that, whenever secondary use is considered, there is a distinction to be made between that use which is 'compatible' with the original purpose, and that which is 'incompatible', as described by the Article 29 WP.[178] The facts of the matter will determine whether such use is compatible or incompatible. Brouwer provides an example for the context of the land registry. Where the land registry provides a list of addresses which contains houses valued above a certain price in a particular postal code area to a realtor, this would result in an incompatible use, as it is contrary to the purposes described in Article 2a Kw. The land registry may also not provide such information in bulk in such a manner that this information can be (without particular effort) gathered by the realtor himself.[179]

Article 3a(2) Kw was introduced to unequivocally state that the land registry does not process personal data in relation to, or in order to, facilitate a direct relationship between the land registry, or a third party, and the data subject with regard to recruitment for

174 Not legal certainty as discussed in section 2.3.

175 See also the advancement of a broader purpose, which externalises the need for information and emphasises its 'publicity function', De Jong, Rietdijk & Pluijmers 1997, p. 227.

176 Article 29 Data Protection Working Party 2013, p. 54.

177 Article 29 Data Protection Working Party 2013, p. 5. See on how this was applied in relation to real estate information under the old Wpr, De Jong, Rietdijk & Pluijmers 1997, p. 211–214.

178 Article 29 Data Protection Working Party 2013, p. 5.

179 Brouwer 2002, p. 116, KST II 1998-1999, 25 892, nr. 6. 'Het kadaster mag een dergelijke selectie dus niet verrichten, noch bulkgegevens in zodanige vorm verstrekken dat een dergelijke selectie zonder bijzondere inspanning langs geautomatisserde weg door de makelaar kan worden verricht'.

commercial or charitable goals. In short, the land registry is prohibited from facilitating direct marketing. The legislator deemed it 'incorrect' if personal data, which was provided under a legal duty to the land registry, would then be provided for direct marketing or other commercial purposes.[180] It is therefore remarkable that kadasterdata.nl, a reseller of information from the land registry, explicitly advertises with direct marketing use-cases.[181]

Brouwer states that the provision does not exclude all forms of commercial use,[182] hinting that the distinguishing factor, between the above incompatible use and compatible commercial use of information, seems to be the involvement of the land registry itself as the direct supplier. In short, the land registry may not make it 'too easy' to make commercial use of the information.

6.3.3.5 Bulk disclosures

There are different ways in which information can be disclosed from the land registry: either incidental or in bulk. Bulk disclosures can in turn be a once-off or on a more subscription-based level, for example a quarterly overview of data concerning a particular municipality. The land registry facilitates all forms of disclosure in different manners. Each is discussed below, as are their limitations.

In line with the purpose limitation article (see section 5.6.7.3), the implementation of the Data Protection Directive meant restrictions were placed on (incidental) bulk delivery, which were codified in a new Article 107c Kw. Article 107c requires an implementing measure (*Algemene Maatregel van Bestuur*, AMvB).[183] Such an implementing measure does not exist at the moment. Therefore, there are only rules regarding the disclosure by way of permanent connection which places certain restrictions on the further disclosure of the information, which will be discussed below.

In the Explanatory Memorandum to Article 107c Kw,[184] the legislator noted that the public nature of the land registry did not bring with it the unrestricted disclosure of information from the land registry.[185] In particular, the facilitation of digital information in bulk, so that this information may be searched or filtered using certain criteria without a legitimate interest of the receiver, is a form of processing which requires a separate

180 KST II 1998-1999, 26 410, nr. 3 (MvT), p. 46.

181 See https://perma.cc/8SMS-G5N3 (https://www.kadasterdata.nl/b2b/directmarketing1) & https://perma.cc/9XK8-PYST (https://www.kadasterdata.nl/b2b/directmarketing2).

182 See further on the compatibility also Brouwer 2002, p. 117.

183 It entered into force at the same time as the Wbp, *Stb.* 2001, 337.

184 Which seems in line with the criticism on such bulk disclosure made earlier by: De Jong, Rietdijk & Pluijmers 1997, p. 235.

185 'De openbaarheid van het kadaster brengt niet zonder meer met zich mee dat elke vorm van verstrekking aan wie dan ook nodig is.' KST II 1998-1999, 26 410, nr. 3 (MvT), p. 48.

justification.[186] Therefore, certain limitations would have to be placed on such facilitation, in part to provide safeguards for the processing of personal data.[187]

Bulk disclosures or processing occurs when in a single request for information a bulk of information is requested. This type of request is therefore to be distinguished from frequent incidental requests. For example, a reseller of information from the land registry, does not copy the entire, nor parts of the, database of the land registry,[188] by requesting information in bulk. Rather, depending on the request by their customers, these companies request the information with the land registry and then relay this information to the customer. As such this would not fall under the bulk disclosure system. Depending on their manner of accessing the land registry, they might fall under the permanent connection system, described next.

Bulk disclosures within the scope of Article 107c Kw should also be distinguished from the permanent connection method, which allows bulk disclosure by way of the Main Cadaster Register delivery service (*BRK-levering*) in certain instances.[189] A permanent connection to the up-to-date information held by the cadastre and land registry can be facilitated upon request and is mostly used by municipalities and public authorities.[190] The facilitation of such a connection is not without limits. Most importantly Article 36(1)(f) jo. Article 37 *Kadasterbesluit* laid down the conditions under which the information gathered from the permanent connection may be disclosed to third parties. Secondary use or further disclosure of the information is prohibited.[191] Only municipalities are allowed to relay information gathered in this manner, as laid down in Article 37 *Kadasterbesluit*.[192] If companies nevertheless make use of a permanent connection and resell the information to third parties, they would be in breach of Article 36(1)(f) *Kadasterbesluit*, and the land registry can withdraw their permission and disconnect them from the permanent connection.[193]

When bulk disclosures that cannot be qualified as a permanent connection are at issue, there are also certain limitations. The explanatory memorandum provides as an

186 'Het verstrekken van bulkinformatie in digitale vorm zodat volgens bepaalde criteria de gegevens kunnen worden doorzocht zonder een gerechtvaardigd belang van de ontvanger, is een vorm van gegevensverwerking die een afzonderlijke rechtvaardiging behoeft.' KST II 1998-1999, 26 410, nr. 3 (MvT), p. 48.

187 Brouwer para. 2.1.3.107c2.1 See also KST II 1998-1999, 26 410, nr. 3 (MvT), p. 48.

188 Leaving questions of database rights aside.

189 See on the origins of the article Reehuis & Slob 1990, p. 344 *et seq*.

190 Although it is not limited to them, see also on this De Jong, Rietdijk & Pluijmers 1997, p. 226.

191 Article 36(1)(f) Kadasterbesluit.

192 Which boil down to allowing further disclosure of the information to a third party under the condition the individual looks at the screen at the municipality or gets a copy of the data. Effectively, this means that it is limited to consultation of the information by third parties at a 'physical location of the municipality' Paapst, Klingenberg & Bröring 2010, p. 11. See also Reehuis & Slob 1990, p. 345.

193 Article 36(2). See also Paapst, Klingenberg & Bröring 2010, p. 10 who refer to companies in general without naming any.

example public bodies, such as municipalities,[194] which require such information in bulk for purposes of immovable property taxes,[195] but also private parties, such as the National Rail Transportation Services (*Nederlandse Spoorwegen*).[196] Special provisions in other laws which require the disclosure of such information in bulk, for example to aid an investigation into crimes committed by a group or in a group, are excluded from the scope of 107c Kw, as there is a specific rule for this.[197] Article 107c Kw itself also lays down some requirements for bulk disclosure, should an implementing measure ever come into existence. These requirements are that bulk disclosure is only allowed in instances where the information is not requested for commercial purposes, in line with Article 3a(2) Kw. The delivery in bulk is limited to any of the purposes mentioned in 3a Kw jo 2 Kw.[198] Moreover, the specific AMvB would first have to go via the Data Protection Authority which would be consulted on its contents.[199]

Thus, in bulk delivery, by way of a permanent connection, there are limitations placed so as to protect the disclosure of personal data, by restricting the further disclosure of the information. However, no use has been made of Article 107c Kw which requires the details to be laid down in an implementing measure, leaving bulk disclosure by other means that the permanent connection without specific safeguards in place.

6.3.3.6 A possibility for shielding an individual registration: Article 107b Kw

Next to the delivery of information in bulk on which restrictions are placed to safeguard the privacy of the individual, the legislator also provided the legal framework to allow an individual to have their information be shielded from the BRK and land registry. In implementing the Data Protection Directive, the legislator introduced a new Article 107b Kw which provided this legal basis for an implementing regulation, an AMvB,[200] that would allow an individual to shield their (personal)[201] data from disclosures if certain circumstances were present.

In drafting Article 107b Kw, the legislator looked at the solution found for the shielding of personal data in the commercial register some six years prior, when data protection legislation was still in its relative infancy.[202] They considered that in certain cases the

194 This is then a separate ground for the information next to Article 104 Kw. Municipalities would rely on Article 104 Kw rather than 107c Kw. Moreover, they could also make use of the permanent connection to the information as mentioned in Article 105 Kw *jo*. 36-37 Kadasterbesluit.

195 Which is compatible use in light of Article 3a jo 2a(b) Kw.

196 KST II 1998-1999, 26 410, nr. 3 (MvT), p. 48.

197 Article 126gg(2) Wetboek van Strafvordering for example allows the Prosecutor to set aside Article 9(1) Wbp for such a purpose. See also KST II 1998-1999, 26 410, nr. 3 (MvT), p. 48. See also Brouwer para. 2.1.3.107c2.1.

198 KST II 1998-1999, 26 410, nr. 3 (MvT), p. 48.

199 Article 51(2) Wbp.

200 The implementing regulation would be an *Algemene maatregel van bestuur*, AmvB.

201 Initially it read 'data' it was changed to 'personal data' with *Stb*. 2005, 107.

202 KST II 1998-1999, 26 410, nr. 3 (MvT), p. 47.

public nature of certain data does not weigh up against the protection of privacy of the individual.[203] Under the commercial register, this was in 1995, there was an article that stated that personal data may be shielded in order to protect the privacy of those registered.[204] This was only available for directors and members of the supervisory board, *i.e.* mostly for larger companies.[205] The particular article was enacted because reports surfaced of harassment and even threats made against representatives of companies, who were known by name and address from the commercial register (also a public register). Such a request to shield information would only be granted where the individual had attempted to shield himself in other registries as well, and only when supported by substantial arguments.[206] For representatives of companies who were also working in a notary's office, this problem was resolved in 1999 with the alteration of the *'pervert'*-article.[207] And for those individuals that were representing a company in another capacity, a solution was now also found.[208]

The legislator opted for a similar approach to Article 107c Kw, by leaving it up to the responsible minister to come up with an implementing measure, which could safeguard the privacy of specific individuals who requested such shielding from the public.[209] To this day, there is no such implementing measure in place. This means that there is no legal basis explicitly provided for in the *Kadasterwet* on which an individual can shield their personal data, which includes matters such as home address and passport number, from disclosure to anyone who asks for the information. The possibility is there to govern this issue but it has not been taken up.[210]

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203 'In beginsel zijn de in het handelsregister opgenomen gegevens openbaar, maar er kunnen zich situaties voordoen waarin het belang van openbaarheid van bepaalde gegevens niet opweegt tegen het belang van de bescherming van de persoonlijke levenssfeer.' KST II 1994-1995, 23 970, Nr. 3 (MvT), p. 13.

204 An implementing regulation may be enacted by the Minstry (*AmvB*). The rule is currently found in Article 23 Handelsregisterwet 2007 and was at the time of enactment in Article 16, and at the time of discussions in Article 17.

205 KST I 1995-1996, 23 970, nr. 162, p. 1. However, for those that can (more easily) be held personally liable for the actions of the company, *e.g.* self-employed (*eenmanszaken*) or a partnership firm (*vennootschap onder firma*).

206 'De noodzaak tot privacybescherming dient echter met zwaarwegende argumenten aannemelijk te worden gemaakt. Door een betrokkene dient daartoe een gemotiveerd verzoek te worden gedaan. Het ligt voor de hand dat betrokkene daarbij tevens aantoont dat ook op andere terreinen zijn privé-adres geheim is, bijvoorbeeld omdat hij aan het gemeentebestuur heeft verzocht zijn in de gemeentelijke basisadministratie opgenomen privé-adres niet aan derden te verstrekken en omdat hij een geheim telefoonnumer heeft. Ik denk vooralsnog alleen aan genoemde functionarissen van banken en verzekeringsmaatschappijen. Van bijzondere problemen bij andere functionarissen is mij niet gebleken' KST I 1995-1996, 23 970, nr. 162, p. 2 As responded the Minister of Economic Affairs at the time to a question of a Senator in the First Chamber (*Eerste Kamer*) of Parliament.

207 See section 6.3.1 above, about this issue in more detail.

208 KST II 1994-1995, 23 970, Nr. 3 (MvT), p. 13.

209 Kloek-Tromp notes that between 2013-2015, there were 23 requests for shielding information made. In 2016 alone this was 48. In 70% of the cases it concerns people seeking to shield the information because they feared for their security. Kloek-Tromp 2017, p. 857.

210 See also Kloek-Tromp 2017 p. 857.

At least one attempt was made to create such an implementing measure, which was referenced online and in reports of the government already in 2013.[211] However, no action has been undertaken recently to proceed on the issue. A request based on the Government Information (Public Access) Act (*Wet openbaarheid van bestuur, Wob-verzoek*) was therefore made to ministry, which showed that there were two documents available: a draft for an AMvB and an accompanying Explanatory Note. A request to see the text was denied based on Article 11 Government Information (Public Access) Act (*Wet openbaarheid van bestuur, Wob*).[212] The draft text and accompanying note were deemed to be internal documents meant for internal consideration and therefore not subject to a Government Information (Public Access) request. It is interesting to note here that the draft text, at the time, had not even been seen by the Minister responsible for its implementation,[213] meaning the entire process is still at a very early stage. In November 2016, the government responded to questions posed by Member of Parliament Bashir[214] and announced that it would ask the Data Protection Authority for advice on the public nature of the land registry.[215]

The legal basis for specific action to shield personal data from incidental disclosure has therefore not been used.[216] Until there is such a regulation, the legal framework of the Data Protection Directive, and in particular Article 36, will therefore still have effect.[217] Article 36 Wbp is an implementation of Article 12(b) of the Data Protection Directive[218] and provides the data subject the right to a rectification of personal data, or to conceal or erase the personal data if the information is incorrect, incomplete, not necessary for the purpose(s) for which it is collected, or otherwise processed in a manner incompliant with the law.[219]

211 Vermissen 2013, p. 59.

212 A copy of the letter is available upon request to the author.

213 Early september 2016.

214 KST II 2016-17 Vragen 2016Z18671. This was raised after a tv programme which showed how public the information in the land registry is. PowNed 7 October 2016: Gegevens op straat dankzij Kadaster 2016, http://www.npo.nl/gegevens-op-straat-dankzij-kadaster/07-10-2016/WO_POWN_5467997.

215 KST II 2016-17 Aanhangsel 453.

216 This may also raise questions of whether the current law therefore is compatible with Article 8 ECHR, in light of the ruling in ECtHR 9 October 2012, 42811/06 (*Alkaya v. Turkey*), where the ECtHR considered 'it useful to note that the choice of the place of residence is a quintessentially private decision, and the free exercise of this choice is an integral part of the sphere of personal autonomy, protected by Article 8 of the Convention. A person's home address constituted personal data or information which fell within the scope of private life and as such was eligible for the protection granted to the latter', ECtHR 9 October 2012, 42811/06 (*Alkaya v. Turkey*) at 30.

217 Ploeger in: Asser/Bartels & Van Mierlo 3-IV 2013/534, KST II 2005-2006, 30 544, nr. 3 (MvT), p. 24 jo KST II 1997-1998, 25 892, nr. 3 (MvT), p. 16.

218 KST II 1997-1998, 25 892, nr. 3 (MvT), p. 160 which read: Article 12. 'Member States shall guarantee every data subject the right to obtain from the controller: (b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data'.

219 Artikel 36(1) Wbp.

Article 36(5) Wbp however states that, where it concerns public registers established by law,[220] the rectification right of Article 36 only applies insofar as the sectoral law does not provide differently. Such provisions exist in the *Kadasterwet* where it concerns the information in the BRK, however, this only concerns authentic data in the BRK. It is not related to the data contained in the land registry, nor does the scope contain *non*-authentic (personal) data kept in the BRK. This means that, when we are dealing with rectification of authentic data in BRK, the *Kadasterwet* contains the legal provisions that address this matter, however, in the event that any other type of personal data that requires rectification (or shielding) is at issue, then Article 36 Wbp applies.

6.3.3.7 Internal policy to restrict access: the notary's address & APG-counter

Without an existing legal basis, the efforts of the land registry to answer requests for shielding personal data from disclosure have remained incidental and reactive. For example, in response to questions from Members of Parliament[221] about the balance between the public nature of BRK data and the vulnerability of individual home owners with regard to stalking, the Minister responded in 2003 that, upon request the land registry already facilitates a (limited) shielding of personal data by replacing the address data in the BRK with that of a notary for example.[222] The result of this is that a search by name will not provide the corresponding address from the BRK, but rather will provide the address of a notary, shielding the individual's residential address. The Minister however failed to note that this only protects the individual in a limited way. The Minister is correct in rebutting the proposed solution by the Members of Parliament,[223] which was an access log, keeping track of who accessed information concerning a particular person or plot. This after-the-fact access log does not provide (adequate) protection for the individual seeking privacy.

The same is true for those seeking privacy by requesting their address be concealed by the Main Registry of Persons (BRP), which would also have the address shielded in the BRK.[224] An interested party, with good or bad intentions, will still be able to request the underlying deed, which is referenced in the BRK, or will be able to view the object address, which is most likely the same. The deed will provide an interested party with the address, as the object which was transferred from seller to buyer will be specified, not only by cadastral reference, but also with the address of the property.[225] The land registry cannot shield that information, as it is not allowed to alter the contents of the deed. Considering that the

220 Which in this case is both the land registry and the BRK. The narrow definition of 3:16 BW is another which only governs the land registry. The Wbp contains a broader definition of public register, which includes the Main Cadastral Register (BRK).

221 KST II 2002-2003, 28 748, nr. 4, p. 2.

222 KST II 2002-2003, 28 748, nr. 5, p. 5.

223 KST II 2002-2003, 28 748, nr. 4, p. 2.

224 Formerly known as the *Gemeentelijke Basisadministratie*. The shielding can be requested, without providing reasons as to why, by way of Article 2.59, 2.81 BRP.

225 Article 20(1) Kw, 'plaatselijke aanduiding zo deze er is'.

address of the purchased property (object address) is most likely the residence of the purchaser (residential address),[226] the measure is limited in effect. The lack of significant restrictions[227] placed on searching by name make it possible to find the address.

An internal, and it seems interim,[228] solution to this problem of being able to search by name at the land registry was found in the setting up of the Shielding of Personal Data Counter at the Cadastre and Land Registry (*APG-loket*, APG-counter).[229] Personal data can be shielded upon request when it concerns a 'serious situation' (*een ernstige situatie*).[230] The test of whether the situation is serious enough is a stringent one.[231] The land registry will balance, and require, the following:[232]

a. Is there an infringement or threat thereof to the private life or physical integrity of the data subject requesting their information to be shielded? This requires a report made to the police or a court ruling; and
b. Can the interests in masking the information be put before those of the facilitation of legal certainty in relation to registrable objects; and
c. Did the individual that requested the shielding of their information also take all other reasonable precautions within their power to limit the exposure of their personal data. Here the land registry will test whether you have shielded your information in the Main Register of Persons (BRP)[233] and will check whether the individual does not have any public social media accounts.

From the criteria, which are cumulative, it is clear that someone will only be able to be shielded in relation to information in the BRK and land registry in dire circumstances. The land registry states that it is 'ahead of legislation' in this area, and it can only grant such a shielding request in obviously serious situations.[234] This is different in the proposal for the implementing measure proposed under Article 107b Kw, which will also in-

226 Residential address is the address.
227 If you simply ring the land registry or visit one of their offices, they should provide you with information based solely on name and perhaps birth-date. However, if one wants to find this information online it requires a subscription to kadaster-on-line, which in turn requires a business registration number.
228 The letter accompanying the denial of Government Information (Public Access) Act request has a slightly broader scope.
229 Kloek-Tromp 2017 does not mention this possibility.
230 Para 3. Letter informing an individual requesting information to be shielded.
231 'De toetsing is streng.' Para. 3. Letter informing an individual requesting information to be shielded.
232 Para 3. Letter informing an individual requesting information to be shielded.
233 The letter mentions the GBA, which is the old notation of the BRP.
234 'In de nog in werking te treden artikelen 37a en 37b van het Kadasterbesluit zijn de criteria te vinden. Het Kadaster loopt dus op de wetgeving vooruit en kan dit ook slechts in evident ernstige gevallen doen.' Para. 3. Letter informing an individual requesting for information to be shielded.

clude the option for those who, for example, work for the Public Prosecutor and therefore want to remain hidden,[235] exemplifying a broader scope therefore.[236]

Criterion (a) focuses on the evidence of either a police report or a court ruling. It is unclear what types of police reports would suffice. Will all types of harassment suffice or will there be a test of the severity of the crime reported? Perhaps such a differentiation between types of harassment will weigh into the balance under criterion (b). Questions also arise concerning criterion (b). How will such a balance be carried out and what type of balancing act is still required if a police report or court order, such as a restraining order for example, is provided for? In what situation does legal certainty regarding a registrable property then still prevail? The final criterion regarding the efforts by the individual also poses certain questions. What is meant by 'public social media accounts'? Does it have a list of social media platforms which they will check against the requesting party? And what if one of them is inadvertently semi-public, or what if the profile is public but the individual only posts matters that have nothing to do with their location? Where is the line drawn? Will they inform the individual or deny the request? What would be the consequence for a public figure, such as an actor, singer, or politician? Will they not be able to hide their information from the land registry for example if they are pursued by a stalker, because they have a public (work) profile on Facebook or the like? These are all questions which could be posed but are not necessarily answered due to the format of the policy, which is an internal document and not an implementing measure based on Article 107b Kw. In connection with the criteria which have to be fulfilled, the individual is also requested to hand over a copy of proof of identity (*legitimatiebewijs*).[237]

The result of a successful application to the APG-counter will be that the cadastral information which is made available to individuals will shield not only the residential address[238] but *also* the address of the object itself. An individual not acting under the auspices

235 Or the head of the Dutch General Intelligence and Security Service (*Algemene Inlichtingen- en Veiligheidsdienst*), who according to a report by PowNed no longer can be found in the register, after they had confronted him some months earlier at his doorstep with the ease by which he could be found. See https://perma.cc/Z48H-TQT7.

236 'Een persoon kan een belang tot afscherming hebben wanneer werkomstandigheden (bijv. personen die werkzaam zijn bij het openbaar ministerie) of persoonlijke omstandigheden (bijv. stalking) daartoe nopen. Dit belang dient wel door de verzoeker redelijkerwijs aangetoond te worden.' This information comes from the information document attached to the denial of the request under the Government Information (Public Access) Act, which is available upon request to the author.

237 The processing of a copy of an identity card is only allowed in very limited cases according to the Wbp. If there is no requirement laid down in law nor is necessary to fulfill a contract, then there is no legal basis to request such information. The request however is in the same sentence as the request for a copy of the police report and/or judicial documentation which is part of the evidence to support criterion (a) which is required. Therefore, the request is part of a sentence with requirements and the option to say 'no' seems very limited. 'Ik verzoek u bij uw verzoek een kopie van uw legitimatiebewijs, aangiften en/of rechterlijke stukken te voegen en uw volledige persoonsgegevens te voegen'.

238 This already happens automatically if an individual requests that information will not be provided to third parties in the BRP.

of a company cannot search by name via the online portal. As such, unless they know where the person lives, they will not get the address. The real issue here is searching by name.

Searching by name via the online portal is limited to anyone with a commercial registration number. This means a natural person will not be able to search by name other than by making a personal visit to the land registry.[239] However, if a persistent stalker, or otherwise interested party, does have the option to get access to a subscription to the land registry online portal for companies, that person will be confronted with a message that says 'consult the APG-counter at phone number [x] or email [x]'.[240] A 'small group of authorised people' will then check whether the data will be disclosed to the professional customer.[241] Professionals to whom information will be provided include: notaries, judicial enforcement officers (*deurwaarders*), and governmental authorities. Any other party will require the written permission of the data subject.[242] Effectively, this affords some safeguards to the protection of the data subject. The masking of the personal information is only for five years, which may be extended after a new request is made.[243]

As the land registry also notes,[244] shielding the information of the individual is limited to the online platform of the land registry, *Kadaster-on-line*, while other products such as bulk delivery, will not necessarily go via *Kadaster-on-line* and therefore do not afford any sort of protection to the individual. The land registry has stated that they are 'working on a technical solution which will provide near complete shielding of the personal information in the BRK'. This only mentions BRK. Whether this would also include the shielding of the information in the land registry or leave that option open is to be seen.[245]

Apart from questions and criticism related to the *content* of the policy, the manner in which it has become policy is somewhat problematic. While it is laudable that the land registry has taken action, this does not negate the fact that the policy itself is based on a questionable legal basis. Rather than in the form of an AMvB which would provide transparency to the rules,[246] and as such allow a discussion about the contents of the rules, it was created without any such transparency. Moreover, if the policy is to request a copy of proof of identity, an AMvB would resolve the lack of a legal basis for requesting the information. Furthermore, the internal policy did not have to be put before the Data Protection Authority, nor the Council of State, whereas an AMvB, before becoming binding, would indeed follow this path, during which changes to the proposed regulation

239 Unless they also have a company registered in the business register.
240 Para 4-5. Letter informing an individual requesting information to be shielded.
241 Who is authorised to decide upon this is unknown. Whether it is only the registrars or also includes the Data Protection Officer is unclear.
242 Para 4. Letter informing an individual requesting information to be shielded.
243 Para 6. Letter informing an individual requesting information to be shielded.
244 Para 5. Letter informing an individual requesting information to be shielded.
245 Although if one cannot be found in the BRK, it is of course *highly* unlikely that they will be found in the land registry, as the BRK is the portal to the land registry.
246 It would be published in the *Staatscourant*.

could be made.[247] Lastly, because there is no legislation based on 107b Kw, the general rule of Article 36 Wbp, the right to rectification applies.[248] The only deviation from the starting point of Articles 99 and 100 Kw which advance the public nature of the land registry, and the Cadastral Registry respectively, can be based on Article 36.[249] It is questionable whether a deviation, however laudable in its intentions, from the public nature of the land registry as laid down in Articles 99 and 100 Kw, by way of the *internal* policy of the land registry, would be desirable or perhaps even legal. Moreover, the policy also cannot be based on the right to object as laid down in Article 14(1) of the Data Protection Directive, because it is implemented in Dutch law in Article 40 Wbp, which specifically excludes the application of the right to object to public registers instituted by law, such as the land registry.[250]

6.4 Conclusion

The system of access to land registry information in the Netherlands is very open. It could hardly be any more open, as Van Velten states.[251] Van Velten furthermore notes that this openness 'seems to be accepted by everyone'.[252] While there has indeed been very little academic[253] and societal debate,[254] there is one stakeholder that has described its discomfort with the public system, as it is given shape, on at least two occasions: the Dutch Data Protection Authority. In 1993 the concerns were voiced by the interim-head of the DPA, Overkleeft-Verburg,[255] and in 2015 the then head of the Dutch DPA,[256] Kohnstamm,[257] voiced his concerns about the ease by which personal data from the land registry is disclosed to anyone, irrespective of their interest being legitimate or not.[258]

247 Article 51(2) Wbp.

248 Asser/Bartels & Van Mierlo 3-IV 2013/534, KST II 2005-2006, 30 544, nr. 3 (MvT), p. 23–24.

249 Article 40 Wbp, which concerns the implementation of Article 14(1) Data Protection Directive, explicitly excluded the right to object in relation to public registers in Article 40(4) Wbp.

250 Article 40(4) Wbp.

251 Van Velten 2009, p. 9 notes that 'Opvallend bij dit alles is overigens, dat door digitalisering van het kadaster de privacy op het gebied van onroerend goed tegenwoordig in feite geheel verdwenen is. (…) Het kadaster is tegenwoordig meer openbaar dan het ooit geweest is; openbaarder is nauwelijks denkbaar'.

252 'Kennelijk wordt dit (anders dan in Duitsland) door iedereen geaccepteerd.' Van Velten 2009, p. 9.

253 Although, De Jong, Rietdijk & Pluijmers 1997, p. 233: 'The question is however, whether this principle [of full publicity] can remain entirely as it stands now in this period of strong developments in information technology' (De vraag is echter of dit beginsel volledig overeind kan blijven in deze periode van sterke ontwikkelingen in de informatietechnologie.).

254 Although this seems to be picking up, see Akkermans 2015 and Pow!Ned, see ftnt. 214.

255 Interim head of the DPA at the time, *de Registratiekamer*.

256 At the time called the *College Bescherming Persoonsgegevens*. Since 2016 it is more commonly known as the *Autoriteit Persoonsgegevens*.

257 Perhaps interesting to note. At the time of the discussions of the Wbp, Kohnstamm was the deputy Minister of internal affairs and one of the signatories to the Explanatory Memorandum of the Wbp.

258 Emphasis added. 'Als iemand een huis wil kopen, is het belangrijk dat hij zeker weet wie de eigenaar is', zegt Kohnstamm. (…) Als koper heb je daar belang bij. Maar het probleem is dat de gegevens door iedereen zijn

Kohnstamm called the Dutch legislation in this area 'outdated', as it was devised at a time when the internet and search engines were still in their infancy. He therefore openly wondered whether the considerations made at the time would still hold up in modern times.[259]

These modern times include doing away with paper, microfiche, and replacing these with PDF and XML files. Moreover, with the centralisation of the information held by the land registry, and the utilisation of the internet, the land registry made all the information on land ownership for the whole of the Netherlands accessible online, to anyone willing to pay a small fee.[260] The ease of access has therefore increased exponentially. These days, information products can be acquired in a matter of minutes and at all times of the day.[261] There are no longer office hours limiting access to certain facilities of the land registry[262] and there is no longer a multitude of offices to visit to get a full picture of a person's financial holdings in immovable property. The distance between the information gatherer and the information itself has never been this small.[263]

The increased utilisation of electronic collecting and further processing, including the disclosure of information, has also garnered the attention of the legislator to the manner in which the disclosure of information from the land registry is given shape[264] and to

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in te zien.' (…) Kohnstamm maakt zich daarover zorgen. 'Als het doel rechtszekerheid is, is het de vraag of dat goed is. Als je een vordering op iemand hebt en die wil je incasseren, heb je een gerechtvaardigd belang om te weten of die persoon inderdaad een huis heeft en of je je vordering kunt verhalen door beslag te leggen op het huis. Maar een nieuwsgierige buurvrouw heeft geen gerechtvaardigd belang.' Kohnstamm was the head of the Dutch DPA at the time of this interview. Akkermans 2015, p. 18.

259 Linking this issue with 'big data' threats and the linking of information from all sorts of sources into profiles. Akkermans 2015, p. 21.

260 Currently at €2.40, costs of a deed without a subscription, €15.40 for email delivery, €17.40 per regular mail, and €31.40 for in person delivery at one of the offices of the land registry.

261 Those making use of the permanent connection for mass disclosure of information still fall under the *Regeling massale gegevensverstrekking uit de kadastrale registratie* 1994, which has the provision that the permanent connection should be available *at least* during workdays from 08:00-17:00.

262 This is restricted to companies as it the subscription requires a Companies' Register number https://perma.cc/JS88-3DQJ. The information can also be requested online via a form, but then for certain inquiries an employee from the land registry will have to process the request and, as such, the request will be limited to office hours. This is however not the case for requesting, for example, a copy of the information available regarding a particular plot of land. That will be automatically processed after payment.

263 The use of the internet thus also muted the points raised by the municipalities in the early 1990s that stated that the distance between the citizen and the land registry was too great. Compare with Germany's reasoning for providing access via notaries, see section 8.3. See this also repeated in the discussions about the new Dutch Civil Code, Reehuis & Slob 1990, p. 329. This lead to an increased collaboration between the land registry and the municipalities, who would set up counters whereby direct access to the Cadastre and Land Registry were set up, so as to close the gap, Berkers 2001, p. 172. See also De Jong, Rietdijk & Pluijmers 1997, p. 182.

264 'Het openbaarheidsbeginsel dat ten grondslag ligt aan het door het Kadaster gehouden wettelijk register en de registratie en dat (opnieuw) in de Kadasterwet werd verankerd kan niet los gezien worden van het feit dat sinds het ontstaan van deze registers in het midden van de vorige eeuw tot het einde van de jaren tachtig altijd sprake is geweest van papieren registers en registraties.' De Jong, Rietdijk & Pluijmers 1997, p. 225.

what extent the later developed legislative framework of data protection should apply, if at all, to the information in the land registry.

The first comprehensive approach to data protection legislation in the Netherlands was the *Wet persoonsregistraties* in 1989, which explicitly excluded public registers from its scope, thereby setting aside the development of safeguards for data protection in favour of an ever-expanding public register. Nevertheless, where the legislator gave little attention to applying data protection in relation to the land registry, scholars took up the issue, leading to the 1993 colloquium, in which both practitioners and scholars came together to discuss privacy implications in land registration. The colloquium results showed the discrepancy between the viewpoints held by those that worked with the data, the people from the (municipality) Cadastre, and the opinions on the matter of the data protection experts.[265] The results were a newfound interest in matters of privacy in relation to land registration, but without any substantive action that was undertaken thereafter.[266]

The access regime was hardly altered and continued to be entirely open. However, what was foreshadowed by the data protection expert at the Colloquium came to pass in 1995 with the adoption of the Data Protection Directive, which would – for the first time – apply to public registers, including the land registry. It was only in 2001 that the Dutch legislator implemented the Data Protection Directive in the *Wet bescherming persoonsgegevens*, which also resulted in changes to the *Kadasterwet*, which governed the specifics of access to information in the land registry. Whereas the Wpr had very little influence on the access regime of the land registry,[267] the Wbp on the other hand had a significant effect. Under the new access regime, the starting point of the access right was still Articles 99 and 100 Kw noting that the land registry and BRK are open to all upon request. However, the public nature of the registers was curtailed so as to provide certain data protection safeguards. The safeguards put in place were almost exclusively in the form of further delegated legislation.

While bulk disclosure by way of a permanent connection to the BRK is subjected to restrictions that disallow further disclosure,[268] there are no such safeguards in place for incidental bulk disclosures, where the only limitation seems to be the practice of asking the individual or company seeking information in bulk what intentions they have in relation to the information. If such intentions indicate some sort of commercial or charitable purpose, the request is denied. However, this policy is not laid down in the delegated legislation as required by Article 107c Kw.

The same holds true for the shielding of individuals' information in the BRK and land registry. Article 107b Kw provides a data protection safeguard for shielding individuals'

265 See extensively section 6.3.2.
266 Although see also De Jong, Rietdijk & Pluijmers 1997.
267 See extensively section 6.2.2.2.
268 See section 6.3.3.5.

information in the BRK and land registry. However, this is a delegated mandate that has not yet been taken up. There is no implementing legislation as of yet that provides for such shielding of an individual's information in the registers. In the meantime, there is a twofold 'solution'. Firstly, for want of any regulation based on Article 107b Kw, the rectification right of Article 36 Wbp continues to have effect.[269] Secondly, there is a practical solution devised by the land registry. Internal policy has been developed that allows for the shielding of personal data in those instances in which the circumstances are so that it is self-evident that there is a dire need for the address of the person to be shielded. While it is laudable that the land registry has facilitated the option for the information of these individuals to remain shielded, the way in which this policy has been devised and set-up leaves much to be desired. It should be clear that, where there is a legal basis clearly provided for by law to govern this situation exactly by way of an implementing measure, the outcome should not be that the matter is (temporarily) resolved by means of internal policy of the land registry. The legislator understood the need for such safeguards to be in place and provided the legal framework for taking action. It has been fifteen years since the creation of Article 107b Kw and still no governmental action has been taken, apart from advice being requested at the Data Protection Authority,[270] leaving the land registry to come up with pragmatic solutions, the legality of which can be questioned.[271]

This lack of an implementing measure for Article 107b and 107c Kw also affects the justification of Article 107a Kw. In this provision, the data protection legislation, in particular the access rights of the data subject, have been explicitly excluded, because of the framework put in place by Articles 107b and 107c. On account of the lack of action being taken regarding Article 107b Kw, the default reverts back to the application of the rectification right as codified in Article 36 Wbp. However, the lack of an access log deprives the data subject of the option to exercise its rectification right effectively as provided for in Article 36 Wbp, because it is not possible for the data subject or the controller[272] to inform third parties of a mistake in the record when they do not know to whom the information has been provided.

The lack of action taken in relation to Articles 107b and 107c Kw directly affects the justification for the second paragraph of Article 107a Kw, which states that there is only recourse in administrative law for a decision of the land registry to *decline* access to the information, not for the *granting* of access to the information in BRK or land registry. One of the justifications for not allowing recourse to such a decision was that the only real danger exists for bulk disclosures and Article 107c Kw provides for safeguards in that respect. As long as there are no safeguards in place for the individual to be shielded, nor

269 See section 6.3.3.6.
270 See section 6.3.3.6.
271 See section 6.3.3.7.
272 Article 12(c) Data Protection Directive.

(enough) safeguards in place to protect personal data in bulk disclosures, this justification is no justification at all.

Consequently, while there is a legislative framework in place to protect personal data, they have not all been effectuated. If they were, there would be room for a layered approach to access to information in the land registry, as suggested by some authors.[273] This leads to the conclusion that, with virtually unrestricted access to the personal data of home owners in the land registry and the BRK, the ability to search not only by object but also by name,[274] and only limited restrictions placed on bulk access to information, the Netherlands is a *very* open system.

273 As suggested in Akkermans 2015, p. 17–21 De Jong, Rietdijk & Pluijmers 1997, p. 189, 'Door middel van het instellen van wachtwoorden kunnen aan verschillende gebruikers van gegevensverzamelingen verschillende autorisaties worden verleend. Zo kunnen bijvoorbeeld de in een basisregistratie opgenomen waardegegevens van een object uitsluitend toegankelijk worden gemaakt voor een afdeling die zich bezighoud met belastingen of voor een afdeling die zich bezighoudt met grondverwerving. Iedere gebruiker heeft dan alleen toegang tot die gegevens die hij echt nodig heeft.' And see further De Jong, Rietdijk & Pluijmers 1997, p. 233–235 where they expound on the different categories of people that information is disclosed to: (1) information disclosure in individual transactions in relation to immovable property; (2) disclosure of information to public authorities, (3) disclosure to facilitate certain commercial applications. De Jong, Rietdijk & Pluijmers 1997, p. 259, where they propose different categories of 'thirds' and test the purposes of the information.

274 If you have a Commercial Register Number.

7 A Fluctuating System: England & Wales

7.1 Introduction

The English land registry was not always as open as it is today. For registered conveyancing, the turning point is clearly demarcated at 3 December 1990. At that moment, the Land Registration Act 1988 entered into force and access rules, referred to as inspection rules, pertaining to the land registry's registers were relaxed to include everyone, rather than everyone with permission from the proprietor (*i.e.* the registered property right holder). While the legal demarcation line is significant, and is emblematic of a radical shift in perspective from a system that allows 'no access, unless' to a system which allows 'access, unless', the fact that the shift came to pass is anything but radical. The legislative efforts in the eighteen years prior to the enactment of LRA 1988 show, with hindsight, that it was only a matter of time before the land registry would be opened up.

While elsewhere the development of registration itself is discussed,[1] below the overview is specifically directed at the right to access information in the registry, more commonly referred to in English law as the inspection right. We start with a brief historical overview.

7.2 Brief historical overview

Some twenty years after the Battle of Hastings, William the Conqueror commissioned England's earliest surviving public record: the Domesday Book.[2] It comprises two volumes,[3] and it was an extensive and methodically compiled survey of almost all the land under the rule of William I.[4]

Domesday is primarily a 'geld book',[5] which is a collection of facts for the purposes of taxation.[6] At the time of issuing the Domesday book, William I needed (more) money to help counter the threat of a Viking invasion. Thus, it comes as no surprise that Domesday Inquest Commissioners were not only tasked with giving the former and current state of landholding in England, but also with describing what more could be taken in *geld*, than had previously been done. Considering that Domesday, in its final form, was presented as

1 See section 3.5.

2 The name Domesday was given to the books in the 12th Century, which has stuck ever since.

3 The Great Domesday Book and the Little Domesday Book, the names of which might as well have been switched, seeing as the latter is more detailed and longer than the former. See Roffe 2002, p. 221–223.

4 The cities of London (at that time) and Winchester were not included, neither any of the four northern counties, later known as Cumberland, Northumberland, Westmorland, and the County Palatine of Durham.

5 Maitland 1907, p. 3.

6 Simpson 1976, p. 112. Compare with the origins of the Dutch cadaster, section 6.2.

a book which was indexed by the name of the tenants-in-chief rather than by county makes the fiscal nature of Domesday less obvious.[7] Generally, registers which serve a fiscal purpose were arranged geographically, so that the tax collector could visit specific regions and know how much to collect. Domesday made such a practice more difficult, as its index was by name, not region, and therefore it gave the information of all the land that was held by a specific person, in different counties, but not a list of all the landowners in a specific county. This led some scholars to suggest that the Domesday Inquest was held for taxation purposes, while the Domesday Book, produced some three or four years after, was more 'a record of the *status quo ante*, it was conceived of as an administrative aide that informed the settlement.' Settlement was required in the aftermath of the rebellion of 1088 against William Rufus.[8]

With incredible speed, the (independent) Inquest Commissioners went out into the countryside and completed the survey and presented a first draft to William I, who used this to collect taxes and to bolster his control over his country.[9] The Anglo-Saxon Chronicle records that William I summoned, on 1 August 1086, all the landsmen that were of any account all over England and made them swear oaths of allegiance. After this ceremony, he was presented with Domesday, which, from that point on, laid down the legal landholding of England,[10] effectively expropriating anyone who was not recorded in Domesday[11] and reaffirming the position of William I as the landowner of England.[12]

Domesday included a list of owners with their attributes: from whom they held land, the number of villeins (villagers) the land housed, the number of hides it comprised (measurements of land approximating 12 acres), the number of ploughs (knowing that each plough requires eight oxen to work it), as well as the true (annual) value. Furthermore, the Inquest Commissioners asked and recorded: (1) what the land-owning situa-

7 And some, like Galbraith even rejected the notion that *Geld* was the reason for the inquest entirely. See Galbraith 1961 where he showed an overview of the scholarly work up until that point, from which it may be derived that the true reason(s) for compiling Domesday Book are unknown: Galbraith *The English Historical Review* 57/226, p. 161–177.

8 Roffe/Hallam & Bates 2001, p. 25. See also extensively Roffe 2002.

9 Cooke 2003, p. 16. William I passed away before Domesday was completed in its final form; the Domesday Book. He may have found out by use of Domesday that certain barons were occupying land he had reserved for himself, see Maitland 1907, p. 5.

10 It was not updated.

11 Except for the odd one out, like the Saxon family of Shobington in Bucks, who, upon hearing that the land he had called his own was to be taken over by a Norman lord, fiercly defended the land and with success. He was then summond to William I who was impressed with the bravery of Shobington. It is reported that Shobington told William I: 'If thou wilt leave me my lands, O king, I will server thee faitgully as I did the dead Harold.' Harold was the initial successor, who was thrust off the throne by William. William accepted and confirmed ownership of Shobington and renamed him Bullstrode. See Fisher 1876, p. 29.

12 Contrary, see Roffe/Hallam & Bates 2001, p. 25–36, who makes the argument that Domesday survey was the beginning of a negotiation and compromise for William I. 'The inquest was no less than a means of consultation. William was in a fix in 1085. To meet the threat of invasion he needed consent and support of his subjects. The inquest was the only means available to mashal opinion. In it we see a Norman king ruling with his people, not in spite of them.' p. 36.

tion was prior to 1066, (2) at 1066, and (3) at the time of the Commissioners' inquest, providing an overview of the land development over twenty years.[13]

It was roughly the last land register in England & Wales that was created for taxation purposes. From that point forward, land registration would serve conveyancing more than taxation. However, the development of such a land registry would take another couple of hundred years. The first steps were taken some two hundred years after the Battle of Hastings.

With the *Quia Emptores* statute of 1290, the practice of subinfeudation was abolished in favour of transferring or the alienation of estates. Alienation of feudal land holdings, however, was made conditional upon a method of achieving publicity,[14] in particular the delivery of possession, often executed by handing over a bit of turf, in front of several witnesses on the land itself and often documented in a charter, or deed, to give further permanence and specificity to the delivery.[15] This 'feoffment with livery of seisin' could therefore be characterised as a conveyance of land which required publicity.

However, a practice of avoiding this public conveyance of land established the means of the 'use'. This precursor to the trust was developed for the Franciscan friars,[16] who were not allowed to own any property, either individually or as a collective.[17] The practice developed, in short, to convey property to certain trusted people outside of the Church who would hold the land 'to the use' of the friars.[18] Rowton Simpson explains how the use became so integral to land transfer as a whole.[19]

> During the fourteenth century landowners began to discover that this sort of arrangement could be turned to their advantage. The landowner could convey his land to a group of his friends for 'his own use'; they jointly became the legal owner whilst he retained the profits and enjoyment of the land. If one of them died he could be replaced and so, in effect, the legal owner never died, thus avoiding the oppressive feudal burdens of wardship and marriage which gave the overlord valuable rights on the death of a landowner leaving an infant heir (…) Creditors could also be defeated in this way, for the 'friends' did not owe the debt and the debtor did not own the land.

The 'use' did not require any formalities or publicity, neither for its creation nor for the enforcement of the 'use' by the Court of Chancery.[20]

13 Maitland 1907, p. 12.
14 Simpson 1976, p. 37.
15 Rowton Simpson considered the meaning of such a charter as 'a permanent record and to ensure that the interest intended to be conveyed was clearly defined.' Simpson 1976, p. 37.
16 Inspired by St. Francis of Assisi who served the Catholic Church.
17 See also on the matter Loof 2016, para 6.1.
18 Pollock & Maitland 1895, p. 229.
19 Simpson 1976, p. 35.
20 The involvement of the Court of Chancery can be traced back to the reason for the creation of the instrument of 'use' in the first place; the Franciscan Friars.

The practice of the 'use' to avoid the payment of feudal dues meant a decrease in revenue for the King[21] and, in 1535, Henry VIII attempted to end the practice of the 'use' by having Parliament enact the Statute of Uses.[22] The Statute would 'execute' the use if land was conveyed, which meant that the equitable interest would be converted into a legal interest.[23] This meant that the circumvention of the feudal duties would be over, but it also had as a side effect that *any* creation of the use would lead to a legal estate, rather than an equitable one. This transformation included the creation of a use by 'bargain and sale'. This 'use by bargain and sale' established a use upon the mere agreement on the transfer of land and payment of purchase price,[24] *without* the formalities of livery of seisin. As such, the Statue of Uses extended the private land conveyancing, rather than limit it.

The Statute of Enrolments 1536[25] mitigated the result somewhat by requiring the bargain and sale to be recorded on a deed which was subsequently enrolled, within six months, with the keeper of the rolls in the county or at one of the King's Courts of Record at Westminster. By requiring this enrolment, a public system of land conveyancing was envisaged. Access to the enrolled deeds was limited and only open to inspection by those 'that hath to do therewith'.[26]

However, the Statutes failed in the attempt to set up a more public framework of land transfer,[27] and miserably so, as the result was the exact reverse: even less publicity than existed prior to their enactment. The problem was in the material scope of the Statute of Enrolments. The statute did not provide for the enrolment of estates *less than* freehold[28] and, as such, a loophole was found[29] in the method of 'lease and release'. If a short leasehold was granted by way of bargain and sale, it would not have to be enrolled, even though the Statute of Uses considered the leaseholder to be in lawful possession. However, if before the lapse of the term of years for which it was created, the leaseholder would acquire the freehold from the person with the reversion by way of a 'release',[30] which is what the deed that lays down such a transaction is called, there could be no livery

21 Swadling/Burrows 2013, p. 173–306.

22 27 Hen. 8, c. 10.

23 See extensively Bordwell *Iowa Law Review* 21/1, p. 1–49.

24 As enforced by the Court of Chancery.

25 27 Hen 8', c 16.

26 See Kaye 1988, p. 632–633.

27 Note, Ives considers that 'Its only possible significance in the legislative story of the Reformation Parliament is that its programme of ensuring the maximum publicity for land transfers could be the embryo of the later Statute of Enrolments; it has plainly no place in the story of the Statute of Uses.' Ives *The English Historical Review* 82/325, p. 680.

28 Freehold is the equivalent of ownership in civil law terminology. Estates less than freehold are the limited property rights. For example, a term of years - or leasehold - which comprises of an estate that is fixed in duration, hence a 'term of years'.

29 The statute spoke of 'any estate of inheritance or freehold'.

30 A reversion is the future interest in land, for the grantor, created by operation of law by granting a lease. Upon expiration of the term of years, the land reverts to the lease grantor or his or her heirs. The person who grants the lease therefore generally has the reversion. Although, a reversion may also be transferred.

of seisin.[31] No such livery of seisin is possible, because the leaseholder was already in possession on account of the Satute of Uses. As such, even after the enactment of the Statute of Enrolment the acquisition of freehold without publicity by way of deed was still possible and made it even easier.[32]

Around the same time that this practice of unregistered or private conveyancing was developed, the different legislators attempted to remedy the fragmented state of the different registers. In relation to centralisation of access of information, the 1617 Royal Letters of Patent establishing 'The General Remembrances of Matters of Record' are of importance. It was one of the first instances in which a centralised registration of deeds was envisaged. Up until that point, as was lamented by the Lord Keeper at the time, Sir Francis Bacon, if purchasers of land, creditors, executors, or administrators of persons deceased, wanted information, they would have to fulfil a 'multiplicity of [s]earches',[33] which had created a situation in which it

> hath beene so manifold intricate, chargeable, tedious and uncertaine, as that no purchaser without a multitude of severall searches in the said severall courts, offices, and places, and without great charge, and trouble, can be sure or secured from or be able to know or finde out such incumbrances, whereby the lands may be charged, or the due and legall discharges of the same, if any be or have beene in that behalf.[34]

The Letters of Patent were a very early attempt at centralisation 'for the convenience of search'.[35] From that point onwards, many attempts were undertaken to establish a centralised, or general registry,[36] however no significant changes were made to the substantive law of the uses,[37] and the system established by the Statute of Uses, which in practice meant conveyances without notoriety, remained. In the second half of the eighteenth century, Blackstone, in his Commentaries, considered this 'want of sufficient notoriety (…) so that purchasers or creditors cannot know, with any absolute certainty, what the estate, and the title to it, in reality are, upon which they are to lay out or to lend their

31 [A] leases Blackacre to [B] for a term of 2 years. [A] has the reversion, [B] a leasehold. After 1 year [A] releases the reversion and [B] acquires it. He now has the lease and the reversion in relation to Blackacre. Neither the lease nor the release would be enrolled, effectively transferring the freehold void of publicity.

32 Blackstone 1893, p. 342, Blyth *Law Quarterly Review* 12/4, p. 356, Pollock 1883, p. 106, Simpson 1976, p. 38, Royal Commission On Registration Of Title 1857, p. 2–3.

33 The Office of Generall Remembrance. Of Matters of Record, Letters Patent 1617.

34 The Office of Generall Remembrance. Of Matters of Record, Letters Patent 1617.

35 Sanders 1850, p. 233.

36 See extensively on the topic, Sanders 1850, Holdsworth 1927, p. 305 *et seq.*

37 See on this shortfall Holdsworth who deemed the main cause for the failure of the attempts at setting up a general registry to lay with 'the great complication which the statute of Uses and Wills and the doctrines of equity had introduced into the land law.' Holdsworth 1927, p. 308.

money', a 'palpable defect'.[38] Not only did Blackstone echo the concerns voiced two hundred years earlier in the Letters of Patent, a possible solution put forth was again a general register, the establishment of which according to Blackstone was at least deserving of being 'well considered'.[39]

And considered it was, in a series of reports by the Real Property Commissioners in 1829 and 1830 and the Registration and Conveyancing Commission in 1850,[40] as well as the Registration of Title Commission in 1857. All of the reports advanced a general system of land registration, however the difference between the reports was that the earlier reports required little change in the substantive rules of land law, as Holdsworth puts it,[41] and proposed the establishment of a land registry as something which could cure most of the defects in the substantive law.[42] This approach was, according to Simpson, 'as unsuccessful as it was unimaginative'.[43] However, in the latter half of the nineteenth century the circumstances were changing.[44] The 1850 and 1857 reports also envisaged the establishment of a general registry, but they referenced the registration of title as opposed to deeds. The 1857 report even went so far as to investigate whether or not 'the failure of measures so often proposed and so generally desired can hardly be attributed to any other cause than the practical difficulties which, upon examination, are seen to be inherent in or likely to result from a system of registration of assurances'.[45] Also,

38 Blackstone 1893, p. 342.

39 Blackstone 1893, p. 343.

40 The Royal Commission appointed for making a full and diligent inquiry whether the burdens of land can be diminished by the establishment of an effective system for the registration of deeds and the simplification of the forms of conveyance, and by what means the same can be effectuated.

41 Holdsworth 1927, p. 309. See also Dicey who noted that the plethora of legal changes to the English land law between 1830-1900 presented a 'paradox of the land law': 'incessant modifications or reforms of the law, which extend over seventy years, and have certainly not yet come to an end [in 1905 when Dicey wrote this, AB], have left unchanged, in a sense almost untouched, the fundamentals of the law with regard to land.' Dicey 1905, p. 221.

42 Holdsworth 1927, p. 309. See also Simpson 1976, p. 40 who was surpised by the comment of the Commission that '[t]he Law of England, except in a few comparatively unimportant particulars, appears to come almost as near to perfection as can be expected in any human institutions', in particular in light of the lack of improvements made to it since Blackstone described it as anything but perfect.

43 Simpson 1976, p. 40. The only slight originality in the report, as Simpson notes, was 'the first reference to registration of title as distinct from registration of deeds'.

44 Holdsworth 1927, p. 310.

45 For assurances, you may read (title) deeds. Royal Commission On Registration Of Title 1857, p. 3. The Commission did state that setting up a Register of Assurances 'would give increased security of title' and '[a]ll those evils and objections which call for protection against the suppression of documentary evidence of title, would, we think, be removed or remedied by a general register of deeds and other assurances relating to land' Royal Commission On Registration Of Title 1857, p. 9, however, a register of title was preferred. A register of assurance would not, as the Commission conceived 'operate to simpify title, or facilictate (as respects the title) the transfer of land, or render less intricate the practice of conveyancing, or lessen any of the burdens on land which arise from those peculiarities in the ownership to which [they] adverted'. Royal Commission On Registration Of Title 1857, p. 10.

this time around, the downside of the substantive law on conveyancing was becoming more pressing.[46]

The report of the Registration of Title Commission in 1857 was the final push that led to the creation of a general registry of *title* established by the Land Registry Act, 1862.[47] In the report the Commissioners did not concern themselves with the question of *whether* a general registry should be established, as by then everyone was in favour,[48] but rather they were concerned with what the *nature* of the registry should be. Should it become a registry of title or one of Assurances? The Commission was clear in its starting point:

> With such a remarkable concurrence of opinion, the failure of measures so often proposed and so generally desired can hardly be attributed to any other cause than the practical difficulties which, upon examination, are seen to be inherent in or likely to result from a system of registration of assurances. The fear that such a system of registration would be found to be productive of evils as great, or nearly as great, as those against which it was intended to provide, was probably the main reason which [led to the appointment of the Commission to investigate a registration of title].

The Commission then carefully set out the different evils of the system at that time and, after providing a brief description of the advantages of a Registration of Assurances, provided seven objections to such a registration.[49] The Fourth objection is of particular interest.[50] For this objection,[51] the Commission relied heavily on the work of Sir Edward Sugden, published five years earlier.[52]

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46 Although, take note of Anderson *Current Legal Problems* 37/1, p. 69. For example, see the issue of second mortgages, Holdsworth 1927, p. 310 referencing Joshua Williams in 1862.

47 See the Short Titles Act 1896, c. 14. The full title was 'An Act to facilitate the Proof of Title to, and the Conveyance of, Real Estates. At the time, the registration was still voluntary, it wasn't until the Land Transfer Acts of 1875 and 1897 that registration of title became compulsory in certain instances and for certain parts of England. See extensively on these Acts: Hogg *The Law Quarterly Review* 21/1 & Nottage 1902.

48 They note the history of a constant recommendation for a general registry by 'the ablest lawyers and statesmen' and both Houses of Parliament, and then firmly place the blame on the lack of it becoming a reality on the nature of the register proposed; one of Assurances, rather than title. Royal Commission On Registration Of Title 1857, p. 3.

49 Royal Commission On Registration Of Title 1857, p. 10–14.

50 Although the seventh, which concerned the furnishing of the requisite indices and 'affording the necessary facilities for search' should also be mentioned. At the time, there were some difficulties in the indices which might have been at times complete, just not neatly ordered and therefore lacking the benefit they should provide. See Howell *Cambridge Law Journal* 58/2, p. 380 *et seq*. Royal Commission On Registration Of Title 1857, p. 14.

51 As it did for the First objection relating to cost, compare Royal Commission On Registration Of Title 1857, p. 10–11, with Sugden 1852, p. 4–5, 11.

52 Sugden 1852.

> Another objection raised to a general registration of assurances is the fear of unnecessary and uncalled-for disclosures. No man likes to make his private affairs public; and one man has no right to pry into the affairs of another, except for some object, in which the latter has given him an interest. Now the only legitimate object of making public or giving notoriety to any title-deeds is to prevent frauds in the transfer of property by ensuring notice to future contractors of all transactions which are to affect them. For that purpose, however, there can be no need of disclosing the whole internal history of the title for an indefinite period. There can be no reason why every particular, however secret or however confidential, should be made known.[53]

In particular, in relation to private settlements and family arrangements, the questions of uncalled-for disclosure came up.[54] However, one can wonder whether the two cited statements of the Commission are not in conflict. On the one hand, advancing the idea that the lack of notoriety of land transfers was considered 'an evil', while on the other hand one could consider the fear of unnecessary and uncalled-for disclosures. The Commission did not consider them to be in conflict.

> Nor do we think that there is any inconsistency in attributing weight to this objection, and at the same time regarding as an evil the disuse or loss of that system of public transfer of land which in a previous part of this report we have adverted to as having prevailed in the earlier periods of our history.[55]

The Commission then advanced a register of title,[56] which was simple and secure.[57] This entails that the register 'ought to be composed of a succession of simple transfer merely, and should manifest only the actual and existing ownership of the land for the time being, without laying open the history or past deduction of it.'[58] Not doing so would not 'afford the requisite relief from the obligation of retrospectively investigating the title'. The Com-

53 Royal Commission On Registration Of Title 1857, p. 12. Here the Commission did not fully copy the statements of Sugden, who seemed to imply some sort of protection flowing from the lack of disclosure in the system at the time (1852): 'No man desires to make his private affairs public, and the public have no right to pry into his affairs except for some legitimate object, and this case presents none. But if all the dealings of men of property, and all their title-deeds were to be disclosed to the world, the mischiefs would be obvious; immediate ruin would not unfrequently be occasioned; flaws in titles would be readily discovered; for the plan will not add to the learning or sagacity of real property lawyers; (…). Many a young man has been saved from ruin because he had not the means of proving to money-lenders what his interest was in the family property.' Sugden 1852, p. 12–13.

54 Royal Commission On Registration Of Title 1857, p. 12–13.

55 Royal Commission On Registration Of Title 1857, p. 13.

56 See on a more comprehensive account of the choice between title and deeds registration Howell *Cambridge Law Journal* 58/2.

57 Royal Commission On Registration Of Title 1857, p. 25.

58 Royal Commission On Registration Of Title 1857, p. 25.

mission did not discuss unwanted disclosure of information in relation to the setting up a system of title. However, as we shall see, access to the information registered was nonetheless limited.

7.3 Access to Land Registration information in registered land

7.3.1 Access under the Land Registry Act, 1862

The 'principle of secrecy' was so established by the time the Land Registry Act 1862 came into being that 'the original framers felt bound' to adopt it.[59] This entailed restricted access to the information in the land registry, as evidenced by two sections laying down the rules concerning inspection of the book containing voluntarily registered freehold and leasehold estates kept by the land registry.[60]

> S. 15 Land Registry Act 1862: Subject to such Directions as may be given by General Orders, the aforesaid Books of Registry may be inspected by the Owners of the Estates and Interests, or of the Mortgages and Incumbrances recorded therein, or their respective Solicitors or Agents: No other Person shall be permitted to inspect such Books, except under an Order of the Court of Chancery.
> S. 137. Land Registry Act 1862: Subject to such Regulations as may be imposed, and to the Payment of such Sums as may be fixed by the Registrar with the Sanction of the Lord Chancellor, any person registered as Proprietor of any Estate or Interest in any Land or Charge, and any Person authorized by any such Proprietor, or by an Order of the Court of Chancery, but no other Person, may inspect and make Copies of and Extracts from any Register or Document in the Custody of the Registrar relating to such Land or Charge.

It follows that access to the registry was limited to those registered,[61] or whoever had acquired permission either by a person registered or by an Order of the Court of Chancery.[62] Note that the inspection was also limited to a particular registration, namely that of the owner of the estate, interest or of the mortgagee or of the registration of the person

59 Ruoff e.a. 1986, p. 666.

60 The legal ground for establishing the land registry is found in S. 2 LRA 1862, which states 'There shall be established a Registry of the Title to Landed estates'.

61 With the right to inspection we can also read a right to make copies of and extracts from the registers, including all documents which relate to the property at issue and are held by the Registrar. Gough 1862, p. 43.

62 They have been digitised and are searcheable by name, county/parish, title number, volume number, and page number via http://digitalarchives.landregistry.gov.uk/1862/search.

with an encumbrance in the land. Permission of *a* proprietor would not provide access to any and all registrations.[63]

If a right to inspection was granted, this also included a right to an office copy, in pencil only,[64] of the particular registration.[65] The execution of the inspection itself required the presence of an officer of the registry.[66]

Access to the index map, which consisted of the ordinance map on a large scale, coloured pink when land was registered and numbered, was open to any and all people free of charge.[67] The Index of Proprietors' Names was not open to the public.[68]

The Land Transfer Acts of 1875 and 1897 did not bring about any substantive change in the regime for access to information concerning registered land.[69] One of the main changes brought about by the Land Transfer Acts was the addition of compulsory registration of land,[70] as, since the enactment of the Land Registry Act 1862, only a total of 650 titles had been registered.[71] It had not been a success. Incessant alterations to land law and even the establishment of the land registry did not modify the habits of English

63 See also Gough 1862, p. 42 '[t]he right ofinspection is, however, limited to the particular entries and documents in which the persons above mentioned are respectively interested (s. 137)'.

64 r. 223 LTR 1898. 'No ink shall be used'.

65 r. 229 LTR 1898.

66 r. 223 LTR 1898.

67 r. 14 LTR 1898. 'The Index Maps, and the list of pending applications (but no other book, map, plan, or document), shall be open to general public inspection at any time during office hours'.

68 r. 14 LTR 1898 'The index of proprietors' names shall be open to the inspection of the registered proprietors only, provided that if any person shall satisfy the registrar that he is interested generally in the property of any proprietor – for instance, as his trustee in bankruptcy, or his executor or administrator – he may inspect that index also'.

69 S. 104. LTA 1875 reads: '[s]ubject to such regulations and exceptions and to the payment of such sums as may be fixed by general rules, any person registered as proprietor of any land or charge, and any person authorised by any such proprietor, or by an order of the Court, or by general rule, but no other person, may inspect and make copies of and extracts from any register or document in the custody of the registrar relating to such land or charge.' See more extensively on these Acts Brickdale & Sheldon 1899, Hogg *The Law Quarterly Review* 21/1 Nottage 1902. See also Anderson 2010, p. 119–220.

70 S. 4 LRA 1862 lists the persons who 'may' make an application for Registration of Title.

71 Sweeney & Simson *The Geographical Journal* 133/1, p. 11–12, who attribute this failure in part to a mapping issue 'Two of the principal reasons for this failure had to do with mapping; firstly, the applicant was required to deposit a map or plan of the land to be registered, and the Registrar to settle an exact description of the land. Now at this time there was no large-scale map covering the whole of the country; (…). Because of this, it was agreed to accept for registration purposes the best plan available and these were usually copies of tithe maps, inclosure award maps, estate plans and auction sale plans. Some of these were accurate, but many were later found to be little better than sketch plans, and gave rise to all kinds of difficulties, particularly where an estate was later sold off in plots, which would not have occurred had a national large-scale map been available. These assorted maps were not checked on the ground for the Registry; there was no money available for this; but surveyors from the Tithe Office did perambulate the boundaries with the applicant or his agent in order to ascertain the exact position of the boundary claimed in relation to the physical boundary. This could be, for example, three feet from the centre of a hedge, the face of a fence, or nine inches from the outer face of a wall. Notice was then served on every adjoining owner and occupier of the intention to register to the claimed boundaries. This meant that neighbours had to press their claims to the last inch or surrender them for ever; it could lead to endless correspondence, or even to litigation, and it was this

landowners, as Dicey remarked in 1905,[72] and private conveyances or contracts without any publicity were still the norm.

7.3.2 Access under the Land Registration Act, 1925.

Access to land information under the Land Registration Act 1925 can be viewed in two separate and very distinct phases. The first phase, 1925-1988, was a continuation and refinement of the procedure as established under the 1862 Act. Access was granted in a layered structure to people requesting access, based on the nature of their interest or the extent of their permission from the proprietor or Land Registrar. It was a system which can be characterised as 'no access, unless'. The second phase, which started with the entry into force of the LRA 1988, was the exact reverse. Here the default access was 'access, unless', with certain specific exceptions.[73] Both phases are discussed.

The access regime under the Land Registration Act, 1925 (LRA 1925), did not differ significantly from that of the 1862 Act. It comprised a general provision in the LRA 1925, supplemented by special rules for each of the indices and registries and two specific provisions for individual circumstances.

S. 112 LRA 1925, which provided the general rule, as originally enacted reads:

> Subject to the provisions of this Act as to furnishing information to Government departments and local authorities and to such regulations and exceptions and to the payment of such sums as may be made or fixed by general rules, any person registered as proprietor of any land or charge, and any person authorized by any such proprietor, or by an order of the court, or by general rule, but no other person, may inspect and make copies of and extracts from any register or document in the custody of the registrar relating to such land or charge.

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requirement for fixing exact boundaries which was the second reason for the failure of the 1862 Act.' See also on this point Simpson 1976, p. 117.

72 Dicey 1905, p. 221, '[t]o the student of legal history the development of the English land law from 1830 to 1900 presents this paradox: incessant modifications or reforms of the law, which extend over seventy years, and have certainly not yet come to an end, have left unchanged, in a sense almost untouched, the fundamentals of the law with regard to land.' Dicey 1905, p. 222: '[p]rivate conveyances of land, that is conveyances or parties thereto, acts of the party arising simply from the private are still not only possible, but usual. Every endeavour to introduce a system of land registration, under which the transfer of land shall be at once easy, certain, and notorious, has either broken down, or at any rate has hitherto not modified the habits of English landowners. Land is still sold or charged by private conveyances or contracts, which may be unknown to every one but the persons immediately concerned'.

73 See further section 7.3.4.

Special provisions which also relayed an inspection right could be found in ss. 59(3) and 61(10), for the person interested under a writ or order for enforcing a judgment against registered land or a registered charge and the official receiver or trustee, or creditor in bankruptcy respectively.[74]

A notable difference in the general provision on access, s. 112 LRA 1925, and the provision under the earlier LRA 1862 is the explicit mentioning of Government departments and local authorities in the former, for example, the Commissioners of Inland Revenue.[75] Access was granted when local authorities[76] or government departments were *by law* entitled to require certain information from the owners of property and this information is also contained in the land registry. In such an instance, these authorities may apply for the information in written form,[77] directly at the HMLR.[78] It did not extend inspection rights without permission of the registered proprietor when government departments wanted access for reasons not specified in law.

Moreover, while the wording of the article is very similar to the provision under the 1862 Act, the content of the Land Registry was extended with the 1925 Act, as well as its geographical reach, as it made more land subject to compulsory registration. More information containing the rights registered was also recorded. As such, more information was made available under the newer system.[79]

While the Act provided the framework for access, it was with the Land Registration Rules 1925 (LRR 1925) that the access regime took shape. As a starting point, similar to the 1862 established regime, any inspection was made in the presence of an officer of the

74 s. 59(3) LRA 1925 read: '[a] person interested under a writ or order for enforcing a judgment against registered land or a registered charge, may inspect and make copies of and extracts from the register and documents referred to therein which are in the custody of the registrar, so far as the same relate to the registered land or charge, and may, in accordance with this Act, lodge a caution against dealings therewith.' Note, a document which has been cancelled is no longer a document 'referred to in the register', see Ruoff e.a. 1986, p. 760. s. 61(10) LRA 1925: 'The official receiver or trustee in bankruptcy may inspect the register so far as it relates to any proprietor against whom a receiving order has been made, and any creditor, on behalf of himself and all other creditors, or the official receiver or trustee in bankruptcy, may lodge a caution against any such proprietor in respect of any minor interest affecting the registered land'.

75 s. 129 LRA 1925.

76 As described in the Local Government (Miscellaneous Provisions) Act 1976, s.4(1), as amended by the Local Government Act 1985, s. 102; Schedule 17.

77 Although there is no prescribed form for the application, this is assumed from the detailed account which has to be provided, not only of the stautory basis upon which the application rests and the 'the relevant Act empowering the authority to carry out the particular function (suitably described) which it desires to exercise and for which it is necessary to know all those who have an interest in the land'. Ruoff e.a. 1986, p. 754.

78 s. 129 LRA 1925. See also Ruoff e.a. 1986, p. 754.

79 However, as the number of legal estates was significantly limited with the 1925 land reform, the number of registerable estates was also limited.

Registry,[80] and every copy,[81] note or extract was again only delivered in pencil.[82] Official searches could now also be made by the relatively newly invented telephone,[83] next to the already existing method of an official search by way of telegram.[84] The permission to conduct an official search is derived from the inspection right.[85]

The inspection right was not a one size fits all right. The type of register denoted the conditions that had to be fulfilled before access could be granted.[86] As such, the access regime under the 1925 LRA has a layered structure, distinguishing different classes of third parties.[87] There is information which (1) is open to all; (2) available to all who have the tacit permission of the proprietor;[88] (3) available to anyone with the explicit permission of the proprietor;[89] (4) available to the person acting in a particular capacity; (5) open to anyone who can show that he is interested generally in the property of any proprietor; (6) open to the proprietor only; (7) open to anyone with a court order for inspection;[90] (8) open to the Director of Public Prosecutions or a chief office of the police in connection with a criminal offence; and (9) available at the discretion of the Registrar. Another categorisation could be made based on the solvability of the proprietor. There is a clear difference in situations in which the registered proprietor is solvent or no longer solvent and 'has been made a bankrupt' in terms of who is awarded access.[91]

80 r. 291 LRR 1925.

81 For office copies, see the specific r. 296 LRR 1925, which is a right also derived from the inspection right.

82 r. 291 LRR 1925. Office copies of entries in the register were made by the Registry, and issued to the person requesting it, or their sollicitor, see r. 296 LRR 1925.

83 Which had not been invented at the time of the earlier 1862 Act, although it still required confirmation in writing, see r. 293(3) LRR 1925.

84 rr. 292-294 LRR 1925.

85 r. 292(1) LRR 1925. Official searches served the purpose of a last check of all the entries in the register on the title of the transferor, after which the purchase was completed, as well as the purpose of ensuring that 'no adverse entry will be made on the register before the purchaser has an opportunity to compete the transfer by registration'. Ruoff e.a. 1986, p. 764.

86 For a full overview of the different types of registers and indices, see section 3.5.1.

87 Ruoff & Roper took the position that there was a general rule and there were certain exceptions. They listed the exceptions as follows:
1. 'Government departments and local authorities.
2. Persons authorised by the court.
3. Judgment creditors, the Official Receiver and trustees in bankruptcy.
4. The Director of Public Prosecutions and others in relation to criminal offences.
5. Persons interested only in the property register and filed plan.
6. Persons with sufficient interest where, following service of notice by the Chief Land Registrar, the registered proprietor has made no objection, or, where the proprietor is not available to give consent.
7. Morgagees, in respect of entries protecting rights of occupation of the matrimonial home.' Ruoff e.a. 1986, p. 753.

88 See also Ruoff & Roper who discuss this under the heading: 'Inspection after notice to proprietor'. Ruoff e.a. 1986, p. 757–759.

89 Or by his solicitor. If it is signed by the solicitor, Ruoff & Roper state that it would have required the full names of both the solicitor and the client(s). Ruoff e.a. 1986, p. 760.

90 Introduced in 1982 with the Administration of Justice Act 1982. s. 112(2)(b) LRA 1925.

91 See also Ruoff e.a. 1986, p. 755.

The different types or parts of the Register in place at the time were the Property Register; the Proprietorship Register and the Charges register.[92] Furthermore, there were the different Indices: (1) the Index Map and Parcels Index;[93] (2) Index of Proprietors' Names; (3) Minor Interests Index. Then fourth and finally, there is also a list of Pending Applications. Access to the information kept in the different registers and indices follows the aforementioned layered structure.

The most generous access is provided to anyone wanting to inspect the Index Map, the General Map and the Parcels Index. These were open to any and all people, at any time during office hours.[94] The same holds true for the Pending Applications, which were open to the general public during office hours.[95]

The Property Register as well as the filed plan of any title may be inspected 'by any person interested in the land or in any adjoining land or in a charge or incumbrance thereon'.[96] The interest claimed 'must be specified in writing and proof of it will be required, such as by a statement signed by a solicitor'.[97] For example a lessor is deemed an interested party, but also a person claiming a right to enforce a restrictive covenant.[98] Rule 288(2) LRR stated that 'Other entries in the register and documents referred to therein,[99] and the statutory declaration in support of a caution, may be inspected by any person interested, on giving three days' notice to the proprietor',[100] which in practice meant that they had to apply to the Chief Land Registrar, who gives notice to the proprietor.[101] The application will be construed narrowly and may be limited to specific entries on the registry.[102] The Chief Land Registrar will first consider the reasons for an application, and only after the Chief Land Registrar is 'satisfied that there are reasonable grounds for allowing [the application]' will he send it on to the registered proprietor.[103] Ruoff & Roper had some of the following examples where the Chief Land Registrar would send the application on to the proprietor: the lessor wanting to inspect his lessor's register; an application by a rentchargee to inspect the rentowner's register; an application by a person entitled to the benefit of a restrictive covenant to inspect the register of land to which the covenant relates, so as to take proceedings for breach of covenant.[104]

92 r. 2 LRR 1925.
93 r. 8 LRR 1925.
94 r. 12(1) LRR 1925.
95 r. 12 (1) LRR 1925.
96 r. 288(1) LRR 1925.
97 Ruoff e.a. 1986, p. 756.
98 Ruoff e.a. 1986, p. 756–757.
99 Note, a document which has been cancelled is no longer a document 'referred to in the register', see Ruoff e.a. 1986, p. 760.
100 r. 288(2) LRR 1925.
101 Ruoff e.a. 1986, p. 757.
102 Ruoff e.a. 1986, p. 757.
103 Ruoff e.a. 1986, p. 757.
104 Ruoff e.a. 1986, p. 758.

Examples were also provided for those instances in which the Chief Land Registrar would not even send the application to the registered proprietor and deny the application outright. The following were denied: an adjoining owner claiming a prescriptive right of way over the land registered; or a local authority seeking to serve a 'dangerous structure notice' or a notice to halt a nuisance;[105] a squatter who would like to find out the identity of the registered owner of the land; and potential purchasers or potential lessees in the hopes of negotiating with the registered proprietor.[106] The actual purchaser, upon sale or other disposition of registered land, will have a legal right to have copies or abstracts from the register relating to that particular purchased land.[107]

If the Registrar did not hear back within fifteen days with an objection from the registered proprietor, he may allow the register to be inspected.[108] An objection of the proprietor need not be based on any particular reason, the mere fact that he, she, or they object would suffice.

The Index of Proprietors' names was open to inspection by the registered proprietors. Any other person would only be granted access to the index if they could satisfy the Registrar that they were 'interested generally in the property of any proprietor', for example when they are the trustee in bankruptcy,[109] or their personal representative.

The Minor Interests Index, which held all priority cautions and inhibitions relating to dealings with minor interest and which did not affect the powers of disposition of the proprietor,[110] did not form part of the register, nor should any purchaser be concerned with that Index.[111] Inspection of the books and documents relating to this index were at the discretion of the Registrar.[112]

For two categories, the LRA 1925 provided a specific right of inspection, irrespective of permission by those registered. Under s. 59(3) LRA 1925, a person interested under a writ or order for enforcing a judgment against registered land or a registered charge is granted permission to inspect the register as well as documents referred to therein which are in the custody of the registrar.[113] Under s. 61(10) LRA 1925, the official receiver or

105 If this authority could base their application on a legal authority, then they would be granted access.

106 Ruoff e.a. 1986, p. 758. Compare with the German classifications of potential purchasers, see section 8.5.2.12.

107 s. 110(1) LRA 1925.

108 Seven days allowing the proprietor to be notified and another seven for any objection to arise, giving fourteen days in all, see Ruoff e.a. 1986, p. 757.

109 r. 12(2) LRR 1925. The trustee in bankruptcy also has inspection rights under s. 61(10) LRA 1925 when a receiving order has been made against the proprietor.

110 r. 11(1) LRR 1925. Note this Index was abolished with s. 5 Land Registration Act 1986, c. 26. The rules in relation to the Minor Index were revoked in 1997 with s. 3 Land Registration Rules 1997, S.I. 1997/3037.

111 r. 11(2) LRR 1925.

112 r. 290(1) LRR 1925. It was reported to the Law Commission that, in the timeframe 1959-1970, there were a total of 17 inspections carried out. The Law Commission 1971, p. 57.

113 A document which has been cancelled is no longer a document 'referred to in the register', see Ruoff e.a. 1986, p. 760.

trustee in bankruptcy has inspection rights in so far as it relates to any proprietor against whom a receiving order has been made.

7.3.3 Towards an open land registry

The layered structure was continued and extended all the way up to 1988 when the land registry access regime was reformed extensively. The 1988 reform however was foreshadowed by legislative efforts opening up the register for unregistered land[114] and a gradual extension of the access regime, in particular from the 1970s onwards.

7.3.3.1 1970 - A relaxation of the closed nature of the Land Registry

In 1970, the Law Commission published a working paper on land registration,[115] which, among other matters,[116] dealt explicitly with access to the registry. It started by considering that, based on their inquiries, there was 'no widespread demand for the register in its present form to be opened to public inspection.'[117] However, there was considerable support 'for some relaxation in the existing rules, particularly in relation to the non-disclosure of the names and addresses of registered proprietors'.[118] For example, local authorities and property developers, with a perfectly legitimate reason for wanting to contact the registered proprietor, were barred from accessing this information in the land registry. For them, it would be 'extremely helpful' to get access,[119] although the Commission was adamant not to provide any special right to inspect the register to public bodies merely on account of them being public bodies.[120]

Other reasons the 'privacy of the register' was considered disadvantageous at the time were: (1) the problems created in conveyancing in relation to leasehold titles, where the lessee is deemed to be affected with notice of all restrictive covenants on the register, although he was not allowed to inspect the register without the authority of the proprietor;[121] and (2) the assumption that it may lead to problems in the future in connection with 'the adoption of new mechanical and electronic devices'. For example, official

114 See sections 7.3.3.1 - 7.3.3.10.
115 The Law Commission 1970.
116 A large part was devoted to the registrability of leases and leaseholds in general.
117 There was even 'a substantial body of opinion' which considered that 'it would be wrong, as a matter of principle, to make any change in the existing law in this respect'. Whereas others thought 'it would be wrong to make any change so long as some titles are registered and others are not'. The Law Commission 1970, p. 41.
118 The Law Commission 1970, p. 41.
119 The Law Commission 1970, p. 41.
120 The Law Commission 1970, p. 53, 55.
121 The Law Commission 1970, p. 41–42.

searches at the time could not be conducted with the teleprinter.[122] It is unclear why this particular issue is one relating to the nature of the register, since it is private and not public, as opposed to merely an issue of technology-specific legislation.

Two arguments were put forward in favour of keeping the register 'private'. The first was an argument based on a system coherence, while the second was a more substantive argument. Firstly, at that time, the inspection system for unregistered land and registered land was alike and one of the arguments for keeping the system of registered land closed off was that the same was true for unregistered land.[123] Secondly, the disclosure of financial matters was deemed inappropriate. The Law Commission received many comments stating that 'a registered proprietor does not wish certain financial matters, such as prices, rents and details of mortgages, to be disclosed to all and sundry.' However, if 'it were possible to exclude these financial matters from public scrutiny, [the Commission] can see no real objection to making the remaining part of the register wholly open to public inspection.' That view was also largely shared by those that wrote to the Law Commission.[124]

The Law Commission made two proposals for reform. While it did not recommend to open up the register fully at that time, it wanted to solve 'some of the problems created by a wholly private register'.[125] Proposal A focussed on making the names and addresses of proprietors available,[126] whereas Proposal B wanted to make office copies of entries, excluding financial information available generally (*i.e.* open to everyone willing to pay the appropriate fee).[127]

The response to the proposals put forth by the Law Commission was 'small and indecisive', with 34 responses that included a fully open register, no reform whatsoever and everything in between.[128]

122 The Land Registration (Official Searches) Rules 1969 did allow for solicitors to carry out a search by way of telephone or teleprinter, however these were not official searches, which required the 'ordinary form together with a written authority of the registered proprietor or his solicitor to inspect the register'. The Law Commission 1970, p. 42.

123 The Law Commission 1970, p. 40–41, 44. This should be distinguished from *charges* in the unregistered land, which were subject to publicity and were open to official searches. See section 7.4.

124 The Law Commission 1970, p. 42.

125 The Law Commission 1970, p. 54.

126 The Law Commission 1970, p. 45–46.

127 The Law Commission 1970, p. 46–55, this included information regarding (a) pices and premiums paid; (b) the amount of any rents payable and receivable, (c) the amount of any rentcharges to which a property is subject, (d) the amount secured by any financial charge, and (e) prices or value specified in any notice on the register, e.g. contracts for the sale of a property.

128 The Law Commission 1985, p. 1.

7.3.3.2 1973 - Failed privatisation of the Land Registry and a new call for an open registry

In 1973 a Land Registry Bill was proposed and discussed in the House of Lords. This was one of the earlier attempts to privatise HM Land Registry. The discussions started off by Lord Gardiner calling the Bill 'silly',[129] and stated that the 'sole cause of this Bill is the unhappy disposition of budding Prime Ministers to make unwise electoral promises about the number of civil servants',[130] in this particular instance the reduction thereof.[131] That set the tone for the debate and the final result was that it failed. The Bill however is interesting here as it also raised questions about the nature of the register to be kept. There was a clause in the Bill that would make it clear 'that the privacy of the register which is to continue is not to be a screen behind which criminals can hide their identity or conceal the profits of crime.'[132]

Lord Gardiner, who incidentally was the Lord Chancellor before the one that introduced this bill, not only criticised the restructuring of HM Land Registry, but took this small opening of being given the first word after the Lord Chancellor's introduction of the Bill to hijack the conversation in the House of Lords and bring about a general discussion about the private nature of the register. He even proposed an Amendment to open up the entire HMLR. While the Bill failed on account of the privatisation efforts set out therein, there was significant support for the register to be made public.[133] The Lord Chancellor, while lamenting that this was not really the point of the Bill,[134] considered the question of publicity attached to freehold title 'a controversial one' and that, rather than by-pass the

129 HL Deb 20 November 1973 vol 346 c 914.

130 HL Deb 20 November 1973 vol 346 c 920.

131 Compare this with the reasons for the privatisation efforts in 2014 and 2016. See section 3.3.2.

132 In the words of the Lord Chancellor, HL Deb 20 November 1973 vol 346 c 912.

133 Lord Gardiner, HL Deb 20 November 1973 vol 346 c 920; Lord Wade, HL Deb 29 November 1973 vol 347 c 239 'I do not recall that anyone objected to the right of inspection, and my view is that the proposal of the noble and learned Lord is a sensible one.'; The Earl of Selkirk, who was the first to note that 'I know nothing whatever about English conveyancing, and I did not even know that there was not a public registry in England until I listened to the Second Reading debate the other day.' However, he continued, 'We have had one in Scotland for what is claimed to be about 300 years, though I should guess that it was certainly pretty elementary in the early stages. I have never heard any criticism of this particular system. I have never heard anybody say that there were grave disadvantages to it. We rather pride ourselves—rightly or wrongly, I know not —that this is rather a good system to work.' HL Deb 29 November 1973 vol 347 c 240.

134 'It is a little depressing, from the point of view of the would-be law reformer, when one puts forward what one believes to be a useful and constructive suggestion for the improvement of the law in one direction, that attempts are made to introduce much more controversial and less well considered reforms as a means of "tacking" to that particular Bill. As I attempted to show on Second Reading, the purpose of this Bill is to alter the structure of the land registry; it has basically nothing to do with the system of inspection, or otherwise, of the register. With the one qualification in Clause 4 of a slight easement for the detection of crime, it is not intended to affect the land registry one way or the other, except by transferring it to a public body rather than making it a part of the Lord Chancellor's Department.' HL Deb 29 November 1973 vol 347 cc 240-241.

Law Commission, as he deemed Lord Gardiner wanted him to do,[135] they should allow the Law Commission to 'get on with their work' and await those results.[136] The Amendment was withdrawn and the discussion was tabled for later.[137]

7.3.3.3 1976 - Searching the Index of Proprietors' Names and Price Paid

In 1976, the Land Registration Rules were amended to make it possible to search the Index of Proprietors' names, partially implementing the Law Commission's recommendations from six years earlier. Searching the Index was allowed for those who wanted to search in respect of their own name or in relation to 'some other person in whose property he is able to satisfy the Registrar that he is interested generally'; this was held to include the trustee in bankruptcy or his personal representative.[138]

While it therefore introduced a wider access regime for the Index of Proprietors' names, the same statutory instrument also narrowed the information kept at the registry.[139] Although it did not entirely follow the suggestions in Proposal B from the Law Commission Report mentioned above, certain changes to r. 246 were made. Prior to the LRR 1976, rule 246 LRR 1925 stated that the price paid for the property registered would be entered in the register and on the land certificate 'whenever practicable'. The LRR 1976 changed the latter wording to 'if the proprietor so requests'. This too, like the aforementioned opening up of the Index of Proprietors' names, was not as extensive as proposed by the Law Commission which had put forth the idea to revoke the entire rule, leaving the price paid out entirely, as it was not common practice to provide this information.[140] In

135 'I cannot help noticing that whenever he [Lord Gardiner, AB] has a hobby-horse of his own he asks me to by-pass the Law Commission, to override all his doctrines, many of which are sound, and to try to stampede the House into premature action.' HL Deb 29 November 1973 vol 347 c 242.

136 'I suggest that the Law Commission should be allowed to get on with their work. As I say, I am not opposing this as a principle; on the contrary, I think if a workmanlike way of considering this matter were put forward, and if it were a matter of widespread consent to introduce a workmanlike measure on those lines I am far from saying I would oppose it. I might be one of the first to support it. I would ask the noble Lord to think of this issue again. I will promise to think of it again in the meantime, and I will consult the Registrar on the subject further, although I did carry out my promise to do so before. At the moment, I do not think that this Amendment will do although it may be that something else will.' HL Deb 13 December 1973 vol 347 c 1281.

137 HL Deb 13 December 1973 vol 347 c 1282.

138 s. 2 The Land Registration Rules 1976, S.I. 1976/1332. Amending r. 9 LRR 1925 and introducing a new paragraph 2.

139 On this, the Law Commission had remarked in its 1970 Working Paper 'It remains to be considered whether, if Proposal A be adopted, Proposal B should also be adopted and vice versa.' The Law Commission 1970, p. 53.

140 The Law Commission 1970, p. 47. 'So far as prices and premiums are concerned, it is suggested that, for the future, these should not be shown in the register and that rule 247(1) which requires "the price paid or value declared" to be entered in the register, wherever practicable, should be revoked. We suggest, too, that prices or values need no longer be specified in any notice on the register. In relation to registered charges, although rule 247(2) provides that the original amount of every charge shall, where practicable, be entered on the register, the present practice is for this amount not to be entered. It is suggested, therefore, that this practice should be continued, and that rule 247(2) should be revoked'.

any event, the amendment was temporary and was reversed some twenty-three years later, in 1999, restoring the 'whenever practicable' requirement.[141]

7.3.3.4 1977 - Inspection rights in connection with criminal proceedings and proceeds

In 1977 an inspection right in connection with criminal proceedings was created,[142] allowing the Director of Public Prosecutions, a chief officer of police,[143] or an official receiver[144] to apply to the Registrar for permission to undertake an inspection in relation to a person or property specified in the application.[145] The application should also include 'an appropriate certificate', containing details about the criminal offence which has been or is reasonably suspected to have been committed and that the information in the register is relevant or could be relevant to the investigation of that offence or the institution of proceedings for it.[146] The appropriate certificate could alternatively include information about a person convicted of a criminal offence as specified in the document and the inspection is warranted because there is reason to believe that the register may contain information relevant to the institution of proceedings for 'distribution or otherwise for recovering the proceeds of the commission of that offence or any other offence taken into consideration by the court dealing with him for it'.[147] Ruoff and Roper consider this an inspection right 'in the public interest'.[148] The narrowly construed clause in the failed Land Registry Bill of 1973 therefore became law.[149] The Law Commission report regarding the inspection of the registry at that time was still years away from being finished. In the meantime, the legislative extension of access to the land registry continued.

7.3.3.5 1981 - An inspection right for mortgagees in relation to Matrimonial Homes

A new s. 112B LRA 1925 was introduced with the Matrimonial Homes and Property Act 1981.[150] This amendment allowed for an official search of the register and, as such, an

141 See for an early option of returning to the pre-1976 state: The Conveyancing Committee e.a./Farrand 1985 s. 2 The Land Registration (No. 3) Rules 1999, S.I. 1999/3462.

142 s. 25 Administration of Justice Act 1977. Echoing the failed Land Registry Bill of 1973, see section 7.3.3.2.

143 Where it concerns a chief officer of police, the powers regarding inspection may also be exercised on behalf of a chief officer of police by any police officer not below the rank of superintendent'. s. 112A(3) LRA 1925 as introduced with the Administration of Justice Act 1977.

144 Which means an official receiver appointed under s. 70 Bankruptcy Act 1914 or s. 233 Companies Act 1948, see s. 112A(4) LRA 1925 as introduced with the Administration of Justice Act 1977.

145 s. 112A(1) LRA 1925 as introduced with the Administration of Justice Act 1977.

146 s. 112A(2)(a) LRA 1925 as introduced with the Administration of Justice Act 1977.

147 s. 112A(2)(b) LRA 1925 as introduced with the Administration of Justice Act 1977.

148 Ruoff e.a. 1986, p. 756. Compare with the inspection right based on a public interest under the German system, see section 8.5.5.

149 See above section 7.3.3.2.

150 The Matrimonial Homes and Property Act 1981, c. 24.

inspection right for a proprietor of a registered charge on land which has a dwelling house on it[151] or a mortgagee by filling out a specific form.[152] This was introduced after it was recommended by the Law Commission,[153] as a safeguard for the mortgagee who has to bring an action to enforce a mortgage secured on a matrimonial home,[154] for the reason that the mortgagee is required to serve notice of the action on a spouse having rights of occupation which are protected at the relevant time by an entry on the register.[155] A mortgagee who does not have a registered legal charge and as such cannot derive an inspection right from that fact would otherwise not be allowed to inspect the register and, as such, a specific provision was required.[156]

7.3.3.6 1982 - An inspection right after obtaining a court order

The possibility of obtaining a court order to authorise an inspection of the registry was introduced with the Administration of Justice Act 1982. The authorisation was only provided by the High Court or county court if it appeared to these courts that the register or any such document may contain information which is relevant to proceedings pending in the court (…) or by the High Court only if 'it appears to the court, on an application made for that purpose, that such an order ought to be made for any other reason'.[157] By virtue of the same Act, s. 113A was introduced which provided that, whenever inspection right was granted, the duty to make it available meant that the 'thing' should be in 'visible and legible form'.[158]

7.3.3.7 1982 - Removal of legal barriers for a computerised Land Registry

Furthermore, in order to remove legal barriers to keeping the land registry in computerised form,[159] the law was adapted to include that the register,[160] as well as inspections thereof, no longer need to be in documentary form only.[161] Whenever there was a men-

151 Or when it is subject to a mortgage which is protected by a notice or caution in accordance with s. 106(3) LRA 1925.
152 Introduced with the Land Registration (Matrimonial Homes) Rules 1983, r. 6; Schedule Form 106.
153 In its Third Report on Family Property (1978), Law Com. No. 86, p. 248-249.
154 He would have an inspection right if he had a registered charge, but not if he was a mortgagee without such a registered charge.
155 Unless the spouse is a party to the action.
156 See more extensively Ruoff e.a. 1986, p. 759.
157 s. 112(2) LRA 1925 as amended by the Administration of Justice Act 1982, c. 53, Schedule 5.
158 s. 113A LRA 1925 as introduced by the Administration of Justice Act 1982, c. 53, s. 66.
159 The land registry by 1983 owned two IBM computers, one of which was used for the Land Charges Department, which was computerised as early as 1974, and a second for the mechanised Day List held at the Plymouth office end 1980.
160 s. 1(2) LRA 1925 as substituted by the Administration of Justice Act 1982, c. 53, s. 66(1).
161 The Conveyancing Committee e.a./Farrand 1985 The Law Commission 1985.

tion of copies and extracts, this included 'a reference to reproductions of things which are kept by the registrar under this Act otherwise than in documentary form'.[162]

By this time, the land registry was using computers for many years.[163] Already in 1974 it computerised part of the Land Charges Department,[164] and in 1980 it had started using a computerised Day List,[165] although the efforts somewhat stalled after that, to the extent that, when the Conveyancing Committee reported on 'Conveyancing Simplifications' in 1985, it spoke to consultants advising on the computerisation project as being 'relatively advanced when first implemented and "now in need of modernisation"'.[166]

In 1985, the Conveyancing Committee considered the progress in the area of computerisation of the register a 'high priority' which 'should not be delayed'.[167] In particular, in light of the Conveyancing Committee's interest in simplifying the conveyancing process, it strongly recommended '[t]he development of HM Land Registry's computerisation programme, and in particular facilities for on-line access, should proceed as rapidly as possible and the latter should be made available in stages.'[168] This included enabling 'access from any single point to all other registers and records throughout the country' by way of 'direct terminal links from computer to computer'.[169]

At the time, the Chief Land Registrar did not deem the closed system to be a hindrance to computerisation. The land registry's efforts in computerisation were at that time directed at serving internal processes, for example the daylist and keeping track of the storage of the register itself,[170] to the chagrin of the Conveyancing Committee which called this internal focus a 'lack of vision'.[171]

However, the Chief Land Registrar went on and considered that '[i]f, eventually, on-line facilities are provided, it is not envisaged that there would be any appreciable difficulty even if the present provisions regarding the privacy of the register were to continue.'[172] Irrespectively, the Conveyancing Committee came to a different conclusion

162 s. 113A LRA 1925 as introduced by the Administration of Justice Act 1982, c. 53, s. 66(2).

163 The Working paper no. 32 of the Law Commission already hinted at this in 1970. The Law Commission 1970, p. 42.

164 Which was described by the HMLR's computer consultants as 'basically a batch processing system, with limited on-line enquiry facilities'. The Conveyancing Committee e.a./Farrand 1985 See also for earlier more local attempts, such as in Lancaster, Cobley 1984.

165 The Conveyancing Committee e.a./Farrand 1985.

166 The Conveyancing Committee e.a./Farrand 1985.

167 The Conveyancing Committee e.a./Farrand 1985, 'urgently needed', p. 39.

168 The Conveyancing Committee e.a./Farrand 1985.

169 The Conveyancing Committee e.a./Farrand 1985.

170 And as such the 'question of the registered proprietor's authority does not affect these processes.' The Conveyancing Committee e.a./Farrand 1985.

171 The Conveyancing Committee e.a./Farrand 1985.

172 The Conveyancing Committee e.a./Farrand 1985, compare this with his comments to the Law Commission noted down in the report of that same year: 'An open register would be helpful in relation to computerisation, particularly when ultimately we move to the provision of on-line facilities. If the register were to remain closed, key numbers or other devices would have to be provided'.

based on the answer of the Chief Land Registrar[173] and stated that 'the development of a computerised register of title will to some extent be inhibited by the existing privacy rule; (…)'.[174] The latter view would be taken over by the Law Commission, as was evidenced by their report later that year.[175]

7.3.3.8 1985 - Opening up the register to simplify conveyancing

The Conveyancing Committee's second report[176] looked into the simplification of conveyancing practice and procedures. The recommendations of this Committee should be read in light of its mandate.[177] The report was published in 1985, a mere six months prior to the Law Commission's report on Inspection of the Register.[178] Next to the manner in which computerisation could simplify conveyancing,[179] the nature of the registry, being 'private' or 'secret', was also discussed in light of simplification. The Conveyancing Committee took a narrower view than the later published report by the Law Commission and focussed on the implications for conveyancers.[180]

The Conveyancing Committee spoke at length with people from HM Land Registry, including the aforementioned Chief Land Registrar. When asked whether he would see any disadvantages in having the register opened up, he had no real objections. He stated:

> It is thought that initially the registry might be somewhat embarrassed by numerous enquiries from busy-bodies and others having no true interest in obtaining this information, but thereafter, it is thought that the level of enquiries would settle down to proportions which would cause the Registry little difficulty; the additional resources required would be unlikely to be high. (…)[181]

He was less enthusiastic about the option put forth of opening up the registry in part. For example, (1) a register 'open', save for those entries on the charges register; or (2) the default being 'open', and only closed when the proprietor expressed that it should be private; or finally (3) a register 'open' to special categories, such as all practicing solicitors or licensed conveyancers lawfully undertaking conveyancing.[182] The discretionary element introduced in all those examples where the registry would be opened up in part

173 It specifically referred to the answer of the Chief Land Registrar.
174 The Conveyancing Committee e.a./Farrand 1985.
175 The Law Commission 1985, p. 16.
176 The Conveyancing Committee e.a./Farrand 1985.
177 As it stated itself on numerous occasions throughout the report as well; The Conveyancing Committee e.a./Farrand 1985.
178 The Law Commission 1985.
179 See section 7.3.3.7.
180 The Conveyancing Committee e.a./Farrand 1985.
181 The Conveyancing Committee e.a./Farrand 1985.
182 The Conveyancing Committee e.a./Farrand 1985.

was what the Chief Land Registrar was objecting to it,[183] not so much for principled reasons, but because it would result in an increase in manpower and 'administrative problems' for the Registry.

The simplifications that might result from opening up HM Land Registry were listed as follows. Opening up the registry (a) would obviate the extra formality of obtaining the written consent of the registered proprietor; (b) allow the transferor's title to be verified earlier in the process;[184] (c) would allow the leaseholder to find out about the restricted covenants or other incumbrances on the superior titles;[185] (d) would do away with any hindrance put in place on the development of a computerised register;[186] (e) and would allow a purchaser to inspect also the adjoining properties, not just for the names but also the filed plan, any possible restrictive covenants, and rights of way etc.[187] It therefore does not come as any surprise that, from the perspective of conveyancing, the Committee considered that 'there is significant scope here for simplification of conveyancing practice and procedure' by opening up the registry.[188] The Committee dismissed the idea of a partially 'open' system not necessarily because of the practical difficulties as highlighted by the Chief Land Registrar, but rather 'an "open" register which yet did not reveal the benefits and burdens of restrictive covenants, rights of way and other easements in relation to adjoining properties, could not notably simplify conveyancing'. The Committee here neglected to note that the third variety of the partially open registry, allowing conveyancing professionals access without authority, would be able to catch all of the aforementioned cases or the information could be gleaned by providing access rights in those specific instances.

7.3.3.9 1985 - The Law Commission Report on Inspection of the Register

The Law Commission Report that was published in 1985 was the final push that lead to the adoption of the Land Registry Act 1988, which would herald the new era of public access to the land registry.

After carefully describing the law as it stood, the Commission considered the layered structure of access. It drew up a distinction between those who have an access right automatically and those who may acquire such a right of inspection 'through the exercise of some authority or discretion'.[189] The automatic rights are those that flow from the statutory sections and rules, whereas the remainder are those by which the High Court

183 Also, '(iii) Again difficulty could be caused because the Registry would then be concerned to find out whether the applicant practitioner was entitled to proceed without special authority.' As cited in: The Conveyancing Committee e.a./Farrand 1985.

184 Before the specified s. 110(1) LRA 1925 time.

185 See for this issue also section 7.3.3.1.

186 See section 7.3.3.7.

187 The Conveyancing Committee e.a./Farrand 1985.

188 The Conveyancing Committee e.a./Farrand 1985.

189 The Law Commission 1985, p. 7.

or the Chief Land Registrar provide permission to access the information, or the proprietor does not object or provides explicit permission to access the registry.[190]

The remainder of the report was an enumeration of the arguments in favour and against opening up the register as expressed in the consultation round. These will be discussed next. However, it bears noting that none of these were, according to the Law Commission, 'sound reasons for retaining the secrecy rule' nor did they contain 'substantial disadvantages' that would flow from opening up the register.[191]

Firstly, changing the nature of the register would constitute a 'breach of faith', as all of the prior manners of registration had been based on the idea that the information was kept confidential.[192] This is in essence a legitimate expectation argument.[193] However, it was argued on the contrary that registration of title had always been undertaken 'not in reliance on any principle of confidentiality or secrecy rule, but partly because of its other advantages' and because it was compulsory.[194] Secondly, it was put forth that, where the State requires information to be furnished under obligation, such information should not be published unless there is a clear need to do so.[195] This argument is also in line with the Data Protection Principles, as described in the Data Protection Act 1984, Sch. 1.[196] and in particular relies on the second and third principles where it is stated that the purpose for which the personal data is collected and held should 'not be used or disclosed in any manner incompatible with that purpose'. However, the Data Protection Act 1984 was overlooked. The opposite was argued, that there 'appears to be no basis for a restriction on publication as asserted to be found in existing general law or policy', rather it is 'directly contradicted in relation to the other registries' in existence.[197]

The harm that could come to pass as a result of opening up the register was the third argument at the heart of the rejection of an open register. The information that would become publicly available was vast, from whether land was mortgaged to what rents were payable under any lease. Examples of 'annoying' results that could occur were the receiving of unsolicited commercial mail, and that the information gleaned from the register could be used 'for publication in a gossip column'.[198] Some suggestions went even further and stated that the harm could be constituted in the fact that the person wanting access might even be 'a terrorist anxious to ascertain details of who owns land in order to further his aim of murder or arson'. This potential harm to individuals 'is not outweighed by

190 The Law Commission 1985, p. 8–10.
191 The Law Commission 1985, p. 18.
192 The Law Commission 1985, p. 10.
193 Compare with the Law Commissions' report of 1970, see Chapter 8.
194 The Law Commission 1985, p. 11.
195 Compare with the Dutch, section 6.3.2 and the EU Data Protection Principles section 5.6.7, as well as the Data Protection Principles from the DPA 1984.
196 Flowing from Convention no. 108, section 5.5.3.
197 The Law Commission 1985, p. 11, 15.
198 Compare with the Dutch examples of publishing the seizing of property by the Official Receiver in national newspapers where it concerns 'famous persons'.

some theoretical public "right to know"' it was put forth.[199] These examples were all dismissed by the Commission. The Commission deemed commercial exploitation by advertisers 'a fact of modern life' and inspection by a gossip columnist, or even a terrorist, 'an unlikely way for them to obtain otherwise available information' and one 'which can in any case be avoided if wished by means of nominee registration'.[200]

However, an increase of nominee registration by virtue of the use of a trust was exactly the fourth argument put forth *against* opening up the register. It 'would defeat the purpose of an open register' if the opening up of the registry might have the effect of encouraging nominee registrations concealing beneficial ownership.[201] Some respondents considered this to be 'undesirable in as much as they might reduce the information available to those who at present have access to the register and who have a proper interest in ascertaining beneficial ownership'. The Law Commission disagreed and even encouraged the use of the trust.[202] The Commission recalled that it has 'always been fundamental' that the registry would only register legal estates and 'was not designed to reveal beneficial ownership'.[203] Furthermore, as the trust concept itself has become such a 'basic feature of the English legal system', the use of that instrument 'should not be lightly categorised as undesirable'.

Next to rebutting the examples put forth, the Commission also stated in more general terms that reliance on privacy would be misplaced as it should be 'remembered that there is no general right to privacy recognised by English law, and that no such right was recommended by the Younger Committee.'[204] Whatever may be said about the accuracy of that statement, it pales in comparison to the Law Commission completely ignoring the Data Protection Act 1984 (DPA 1984). Even though HM Land Registry, as a data user,[205] under the DPA 1984, would largely be exempted from the application of most of the DPA 1984,[206] in particular the rights of the data subjects and the registration requirement, it would not be exempted from s. 2(2) DPA 1984 which considered the application of the Data Protection Principles.[207]

A fifth reason put forth on why the land registry should remain closed was based on system coherence. As unregistered conveyancing is private, the mere fact that the title

199 The Law Commission 1985, p. 10–11.
200 The Law Commission 1985, p. 12.
201 The Law Commission 1985, p. 11.
202 'On the contrary, nominee or company registrations should be encouraged in this context as an equivalent device to ex-directory telephone numbers', also known as 'unlisted numbers'. The Law Commission 1985, p. 13.
203 The Law Commission 1985, p. 12.
204 The Law Commission 1985, p. 12. The Younger Committee wrote an influential report on privacy in 1972, Report of the Committee on Privacy, Cmnd. 5012, HMSO, 1972.
205 s. 1(5) DPA 1984.
206 s. 34 DPA 1984.
207 For the data protection principles, see section 5.6.7.1.

happens to be registered should not change the private nature of the conveyance.[208] The Commission countered this argument by stating that there had 'never been any accepted policy or principle requiring that unregistered title deeds be private'.[209] Indeed, the Middlesex and Yorkshire Deeds Registries were open to the public. Likewise, the Land Charges Registry (not to be confused with the registered equivalent, the Charges Register) had been searchable based on the name of proprietor from the start.[210]

The sixth objection was one of subsidiarity or proportionality, namely, to put on the agenda the option disregarded earlier by the Conveyancing Committee on allowing partial openness. This would 'give the public all that it has a legitimate interest in knowing'. For example, '[t]he amount of information of a personal nature which should be publicly available should be restricted to the absolute minimum and this could be done by not making the Register of Charges open. Alternatively, access should be dependent upon reasonable cause being shown'.[211] This suggestion was considered 'impractical', recalling the words of the Chief Land Registrar in the Conveyancing Committee report, as 'involving unacceptable administration and resource implications' for HMLR.[212] Furthermore, the suggestion was dismissed because:

> 'Personal' information is to be found in all three Parts of the register. Therefore to exclude this type of information would require too many 'expert man hours' to be considered feasible. Besides, any charge of a property necessarily affects the very ownership of the legal estate, and to exclude the Charges Register from public access would be to exclude not only references to mortgages but also vital information relating to leases, restrictive covenants, etc. In other words, any alteration of the present position short of a completely open register would appear to be more trouble than it is worth.

The option was therefore not entertained any further.[213] An option to implement a system similar to the German 'legitimate interest' test was not discussed either.[214]

208 The Law Commission 1985, p. 11.
209 The Law Commission 1985, p. 12.
210 The Law Commission 1985, p. 12. See further section 3.5.2.
211 The Law Commission 1985, p. 11.
212 The Law Commission 1985, p. 13, 17.
213 This was later lamented by Lord Coleraine in the discussions about the resulting Bill, 'Nevertheless, I am far from convinced by the reasons given by the Law Commission and I think it is a pity that they have to assume the immutability of government public expenditure policy and that they did not express any clear opinion as to whether partial opening might be desirable in principle.' HL Deb 25 November 1987 vol 490 c. 684.
214 Compare with the argument in para. 18(i) of the Report 'Virtually all other countries with land registers or Registers of Title (including, of obvious relevance, Scotland and Northern Ireland) have no similar restrictions on public access. This fact, although in itself is hardly conclusive, must at least raise some doubt as to whether there is any genuine need, unique to England and Wales, for a secrecy rule.' The Law Commission 1985, p. 15.

The seventh and final objection that was raised, concerned the specific case of the Matrimonial Homes. It was considered 'undesirable' if third parties could learn of a registration of rights under the Matrimonial Homes Act 1983 before the registered proprietor did.[215] While criticised by the courts,[216] it was still the practice of the Chief Land Registrar not to give the proprietor notice of the application for registration,[217] on account of wanting to avoid 'exacerbating what may already be a delicate matrimonial situation or doing anything that might provoke a bullying or fraudulent husband into obtaining cancellation of the entry'.[218] The Law Commission was not convinced, referring to the critique by the courts on this practice and the fact that the proprietor's spouse is currently already notified by third parties, namely potential purchasers or chargees,[219] which merely shifts the unease from the Chief Land Registrar to the purchaser or chargee.

What remained were the arguments in favour of an open registry. Justifications for a shift from closed to open were found in that England and Wales was 'unique' in comparison with 'virtually all other countries with land registers or Registers of Title' in maintaining a closed register.[220] Also, within England and Wales itself, the land registry, compared to other registries (electoral roll, common land, charities, probate, wills, births, deaths and marriages, restricted contracts, etc.), was the odd one out.[221] While that position in itself is 'hardly conclusive', the Commission continued that it 'must at least raise some doubts' as to any genuine need for the register to remain closed.[222]

Opening up the register would furthermore simplify conveyancing. For this, the Law Commission referred to the arguments enumerated by the Conveyancing Committee in the report earlier that year.[223]

The final two arguments turned on matters of a legitimate interest in having access to the information in the registers. There were matters of 'legitimate public interest' and of 'legitimate private interest'. Not only would opening up the registry contribute to the principle that 'in an open society there should be freedom of information and publication',[224] but it would serve the 'social responsibilities' attached to ownership. The ownership of land, as well as the use of land, carries with it 'social responsibilities' and, as such, is a matter of

215 The Law Commission 1985, p. 11.

216 Karminski LJ Watts and Another v Waller and Another [1973] Q.B. 153. Sachs LJ at 177-178. And per Megarry J: 'A practice which warns a mortgagee of the registration of a charge over which his mortgage takes priority, but leaves unwarned the landowner, who may proceed to act to his detriment in ignorance of his wife's application, is a practice which seems to me (and I speak temperately) to deserve further consideration.' Wroth and Another v Tyler [1974] Ch. 30.

217 The Law Commission 1985, p. 11, referencing: Ruoff & Roper 1979, p. 747.

218 Ruoff & Roper 1979, p. 747.

219 The Law Commission 1985, p. 13–14.

220 The Law Commission 1985, p. 15. See also The Law Commission 1970, p. 43.

221 The Law Commission 1985, p. 15.

222 The Law Commission 1985, p. 15.

223 The Conveyancing Committee e.a./Farrand 1985 see above. The Law Commission 1985, p. 16–17.

224 The Law Commission 1985, p. 18, referencing Lately J. in Re a Baby, The Times, 15 January 1985.

legitimate public interest.[225] It referenced the provisions on public access to information concerning Crown Land here, which of course do not contain information concerning natural persons, but legal persons, in particular government bodies.[226]

In connection with the legitimate public interest, information concerning land and the owner of land would serve to assist research, such as historical research, the study of estate planning and management, the promotion of desirable developments and halt those that are undesirable. It could furthermore assist in ensuring 'preservation of footpaths or ancient buildings'.[227] Moreover, it should be appreciated, according to the Commission, that the object of an open register is not only to enable the discovery of the name of a landowner but also serves a publicity function in that it opens up information about the extent, benefit and burdens on the land and title to the legal estate.[228]

Next to legitimate public interests, the Commission also highlighted legitimate private interests, such as tenants who wish to identify immediate and in particular superior landlords,[229] or the aforementioned developers and local authorities who wanted to get into contact with the registered proprietor but for want of a legal basis had to rely on permission,[230] but also neighbours who want to obtain access 'to abate nuisances or to repair property',[231] auditors or others tracing assets, and the very general category of everyone seeking to check creditworthiness or to avoid or investigate fraud. Also mentioned as having a legitimate private interest were those wanting to 'indulge in "outdoor activities"',[232] wanting access to ascertain whom to ask for permission so as not to trespass. This tied in with the response of the Chief Land Registrar who saw a benefit in opening up the register so as to avoid or resolve a dispute by bringing parties together.[233]

Based on all the foregoing, the Law Commission recommended that the register of title to freehold land and leasehold land should become public.[234]

225 The Law Commission 1985, p. 15.

226 ss. 95-96 Local Government, Planning and Land Act 1980.

227 The Law Commission 1985, p. 15.

228 The Law Commission 1985, p. 13. Just prior to the 1988 LRA, there was a change to the Land Registration Rules, with the LRR 1987, which altered rule 288, to specifically include under the heading 'a person interested', 'a tenant or a person interested in a charge or incumbrance to which the land is subject or a person interested as hereby defined in any adjoining land'. See r. 288(1) LRR 1925 as amended by The Land Registration Rules 1987, S.I. 1987/2214.

229 The Housing Act 1974 sections 121-122 only related to immediate landlords.

230 The Law Commission 1970, see above section 7.3.3.1.

231 Which did not fall under r. 288(1) 'any person in the land or in any adjoining land'.

232 Examples of mountaineering, canoeing, orienteering, wild life watching, and archaeology were mentioned.

233 As cited by the Law Commission in: The Law Commission 1985, p. 17. Compare with Germany's approach to conflict avoidance, section 8.5.2.7.

234 The Law Commission 1985, p. 19.

7.3.3.10 1987 - An inspection right for tenants

Shortly before the enactment of the Land Registration Act, 1988, some of the objections to a closed-off register were overcome. In particular, the position of the tenant was resolved with the Landlord and Tenant Act 1987. S. 112C LRA 1925 was introduced to include a right for the tenant for 'the purpose of enabling him to ascertain the name and address of his landlord', to inspect and make copies of, any part of any register kept by the registrar which contains the name and address of the proprietor(s) of the premises.[235]

The Land Registration Rules were amended to include, very specifically, a tenant as 'a person interested in relation to any land',[236] and as such they were entitled to inspect the Property Register and the filed plan of the title to that land.[237] The right to inspect, and make office copies,[238] of the Proprietorship Register of a title under s. 112C was also governed by the new rules. For others interested in the land, the registrar had to be 'satisfied that such inspection is reasonable and proper' and they could not be authorised by the registered proprietor themselves, either because the sole proprietor had died or for any other 'sufficient reason',[239] or there was tacit permission of the proprietor for such an inspection.[240] This was the final exception made to the closed off register, before the default access regime was changed.

7.3.4 Access under the Land Registration Act, 1988

The Law Commission's recommendation to open up the register was followed and, with the Land Registration Act 1988, access to the registry was made available to 'any person'. The Act entered into force on 3 December 1990 and changed the default access regime, except for some remaining exceptions, from 'closed, unless' to 'open, unless'.

ss. 112-112C LRA 1925 were substituted for the new s. 112,[241] and read from that point onwards:

1. Any person may, subject to such conditions as may be prescribed and on payment of any fee payable, inspect and make copies of and extracts from—
   a. entries on the register, and

235 s. 112C(1) LRA 1925 as inserted by s. 51(1) Landlord and Tenant Act 1987, c. 31. The registrar could refuse access in the event he has reason to believe that the proprietor of the land is not actually the landlord, s. 112C(3) LRA 1925 as inserted by s. 51(1) Landlord and Tenant Act 1987, c. 31.

236 r. 288(1) LRR 1925 as amended by Land Registration Rules 1987, S.I. 1987/2214.

237 r. 288(2) LRR 1925 as amended by Land Registration Rules 1987, S.I. 1987/2214.

238 r. 288(4) LRR 1925 as amended by Land Registration Rules 1987, S.I. 1987/2214.

239 r. 288(4)(a) LRR 1925 as amended by Land Registration Rules 1987, S.I. 1987/2214.

240 See on this matter further the explanation in section 7.3.2.

241 Also ss. 59(3) & 61(10) LRA 1925 were repealed, see on the content of these provisions section 7.3.2. Also, specific other provisions, which provided inspection rights in particular instances, were revoked.

b. documents referred to in the register which are in the custody of the registrar (other than leases or charges or copies of leases or charges).

2. Documents in the custody of the registrar relating to any land or charge but not falling within subsection (1)(b) of this section may be inspected, and copies of and extracts from them may be made—
   a. as of right, in such cases as may be prescribed, and
   b. at the discretion of the registrar, in any other case, but subject in all cases to such conditions as may be prescribed and on payment of any fee payable.
3. References in this section to documents include references to things kept otherwise than in documentary form.

The inspection right was granted to anyone and is provided independently from any permission afforded by the registered proprietor(s). The layered structure of the pre-1988 inspection right was significantly limited. It was not, however, undone entirely.

The indices, for example, were excluded from the inspection right, and the old regime continued for them. The Index Maps: the General map, the Parcels Index, and the list of pending applications were open to general public inspection.[242] The Index of Proprietors' Names, on the other hand, was only open to the registered proprietor or some other person in whose property the applicant is able to satisfy the Registrar that he is 'interested generally'.[243]

In *Quigly v. Chief Land Registrar*, Mr. Quigly sought access to the Index of Proprietors' Names not by relying on r. 9(2) LRR 1925, as he knew he would not stand a chance under that provision for want of such a general 'interest', rather he relied on the discretionary powers afforded to the Registrar under s. 112(2)(b) LRA 1925. The Registrar refused the search based on r. 9(2) LRR 1925, as well as under s. 112(2)(b) LRA 1925. While the Court considered whether he could appeal that decision, the Justices also stated that the refusal under s. 112(2)(b) LRA 1925 'appears to [Hoffmann L.J.] to have been an unassailable exercise of discretion and the refusal to make an index search is conceded by Mr. Quigly to have been in accordance with the proper construction of the rule.'[244]

The inspection right in relation to the register itself was not subjected to any restrictions (s. 121(1)(a) LRA 1925), however there were restrictions placed on the inspection of

242 r. 12 LRR 1925.

243 r. 9(2) LRR 1925 as inserted by s. 2(1) Land Registration Rules S.I.1976/1332. For example, a personal representative may search against the name of the deceased on the production of the relevant evidence, such as probate or letters of administration. See Practice guide 74: searches of the Index of Proprietors' Names. Also available to the Official Receiver or a trustee in bankruptcy may search against the name of the bankrupt. However, as stated in the Practice guide: 'Please note that a foreign bankruptcy order (including a Scottish order), even if recognised by the English courts, does not have the effect of vesting any of the bankrupt's property in England and Wales in the trustee in bankruptcy. The effect of this is that a foreign bankruptcy order does not entitle the trustee in bankruptcy to make a search in the [Index of Proprietors' Names]'.

244 Hoffmann L.J. in: Quigly v. Chief Land Registrar [1992] 1 W.L.R. 1435.

documents referred to in the registers. The Bill proposed by the Law Commission did not limit the access to 'documents referred to' in the register, but the final Act specifically excluded certain documents by stating that an inspection right existed in relation to documents referred to in the register '(other than leases or charges or copies of leases or charges).' This exception was added in the debate on the Bill in the House of Lords.[245] Supported by the Government, and HMLR, it was a codification of the practice as employed up until that point by the HMLR. It had not been the practice of HMLR to include under the old regime office copies of 'all the lengthy mortgages and leases' when an inspection right was granted with the permission of the proprietor.[246] This practice was to be continued under the new access regime.

Documents which were *not* referred to in the register, but nevertheless related to land or a charge would be made available at the discretion of the Registrar,[247] or where prescribed by law.[248] These again did not include leases or charges, or copies thereof. In the event the Chief Land Registrar exercises his discretionary powers to refuse access to documents, no appeal is possible in relation to that decision based on r. 298 LRR 1925, as they are 'purely administrative decisions' which do not fall under that rule.[249]

Thus, while the 1988 reform was significant, the Lord Chancellor, by stating that they were 'taking the plunge and making the register open to everybody', is only correct in the narrow sense of the word 'register',[250] meaning the Property Register; Charges Register; and Proprietorship Register. In a broader view of information in the 'registry' held by HM Land Registry, including the Index of Proprietors' Names, which allows a search by name, rather than property, as well as documents held in relation to leases or charges, and documents not referred to explicitly, the access regime was less flexible. Access to that information still required an assessment made by the Registrar on whether the interest in the information warranted such access. A fully 'open' register therefore did not exist (just yet).

In order to 'bring [England & Wales] into the age of the computer' the inspection right also extends to documents kept otherwise than in documentary form.[251]

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245 HL Deb 16 December 1987 vol 491 cc 802-805, c. 802.

246 'It is not the practice of the Land Registry when granting inspections with the authority of the proprietor to make available office copies of all the lengthy mortgages and leases. The amendment will enable the Land Registry to follow that practice when the registry becomes open.' Lord Templeman in the Committee as cited in HL Deb 16 December 1987 vol 491 cc 802-805, c. 802.

247 S. 112(2)(b) LRA 1925 as amended by LRA 1988.

248 S. 112(2)(a) LRA 1925 as amended by LRA 1988.

249 That is not to say that there is no judicial review available, just not based on this particular rule. Hoffmann L.J. in: 1 Quigly v. Chief Land Registrar [1992] 1 W.L.R. 1435. See also Balcombe L.J. at 1439.

250 HL Deb 16 December 1987 vol 491 cc 802-805, c. 804.

251 Lord Templeman in Committee, as cited in HL Deb 16 December 1987 vol 491 cc 802-805, c. 803. It is not entirely clear why this should be legislated separately and would not already fall under s. 113A(2) LRA 1925 which read, 'Any reference in this Act to copies of and extracts from the register and of and from documents filed in the registry includes a reference to reproductions of things which are kept by the registrar under this Act otherwise than in documentary form'.

7.3.5 Access under the Land Registration Act, 2002

In 2001, the Law Commission and HM Land Registry (Joint Working Group) published a very extensive report[252] on 'Land Registration for the Twenty-First Century. A Conveyancing Revolution'.[253] Together with the earlier 1998 report with the same name, but branded as a 'consultative report',[254] it led to the adoption of the Land Registration Act 2002, which ushered in the current regime on access to information in the land registry.

The reason for the extensive report was that the 1925 Land Registration Act was no longer suited to the task. By the end of the century, the consensus was that the legislation required an overhaul.[255] The first two of the Law Commission's reports on land registration were implemented with the LRA 1986 and LRA 1988 respectively,[256] but the more extensive and ambitious projects laid down in the third and fourth reports were left for the Joint Working Group to be taken up at their collaborative Joint Working Group which was established in 1994.[257]

7.3.5.1 Towards e-conveyancing

In 1998, the Law Commission, together with HM Land Registry, published a consultative document,[258] which was intended to pave the way for e-conveyancing. The timing of this report fits with the more general desire to modernise, as expressed by the UK Government in its 1999 White Paper on 'Modernising Government'.[259] For the land registry, the efforts of modernisation had already begun. By that time, the register had been computerised and direct access to the computerised system was possible. Therefore, when the report speaks of e-conveyeancing, it is not taken to mean any of those efforts, rather, with e-conveyancing the Joint Working Group considered a system of conveyancing in 'dematerialised form'.[260] The Joint Working Group described as the fundamental objective of the proposed bill:

252 Totalling well over 600 pages.

253 The Law Commission & HM Land Registry 2001.

254 As it represented in some respects a significant departure from the third and fourth reports by the Law Commission in the 1980s. The Law Commission 1987 The Law Commission 1988 Hill e.a. 2005, p. 1–2.

255 'The Registry has succeeded in constructing a smooth-running machine out of legislation of exceptionally low quality, which is in need of a thorough overhaul.' Megarry & Wade 1984, p. 196. 'The LRA 2002 represents a concerteed effort to deal with the deficiencies still remaining in the 1925 legislation and also seeks to move land law forward and create the necessary framework in which all registered conveyancing can be conducted electronically.' Bogusz *The Modern Law Review* 65/4, p. 557.

256 The 1986 LRA dealt with compulsory registration (of certain leases) and the abolition of the Minor Interests Index, whereas the 1988 LRA is discussed above extensively, section 7.3.4.

257 See also Hill e.a. 2005, p. 1–3.

258 The Law Commission & HM Land Registry 1998.

259 Prime Minister & Minister For The Cabinet Office 1999, p. 42, see also Bogusz *The Modern Law Review* 65/4, p. 556.

260 The Law Commission & HM Land Registry 2001, p. 1.

> The fundamental objective of the Bill is that, under the system of electronic dealing with land that it seeks to create, the register should be a complete and accurate reflection of the state of the title of the land at any given time, so that it is possible to investigate title to land on line, with the absolute minimum of additional enquiries and inspections.

The consultative document was followed up by another joint report published simultaneously with the Land Registration Bill in 2001, which would lead to the LRA 2002.[261] This second joint report provided a commentary on the proposed changes and reads as an explanatory memorandum to the LRA 2002. It considered two key features of the Bill to be the introduction of e-conveyancing as well as abandoning the notion that a squatter acquires title once he or she has been in adverse possession for 12 years.[262]

While e-conveyancing itself did not significantly change the access to information regime under the LRA 2002, it signalled the importance of online access to information and online means of providing documentation to the land registry.

One change under the LRA 2002 was the extension of the information held by HM Land Registry. The LRA 2002 provided for an extension of the registration requirement for leases granted for a shorter duration, changed from 22 years to compulsory registration for any lease granted for more than seven years.[263] As such, the pool of information held by HM Land Registry was extended. Furthermore, a possibility to access the *historical* information regarding a registered title (insofar as was held by HM Land Registry) was opened up, but only 'if there is a reason to see it'.[264]

7.3.5.2 The access regime under the LRA 2002

As mentioned above, the changes with the LRA 2002 were not specifically directed at bringing about changes to the access regime. Evidence of this can be seen in the wording of S. 66 LRA 2002.

S. 66 LRA 2002 reads as follows and has not been altered since its enactment:

1. Any person may inspect and make copies of, or of any part of—
   a. the register of title,
   b. any document kept by the registrar which is referred to in the register of title,
   c. any other document kept by the registrar which relates to an application to him, or
   d. the register of cautions against first registration.
2. The right under subsection (1) is subject to rules which may, in particular—

261 The Law Commission & HM Land Registry 2001.
262 The Law Commission & HM Land Registry 2001, p. 4–5.
263 S. 4(1)(c) LRA 2002.
264 The Law Commission & HM Land Registry 2001, p. 5.

a. provide for exceptions to the right, and
b. impose conditions on its exercise, including conditions requiring the payment of fees.

As we can see, the inspection right, as granted under the LRA 2002, did not differ significantly from the general inspection right as it existed under the LRA 1988. In line with previous alterations to the inspection right, the changes comprised of an extension of the right. Specifically, there were no longer limitations placed on access to documents referred to in the register of title regarding leases or charges. However, certain exceptions to accessing particular documents were made.

It is important to recall the alterations to the land registration rules made in 1999 which undid the legislative change introduced in 1976 regarding the recording of price paid.[265] Prior to 1976, under the land registration rules, the price paid for a property was recorded 'whenever practicable'. In 1976 this was altered to 'if the proprietor so requests', effectively ending the practice of entering the price paid in the registry.[266] In 1999, this was reversed and the price paid was recorded again 'whenever practicable'. As such, the inspection right itself was not only extended but also the pool of information to which it related was enlarged.

The Land Registration Rules 2003 (LRR 2003) laid down the rules for the inspection right, which was accorded to 'any person' in accordance with s. 66 LRA 2002. However, although there were no more categories of persons who were barred from having access to information in the land registry, save for the information in the Index of Proprietors' Names,[267] there were limitations placed on the *documents* which could be accessed. Both types of restrictions on the scope of the inspection right are discussed next.

7.3.5.3 Restrictions on Searching the Index of Proprietors' Names

One of the few remaining areas where the discretion of the Chief Land Registrar remains, compared to the old system,[268] is the area of allowing a search in the Index of Proprietors' Names. As described in rule 11 LRR 2003, a search based on the Index of Proprietors' Names is restricted to one's own name or the name 'of some other person in whose property he can satisfy the registrar that he is interested generally (for instance as a trustee in bankruptcy or a personal representative)'. It is no surprise that relatively few cases deal with this discretionary power held by the Chief Land Registrar.

265 See also section 7.3.3.3.
266 Although the proposal of the Law Commission to scrap the entire rule, meaning the postcode would never be included, was not taken over. See section 7.3.3.3.
267 See section 7.3.5.3.
268 Pre-1988.

7.3.5.4 Exclusion of certain documents and information from the inspection right

As mentioned, certain exceptions exist to the inspection right. These exceptions are enumerated in r. 133(2) LRR 2003 and are as follows:[269]

> There is excepted from the right—
> a. any exempt information document,
> b. any edited information document which has been replaced by another edited information document under rule 136(6),
> c. any Form EX1A,
> d. any Form CIT,[270]
> e. any Form to which Form CIT has been attached under rule 140(3) or (4), and
> f. any document or copy of any document prepared by the registrar in connection with an application in a Form to which Form CIT has been attached under rule 140(3) or (4).

The various exceptions will be discussed below.

Exempt information documents and related documents and forms

The first category of excepted information from the right to inspection is the 'exempt information documents'. A document will be designated as an 'exempt information document' if the registrar is satisfied that the application for such a designation 'is not groundless'[271] and it could not 'prejudice the keeping of the register'.[272] The application must furthermore contain reasons why the applicant seeks to designate the document as exempt. There are only a few acceptable reasons, which concern documents that contain prejudicial information. Two types of prejudicial information exist according to the LRR 2003.

The first type of prejudicial information is personal information which if disclosed to the public generally or specific persons would or would be likely to cause 'substantial unwarranted damage' or 'substantial unwarranted distress' either to that or another person. The language used is similar to the wording of s. 10(1) Data Protection Act 1998 (DPA 1998). This section allows an individual to require the data controller either not to begin processing or cease processing any personal data in respect of which he is the data subject on the same grounds, either that the processing 'is causing or is likely to cause substantial damage or substantial distress to him or to another, and that damage or dis-

269 They are the same for official copies, see r. 135(2) LRR 2003.
270 CIT stands for court proceedings, insolvency and tax liability.
271 r. 136(3) LRR 2003.
272 r. 136(4) LRR 2003.

tress is or would be unwarranted'.[273] However, it is important to note that s. 10(1) DPA 1998 itself is not applicable to the processing of personal data by HM Land Registry.[274] Considering this information as prejudicial is therefore solely based on the Land Registration Rules and not on the direct application of the Data Protection rules.

The second type of prejudicial information is information which if disclosed would, or would be likely to, prejudice the commercial interest of the person requesting the information to be exempted.[275] This exemption also mirrors language elsewhere in legislation, in particular flowing from the Freedom of Information Act (FOIA) 2000. Under the FOIA 2000, information held by public sector organisations is generally disclosed upon request, unless the information is exempted. One such reason for an exemption is if its disclosure under the FOIA 2000 would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).[276] The LRR 2003 takes this one step further and allows for the party themselves to shield the information from disclosure to the public by way of designating the document as being exempted.

Irrespective of the nature of the prejudicial information, the rules further stipulate that such information may only be designated as an exempt information document if it concerns a 'relevant document'. Relevant documents are those documents that are 'referred to in the register of title, or one that relates to an application to the registrar',[277] or a document 'that will be referred to in the register of title as a result of an application made at the same time as an application under' this rule that allows a document to be made exempt.[278] As such, the application to have a document exempted can be made at the same time as the application for the registration of the document occurs.

In practice, this means that the application to have a document exempted must include the forms requesting such an exemption,[279] a copy of the relevant document which excludes the prejudicial information and is certified as being a true copy of the relevant document from which the information has been excluded.[280] The form which holds the reasons as to why the applicant deems the information to be prejudicial is also explicitly excluded from the inspection right.[281]

If a document is exempted under the aforementioned rules, this does not mean that access to the information will be barred in all instances. When a person seeks an official copy of the exempt information document, the registrar must decide whether all the

273 s. 10(1)(a)-(b) DPA 1998.
274 s. 10(2)(a) jo. Schedule 2(3) DPA 1998.
275 r. 131 LRR 2003.
276 s. 43(2) FOIA 2000.
277 r. 136(7)(a) LRR 2003.
278 r. 136(7)(b) LRR 2003.
279 r. 136(2)(a) LRR 2003. Forms EX1 (the application to designate as exempted information document) and EX1A (as to the reasons why it should be exempted).
280 r. 136(2)(b) LRR 2003. To be attached to Form EX1.
281 r. 133(2)(c) LRR 2003.

information is (still) prejudicial information[282] and, if not, he must remove the designation of the document as exempt information[283] and provide an official copy of the exempt information to the person who requested it.[284] Moreover, even in the event the information is still considered prejudicial, the registrar must still weigh the public interest in providing an official copy of the exempt information document to the applicant against the *public* interest in not doing so. If the public interest to disclose outweighs the public interest in not doing so, he must provide an official copy of the document.[285] However, unlike the former example, here the designation as an exempt information document remains. In any event, the registrar is bound to inform the original applicant who requested the designation of the document as an exempt information document, unless such notice is unnecessary or impracticable.[286] It is also allowed to inspect and make copies of any of the exempted information documents or forms in relation to those qualifying applicants as mentioned in r. 140 LRR 2003. These are generally applicants who have dealings in the court proceedings, insolvency and tax liability of the registered. As such, the public interest in inspecting these exempted information documents supersedes the interest in keeping them exempt from the inspection right.[287]

Another group of documents which is excepted from the inspection right flowing from s. 66 LRA 2002 are those closely related to the exempt information documents and concern the edited information document which has been replaced by another edited information document under rule 136(6) LRR 2003.[288] This occurs when an application for a designation of an exempt information document is made for a document which is already designated as such. In such an instance, the registrar must prepare *another* edited information document which excludes '(a) the information excluded from the existing edited information document, and (b) any further information excluded from the edited information document lodged by the applicant.'[289] Access to this edited information document does not fall under s. 66 LRA 2002.

Inspection and official copies in connection with court proceedings, insolvency and tax liability (Form CIT)

The second category of exceptions to the inspection right deal with the documents concerning searches made in connection with court proceedings, insolvency and tax liabilities. Schedule 5 of the LRR 2003 keeps a list of those people and institutions which are

282 For example, information prejudicial in 2004 may very well be outdated and no longer prejudicial in 2018.
283 r. 137(5) LRR 2003. Such a removal may also be on the application of the person who applied for the designation themselves; r. 138 LRR 2003, unless another person also requested and was granted the designation, see r. 138(4) LRR 2003.
284 r. 137(4)(a) LRR 2003.
285 r. 137(4)(b) LRR 2003.
286 r. 137(3) LRR 2003.
287 See in similar vein Sparkes 2003, p. 120.
288 r. 133(2)(b) LRR 2003. The same holds true for official copies, r. 135(2)(b) LRR 2003.
289 r. 136(6) LRR 2003.

deemed a 'qualifying applicant'.[290] If they are qualified and can show the appropriate certificate referred to in the same Schedule 5 LRR 2003,[291] then they may inspect any exempted information document and may even search the Index of Proprietors' Names.[292] However, their application for information which is laid down in Form CIT itself and the attached documents to that form or the documents to which it is attached[293] are also not subject to the general inspection right as granted by s. 66 LRA 2002.[294] As such, they form the second category of excluded information from the inspection right.

Note, if any of the qualifying applicants seek access in a way other than by using Form CIT,[295] the information would necessarily fall under the general inspection right and anyone may request the information.[296]

7.3.6 2007 – closing off internet access for certain documents

On 5 November 2007, two days before a scheduled debate on the matter,[297] the land registry closed off online access for documents which were referred to on the register.[298] The information itself, which included mortgage deeds and leases, was not made unavailable, however, the manner in which the information could be accessed was restricted to post or personal visits to the land registry offices. The restrictions came after an investigation showed that the scanned documents, which included signatures from the proprietors, were used to commit fraud, which at the time was deceptively simple.[299]

Matthews explained the way in which the fraud was perpetrated as follows:[300]

> I would do a search on the—public—Land Register (it cost me £2) and obtain details of your registered property, I would download a form TR1 from the

290 If they can show a particular certificate as mentioned in Schedule 5 as well.

291 They include but are not limited to an administrator or liquidator appointed for the purposes of the Insolvency Act 1986; a Chief Officer of Police or a police officer authorised to apply on behalf of a Chief Officer; a person commissioned by the Commissioners of Customs and Excise; a constable; the Director of the Serious Fraud Office or a member authorised; the Secretary of State for the Department of trade and Industry; a trustee in bankruptcy.

292 In respect of the name of a person specified in the application. r. 140(2)(a)-(c) LRR 2003.

293 See also r. 140(4) LRR 2003.

294 r. 133(2)(d)-(f) LRR 2003. With the exception of any (other) qualifying applicant under r. 140(1) showing the appropriate certificate.

295 The rules do not specify that the Form CIT is required. The downside perhaps is that an application using form CIT will not be possible via the Land Registry Portal and would thus have to be carried out by post.

296 Unless they can make a case after the fact for making it an exempt information document which contains prejudicial information, see section 7.3.5.4. See also the Practice guide 43: applications in connection with court proceedings, insolvency and tax liability, online available at https://perma.cc/2XAF-W265.

297 House of Commons, debate 7 November 2007, Col. 241. 'it was the fact that this debate was taking place that caused the land registry to take action'.

298 Press Notice 25/07, HM Land Registry 2007.

299 It has since been resolved.

300 Matthews *Law Quarterly Review* 124/3, p. 351.

> Land Registry's website (free), type in your name and details of the property, and my name as transferee, and then forge your signature at the bottom. I would send in the form, and, within a few weeks, receive confirmation that I was now the registered proprietor. Under the Land Registration Act 2002 s.58, the mere fact of registration makes me legal owner, so- called "statutory magic". Having applied to a bank for a loan secured on the property, I granted a charge to the bank, which charge was then registered, the bank paid me the money, and I disappeared into the sunset, leaving no forwarding address.

The land registry acknowledged 'that removing online access makes the documents less readily available, but believes this to be a positive step which will help to alleviate any risk of misuse'.[301] Two days after, the matter was discussed in the House of Commons,[302] where the Minister of Justice reiterated the need for the land registry to strike a 'careful balance between, on the one hand, making information accessible and facilitating the conveyancing process and commerce and, on the other hand, ensuring that there are appropriate safeguards in place to prevent fraud.'[303] The Minister continued:

> It is important that the public have a legal right to inspect the register of any title, and any documents that are filed in the Land Registry in relation to any title. There are a number of reasons for that. The open register assists the buying and selling of houses and land and other transactions with land. It assists business and commerce. It enables anyone to find out who owns a piece of land, which can be invaluable in, for example, cases of nuisance or neighbour disputes. It can itself be a safeguard against fraud, because it is transparent: no one can represent themselves as owning a property that is registered to someone else. In many other countries in the European Union and beyond, land registers have been open for much longer than they have been in England and Wales. In fact, an open register is the norm in countries with a land registration system.

Matthews disagreed with the Minister. His point for point rebuttal is especially interesting to read, although he is incorrect in his first rebuttal stating that 'there was never any real problem in buying, mortgaging and selling houses before the register became public'.[304] As section 7.3.3 has shown, there were some problems with the access regime as it stood, which were resolved on an ad-hoc basis. However, Matthews is on point when he reiterates the problem that an open register does not resolve the issue of nuisance or

301 Press Notice 25/07, HM Land Registry 2007.
302 House of Commons, 7 Nov 2007: Cols 238-246. See for the example by Peter Lilley, MP, Col. 238.
303 House of Commons, 7 Nov 2007: Col 243.
304 Matthews *Law Quarterly Review* 124/3, p. 351–355.

neighbour disputes, as the proprietor can simply 'conceal their ownership of a piece of land' by using an offshore company or a trust, as many do.[305] This point is at the heart of his rebuttal against the notion that the Minister puts forth that 'no one can represent themselves as owning a property that is registered to someone else'. It would be simple for the fraudster to state the registered person is 'simply a nominee or a trustee for him or her, or is a company which he or she beneficially owns'.[306] His final rebuttal is in the comparison with the other countries in the European Union, which apparently have been open for much longer than they have been in England & Wales. Matthews takes particular issue with the fact that the Minister is ignoring the important role notaries play in those (generally) civil law systems in the identification of the parties attending.[307]

None of these issues put forth are resolved by closing off the online access to the land registry. Nevertheless, the Government in conjunction with HM Land Registry came to the conclusion that it would close off online access to the documents, as was done on 5 November 2007.

7.4 Access to Land Registration information in unregistered land

As the system of land registration in unregistered land will come to an end, at least that is the plan,[308] the discussion on how this system operates and provides for access is discussed briefly.

As has been elaborated on in section 3.5, England & Wales has two systems of land registration, with different sets of registers as well as information gathered therein. What separates the two systems is manifold, however, they are alike in their access regime, since they are both open. There is a notable difference between the systems in their timing. While it was not until the end of 1990, with the entry into force of the LRA 1988, that the registers for registered land were opened up; this had already come to pass decades earlier, as is evidenced by the Land Charges Act 1925 (LCA 1925) which read in S. 16:

> Any person may search in any register or index kept in pursuance of this Act on paying the prescribed fee.

This was maintained under the LCA 1972, where S. 9(1) LCA 1972 is exactly the same. S. 9(2) LCA 1972 allowed the registrar to 'provide facilities for enabling persons entitled to

305 This is also an issue in Scotland, which has led the Scottish Government to consult on setting up a register of controlling interests, in order to find out the identity of those who are controlling the land. https://perma.cc/RK5K-FENB.

306 Matthews *Law Quarterly Review* 124/3, p. 352.

307 Matthews *Law Quarterly Review* 124/3, p. 353.

308 See section 3.5.2.

search in any such register to see photographic or other images or copies of any portion of the register which they may wish to examine'.

It is important to note here the fact that the Land Charges register is a *debtor* register, the registrations therein are in the name of the estate owner whose estate is intended to be affected,[309] *not* against the land itself.[310]

The manner in which one can carry out a search is either in person, or by way of an official search,[311] the latter of which is more common.[312] Also, it provides more safeguards, as is clear from *Oak Co-operative B.S. v. Blackburn*,[313] where the effect of searching against the correct name would not yield the registered result, because the registration was under an incorrect name. In this case, it concerned a difference between Francis David Blackburn and Francis Davis Blackburn. Russel L.J. noted that a person who made an official search against the correct name would be protected, however, a person who would carry out the search in person, would not:[314]

> But we think that anyone who nowadays is foolish enough to search personally deserves what he gets: and if the aim of the statute is to arrive at a sensible working system that aim is better furthered by upholding a registration such as this than by protecting a personal searcher from his folly.

Thus, the access regime in relation to unregistered land, in the Land Charges has been public for much longer than that of the registered land. Moreover, it is a debtor register, rather than one by object.

7.5 Conclusion

This chapter started with describing that 1990 was a tipping point in the history of England & Wales' land registration, concerning the access regime. However, with hindsight, the opening up of the land registry seemed to be the final push after two decades of the relaxation of the rules on access. This slow and steady relaxation was required because the access regime, as set up in 1862,[315] which had not significantly changed since, made access to information in HM Land Registry dependant on the consent of the proprietor.

Requiring consent of a proprietor as the primary manner of providing access to information – as opposed to supplemental – is not necessarily evidence of a system de-

309 Form K15 or K16 is to be used, r. 16 LCR 1974. See r. 20 LCR 1974 on copies.
310 S. 3 LCA 1972.
311 S. 10 LCA 1972.
312 See on this matter in more detail Megarry & Wade/Harpum, Bridge & Dixon 2012, p. 304–305.
313 Oak Cooperative Building Society v Blackburn [1968] Ch. 730, p. 730–744.
314 Oak Cooperative Building Society v Blackburn [1968] Ch. 730, p. 743–744.
315 See section 7.3.1.

signed with publicity in mind. Nevertheless, as we have seen, the idea for a general land registry, which provided publicity to land registrations and held all the records of the land in a centralised system was exactly what the drafters had in mind. Making the consent of the proprietor paramount is therefore a rather odd choice, one which can be explained, at least in part, by looking at the desire to keep one's personal (financial) affairs private. This desire to keep financial matters private was also noticed in the discussions in 1970,[316] 1976,[317] and became of lesser importance from 1990 onwards.[318] Making the proprietor's consent a requirement for access to the land registry made sure that it was the proprietor who could decide the person or persons to whom they would disclose their financial status.[319]

However, wanting to provide notoriety to land transfers does not square well with this access regime and, from 1970 onwards, more and more exceptions to the consent rule came about. These exceptions can all be categorised as extending the scope of access to those that had a legitimate interest that the legislator wanted to protect,[320] either because they were Public Prosecutors who required access to investigate crimes and gather information in relation to criminal investigations,[321] or to provide access rights to those having obtained a court order,[322] as well as tenants legitimately seeking information on their landlord and their estate.[323] There were so many instances of the rules being relaxed that, by the time the register was opened up, one could wonder whether this opening up could still be based on practical issues with the semi-open system. It seemed that any practical problems of access denied to legitimately interested persons, or groups, as identified by the Law Commission reports, were resolved before the LRA 1988. The change in system is therefore not necessarily because of any remaining practical issues, but more fundamental.

This gradual extension of the access regime culminated in a fully open register with the LRA 1988. In the justification of opening up the registry, the hindrances a semi-open system placed on computerisation were also highlighted,[324] as well as the (heavy) administrative burden that the discretionary powers to validate the interest of the person(s) seeking access placed on the land registry. It was deemed that computerisation would only increase the administrative burden on the land registry and anything 'short of a completely open register would appear more trouble than its worth'.[325]

316 See section 7.3.3.1.
317 On the purchase price inclusion, see section 7.3.3.3.
318 See section 7.3.4.
319 Compare with the control theory discussed in section 4.3.
320 See on this especially the categorisation of the Law Commission into public and private legitimate interests that required access rights to the land registry, section 7.3.3.9.
321 See section 7.3.3.4.
322 See section 7.3.3.6.
323 See section 7.3.3.10.
324 See section 7.3.3.7. Compare also with the Netherlands section 6.2.2.1 and section 6.3.3.6.
325 See section 7.3.3.7.

With the LRA 2002 and LRR 2003, the register was opened up even more,[326] while at the same time placing limitations on access to certain documents. As such, the alterations to the access regime from 1862 to modern times can be seen as a development in which limitations have been placed on 'who' could get access to 'what' anyone could access. Any person was granted access to the information in the land registry, just not to *all* the information kept by the land registry. Restrictions on access to certain documents came about in order to protect the privacy of individuals registered in the land registry,[327] as well as restrictions based on access to documents which were designatated as exempt (from access) information documents on account of their likelihood to prejudice commercial interests, or because these would cause 'substantial unwarranted damage or distress'.[328] Having a document marked as an exempt information document does not shield that document entirely from being accessed. However, it requires an additional weighing of the public interest in having the information be known against the *public* interest of having it remain hidden. Individual privacy in this way becomes a public matter. A way in which shielding personal data can be achieved is by 'hiding' behind a trust. As only the trustee is registered, a nominee will not be recorded in the land registry.[329]

In 2005, the computerisation efforts reached a new high, with the opening up of online access to the land registry. Direct network connections already existed, however. Since 2005, the general public could get access to the land registry via the internet. At the end of 2007, online access to certain documents, including scanned documents, with signatures of the proprietor on them, were shielded from public access, because access to these documents was being used to perpetrate fraud in property transfers.[330]

The England & Wales' system of providing access to land registration information has been one that has seen all ends of the spectrum and just about everything in between. It started off as closed as possible, only to slowly but surely transition from closed to semi-open, to fully open and open with some restrictions.

326 See section 7.3.5.2.

327 See section 7.3.5.4.

328 See section 7.3.5.4.

329 It may however be recorded in the required Ultimate Beneficial Owners register (UBO-register), which has to be set up in accordance with the Fourth Anti-Money Laundering Directive, see Article 31 Directive.

330 See section 7.3.6.

8 A Legitimate Interest Test to Access: Germany

8.1 Introduction

Access to information held by the land registry in Germany is limited to those people that can show that they have a legitimate interest in the information. This access regime is still very much linked to the publicity principle and in particular the public faith principle as laid down in § 893 BGB.[1] How access is limited is the subject matter of this section. Currently the text of § 12 GBO reads that anyone who presents a legitimate interest may access the contents of the land registry.[2] While the text of the paragraph has not changed since its promulgation in 1897,[3] the scope of what constitutes a legitimate interest has.[4] In the drafting phase of the Land Registration Regulation (*Grundbuchordnung*, GBO), the legitimate interest test was only added at the very last minute, a mere two months before the promulgation of the GBO.

Firstly, this drafting process is discussed, after which the two distinct ways in which access to the land registry can be achieved are explained. After that we turn to a case law analysis, which elaborates on what constitutes a legitimate interest and what proof is required to show such a legitimate interest that warrants access to the information in the land registry. The position of the persons registered and how this relates to data protection legislation concludes this chapter.

8.2 Brief legislative background to §12 GBO

Initially, the first drafts of the GBO opted for access based on a *legal* interest (*rechtlichen Interesse*), which is necessarily narrower than a legitimate interest as was later settled on.[5]

The 1883 first preliminary draft by Johow (*erster Vorentwurf*) contained the following provision governing the inspection right (emphasis added):[6]

1 'Ohne Einsichtrecht kein öffentlicher Glaube und kein öffentlicher Glaube ohne Möglichkeit der Einsicht' Böttcher in Meikel, Grundbuchrecht, 8 § 12 GBO Rz. 1.

2 § 43 extends this also to the contents of the *Grundakten*, or underlying deeds.

3 Although it's place in the GBO has. It was initially § 11 GBO, but later changed to its current place as § 12 GBO.

4 Sometime so much so that people start to wonder if it has not been stretched too far, see an overview by Böhringer 2001.

5 See also on the history Melchers 1993, p. 309–310.

6 Jakobs & Schubert 1982, p. 102.

> § 16 GBO:
> Die Einsicht des Grundbuchblattes und der Grundakten, des Stockbuches und der Grundkarte darf den eingetragenen Berechtigten, deren Rechtsnachfolgern oder Vetretern nicht verweigert werden. Anderen Personen ist sie nur zu gestatten, wenn dieselben **ein rechtliches Interesse** daran dem Grundbuchamte glaubhaft machen. – Öffentliche Beamte können die Bücher, Akten und Karten einsehen, wenn der amtliche Zweck dem Grundbuchamte von der zuständigen Behörde angezeigt wird.

At the same time, there were discussions and drafts circulating of what would become the German Civil Code (BGB). In those earlier versions, § 22 in the draft of the General Section under '*Sachen*', specifically stipulated that the land registry be open. Only a law could limit the access to the books kept by the land registry.[7] However, this specific paragraph was deleted from the BGB drafts by the Committee in 1884, which considered the publicity principle to be regulated in the GBO as opposed to the BGB.[8] There was furthermore discomfort in placing the right to inspect the land registry in a provision in the Civil Code, as this would alter the nature of the right to access from public to private. The right to access was considered a public right (*öffentliches, der Buchbehörde gegenüber bestehendes Recht*), whereas placing it in the Civil Code would give it a private law character (*einen privatrechtlichen Charakter*).[9]

It was discussed that, depending on the way the right is granted, a further distinction in character could be made.[10] If the books were open to *all*, the right to access could perhaps be considered an absolute personality right (*ein Persönlichkeitsrecht*), a violation of which would constitute a tort. However, if the access right were not absolute, but restricted to only the owner or someone who had the owner's permission, this would also lead to undesirable results.[11] The right to access would then be linked to ownership of the land. The result of which would be, it was argued, that a legal claim was attached to the right to access and the owner(s) could be sued for not granting the permission to inspect the land registry entry. This would not be acceptable. The result is the more practical solution; allowing the law to indicate who should be given access to the land registry.[12] In that way, the right has a publicity legitimacy and is protected by the registry authority and the appellate court system, and it is not subject to private law litigation.

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7 'Das Grundbuch ist öffentlich. Die Einsicht des Buches kann nur nach Maßgabe des Gesetzes beschränkt werden'.

8 Jakobs/Jakobs & Schubert 1985, p. 363, Committee meeting 21.3.1884.

9 Jakobs/Jakobs & Schubert 1985, p. 363, Referencing Prot. I 3567.

10 The following is a paraphrasing of the discussing of the Committee and can be found in succinct form in Jakobs/Jakobs & Schubert 1985, p. 363–364.

11 Compare this with England & Wales, section 7.3.1 and 7.3.3.

12 'Dem praktischen Bedürfnisse sei völlig genügt, wenn das Gesetz die Behörde anweise, den Betheiligten die Einsicht des Buches zu gestatten.' Jakobs/Jakobs & Schubert 1985, p. 363.

In 1888 the Committee released another draft in which there was a slight alteration to the text of the inspection right.[13] The discussions on the nature of the right were let go and they were more practically oriented. The three-tiered approach, which differentiated between registered parties, public officials, and the rest, as seen above in § 16 GBO was replaced by a singular approach to providing access to those with a *legal* interest.

This 1888 draft read (emphasis added):[14]

> § 15 GBO:
> Das Grundbuchamt hat die Einsicht des Grundbuches, der im §. 14 bezeichneten Urkunden und der noch nicht erledigten Eintragungsanträge einem Jeden insoweit zu gestatten, als **ein rechtliches Interesse glaubhaft gemacht wird**. Soweit Einsicht zu gestatten ist, kann auch die Ertheilung einer Abschrift verlangt warden. Inwieweit einer Behöhrde oder einem Beamten Einsicht zu gestatten und Abschrift zu ertheilen ist, bestimmt sich nach den Landesgesetzen.

The drafters considered the inspection right in the draft to be a publicity right (*ein publizistisches Recht*). Based on the content of the German Civil Code, the drafters of the GBO recognised the need for a certain openness of the land registry. This did not entail unrestricted openness,[15] but it meant only a limited public register, based on showing a credible *legal* interest in the contents of the land registry.[16]

The most striking difference with the current § 12 GBO is the narrow meaning of opting for a *legal interest*, as opposed to a *legitimate interest*.

Already from these early drafts, it was clear that the interest in the information would necessarily also restrict the scope of the information provided. A right to access, when granted, would not mean a right to *unrestricted* access.[17] The scope of the interest determined the scope of information. But, in principle, the inspection right could extend to information kept in the underlying deeds, as well as applications that have been received,

13 Johow also released a second preliminary draft, also published in 1888. In this second preliminary draft there was an even smaller change noticable from his 1883 draft. In this second preliminary draft § 16 GBO read: 'Die Einsicht des Grundbuchblattess, der Grundakten und des Flurbuches darf den eingetragenen Berechtigten, deren Rechtsnachfolgern oder Vertretern nicht verweigert werden. Anderen Personen ist sie nur zu gestatten, wenn dieselbene in rechtliches Interesse daran dem Grundbuchamte glaubhaft machen. - Beambte können die Bücher und Akten einsehen, wenn der amtliche Zweck dem Grundbuchamte von der zuständigen Behörde angezeigt wird.' Jakobs & Schubert 1982, p. 131–132.

14 Not to be confused with the second preliminary draft of 1888 by Johow.

15 Compare with the Netherlands, Chapter 6 .

16 '(…) aber nu reiner beschränkten Oeffentlichkeit dahin, daß einem Jeden, welcher mit Rücksicht auf jenen Einfluß ein rechtliches Interesse an der Kenntniß des Grundbuchinhaltes glaubhaft machen kann, die Einsicht des Grundbuches gestattet sein muß.' Entwurf einer Grundbuchordnung und Entwurf eines Gesetzes betreffend die Zwangsvollstreckung in das unbewegliche Vermögen. Amtliche Ausgabe 1889, p. 44–45.

17 Entwurf einer Grundbuchordnung und Entwurf eines Gesetzes betreffend die Zwangsvollstreckung in das unbewegliche Vermögen. Amtliche Ausgabe 1889, p. 45.

but were not yet fully processed.[18] It would not extend to the cadastral maps,[19] even though they complement one another. The States are allowed to choose whether the cadastral maps are kept by the land registry or by another authority.[20]

In line with the earlier reasoning, because the inspection right is not a highly personal right,[21] it was considered doubtful whether a representative could have access to the information. For the second reading of the draft Alexander Achilles, a judge in the *Reichsgericht* at the time and property law expert,[22] wrote an extensive commentary.[23] He notes that a question for the second reading of the draft should be whether the circle of persons who would be granted access to the land registry should not be extended, in part to include these representatives.[24] In particular, he considered the need to specifically mention the right of the owner and others registered with an entitlement (think here of limited property right holders) to get access, which had been proposed in earlier meetings as well. He therefore proposed to alter § 15 GBO accordingly, specifically mentioning the owner and others with an entitlement.[25] In its current form, as we shall see below, the owner and limited property right holders are given a right to access separate from § 12 GBO, see § 43(2) GBV.[26]

At the second reading of the draft, in November 1895, the Committee was not convinced of the need for a semi-open register. Rather, it stated that the justification mentioned earlier for accepting only restricted access to the land registry based on the rarity of a contrary approach elsewhere in the BGB is unconvincing.[27] Apart from a law in Elzaß-Lotheringen,[28] it was stated that there is no reason to have a different approach to how open the land registry should be, when compared to the Commercial Register (*Handelsregister*), the cooperative (society) register (*Genossenschaftsregister*), or the Registry of Ships (*Schiffsregister*), which all kept an open registry, without limitations.

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18 The latter based on § 49 GBO, which provides for the order of application processing. Entwurf einer Grundbuchordnung und Entwurf eines Gesetzes betreffend die Zwangsvollstreckung in das unbewegliche Vermögen. Amtliche Ausgabe 1889, p. 45.

19 Compare with the preliminary draft by Johow, which also referred to the Flurbuch.

20 Entwurf einer Grundbuchordnung und Entwurf eines Gesetzes betreffend die Zwangsvollstreckung in das unbewegliche Vermögen. Amtliche Ausgabe 1889, p. 45–46 The link with the public faith principle, which is not applicable to the Cadaster, as was used as a justification later on see section 8.8.2, was not yet part of the discussions here.

21 As was rejected by the Committee meeting of the BGB on 21.3.1884, Jakobs/Jakobs & Schubert 1985, p. 363.

22 Schulte-Nölke 1995, p. 260.

23 Achilles in: Jakobs & Schubert 1982, p. 317-454.

24 Achilles in: Jakobs & Schubert 1982, p. 354, referencing Prot. of 1 Feburary 1893 p. 3463.

25 His proposed amendment would make § 15 GBO read as follows: 'Die Einsicht des Grundbuches, der im § 14 bezeichneten Urkunden und der noch nicht erledigten Eintragungsanträge darf in Ansehung eines Grundstücks *demjenigen, welchem ein Recht aus dem Grundstücke zusteht, während der gewöhnlichen Dienststunden nicht versagt werden*; einem Anderen ist (…)' emphasis added. Achilles was also a proponent of limiting access rights to working hours of the land registry.

26 Which is based on § 12 GBO.

27 'Diese Begründung erscheint nicht überzeugend.' Jakobs & Schubert 1982, p. 528.

28 Gesetz betreffend die Einrichtung von Grundbüchern from 1891. See Jakobs & Schubert 1982, p. 528, footnote 8.

Moreover, the *legal interest* requirement would be capable of damaging the interests of those that are not *yet* in a legal relationship with someone registered, but they are about to be.[29] For these people, there exists no *legal* interest just yet, and, hence, they will have to rely on the owner to provide them permission to access the registry entry. However, the Committee notes, this does not satisfy the needs of the person seeking access in many cases. It is not uncommon, that the owner infers from the request for access to his land registry information a (likely) unfavourable credit assessment and would then prefer to cancel the entire (planned) transaction.[30] It was not yet put forth that a legitimate interest test might resolve this issue. Rather, the Committee proposed a new § 15 GBO which read (emphasis added):[31]

> § 15 GBO:
> **Die Einsicht des Grundbuchs ist Jedem gestattet**. Von den Eintragungen kann eine Abschrift gefordert warden; die Abschrift ist auf Verlangen zu beglaubigen. – Das Gleiche gilt von Urkunden, auf die im Grundbuche zur Ergänzung einer Eintragung Bezug genommen ist, sowie von den noch nicht erledigten Eintragungsanträgen.

Here the starting point was a completely open register and the legal interest test was entirely abandoned. A possible limitation could be instated, the Committee suggested, by the individual States, for example so as to avoid abuse of the public nature of the registry.[32]

This was the version of the provision that was presented to the *Bundesrat*.[33] It was sent to the Justice Committee of the *Bundesrat* where a debate followed. There was no agreement among the different States on the topic. Prussia, Bavaria, Mecklenburg-Schwerin, Sachsen-Koburg-Gotha, Schwarzburg-Sonderhausen, and Lippe all requested to return to the *legal interest* test;[34] Sachsen, Baden, Hessen and Hansestädt were in favour of an open registry. The debate,[35] as reported on by Klügmann,[36] clearly showed the remaining political influence of the Prussian government.[37] While the Deputy Min-

29 Jakobs & Schubert 1982, p. 529, Meeting of 30 November 1895.
30 In particular builders are referred to, who, prior to entering into a contract, would require information about land ownership etc. Jakobs & Schubert 1982, p. 529.
31 See Jakobs & Schubert 1982, p. 522.
32 Jakobs & Schubert 1982, p. 529.
33 Jakobs & Schubert 1982, p. 578.
34 See Jakobs & Schubert 1982, p. 606–607.
35 Request to strike it from Baden in the Justice Committee meeting of 21.12.1896, Jakobs & Schubert 1982, p. 627, then back in by Bayern in the meeting on 8.1.1897, Jakobs & Schubert 1982, p. 628 also in by Hessischen Minister of Justice at Justice Committee meeting Jakobs & Schubert 1982, p. 630. See also the comments by Heller (Bayern) about the meeting Jakobs & Schubert 1982, p. 640–641.
36 Jakobs & Schubert 1982, p. 648.
37 'Nach dieser Erklärung, die kennen Zweifel darüber ließ, daß Preußen seinen Einfluß anwenden werde, um in Plenum seine Absicht durchzuführen, gab der Vertreter für Sachsen zu erkennen, daß eine Aenderung

ister of Justice had stated at the beginning of the discussions that the Federal Government agreed with an open register, as put forward in the draft presented to the *Bundesrat*, the Prussian government was strongly opposed to the idea. It stated that such a provision 'would give rise to great concern in rural districts'[38] and if the *legal interest* test was not part of the provision that this would 'endanger the realisation of the law'.[39] For political reasons therefore the Prussian government had to insist on the version that included the *legal interest* test,[40] which had not lead to any major issues with the other parties, although they were in favour of an open register.[41] Prussia's extensive political clout got the amendment accepted and the *legal interest* test was included, even though a majority was initially against the amendment.

On 22 January 1897, a mere two months prior to the promulgation of the GBO, the wording was changed from *legal interest* to *legitimate interest*. Kauffmann, one of the Committee members of the 16th Committee, suggested to change the wording from legal interest (*rechtliches*) to reasoned (*begründetes*) interest,[42] and later on to legitimate (*berechtigtes*) interest, which was accepted by all committee members and adopted without further discussion.[43] Consequently, the final version which has not been changed since its enactment reads as follows:

> § 11 GBO [44]
> Die Einsicht des Grundbuchs ist Jedem gestattet, der ein berechtigtes Interesse darlegt. Das Gleiche gilt von Urkunden, auf die im Grundbuche zur Ergänzung einer Eintragung Bezug genommen ist, sowie von den noch nicht erledigten Eintragungsanträgen.
> Soweit die Einsicht des Grundbuchs, der im Abs. 1. bezeichneten Urkunden und der noch nicht erledigten Eintragungsanträge gestattet ist, kann eine Abschrift gefordert werden; die Abschrift ist auf Verlangen zu beglaubigen.

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der ihm ertheilten Instruction vielleicht schon für die zweite Lesung zu erwarten sei.' Jakobs & Schubert 1982, p. 648.

38 Why is unknown. See also Schulte-Nölke 1995, p. 260 who states: 'Überraschenderweise stieß der Entwurf bei der preußischen Regierung auf erheblichen Widerstand, obwohl deren Interessen schon in der Kommission des Reichsjustizamts zu Gehör gekommen waren. Fast alle preußischen Ministerien machten Vorbehalte geltend'.

39 Jakobs & Schubert 1982, p. 648.

40 'Die preußische Regierung müsse daher aus politischen Gründen großen Werth auf die Beibehaltung der vorgelegten Fassung des § 11 legen (…)' Klügmann in: Jakobs & Schubert 1982, p. 648.

41 This was in part because a proposed § 91 GBO allowed for the States to enact rules in relation to their State that would broaden the scope of the inspection right.

42 Kaufmann in: Jakobs & Schubert 1982, p. 661.

43 Jakobs & Schubert 1982, p. 667.

44 Grundbuchordnung. Deutsches Reichsgesetzblatt Band 1897, Nr. 15, pp 139–157, p. 141.

Hence, anyone who presented a legitimate interest in the information in the land registry would have access to that information.

8.3 Three Manners of Access

There are three different ways in which the land registry information can be accessed. One can get access via the land registry itself, via the notary or by requesting access via the president of the district court who can provide access by way of an administrative ruling. As the latter is a very specific way of getting information from the land registry, it is only looked at briefly in this section.

The most prominent way in which the information in the land registry is opened up is by going directly to the land registry itself. The land registry officials will assess whether a legitimate interest is presented and if they are satisfied of the legitimate interest shown, they will provide access, extracts or copies accordingly. From 2013, it was also possible to request access to the *Grundbuch* via the notary, even in the event that such access was not directly related to the creation or authentication of a notarial deed. This restricted access to the land registry (*isolierte Grundbucheinsicht*) is limited to private interests. For example, a journalist seeking access based on a public interest will have to turn to the land registry itself,[45] as will the (scientific) researcher.[46] However, a creditor who can present his legitimate interest in having access to his debtor's registration at the *Grundbuch* will be able to go to a notary to get access.[47] The option to go to the land registry is not restricted in these instances, rather the notary constitutes a parallel option.[48]

Generally, however, access to information held by the land registry is accessed by addressing the land registry directly. A request for access is accompanied by a presentation of the legitimate interest. The requirements for the presentation of a legitimate interest entail not so much that one *proves* a legitimate interest,[49] but rather whether there is enough evidence to *convince* the land registrar that a legitimate interest is present.[50]

45 See more extensively on the public interest and journalists, section 8.5.5.1.

46 § 133a GBO.

47 Böhringer 2014.

48 At the time of the presentation of the draft legislation, it was explicitly stated that the legislator saw no possible concern in a deviation from the interpretation of a legitimate interest because the appeal procedure for the land registry and notary's decision to refuse access are different. See Deutscher bundestag beschlussempfehlung und bericht, entwurf eines gesetzes zur übertragung von aufgaben im bereich der freiwilligen gerichtsbarkeit auf notare', *Bundestagsdrucksache 17/13136* 2013, p. 20–21. It was not discussed whether the mere fact that there now *is* a parallel option would cause a difference in interpretation of a legitimate interest.

49 Which is different from a *Glaubhaftmachung*.

50 See more extensively section 8.6.

The way in which access is granted is in part up to the person seeking access. He may come to the offices in person[51] or request a copy or a certified copy. Such a copy may even entail a (manually) coloured-in copy of the deed.[52] The person who has been granted access may also take a photo of the land registry computer screen[53] or take notes of (not on) the information from the land registry when it is presented to him.[54]

He may not however request to have original documents sent to him or his office.[55] In certain cases, the originals can be sent to the nearest *Amtsgericht* to be inspected in person.[56] Moreover, the land registry does not have to answer a question of a creditor, whether the debtor has any land ownership in a particular district.[57] Furthermore, where it concerns certified copies, the GBV will dictate the manner in which the certification will take place.[58] Requesting access in a manner that deviates from what is described there will not be honoured.[59]

The second, and parallel, option is a relatively new one as alluded to above. In 2013, a new § 133a GBO was introduced,[60] which allows for access to land registry information, including the deeds,[61] via a notary without having to go directly to the land registry.[62] It was

51 If kept in electronic form, then he will show the computer-screen, see § 99 jo. 79(1) GBV, where technically possible, it should not extend beyond the legitimate interest presented. For example, the screen should not show Sections 2 and 3 if a legitimate interest is only present for Section 1, see § 79(1) GBV.

52 OLG Saarbrücken 02.11.2006, *MittBayNot* 2007, 495, Munzig was stunned (*verblüfft*) by this ruling and was very critical. The ruling stated that, if legal certainty allows for the keeping of records in colour, in this case a right of way in green indicated on the original, then it should also ensure its reproducibility, even if this means manually colouring-in a black and white copy of the deed, because the land registry itself does not have any copying machines with colour printing options. Munzig: 'Das Urteil des OLG Saarbrücken verblüfft, weil es eine Reihe von Rechtsfragen anreißt, die in der Praxis im Regelfall erst gar nicht gestellt, sondern ohne (ober)gerichtliche Zuhilfenahme pragmatisch beantwortet werden. Das Urteil erscheint umso bemerkenswerter, als es das Grundbuchamt, wie dies vor kurzem schon der BGH hinsichtlich der personellen Ausstattung getan hat, ohne Rücksicht auf eine (vermeintlich) mangelhafte Sachausstattung in die Pflicht nimmt'.

53 KG 30.11.2010, *FGPrax 2011, 108*.

54 OLG Schleswig 30.10.2009, *BeckRS 2010, 17290*. At no additional costs, because this forms past of the access right.

55 OLG Hamm 15.11.2012, *NJOZ 2013, 1282*, here a lawyer requested the documents to be sent to him. This was refused.

56 OLG Hamm 15.11.2012, *NJOZ 2013, 1282*.

57 LG Ravensburg 18.03.1987, Rpfleger 1987, 365.

58 See §§ 50, 51 GBV.

59 BayObLG 25.01.1982, *BayObLGZ 1982, 29*.

60 Gesetz zur Übertragung von Aufgaben im Bereich der freiwilligen Gerichtsbarkeit auf Notare vom 26.6.2013 (BGBl. I 1800). The law was foreshadowed by case-law OLG Celle 24.08.2010, *NJOZ 2011, 913*, see also Völzmann 2011. See further Fassung aufgrund des Gesetzes zur Abwicklung der staatlichen Notariate und zur Anpassung von Vorschriften zu Grundbucheinsichtsstellen vom 29.11.2016 (GBl. S. 605)

61 § 139(2) GBO, compare with § 99 jo. 79 GBV.

62 See for possible limitations placed on this right by the States, Deutscher bundestag beschlussempfehlung und bericht, entwurf eines gesetzes zur übertragung von aufgaben im bereich der freiwilligen gerichtsbarkeit auf notare', *Bundestagsdrucksache 17/13136* 2013, p. 20.

introduced to create a more service-oriented way for citizens to get the information from the land registry[63] and, in light of scarce human and financial resources at the land registry.[64] The option is only available if there is a land registry which is kept in electronic form and access is available via a direct network connection by the notary.[65] Here a notary will assess the legitimate interest and provide the information if he is satisfied that this person has a legitimate interest. The legitimate interest test therefore shifts from the courts to a notary,[66] the consequence of which is that a court will no longer balance – at times – competing interests which include the weighing of the fundamental right to privacy and informational self-determination as contained in Articles 1 and 2 of the Basic Law of Germany, but rather a civil law notary will carry out this balancing of a fundamental right.[67] The legislator however had faith in such a transfer of power from the judiciary to the public law notary,[68] whereas the government on the other hand had considerable concern about the legislative change.[69] The government saw no reason why a system which has proven itself in practice should be changed, especially where there are no pressing reasons to implement such a change that would alter the structure of the system of land registration.[70] Court oversight here is limited to an administrative ruling which can only assess whether the decision to not grant access was not arbitrarily taken by the notary; there is no full review of the decision.[71]

63 Noting that notaries are often closer by than the nearest land registry office, Gesetzentwurf des bundesrates entwurf eines gesetzes zur übertragung von aufgaben im bereich der freiwilligen gerichtsbarkeit auf notare, 21.04.2010, 17/1469, p. 1.

64 Andrea Astrid Voßhoff in: Deutscher bundestag, 234. sitzung, 18.04.2013, plenarprokoll 17/234, p. 29381; Gesetzentwurf des bundesrates entwurf eines gesetzes zur übertragung von aufgaben im bereich der freiwilligen gerichtsbarkeit auf notare, 21.04.2010, 17/1469, p. 1.

65 For paper-based land registries, § 133 concerning automated access does not apply, and in those districts, the only avaialble option is to go directly to the land registry itself.

66 See section 3.3.1 on the organisation of the land registry in Germany.

67 More on the fundamental rights aspect to § 12 GBO, section 8.4.

68 'Die Notare sind als Träger eines öffentlichen Amtes und Teil der vorsorgenden Rechtspflege für die Übernahme bestimmter Aufgaben, die bislang von den Gerichten wahrgenommen werden, besonders geeignet. Mit dem vorliegenden Gesetzentwurf sollen daher die Notare zur Effektivierung des Verfahrens und zur Entlastung der Justiz mit verschiedenen Aufgaben aus dem Bereich der frei- willigen Gerichtsbarkeit betraut werden.' Gesetzentwurf des bundesrates entwurf eines gesetzes zur übertragung von aufgaben im bereich der freiwilligen gerichtsbarkeit auf notare, 21.04.2010, 17/1469, p. 1.

69 Gesetzentwurf des bundesrates entwurf eines gesetzes zur übertragung von aufgaben im bereich der freiwilligen gerichtsbarkeit auf notare, 21.04.2010, 17/1469, p. 24.

70 Gesetzentwurf des bundesrates entwurf eines gesetzes zur übertragung von aufgaben im bereich der freiwilligen gerichtsbarkeit auf notare, 21.04.2010, 17/1469, p. 24: 'Durch die vorgeschlagene Regelung würde die Zuständig- keitsregelung des § 1 Absatz 1 Satz 1 GBO durchbrochen, wonach alle mit der Führung der Grundbücher zusammen- hängenden Aufgaben ausschließlich von den Grundbuchämtern wahrgenommen werden. Um eine unerwünschte Signalwirkung zu vermeiden, sollte ein derartiger Eingriff in die Systematik des Grundbuchrechts nur dann in Betracht gezogen werden, wenn hierfür ein dringendes Erfordernis besteht. Ein solches ist jedoch bisher nicht hinreichend dargelegt. Die bisherige Zuständigkeitsregelung hat sich in der Praxis bewährt'.

71 If there was a refusal to grant access then the person may still approach the land registry and see whether they can be granted access. See also Böhringer 2014, see contrary Deutscher bundestag beschlussempfehlung und bericht, entwurf eines gesetzes zur übertragung von aufgaben im bereich der freiwilligen gerichtsbarkeit auf notare', *Bundestagsdrucksache 17/13136* 2013, p. 20–21. This particular issue was also raised by the

However, where the fundamental rights that have to be weighed against the informational self-determination right of the registered are of a public nature, such as the right to press freedom, then the issue will still be squarely in the hands of the judiciary. This is because § 133a(2) GBO limits the access via the notary for those legitimate interests which are *private* legitimate interests.[72] If one has a public interest in the information, as a journalist has, or one requires access for scientific or research purposes,[73] a request will still have to be made at the land registry directly.[74] Therefore, the access route via the notary is also referred to as a 'restricted access to the land registry' (*Isolierte Grundbucheinsicht*).[75]

Access to the land registry system, when kept in electronic form, can also be established in a more permanent manner by way of a direct connection to the automated system of the land registry.[76] This option is available to those companies[77] which, according to their business structure in general require a variety of land registry access rights, or it is expected that they require urgent access, for example in the context of (law) enforcement proceedings. Notaries are the prime example of professionals requiring such direct access to the land registry.[78]

However, a notary may only make use of the automated access connection when he is acting in the course of his work as a notary. Only then will he fall within the presumption of § 43(2) GBV.[79] If he is acting on his own then he may not make use of the system, because there is no possibility to supply the reasons for a legitimate reason in the automated access system. Accordingly, he is also barred from procuring information for a colleague from the land registry in this manner, even if the colleague has a legitimate interest.[80] It is unclear whether this case law still holds up after the introduction of the

German government in response to the draft legislation, see Gesetzentwurf des bundesrates entwurf eines gesetzes zur übertragung von aufgaben im bereich der freiwilligen gerichtsbarkeit auf notare, 21.04.2010, 17/1469, p. 24.

72 For an overview of which interests will therefore be accepted by the notary, and for which a person will have to go to the land registry for, see section 8.3 below, or the overview as provided by Böhringer 2014, p. 24–39.

73 See also Böhringer 2014.

74 § 133a(2) GBO reads: 'Die Mitteilung des Grundbuchinhalts im öffentlichen Interesse oder zu wissenschaftlichen und Forschungszwecken ist nicht zulässig'.

75 See also Böhringer 2014. It is distinguished from those instances in which the notary would have access and give out information resulting from said access in the course of his involvement in a transfer, for example.

76 §§ 133 *et seq*.

77 But also land registries in other districts. See also Demharter 2014, § 133, Rn. 19. See § 133 (2) GBO. If it turns out that one of the requirements of § 133 (2) GBO has not been fulfilled, automated access is withdrawn, without prior warning. Prior warning only exists when there is an abuse of the automated access retrieval system, OLG Hamm 11.04.2017, *BeckRS 2017, 113580*.

78 It is not available to a manager of a WEG, who might need extensive access, but still will have to go through the motions of the legitimate interest test as supplied in § 12 GBO. OLG Hamm 15.01.2008, *BeckRS 2008, 11093*. Staatsbank Berlin is also allowed access, though not other public law credit instituitons, see section 8.5.3.2. Demharter 2014, § 133 GBO, Rn. 4.

79 OLG Celle 15.02.2013, *BeckRS 2013, 04924*.

80 OLG Celle 15.02.2013, *BeckRS 2013, 04924*.

2013 *isolierte Grundbucheinsicht* for notaries. In any event, abuse of the automated access will be grounds for denying access in an automated fashion.[81]

The third option of getting information from the land registry will be by requesting access via an administrative ruling from the President of the district court directly.[82] There is no legitimate interest test here similar to the two other options as discussed above. This is not a parallel option to these other access routes, but rather it is limited to very specific circumstances.[83] Examples of these types of access requests are when they are based on wanting access to serve a legal historical purpose or for ethnological studies. They furthermore include, as Eickmann notes,[84] access for 'artistic considerations' or for the purpose of fulfilling a public task. However, this option is not discussed further, as the main access occurs by going to the land registry directly or via the notary.[85]

8.4 Constitutional Questions

Germany is different from the Dutch and England and Welsh discussions on access to land registration information due to the influence that the Constitutional Court has had on the matter.[86] In particular, the German Constitutional Court (*Bundesverfassungsgericht*, BVerf) has ruled on the constitutionality of restricting access to the land registry by way of § 12 GBO. Furthermore, it has interpreted § 12 GBO in light of a weighing of the interests of informational self-determination as protected under Articles 1 and 2 of the Basic Law against the interest of the press and their right to press freedom as protected under Article 5 Basic Law.[87] This is discussed more extensively in section 8.5.5.1. The fundamental right to informational self-determination itself was developed by the German Constitutional Court in the *Census* case of 1983,[88] in which the Court considered that the right to informational self-determination was part of the general personality right as protected by Article 2 of the Ger-

81 OLG Hamm 01.02.2011, *FGPrax 2011, 151*. OLG Hamm 11.04.2017, *BeckRS* 2017, 113580. Compare with the Dutch approach to automated access, see section 6.3.3.5.

82 Kuntze & Eickmann 2006, p. 551.

83 See also OLG München 27.03.2017, *BeckRS* 105061.

84 Kuntze & Eickmann 2006, p. 551–552, see also Böhringer 1987b, p. 182.

85 Böhringer 1987b, p. 181–191.

86 This is of course also logical, in that neither the Netherlands nor England & Wales has a constitutional court. Moreover, there is no written constitution in England & Wales and in the Netherlands judges are barred from checking (national) laws for their constiutitonality, even if the right to privacy for example is enshrined in the constitution. The latter is somewhat mitigated as judges are allowed to, and must to some extent, check (national) provisions against international treaties, such as the ECHR, which includes a right to privacy as well, see section 5.5.2. Note that the German Basic Law was enacted in 1949.

87 Although such weighing does not occur every time one could expect it. For example, in LG Mosbach 01.09. 1989, *NJW-RR 1990, 212*, where Article 5 Basic Law was used in the explanation of the § 12 GBO test in assessing whether an owner would be informed three weeks after the access has been granted, of such provision of access to his *Grundbuchblatt*. There was no balancing against Arts. 1 and 2 of the Basic Law, as we do see in other cases, see section 8.8.2.

88 BverfG 15.12.1983, *NJW 1984, 419*.

man Basic Law.[89] To a lesser extent, there is also a weighing of the right to property as protected in Article 14 Basic Law and whether such a fundamental right restricts further access to information held by the land registry.[90]

In terms of the constitutionality of § 12 GBO itself, we can look at an example in a 1985 case, where the Higher Regional Court Düsseldorf was confronted with an applicant who was a registered owner in the land registry on *Grundbuchblatt* [X], and had a 1/11 share on *Grundbuchblatt* [Y]. By notarial deed, he requested to book the co-ownership of a plot of land on another sheet, so as to hide from the other co-owners the burdens on the land. When this re-booking of the registration was refused, he considered this a violation of his fundamental right to informational self-determination, as protected under Articles 1 and 2 of the German Basic Law. The applicant alleged a breach of his informational self-determination, not directly based on the type of registration (the booking) of his property, but from the resulting scope of publicity of an entry, co-ownership, from §§ 12 and 55 GBO.[91] The Higher Regional Court did not side with the applicant, and ruled that the informational self-determination's limited integration of the individual into the community, here co-ownership, is in part because of their participation in legal relationships with others that require a basis of trust, which in turn requires a disclosure of relevant information to a more or less large circle. Therein lies the justification, also considered in Articles 1 and 2 of the Basic Law, for the disclosure obligation and the establishment of a public register for certain areas. This limitation of informational self-determination is therefore a reasonable one.[92] The land registry can only ensure legal certainty in the area of land law when it makes the legal relationships clear and understandable. Therefore, it is not objectionable, if, pursuant to § 3 GBO, every plot of land in the land registry has its own place and changes are only allowed from that point in so far as it does not create any 'confusion' and it might be practical.[93]

Accordingly, § 12 GBO is in and of itself constitutional.[94] How the different fundamental rights weigh against one another is further discussed below in the individual cases and in section 8.8.2.

89 See further on the case itself and how it is still relevant today, Hornung & Schnabel *Computer Law and Security Review* 25/1, p. 84–88.

90 OLG Düsseldorf 03.07.1987, *DNotZ 1988, 169*, which is more extensively discussed in section 8.8.3 on the right to be forgotten.

91 § 55(1) GBO reads: 'Jede Eintragung soll dem den Antrag einreichenden Notar, dem Antragsteller und dem eingetragenen Eigentümer sowie allen aus dem Grundbuch ersichtlichen Personen bekanntgemacht werden, zu deren Gunsten die Eintragung erfolgt ist oder deren Recht durch sie betroffen wird, die Eintragung eines Eigentümers auch denen, für die eine Hypothek, Grundschuld, Rentenschuld, Reallast oder ein Recht an einem solchen Recht im Grundbuch eingetragen ist'.

92 BVerfG 15.06.1983, *NJW 1983, 2811*.

93 OLG Düsseldorf 31.05.1985, *NJW 1985, 2537*.

94 BVerfG 28.08.2000, *NJW 2001, 503* & BVerfG 15.06.1983, *NJW 1983, 2811*. VG Berlin 26.01.2017, *BeckRS* 2017, 108993.

8.5 What Interests are legitimate

The greater number of cases deal not with a weighing of constitutional rights, but rather determine the scope of a 'legitimate interest'. As is clear, the legitimate interest requirement of § 12 GBO is an open norm which has been interpreted by the judiciary over the years. The legislator has given some guidelines as to which interests are legally considered 'legitimate' by dismissing the need for certain parties to show their legitimate interest and presuming that there is one for these parties.[95] Nevertheless, the major contribution to the contours of what is considered a legitimate interest is provided by case law.

In general, the formula used in many cases is that a legitimate interest is not the same as the more limited formulation of a *legal* interest.[96] It is not required that the right to access can be found in the written law or flow directly from the law. It is a much more flexible norm that allows for the presentation of factual circumstances that warrant an access right.[97] The flexibility however should not be interpreted to mean it is a very extensive right.[98] It is not so extensive that it will cater to *any* interest, therefore the idly curious (*Blöße Neugier*) are excluded.[99] Nor may it be used for abusive purposes.[100]

The legitimate interest required for § 12 GBO is therefore somewhere between the 'legal interest' test present elsewhere in German law, for example in § 299 ZPO, and the completely public nature of the business registry and the registry for ships, etc.[101]

A case law overview, as provided below, shows that there is not a one-size-fits-all interpretation of what constitutes a legitimate interest; it all hinges on the facts of the case.[102] The results differ depending on various factors which include, but are not limited to:

1. The type of person requesting information and the capacity in which they do so (*e.g.* a notary requesting access for himself or in the course of carrying out his profession),[103]
2. The nature of the interest (*e.g.* public or private),

95 See in particular § 43 GBV and section 8.5.1.

96 Demharter 2014 Kuntze & Eickmann 2006, p. 552, see also just a few cases in which this was reiterated BayObLG 03.12.1998, *DNotZ 1999, 739*, OLG Rostock 07.09.1994, *DtZ 1995, 103*, OLG Düsseldorf 15.10.1986, *NJW 1987, 1651*, OLG Hamm 14.05.1988, *NJW 1988, 2482*, BVerfG 28.08.2000, *NJW 2001, 503*, LG Köln 07.10.1997, *NZM 1998, 879*, OLG Karlsruhe 29.05.2013, *RNotZ 2014, 70*, OLG Düsseldorf 06.10.2010, *FGPrax 2011, 57*, and OLG Hamm 01.02.2011, *FGPrax 2011, 151*.

97 See on the flexibility and relation to Arts 1 and 2 Basic Law also Böhringer 1987b, p. 182 Böhringer 2001, p. 331 stating that it the right to access has changed significantly over the past 100 years.

98 See especially the concerns of Eickmann as voiced under OLG Hamm 18.12.1985, *DNotZ 1986, 497*. See also Böhringer 1987b, p. 183.

99 Böhringer 1987b, p. 183.

100 LG Heilbronn 12.07.1982, *RPfleger 1982, 414*.

101 Böhringer 1987b, p. 183 Melchers 1993, p. 309.

102 For other overviews of the case law in a different manner and sometimes with differing cases, see especially: Böhringer 1989, p. 189–191, Böhringer 2014, Demharter 2014, Grziwotz *MDR* 67/8, Hügel 2014, Kuntze & Eickmann 2006, p. 553–556.

103 OLG Celle 15.02.2013, *BeckRS 2013, 04924*. See section 8.5.1.

3. The time at which the request for access was made (*e.g.* before or after entering into negotiations, prior or post death of a legator),[104] and
4. To what particular section of the land registry or the underlying deeds access is requested (*e.g.* someone might have a legitimate interest in the name of the owner but not in the purchase price information).

A legitimate interest is assessed independently from any involvement of the owner or other right holder registered in the land registry.[105] Therefore, compared to the English pre-1990 system, where obtaining the permission of the owner, or his proxy, was a requirement for accessing the land registry, this is very different under German law.[106] An option similar to the English pre-1990 system was explicitly discussed and disregarded during the drafting process, as it would mean that, in case of a conflict, the land owner would have a means to hinder the creditor seeking access, for example, and could even block him from having access.[107] Rather, the entire process takes place without even informing the owner of information being given out about their person and property.[108] Registered right holders are neither consulted nor informed of the granting of access to information about their rights registered in the land registry.[109] They do have, since 2014, an option of consulting the log of people that have been granted access to their land registry entries.[110]

The right of access to the land registry is therefore autonomous from the permission of the owner. This autonomy is also prevalent in other areas and can be deduced from the fact that, while there is a subsidiarity requirement for accessing information,[111] the possibility of an alternative place to get access to the information will not (negatively) influence the legitimate interest.

8.5.1 Presumption of a legitimate interest

For certain professions and authorities, there is a presumption of a legitimate interest in the information in the land registry. Where such a presumption exists, there is no need to *present* the legitimate interest to the land registry when requesting access. The mere fact that one belongs to one of these categories obviates the handing over of information

104 Closely related to the question of the type of person. See also Böhringer 1987b, p. 184.
105 Or from any other entity that might have access. See for example LG Tübingen 28.05.1984, *NZA 1985, 99*.
106 Although it still exists to some extent for the realtor, where subsidiarity dictates that the realtor must first seek access via a proxy of his client prior to having a legitimate interest of his own, see section 8.5.2.14.
107 LG Berlin 24.08.1981, *Zip 1982, 53*. See also section 8.2 on the discussions at the drafting stage of what is now § 12 GBO. See for the solution presented in such a case under England & Wales law pre-1988, section 7.3.2.
108 Although this has not gone without significant debate and jurisprudence, see the overview in section 8.8.
109 For more on this matter section 8.8.
110 See section 8.8.1.
111 See on this matter sections 8.5.2.14, 8.5.5.1, and 8.9.4.2.

sustaining the claim that you have a legitimate interest. This presumption exists for public officials,[112] owners of the land itself,[113] and notaries.[114] Moreover, it extends to lawyers who act on behalf of a notary in dealings with land[115] and publicly instituted land surveyors.[116] Furthermore, (limited) property right holders are presumed to have a legitimate interest in the information concerning the plot of land which is tied to (their) limited property right.[117]

However, where the legitimate interest is obviously lacking, because for example an enforcement authority (*Vollstreckungsbehörde*) requests access to a particular *Grundbuchblatt* of an owner who has not yet paid his or her waste disposal fees, and the land registry sees that the owner and the debtor are two different people, then access may still be refused due to the lack of a legitimate interest.[118] The same is true for the matter in which, after the fact, it becomes clear that a notary was accessing information in the land registry without having a legitimate interest. This may result in a disciplinary ruling issued against the notary.[119]

8.5.2 A legitimate interest: Private interest(s)

Most of the legitimate interest cases concern matters in which a (legal) person requests access but was denied in first instance by the land registry due to the lack of a legitimate interest. Many of these cases concern a purported *private* interest. The public interest cases are discussed afterwards.

The private interests are further categorised in the following manner: (1) the users of the property, either by virtue of ownership, apartment right, or limited property right are discussed. Also included are those that use the property itself but do not have a (limited) property right; the tenants and the neighbours; (2) then legal professionals are discussed, in particular the lawyers, notaries and lawyer-notaries and a professor who incidentally was also a lawyer; (3) next are the purchasers of a property, either actual or potential, as well as those that service them, the realtors; (4) discussion of a legitimate interest in credit-debt relationships follows, which includes creditors in general, creditors in specific situations, such as an insolvency, or specific types of creditors, such as banks, construction workers, and shareholders, (5) while the last category of private interests are com-

112 § 43(1) GBV. See also § 86a GBV for electricity companies, as well as OLG Brandenburg 17.02.2016, *RPfleger* 2016, 558.
113 Where they seek access to information relating to their own plot of land. Or when they have an equivalent right, see on these section 8.5.2.1.
114 § 43(1) GBV.
115 § 43(2) GBV.
116 § 43(2) GBV.
117 § 43 (2) GBV.
118 LG Bonn 07.12.1992, *BeckRS 2015, 09970*.
119 OLG Celle 15.02.2013, *BeckRS 2013, 04924*, see further section 8.5.2.9.

prised of all sorts of familial relationships. The actual or potential heir, children and their parents, siblings, and (estranged) partners.

8.5.2.1 The (co-)owner not including apartment ownership

A current[120] owner of a property registered in the land registry is always granted access to information relating to their plot of land; moreover he is presumed to have a legitimate interest in the information concerning his or her plot of land.[121] The same is therefore true for co-owners.[122]

8.5.2.2 Limited property right holder

A limited property right holder is entitled to access the land registry information of the particular plot of land in relation to which he or she has a limited property right based on § 43(2) GBV. However, this does not automatically apply to other similar plots of lands as well. For example, a building leaseholder[123] who thinks he may have had to pay an excessive price for the building lease and therefore requests the size, date, and price paid (information in the underlying deeds) of some 20+ plots of land, will have to show a concrete indication to substantiate the suspicion that he had been cheated decades ago when he acquired the building lease, or he will not be granted access to these deeds.[124]

8.5.2.3 Apartment owners

Apartment owners seeking access to information in the land registry about their fellow apartment owners may in certain cases have a legitimate interest. An interesting turn has taken place in 2015 when the old access regime, as established through case law, was set aside and a more restrictive approach was taken with regard to accepting a legitimate interest for apartment owners seeking access to the land registry information of their fellow apartment owners.[125]

Prior to 2015, case law allowed access to Section 1 *Grundbuchblatt* which contains the names of the owners, as it was deemed understandable and justified by the circumstances of being a fellow apartment owner.[126] Wanting to know who one is associated with in a community of owners[127] is an interest which was considered legitimate and could serve

120 Not necessarily a former OLG Düsseldorf 09.09.2015, *MDR* 2015, 1290.
121 § 43(2) GBV.
122 See also OLG München 11.01.2016, *ZWE* 2016, 133.
123 See on the building lease, section 3.7.1.3.
124 Similar to a right of *emphytheusis*. Furthermore, in this case it was also not clear what legal conclusions he could draw after learning the requested information. BayObLG 03.12.1998, *DNotZ 1999, 739*.
125 Compare with the tendency towards a too relaxed interpretation of the legitimate interest test as described by Böhringer 2001.
126 OLG Stuttgart 09.02.1995, *r + s 1996, 185*.
127 Or one specific co-owner to institute legal proceedings. OLG Stuttgart 09.02.1995, *r + s 1996, 185*.

as the basis for an access right.[128] As the members of such a community are in many ways linked to one another, for example by repair costs allocations and service costs, wanting more information would not constitute 'idle curiosity'.[129] Access was therefore always provided to Section 1 *Grundbuchblatt*. There were some rules that addressed access to Sections 2 and 3 of the *Grundbuchblatt*, because, even though the information about burdens on the land (as contained in Sections 2 and 3) affects the economic situation of the owners as a whole, it does not necessarily warrant the individual owners to have access to information contained in those sections without providing further reasons.[130]

An access right was also granted to a fellow apartment owner who wished to establish at what price the other condominiums were sold, as their own apartment was still stuck in the construction phase (*steckengebliebenen Baus*). Access was requested to the deeds of the other owners, to collect enough information to assess the extent to which he could claim financial help from the others for the residual completion.[131]

However, in 2015 there was a shift in the approach. The OLG Hamm did not follow the earlier opinion that, regardless of the independent right that the residential property manager has to request access,[132] an access right also exists for independent co-owners merely from being a co-owner of the property.[133] The OLG considered that the position of co-owner does not, in principle, say anything concrete about a need for information.[134] In so far as there is a relationship between them, which can be illustrated, it only warrants access to the Index and Section 1. Access to Sections 2 and 3, however, would disclose uses and liabilities of the other private property owners and concerns their financial status. Here, it concerned housing allowance arrears which are principally a matter for the manager to deal with. The manager will then have an independent right to access to the land registry, including in such a case Sections 2 and 3. A right for an individual co-owner to access would then require specific facts showing that they wanted to pursue monetary claims against one of their fellow apartment owners *and* that the aforementioned method of gaining the information (via the manager) would not be feasible or unreasonable, for example in the case the manager stubbornly refuses (*hartnäckig weigert*).[135]

128 KG 03.04.2014, *ZWE 2014, 310*.

129 OLG Düsseldorf 15.10.1986, *NJW 1987, 1651*. Compare with KG 03.04.2014, *ZWE 2014, 310*, where it was questioned where the access right was restricted to instances that concerned such repair costs allocation matters or issues about service costs.

130 See also OLG München 11.12.2015, *NJW-RR* 2016, 651.

131 OLG Hamburg 24.04.2008, *BeckRS 2008, 21630*.

132 See on this right 8.5.2.4.

133 OLG Hamm 17.06.2015, *ZWE 2015, 361*.

134 OLG Hamm 17.06.2015, *ZWE 2015, 361, 362*.

135 OLG Hamm 17.06.2015, *ZWE 2015, 361, 362*. This was not at all the case here. The opposite is true in fact. It follows from the facts that the manager (later) authorised the individual co-owner to access in the land registry on his behalf and that he was quite willing to cooperate.

8.5.2.4 Manager of an apartment building

A manager seeking access to the land registry in order to satisfy a claim on behalf of the community of owners would have a legitimate interest,[136] or if he seeks access to make sure that he is able to invite the currently registered in the land registry to the owners' meetings so as to avoid potential contestability of decisions made by the owners, this would also satisfy the legitimate interest test.[137] He however would not be eligible for a direct connection to the automated system of the land registry.[138]

8.5.2.5 Former residents

In the event former residents want to institute legal proceedings against a person with whom they are in a dispute, which deals *inter alia* with a question of whether the person in question has claims of ownership or possession that it can effectuate, then they have a legitimate interest in accessing the information of Section 1, containing ownership information.[139]

8.5.2.6 Tenant

It is questionable if, in the event a landlord increases rent based on rising capital costs, the tenant has a legitimate interest in accessing the information in the land registry.[140] A legitimate interest is present for those tenants who are threatened with eviction based on the fact that the landlord wants to use the property for himself, the so-called *Eigenbedarf*. Such an eviction is only available to the landlord who has no other property to live on, therefore the tenant seeking access to see whether the landlord has any alternative living places in his name and is pending a legal eviction process has a legitimate interest in accessing the Index and Section 1.[141]

Eickmann wrote an almost seething case note on a case in which a tenant was granted access because he demonstrated a desire for objective reasons, which precluded curiosity or the pursuance of unauthorised purposes. This case concerned a (potential)[142] tenant who requested access to the land registry to see whether there were expenses relating to

136 OLG Hamm 17.06.2015, *ZWE 2015, 361*.

137 OLG Hamm 15.01.2008, *BeckRS 2008, 11093*.

138 See for this section 8.3.

139 LG Köln 02.11.1994, *BeckRS 2015, 04111*.

140 Positively: AG München 11.02.1982, *FHZivR 28 Nr. 8171*. Questionable: BayObLG 09.12. 1992, *NJW 1993, 1142*. This does not extend to a legitimate interest in Section 3. The only thing that can be learned from Section 3 is the maximum amount of the securities. An increase or decrease in interest rates for the secured credit loan does not appear from the land registry, because the interest rate agreement for the loans always contains a fixed rate or a maximum rate of interest that is selected based on the experience of the credit institution so that after the conclusion of the agreement it covers the highest market interest. See BayObLG 09.12. 1992, *NJW 1993, 1142*.

141 LG Mannheim 22.01.1992, *NJW 1992, 2492*. Compare with LG Hamburg 01.12.1992, *BeckRS 1992, 08897*.

142 The court deemed it irrelevant whether the lease agreement had already been signed at the moment the request for access was made.

(cosmetic) repairs, the acquisition of fitted and built-in furniture, as well as carpeting and the like.[143] Eickmann stated that the particular facts of the case might very well justify a legitimate interest in that case,[144] however, the reasoning was alarming to him. He took particular issue with the inclusive interpretation of what constitutes a legitimate interest (anything other than idle curiosity) as was evident in other case law as well.[145] He was worried that such an interpretation would allow the land registry to become a public register, something which was not intended by the legislator.[146] Eickmann took a very narrow approach to the legitimate interest test, very closely tied to the publicity principle in property law, and therefore he was generally not in favour of accepting access when it was based on personal legal relationships with the landowners, not the land itself. Nevertheless, in certain circumstances such (personal) interest becomes so concrete that it can nonetheless justify access. However, the particular facts of the case must substantiate such a claim, not a generality as professed in this case.

8.5.2.7 Neighbour

A neighbour does not have a legitimate interest arising out of the mere fact that he or she is a neighbour.[147] However, if a neighbour can show other facts and circumstances, then a legitimate interest may arise.[148] For instance, when they want to get in contact with their neighbours to avoid a conflict that may arise out of excessive building on their property, that will cause noise and disruption to their neighbours, then a legitimate interest in finding out the names of the neighbours, from accessing Section 1 *Grundbuchblatt*, may be present.[149] Access is also allowed to the information of those that have acquired a future interest in the land, such as those that bought property still in development, when the development itself causes a wall of the neighbour to collapse or possibly collapse.[150] Access to Section 2 might for example be granted when the adjacent neighbour wants to find out the legal and factual situation of a small pathway that is used by neighbours and others for transit. In the event that it is unclear who the owner is, and what the

143 OLG Hamm 18.12.1985, *DNotZ 1986, 497*. See also on the difference between potential and actual tenant in relation to legitimate interest, OLG Düsseldorf 17.06.2016, *BeckRS* 2016, 14513, see criticism on the remainder of the ruling note by Ulrich in FGPrax 2016, 251.

144 OLG Hamm 18.12.1985, *DNotZ 1986, 497*, 500.

145 See for example OLG Stuttgart 17.01.1983, *Justiz 1983, 80*, and LG Heilbronn *Rpfleger 1982, 414*.

146 OLG Hamm 18.12.1985, *DNotZ 1986, 497, 499*.

147 OLG Köln 19.11.2009, *RNotZ 2010, 203*. Not even if he is both a neighbour and a potential buyer, he is then merely considered a potential buyer and will have to show he has entered into negotiations, see also section 8.5.2.12 and OLG Naumburg 14.09.2015, *NZM* 2016, 287.

148 If it concerns a suspicion that there was something wrong about an earlier transaction involving the neighbouring land, then the suspicions will have to be substantiated. See also Böhringer 1987b, p. 186.

149 OLG Karlsruhe 29.05.2013, *RNotZ 2014, 70*. Even if this is not a direct neighbour, but one in the vicinity. Access is limited to Section 1. Wanting access to the names of earlier owners or anything in Section 3 is not part of the legitimate interest.

150 OLG München 08.06.2016, *BeckRS* 2016, 10884.

use, maintenance and safety rules are in relation to the pathway, the neighbour should have a legitimate interest in finding out whether there is a real burden (*Reallast*) in Section 2.[151]

8.5.2.8 Lawyer

If a lawyer acts as a representative, the lawyer's legitimate interest is not assessed, but rather that of the person(s) he is representing.[152] For example a lawyer who works on behalf of a Works Council of a company and is seeking access to assist the Works Council with their task to discharge the company and their entitlements flowing from the Works Constitution Act (*Betriebsverfassungsgezetz*), this would satisfy the legitimate interest test as it needed this information to explain the balance sheet of the company, which includes burdens on the plots of land.[153] A lawyer who acts on behalf of a notary in a conveyancing matter or other matter related to land, will be discharged of the obligation to show his legitimate interest, and he will be presumed to have such a legitimate interest.[154]

If a lawyer of a compulsory enforcement creditor (*Zwangsvollstreckungsgläubiger*) wants access, because he suspects that the debtor has transferred the property in a questionable way, he will have to provide facts that speak to the accuracy of the suspicion. The mere utterance of a suspicion is insufficient.[155]

A lawyer who wants access for a claim of his own, for example on the grounds of the enforcement of his legal fee claim against a (former) client, would have to show his legitimate interest.[156] If the lawyer is also a professor, this would not change the requirement of providing a legitimate interest.[157]

8.5.2.9 Notary

As mentioned earlier, a notary is presumed to have a legitimate interest when he accesses the land registry.[158] Nonetheless, the OLG Celle noted that this presumption is men-

151 The Court here did not want to see whether the reasons put forth would suffice and referred the case back to the land registry. It would be highly unlikely that in such an instance a legitimate interest would not be accepted.

152 LG Köln 02.11.1994, *BeckRS 2015, 04111*.

153 This conclusion is not changed by the fact that there is another entity that has the same rights, such as the *Wirtschaftausschuß* flowing from § 106 BetrVG. LG Tübingen 28.05.1984, *NZA 1985, 99*.

154 § 43(2) GBV.

155 OLG Hamm 02.01.1978, *AnwBl. 78, 101*. See on evidence required in general terms section 8.6. Compare with a suspicion by a journalist, section 8.5.5.1.

156 OLG Celle 03.04.2013, *NJW-RR 2013, 1104*, in this case there was no legitimate interest as the former client was not registered on the plot of land to which he sought access, hence access was denied.

157 VG Potsdam 04.05.2012, *LKV 2013, 284*, see also 8.5.2.11.

158 § 43(1) GBV. From a case from 1967 it was ruled that the notary may be refused access if there are reasonable doubts as to the legitimate interest of the notary. BayObLG 20.09.1967, *BayObLGZ 1967, 347*. It is questionable whether this ruling is still of any use, considering the direct connection of the notary to the land registry contents.

tioned in the same provision as the presumption available to public officials in § 43(1) GBV. From this it follows that the inspection of the land registry, without providing a legitimate interest, is only permitted when the inspection is based on public law duties. For the notary, this means that the inspection must always be in relation to the notarial activity, because only then is it carried out in the public law function of the notary.[159] This presumption has made it easier to have direct access, without delay to the information in the land registry by way of a direct (network) connection.[160] However, he will be *presumed* to have a legitimate interest.[161] In the event the notary lacks such an interest and this is discovered later on, he will be subject to disciplinary proceedings.[162] For example, where a notary accesses the automated land registry on six occasions upon request by a realtor, without making sure that the realtor has a legitimate interest, then, due to the lack of a legitimate interest, he should not have accessed the land registry.[163] In another case involving accessing the land registry on behalf of the realtor (here two of them), without checking whether these realtors had a legitimate interest, the notary would be offering something akin to a 'realtor service' (*Grundbuchservice auf Zuruf*) in the hopes of being given the instruction to draft the transfer deed later on. This is behaviour unbecoming of a notary.[164]

A notary is also entitled to access the land registry on behalf of the owner, in that case there is no need to show a legitimate interest.[165]

8.5.2.10 The lawyer-notary (Anwaltsnotar)

When a person qualifies as both a notary and as a lawyer, he is called an *Anwaltsnotar* or a lawyer-notary. With regard to accessing the land registry, it must be established from

159 OLG Celle 15.02.2013, *BeckRS 2013, 04924*.

160 More on this see section 8.3.

161 It does not provide him with a licence for unrestricted access, see OLG Hamm 13.06.2016, *MittBayNot* 2016, 508.

162 OLG Celle 15.02.2013, *BeckRS 2013, 04924*. For example, from OLG Celle 15.07.2011, *MittBayNot 2012*, 65: 'A notary has to faithfully administer his office as his oath requires (§ 14(1) BNotO). In accordance with § 14(3) BNotO he has to avoid any behaviour that appears to breach his obligations imposed on him by law. Here the notary failed. The notary gave the impression that he does not take the legal requirements seriously, by obtaining information from the automatic land registry service without further verification of the existence of a legitimate interest' (translation by the author).

163 Here the notary could not rule out that the realtor had already had contact with potential purchasers and wanted access on their behalf before they had entered into negotiations with the seller, see section 8.5.2.12 on why this is not allowed. Likewise, it was conceivable that the realtor was only interested in access so as to better prepare the purchase price agreement negotiations for any potential purchasers. Therefore, the situation is not comparable with the situation in which the owner of the land, directly or through a third party, requests access to the land registry via the notary. OLG Celle 03.03.2011, *RNotZ 2011, 367*. See for revocation of automated access and a notary also OLG Hamm 13.06.2016, *MittBayNot* 2016, 508, with critical note by Johannes Hecht.

164 OLG Celle 15.07.2011, *MittBayNot 2012, 65*.

165 LG Berlin 28.01.1997, *FHZivR 43 Nr. 9367*. An owner has a right to access the land registry information concerning his own plot of land.

the outset whether the lawyer-notary is acting in his capacity as a lawyer or as a notary.[166] The distinction is important, because when he is acting as a notary, he is presumed to have a legitimate interest. If he is acting as a lawyer, on the other hand, the legitimate interest is only a given when the circumstances so dictate, or when he is tasked by a notary to inspect the land registry.[167] If he is acting for someone else, as was the case in a disciplinary ruling from 2010, where an *Anwaltsnotar* had convinced himself that the tax consultant who wanted access was commissioned by the owner of the property to obtain a land register extract, then he was not acting contrary to his duties as a notary. The Senate, however, in this case explicitly left open the question whether the powers of the notary to gain full access to the land registry arose from the fact that the owner of the land gave permission or whether other circumstances were present that warranted an independent legitimate interest by the tax consultant in this case.[168]

8.5.2.11 Professor

A professor who wanted to explore how a particular law works in practice does not have a legitimate interest.[169] Incidentally, this professor was also a lawyer. Based on either profession, he was not granted (automatic) access.

8.5.2.12 Potential purchaser

There is no legitimate interest present when there is a potential purchaser who has not yet entered into negotiations with the seller,[170] not even to learn the names of the owners in the land registry.[171]

8.5.2.13 (potential) Auction purchaser

A person who wants access to the land registry to check whether there is a pre-emption right registered in Section 2,[172] prior to placing a bid on the property in an auction does not have a legitimate interest. Similar to a potential purchaser, the potential purchaser at an auction does not have legitimate interest.[173] They are distinguished from potential purchasers in that they do not have a moment of entering into purchase negotiations

166 OLG Celle 24.08.2010, *NJOZ* 2011, 913. See also the note by Völzmann; Völzmann 2011.

167 § 43(2) GBV. Which could be himself, which would make it a very shizofrenic situation, and it is more likely he will act as a notary in that instance.

168 OLG Celle 24.08.2010, *NJOZ* 2011, 913.

169 He wanted comprehensive information on forest conversion permits and about the compensatory measures since 2007 via the *Umweltinfomationgesetz des Landes Brandenburg*. VG Potsdam 04.05.2012, *LKV 2013, 284*.

170 BayObLG 14.03.1991, *BeckRS 1991, 06052*, OLG Naumburg 14.09.2015, *NZM* 2016, 287 see also the note by Eickmann under OLG Hamm 18.12.1985, *DNotZ 1986, 497*.

171 BayObLG 15.03.1984, *Rpfleger 1984, 351*.

172 Also, to check whether there were any possible waivers of claims for mining damages.

173 OLG Düsseldorf 01.06.2012, *BeckRS 2012, 12834*.

during the bidding process, which is available to the potential purchaser who acquires a legitimate interest at that time. However, the legislator provided for a specific provision in the law § 42 ZVG for those interested in bidding on a property to gain access to information concerning the foreclosing property. Therefore, they are not left empty handed, but they may rely on the information available to them by way of § 42 ZVG, which provides access to the foreclosure filing.

8.5.2.14 Realtor

A realtor calculates his commission based on the purchase price, information which he is generally given by his client (either purchaser or seller).[174] If he has not approached the client for this information he will not have a legitimate interest in accessing the land registry. However, a realtor will have a legitimate interest when his client denied him the information after the transfer has been completed.[175] It is important here to note that the actual provision must be due, where it is less certain that his client was involved at all in the transaction, *i.e.* uncertainty as to the existence of a provision claim at all, then a legitimate interest is not necessarily present.[176]

If a realtor wants to determine whether a sale he was involved in led to the registration of the property he has a right to access, according to the Higher Regional Court Stuttgart in 1983.[177] What is odd is the court's interpretation of the legitimate interest test as taken to mean anyone who had an interest not based on curiosity or for unjustified reasons. This was a much more inclusive interpretation, than how the legitimate interest test had normally been interpreted. It is therefore considered an exception and has not been received positively in literature or jurisprudence.[178] Thirteen years later, a similar case was brought before the Higher Regional Court Karlsruhe, where it was quite clear. The realtor should provide evidence of a provision due to him by an individual who is, or was, registered in the land registry.[179] If he can show this, he has a legitimate interest. The best way would be by showing he has a written contract, yet, even an oral contract would suffice if a satisfactorily set of conclusive factual matters is presented to the land registrar, from which it can be deduced that there is a considerable probability of a commission

174 Under the old law, it was assumed this was necessary, see for example Böhringer 1987b, p. 188–189.

175 OLG Karlsruhe 13.08.1963, *FHZivR 10 Nr. 10204*. See also OLG Dresden 03.12.2009, *NJW-RR 2010, 1175*, although here the legitimate interest already failed for want of any evidence of a brokerage contract.

176 OLG Karlsruhe 15.04.1996, *NJW-RR 1996, 1043*. Evidence of involvement a year earlier did not warrant a legitimate interest a year later when a transfer deed was recorded, see OLG Brandenburg 06.10.2016, *NotBZ* 2017, 153.

177 OLG Stuttgart 17.01.1983, *FHZivR 29 Nr. 7956*.

178 See OLG Hamm 18.12.1985, *DNotZ 1986, 497*, with note by Eickmann.

179 In the event there is no written contract, but an oral agreement for example, then the presentation of a legitimate interest may require more concrete facts to show that there is such an agreement. Thus, this increases the burden of proof for a realtor in the event that there is no written contract. LG Köln 07.10.1997, *NZM 1998, 879*. Compare with OLG Dresden 03.12.2009, *NJW-RR 2010, 1175*. See for the increased burden of proof also OLG Düsseldorf 06.01.2017, *FGPrax* 2017, 58.

claim.[180] However, allowing anything other than that would be tantamount to allowing a fishing expedition at the land registry.[181] Consequently, an argument that the evidence list was not exhaustive, and therefore it cannot be ruled out that the customers who have concluded a contract with him are not included in the contract, which leaves the realtor without a paper trail to show his involvement in the transaction, is insufficient to warrant a legitimate interest. To put it bluntly, the Higher Regional Court states that ruling differently would allow the realtor to demand a copy of the deed at each change of ownership in the land registry, so as to check whether the person might owe him a brokerage fee. This cannot be the case.[182]

8.5.3 Credit-debit relationships

8.5.3.1 Creditors (general)

In the event the debtor does not pay, the creditor is allowed access to the land registry.[183]

A creditor who has a right in the land is allowed access, as we saw above in section 8.5.2.2, even when it is not directly clear from the land registry itself, as is possible with a land charge (*Grundschuld*).[184] The debt need not be a large debt, nor does it have to be a secured debt. It may be as small as an unsecured debt of 500 DM.[185]

The creditor of a person renting a property, who is not also a registered owner or right holder of the property, will not be able to have access, not even to notify the owner.[186] While this interest is more than a 'mere curiosity', it is insufficient to be considered a legitimate interest.[187] If you want to find out who the landlord of the property is, a simple internet search for rental properties should suffice, the OLG stated.[188]

8.5.3.2 Banks

When a bank acts as a creditor, it is subject to the same access rules on showing a legitimate interest as other creditors (see section 8.5.3.1). However, certain specific cases have been ruled upon concerning banks. For example, a bank who is in talks to extend credit to

180 OLG Stuttgart 28.09.2010, *FGPrax 2010, 324*.
181 See also OLG Düsseldorf 06.01.2017, *FGPrax* 2017, 58 for the relationship with data protection.
182 OLG Karlsruhe 15.04.1996, *NJW-RR 1996, 1043*.
183 For building creditors (*Baugläubiger*), see LG Stuttgart 24.01.2001, *FHZivR 47 Nr. 10355*. It has to be in relation to a creditor who has an interest in the land, not to obtain information used to enforce a claim against a third party who does not have rights in the land, see OLG München 17.10.2016, *MDR* 2017, 30.
184 LG Berlin 19.08.1981, *ZIP 1981, 1197*.
185 Deutsche Mark, the currency prior to the Euro in Germany. See BayObLG 28.05.1975, *FHZivR 21 Nr. 7969a*. Amounting to roughly 350 EUR, calculated including inflation.
186 Who might be a third-party debtor of a pledge or a claim, perhaps in his capacity as a landlord.
187 OLG Schleswig 12.01.2011, *BeckRS 2011, 01850*.
188 OLG Schleswig 12.01.2011, *BeckRS 2011, 01850*.

a landowner who has requested to open a bank account with the bank is allowed access to the land registry.[189]

However, merely stating that the bank grants credit to the owner without any further (sound) reason is not sufficient,[190] however trustworthy the bank may be.[191] The *Landgericht* (LG) in Offenburg affirmed a decision by the land registry to deny access to a bank which stated that they wanted access to 'inform themselves of the current financial circumstances of the client', without providing any other reason.[192] However, a concrete case, in which a landowner has obliged himself by way of a contract with a bank to refrain from making certain (future) dispositions, *i.e.* no more burdens on the land, will provide the bank a legitimate interest in accessing the information in the land registry, to assess whether the owner has kept his promise.[193]

Where a mortgage-managing institution, such as the *Bau und Bodenbank*, seeks access, the factual legitimate interest is clear. They are right holders of registered *hypothecs* and, as such, they are allowed access.[194] In a particular case, such an institution wanted to verify that *all* its liabilities are recorded and hence requested access and extracts. It would take a long time to gather this information and places a significant burden on the land registry, which should be taken into account when requesting the information. However, that such information can be verified by other means than accessing the land registry does not influence the legitimate interest they have.[195] As such, it is irrelevant for the § 12 GBO test. They were granted access.

While it is now common that (private) banks offer services for individuals next to their investment activities, this was not always deemed a necessary part of (private) banking. The Savings and Loan banks offered such services. These publicly established banks existed for a long time next to private banks and performed different types of functions. These differences have faded over time. However, under the older law, the distinction between public law banks and private banks also had an effect on the access regime which was applied to each. The Savings and Loan banks were taken to be 'public authorities' for the purposes of § 43 GBV and therefore did not have to present a legitimate interest, but they were presumed to have one.[196] The same did not apply to private banks.

This distinction was removed by the German Constitutional Court (*Bundesverfassungsgericht, Bverf*) in 1983.[197] The Court was unconvinced of the impugned judgment

189 LG Heilbronn 12.07.1982, *RPfleger 1982, 414*.
190 LG Offenburg 14.03.1996, *NJW-RR 1996, 1521*.
191 See on the influence of the character or trustworthiness of the instituion seeking access section 8.6.
192 LG Offenburg 14.03.1996, *NJW-RR 1996, 1521*.
193 Even the fact that the contractual obligation came into existence four years earlier did not bar the legitimate interest. This was deemed nothing unusual in this particular case. LG Berlin 24.08.1981, *Zip 1982, 53*.
194 § 43(2) GBV.
195 BayObLG 25.03.1952, *BayObLGZ 1952, 82*.
196 Affirmed by BayObLG 23.08.1979, *Rpfleger 79, 424*, and LG Karlsruhe 16.06.1980, *BWNotZ 82, 94*.
197 BVerfG 15.06.1983, *NJW* 1983, 2811. Although see Kuntze & Eickmann 2006, who still see a role for banks in § 43 GBV, whereas Böhringer no longer did. Böhringer 1987b, p. 187.

of the Bavarian Highest Regional Court (*Bayerisches Oberste Landesgericht*, BayObLG) which based the privileged position of the public law banks on the fact that, with these types of banks, the danger of unlawful access to the land registry was lower than with private banks as a result of the existing additional governmental supervision. Information obtained by the Court did not affirm this proposition.[198] Rather, both savings banks and private banks have been involved in abuse cases. Governmental supervision did not influence this matter, as the supervision is limited and does not take into account the problem of possible abuse of land registration access.[199]

Therefore, the Savings and Loan banks had a competitive advantage, which cannot, according to the German Constitutional Court, be justified by their particular task. This is especially so as, over time, the private banks have started taking on the activities traditionally carried out by these Savings and Loan banks, and vice-versa. Therefore, all banks are more 'Universal Banks' (*Universalbanken*). The special treatment sometimes still prevalent in the law has nothing to do with § 12 GBO and therefore these different types of banks should be treated equally for the purposes of § 12 GBO.[200] In a similar vein, § 43 GBV should be interpreted restrictively and in conformity with the Basic Law. Therefore, in a constitutional-conform explanation of § 43 GBV, the Savings and Loan Banks are not exempt from having to present their legitimate interest.[201]

8.5.3.3 Construction worker

A construction worker who bases his legitimate interest on having a security *hypothec* (*Sicherungshypothek*) and wants to institute legal proceedings, is granted access to not only Sections 1 and 2 but also the *Auflassung* which is part of the underlying deeds.[202] It is plausible, the court noted, that a sensible creditor, prior to initiating legal action, wants to have an overview of the prospects of his enforcement plan and the property. The entries in Section 2 are therefore also included in the inspection right.[203]

8.5.3.4 Creditors in insolvency

A creditor in an insolvency proceeding might have a legitimate interest in the information concerning a property owned by the debtor, for instance, where an insolvency administrator did not give a conclusive estimate of the patrimony of the debtor and the creditor wants to check this.[204] However, in the event the debtor stated that they were in

198 Neither did information as provided by the Federal Supervisory Office for the Credit System.
199 BVerfG 15.06.1983, *NJW* 1983, 2811, 2811. As confirmed by the Bavarian Prime Minister.
200 BVerfG 15.06. 1983, *NJW* 1983, 2811, 2812, based on Article 31 Basic Law the equal treatment provision.
201 BVerfG 15.06. 1983, *NJW* 1983, 2811, 2812.
202 OLG München 09.02.2015, *BeckRS 2015, 08323*.
203 OLG München 09.02.2015, *BeckRS 2015, 08323*.
204 AG Brühl 17.04.2014, *BeckRS 2014, 09527*, which was not the case here. Here the insolvency administrator concluded, after doing research that the ownership claims could not have been successful on account of

the process of becoming the owner of a property after her grandparents passed away, but there is nothing in the deeds to the property to support this claim (as checked by the insolvency liquidator), there is no legitimate interest to access the information in the land registry concerning that property. The land registry informed the creditor that the Federal State of Germany was the owner and there was no mention in any files of the debtor nor her grandparents. Hence, no legitimate interest was present.[205]

8.5.3.5 Shareholder of a company

For the effective exercise of shareholder rights in the Annual General Meeting (§§ 118, 119 AktG) advance information is required. This includes a review of the use of property owned by the company, so as to assess the net result. The shareholder therefore has a legitimate interest in accessing the information about the company in the land registry.[206]

8.5.3.6 Bailiff / process server / executor of claim

In a 1992 case, the applicant was the enforcing authority (*Vollstreckungsbehörde*) in a matter where fees for waste disposal were not paid. However, Mrs. U, the person who owed the debts, was not the owner of the plot of land for which the enforcing authority requested access to the land registry. The land registry communicated that fact, and that was deemed sufficient. Should the bailiff be exercising his rights in the course of his official duties, he would be granted access based on § 43 GBV However, if he seeks access to information regarding another person than is registered, a legitimate interest is not present and he is refused access.[207]

8.5.4 Familial relationships

A mere familial relationship alone with a registered individual will not suffice for anyone to be given access to the land registry.[208] Other facts are required to establish a legitimate

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prescription. Moreover, by the time the land should have passed to the debtor, it was registered in the name of another, and not the seller, who was long dead at the time. Hence, it could not have passed.

205 OLG Köln 23.06.2014, *BeckRS 2014, 13407*. The applicant appealed, stating there was no proper examination of her request, by for instance a judge. However, that is not a requirement, it is the *Rechtspfleger*, not a judge who decides about granting access.

206 LG Kempten 06.06.1988, *NJW 1989, 2825*.

207 LG Bonn 07.12.1992, *BeckRS 2015*, 09970. 'Wie das Amtsgericht zu Recht ausgeführt hat, bestand nur insoweit ein berechtigtes Interesse der Antragstellerin und es Sache der Antragstellerin darzulegen, dass die Forderung notfalls auch gegen den Eigentümer vollstreckt warden könnte. Hierzu hat sie jedoch nichts vorgetragen'.

208 OLG Karlsruhe 14.10.2008, *BeckRS 2009, 07601*.

interest in information held by the land registry concerning a family member.[209] These may be incurring a maintenance obligation or the fact that this person is an heir and wants to calculate their compulsory part.[210] The circumstances in which familial relationships give rise to a legitimate interest case are discussed below.

8.5.4.1 Sons and daughters

For example, we can mention the case of the son who requested access on the grounds that his biological father was the (co-)owner of a property in which he wanted to spend his twilight years.[211] The son learned of his father's intentions to move to a flat. The son requested access to the land registry to examine whether his ailing father had the intention to, or already did, transfer the property to his daughter without securing a lifelong right to live there for himself. The son is not entitled to a registered right in the property, but he wanted to see whether his severely demented father needed assistance in housing matters. The land registry however refused such access as his reasons were based on conjecture and speculation. Mere suspicions that the acquisition or disposition of rights registered in the land registry are insufficient to warrant access. It cannot be established from access to the land registry whether his father requires any assistance.[212]

8.5.4.2 Maintenance obligations

Maintenance obligations may arise when a parent moves into a nursing home, but their pension will not suffice to cover the costs of living there. The children could then be called upon to pay maintenance. However, the mere fact that a mother is 88 years old and would in the foreseeable future move to such a home is insufficient to warrant access to the land registry information on the property of the mother. Another outcome would make the land registry a public registry for children of property owners.[213] This ruling of the Higher Regional Court Karlsruhe is in line with the general idea that future interests, whether they are near or far in the future, do not give rise to an access right. For the right to be granted, the specific event will have to have materialised. A different outcome is seen in a ruling of the Regional Court Stuttgart ten years earlier, where a 90-year old parent already resided in a nursing home (an expensive one). Here the access right of the daughter was denied in first instance by the land registry, but it was granted by the LG on appeal. Considering the high costs of the nursing home, the LG noted that it was not unlikely that the existing financial reserves of the parent have been depleted and that in a relatively short time the question of maintenance obligation payments might present

209 See also a very extensive overview by Böhringer 2011, see also less extensive discussion by Grziwotz *MDR* 67/8, p. 434–435.

210 See also a claim against a sibling in an inheritance situation OLG Hamm 23.09.2015, *BeckRS* 2015, 20814.

211 OLG München 22.06.2011, *RNotZ 2011, 604, 604.*

212 OLG München 22.06.2011, *RNotZ 2011, 604, 605*.

213 OLG Karlsruhe 14.10.2008, *BeckRS 2009, 07601*. See also section 8.5.4.8.

itself.[214] Whether such a case would still be ruled on in the same way today, after the Higher Regional Court Karlsruhe ruling of 2008, is unclear.

8.5.4.3 Executor of testament

A current executor of a testament, has a legitimate interest in the land registry information of the former executor, where he has a claim for incorrect administration of the testament (*unzureichender Amtsführung*). The current executor is then acting on behalf of the 'community of heirs' (*Erbengemeinschaft*), and, as such, has a legitimate interest.[215]

8.5.4.4 Fathers and daughters

In 1991, the Highest Regional Court Bavaria (BayObLG) ruled on the case of a concerned father. His daughter wanted to marry the owner of the property, who would become his son-in-law, with whom she already had a child.[216] The father knew that his future son-in-law's family was in financial difficulties at the time (forced sale (*Zwangversteigerung*) arrangements had already been made in the past). Because his daughter and grandchild would become dependents of the father if her future husband and his parents cannot afford anything, the father was anxious to secure the 'existence' of his descendants through the acquisition of the land. He was therefore interested to learn from the land registry whether his future son-in-law had any property rights in the land and whether there were any burdens on the land. This was in part because of possible maintenance claims from his daughter and grandchild. However legitimate the concerns of the man were, the BayObLG did not grant him an access right, neither as a potential purchaser, because he would have to have been in negotiations for that,[217] nor on account of the possible future maintenance claims, as they had not yet materialised at the moment of the request for access, and[218] lastly, also not on the basis of his concern for their wellbeing.

8.5.4.5 Former partner (divorced)

In order to determine how many assets were accrued during the marriage, for the purposes of the division of the marital assets, an ex-spouse has a legitimate interest in examining the land registry. In particular, the legitimate interest extends to access to the underlying sales agreements of acquisition and sale of a property, as these deeds contain the purchase price and, as such, can give an indication of how much was accrued during the marriage.[219]

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214 LG Stuttgart 26.02.1998, *NJW-RR 1998, 736*.
215 LG Stuttgart 21.11.2001, *BWNotZ 2002, 68*.
216 BayObLG 14.03.1991, *BeckRS 1991, 06052*.
217 See section 8.5.2.12.
218 See section 8.5.4.2.
219 In this case, the transfer of the house was one year after the divorce. LG Stuttgart 05.09.1995, *NJW-RR 1996, 532*.

8.5.4.6 Former partner (not divorced)

For the assessment of assets of an estranged but not yet divorced partner information as to the purchase price of a property is relevant, especially if the estranged partner is in the process of selling the property.[220] Since the partners are estranged but still married to one another, the access of the former partner will still fulfil the legitimate interest test. The land registry may not refuse access to the information for the mere reason that the couple is no longer living together; this is irrelevant.[221]

An interesting question came up in a remarkable case from 1997 before the Regional Higher Court Stuttgart.[222] Here a notarially authenticated purchase agreement between the husband and a third party contained a provision that required that the purchase price be paid into a bank account to be named later by the husband, which was the account of the wife. The husband had access to this account as well and had authorisation from his wife. The purchase price was paid and shortly thereafter the wife withdrew the husband's authorisation to access the account. She then instituted the divorce proceedings. The transferor, the husband, had provided a power of attorney earlier, and the transfer had taken place. The wife wanted to dispose of the money, but she was refused by the bank. The lawyer, on behalf of the wife, then sought access to the land registry and requested a copy of the sales agreement. Access was rejected initially, as a legitimate interest in the information has to concern the land according to the land registry. Here, the need for access had nothing to do with the land, but it was concerned with a need to clarify the right of disposal of a bank account. The Regional Higher Court on appeal disagreed with the land registry and considered that a legitimate interest is not limited to only matters of land, but can also in the absence of any direct reference relate to the ownership and other legal relations that are contained in the land registry's deeds, as was the case here.[223]

Henzler was critical of this ruling in his case note in *BWNotZ*,[224] as he agreed with the land registry, that the idea prior to this ruling had been that a legitimate interest had to concern the content of the land registry. He ponders whether this extended possibility for access also means that a reference to something which is not registered in the land registry but is part of the deeds would also be subject to access rights.[225] This cannot be true for information that is recorded in notarial deeds but which are not part of the deeds registered at the land registry, as these would fall outside of the scope of §12 GBO and instead they would be subjected to the heavily restricted regime of § 51 BeurK,[226] which governs access rights to notarial deeds at the notary's offices. The access to the documents

220 As was the case in OLG Rostock 23.12.2011, *NJW-RR 2012, 400*.
221 OLG Rostock 23.12.2011, *NJW-RR 2012, 400*.
222 OLG Stuttgart 24.10.1997, *BWNotZ 1998, 145*.
223 OLG Stuttgart 24.10.1997, *BWNotZ 1998, 145, 146*.
224 OLG Stuttgart 24.10.1997, *BWNotZ 1998, 145, 146*.
225 This is true, where it concerns deeds registered but not referred to, that a person can show a legitimate interest in, based on § 46(1) GBV.
226 Beurkundungsgesetz of 28 August 1969 (BGBl. I S. 1513).

held by the land registry and those records held by the notary were obviously meant to be treated separately.[227]

8.5.4.7 Estranged son/Daughter in law

In 2013 the Higher Regional Court München was confronted with the case of a woman who wanted access to the land registry information of her estranged husband's parents, because he claimed he had no assets during the divorce proceedings, and she thought that he would be the heir of the parents. However, the in-laws were still very much alive and therefore no legitimate interest was present according to the land registry. Heirs of compulsory parts have a right to access at the moment of inheritance, not before, irrespective of the age of the owner(s).[228] The claim was denied accordingly, because it was based on a future event.[229]

8.5.4.8 Heir(s)

By and large, the most cases in the sphere of access to the land registry based on a familial relationship concern (potential) heirs. In particular, the cases concern (grand)[230] children wanting to know whether there is any change to the amount of the compulsory part. In the event the parents are deceased, the children have a legitimate interest in the information in the land registry so as to assess their compulsory part.[231] This extends to all parts of the land registry information.[232] The legitimate interest does not require one to show a certificate of inheritance, as such heirs are treated similarly to notaries and others who are presumed to have a legitimate interest.[233] Access may only be refused in the event that it would constitute an abuse of law.[234] Heirs may also have access to land registry entries which concern land that their parents formerly owned, but they had transferred while they were still alive. In the event there is a suspicion, based on facts, that the parent(s) transferred the land for such a low price that it can be considered a gift or donation,[235]

227 See also LG München II 21.07.2011, *LSK 2011, 460532*, where direct access to the records of the notary were requested by relying on § 12 GBO.

228 OLG München 17.07.2013, *NJOZ 2013, 2081*.

229 There is a case from 1984 in which access is given to future potential compulsory part heirs, but this case was considered an exception and was heavily criticised. See note of Böhringer at LG Ellwangen 22.02.1984, *Rpfleger 1984, 181*. See further on future potential compulsory part heirs 8.5.4.8.

230 OLG Düsseldorf 06.10.2010, *FGPrax 2011, 57*.

231 KG 20.01.2004, *RNotZ 2004, 464*, OLG Frankfurt a.M. 06.01.1997, *NJW-RR 1997, 910*. Böhringer 2011 see also extensively Sarres 2012.

232 OLG Düsseldorf 08.10.2010, *ZEV 2011, 44*, not just Section 1, OLG Düsseldorf 04.02.2014, *FGPrax 2014, 151*.

233 OLG Frankfurt a. M. 17.02.2011, *BeckRS 2011, 17459*. He need not show more than that he is an heir. LG Stuttgart 09.02.2005, *ZEV 2005, 313*, see also OLG Düsseldorf 08.10.2010, *ZEV 2011, 44*, OLG Düsseldorf 04.02.2014, *FGPrax 2014, 151*.

234 OLG München 07.11.2012, *BeckRS 2012*, 24440. What could give rise to such an abuse is unclear.

the (grand)children have a legitimate interest in the information concerning the purchase price and the reason for the transfer from the sales agreement held by the land registry.[236]

Nevertheless, in such cases, or where there is a suspicion that fraud was committed during the transfer from the now deceased (grand)parent to another party, there needs to be evidence that supports such suspicions. Also, these claims may prescribe, so one cannot wait 70 years.[237]

As noted earlier, for the legitimate interest to exist, the (grand)parents must be deceased.[238] There is no legitimate interest when the parents are still alive and the child(ren) seek access to assess how large their share of the compulsory part will be. This is not even the case when they want to check whether the parents have transferred the property to one of their siblings or a third party and their compulsory part would be nihil.[239] Allowing access to the children when the parents are still alive would be tantamount to establishing a public register for children in relation to their parents.[240]

8.5.5 Public interest(s)

While in the memoranda to the first drafts of the GBO, it was put forth that, even though the right to access was primarily to be understood as a private interest, there is no reason why this could not also be extended to public interests. The extent of granting such public interests access rights under § 12 GBO (at the time in the drafting stage § 15 GBO) would have to be decided by the State legislature.[241] However, the topic has been contentious in case law since, and has only been really settled in 1971, in favour of allowing public

235 However, there has to be concrete evidence to accept such a claim. An applicant seeking access to the current and former Grundbuchblatt containing a plot of land, neither is owned by the person he thinks owned it, to determine whether there is a slight possibility that the money used was gifted by the testator, is not going to pass the test. This is especially so, because the origin of the money used to pay the purchase price is immaterial to the contractual relationship, see OLG München 23.02.2011, *BeckRS 2011, 07262*.

236 OLG Karlsruhe 05.09.2013, *ZEV 2013, 621*, OLG Düsseldorf 06.10.2010, *FGPrax 2011, 57*, where it concerned a grandchild, LG Stuttgart 09.02.2005, *ZEV 2005, 313*, in particular the note by Damrau, on the importance of this case for donation matters, ZEV 2005, 313, 314-315. Note, the access is then limited to the sales agreement only, see OLG Karlsruhe 05.09.2013, *ZEV 2013, 621*.

237 Although, in this case, the claim that there was any fraud committed lacked any factual basis and was therefore already denied. The Court however did note that, were the claim to succeed, they would have to show exceptional circumstances of why it had not yet prescribed after 70 years. OLG München 13.01.2011, *ZEV 2011, 388*.

238 See for the heavily criticised exception LG Ellwangen 22.02.1984, *Rpfleger 1984, 181*. See Böhringer in his case note in RPfleger 1984, 181-182. See also Sarres 2012, p. 297, who completely ignores this case in his extensive discussion on the matter.

239 OLG Düsseldorf 19.02.1997, *NJWRR 1997, 720, BayObLG 25.03.1998, NJW-RR 1998, 1241*.

240 BayObLG 25.03.1998, *NJW-RR 1998, 1241*. See also OLG Karlsruhe 14.10.2008, *BeckRS 2009, 07601*, where it concerned a maintenance obligation, see section 8.5.4.2.

241 'Das im ersten Absatze des § 15 bezeichnete Interesse ist zwar als ein privatrechtliches zu verstehen. Es liegt jedoch kein Grund vor, die Berücksichtigung des öffentlichen Interesses auszuschliessen, nur muss die Entscheidung, inwieweit eine Berücksichtigung dieses Interesses stattfinden soll, der Landesgesetzgebung

interest to also serve as a basis for a legitimate interest.[242] In part, access based on a public interest already flows from the law itself, as notaries are presumed to have a legitimate interest and those tasked with the inspection and control of justice (*Justitzaufsichtsbehörden*) were granted unrestricted access. Later, through court cases described below, the contours of what was considered a public interest was given more substance.

Even though a public interest could serve as a legitimate interest,[243] it is highly unlikely that an individual could assert such an interest. A public interest cannot be asserted (easily) by a single 'concerned citizen'.[244] The prime example is a case decided by the Higher Regional Court Hamm,[245] in which an applicant requested access to the land registry information of a non-profit housing company, so he could show that the company was 97% owned by the city of [H], which would be contrary to the Articles of Association. As a citizen, he wanted 'clean leadership of the municipality' and wanted to further that goal by showing the problem with this particular non-profit.[246]

At the time, the possibility of a public interest was not yet readily accepted by the courts.[247] However, the Higher Regional Court Hamm considered a public interest to be possible, although not for an individual citizen in this case. It considered that it may very well be so that, under German rules on municipal life, every citizen of a municipality is in a direct personal relationship with the other and therefore everything touches the sphere of interest of the individual citizen. This, however, is not sufficient for the individual citizen to claim he has direct power to represent the interest of the general public and enforce it. There is no *individual* control function.[248] This follows from the nature of a representative democracy.[249]

überlassen werden, weil diese Entscheidung nicht dem Privatrechte angehört.' Entwurf einer Grundbuchordnung und Entwurf eines Gesetzes betreffend die Zwangsvollstreckung in das unbewegliche Vermögen. Amtliche Ausgabe1889, p. 46.

242 Even then it was not accepted wholeheartedly, Melchers 1993, p. 312–313. Melchers considered such a public interest not fitting from both a dogmatic and historical point of view. Melchers 1993, p. 317.

243 Böhringer 1987b, p. 184, Demharter 2014.

244 OLG Hamm 15.12.1970, *NJW 1971, 899*, OLG München 11.07.2016, *NJW-RR* 2017, 77.

245 Although, see for a similar case OLG München 11.07.2016, *NJW-RR* 2017, 77, where it was related to a group of concerned citizens who for the protection of the unborn child wanted access to information regarding a doctor who facilitated abortions.

246 OLG Hamm 15.12.1970, *NJW 1971, 899*, 899.

247 For example, KG 17.4.1913, *KGJ 45 A, 198*. Considered the drafting of § 12 GBO documents and considered that a public interest could not be accepted.

248 OLG Hamm 15.12.1970, *NJW 1971, 899*, 890. See also OLG Hamm 14. 05. 1988, *NJW 1988, 2482*. Although this ruling has not been accepted as a good thing necessarily, but rather another stretching of the legitimate interest test, see Eickmann in his note to in BWNotZ 1989, 376, 378. See placed in an overview Böhringer 2001, p. 332.

249 The position of the individual in a municipality is limited to the participation in the procurement of community affairs; his right includes above all the active and passive right to vote. OLG Hamm 15.12.1970, *NJW 1971, 899, 890*.

Whether the individual could, in exceptional circumstances, fulfil a control function, however, is not further discussed, because, in any case, he must first go to the supervisory and monitoring bodies prescribed by law. Because he did not do that, the discussion is mute.[250] A further complication of this ruling might exist where the individual asserts a public interest based on him claiming to be a citizen journalist or blogger, and it relies on the exception provided to the press.

Thus, while the public interest could give rise to a legitimate interest, whether an individual can have a such a right is contentious; in any event, he will firstly have to exhaust the official options available to him.

8.5.5.1 Press interests

A particular group which may claim to represent the public interest,[251] and as such can rely on an access right to the land registry, are journalists. The term 'press' is understood in a wide manner.[252]

In many of the cases involving a press interest there is a weighing of constitutional rights. In particular, Articles 1 and 2 address the informational self-determination of those registered[253] and the right to press freedom is laid down in Article 5 of the Basic Law.

Article 5 of the Basic law also influences the requirements for the presentation of facts to show a legitimate interest. The requirement of the presentation of facts for the press is lower than for private interests, such as a creditor seeking access. In older rulings, a journalist was required to demonstrate why he is authorised to carry out the public interest,[254] but this has been relaxed in later years to only having to show some sort of 'information concern' (*Informationsanliegen*).[255]

In 2000, the German Constitutional Court, on appeal of a 1991 case from Düsseldorf,[256] decided on the balancing of the competing rights at stake. The applicant, a representative of the science magazine *Wirtschaftswoche* sought access to the land registry without providing any reason.[257] They were initially denied access, as the court stated that, for a balancing between the interests of the applicant and the registered, there would have to be at least

250 OLG Hamm 15.12.1970, *NJW 1971, 899, 890*. For criticism on this ruling see Böhringer 1987b, p. 186.

251 LG Frankfurt 12.05.1978, *Rpfleger 78, 316*.

252 KG 28.08.2012, *NJOZ 2014, 3*. It refers to all printed products, also books, in particular non-fiction. Whether it includes citizen-journalism is not clear. It includes researchers with a Research center which collaborates with newspapers and public law news broadcasters, see OLG Düsseldorf 07.10.2015, *NJW* 2016, 89.

253 Although not always, for example LG Mosbach 01.09.1989, *NJW-RR 1990, 212*, where there was no mention of Articles 1 or 2 of the Basic Law.

254 LG Frankfurt 12.05.1978, *Rpfleger 78, 316*.

255 See for example OLG München 28.07.2016, *BeckRS* 2016, 15373, OLG München 20.04.2016, *NotBZ* 2016, 430.

256 OLG Düsseldorf 12.06.1991, *NJW-RR 1992, 695*.

257 The information requested concerned properties that belonged to a group of other companies of another Company, as part of the research by the magazine it was to be determined whether the losses of the company have been compensated in the past by selling off the land.

some information as to the reason why access was requested. The resulting legal rules were affirmed by the German Federal Court of Justice (*Bundesgerichtshof*) in 2011.[258]

In its assessment, the German Constitutional Court, firstly referred to its earlier ruling in 1983[259] and considered that § 12 GBO itself is not unconstitutional. This does not change in light of the interest advanced by the press. Rather, the Constitutional Court states that the very use of the legitimate interest test allows the courts the flexibility to adequately take into account the value-setting importance of press freedom in interpreting and applying the provision.[260]

How do we balance the different fundamental rights? In principle, the Court continues, neither freedom of the press nor information self-determination is prioritised over the other from the outset.[261] It depends on the extent to which the information in the land registry is relevant to the public on the one hand and the interest in keeping the matters non-public on the other.[262] Therefore, by requiring the presentation of facts to indicate a legitimate interest prior to granting the access, the legislature established a fair balance between these rights, the German Constitutional Court considered.[263]

In balancing these rights, the different basis for access by the press and that of another person or entity must be taken into account. It follows from the operation of property rights (in land) as rights that have an effect against anyone, that there is a requirement that those involved in legal transactions can also become aware of these rights.[264] However, this is not the same basis on which access is granted when we discuss access to the land registry on account of freedom of the press. In this case there is the possibility of personal information being released to an undefined large group of people by way of publication of such data, and this results in the need to protect the registered person in a different way than in the 'normal case' of land registry access, relying on the third-party effect of property rights.[265]

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258 BGH 17.08.2011, *NJW-RR 2011, 1651*.

259 BVerfG 15.06. 1983, *NJW 1983, 2811*, see on this section 8.5.3.2, on the distinction between public and private banks.

260 'Auch unter dem Aspekt der Pressefreiheit ist die Vorschrift nicht zu beanstanden, da die Verwendung des unbestimmten Rechtsbegriffs des „berechtigten Interesses" den Gerichten genügend Spielraum lässt, bei der Interpretation und Anwendung der Vorschrift der wertsetzenden Bedeutung der Pressefreiheit hinreichend Rechnung zu tragen'. *BVerfG 28.08.2000, NJW 2001, 503, 504*.

261 Although in the older literature it was suggested that the right of the press to information was without bounds, see KEHE/Eickmann, Grundbuchrecht, 1991, § 12 GBO Rn. 6.

262 BVerfG 28.08.2000, *NJW 2001, 503, 505*. 'Es kommt insoweit maßgeblich auf das Informationsinteresse (hier der Öffentlichkeit) einerseits und das Geheimhaltungsinteresse der im Grundbuch Eingetragenen und von der Recherche Betroffenen andererseits an. Der Gesetzgeber hat für den Regelfall der Grundbucheinsicht einen angemessenen Ausgleich dadurch hergestellt, dass bei Privatpersonen, die etwa aus einem Zwangsvollstreckungsinteresse heraus die Einsicht begehren, Einsicht bei Darlegung eines berechtigten Interesses gewährt wird'.

263 BVerfG 28.08.2000, *NJW 2001, 503, 505*.

264 BVerfG 28.08.2000, *NJW 2001, 503, 505*. See also BGH 17.08.2011, *NJW-RR 2011, 1651, 1652*.

265 BVerfG 28.08.2000, *NJW 2001, 503, 505*. Compare with LG Mosbach 01.09.1989, *NJW-RR 1990, 212* & OLG Düsseldorf 12.06.1991, *NJW-RR 1992, 695*.

In this case, how should the land registry determine a legitimate interest is present in matters where the press seeks access? The Constitutional Court provided some guidelines to the land registries. It stated that it would be incompatible with the constitutional protection of the press if access to the land registry would be made dependent on a governmental review of the 'information concern'. What it can do is examine the *existence* of a press interest in the information, and not subject it to any review.[266] As a further specification of that test, the land registry may only request specifications from the press that are specifications needed for their limited verification assessment of the 'information interest'. The threshold to show a legitimate interest for the press is very low.[267] In its examination of the existence of a press interest, the land registry should take into account that the press often acts on limited, and sometimes even weak, assumptions. Mere speculations are often the starting point for finding significant facts.[268] If press-worthy information is to be expected if the assumption proves to be true, then there is a sufficient presentation of facts to support their claim for access rights.[269]

The land registry is allowed some leeway to examine whether the access is appropriate in light of the information concerns. Such an examination includes a subsidiarity test,[270] *i.e.* whether the information could not be gathered by utilising other means which are less invasive with regard to the private life of those registered.[271] However, here the land registry should remain neutral. Nonetheless, the proposed exploitation purposes of the information can be important in the context of this suitability and necessity test (*Prüfung der Eignung und Erforderlichkeit*). In particular, the Court here refers to the balancing of interests in ruling out access in favour of colliding personality rights such as in case of *Caroline of Monaco III*,[272] where it concerned not so much issues that are of interest to the public and which add to a serious and substantive debate, but deal much more with purely private matters that only

266 BVerfG 28.08.2000, *NJW 2001, 503, 505-506*. See also BVerfG 07.10.2000, *ZUM-RD 2001, 159*, BGH 17.08.2011, *NJW-RR 2011, 1651*, where the BGH stated that the land registry is not allowed to limit the access where it would result in a pre-selection of relevant and non-relevant records. Compare this with OLG Hamm 17.01.2011, *BeckRS 2012, 02305*.

267 OLG Stuttgart 08.02.2017, *GRUR-RS* 2017, 103495, but not non-existent, see VG Berlin 26.01.2017, *BeckRS* 2017, 108993, OLG München 08.12.2016, *NJW-RR* 2017, 168.

268 See also BGH 17.08.2011, *NJW-RR 2011, 1651, 1652*.

269 BVerfG 28.08.2000, *NJW 2001, 503, 505-506*, BGH 17.08.2011, *NJW-RR 2011, 1651, 1652*, see also OLG München 08.12.2016, *NJW-RR* 2017, 168, OLG München 20.04.2016, *NotBZ* 2016, 430.

270 Which is contentious Böhringer 1987b, p. 181–191. See also section 8.5.

271 BVerfG 28.08.2000, *NJW 2001, 503, 506*. See the application of this in KG 19.06.2001, *ZUM 2001, 878, 880-881* and BGH 17.08.2011, *NJW-RR 2011, 1651*. However, for example, in insolvency proceedings, this does not mean that the information should be sought from the insolvency administrator. While this administrator is responsible for examining whether reviewable legal acts have been made to the detriment of the insolvency creditors, he is not responsible for satisfying the need for information of the public in relation to those legal acts. See OLG Stuttgart 27.06.2012, *ZUM-RD 2013, 185*, and OLG Stuttgart 22.06.2012, *ZUM-RD 2012, 682*.

272 BVerfG 15.12.1999, *NJW 2000, 1021*. See also 5.5.2.

satisfy curiosity.[273] One such example arose after the case by the Constitutional Court was decided.[274] In 2001 the Higher Regional Court Berlin ruled on the request by the *BILD am sonntag*, which wanted access to the land registry sections 1, 2 and 3 of a person married to a famous Berlin actor and entertainer. The information contained in Sections 2 and 3 was refused,[275] as here the informational self-determination took precedence over press freedom which was only used to satisfy curiosity and sensationalism. The press wanted to expose the financial situation of the family. This information was not required for the formation of public opinion, nor did it contribute to any serious or substantive discussion and hence would not be considered a justifiable infringement of the informational privacy of the registered.[276] The fact that the famous actor in the past had laid bare his private arrangements and financial situation did not matter. The registered person in question was not the actor but his wife.[277] She had not disclosed any of this information in the past and was not bound by her husband's earlier disclosures to the press. The court considered that it is up to those registered whether they wanted to make this information public, for example by way of giving an interview.[278]

Thus, the German Constitutional Court in general terms stated that access to the land registry, for example by reason of press interest, has priority with regard to issues that (greatly) concern the public and if the research serves a serious and substantive debate.[279] In this way, the Court considers, the interests if the owner might be affected but then they are not disproportionately affected.[280] There is therefore a difference between public *interest* and public *curiosity*.

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273 See also on this balancing the ECHR cases of ECtHR 24 June 2004, 59320/00 (*Von Hannover v. Germany*). ECtHR 7 February 2012, 40660/08 and 60641/08 (*Von Hannover v. Germany (No. 2)*. ECtHR 10 November 2015, 40454/07 (*Couderc and Hachette Filipacchi Associés v. France*).

274 See for another OLG Hamm 17.01.2011, *BeckRS 2012, 02305*, where access to three land registries' folio's was requested as well as the underlying deeds. Access was requested on suspicion that at the sale of these plots or the leasing thereof, financial benefits were rewarded. The plots of land belonged to a well-known politician and his family. While access was granted to most information concerning the different plots it was denied, in relation to one, as this concerned a *Grundbuchblatt* of the politician's relative who passed away already ten years earlier and who was registered in 1968 as the owner. For this one it was therefore unclear what the public interest was in that sheet. A public curiosity was present, but this was not enough. While understandable, it may not necessarily be in line with the case law later. It is not up to the land registry to decide what is important and what is not. See BVerfG 28.08.2000, *NJW 2001, 503*. And especially BGH 17.08.2011, *NJW-RR 2011, 1651*.

275 Meaning that information contained in Section 1 was granted.

276 KG 19.06.2001, *ZUM 2001, 878, 880*.

277 Suggesting that it could have been different if the famous actor himself was the one registered. Although, even so, this in and of itself could not lead to a justification of being granted access without the consent of the registered owner, to satisfy their curiosity. KG 19.06.2001, *ZUM 2001, 878, 880-881*.

278 KG 19.06.2001, *ZUM 2001, 878, 881*. Compare this with the Dutch publicness as expressed in Chapter 6 . Compare also with section 4.3.

279 Affirmed by the BGH, see BGH 17.08.2011, *NJW-RR 2011, 1651*. See also OLG München 28.07.2016, *BeckRS* 2016, 15373.

280 'Diese Gesichtspunkte können daher auch bei der Abwägung zwischen dem Informationsinteresse und dem Persönlichkeitsrecht bei der Grundbucheinsicht bedeutsam werden. Dabei hat das Zugangsinteresse der Presse Vorrang, wenn es um Fragen geht, die die öffentlichkeit wesentlich angehen und wenn die Recherche der Aufbereitung einer ernsthaften und sachbezogenen Auseinandersetzung dient. Hierdurch werden die

Examples where there was a legitimate interest advanced by the press include wanting access to the land registry to see who owns a particular property, which was at the address of the local offices of a particular political party. The information was to be used in a report on the financial situation/strength of the parties in the *Bundestag*.[281] Furthermore, a legitimate interest also exists where a journalist who is working on a biography of the Members of Parliament, wants access to the land registry to see whether the Member of Parliament (MP) or his wife is registered as the owner of an apartment and an entire apartment building. This is especially so, because this MP was publicly voicing an opinion against gentrification, commercialisation of apartments and expulsion of squatters, but privately he may have had different interests. This was deemed a legitimate interest.[282] A legitimate interest is also present for the press where there is a suspicion[283] that, on the sale of plots of land either from a well-known politician or his family members, financial benefits were awarded.[284] Another recognised legitimate interest exists where a daily newspaper,[285] or public and private service broadcaster,[286] wants access to the land registry to access information about a land transfer among family members just before the opening of an insolvency proceedings over the assets of the transferor. The public interest may be as small as the interests of the workers of the company group that would enter into bankruptcy proceedings as these cases showed.[287]

8.6 What evidence is required

In the German Constitutional Court case where press freedom was weighed against the fundamental rights of those registered, the Court stated that a 'fair balance' was established by the legislature with the rule that requires a presentation of a legitimate interest, prior to granting access.[288]

A mere assertion of facts is not enough to show a legitimate interest.[289] What is required is a presentation of facts in such a way that the land registry is convinced of the pursuit of a legitimate interest. For example, stating that you are a creditor of the

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Interessen des Eigentümers nicht unverhältnismäßig beeinträchtigt.' BVerfG 28.08.2000, *NJW 2001, 503, 506*.

281 In particular, whether the party organisations may use the property for free or at a discount and whether or not they have a property that they declare on the income. LG Hof 17.01.2001, *BeckRS 2001, 31155053*.

282 KG 28.08.2012, *NJOZ 2014, 3*.

283 Compare with section 8.6 where a suspicion is insufficient to show legitimate interest if not supported by ample evidence.

284 OLG Hamm 17.01.2011, *BeckRS 2012, 02305*.

285 OLG Stuttgart 22.06.2012, *ZUM-RD 2012, 682*.

286 OLG Stuttgart 27.06.2012, *ZUM-RD 2013, 185*.

287 OLG Stuttgart 22.06.2012, *ZUM-RD 2012, 682, 683*.

288 BVerfG 28.08.2000, *NJW 2001, 503, 505*.

289 LG Berlin 19.08.1981, *ZIP 1981, 1197*.

person from whom you want information in the land registry will not suffice,[290] but showing a credit agreement will.[291] The presentation of concrete facts must therefore go beyond the mere assertion of such an interest.[292] This does *not* mean that these facts need to be proven to be credible.[293] It is sufficient if the statement of facts is so concrete that it can be considered credible.[294] In this assessment, the character of the applicant can also be taken into consideration, when this person is generally considered trustworthy.[295]

If a request for access is based on a suspicion of a questionable transfer of the property, or really any suspicion,[296] then the applicant must provide facts that speak to the accuracy of the suspicion, as well as show that he should be allowed access based on his relationship with the registered owner.[297]

There are exceptions to the presentation of evidence. They may be divided into three groups: (1) those who are presumed to have a legitimate interest; (2) when the applicant is an heir; and (3) where it concerns the press.

Firstly, as mentioned in section 8.5.1, there are exceptions that flow from the presumption of a legitimate interest. When a legitimate interest is presumed, there is no need for evidence. A notary, for example, will fall under this category and will not have to show his legitimate interest. This even extends to the ownership index.[298]

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290 'Die Auffassung der Bf., allein der Umstand, daß sie dem Eigentümer Kredit gewähre, ergebe ein berechtigtes Interesse, sich auf dem Wege der Grundbucheinsicht "über die Vermögensverhältnisse des Kunden zu informieren", trifft nicht zu.' LG Offenburg 14.03.1996, *NJW-RR 1996, 1521*.

291 For a bank which is in talks with a landowner about credit and opening up a current account, land registry access is provided upon a concrete statement of facts based upon which it can be ruled out that the access is not for 'abusive purposes or to satisfy curiosity', see LG Heilbronn 12.07.1982, *Rpfleger 1982, 414*.

292 See also LG Heilbronn 12.07.1982, *RPfleger 1982, 414*. This is no different for large banks, LG Offenburg 14.03. 1996, *NJW-RR 1996, 1521*.

293 Therefore, it is not as strong as § 34 FGG 'Glaubhaftmachung', see Böhringer 1987b, p. 184–185. Demharter 2014, p. § 12 GBO, Rn. 13.

294 Melchers 1993, p. 314.

295 In this case, it was a leading credit institution. The LG even considered that it was not clear why such a leading institution would want access to the land registry by inventing details and legal relationships. LG Berlin 19.08.1981, *ZIP 1981, 1197*.

296 LG Stuttgart 09.02.2005, *ZEV 2005, 313*, BayObLG 03.12.1998, *DNotZ 1999, 739*, BayObLG 08.05.1991, *MittBayNot 1991, 171*, OLG Düsseldorf 07.04.2015, *BeckRS 2015, 08478*. Although compare these regular cases with those where there is a suspicion but it is a journalist who is seeking access. OLG Hamm 17.01.2011, *BeckRS 2012, 02305*, BGH 17.08.2011, *NJW-RR 2011, 1651*.

297 OLG Hamm 02.01.1978, *AnwBl. 78, 101*, BayObLG 08.05.1991, *MittBayNot 1991, 171*, in this case it concerned an applicant who is registered as the owner of a plot of land since 1972. The plot of land came into (legal) existence by the division of plots in 1966. Her brother led the purchase negotiations, but the acquisition was done by her. The applicant wanted information concerning two neighbouring plots of land. In support of her claim, she argued that, at the time of the purchasing negotiations done by her brother, he had signed a building plan as the owner of one of the neighbouring plots. That proves, according to the applicant, that her brother had purchased a larger plot of land with her money and split off some of the land. In order to check this, she would like information about the developments of the neighbouring plots. The application was denied by the LG, who considered it too vague a suspicion, which would not grant her a legitimate interest. The OLG agreed. The suspicion of fraud was raised but not substantiated with any facts, or even clues that might suggest such a suspicion to an intelligent observer.

298 LG Berlin, 28.01.1997, *Rpfleger 1997, 212*. See section 8.7.2.

Secondly, the evidence requirements are also relaxed, but not waived, for heirs that may be entitled to a compulsory part. They need not show the presence of a claim to a compulsory part, but they need only convince the land registry of their position as an heir who could be entitled to a compulsory part. In this case the requirements are also relaxed: showing a certification of inheritance, for example, is not necessary.[299]

Third, and last, there is also a relaxation of the requirements for the press in showing a legitimate interest. This special position flows from the constitutional protection afforded to the press by way of Article 5 of the Basic Law.[300] They will only have to show a public interest in the information,[301] and it may be as vague as a hunch or a single lead. However, even the press is bound to accept that they will not have a legitimate interest when they refer to plots of land they think are held by company [X] for example, but the land registry finds out that company [X] is not registered under that plot. In that case, even journalists will not have a legitimate interest in accessing that particular *Grundbuchblatt*.[302] Furthermore, where the interest pursued by the press is only one of sensationalism or in order to satisfy public curiosity, then they too may be refused access.[303] However, the land registry is very careful in its assessment of such a situation.[304]

8.7 Access to different parts of the land registry

As was already clear from the very inception of § 12 GBO, a legitimate interest would only give rise to an access right to information. It is not a one-stop-shop, in the sense that once an access right is granted, it will give the holder of an access right the option to browse through all the information on the particular plot of land. This is possible if the legitimate interest extends to *all* information regarding a particular plot of land, or a set of plots of land, but generally it is much more limited. Where a person only needs the name of the owner in order to contact them to avoid a neighbourly dispute, then they will only be granted information from Section 1, which contains ownership information.[305] They will not need any access to the information contained in Sections 3 or 4 containing the burdens and debts registered to the land. In section 3.7.1.1, the different sections that comprise the *Grundbuch* are explained in more detail. In the following sections, the

299 See section 8.5.4.8.

300 See section 8.4 and 8.5.5.1.

301 See more extensively section 8.5.5.1.

302 OLG Frankfurt a.M. 13.07.2000, *BeckRS 2014, 21259*. See also BVerfG 07.10.2000, *ZUM-RD 2001, 159* where the bank is not registered as the owner of the land designated by the journalist, nor was the land in question sold by the German Bundesbank (the subject of interest) to the registered owner. The press did not show a research interest in the registered owner of the plot and as such he would not be granted the right to access.

303 OLG Stuttgart 27.06.2012, *ZUM-RD 2013, 185*, KG 19.06.2001, *ZUM 2001, 878*, BGH 17.08.2011, *NJW-RR 2011, 1651*.

304 See section 8.5.5.1. This in order to prevent meddling with freedom of the press.

305 For example; OLG Karlsruhe 29.05.2013, *RNotZ 2014, 70*.

relationship between the information recorded in those sections and access to the information is discussed.

8.7.1 Index (Bestandsverzeichnis)

The index contains the history of the particular land registry recording and serves as a reference for the land registry officials to locate the different registrations, deeds, etc. The information contained in the Index concerns the location, *e.g.* street, number, and other customary designation, the size of the *Grundstück*, which can give an indication as to its worth. Information in the Index is generally requested in order to get an overview of the different transactions that related to the particular plot of land and therefore serve more as a starting point than as an end. While the information contained in the index seems the least related to personal data, a legitimate interest will still have to be shown, and it may at times be refused.[306]

8.7.2 Ownership Index (Eigentümerverzeichnis)

There is also an Ownership Index,[307] which does not form part of the *Grundbuch* itself, but *may* be held by the land registry.[308] It is not subject to the public faith principle, and therefore it also does not fall under the purview of § 12 GBO directly. There is however, as we shall see, a clear relationship with § 12 GBO. The Ownership Index contains an alphabetically sorted list of names of all those who have a right of ownership, an equivalent right,[309] or an apartment right. It provides an alternative method of searching for a particular registration. Conversely, as it is sorted by owner, the Ownership Index inadvertently gives an overview of the patrimony of an owner in a particular district.

By virtue of a separate § 12a GBO, which was introduced in 1993, the legitimate interest test does form a part of the access regime of the Ownership Index, as well as the *Grundstücke* Index.[310] However, access here should be distinguished from the normal meaning of the word in this chapter. Access does not entail that a copy of the contents of the index is provided, or the literal showing of the result, rather it results in providing the result of a search in the Index.[311] For example, if you are entitled to know if Mrs. [X] has a property in the region, then the result will be a simple 'yes' or 'no', and, if you have a legitimate interest in more information about the property, the referenced information of

306 OLG Düsseldorf 06.10.2010, *FGPrax 2011, 57*, OLG Rostock 07.09.1994, *DtZ 1995, 103*.
307 See also section 3.7.2.1. This may be kept in paper or electronic form, see § 12a(1) GBO, Demharter 2014, p. § 12a GBO, Rn. 3. D.
308 There is no need to have such an index. See section 3.7.2.1.
309 See section 3.7.2.1.
310 RegVBG, 20.12.1993, BGBl. I 2182.
311 § 12a GBO.

the particular registration will be provided and access in the broader sense, which includes copies etc., will be provided by way of § 12 GBO for the registration information of the plot of land and respective section of the land registry. Thus, the access regime under § 12a GBO is limited to the result of a particular search. It serves in this way as a starting point for further exploration of the land registry, which is carried out under the auspices of the legitimate interest test provided by § 12 GBO.

Such access to the Ownership Index will furthermore be limited in the sense that it may only be provided where the State has opened up the Index to the public.[312] Moreover, the access must serve the purpose of finding a particular *Grundbuchblatt* to which further access is requested *and* the legitimate interest test for that particular registration has to be fulfilled.[313] In that way, a link with § 12 GBO is made.[314] Where one does not have a legitimate interest in information in the land registry, or part thereof, then he or she will not be granted access to the Ownership Index. The legitimate interest test is therefore extended to also cover the Ownership Index.[315] Next to this manner of getting access to the Index, access may also be provided to the Index in the event that it will make (further) access to the land registry itself redundant.[316] For example, if the question is merely whether company [X] owns any land in the district, the Ownership Index could be consulted.[317]

There are exceptions to this access regime under § 12a GBO. For example, domestic courts, public authorities, and notaries may be granted access to the Index, without showing a legitimate interest.[318] Additionally, the court, public authorities, and notaries may even have access to the Ownership Index in the more common meaning of the word to the Index, *actual* access, and copies of the result may be provided to these groups.[319]

The access log requirements apply also to the Index, meaning that anyone who gets access to the registration will be logged.[320]

312 This need not be the case. It may very well be that there is such an Index but it is merely used for internal purposes of the administration of the land registry. This is up to the State.

313 § 12a GBO. See also Demharter 2014, p. § 12a GBO, Rn. 6.

314 See for example LG Stuttgart 21.11.2001, *BWNotZ 2002, 68*.

315 For example, whether the landlord who wants to evict his tenant for '*Eigenbedarf*' has any other land, see also section 8.5.2.6, LG Hamburg 01.12.1992, *BeckRS 1992, 08897*.

316 § 12a GBO.

317 For a similar example see Demharter 2014, p. § 12a GBO, Rn. 7.

318 LG Berlin, 28.01.1997, *Rpfleger 1997, 212*. This is in line with § 43(2) GBV and therefore we can assume the same is true for the domestic courts and public authorities. See also Demharter 2014, p. § 12a GBO, Rn 8, jo. § 12 GBO, Rn. 15.

319 § 12a GBO.

320 § 46a(6) GBV. See further on the access log section 8.8.1.

8.7.3 The Grundstück Index (Grundstückverzeichnis)

The *Grundstück* Index is subject to the same rules on access as the Ownership Index. Therefore see section 8.7.2.[321]

8.7.4 Section 1 Grundbuchblatt

Section 1 of the *Grundbuchblatt*, contains information about the current and past owners of the property and the basis for the registration, be it a transfer or succession or otherwise.[322] The information about the owners, present and past, contains their birthdate, and sometimes place of birth. This type of information is often requested by realtors to check whether their involvement led to a transfer to their client, which would mean a commission for them. They therefore only need to know whether their client is registered as the owner of the particular plot of land.[323]

While the burden to satisfy a legitimate interest in information contained in Section 1 of the *Grundbuchblatt* is the lowest, except for the Index, there still are specific requirements that must be taken into account to satisfy this burden. For example, there must be a relationship with the property owner, to warrant access. A legal relationship with a person renting the property who is not the owner would for example not suffice to get access to information about the owner, as presented in Section 1.[324] A legitimate interest may also be limited to the current owner only. In the land registries which are still kept in written form, it may very well be that the previous owners' information is visible and underlined in red to show that they are not the *current* owners of the property. A legitimate interest in the information of the current owner however does not warrant information about the previous owners being provided.[325]

Moreover, one has to request information that can be obtained by having access to Section 1. If one requests information that can only be found in the deeds, then it is deemed that there is no legitimate interest in the information in Section 1.[326]

321 See furthermore on the content of the *Grundstück* Index, section 8.7.3 and 3.7.2.2.

322 See more detailed on what is part of Section 1, section 3.7.1.1.4.

323 See for example LG Köln 02.11.1994, *BeckRS 2015, 04111*. See further section 8.5.2.14.

324 OLG Schleswig 12.01.2011, *BeckRS 2011, 01850*.

325 OLG Karlsruhe 29.05.2013, *RNotZ 2014, 70*.

326 See the example of a grandchild wanting access in order to determine whether a transfer was based on a donation, information which may be found in the deeds, but not Section 1 or the index. OLG Düsseldorf 06.10.2010, *FGPrax 2011, 57*.

8.7.5 Section 2 Grundbuchblatt

The second section of the *Grundbuchblatt* contains the different burdens in relation to the *Grundstück*, with the exception of those that are registered in Section 3. This means information regarding real burdens, ground rent (*Erbbauzins*) including price, servitudes, usufruct, and priority notices may be found in this section.[327] This section contains more personal information concerning the financial status of a registered owner, as it gives information about his liabilities.[328] The legitimate interest therefore also takes into account this more personal nature of the information contained in this section. If a neighbour, for example, wants details regarding the existence of a servitude, then access to Section 2, and possibly the underlying deed as well, will be warranted.[329] However, if a person merely wants to get in contact with the owner, and therefore requires his name, he is not entitled to information in Section 2, as this information it is not warranted for this purpose.[330]

8.7.6 Section 3 Grundbuchblatt

Section 3 contains the burdens on land notably missing from section 2 *Grundbuchblatt*, mainly the security rights. The different forms of *hypothec* that exist in Germany, the *Hypothec, Rentenschuld*, and *Grundschuld*, are recorded in this section,[331] as well as the rights of provisional registration and objections in relation to these rights.[332] This Section contains, next to the designation of the type of right, the name of the person or company which holds the right and the amount which the right secures, as well as the yearly interest rate. An increase or decrease in interest rates, however, does not appear in the land registry.[333] Taken together, Sections 2 and 3 consequently show the outstanding debts associated with the ownership of the land.

The information concerning the existence and type of (potential other) security rights is particularly important to other creditors who intend to secure a loan for the owner of the land. They will require information as to the certainty of their security.[334] This information helps to determine whether they will get a first or second right of *hypothec*, or

327 See more extensively on what is registered and what not in Section 2, section 3.7.1.1.5.

328 Compare with section 5.6.4.3. It influences the value of the property, see for example OLG Düsseldorf 04.02.2014, *FGPrax 2014, 151*. See on the importance of the financial information and link with the informational self-determination right, KG 19.06.2001, *ZUM 2001, 878*.

329 OLG Köln 19.11.2009, RNotZ 2010, 203. See also section 8.5.2.7 on neighbours.

330 OLG Karlsruhe 29.05.2013, *RNotZ 2014, 70*.

331 Although it should be noted that the *Grundschuld* functions similarly to the *Hypothec* and *Rentenschuld*, it may be used to conceal from the register the person who holds the right. See section section 3.7.1.1.6.

332 See extensively on this section 3.7.1.1.6.

333 See BayObLG 09.12.1992, *NJW 1993, 1142*.

334 After title 'Zekere Zekerheid' from Beekhoven Van Den Boezem & Van Den Bosch *MvV* 13/7–8.

whether their security will be last in the row of many other security rights that have effectively already usurped the value the property as collateral. The creditors, or potential creditors, of the owner of a plot of land will therefore have a legitimate interest in the contents of Section 3. For certain creditors, this is somewhat more difficult to prove, for example the right holder of a *Grundschuld* who has been assigned the security right from the person who was registered in the land registry. This is because it is possible to be assigned the right of *Grundschuld* without changing anything in the land registry. However, if the creditor can show he is really the creditor, without needing to submit a declaration of assignment, he will be able to convince the land registry officials of the accuracy of the statement that he has a legitimate interest.[335]

With regard to access to Section 3, the timing is also important. If a person or company is already a creditor of the owner, they may have access, however, if they are in negotiations to provide credit to the owner, they may also have a legitimate interest, but in this case the threshold for providing evidence is higher. A similar situation of differentiation with regard to time exists in the case of renters. Merely having a rental contract is insufficient to warrant access to Section 3 in the land registry.[336] Nevertheless, *prior* to entering into a rental agreement the prospective tenant might require additional information of existing security rights in land, so as to determine the risk of any premature termination of the rental agreement in the event of such a security right ex § 57a ZVG being enforced.[337] In contrast, *after* the conclusion of the rental agreement, the interest in Section 3 can only exist when there are special circumstances at play, such as the intention to undertake major improvements or repairs to the rented premises by the tenant.[338]

*8.7.7 Deeds (*Grundakten*)*

Finally, the land registry also holds a collection of deeds relating to land or otherwise offered to the land registry. The hurdle to get to a legitimate interest here is somewhat higher than in the other Sections. This is in part because the information contained in the deeds is much more expansive and personal than what is recorded in the land registry books. For example, it includes the agreed-upon purchase price of the property. This information is not part of the land registry's *Grundbuchblatt* itself, but it is part of the underlying deed, the *Grundakte*. As such, a particularly careful and strict verification of

335 LG Berlin 19.08.1981, *ZIP 1981, 1197*.

336 BayObLG 09.12.1992, *NJW 1993, 1142*.

337 § 57a ZVG reads: 'Der Ersteher ist berechtigt, das Miet- oder Pachtverhältnis unter Einhaltung der gesetzlichen Frist zu kündigen. Die Kündigung ist ausgeschlossen, wenn sie nicht für den ersten Termin erfolgt, für den sie zulässig ist.' The purchaser in an auction is entitled to terminate the tenancy agreement, subject to the statutory period. The termination is excluded if not executed for the first date at which it is permitted. See BayObLG 09.12.1992, *NJW 1993, 1142*.

338 See OLG Hamm 18.12.1985, *DNotZ 1986, 497* and BayObLG 09.12.1992, *NJW 1993, 1142*.

the legitimate interest is appropriate here.[339] It concerns very personal financial information.[340] This is especially the case as the person is not consulted and is unable to object to the information being given out.[341]

In terms of access to the deeds, there is a distinction to be made by looking at the reason(s) why those deeds are kept by the land registry. The underlying deeds that *are referred to* in the land registry itself are also accessible to anyone who can show a legitimate interest in these documents. This flows from § 12(1) GBO. For example, it is necessary to keep these underlying deeds so that at any time it can be ensured that, for all the entries, the legal conditions were met.[342] If not, there is a possibility to object to the accuracy of the land registry, which may be done years after the registration was made.[343] Where it concerns deeds that are *not* referred to, but still held by the land registry, then they too may be inspected upon showing a legitimate interest, but the legal basis is different; § 46 GBV.[344] § 43 GBV which deals with the presumption of a legitimate interest for public authorities and notaries, as well as the people already registered in the land registry. This presumption also applies to these deeds.[345] The access log requirement is also applicable to these parties.[346]

8.8 Position of the Registered

Under the current law, there is no participation by the land owner or others registered in the land registry in the process of checking the legitimate interest of a person seeking access to their information.[347] The Federal Court of Justice already considered in 1981

339 Although in the weighing of the legitimate interest, the nature of the request and the requester should be taken into account, *i.e.* where it concerns a request by a journalist to access to the *Grundakten*, this should generally weigh heavier. See LG Mosbach 01.09.1989, *NJW-RR 1990, 212*, a ruling which was 'neglected' by practice at the time, see Melchers 1993, p. 313. See for an increased burden to a contract transferring land several decades earlier OLG München 30.11.2016, *NJW-RR* 2017, 266.

340 Böhringer 1987b, p. 185. The cost of rental agreement also constitutes personal data, see VG Berlin 26.01.2017, *BeckRS* 2017, 108993.

341 Compare with section 8.8. OLG Oldenburg 30.09.2013, *RNotZ 2014, 234, 235*. See also OLG Hamburg 24.04.2008, *BeckRS 2008, 21630*.

342 If they are not present and there is no note present stating which other court the deed has been sent to - which is the only legal reason why it may change place see § 17 Geschäftsordnung für die Grundbuchämter - then the land registry and as such the treasury is liable for the (temporary) inability to access the land registry. See on this LG Hannover 15.09. 1987, *NJW-RR 1988, 218*. Demharter 2014, p. § 12 GBO, Rn. 4.

343 § 53 GBO, see also on the importance of the underlying deeds and the access right OLG München 07.06.2010, *NJWRR 2010, 1665*.

344 This used to be covered by § 142 GBO, jo § 46 GBV.

345 § 46(2) GBV.

346 § 46a(6) GBV.

347 BVerfG 28.08.2000, *NJW 2001, 503*. Which was a departure from what was understood in the literature. See note Demharter in *FGPrax 2001, 52, 53*. See also OLG Hamburg 24.04.2008, *BeckRS 2008, 21630*. Doing so would be incorrect. OLG Düsseldorf 04.02.2014, *FGPrax 2014, 151*. See also LG Mosbach 01.09.1989, *NJW-RR 1990, 212*, where it concerned the land registry calling up the registered party, here the municipality, to

that it is not provided for in the GBO.[348] A possible interest of the person who is registered in limiting access to his information held by the land registry is already taken into account by the legislator, the Federal Court of Justice notes, in the fact that such an inspection may only be granted after presenting a legitimate interest.[349] Not hearing the opinion of the landowner prior to giving access to his information is therefore not an interference of Article 103 Basic Law (on a fair trial). The Federal Court of Justice states that the substantive legal relationships are not changed by providing access; they are only made available.[350]

There are also arguments against extending a voice to the particular interests of the registered person in carrying out the legitimate interest test. If the legislator or judiciary would allow such a consultation, it might risk frustrating the legitimate interest of the (legal) person(s) seeking access. This is particularly pressing in matters where the press seeks access and a journalistic investigation could be seriously jeopardised where the subject of the investigation is consulted or notified.[351] This can also be true even if such a notification occurs after the access has been granted and a period of time has passed.[352] Therefore, the small caveat, as provided by the Higher Regional Court Hamm in 1988 on a consultation right for exactly this reason, was overruled.[353] In that case, a notification or consultation right (*Anhörungsrecht*) was expressly granted *because* the press sought access.[354] The reasoning was that such an investigation and subsequent publication would

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see whether they would have any issues with allowing access. See also BayObLG 09.12.1992, *NJW 1993, 1142, OLG Stuttgart 13.01.1992, BeckRS 2012, 02286*. Böhringer 1987b, p. 186. See also OLG München 08.12.2016, *NJW-RR* 2017, 168.

348 'Eine Beteiligung des Grundstückseigentümers oder der sonstigen aus dem Grundbuch ersichtlichen dinglich Berechtigten an diesem Prüfungsverfahren ist in der Grundbuchordnung nicht vorgesehen. Sie ist auch nicht aus sonstigen Gründen geboten. Einem etwaigen Interesse der Eingetragenen an einer Einschränkung der Bekanntgabe der in bezug auf ein Grundstück bestehenden Rechtsverhältnisse hat der Gesetzgeber dadurch Rechnung getragen, daß die Einsicht nach § 12 GBO nur bei Darlegung eines berechtigten Interesses gewährt werden darf.' BGH 06.03.1981, *NJW 1981*, 1563, 1563-1564.

349 BGH 06.03.1981, *NJW 1981*, 1563, 1564.

350 'Die materiellen Rechtsverhältnisse werden durch die Einsichtgewährung nicht verändert; sie werden nur nach Maßgabe der Grundbuchordnung bekanntgegeben.' BGH 06.03.1981, *NJW 1981*, 1563, 1564.

351 BVerfG 28.08.2000, *NJW 2001, 503, 506*. Where a person who is subject to an investigation by the press is notified, this could seriously jeopardise the investigation. Given these risks associated with allowing the consultation, it is excluded. Similar concerns are codified for the registration of access in the access log where it concerns law enforcement, see section 8.5.5.

352 There is no such thing as 'a sufficient time period' expiring, before notification may occur. This cannot be predicted in general, hence it does not exist. OLG Zweibrücken 24.01.2013, *FGPrax 2013, 163*. There was no mention of the access log which, if consulted, provides exactly this type of information. However, it requires that the owners themselves are active, and they are not notified that an entry on the access log has been made, see section 8.8.1.

353 See note by Demharter on the BGH case in FGPrax 2001, 52, 53 under 3.

354 See also Melchers 1993, p. 317 who was critical of allowing a public interest to be accepted as a legitimate interest at all. However, in such events he would advocate that the owner be informed.

give greater publicity to the information in the land registry than is true for normal access cases.[355]

No right of appeal exists against the decision to provide access without consultation in the course of a §12 GBO request. The involvement of the registered person in the process of granting an access right to the land registry therefore is nihil. They are not involved, nor may they object. Their only recourse is after the fact, when they can access the log kept by the land registry of who has been granted access to the land registry for a particular plot of land.

8.8.1 Access Log

A record is kept detailing the times someone accessed the land registry.[356] Any access granted to the Ownership Index and the underlying deeds is included, even though they do not form part of the land registry itself.[357] This log (*Protokoll*) is kept so as to (1) allow one to check the legality of access provided after the fact when there are concrete indications that require such a check, (2) to ensure proper data processing, and (3) for cost surveys of all the inquiries made via the system.[358] Next to the administrative use of the access log, the log may also be accessed by the owner or the holder of a right similar to ownership (*Grundstücksgleiches recht*)[359] of a particular property.[360]

Owners and those registered are however not informed of access granted to a law enforcement agency in the previous six months if the agency has stated that the notification would jeopardise the process of the criminal investigation or procedure.[361] The six-month period can be extended if necessary.[362] However, a similar possibility does not exist for journalists who have been granted access to information to be shielded, even in the event there are similar concerns about influencing the behaviour of the registered party.[363]

355 OLG Hamm 14.05. 1988, *NJW 1988, 2482*. And for instance, in LG Mosbach 01.09.1989, *NJW-RR 1990, 212*, the land registry called the institution registered to see whether they had any objections.

356 See also Demharter 2014, p. § 12 GBO, Rn. 30. Unless it concerns access by the owner himself, see also for notaries parallel route: Deutscher bundestag beschlussempfehlung und bericht, entwurf eines gesetzes zur übertragung von aufgaben im bereich der freiwilligen gerichtsbarkeit auf notare', *Bundestagsdrucksache 17/13136* 2013, p. 20.

357 § 12a(6) GBO, jo § 12(4) GBO.

358 § 83(1) GBV. Demharter 2014, p. § 133, Rn. 9.

359 See more on these types, section 3.7.1.1.

360 § 83(2) GBV. Demharter 2014, p. § 133, Rn. 10.

361 § 46a(3) & 83(2) GBV. A code symbol indicates such a statement by the law enforcement agency, to bring this event to the attention of the land registry.

362 Requiring a similar notice to the land registry as provided in first instance. § 46a(4) & § 83(2), fourth sentence.

363 Compare to section 8.5.5.1.

There is also an access log requirement for the notary, when the access to the land registry is granted by a notary.[364] This is a minimal-log (*Minimal-Protokoll*) which serves as a control mechanism.[365] It furthermore provides for data protection by allowing the DPA to check the access log, even without an indication of a breach.[366] The owner or holder of the property will also be allowed access to this log.[367] It entails the (1) date of access provided, (2) a description of the *Grundbuchblatt* accessed, (3) a description of the person who was granted the access right, and (4) an indication of whether a land registry printout was issued.[368] While the literal text of the law does not indicate that the legitimate interest presented to the notary also has to be written down in the access log, this is appropriate and part of the suggested model for the log presented by Böhringer.[369] There is no indication of how long these logs will have to be kept for, which leads Böhringer to suggest that the logs should be kept for two calendar years after the recording of the data and then destroyed in such a manner that a reconstruction is no longer possible.[370]

This two-year period is in line with the requirements of the access log, as kept by the land registry, which stipulates that, after the second year following the creation of the record on the log, it will be destroyed. During the two years, the recorded data shall be protected with suitable measures against inappropriate use and other misuse of data.[371] Whether the two-year retention period for the access logs is compliant with data protection legislation is unclear.[372] A limitation based on ownership of the land and only for that duration or one year, whichever is longer, would be more in line with the inspection rights flowing from the Data Protection Directive.[373]

8.8.2 Relationship § 12 GBO and Personal Data Protection

While the access log is in part set up for Data Protection reasons,[374] authors have been hesitant to admit, or have outright denied, the influence of data protection laws on the

364 § 133a(3)-(4) GBO.
365 Böhringer 2014, p. 21.
366 See § 38 BundesdatenschutzG, Demharter 2014, p. § 133, Rn. 12.
367 And it may further only be used in order to check the validity of the handing out of the information by the Notary, see § 85a(2) GBV.
368 § 85a(1) GBV.
369 Böhringer 2014, p. 22 ('Der Auftraggeber hat sein berechtigtes Interesse wie folgt dargelegt').
370 Böhringer 2014, p. 22, who bases this on an analogy after § 53(2) GBV concerning unusable deeds of debt. He did not make the analogy with the access log of the land registry itself, which is laid down in § 83(4) GBV and also adheres to a two-year period.
371 § 46a(2) & 83(2) GBV.
372 See in particular CJEU 7 May 2009, ECLI:EU:C:2009:293, C-553/07 (*College van burgemeester en wethouders van Rotterdam v. M.E.E. Rijkeboer*), m.nt Overkleeft-Verburg.
373 Compare with section 5.6.7.4.
374 See section 5.6.7.5.

legitimate interest test of § 12 GBO.[375] For a while in the 1980s and 1990s, it was even not assumed that information in the land registry would fall under the concept of 'data' as protected by the Federal Data Protection Act (*Bundesdatenschutzgesetz*, FDPA) at the time.[376] It should be mentioned that the concept of 'data' (*Daten*) at the time was much more limited in meaning than what is currently understood as data.[377] Furthermore, according to § 45 FDPA at the time,[378] § 12 GBO takes precedence over the data protection rules,[379] and the application of the FDPA is therefore necessarily limited.[380] However, the FDPA would apply in those instances where § 12 GBO would not apply, for example regarding access to the Ownership Index.[381] Additionally, the lack of minimum protection could not be remedied on the State level, as § 12 GBO, being a federal provision, takes precedence over state data protection laws.[382]

In part, this resistance to acknowledging or accepting the influence of data protection laws on the legitimate interest test of § 12 GBO was based on a fear that data protection laws would require a more restrictive – even *too* restrictive – approach to assessing a

375 Lüke 1983, p. 1407–1409 'Das Datenschutzrecht beschränkt das Einsichtsrecht des § 12I 1 GBO nicht'. Melchers 1993, p. 310, note that this was 1983. See also VGH Mannheim 18.06.1980, *BWNotZ 1981, 22-23*, and the very negative reception of that ruling by Gärtner in the case note in BWNotZ, Böhringer 1987b, p. 183, and Melchers 1993, p. 312. Even though it was Böhringer who, a mere two years later, stated that the influence of the Census ruling of the German Constitutional Court was not yet properly researched with regard to the land registry. Böhringer 1989, see also Melchers 1993, p. 311 referring to the ruling.

376 Lüke 1983, p. 1408–1409, Schreiner 1980, p. 52 Melchers 1993, p. 310 in part, because it is a paper-based collection of materials. Böhringer 1987b, p. 182 Böhringer 1989, p. 310. Although where it concerns loose-leaf format, see also the acceptance of the 'data' concept Nieder 1984, p. 336. This has not changed with the new FDPA from 2003 according to Demharter 2014, p. § 12 GBO, Rn. 3.

377 At the time *Daten* specifically referred to 'the data that computers processed', and therefore it had a different meaning than 'data' as used in a more general sense, like the Dutch '*gegevens*' or the English 'data'. See more on this González Fuster 2014, p. 57 Hondius 1975, p. 36.

378 Later § 1 FDPA, see Melchers 1993, p. 310, who also discusses the application at the time. The Act 'appears to embody a strict approach to the processing of personal data, by globally proscribing it, but, on the other hand, it also advances a wide and extremely elastic avenue to sidestep the general proscription, (…)' as noted by González Fuster, see González Fuster 2014, p. 60. While Gozález Fuster was referring to consent, the second pillar of allowing the processing was where another law allowed for such processing, here § 12 GBO.

379 See for a more modern example a case concerning an apartment owner who wanted access to information on one of his fellow apartment owners and was denied access to Sections 2 and 3 of the *Grundbuchblatt*, the applicant attempted to get access based on § 3 Berlin Freedom of Information Act (*Berliner Informationsfreiheitsgesetzes*). Irrespective of whether such an act was applicable, it would not give rise to an access right, as personal data (here information relating to burdens on the property) would be processed by giving access, and § 6 of the statute would have private interest of the registered prevail in that circumstance. KG 03.04.2014, *ZWE 2014, 310*.

380 Böhringer 1987b, p. 182 Kuntze & Eickmann 2006, p. 551. Lüke 1983, p. 1408.

381 Böhringer 1989, p. 311, which considers the practice of granting access in a similar fashion to § 12 GBO 'not unproblematic' in light of the Federal Data Protection Legislation. And in a similar vein to access to deeds not specifically mentioned in the land registry. The same would be true for the deeds not referred to in the land registry as well as the *Grundstücke* Index.

382 Article 31 Basic Law, which states: 'Bundesrecht bricht Landesrecht'.

legitimate interest.[383] This lack of acknowledgement, while persistent,[384] has been somewhat mitigated. If we look at the current interpretation of the legitimate interest test as prescribed by § 12 GBO, it is clear that it is influenced especially by the fundamental right to informational self-determination.[385]

Those registered in the land registry also enjoy fundamental rights protection by way of the Basic Law: Article 2 in connection with Article 1 Basic Law. These rights guarantee the right to privacy, the right of the individual to decide for themselves when and within what limits the details of their lives are revealed. The Constitutional Court has stated that the land registry and the deeds held by the land registry contain a wealth of (personal) data about personal, family, social and economic aspects.[386] If a third party is granted access to this information, there is an encroachment of the informational self-determination right in relation to this data.[387] This encroachment on the right to informational self-determination may be justified if the party being granted access has a legitimate interest in the information.

Informational self-determination influences both the data protection rules as well as the legitimate interest test.[388] In 2000, the German Constitutional Court reiterated this again by delineating the scope of § 12 GBO in line with this fundamental right,[389] stating that, while the scope of § 12 GBO has been interpreted in a broader manner than its original regulatory purpose,[390] this should not mean that the purpose serves no purpose anymore.[391] Rather, it is now only a part of the equation. The interpretation of the access right has changed or evolved.[392] The delimitation of the right to access is in modern terminology the protection of the registered person.[393] In part, this protection was al-

383 Böhringer 1987b, p. 182 'Eine restriktive Handhabung der Grundbucheinsicht mit Rücksicht auf den Datenschutz ist abzulehnen. Dies würde dem Sinn und Zweck des § 12 GBO widersprechen. Das fein abgestimmte System zwischen materiellem und formellem Publizitätsprinzip darf nicht im Wege der Auslegung des Begriffs 'berechtigtes Interesse' aufgrund der Datenschutzgedanken gestört werden; dazu wäre eine ausdrückliche gesetzliche Fixierung erforderlich'.

384 Demharter 2014, p. § 12 GBO, Rn. 2–3.

385 See more on this section 8.4. See also the by that time enacted *Gesetz zum Schutz vor Mißbrauch personenbezogener Daten bei der Datenverarbeitung* (*Bundesdatenschutzgesetz*, BDSG).

386 See also Böhringer who states that the information in the land registry provides a 'deep insight into the personal relationships of those concerned', Böhringer 1987b, p. 182.

387 BVerfG 28.08.2000, *NJW 2001, 503, 505*.

388 On the influence on data protection in general see section 5.6.

389 In line with the Census Ruling of 1983, BVerfG 15.12.1983, *NJW 1984, 419*. The German Constitutional Court's ruling of 1983 as part of the third-generation statute – skipping the second-generation statutes which were more directed and involving the individuals rather than merely the State – went beyond this narrow interpretation which is not illogical as Mayer-Schönberger notes, because it came at a time 'when civic virtues and traditions, emphasizing active and deliberate participation over negative liberties and freedoms, and were enjoying a sudden revival.' Mayer-Schönberger/Agre & Rotenberg 1997, p. 229.

390 Strictly in terms of the publicity principle in property law.

391 Indirectly countering the fear as expressed by Böhringer and Eickmann.

392 Not the words of the German Constitutional Court.

393 BVerfG 28.08.2000, *NJW 2001, 503, 504*. 'Dass durch die erweiternde Auslegung des § 12I GBO der Anwendungsbereich der Vorschrift über ihren ursprünglichen Regelungszweck ausgedehnt wird, bedeutet

ready served by the original regulatory purpose, which limits access to those that (seek to) participate in the land registry related legal transaction. However, over the years it has been extended to situations outside that narrow scope, and protection is based on other explanations, *i.e.* the self-determination right of the registered.[394]

This delimitation of access based on the protection of the registered can also be found in the proportionality requirement that forms part of the legitimate interest test of § 12 GBO. This is especially prevalent where it concerns different fundamental rights which require a balancing effort to be made. Here the restrictions to the personality right on the one hand and freedom of the press, for example, on the other are only lawful when they are proportionate.[395]

8.8.3 A right to be forgotten for the registered?

There are some cases,[396] as early as 1987,[397] that deal with requests by owners to have something akin to a 'right to be forgotten'[398] or a clean start. The latter should be taken rather literally. Often the claim was to have an old, paid off, debt not only be struck from the record, where a red strike out signals the invalidity of the debt or the right attached to the debt, rather the owner wanted a clean sheet to be drawn up, without the discharged debt mentioned. In that way, the land registry record would no longer show the debt.[399] Allowing such a clean sheet would place the owner of the land on equal footing with those people entered into the Debtors Index (*Schuldnerverzeichnis*), which had a clean slate policy. A legal basis for their claim was generally sought in § 10 GBO, which allows for a deed to be withdrawn from the land registry where it serves no function whatsoever, not on the right to be forgotten as we understand it now.[400] The argument was that, as the debt had been struck from the record, and it no longer existed, the deed itself served no purpose either and could be removed. However, such a claim would not succeed where it

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nicht, dass dem herkömmlichen Regelungsziel keinerlei Bedeutung zukommt. Die Eingrenzung des Einsichtnahmerechts dient - in moderner Terminologie - dem Persönlichkeitsschutz der Eingetragenen.' Compare with older literature, which had a narrower interpretation still very much focused on limitations stemming from not taking part in commerce, for example Melchers 1993, p. 311.

394 BVerfG 28.08.2000, *NJW 2001, 503, 504*. 'Wird der Schutz anders als bei der üblichen Einsichtnahme nicht durch Begrenzung des Einsichtsrechts auf die Teilnahme am grundbuchbezogenen Rechtsverkehr erfüllt, muss ihm anderweitig bei der Ausgestaltung des Einsichtsrechts Rechnung getragen werden'.

395 BVerfG 28.08.2000, *NJW 2001, 503, 505*.

396 OLG Düsseldorf 03.07.1987, *DNotZ 1988, 169, BayObLG 14.05.1992, MittRhNotK 1992, 188*, OLG Celle 24.01.2013, *NJOZ 2013, 764*, OLG München 05.11.2013, *NJOZ 2014, 687* and OLG Düsseldorf 15.02.2017, *FGPrax* 2017, 100 with note by Wilsch. See also Demharter 2014, p. § 12 GBO, Rn. 27.

397 OLG Düsseldorf 03.07.1987, *DNotZ 1988, 169*.

398 See extensively on the right to be forgotten section 5.6.7.4.

399 For example, in OLG Düsseldorf 03.07.1987, *DNotZ 1988, 169*.

400 For more on this see section 5.6.7.4.

concerned those deeds registered which form the basis for any past registration in the land registry, as these always serve a function, even in the event the registration itself has been struck from the record.[401]

Hence, these claims have generally not been supported by the courts.[402] In the 1987 case of the Higher Regional Court Düsseldorf, the request for a clean sheet was denied, because it would not yield the full results the applicant sought. Even though it might not be found on the *Grundbuchblatt*, it would still be possible to have access to the information from the underlying deeds.[403] Furthermore, the Higher Regional Court, contrary to the opinion of the lower court, did not consider that it follows from Article 3 Basic Law, that the owner is placed on equal footing with the people entered into the Debtors Index. The two registries served a very different function. In particular, for legal certainty reasons the request should be denied. Legal certainty in land transactions would become difficult and uncertain to attain if those entitled to access would be cut off from it.[404] The Court noted that the protection of ownership, but also ownership's social function,[405] would not be conducive to such a development.[406] The distinction between the Debtors Index and the land registry was also made clear from the fact that financing homes is associated with higher risks than those apparent from granting personal loans. It follows that the request for a 'clean' transcribed *Grundbuchblatt* could not be granted under the law as it stood at the time.[407]

A mere five years later, a similar case was brought before the Bavarian Highest Regional Court.[408] Here too, there was a request for a clean, new land registry registration sheet, after a compulsory collateral *hypothec* (*Zwangssicherungshypothek*) was registered

401 See on the importance of keeping older deeds, § 52 GBO and OLG München 07.06.2010, *NJWRR 2010, 1665*.

402 A claim for the creation of a new land registry sheet and transcribing the information from the old onto the new will be granted exceptionally, when the legal requirements for registration were not met, resulting in an incorrect registration. BayObLG 14.05.1992, *MittRhNotK 1992, 188*. The introduction of the database-*grundbuch* which only shows the current rights in relation to land effectively does establish such a 'clean slate', see note by Wilsch OLG Düsseldorf 15.02.2017, *FGPrax* 2017, 100.

403 OLG Düsseldorf 03.07. 1987, *DNotZ 1988, 169, 170*. See for similar reasoning BayObLG 14.05.1992, *MittRhNotK 1992, 188*. Böhringer 1989, p. 310–311.

404 The same reasoning can be found in BayObLG 14.05.1992, *MittRhNotK 1992, 188*.

405 See in a similar vein also Böhringer 1987b, p. 183 'Das Einsichtsrecht interessierter Dritter stellt sich als ein Reflex des sozialen Kontakts der im Grundbuch eingetragenen Person nach außen dar: dieser am Rechtsverkehr Beteiligte muß akzeptieren, daß dabei ein bestimmtes Maß an Information über seine Person bekannt wird; die Teilnahme zu den dort möglichen (günstigen) Bedingungen wird ihm umgekehrt nur zu diesem Preis gestattet'.

406 'Vielmehr würde der Immobiliarrechtsverkehr erschwert und verunsichert, soweit die Beteiligten von Informationen aus dem weitgehend Richtigkeit gewährleistenden öffentlichen Register abgeschnitten und auf persönliche Auskünfte und sonstige Recherchen verwiesen würden. Dem Schutz, aber auch der sozialen Funktion des Eigentums wäre eine solche Entwicklung nicht dienlich.' See aslo Melchers 1993, p. 311, OLG Düsseldorf 03.07.1987, *DNotZ 1988, 169, 171*. Different see Böhringer 1989, p. 311.

407 OLG Düsseldorf 03.07.1987, *DNotZ 1988, 169*, 171. Although see for a positive commentary of the idea by Böhringer 1989, p. 311–313 after the Census ruling by the BverfG. BverfGE 15.12.1983, *NJW 1984, 419*.

408 BayObLG 14.05.1992, *MittRhNotK 1992, 188*.

and subsequently cancelled. The now cancelled *hypothec* still had a negative influence on the creditworthiness of the owner.[409] The Court here too denied the request for a clean slate, stating that this is simply the 'social reality' (*sozialer Realität*) and cannot be attributed to the person alone, even if it concerns his personal data. He must accept the overriding public interest restrictions on his right to informational self-determination. These restrictions find their basis in statutory law and are in strict observance of the requirements of proportionality and legal clarity.[410] Thus, an appeal to the informational self-determination of the owner was not sufficient grounds for the creation of a new *Grundbuchblatt*. Furthermore, it was reiterated that publicity of the land registry also exists in respect of deleted records, as they form part of the deeds.[411] Thus, in the balancing of the public interest in the disclosure of the land registry contents and the deeds it holds, even when they are already closed and no longer of concern for current legal processes, the outcome was in favour of keeping access to these (old) deeds open. The land registry can only fulfil its duties reliably when information on both present and past legal relationships concerning land are kept. The earlier registrations remain relevant, even after destruction, especially for a potential lender of the landowner.[412]

The penultimate question answered concerned the effectiveness of making a new land registry sheet in such a case. The effect was limited because the old sheet and deeds still form part of the underlying deeds *(Grundakten*) held by the land registry[413] and, as such, would still be possible to be accessed via the § 12 GBO test. The Court therefore noted that, because the technique of transcribing the information on a new sheet would have a limited effect, the effect should also be measured against the administrative burden it would place on the land registry to comply with such a request.[414]

What remained was the fact that this negatively influences the current creditworthiness of the landowner. The Higher Regional Court was rather blunt in ruling that it was their own fault. According to the Court it cannot be disregarded that the persons concerned are themselves responsible for the consequences of enforcement measures against them.[415]

All four cases where a new sheet was requested to erase old debts from the records[416] were cases ruled on prior to the CJEU case of *Google Spain*, in 2014 and the *Manni* case in 2017. These CJEU cases concerned the right to be forgotten online (*Google Spain*) and in

409 See in similar vein OLG Celle 24.01.2013, *NJOZ 2013, 764* and OLG München 05.11.2013, *NJOZ 2014, 687*.
410 BayObLG 14.05.1992, *MittRhNotK 1992, 188, 189*, referencing the BVerfG 25.07.1988, *Rpfleger 1989, 121*.
411 BayObLG 14.05.1992, *MittRhNotK 1992, 188, 189-190*.
412 BayObLG 14.05.1992, *MittRhNotK 1992, 188, 189*.
413 Compare with the OLG Düsseldorf 03.07.1987, *DNotZ 1988, 169*.
414 BayObLG 14.05.1992, *MittRhNotK 1992, 188, 189*.
415 'Schließlich kann auch nicht außer Betracht bleiben, daß die Betroffenen Vollstreckungsmaßnahmen und ihre Folgen grundsätzlich selbst zu vertreten haben.' BayObLG 14.05.1992, *MittRhNotK 1992, 188*, 190. Interesting side note. The judge who wrote the ruling was Demharter.
416 OLG München 05.11.2013, *NJOZ 2014, 687*, and OLG Celle 24.01.2013, *NJOZ 2013, 764* were not discussed extensively.

a companies register (*Manni*), and they are discussed in more detail in section 5.6.7.4. What is of interest here was the suggestion put forth by the Commission in the *Manni* case. AG Bot discusses the proposal in his Opinion in *Manni*.[417] The AG, however, did not agree with the EU Commission's proposal:

> to limit disclosure of the information entered in the companies register, after a certain period has elapsed from a commercial company ceasing to trade, to a restricted category of third parties, namely those demonstrating a legitimate interest in having that information which prevails over the fundamental rights of the person concerned under Articles 7 and 8 of the Charter, is, as EU law presently stands, such as to ensure a fair balance between the objective of protecting third parties and the right to protection of personal data entered in the companies register.[418]

AG Bot considered the objective pursued of the First Company Directive, which governed the open nature of the companies register, to be broad enough to encompass anyone with an interest.[419] Moreover, the AG highlighted certain practical issues that this proposal of the Commission would create. Chiefly, his objection was that the solution 'has the major disadvantage of leaving it to the unfettered assessment of the authorities keeping companies registers' to determine the time when 'unrestricted disclosure' transforms into 'selective disclosure', as well as whether or not there is a legitimate interest. This causes three issues: (1) it presents 'a major risk of divergence in the assessments made by authorities responsible for keeping companies registers'[420] and could lead to disrupting the equality of access to such data within the EU,[421] and (2) it would 'involve a disproportionate administrative burden [on those keeping the registry, AB], in terms of time and cost, which would ultimately call into question the capacity of the register to fulfil its functions.'[422] (3) it would present the risk that people with a legitimate interest would not be able to prove such an interest and therefore 'the effect would be to lessen their confidence in the register.'[423]

417 It was not really taken up by the CJEU.

418 AG Opinion 8 September 2016, ECLI:EU:C:2016:652, C-398/15 (*Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni*) at 87.

419 AG Opinion 8 September 2016, ECLI:EU:C:2016:652, C-398/15 (*Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni*) at 91.

420 AG Opinion 8 September 2016, ECLI:EU:C:2016:652, C-398/15 (*Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni*) at 92.

421 AG Opinion 8 September 2016, ECLI:EU:C:2016:652, C-398/15 (*Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni*) at 93.

422 AG Opinion 8 September 2016, ECLI:EU:C:2016:652, C-398/15 (*Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni*) at 96.

423 AG Opinion 8 September 2016, ECLI:EU:C:2016:652, C-398/15 (*Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni*) at 97.

The Commission proposal resembles a legitimate interest test similar to the § 12 GBO. It is therefore of particular interest that the *German* government suggested that a legitimate interest test would not be a good idea for the companies register.[424] In particular, the AG referred to the German government for the argument that introducing such a test would involve a disproportionate administrative burden on the keepers of the register.[425] With regard to accessing the companies register and the land registry, the German government accordingly distinguishes between the two.[426]

8.9 Conclusions

8.9.1 From open to closed, from legal to legitimate

Taking all the foregoing into consideration, certain conclusions may be drawn. It is remarkable that the legislative history seems to suggest that the German land registry would have been a fully public register if it were not for Prussia. Such a public registry was, after all, the wish of the majority of States and was backed by the Federal Government.[427] However, even though the Prussian Government supported the minority view in the Bundestag of keeping the registry closed, it managed – albeit under the threat of blocking the entire legislation on the land registry – to get their amendment put through, which restricted access to the land registry to only those who could show a *legal* interest. Such a *legal* interest was necessarily much more restricted than what is currently found in § 12 GBO; the *legitimate* interest test. A mere two months prior to the enactment of the *Grundbuchordnung*, the words were changed and reflected the current provision and the current legitimate interest test. Thus, in one fell swoop, without any substantive discussion recorded, the legitimate interest test was introduced and made law.[428]

Where a *legal* interest test would have been much easier to discern, either access was provided for in the black letter law or it was not, the legitimate interest was an open norm that had to be interpreted by the courts.

424 AG Opinion 8 September 2016, ECLI:EU:C:2016:652, C-398/15 (*Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni*) at 96.
425 AG Opinion 8 September 2016, ECLI:EU:C:2016:652, C-398/15 (*Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni*) at 96.
426 See also Berlee 2017a, regarding the scope of the *Manni* ruling.
427 See section 8.2.
428 See section 8.2.

8.9.2 Flexibility in an open norm

The very nature of § 12 GBO, an open norm, allows for flexibility in deciding who should be granted access to the information contained in the land registry. Changing thoughts and perceptions of both publicity and transparency as well as of privacy and data protection, and even more remote areas such as competition law,[429] can be seamlessly incorporated into the rulings based on § 12 GBO and they have been.

The original interpretation of when a legitimate interest is present has been supplemented and has led to an acceptance of not only those interests that are directly related to the land and relationships therein, as originally envisaged,[430] but have come to include public interests for example.[431] The concerns of some scholars that the legitimate interest test has been stretched too far and is veering towards the direction of an open register[432] are unwarranted. The same flexibility that stretches the legitimate interest test also curtails it. One example of such curtailment is seen in the legitimate interest test applied to a fellow apartment owner. Where the case law up until 2015 had considered a legitimate interest to be present arising out of the fact that all apartment owners were bound to one another in some shape or form, the Higher Regional Court Hamm in 2015 overruled the older case law and put in place a higher threshold in order to access the land registry information of one of their fellow apartment owners.[433] These are examples of individual cases where the flexibility of § 12 GBO has reared its head. The same can be perceived on a more abstract level, which is discussed next.

8.9.3 Flexibility Serving Publicity and Privacy

The flexibility of the legitimate interest test has even changed the scope of the right to access. The delimitation of the right to access was originally connected to the interest of those that (seek to) participate in a land registry related legal transaction. In effect, this was linked directly to the public faith principle, which in turn is tied directly to the publicity principle. Therefore, initially, access was governed by the publicity principle. However, as the German Constitutional Court explained in 2000, publicity is no longer

429 Although here the influence was not so much on § 12 GBO's legitimate interest test, rather the *presumption* of having a legitimate interest which was initially accepted: for example for banks set up by law and not those set up by private parties. As they are now all considered 'universal banks' the distinction between the two should be removed where it concerns matters of § 12 GBO. This was as much a competition law argument (retaining the distinction gives them a competitive advantage) as well as one based on equality before the law (they perform the same duties, and therefore they should be treated the same).

430 See section 8.2.

431 Although this was not accepted easily, see section 8.5.5.

432 See section 8.5.2.6.

433 See section 8.5.2.3.

the sole (contributing) factor in determining an access right.[434] Rather, the delimitation of the right to access in modern terminology is the protection of the registered person.[435] This change has not done away with publicity at all; to be more precise publicity has been supplemented with considerations based on the privacy of the registered person. There has hence been a notable shift from an access right shaped by publicity to one formed by publicity *and* privacy.

For a long time, matters of privacy and protection of personal data were not associated with the dealings of the land registry.[436] The first legislative efforts directed at governing the processing of personal data by the States, and later at a federal level, were not applicable to the land registry. Over the years, however, especially in the margins of the application of § 12 GBO, for example in the maintenance of an access log, data protection legislation did make its mark. However, in the application of § 12 GBO this has not been explicitly recognised. Nevertheless, here too the flexibility of the legitimate interest test is paramount.

While data protection legislation may not directly influence § 12 GBO, it does so by way of the indirect application of the underlying fundamental right to personality and informational self-determination. Informational self-determination was introduced by the German Constitutional Court in the *Census* case of 1983 and has been readily accepted since then as a fundamental right.[437] The right to informational self-determination is part of the general right of personality, which is protected by Article 2(1) in conjunction with Article 1(1) of the Basic Law.[438] As a starting point, the fundamental right basically gives individuals the power to determine when and to what extent they want to disclose information regarding their lives. In the context of land registry information, this means that the prerogative of providing information held by the land registry lies principally with the registered person. However, fundamental rights are not absolute rights. They may be restricted, this is no different for informational self-determination. However, restrictions to the fundamental right of informational self-determination are only permitted in the event of an overriding public interest. One such restriction can be found in § 12 GBO, which gives access to personal information about those registered in the land registry, not only upon their request, but also for other objective reasons justified by the circumstances, *i.e.* in the event of a legitimate interest shown.[439]

The application of informational self-determination does not stop there. While § 12 GBO might derogate from the right to informational self-determination, it also makes room for the operation of that right by way of the legitimate interest test. The open norm

434 BVerfG 28.08.2000, *NJW 2001, 503*, see section 8.8.2.
435 See section 8.8.2.
436 See section 8.8.2.
437 See section 8.4.
438 See section 8.4.
439 Even though § 12 GBO was enacted some 50 years prior to the enactment of the Basic Law. On the compatibility of § 12 GBO with the Basic Law itself see section 8.4.

of § 12 GBO allows for a further application of the informational self-determination right by a weighing of different interests, and, as we have seen above, this includes the interests of the registered person.[440] This room for the continued effect of the informational self-determination right only exists by virtue of the flexibility of § 12 GBO. As the interests of the registered person are taken into account by the legitimate interest test, there is an indirect application of data protection norms. Data protection legislation is enacted in accordance with, and stemming from, the very same informational self-determination right. As such, data protection legislation itself may not be directly applicable; the fundamental right to informational self-determination, which also forms a basis for data protection legislation, is entrenched in the application of § 12 GBO's legitimate interest test.

8.9.4 Flexibility and Legal Certainty

The foregoing suggests great flexibility in the practical application of the legitimate interest test. As such, it might give rise to the incorrect idea that flexibility creates legal uncertainty in the application of the norm. Such certainty is achieved to a large extent by the interpretation of the courts of the legitimate interest as is evidenced by the case law overview. These cases provide an answer in concrete cases to the question of when one has a legitimate interest or not, but it also provides certain parameters which determine the success of an application for access. This judicial interpretation exists next to the already carved out situations by the legislator, which presume a legitimate interest in certain instances. Together, the legislator and courts have provided for an elaborate overview of instances in which a legitimate interest is present or not.[441]

The different parameters that influence the success of a claim for access today[442] include but are certainly not limited to:

1. The time at which the request for access was made (*e.g.* before or after entering into negotiations, or prior or post the death of a legator),[443]
2. The nature of the interest (*e.g.* public or private),
3. The type of person requesting information and the capacity in which they do so (*e.g.* a notary requesting access for himself or in the course of carrying out his profession),[444] and

440 See section 8.8.2.

441 In essence, providing something akin to the optimal balance point, to borrow a term from Merrill and Smith, see section 2.6.2.1.

442 As opposed to some 40 years ago, for example, when it was still very contentious whether a public interest could serve at all as a legitimate interest.

443 See section 8.5.2.12.

444 See section 8.5.1.

4. To what particular section of the land registry or the underlying deeds access is requested (*e.g.* someone might have a legitimate interest regarding the name of the owner but not in the purchase price information recorded in the deeds).

8.9.4.1 Time

Time and timing plays an important role in whether an application for access to the land registry will be successful. For example, there is a general rejection of claims for access that are based on future events which have not yet materialised. A child requesting access to the land registry seeking to determine the legitimate portion that he will inherit, for example, will not have a legitimate interest when the parent is still alive.[445] Such claims – and therefore also the access right – only materialise when the parent has died.[446] The same is true for access sought in relation to possible future maintenance claims a parent or child might have.[447] In essence, this is a matter of timing. Timing is furthermore important where it concerns the legitimate interest of possible future buyers, realtors[448] – for whom entering into negotiations triggers the access right[449] – and marks a difference between a possible tenant and someone who has already signed the rental contract, both of whom may have access but for very different reasons.[450]

8.9.4.2 Nature of the interest: Public or Private

Next to matters of timing, the nature of the interest also determines its scope and the requirements for showing a legitimate interest. Not only does the nature of the interest denote whether or not the parallel access route to the land registry by way of a notary is open to the applicant – affirmative for private interests, negative for public interests – there are also differences as to the number and type of applicants that can appeal successfully to represent a public or private interest.

For example, there was much ado about allowing the public interest to serve as a basis for a legitimate interest right,[451] however when finally accepted, it came with a very narrow interpretation of who may serve as a champion of the public interest.[452] Advocating a public interest is generally restricted to public authorities and supervisors that have

445 See section 8.5.4.8.

446 If not, the land registry would effectively be an 'open register' for children and parents alike for their familial relationship. See section 8.5.4.8 and 8.5.4.1.

447 See section 8.5.4.2.

448 See section 8.5.2.14.

449 See section 8.5.2.12.

450 See section 8.5.2.6.

451 See section 8.2 and 8.5.5.

452 See section 8.5.5. This for example does not generally include an individual. Only in exceptional circumstances may he or she be granted access, by advocating for the public interest.

been legally mandated[453] and the press.[454] This is akin to a subsidiarity requirement, which is present for both public and private interests. The judiciary has made it clear that there are 'proper channels' that have to be exhausted before an access right is granted to an individual who has not been tasked with enforcing a specific public or private interest.[455] A particular role for the press has been carved out here.

Where a press interest is served, the legitimate interest test is necessarily carried out very marginally. In lieu of the constitutional protection afforded to the press, there is a worry that anything more than a marginal check would be an *a priori* governmental review of the press interest and as such would be incompatible with the constitutional protection of the press.[456] Basically, the only check that may be carried out by the land registry is whether the information that can be gleaned from the land registry could potentially lead to something worthy of a public interest.[457] Essentially, the only thing that would not withstand such a test is where the information would serve a public *curiosity* and not so much a public *interest*.[458] An example of such a public *curiosity* exists where access is requested to find out how a celebrity has financed the purchase of their home.[459] There is therefore a very limited check carried out of the legitimate interest that a journalist claims. There is nonetheless a check of the legitimate interest and, therefore, while it comes close, there is no *presumption* of a legitimate interest as exists for certain other professions such as notaries.[460]

8.9.4.3 Type or Capacity of Applicant and the presumption of a legitimate interest

As we have seen with the example of the press above, the capacity or type of applicant carries with it different requirements to show a legitimate interest. The legislator has even set aside the demand of evidence to show a legitimate interest for certain professions, most notably for notaries. They, as well as public authorities,[461] are *presumed* to have a legitimate interest and will be granted access to the land registry by merely showing that

453 § 43(1) GBV. See section 8.5.1. This includes Members of Parliament for example.

454 See section 8.5.5.1.

455 See section 8.5.5 for public interests and section 8.5.2 for private interests, which seems to adhere to a more relaxed approach, specifically recalling that the access right could exist individually next to the representative in certain instances. One example where there is something akin to a subsidiarity test is with the realtor. A realtor must have approached his client (seller or buyer) first in order to get the required information to determine his brokerage fee. He too, therefore, must have exhausted the proper channels in order to get access. See section 8.5.2.14.

456 See section 8.5.5.1.

457 See section 8.5.5.1.

458 See section 8.5.5.1.

459 See section 8.5.5.1.

460 See section 8.5.1. The burden of proving one has a legitimate interest is also very limited where it concerns a child of a (recently) deceased parent who wishes to examine the extent of his legitimate portion of the inheritance. See section 8.5.4.8.

461 See 43 GBV.

they belong to that particular exempted profession.[462] They may even be granted access by way of having a direct connection to the land registry's database. Next to those people which were exempted from having to show a legitimate interest, as determined by the legislator, the judiciary has added another. A similar presumption has been added by the judiciary with regard to direct descending heirs, *i.e.* children, who have a legitimate interest based on their claim to the legitimate portion of the inheritance of their deceased parent(s). They only need to show that they are an heir, nothing more[463] and, even then, there is no obligation to show a certificate of inheritance.[464]

8.9.4.4 Type of Section to which Information is Requested

The final parameter which influences the success of a request for access to information held by the land registry is the specificity requirement of the information required. A request will have to detail the section of the land registry sheet the person seeks access to. A request for access will not automatically encompass all information held on that particular plot of land. This ties in with the legitimate interest test. A legitimate interest may very well be present for information regarding the current owner's name (as recorded in Section 1), but it will not automatically extend to information about the burdens on the plot of land (Sections 2 and 3). The legitimate interest test for all the different sections will have to be fulfilled before access is provided to them. This does not mean that if one wishes to have access to Sections 1, 2 and 3, they will have to apply three different times, rather they will have to show a legitimate interest that encompasses all three Sections. Otherwise, their claim might be (partially) denied.[465] The threshold for each of the Sections is also different, which flows from the nature of the information held therein. Although all Sections contain personal information, the courts have generally adhered to a higher threshold for Section 3, which contains information about security rights established in the property and therefore concern financial information. An even higher threshold is provided for the information contained in the underlying deeds, which contain the consideration provided for the transfer[466] or the establishment of the limited property right, and therefore it is considered even more directly connected to the personal financial sphere of an individual.[467] Therefore, the specificity of the request will determine its outcome. If a person only provides enough reasons why they should be granted access to Section 1, but it also requests information about Section 3 without providing adequate reasons, then, while he or she may have a legitimate interest in the

462 See section 8.5.1. It is a rebuttable presumption, which can have after the fact consequences.
463 See section 8.5.4.8.
464 OLG Frankfurt a. M. 17.02.2011, *BeckRS 2011, 17459*.
465 See section 8.7.
466 Which is not recorded in the land registry registration itself.
467 See section 8.7.7.

information, their request will fail in relation to Section 3 due to a lack of substantiation of the legitimate interest. The link with providing sufficient evidence is therefore clear.

8.9.5 *Some questions about the role of the notaries and the desirability of the parallel access route to Land Registry information*

The role of the notaries in the access to information in the land registry has been significantly increased with the opening up of the parallel route to accessing information held by the land registry. This parallel route enlists the help of notaries to provide access to the land registry other than for their own work as a notary in the course of a specific transaction. This power provided to notaries relieves the land registry of some work in assessing a legitimate interest while at the same time is a source of some potential worries. With the introduction of the legislation, a formerly exclusive power of the land registry is now shared with the notaries.[468] This raises questions on numerous levels.

Firstly, it raises a question in relation to the review process. Review of the decisions made by the notaries follows a different judicial route than that of the land registry and, as such, the judicial development of the interpretation of the legitimate interest test is conducted at different levels, whether this will give rise to a two-stream development of the legitimate interest test remains to be seen. If such a different development should arise, concerns for legal certainty of the legitimate interest test can be raised. Secondly, and this ties in with the review process, the two different routes for decision making also give rise to questions of the transparency of the decisions to accept or deny a legitimate interest. Although both the land registries and notaries will have to maintain an access log,[469] the vast number of notaries, compared to the relatively limited number of land registries within Germany, makes it more difficult to conduct an adequate review of the decisions taken. There is something to be said of a more centralised approach to review as opposed to a more scattered approach. This leads to the third point: the knowledge aspect. The land registries have dealt with access to information in the land registry for over 100 years by now, whereas the notaries have been active for less than five years of being able to deal with these requests.[470] Although there are no guidelines provided by the *Bundesnotarkammer*, the notaries can draw on the case law itself and the categorisations of such case law by scholars in Germany.[471] Providing access to the land registry will nevertheless remain less of an integral part of their work, compared with the land registry, and, as such, the frequency and number of requests for access will most likely be

468 See section 8.3, this was also the first response and objection made by the Federal Government upon introducing the draft legislation.

469 See section 8.8.1.

470 Unfortunately, there are no statistics on how often access to the land registry has been applied for according to § 133a GBO. At least, not with the *Bundesnotarkammer*.

471 See section 8.5.2.

lower for notaries than for the land registry.[472] One of the reasons that access to the land registry is now also available with the notaries was in order to close the gap between the citizen and government, in this case the land registry.[473] Rather than having to go to the land registry far away, a person could visit his local notary and get access to the information. This argument seems moot when the land registry records are now available in a fully electronic format and can be accessed merely with an internet connection.[474] A penultimate consideration to be taken into account is the desirability of weighing fundamental rights, which is part of the legitimate interest test, to be made by notaries, even if they are public law notaries, rather than the land registry which is considered part of the courts. The fifth and final consideration that should be taken into account to assess the desirability of the parallel access route is the fact that there is now a shift of power to grant access to the land registry from an *independent* party to all land dealings (the land registry) to a party that has a vested interest in just about every land transaction: the notary.[475] Finally, it is questionable whether opening up a parallel route to access to the land registry in 2013 was ultimately a good idea. Without further research, based in part on statistics unavailable at this point, this question shall remain unanswered.

8.9.6 A balanced system of access to information in the Land Registry

In conclusion, the German approach to access to information in the land registry is a sytem in which publicity and privacy are both taken into account and balanced in each case where access to information in the land registry is requested. This test allows for the two 'competing' starting points, publicity and privacy, to be balanced. When an interest of a third party seeking access is valid because it is based on the publicity principle, access is granted. However, if such a request for access is not based on the publicity principle, then the interests of the person registered will require that whomever seeks access will have to show another legitimate reason for getting access to the information in the land registry. This test has been one that has stood the test of time. It proves its worth nowadays even more, in a time when there is increased attention for data protection issues on a

472 Although this is an assumption. There are no statistics available on how often access to the land registry has been applied for according to § 133a GBO. At least, not with the *Bundesnotarkammer*.

473 See section 8.5.2.

474 See as an example of how that may look. Chapter 6 on access to the land registry in the Netherlands, compare with section 7.3.6 on the manner of access in England & Wales.

475 See on this importance also OLG Hamm 11.04.2017, *BeckRS* 2017, 113580, 'Im Rahmen des § 133a GBO tritt der Notar an die Stelle des Grundbuchamtes und übt damit kraft seines Amtes behördliche Funktionen aus. Er ist dabei wie jede andere staatliche Stelle an Gesetz und Recht gebunden und hat daher insbesondere die Grundrechte zu achten. Angesichts des mit Verfassungsrang geschützten Grundrechts der informationellen Selbstbestimmung hat er bei der Entscheidung, ob und gegebenenfalls in welchem Umfang er Dritten Mitteilungen über den Inhalt eines Grundbuchs macht, auch zu bedenken, ob und inwieweit er hiermit in das schutzwürdige Recht eingetragener Personen eingreift, ihre Rechts- und Vermögensverhältnisse nicht zu offenbaren (vgl. Maaß in Bauer/von Oefele, GBO, 3. Auflage, § 12 Rn. 7, 8).'

larger scale. In large part, the success of the legitimate interest test has been due to its flexibility. This flexibility allows for the development of the legitimate interest test to go hand in hand with the societal changes and approaches to data protection and access to information, while not diminishing legal certainty in relation to the application of the norm. Whether this legal certainty as to the application of the legitimate interest test has come under pressure by the introduction of the parallel route of opening up the information in the land registry through a notary remains to be seen, but concerns can be voiced nevertheless.

9 Conclusion

9.1 Introduction

This study deals with the topic of information regarding property rights in land. This information concerns details about the person (legal or natural) holding a property right (ownership or limited property right) in land and the specific object (plot or plots of land) to which it relates. The centralised entity that collects, stores and allows access to this information is the land registry. There are two – seemingly competing – interests at stake in determining each of the stages of information processing (collection, storage, and disclosure). The first one, the publicity principle of property law, advances openness or publicity of information to provide legal certainty to third parties who might be affected by these property rights or seek to acquire them. The second interest, as advanced by the fundamental right to privacy and data protection, seemingly contrasts with such openness, as it takes a much more restrictive view on processing information. Specifically, the information should not be collected, stored, or disclosed unless it is done for a specific purpose and done in a fair and legitimate manner. The two interests seem to be starting at opposite ends of the spectrum and therefore appear to be incompatible with one another. The research question posed at the start of this study therefore was: how can a legal system reconcile the need for the publicity of property rights in land while safeguarding the privacy of those registered in the land registry?

As we came to notice over the different chapters, the publicity principle is not really at odds with the right to privacy and data protection legislation. Publicity, on the one hand, does not require that all information in the land registry should be accessible to anyone at all times for any reason, nor does the right to privacy and data protection legislation mandate that all personal information in the land registry should be kept under lock and key and not be provided to anyone. The two can work together very well. One system which reflects this point is the German system of access to land registration information. Access is restricted to those who can show a legitimate interest in the information requested. However, all interests based on obtaining legal certainty in relation to rights registered in the land registry, *i.e.* all the requests based on publicity, will be honoured and access is provided, as they always concern a legitimate interest. Publicity is given full effect when it comes to land registration information, while the personal data of those registered in the land registry is protected and safeguarded.

9.2 Publicity Principle

The publicity principle has been widely acknowledged as a (fundamental) principle of property law. There is consensus on the fact that publicity should follow the third-party effect that property rights have. It is, however, a principle and not a rule and, as such, publicity is not a requirement for a property right to exist. Publicity is often explained by elaborating on *why* we have publicity, rather than state what publicity exactly *is*. This question of why we have publicity is a matter of justification. Often the justification for publicity is sought in the third-party effect that property rights have. This theory of publicity is dealt with in Chapter 2 and, briefly, below in Section 9.2.1. In particular, the contents of the publicity principle are described, especially the notion that publicity consists of transaction-relevant information in relation to the subject-right-object relationship(s). This theoretical exercise is followed by looking at how this transaction-relevant information is provided in practice with regard to land. In particular, the way in which information collection and the purposes for such collection in the three different types of registers that were addressed in this study are examined and compared.

9.2.1 Principle of Publicity in Theory

The classic theory with regard to publicity is linked with the third-party effect property rights may have. Property rights may bind people whether they want to or not. In that sense, property rights are distinguished from personal rights which, in principle, bind only the parties thereto. The effect property rights have goes beyond the parties and extends to third parties. Whether they want to or not, these third parties *should* have the means to find out about the existence and the content of these particular property rights.

When third parties have the means to find out about the existence and content of these particular property rights, they are afforded some legal certainty in relation to these rights. This legal certainty allows (third) parties to obtain and have the required information to determine their position and possible bargaining power in relation to the particular property and/or the property right holder. In essence, this information can be referred to as transaction-relevant information. This information can be in relation to the person holding the right (who is the owner to contact, do they have legal capacity), the right itself (is there a burden on the right of ownership), or the object (in relation to what plot of land does Mrs. [X] claim ownership rights, and what are the boundaries of the land). Transaction-relevant information can therefore be in relation to the subject-right-object dynamic, any individual element, or any combination thereof.

If we look at publicity in this manner, as providing transaction-relevant information in relation to subject-right-object relationship(s), it splits up publicity into different di-

mensions (an internal and external dimension), which in turn can help to understand how these relate to the different theories on publicity and its functions. The external dimension of publicity is discussed first and concerns the context in which information is provided to a third party. This is followed up by a discussion of the internal dimension which is governed by the principle of the specificity of property rights and concerns *which* information is provided to the third parties.

9.2.2 Transaction-relevant Information

Transaction-relevant information is concerned with the external dimension of publicity: the question of what information should be provided *to whom*. It is therefore necessarily contextual. What constitutes 'transaction-relevant information' is determined by the transaction. There should therefore be some sort of 'transaction', whereby I refer to the (legal) relationship one wishes to engage in with a person or regarding an object. If there is no such connection, then there is no reason to disclose any information. A goat herder in Sussex has nothing to do with the school teacher in Tübingen, nor with the violinist in Brighton. No relationship as such exists between these parties, which excludes the need for the violinist in Brighton to have information about the goat herder's land ownership.

However, if there is such a transaction, then this will determine what the information relevant to such transaction is. If one simply wants to know whether they are allowed to walk over a particular property, the amount of information required (contact details of owner(s) would suffice) is different from when a bank is interested in facilitating a loan to a debtor. The transaction in the latter example requires not only the contact details of the (potential) debtor and their legal capacity, but also information about possible burdens on the land, other liabilities in relation to the land, and specific information as to their (potential) position or rank in relation to other creditors. Such information is relevant in order to determine whether they are willing to provide credit and, if so, under what conditions. This means that the transaction determines what is relevant information and therefore is necessarily context dependent.

Information regarding property rights in land, the Netherlands, Germany and England & Wales is disseminated by way of a land registry, rather than relying upon one of the parties to provide the transaction-relevant information. The advantages of such a system are numerous and are discussed further in section 9.3.

9.2.3 Concerning the Subject-Right-Object Relationship(s)

Transaction-relevant information, as described above, contains all information that relates directly to the effect that (certain) property rights (can) have. However, transaction-relevant information could be used in a broader context and includes much more infor-

mation than merely that which relates to the effect property rights (may) have. For example, in the context of a credit facilitation, a bank also requires bank statements of the (potential) debtor and confirmation of employment, if they have any, and a slew of other information that is not related to the effect any property right has. Such information, while relevant to the transaction, is not the information we concern ourselves with here. The transaction-relevant information, as part of the publicity principle of property law, concerns itself with a specific type of information, namely that which relates to the subject-right-object relationship(s).

Whereas transaction-relevant information tells us something about the *context* in which the information is provided, the second part, the subject-right-object relationship provides the *content* for this context: what specific information is provided. As such it concerns itself with the internal aspect of publicity.

Which information is referred to here? This element of the publicity principle is governed by the specificity principle of property. The specificity principle of property rights is generally explained by referring to the need for specificity in the right-object relationship. A property right can only exist in relation to a specific identifiable object. For immovables, a right of ownership or freehold title is only established in relation to a *specified* object, the plot of land. In the land registers, we see this reflected in the references made to the cadastral reference of a plot of land.[1] However, a wider interpretation of specificity is advanced, which does not focus on the right-object relationship only, but it includes a requirement of specificity for the subject-right relationship.

Specificity, when discussed in relation to publicity, cannot be limited to the object-right relationship only, in my opinion. The exercise of the right in relation to the object requires a person – a person who *holds* that right. Not being able to specify the subject to the right does not negate the third-party effect of the right, but it does significantly limit the exercise of powers attached to the right. The exercise of such powers requires a subject; the right does not act out of its own volition. The exercise of a power attached to a property right requires a legal or natural person. The granting of a limited property right by the owner requires an owner, a subject, granting the right. Permission to pass over a plot of land requires a person to grant such a right. The transfer of ownership requires the power to dispose being exercised by someone who has such power. Receiving the canon which can be a part of the *emphytheusis* right requires a person to accept payment. As such, the principle of specificity not only lays down requirements for the specificity in relation to the right-object relationship but also in relation to the subject-right relationship.

This does not however mean that this information about the subject, the person holding the right, should also be provided in all instances. It should be provided only when such information is relevant to the transaction. It therefore may very well be that a po-

1 Although see section 2.4.1 in the Netherlands, the title and deed determine what exactly the boundaries of plot of land are, this *can* be more, or less than the cadastral registration of the plot of land.

tential creditor only requires information as to the existence of other security rights in relation to the object to know that they will not have a first right of *hypothec*, for example, without needing information about the person holding such a limited property right. Nevertheless, the fact that information about the holder of the right is so very closely linked to the property right itself does require that the information *can* be relevant to the transaction and therefore should be collected.

This means that there is specific information concerning the object, the right, the right-holder (subject), or any combination thereof. Registration in a public registry allows for information to be made known about all aspects of the property relationship which may be relevant to the transaction. Possession, on the other hand, i.e. factual control over an object, as a means of providing publicity can only definitively tell us something about the person and the object, but it does not give information about the type of right they have in relation to the object. This may be a personal right or a property right. As such, a fully working publicity principle relies on a mechanism that not only can provide information concerning the object and the person holding the object, but especially also the (existence of the) right and its contents. When it concerns land, such a mechanism is provided by the land registry.

9.3 Principle of Publicity in practice; Land Registries

The external dimension of the principle of publicity described above requires that all information regarding property rights (the internal dimension, which extends to information about the object and the right-holder) should be disclosed when it is relevant to the transaction. This means that a lot of information regarding the land and the persons with rights regarding the land has to be collected, as it may have the potential of being transaction-relevant information and subject to the publicity principle. Where it concerns information about property rights in land, the information is collected and kept not by the person holding the right, but rather by an independent third party, the land registry.

A land registry exists in all three systems that were examined in this study. In all three systems, the information collected was provided to those third parties that require the information when relevant to the transaction, and thus they serve the publicity principle of property law. The approach in the three systems differs however. The following will compare the three different land registration systems and how different elements of their set-up might influence their information management system and their approach to publicity. The effects of these differences can be seen between the content of the registration, whether it is a deeds or title register which may say something about the need for accurate information and the duration for which the information needs to be stored (section 9.3.1), differences between the financing of the registers; are they self-sustaining or fully

funded, which can have repercussions for the need to employ a broad purpose for which the information may be collected and further processed (section 9.3.2), whether the collection of the information is centralised or (still) fragmented over different (local) land registry databases (section 9.3.3), and for what purpose the information is indeed collected and further processed, which is not (only) the publicity principle and to advance legal certainty in land transactions (section 9.3.5).

9.3.1 Rights or Deeds registration

The three land registration systems can be assessed by their nature and what they register: rights or deeds. The England & Wales and German land registration systems register rights, whereas the Dutch land registry contains and registers deeds. There is an implicit bias that rights registration provides more legal certainty, because, unlike deeds registers, they do not require any further investigation as to who has a right in relation to the land; the land registry should tell exactly which rights exist in relation to land. This is different for a land registration system such as the Netherlands, which is a deeds registration system. The deeds register can only really give information about the rights that do *not* exist in relation to that plot of land. It does not provide definitive information as to what rights *do exist* in relation to the land. Rights have to be inferred from the deeds registered, which requires more intensive research than simply requesting the registration of the property. The Dutch land registry has generally usurped this intensive research by providing an overview of the recorded rights in its Main Cadastral Register in relation to the plot of land and attaching a presumptive owner to the plot of land. However, this remains a presumption. Neither the land registry nor the State guarantees the accuracy of the presumption and therefore nobody is liable when such an inference is based on a mistake. Liability for a mistake in the land registry does come into play for the State in rights based land registration, as, in such a system, the State guarantees the accuracy of the register. Therefore, if one is deprived of his right by a mistake in the land registry, the State will have to indemnify the person.

Next to the legal ramifications that the difference between a rights register and a deeds register carry, there are also factual consequences that translate into different approaches to the treatment of information in the registers. In particular, the difference between rights and deeds registers translates into the required duration of storage of the (underlying) deeds of registration, as well as their effect on the access regime. Firstly, the mere fact of access to deeds in a deeds registration system is more prevalent than providing access to deeds in a rights registration system. In both the land registry of England & Wales and Germany, it is more difficult to get access to the deeds than to the actual registration. This difficulty can be explained in part because the information in the deeds is less relevant in relation to publicity and the legal certainty sought in land transactions.

The registration itself is paramount, not the underlying deeds.[2] In the Netherlands, on the other hand, which has a deeds registration system, the legally relevant information is encompassed in the deeds, and therefore such information is much more relevant in order to establish legal certainty in relation to land transactions. A property right in land has to be deduced from a valid chain of deeds. This necessitates that the duration for which deeds have to be stored in the deeds registration systems and be made available should necessarily be longer than in rights registration systems.[3]

When linked to the publicity principle, and the idea that publicity makes available that information about the subject-right-object relationship which is relevant to the transaction, we can note a difference in the relevance of the information kept by the land registry and the duration for which it remains relevant, for rights registers on the one hand and deeds registers on the other.

9.3.2 Financing of Land Registries

The financing of the land registries in the three different legal systems examined differs. The difference between them can in part be explained by how the land registries are embedded within the legal systems. Of the three land registries examined, one was part of the judiciary and two are (semi-)governmental authorities.

Where the land registry is part of the judiciary, such as in the different German Federal States, it will not be governed as much by a need for the development of new information products as its counterparts outside of the judiciary branch in England & Wales and the Netherlands. Both in England & Wales and the Netherlands, the land registry must be self-sufficient in terms of financing and relies on the income generated from the processing of registrations. This income includes both the payment received for the *supply* of information products to the land registry (such as deeds and filled-out registration forms) as well as for the *purchase* of such products from the land registry (*i.e.* access to the information).

The requirement to be a self-sufficient land registry impacts the way in which the land registry generates revenue. Revenue can be generated and increased in different ways. For example, costs for the supply and purchase of information products from the land registry may be increased. Another way is to expand further into the development of (new) information products. The latter is an example of the approach taken by the Dutch land registry when it was made an independent semi-governmental authority (*Zelfstandig bestuursorgaan*).[4] At the same time that the land registry was made a more independent governmental authority, the purposes for which the land registry could use the informa-

2 Although one should not forget the access regimes in these legal systems are also less open in their nature than in the Netherlands. This should not be forgotten here.

3 See section 3.8.

4 See section 3.3.3.

tion it collected and processed were broadened.[5] This allowed the land registry the legal means to process information not only for the purposes of advancing legal certainty in land transactions but, beyond that purpose, it also increased the annual revenue in the process.

9.3.3 *Centralised or Fragmented Land Registries*

The three legal systems examined show two different approaches to the storage of information encompassing rights in land. Again, the delineation falls between the Netherlands and England & Wales, on the one hand, and Germany on the other. Where the former two systems have a centralised land registry,[6] the German land registry is much more fragmented. In Germany, the different Federal States have their own land registry, which is governed within their own State. Germany does not have a land registry headquarters on the Federal level. England & Wales and the Netherlands do have different land registry offices throughout their countries, but they are connected to the headquarters where the information is processed.

The centralisation of information is closely related to technical developments which allow for the transfer of information via other means than the physical delivery by the carrier of information.[7] The advantages of a centralised over a fragmented system of land registration in relation to information flows are clear. Rather than a collection of different sets of databases, which may very well be kept in different formats, a singular computerised database is considered superior in terms of efficiency of information processing. It significantly increases the ease of access for those interested in the information kept by the land registry. This is not only because the information is kept in a form which allows for the (easier) generation of statistical data and allows for identifying and analysing patterns within transactions on a macro level, as well as in relation to individual transactions. These patterns may assist in combatting fraud in real estate transactions, as well as to signal trends within the real estate market. In a more specific example, the party that seeks an overview of all the liabilities and rights one has in relation to land within the legal system will have to invest time and money to get this information from the different land registries within a legal system which adheres to a fragmented land registry. By comparison, in a centralised system, the information request can be placed just once and an overview can be provided of all land holdings within a legal system.

5 See section 6.2.2.

6 They do both have local offices throughout the different countries, but the main efforts are centralised in the respective headquarters.

7 See in general terms about this development section 5.2.

9.3.4 *Information Monopoly*

These days, the collection of the information is carried out by the conveyancing professional, such as solicitor or notary, *and* the land registry. Furthermore, it is the land registry that also stores[8] and provides access to the information concerning transactions and rights in land. This creates an information monopoly in the hands of the land registry. It is the land registry which provides the information to those seeking access.[9] As the land registries in the three systems are all in one shape or form part of the State, we can assert in general terms that the information monopoly lies with the states. That this was not always the case, was noted in section 2.7. During France's *ancien regime* the information monopoly was with the notaries, and in England & Wales for a long time this was squarely with solicitors. The access regimes of notaries and solicitors were anything but open at the time, which led to an undesirable imbalance between parties. Creditors could not have any certainty about the property provided to them as security, as they could not ascertain their rank as creditors, nor did they have the means to assess the existence of any other liabilities in relation to the land or in fact ownership of land. The information monopoly held by notaries and solicitors alike, under the older conveyancing regimes, solidified the powerful position that these groups had within the land transaction schemes to the detriment of, in particular, the creditors.

Under the current laws, however, the information monopoly in relation to land transactions[10] is no longer with the information gatherers, notaries and solicitors, but it lies with the land registries. The negative effects associated with an information monopoly that have surfaced under the land registries are not related to the position of the creditor, but rather to the position of the individual registered. In each of the legal systems examined, the creditor will get access to the information in the land registry by providing little more than payment for the information and perhaps some evidence of their legitimate interest as a creditor. The negative effects of the information monopoly under the old system for creditors have been dispelled. However, by removing (some of) the barriers to access to information about property rights in land, the negative effects of these barriers disappeared but also its positive effects. By making it so difficult, sometimes even impossible, to get (any) information about property rights in land, including information about *who* held these rights, the people who owned or held property rights in land were hidden from prying eyes. Thus, albeit not necessarily by design,[11] the closed system provided privacy protection for those registered. Removing the barriers to access indiscriminately,

8 Although in systems that have a notary public, the notary is generally also required to store the information about the specific transaction.

9 Either directly via a request to the land registry or indirectly as is possible in Germany via the notary, see section 8.3.

10 Not the dealings of *hypothecs* in transactions such as securitisation.

11 See on privacy by design section 5.2.6.

without creating new data protection safeguards, resolves one problem by creating another one.

9.3.5 *Multi-purpose Land Registries*

The increased computerisation of the facilities of the land registries in all three systems showed the potential that this data has. This is visible not only on the micro-level of the individual plots of land but also on the macro level – think of the state of land ownership in general, market prices, and general lending behaviour. The multitude of ways in which information about land ownership could be used required a new approach to the role of the land registries.[12]

The changing (perception of the) role of the land registry also has an effect on the access regimes within these legal systems. Even in the limited open system of Germany, the courts have acknowledged the broader, social role that ownership of land plays,[13] and they allowed access to information about land ownership and rights in the land not only to facilitate legal certainty, which was the original intention of the provision, but also for other legitimate reasons. These legitimate reasons need not necessarily have to relate directly to the land.[14]

The Netherlands is perhaps the most striking example. Here the Cadastre and the land registry have had a very close connection from early on and their purposes and roles intertwined already from the early 1800s onwards, which lead to the merger of the two agencies into a single institution.[15] This differentiation in purposes and roles over the years leads to the characterisation of the land registry as a multi-purpose-land registry. The advantages of such a land registry are manifold, as the data the land registry holds can serve many different purposes. The disadvantages of extending the role of the land registry to fulfil functions that do not necessarily directly relate to legal certainty in land administration and legal relationships in land is twofold: firstly, it muddles the previously clear intentions of setting up a registry and the goals for which the information may be used and, secondly, it requires a stretching of the purpose limitation principle of data protection, which entails that personal data may only be collected and further processed for clear, specific and explicit purposes.[16] The latter stretching has been made clear from amendments made to the Dutch *Kadasterwet* as a result of the implementation of the Data Protection Directive. The result is comprised of a vague description of the purposes

12 For example, in section 9.2.2 above, the publicity principle was explained which stated that this required transaction-relevant information.

13 See section 8.8.2.

14 Called multi-purpose cadastre.

15 See section 6.2.

16 See more extensively on the purpose limitation section 5.6.7.3.

of the land registry.[17] This vagueness was intentional, so as to retain a certain flexibility, allowing the role of the land registry to change with the changing perceptions over time of what its role should be.[18]

Flexibility, however, can be at odds with the legal certainty that is sought, not in relation to land transactions (which will not be affected, as long as the facilitation of legal certainty of land transactions remain part of the purposes of the land registry) but, rather, the legal certainty advanced in relation to data protection. Data protection rules require that there is a certain degree of legal certainty as to the way in which personal data is processed. Legal certainty in that context is best preserved or achieved by processing personal data only where it is done for the purpose for which it was collected or compatible therewith.[19] This means that facilitating flexibility in the purposes of the land registry so as to accommodate a changing role of the land registry, on the one hand, while also seeking to further legal certainty in relation to data protection, on the other hand, creates a tension between flexibility and legal certainty.

Secondly, the changing role that land registries play within society also means that the publicity principle is no longer the driving force behind the different land registration systems and their access regimes. The reason information is collected, stored, and disclosed no longer only relies on the publicity principle and the furtherance of legal certainty. This has a direct influence on the access regime of the land registry. For example, in 2000, the German Constitutional Court elaborated on the scope and nature of the access regime in Germany and the legitimate interest test encompassed in § 12 GBO. The Constitutional Court stated that, as a result of the interpretation of the article, the scope has been extended over the years from its original interpretation. The original interpretation of § 12 GBO focused on the publicity principle. Legitimate interests were those that were based on the publicity principle. However, over the years this was extended to include other interests beyond those based on the publicity principle. According to the German Constitutional Court 'this should not be taken to mean, that the original objective [of § 12 GBO, AB] has lost its meaning. The limitation of the access right serves, in modern terminology, the protection of the personality of those who have been registered.'[20]

17 See section 6.3.3.3.

18 See also section 6.3.3.

19 See extensively Chapter 5.

20 BVerfG 28.08.2000, *NJW* 2001, 503, 504. 'Dass durch die erweiternde Auslegung des § 12I GBO der Anwendungsbereich der Vorschrift über ihren ursprünglichen Regelungszweck ausgedehnt wird, bedeutet nicht, dass dem herkömmlichen Regelungsziel keinerlei Bedeutung zukommt. Die Eingrenzung des Einsichtnahmerechts dient - in moderner Terminologie - dem Persönlichkeitsschutz der Eingetragenen'.

9.4 Publicity Does Not Require Absolute Openness

Publicity is described as the provision of transaction-relevant information concerning the subject-right-object relationship(s). Each of the legal systems that were examined collects and stores information about the subject-right-object relationship(s), where the object concerns land, in a land registry. However, the systems diverge in how they make the information collected available. Moreover, there are differences in the type of information collected. While all systems collect information regarding the identity of the right-holder (full name, birthdate, current contact address), there are differences as well. Germany, for example, also collects and stores information about the academic title of the person, whereas the Netherlands collects and stores the passport number of the individual.

Next to similarities and differences reflected in the content of the information collected and stored, discrepancies and parallels can be drawn in the different access regimes as well: the way in which the information is disclosed. For instance, none of the systems advance absolute publicity in the sense that all information is accessible at all times by every individual seeking access for free. In that sense, not all land registration information is open data. This means that, while each of the legal systems adhere to the principle of publicity, none of them give effect to the principle in the most absolute manner: a *freely* accessible and open land registry. In part, this is because if the information would be supplied freely and access would be free, the land registries of the Netherlands and England & Wales would have serious cash flow problems, as each of these systems relies (largely) on the income derived from the provision of, and access to, information in the land registry. Moreover, full and absolute publicity is not necessary.[21] The principle of publicity does not require absolute openness at all, a basis for a fully open system without any obstacles to the access to information cannot be found in the publicity principle, nor in what it seeks to facilitate, *i.e.* legal certainty.

The publicity principle, when explained as a justification for third-party effect of property rights, or as a means to limit transaction costs, is inherently limited in scope. Property rights *can* in principle have an effect against the whole world, however, they rarely, if ever, do have such a far-reaching effect. Rather, only when a particular person (legal or natural) comes close enough that the property right might have an effect against them, does the publicity principle based on third-party effect *require* that information be made available to this person. Prior to that, the property right does not have an effect against that person and there is therefore no reason that the principle of publicity should be the basis of providing access to information concerning the subject-right-object relationship. However, when a person comes close enough, for example when they seek to establish a legal relationship with the registered, the property right(s) may resort in affecting that particular individual. In such a case, the publicity principle and, in particular,

21 See also Van Den Bergh 1978, p. 5 and section 2.9.

the legal certainty it seeks to facilitate may form the basis for disclosing information about the subject-right-object relationship. However, as mentioned earlier, it is not required in every instance that all information concerning the subject-right-object relationship is disclosed. For example, it may be enough for a creditor that he is provided with information about the *existence* of other rights of *hypothec* in relation to the ownership of a particular plot of land, so as to assess their ranking, without needing information about who holds a first right of *hypothec* if it exists, or the specific (maximum) amount of the loan the *hypothec* secures.

This means that there is not simply one category of 'third parties'. These categories differ depending on the specific context. The use of 'transaction-relevant information', in the description of publicity advanced in section 2.9, reflects on the importance of context. However, of the three legal systems that were assessed, only Germany has opted to include context in the decision on providing access to land registration information. Neither the Netherlands nor England & Wales have taken context into account when setting up their current land registration system. On the contrary, both legal systems have opted for relatively unrestricted access to land registration information in their land registries. Publicity and legal certainty is facilitated in these systems by way of their indiscriminate nature of providing access to the land registry to anyone who would like such access.[22] Under the German system, providing access to facilitate legal certainty represents the hallmark of the system,[23] however the system requires that this motive is made clear by the person seeking access.

The publicity principle is consequently served in all three legal systems equally. Anyone who should be provided access based on publicity is given access. The difference between the systems lies in the fact that the German access regime requires an explanation of what this publicity principle entails and under which circumstances the interest in the information is considered to be in furtherance of a purpose supported by publicity and, as such, legal certainty, whereas the other two systems do not necessarily need to conceptualise publicity any further. For the Netherlands and England & Wales, any conceptualisation of publicity, when applied to land, and any context in which the information might be relevant to the transaction, would fall under the fully open system of providing information. Thus, while these systems have an almost unrestricted access regime, this unrestricted nature of access to the land registry is not necessarily *based on* the publicity principle it serves.

22 Access here is meant in a singular fashion. It does not also comprise of accessing data in large amounts from the land registry.

23 It was designed with this in mind. It is the original consideration which still rings true today, even though it was supplemented later on.

9.5 Safeguarding Privacy by way of Data Protection Legislation

Whereas the publicity principle seeks to make information about property rights in land available to those affected by the property rights, there is a seemingly competing interest advanced by the fundamental right to privacy and the data protection legislation that sprung from the need to protect that privacy. However, neither the fundamental right to privacy itself, nor the fundamental right to data protection as protected under the Charter of Fundamental Rights of the European Union require that the information *never* be disclosed. Rather, as we have seen in Part II, the rights to privacy and data protection merely require that such disclosures take place within the limits of adequate safeguards.

9.5.1 Privacy

There is not a singular all-encompassing definition or school of thought on what privacy exactly entails. Some despair whether it can be usefully addressed at all,[24] while others have said that nobody really knows what it means,[25] that there is a conceptual disarray,[26] and when we look at privacy we find chaos.[27] Others claim that it is a concept that cannot be boiled down to a single essence,[28] and they have called it an umbrella term, encompassing a wide range of interests.[29] The latter definition is tempting. Considering privacy as an umbrella term leaves room for the variety of vastly different acts to fall within the rubric of privacy and invasions thereof: from a targeted advertisement to a discussion about whether women have the right to an abortion or a discussion on drones with camera's flying over urban areas. This vagueness over what constitutes privacy has not impacted the efforts made to curtail it into a theory or definition, which were discussed extensively in Chapter 4.

While the umbrella term may be tempting and useful in discussions about privacy, it is too broad to be the starting point of discussing privacy in relation to property rights in land. Rather, privacy examined in relation to property rights in land and the land registry is focussed here on informational privacy or, as discussed within the EU legal framework, the protection of personal data. This necessarily leaves out the privacy protection against unwarranted intrusion on personal property and the right to conduct oneself within the confines of one's own home. This is discussed in Chapter 4 but only in a limited way.

24 Post *The Georgetown Law Journal* 89/6, p. 2087.
25 Thomson *Philosophy & Public Affairs* 4/4, p. 295.
26 Bloustein *New York University Law Review* 39/6, p. 963.
27 Inness 1996, p. 3.
28 Solove 2009, p. 103. It is 'elusive and ill defined' says Posner *Georgia Law Review* 12/3, p. 393. Cohen *Harvard Law Review* 126/7, p. 1906, calling it 'dynamic' and stating that privacy cannot 'be reduced to a fixed condition or attribute (such as seclusion or control) whose boundaries can be crisply delineated by the application of deductive logic'.
29 DeCew 1997, p. 1.

Rather, the right to privacy is considered in relation to privacy rights asserted in personal data.

In a similar vein, as described in relation to the publicity principle, context plays an important role when discussing (informational) privacy. This is true not only in theory but also when discussing the legal framework, as was seen in Chapter 5. Nowhere is this made more clear than in Nissenbaum's theory on (informational) privacy. Nissenbaum puts forth a compelling argument that privacy is a right to an *appropriate* flow of personal information, rather than outright restriction of such information flow.[30] This is the starting point of Nissenbaum's theory of contextual privacy in which contextual integrity, *i.e.* the acceptance of a certain level of privacy (or lack thereof), is assessed or determined based on the specific context at hand. Nissenbaum's theory is compelling as it breaks down information privacy into smaller increments which can help explain why and when there is a privacy problem. What is considered an appropriate flow of information is determined by the specific social setting in which the information is shared, the actors involved, the conditions under which the information flows from one person to another, and the specific content involved. For example, land registration information shared between a transferor and transferee is acceptable when this is done privately and in the context of a transfer of land, however, when one of these parameters is altered, then there might be a privacy problem.[31] These parameters are also reflected in the legal framework that governs the appropriate flow of personal data that all three legal systems are bound by: the Data Protection Directive.[32]

The legal framework that governs informational privacy, or the protection of personal data, for the Netherlands, England & Wales, and Germany is largely the same and is based on European and EU legislation discussed next.[33]

9.5.2 Data Protection Legislation

While the development of privacy legislation had been going strong ever since the late 1800s, the need for specific data protection legislation came much later. The realisation that specific legislation was required to protect privacy in personal information, *i.e.* data protection legislation, came with the rapid technological changes surrounding the (mainframe) computer, and the computerisation of information processing.[34] This computerisation is one of two developments that can attribute to information practices becoming a

30 This is elaborated in more depth in section 4.7.

31 See for example: in the Netherlands the 'pervert'-article discussed in section 6.3.1, in England & Wales the access to signatures via online access discussed in section 7.3.6, and the numerous examples in Germany elaborated on in section 8.5.2.

32 See section 5.6.

33 For a more extensive elaboration on this matter see Chapter 5.

34 See extensively section 4.3 and section 5.2.

social or political – and later on – a legal issue.[35] The second is the 'increase in record-keeping activities', as Regan notes, to handle the ever increasing complexity of social relationships which organisations developed with their clients and customers.[36] The combination of the two, record keeping by making use of computers, led to an interest in the effect these technologies had on the private life of citizens.

This interest in how the automatic processing of (personal) data affected the private life of citizens and how to protect such private life resulted in a wave of data protection legislation starting from the 1970s with the Council of Europe Convention no. 108,[37] and culminated in 1995 with the EU Data Protection Directive.

9.5.2.1 Free Flow of Information with Adequate Safeguards

Arguably, the most important legal instrument with regard to data protection in Europe is Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive). This Directive will be replaced by the General Data Protection Regulation which will enter into force on 25 May 2018. However, as the GDPR is not yet in force, the discussion below is specific to the legal framework as laid down in the Directive. The changes that the GDPR brings do not impact the aspects discussed here in extensively. With regard to the legal basis requirement we have seen that some changes are important.[38]

The Data Protection Directive attempts to reconcile the free flow of information with high personal data protection by approximation of the national data protection laws.[39] If the standard of protection is equal, then the information may flow wherever without diminishing the protection afforded to the individual, or so goes the reasoning. In such a way, it would appear that the protection of personal data is subordinate to the free flow of information. The two are however on equal footing.[40]

The objective sought to be achieved with the Data Protection Directive therefore was not to bring a complete halt to the processing of personal data. Rather, the flow of personal data is supported, but only when provided with adequate safeguards. These are further elaborated upon in the different data protection requirements and principles.

35 Regan 1995, p. 69.
36 Regan 1995, p. 69.
37 See more extensively on the development section 5.5.3.
38 See on the changes the GDPR will bring section 5.7.
39 See Recitals 5-8 of the Directive. The Directive does allow the Member States some leeway in the implementation of certain provisions. This was a continuation of the efforts of previous legislation. In particular, Convention n. 108, and inspired by the OECD Guidelines which had similar motives.
40 See Article 1 Data Protection Directive & Recital 3 of the Data Protection Directive. See also Commission 2003, p. 3.

9.5.2.2 Data Protection Requirements

The Data Protection Directive lays down certain conditions for the processing of personal data. Personal data is any information relating to an identified or identifiable natural person.[41] The processing of personal data means any operation or set of operations which is performed upon such data, which includes the collection and disclosure of the personal data.[42] The processing of personal data is allowed, but only when adequate data protection safeguards are in place. These are, in part,[43] based on the data quality principles as laid down in Article 6 of the Data Protection Directive. Article 6 requires that the Member States provide that personal data (a) be 'fairly and lawfully' processed, (b) collected only for specific, explicit and legitimate purposes and not further processed in a way incompatible with those purposes, (c) adequate, relevant and not excessive in relation to the purpose for which it is collected and/or further processed, (d) accurate and up-to-date, and finally (e) kept in a form which permits the identification of data subjects for as long as necessary, and not longer than that. Articles 10-12 of the Directive govern information and participation rights of the data subject, which are also part of the general rules on the lawfulness of processing of personal data.[44]

The three different legal systems under review can also be looked at by the way in which they apply these requirements to the processing of personal data by their respective land registries.

9.5.2.2.1 Purpose limitation

The purpose limitation requirement, as laid down in Article 6(b) of the Data Protection Directive, requires that personal data is collected for a specific, explicit, and legitimate purpose. The purposes for which all three legal systems collect and process the personal data are in any event to serve the publicity principle and in turn provide legal certainty in relation to property transactions in land. The three systems have a variety of degrees of specificity to describe the purposes for which they provide access to personal data held by the land registry. For example, the land registry in England & Wales refers to the processing of personal data to fulfil 'statutory duties',[45] whereas the land registry in the Netherlands altered its law specifically to introduce a variety of purposes for which the personal data may be processed. These include 'the promotion of legal certainty in relation to registerable objects (1) in legal matters and transactions (2) in the course of trade, and

41 Article 2(a) Data Protection Directive, see extensively on this provision section 5.6.4.

42 Article 2(b) Data Protection Directive, see extensively on this provision section 5.6.5.

43 Chapter II of the Data Protection Directive contains the general rules on the lawfulness of processing of personal data, which include, next to the data quality principles also criteria for legitimate processing (Article 7), specific rules on special categories of processing (Article 8) and exemptions for journalistic purposes (Article 9), and the information and participatory rights of data subjects (Article 10-12).

44 See Chapter II Data Protection Directive.

45 'We collect and hold personal and non-personal information so that we can fulfil our statutory duties, serve customers, improve the customer experience and meet our obligations as an employer.' https://perma.cc/A2MY-6RG6.

(3) in administrative matters between citizens and administrative bodies'.[46] These purposes were left intentionally broad so as to allow a certain degree of flexibility. However, as already mentioned above, such flexibility, when afforded by too vague a description of the purposes, can be at odds with the legal certainty that is advanced in relation to data protection.[47]

9.5.2.2.2 Adequate, relevant and not excessive

Article 6(c) of the Data Protection Directive requires that personal data must be processed in a manner that is adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed. This covers a proportionality requirement.[48] As the three legal systems have as their primary purpose the promotion or advancement of legal certainty concerning property rights in land by way of the publicity principle, the aforementioned scope of the publicity principle serves as a guideline here – a guideline as well as a restriction. In order to determine whether a manner of processing is considered excessive in relation to the purpose for which it was collected, the boundaries of the purpose for which the personal data was collected have to be clear. Here a demarcation line between the German system, on the one hand, with its legitimate interest test and the open systems of the Netherlands and England & Wales can be examined.

Germany adheres to a legitimate interest test in which the purpose limitation requirement and proportionality are included. The German approach requires that the individual shows the reasons for which he seeks access, which are then tested against the publicity principle or another legitimate interest. The information will not be provided without a legitimate interest in the information. Moreover, the individual seeking access will have to show a legitimate interest in every piece of information, of each of the sections on the *Grundbuch*. The information held by the land registry in Germany is therefore only provided selectively. Proportionality is engrained in the German system of access to information. The same cannot be said for the other two legal systems. The information in the Netherlands and England & Wales is provided in full, meaning that information about the marital status of a particular person is provided even if the request for informaiton was whether there is a servitude burdening the land, for example. Moreover, because of their open nature, the land registries of the Netherlands and England & Wales allow for information to flow without regard to motive for seeking access.

In England & Wales the restrictions that are in place are limited to a lack of access to underlying deeds via the online portal, and safeguards are in place with regard to searching by name. In the Netherlands, there are no restrictions in place. Access to underlying

46 Article 2a Kadasterwet: De Dienst heeft, onverminderd het bepaalde in andere wettelijke voorschriften, als doeleinden: de bevordering van de rechtszekerheid ten aanzien van registergoederen: 1°. in het rechtsverkeer; 2°. in het economisch verkeer; 3°. in het bestuurlijk verkeer tussen burgers en bestuursorganen.

47 See further on this section 5.6.7.2 and 5.6.7.6.

48 See extensively on this section 5.6.7.6.

deeds is available online for a fee, and they are presented in full; no information, such as identification document number, is redacted. The relatively unrestricted access provided by the land registries in the Netherlands and England & Wales is provided for by law, as both legal systems have a provision that states that any person may inspect the register of title (England & Wales) or the land registry as a whole (the Netherlands). The purposes for which the information is collected and/or further processed, however, are not so extensive that they require such a virtually unrestricted access regime, as can be exemplified by the German system. Therefore, the extensive access regimes of the Netherlands and England & Wales can be considered excessive, as they allow for access to personal data that is disproportional to the purposes for which the data was collected or further processed.

The processing of personal data can also be excessive where disclosure of personal data severely encroaches upon the individual's privacy. Here the argument is not that the general processing manner is excessive, but rather in a specific set of circumstances the processing would have undesirable results. An individual's fundamental rights to privacy and data protection would be infringed in the specific situation if processing would nevertheless take place. Both the Netherlands and England & Wales have a legal framework in place to deal with these types of individual cases. In England & Wales the individual has the option to request a document to be designated as an exempt information document, because it contains prejudicial information which would, or would be likely to, cause 'substantial unwarranted damage' or 'substantial unwarranted distress' either to that or another person.[49] In the Netherlands, there is a legal framework in place for shielding off information from the land registry, but it requires further action by the Minister, which has not occurred for well over ten years. In the meantime, there is internal policy of the land registry to shield certain information but the legality of this internal policy can be questioned.[50]

9.5.2.2.3 Limitation in time

Article 6(e) of the Data Protection Directive requires that the personal data should be kept in a form which permits the identification of data subjects for as long as necessary, and not longer than that. This limits the duration of the storage of personal data for the purpose for which it was collected or further processed, which for the land registries of the three legal systems reviewed is not necessarily the same duration. Each preserves the personal data for posterity and historical research. However, the duration for which the information in the land registry remains relevant differs. Here the delineation between the legal systems is between the Netherlands, on the one hand, and England & Wales and Germany, on the other. The distinguishing feature is the nature of the land registration

49 See section 7.3.5.4.

50 See section 6.3.3.7.

system, whether it is a rights or a deeds register. The answer to that question has an influence, as we have seen under section 9.3.1 above, on the duration for which the (underlying) deeds will have to be stored. For title registers, the duration for which the information remains relevant is shorter than for deeds registers.

9.5.2.2.4 Rights of the data subject

Section 5 of the Data Protection Directive concerns the rights of the data subject to access their personal data. These contain not only rights to access to information about the processing of their personal data, but also, where appropriate, the rectification, erasure or blocking of personal data. The latter rights of rectification and erasure exist for the processing of personal data which does not comply with the provisions of the Directive, in particular because of the incomplete or inaccurate nature of the data.

Where it concerns access rights, both the Netherlands and England & Wales have excluded the application of these rights to those registered in their registries. Nevertheless, in the Netherlands the application of the rectification right has not been excluded,[51] but it has *effectively* been excluded, as the land registry in the Netherlands does not keep an access log. It is therefore not known who has been provided access to information held in the land registry in relation to a particular plot. In Germany, the requirement to keep an access log was only introduced recently, in 2014. The purpose of such an access log is (1) to check the legality of access provided after the fact when there are concrete indications that require such a check, (2) for ensuring proper data processing, and (3) for cost surveys of all the inquiries made via the system. The owner of a plot of land is also provided insight into the access log.[52]

The rights of the data subject are further limited in that none of the systems has a legal basis for consultation of the land owner prior to providing access to information in the land registry about their plot of land. In Germany, the rights of the land owner are taken into consideration in the legitimate interest test,[53] whereas in the Netherlands they are explicitly excluded;[54] moreover even the legal means to appeal a decision to grant access to information in the land registry are excluded.[55]

The rights of the data subject are strengthened by the *Google Spain* ruling of the CJEU in 2014, which introduced the right to be forgotten.[56] Whether the right to be forgotten can also be applied to public registries such as the companies register was at issue in the *Manni* case of 2017.[57] In this case the CJEU ruled that the public nature of the companies

51 See section 6.3.3.2.
52 See extensively section 8.8.1.
53 See section 8.8.2.
54 See section 6.3.3.2.
55 Because the legislator could not think of a reason that someone would want to appeal an affirmative decision. See section 6.3.3.2.
56 See extensively section 5.6.7.4.
57 See section 5.6.7.4.

register and the information therein serve a purpose even years after the company was struck from the companies register. As the information could still be relevant, access to it was not cut off. Moreover, the court ruled that this explanation does not lead to a disproportionate infringement of the fundamental rights of an individual. The CJEU considered the disclosure justified in light of the fact that the register (1) only contains a limited amount of personal data which is disclosed upon request; (2) the person chooses to conduct business using a limited liability company which leaves third parties with limited means to have recourse to the patrimony of anything other than the company. Moreover, the person knew he was subjecting himself to a higher degree of (permanent) publicity by conducting business using a limited liability company. Lastly, (3) while *in general* the disclosure of personal data from the business register is compatible, such processing might nevertheless be incompatible with the fundamental rights of an individual where the circumstances of a specific case may exceptionally tip the balance in favour of limiting access to the personal data after the company has long since been dissolved. In such a case, the individual may claim limited access based on the right to object as laid down in Article 14 of the Data Protection Directive, when there are no national provisions to the contrary.

It may be questioned whether these reasons apply equally in the context of land registration information. It has already been argued that a fully open register cannot be based on the publicity principle.[58] The premise that a system of full disclosure is compatible with data protection legislation is therefore already questioned. Irrespective of this, the three reasons the CJEU provides in the *Manni* case are also not necessarily applicable in the land registration context. The information contained in the land registry cannot be considered 'limited'. The land registry may contain more information than merely the name and contact address, such as marital status, purchase price and the (maximum) mortgage loan which tells us something about the financial position of an individual, and in some legal systems it also includes the ID number. Second, the personal data disclosed is justified in *Manni* due 'to the fact that the only safeguards that joint-stock companies and limited liability companies offer to third parties are their assets, which constitutes an increased economic risk for the latter. In view of this, it appears justified that natural persons who choose to participate in trade through such a company are required to disclose the data relating to their identity and functions within that company, especially since they are aware of that requirement when they decide to engage in such activity.'[59] This reasoning is not necessarily applicable in the context of land registration information. The economic risk argument is directed at companies conducting business, and it is not equally applicable in the context of the residential property market with regard to individuals wanting to purchase a home. Moreover, are those registered aware

58 See section 9.4.

59 CJEU 9 March 2017, ECLI:EU:C:2017:197, C-398/15 (*Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni*) at 59.

that this information is accessible in such a manner?[60] Finally, on the availability of the right to object of Article 14 of the Data Protection Directive, an individual in England & Wales has the opportunity to have certain documents designated as prejudicial information because, if it were to be disclosed to the public it would likely cause 'substantial unwarranted damage' or 'substantial unwarranted distress' to an individual.[61] In the Netherlands, this would be arranged with the implementing measure of Article 107b Kw, which does not exist. Moreover, the right to object, in the general data protection legislation, cannot be used as public registers are excluded from its application.[62] Therefore, an individual has no other recourse than to rely on the informal arrangements made by the land registry, the validity of which may be questioned.[63] As the foregoing shows, the *Manni* ruling concerned the companies register and cannot necessarily be relied upon in the context of assessing whether a right to be forgotten exists in the context of information held by a land registry.

The right to be forgotten is also codified in Article 17 GDPR. Under the new framework of the GDPR, the data subject will have the right to see that his personal data is erased by the controller, where for example it is no longer necessary in relation to the purpose for which it was collected.[64] However, Article 17(3) GDPR will not allow this right to erasure for matters that concern the processing of personal data in 'compliance with a legal obligation which requires processing (…) or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller'.[65] Moreover, the same restriction to the data subject's rights shall apply for processing 'for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes'.[66] In the context of the processing of personal data in land registries, I would not advance a right to erasure of the information in the land registry, because this would hinder the valid archiving purposes which are mentioned in Article 17(3)(d) GDPR. However, a less stringent measure of shielding off personal data where it concerns personal data which is no longer relevant *is* advanced. Whether Article 17(1) GDPR also contains such an individual right of the data subject will be a question of interpretation of Article 17(1) GDPR when it enters into force in May 2018.

60 The Dutch land registry frequently gets complaints about the public nature of the registry, Brouwer 1999, para 2.1.3.104. See also the questions posed to the Minister by Members of Parliament, KST II 2016/17, Vragen, 2016Z18671, and KST II 2016/17, 32761, 110. For England & Wales see section 7.3.6.

61 See section 7.3.5.4.

62 Article 40(4) Wbp.

63 See section 6.3.3.7.

64 See section 5.7.

65 Article 17(3)(b) GDPR.

66 Article 17(3)(d) GDPR.

9.5.3 *Privacy as a means not the goal*

The safeguards discussed in the previous sections serve to protect privacy and personal data. However, it bears mentioning that, in certain instances, the protection of privacy can be a means to achieve another purpose. For example, the shielding of personal data in the land registries may be required where the legal system allows for searching by name and certain individuals should not be found for security purposes. In particular, for certain professions such exceptions may be warranted, for example, public prosecutors, judges and secret service public officials. In these situations, the limitations placed on publicity of the land registry information stem from other legitimate interests such as security.

Combatting or preventing fraud can be another way in which privacy is used as a means rather than the goal. One example can be found in England & Wales. In 2007 the land registry closed off online access to documents which were referred to on the register.[67] The information itself, which included mortgage deeds and leases, was not made unavailable, rather the manner in which they could be accessed was restricted to post or personal visits to the HM Land Registry Offices. The restrictions came after an investigation showed that the scanned documents, which included signatures from the proprietors, were used to commit fraud. At the time, this was deceptively simple.[68] In the Netherlands, identity theft is possible in a very specific set of cases: individuals who are both self-employed and home-owners. In the Netherlands those that are self-employed generally have a VAT-number which is comprised of their social security number. The combination of social security number and the passport number in the land registry as well as their address and birthdate would be sufficient information to commit identity theft.

9.5.4 *Privacy Does Not Absolutely Limit Openness of Information*

In the same way that the publicity principle does not require that all information in the land registry be made public, privacy and the data protection legislation it inspired should not be interpreted to mean that the land registry must be closed entirely. In the provision of land registration information there are no such absolutes; it depends on the context. Where the context requires information to be made available based on interests supported by the publicity principle so as to facilitate legal certainty, then data protection legislation only requires this information to be provided with adequate safeguards. These safeguards require that no more information than necessary is provided and only to those warranted by the purpose for which the information was collected. Moreover, the infor-

67 Press Notice 25/07, Land Registry 2007.

68 It has since been resolved. See section 7.3.6.

mation should not be kept for longer than strictly required for the purpose for which it was collected. With regard to each of these requirements, the land registries of the different legal systems have adopted different and sometimes questionable approaches. Where there is room for improvement, the next section will elaborate on suggestions to strengthen the data protection safeguards while preserving access for those who seek it based on the publicity principle of property law.

9.6 How Publicity and Privacy can be Reconciled in Land Registration Systems

As we came to notice over the different chapters, the publicity principle is not really at odds with the right to privacy and data protection legislation. The two *can* work together very well. The next sections therefore provide an answer to the research question posed, how the two – seemingly competing – interests can be reconciled with regard to the disclosure of land registration information.

9.6.1 The false dichotomy between publicity and privacy

As Part I for publicity and Part II for privacy and data protection have shown, there is a false dichotomy between advancing publicity and the protection of privacy. These are not competing interests, but rather they can work together very well. On the one hand, the publicity principle, when examined properly, is inherently limited to those situations where the context warrants that the information should be made public. The provision of information based on the publicity principle can therefore be restricted, not based on an external influence, but one from within, the scope of the principle itself. Privacy therefore does not limit publicity; it is the principle of publicity itself which limits the scope of application. Legal certainty is not advanced by providing information about land ownership out of sheer curiosity or because one wants to find a particular individual. Justifying the provision of information from the land registry based on arguments of legal certainty, where no such legal certainty is at play, is incorrect.

Nevertheless, the fact that privacy does not restrict access to information based on the principle of publicity does not mean that it has no application at all. Rather, privacy and data protection rules provide for the free flow of information while preserving the privacy of those registered in the land registries. Advancing legal certainty by way of publicity cannot justify an open access regime. Hence maintaining such an open system is at odds with the data protection principles, as it is disproportional to the purpose it serves. Moreover, questions can be raised about whether access via a search by *name* should be available at all to the public at large. Similarly, it may be questioned whether payment of a fee or a personal trip to the land registry would suffice as the only barrier(s) in place to

searching by name. If legal certainty concerning property rights in land is sought, what situation calls for the need to search by name rather than plot of land or address, other than for the insolvency administrator or legal guardian who require such access to get acquainted with the liabilities the individual has in the land.[69] However, here again the proposed restriction to access is based on an interpretation of publicity and legal certainty, not on privacy. However, such restrictions would also have a positive impact on the protection of the personal data of those registered.

The proposed changes to the access regimes of the three different systems, which will be discussed below, therefore restrict the access regimes based on the strengthening of the data protection of the registered data subject, but it does not do so to the detriment of the legal certainty advanced by these systems.

9.6.2 Use of Technology to Improve Privacy in Land Registration

The following recommendations to alter the way in which the land registries of the Netherlands and England & Wales in particular, and Germany to some extent, may bring about changes to their access regimes and are largely based on the use of technological advances that have already served the land registries in different contexts,[70] or when implemented they could strengthen not only the privacy of those registered, but even lead to an increase in the provision of classes of open data, or can lead to the creation of new information products.

9.6.2.1 Standardised Deeds

Standardisation of deeds and the delivery of such deeds in machine-readable form could play an important role in the protection of privacy of those registered. Standardisation allows for and makes it easy to split a deed into different information sections. Within the same form, there is a box for name, one for birthdate, one for address, one for Cadastral reference, etc. This makes redacting information based on the context in which the information is requested much simpler. If implemented in systems which are still paper-based there would be an increase in processing speed possible as well.[71] What is entered or supplied in standardised form can more easily be disclosed in a standardised manners as well. Data protection in such a case can be advanced by opting for a sliding scale of information provision.[72] Certain information contained in the deeds may be made available to the public when the personally identifiable information is redacted,[73] whereas

69 For example, in England & Wales, see section 7.3.4.
70 Notable exception see section 9.6.2.3.
71 For example Germany.
72 This has also been advanced by other authors, notably in relation to the Dutch context see Akkermans 2015.
73 *i.e.* information which may be identified or identifiable to a natural person.

other information may only be disclosed to a specific class of people, for example, conveyancing professionals or those with a legitimate interest in the specific information.[74]

A standardised deed in a machine-readable data file does not entail that the idiosyncrasies of a transactions are lost. On the contrary, the different boxes for text on the forms are standardised, not their content. This type of information processing is already available in relation to *hypothec* deeds in the Netherlands where the land registry has been using so called KIK-deeds which are transfer or *hypothec* deeds in XML format, which is a machine-readable data file. Almost one in three *hypothec* deeds is currently collected by the land registry in such a manner in the Netherlands.[75]

The introduction of such automated processing of deeds, not just for *hypothecs*, but across the board, would provide for the technical means of differentiating easily between personal data that should be disclosed and data which need not be disclosed.

9.6.2.2 Access Logs

A second recommendation is the implementation of access logs and moreover, making these access logs available to the person registered not just the land registry itself.[76] Such access logs have been implemented by German law in 2014. Implementing access logs for all land registries would strengthen the position of the data subject, as it would provide them with the means to make use of their access rights enshrined in Article 12(a) of the Data Protection Directive, to the extent that they apply to land registries.[77] Moreover, it would provide the data subject with a possibility to make use of their rectification rights as provided for in Article 12(b) and (c) of the Data Protection Directive.[78] The close link between having a rectification right and an access right was affirmed and reiterated by the CJEU.[79]

It would also provide an overview of which information is requested by whom. This would create a new privacy issue, where the requester of information will need to provide their name and contact details, which would be stored for a certain time. Therefore, here too exceptions should be in place, especially for specific instances such as access provided to law enforcement agencies.[80]

74 Think of the Dutch example of the passport number.

75 See also http://www.kadaster.nl/kik.

76 Or the Data Protection Authority.

77 It has also been argued that the requirement to maintain an access log for the controller can flow from the provisions on confidentiality and security of processing in the Data Protection Directive. Articles 16 and 17 of the Data Protection Directive, implemented in Articles 13 and 15 Wbp. See also CJEU 7 May 2009, ECLI:EU:C:2009:293, C-553/07 (*College van burgemeester en wethouders van Rotterdam v. M.E.E. Rijkeboer*), with note by Overkleeft-Verburg para. 5.

78 See for their application section 5.6.7.5.

79 CJEU 7 May 2009, ECLI:EU:C:2009:293, C-553/07 (*College van burgemeester en wethouders van Rotterdam v. M.E.E. Rijkeboer*) with note by Overkleeft-Verburg para. 5.

80 See those elaborated on in the German context, section 8.8.1. It can be argued that journalists should also be (temporarily) exempt from being recorded in such an access log.

9.6.2.3 Individual Safeguards

A third recommendation is specific to the Netherlands and is not based on making (better) use of technology, but rather it relies on making use of the law itself. In implementing the Data Protection Directive, the Dutch legislator introduced a new Article 107b Kw, which provided a legal basis for an implementing regulation[81] that would allow an individual to shield their (personal)[82] data from disclosures if certain circumstances applied. However, no such implementing legislation is in place today, which means that there is no legal basis for shielding the information of an individual at this moment. Combined with the option to search by name in a relatively easy manner, this means that a registered individual who wants to remain hidden cannot, at least it is not possible based on the rules currently in place. The land registry itself does have a policy to shield an individual, but this policy is based on a questionable basis and implemented without any public oversight. An implementing regulation which is based on the law and follows a more public lawmaking process is to be preferred.

9.6.3 A legitimate interest test

One system which shows us that adequate safeguards for data protection can be put in place without restricting access to the information to such an extent that this is done to the detriment of those who have a legitimate interest in the information based on the principle of publicity and legal certainty it seeks to promote is the German system by way of its legitimate interest test. Access is restricted to those that can show a legitimate interest in the information requested. This furthermore comprises the requirement that, for each piece of information, a legitimate interest must be shown. As the German land registry has divided its registration into different sections, it might very well be that a legitimate interest is shown in relation to one section but not another. Chapter 8 covered the case law that showed what is considered a legitimate interest in Germany extensively.

However, all interests based on obtaining legal certainty in relation to rights registered in the land registry, *i.e.* all the requests based on publicity, will be honoured and access is provided as these always concern a legitimate interest. What constitutes a legitimate interest has been extended beyond merely those private interests based on seeking legal certainty and also covers other interests, for example, public interests, such as the legitimate interest the press has in the information in the land registry. However, the extensions have not been to the detriment of the privacy of those registered or later case law remedied the situation.[83]

81 The implementing regulation would be an *Algemene maatregel van bestuur*, AmvB.
82 Initially it read 'data'; it was changed to 'personal data' with *Stb*. 2005, 107.
83 See section 8.5.2.3 on WEG-access.

The original interpretation of the legitimate interest test of § 12 GBO focused on the publicity principle. However, over the years this was extended to include other interests beyond those based on the publicity principle. According to the German Constitutional Court 'this should not be taken to mean, that the original objective of [§ 12 GBO] has lost its meaning. The limitation of the access right serves, in modern terminology, the protection of the personality of those who have been registered.'[84]

Whether the interest is a legitimate interest is therefore still very much determined by whether the interest in the information is based on the original scope of § 12 GBO; *i.e.* the publicity principle of property law. However, other interests may be deemed legitimate that are outside of the scope of the publicity principle. The interests are then balanced against the protection of the individual registered. Data protection is therefore safeguarded within the system of access to land registration information under § 12 GBO.

A major disadvantage of the system in Germany is its speed. This is in part because of the fragmented nature of the land registries in Germany, in part because of its (compared to the other systems) slow implementation of digitisation techniques, but also in part because of the legitimate interest test. The former two are technical in nature, and can be resolved using technology, the latter is slightly more complex and discussed below in section 9.6.3.2.

9.6.3.1 Advantages of a legitimate interest test

Adoption of a legitimate interest test for access to information in the land registry would mean the legal system has a proven way to protect personal data without a detriment to the publicity principle and without a negative effect on the legal certainty the land registry seeks to advance. By requiring the person seeking access to information to show an interest which is legitimate in the specific circumstance, the context in which the information flows from one person to another is of paramount importance. As such, the legitimate interest serves to preserve contextual integrity.[85] The legitimate interest test is flexible enough to account for changing perspectives on who should be provided access and for what reasons and thus take into account other interests than those based on publicity if the legislator or judiciary considers these legitimate.

The case law overview, as provided in Chapter 8, can serve as a starting point for legislators who want to get an overview of what type of cases can be expected. Rather than have their own 100-year case law development, they can anticipate such cases and provide guidance to their own land registry regarding the interests that the legislator

84 BVerfG 28.08.2000, *NJW* 2001, 503, 504. 'Dass durch die erweiternde Auslegung des § 12I GBO der Anwendungsbereich der Vorschrift über ihren ursprünglichen Regelungszweck ausgedehnt wird, bedeutet nicht, dass dem herkömmlichen Regelungsziel keinerlei Bedeutung zukommt. Die Eingrenzung des Einsichtnahmerechts dient - in moderner Terminologie - dem Persönlichkeitsschutz der Eingetragenen'.

85 See section 4.7 and 9.5.1.

deems legitimate and which it does not.[86] It may very well be that differences in legal systems as well as differences that stem from different legal cultures will lead to a different evaluation of whether a specific interest is deemed legitimate. The flexibility of using an open norm, such as the legitimate interest test, allows for deviations among different legal cultures across borders and over time while striving for the same level of protection.

9.6.3.2 Disadvantages of a legitimate interest test

A disadvantage of restricting access to only those that can show a legitimate interest is that it will be expensive to implement. It slows down access to information for those groups that are not presumed to have a legitimate interest and who will have to await the decision of the land registrar who decides on whether access should be granted or not. What should be noted here is that the legitimate interest consists of a balancing of different and sometimes competing fundamental (human) rights. In Germany, this balancing of fundamental rights is carried out by the land registry, which is a part of the judiciary.

However, if a legitimate interest test is introduced in a legal system where the land registry is a governmental authority or semi-public body, the question becomes whether these institutions are suitable to conduct a balancing of fundamental rights. Is it, for example, a good idea that a balancing of fundamental rights is carried out by a privatised governmental body which relies in part for their financing on the provision of information? Concerns of the same nature may also be voiced in relation to Germany where, since 2013, notaries are allowed to provide direct access to the information in the land registry where it concerns a legitimate interest based on a private interest, but not public interests such as those advanced by the press. This means that, in those cases, the notaries are tasked with assessing whether a legitimate interest is present.[87]

In my view, the disadvantages are minor obstacles when compared to what may be gained by adhering to a legitimate interest test for providing access to information in the land registry: a balanced system of access to information in the land registry where privacy of the registered is protected without hindering publicity and legal certainty regarding property rights in land. For example, a system which applies a legitimate interest test slows down the access to information. This may create problems in time-sensitive applications for information, for example in attachment cases. However, these can be relatively easily accommodated by having a fast-track procedure in place.

86 Of course, certain cases and situations are specific to the legal system.

87 See section 8.3 and 8.9.5. In terms of contextual integrity, this new avenue for access changed the transmission principles and the actors involved. The appropriateness of which may be disputed.

9.7 Conclusion

In designing a legal framework for accessing information held by a land registry, a legislator can no longer rely on simply opening the land registry to anyone willing to pay a small administrative fee. This approach, as taken by the Netherlands, and to a large degree also England & Wales, should be rejected in light of the technological advances made in record keeping, processing, and disseminating information. Rather, it is advanced that a legislator should take a more conscientious way of facilitating access to information in the land registry, preferably by introducing a legitimate interest test similar to, though not the same as, the one present in Germany.

Technological developments have significantly improved the disclosure of information by the land registry. Implementing computerised collection, storage and dissemination has led to both an increase in the (duration of) information stored and processed in these registers, as well as the ease by which such information may be accessed from the land registers. By making the information in the land registries more widely available and easier to access, via internet portals for example, the publicity principle, and the value of legal certainty it seeks to advance in land transactions, have benefitted significantly. Opening up the land registry by way of computerised access has made inquiries into land registration data relatively simple and inexpensive and is therefore welcomed.

However, the increased availability and disclosure of information brings about certain problems of its own. Part of the information contained in the three different land registries is personal data: information relating to an identified or identifiable natural person. Personal data in the different land registries initially benefitted from relative obscurity when information was difficult and expensive to obtain.[88] This is no longer the case, as the increased availability and ease of access to the information held by the land registries of the Netherlands and England & Wales also results in an increase in the availability and ease of access to personal data.

The foregoing has shown that only restricting access to the land registry by imposing a small fee is insufficient to secure an appropriate flow of information from the land registry in modern times.[89] Moreover, such an open system is neither required by the principle used for its justification (publicity), nor vital to achieve its goal of providing legal certainty in land transactions. Therefore, a more restrictive access regime is advanced which preserves the privacy of the individuals registered, while retaining adequate access for those who seek it for legitimate reasons. Such a legal framework carefully balances the publicity of property rights with the privacy of those registered.

88 The expensive nature is therefore not based on the fee paid, but rather the need to travel to the physical location of the respective land registry and, as such, the time and effort spent in order to get certain information from the land registry made it expensive.

89 Compare with what Nissenbaum describes in section 4.7.1 as a violation of contextual integrity.

The most optimal balance, in my view, is found in Germany, where, in order to access the information in the land registry, a legitimate interest has to be presented to the registrar. By introducing a legitimate interest test, an open norm, the German legislator has facilitated access to the land registry where the interest is based on the publicity principle or another legitimate interest, while ensuring that no more (personal) information than required flows from the land registry.[90] The flexibility of the legitimate interest test has allowed the German framework to stand the test of time and follow changing perceptions on the balance between publicity and privacy. That is not to say the German framework is without its problems.[91] Nevertheless, of the three systems examined, it is the one which, in my opinion, has the most optimal balance between publicity and privacy. Thus, to answer the research question: how can a legal system reconcile the need for the publicity of property rights in land while safeguarding the privacy of those registered in the land registry? The answer put forward must be: by introducing a legitimate interest test for access to information in the land registry.

90 As such preserving the contextual integrity of the system, see section 4.7.

91 In particular its lack of speed, the presence of a parallel access route by way of the notary, and the very stringent rules regarding the quality of the person seeking access based on a public interest, see section 8.9.

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Curriculum Vitae

Anna Berlee was born on 8 October 1986 in Uden, the Netherlands. She obtained her LL.B. (*cum laude*) European Law School [English Track] in Maastricht with a minor in Dutch Law in 2010. She obtained her LL.M. (*cum laude*) in Dutch Law also at Maastricht in 2011. She subsequently held a post as a PhD candidate at Maastricht, during which time she was also a visiting lecturer at the China-EU School of Law in Beijing and Tilburg Law School. She also was the PhD representative within the Faculty of Law at Maastricht University. As part of this research she was a visiting researcher at Edinburgh Law School. From 2016 until late 2017 she was a lecturer at Tilburg Law School. Since November 2017 she has worked at the Molengraaff Institute for Private Law of Utrecht University, where she currently holds the position of assistant professor.

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