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edited by
Sjef van Erp
Arthur Salomons
Bram Akkermans

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The need for the integration of the mortgage market in Europe[1]

Sergio Nasarre-Aznar[2]

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2 University Rovira i Virgili (Tarragona, Spain) sergio.nasarre@urv.net.

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I. Introduction

This contribution[3] seeks to depict the Eurohypothec and the Eurotrust as two instruments to achieve an integration of the mortgage market in Europe from the perspective of the EU Commission Green Paper of 19-7-2005[4] and the EU Commission White Paper of 18-12-2007[5] on mortgage credit in the EU, while comparing Eurohypothec's model grade of flexibility and usefulness to the

[3] This piece of research has its origin in a Working Paper published by the Zentrum für Europäische Rechtspolitik at Universität Bremen (ZERP-Diskussionspapier 2/2008), whose Director is Prof. Christoph *Schmid*.

[4] COM/2005/0327 final.

[5] COM(2007) 807 final.

ones of current national mortgage legislations, providing a deeper insight of the Spanish mortgage reform 2007.

It is intended to show that there is a need for the integration of the mortgage market in Europe as this would bring advantages in form of several trans-national mortgage operations that currently are difficult or impossible to structure in many EU countries (which implies disadvantages to European lenders and borrowers), following the EU Comission's Green and White Papers. The Eurohypothec is shown as an optimised instrument to achieve this, especially in a financial crisis context, in which trust, certainty (by law) and legal transparency are more appreciated and even more needed than ever. Some examples of transnational operations with mortgages are provided in which it is evidenced that a common mortgage instrument would allow many EU countries to engage in those operations in an optimised way.

The topic of the Eurohypothec is older than 60 years now, but it is only recently that it has again assumed prominence on the European Commission's agenda. This recent history of the Eurohypothec began with the release of the Green Paper on the Mortgage Market 2005, which dedicated a whole point of discussion to the idea of the Eurohypothec, quoting a piece of research that contains the model of Eurohypothec that was created by a group of researchers after several years of studying the matter: the Basic Guidelines for a Eurohypothec 2005.[6] In December 2007, the EC White Paper, which deals with the steps required to advance the integration of EU mortgage markets, was released.

However, no development has been undertaken since then at EU level.[6a] Neither generalist pan-European research projects[7] have paid much attention to the possibility of creating a true European mortgage market, despite its undoubted importance at legal, economical and financial levels.

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6 *Drewicz-Tulodziecka, Agnieszka (Ed.),* Basic Guidelines for a Eurohypothec, Mortgage Credit Foundation, Warsaw, 2005.

6a At the moment of the copy-edit of this article, the Proposal of Directive of the European Parliament and of the Council on credit agreements relating to residential property (31-3-2011, COM(2011) 142 final) has been released. It deals with matters of consumers' protection in the field of mortgage credit agreements but only in relation to the "contractual" or "obligational" part of the agreement, without mentioning anything in relation to the mortgage itself.

7 As an example, the Draft Common Frame of Reference 2009 does not mention the mortgage at all although deals to real-rights related institutions such as the acquisition and loss of ownership of goods, proprietary security in movable assets and trusts.

II. The Eurohypothec

1. The Eurohypothec as an ideal model of a Paneuropean real charge

When Eurohypothec researchers tried to achieve a "common mortgage" model for Europe, they searched for an ideal model, in the sense that it was not necessarily a real model, but one which would be as much **useful** as possible for purposes of the main goal: creating a Paneuropean mortgage tool that facilitates the creation of an integrated Paneuropean mortgage market.

Therefore, the currently presented model (the model in the Basic Guidelines 2005[8]) should, in any case, prove to be **more beneficial** than that offered by the current model of transnational mortgage funding (at least 27 types of mortgage systems ruled by the *lex rei sitae).* The typical transnational situation that the Eurohypothec seeks to address refers to the case where the lender is in a different EU country other than the piece of land which is to be used as security for the loan/loans to be granted to a borrower, irrespective of where he is.

This "more beneficial" idea should relate both to the lender and borrower:

a) Lender: the Eurohypothec should be able to facilitate the development of a legal framework for optimal Paneuropean mortgage lending and mortgage funding (active and passive operations of the mortgage market).
b) Borrower: Greater freedom in choosing (and changing) the lender, due to increased competition. According to the 2007 Report of Mercer Oliver & Wyman for the European Mortgage Federation,[9] a link exists between the decrease in costs of a mortgage and an increase in the concurrence among credit institutions in several European countries in recent years, as illustrated in Germany, Ireland, Greece, France and Belgium. The White Paper 2007 supports the same idea (p. 13).

One important question to be addressed before drafting the model was the impact and the efficacy of the Eurohypothec, that is, what was to be changed in the European mortgage market and when. The resulting decision would not only alter the way in which the model was conceived, but also its scope.

According to recently obtained results, the Eurohypothec is generating two effects:

1. **At an initial stage**, it is serving as:

– an inspiration for jurisdictions that do not have a well-functioning mortgage system or that do not have any at all (ie. as is still evidenced in some East-European countries).

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8 See below.

9 *European Mortgage Federation and Mercer Oliver & Wyman,* European mortgage markets – 2006 adjusted price analysis, www.hypo.org.

– an inspiration to those jurisdictions that already have one, but are reforming it, in order to adapt to modern times and needs. The optimization of national mortgage legislations in Europe is being studied since 2006 by a research group called "Runder Tisch", whose results have been recently updated[10] and are accordingly quoted thorough this work.[11]
– a popular research topic. Pieces of work of practitioners and researchers worldwide[12] are dealing with core questions in relation to the Eurohy-

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10 See them at *Stöcker, Otmar and Stürner, Rolf,* Flexibility, security and efficiency of security rights over real property in Europe, Vol. III, 2nd revised and extended edition, Band 44, VdP, Berlin, 2010.

11 Maps used in this work come from *Stöcker, Otmar and Stürner, Rolf,* Flexibility, security and efficiency of security rights over real property in Europe, Vol. III, Band 39, VdP, Berlin, 2009.

12 Avoiding to quote the works of the drafters of the Eurohypothec's Basich Guidelines model 2005, here are some of the works. In Germany, among others, *Baur, J. F. and Stürner,* R., Sachenrecht, 18. Auflage, Verlag C.H.Beck, München, 2009; in Italy, *Fiorentini, F.,* Le garanzie immobiliari in Europa. Studio di diritto comparato, Stämpfli Editore SA, Berna, 2009 and *Scalamogna, Pierluigi,* Eurohipoteca, lo strumento per armonizzare il mercato ipotecario europeo?, Congreso Nazionale del Notariato, Pesaro, 18/21 sttembre 2005; in Portugal, *Jardim, M.,* A eurohipoteca e os diversos sistemas registais europeus, Comunicaçao feita na FDUC. 18-4-2008, no Colóquio: Eurohipoteca, Mercado Financeiro e Harmonizaçao Internacional do Direitodas garantias o Il Seminário Luso-Brasileiro de Direito Registal, em 10-5-2007; in the United Kingdom, *Watt, Gary,* Mortgage Law as a Legal Fiction, in *Cooke, Elizabeth,* "Modern studies in property law", Vol. 4, Hart Publishing, Oxford and Portland, Oregon, 2007 and *Steven, Andrew J.,* Accessoriness and Security over Land, en "Edinburgh Law Review", Vol. 13, 2009; see also *Sparkes, P.,* European land law, Hart Publishing, Padstow 2007; in Spain, among many others, *Diéguez Oliva, Rocío,* La Eurohipoteca: luces y sombras de la pretendida unificación en materia hipotecaria, en "Berkeley Program in Law & Economics, 2009", available http://repositories.cdlib.org/bple/alacde/060509-00; in The Netherlands, *Van Erp, Sjef,* Surety agremeents and the Principle of Accessority – Personal Security in the Light of a European Law Principle, at ERPL, Nº 3, 2005 and *Akkermans, Bram,* The Principle of Numerus Clausus in European Property Law, "Ius Commune Europaeum Series", Intersentia, Nº 75; in Norway, *Marthinussen, Hans Fredrik,* Forholdet mellom panterett og pantekrav, Bergen, 2009, Universitetet i Bergen, Allkopi; *Kenna, Padraic,* Housing law and policy in Ireland, 2nd Edition, Clarus Press, Dublin, cop. 2010; in Switzerland, *Dürr, David,* Das Grundpfand, 2 Aufl., in *Gauch and Schmid,* "Kommentar zum schweizerischen Zivilrecht, Schweizerisches Zivilgesetzbuch", Teilband IV 2b, Shulthess, 2009; in Central America, *Cuestas, Ruth Jeanette,* La hipoteca centroamericana:

pothec, such as its possible implementation in different jurisdictions, its model, its efficacy and efficiency in relation to national mortgages, its role in the harmonisation of European private law, discussions and improvements to the model, etc. Figure 1 shows the impact of the Eurohypothec among researchers in the world, including the so-called "Central-American Hypothec", developed upon the core elements of the Eurohypothec.

In essence, the Eurohypothec model may indicate the direction to be taken by mortgage law reforms or implementations in national jurisdictions. That is, what challenges are to be achieved in the modern context of law of mortgages in Europe and what the benefits of a cross-border mortgage are.

In fact, following the introduction of the Basic Guidelines 2005, at least two "traditional" mortgage systems were reformed: the French, through the *Ordinance* 23-3-2006[13] and the Spanish one, through the Act 41/2007.[14] These share something in common: they both consider the flexibility of their mortgage laws, which to a large extent, coincides with the goal of usefulness through the flexibility that governs the Eurohypothec pursuant to the Basic Guidelines. However, neither of them – as we will see more in depth in the Spanish case – has achieved the Eurohypothec's level of flexibility/usefulness.

2. At a second stage. The Eurohypothec should serve as a common instrument for the European mortgage market, thus helping to fulfil the goals of the EU: freedom of people and freedom of capital throughout EU member states. It should be a useful and optimal common transnational mortgage instrument, parallel to the already existing national mortgages. This second stage does not require any changes to the legal framework for mortgages in any national jurisdiction.

3. At a third stage, national jurisdictions should realise the importance of adapting their own legislation to maximise the benefits provided by the Eurohypothec- once it is clear to them, for example, that their enforcement procedures are not timely or that their insolvency law does not sufficiently secure the mortgagee. These – and some other – factors would make the Eurohypothec granted in that particular country to be more expensive (more difficult to be granted, higher interest rate for the borrower) than the same instrument in another jurisdiction with better legal infrastructures, which would in turn cause prejudice amongst its citizens, thus leading to further legislative reforms.

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seguridad jurídica y derecho agrario, International Journal of Land Law and Agricultural Science, 2010; in Turkey, *Association of Insurance and Reinsurance of Turkey,* ýpoteðe dayali konut kredýlerý, Ankara, 2005; among others.

13 Ordonnance n° 2006-346, 23-3-2006 (JORF 24-3-2006).

14 See below.

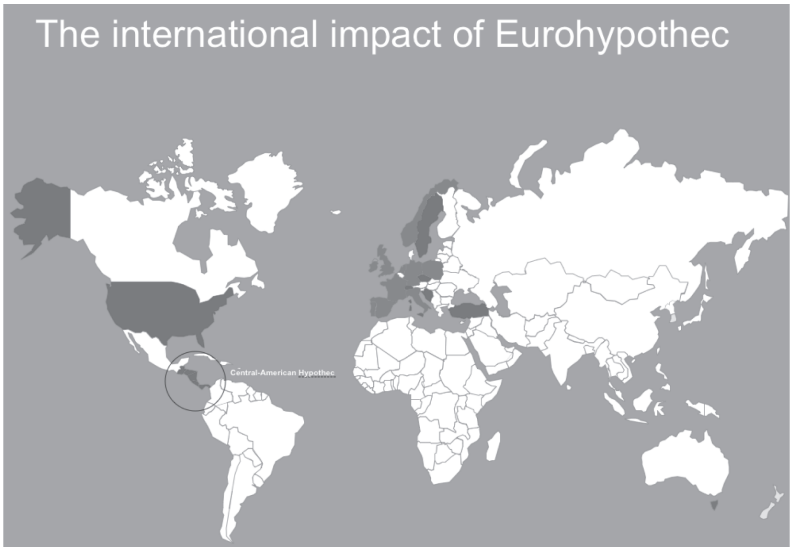

Figure 1: The international impact of the Eurohypothec. Source: own elaboration.

2. Why talk about the Eurohypothec?

As mentioned previously, the idea is far from new. Prof. Claudio Segré instigated the concept of creating a common mortgage instrument in the 60s – as commissioned by the EC. His proposed model was the Swiss *Schuldbrief.* Progressive work on the Eurohypothec was undertaken in the following years by certain institutions such as the International Union of Latin Notaries and the Verband Deutscher Pfandbriefbanken (VdP) and by renowned authors (more intensively by Prof. Wehrens[15] and Dr. Stöcker[16]). In 2004, a special research group was set up to study the Eurohypothec (www.eurohypothec.com). This group not only organized several research events, but also took part in seminars that resulted in the redaction of the Basic Guidelines 2005, which also involved the participation of researchers from different groups and backgrounds. A few months later, the Internal Market Affairs Department

15 *Wehrens, Hans G.,* Überlegungen zu einer Eurohypothek, "Wertpapier Mitteilungen – Zeitschrift für Wirtschafts- und Bankrecht", num. 14, April 1992, pp. 557 a 596.

16 *Stöcker, Otmar,* Die Eurohypothek, Berlin, 1992, Ed. Duncker & Humblot. Most recent article on this topic is *Stöcker, Otmar,* Real estate liens as security for cross-border property finance. The Eurohypothec, a security instrument with real prospects, "Revista Crítica de Derecho Inmobiliario" (Spain), num. 703, 2007, pp. 2255-2277.

of the European Commission issued the Green Paper on Mortgage Credit 2005, which at some point addressed a question considered by governments, mortgage market stakeholders and researchers on the usefulness and importance of the Eurohypothec. The response was very positive as can be seen in Table 1.

	IN FAVOR OF THE BASIC GUIDELINES EUROHYPOTHEC MODEL	IN FAVOR OF THE IDEA OF THE EUROHYPOTHEC, BUT WITH ANOTHER MODEL	HAVE DOUBTS/ NEED MORE INFORMATION	AGAINST THE EUROHYPOTHEC IDEA
GOVERNMENTS	CYPRUS POLAND CZECH REPUBLIK IRELAND FINNLAND	HUNGARY SPAIN	SWEDEN	EASTLAND GERMANY AUSTRIA
CORPORATIONS	Citigroup Inc., International SearchFlow, UK Crédit Agricole (CA), FR Halifax Bank of Scotland plc (HBOS), UK Lloyds TSB Group, UK Royal Bank of Scotland Group (RBS), UK	BBVA, ES	Baclays PLC, UK GMAC – RFC Limited, UK HVB Group, DE	ABN AMRO, NL Banca Intesa, IT
EU INSTITUTIONS	European Central Bank — Eurosystem, EU European Economic and Social Committee			

Table 1: Response to the Eurohypothec question as illustrated by the Green Paper on Mortgage Credit in the EU. Source: own elaboration.

Although a more extensive study of these responses can be found elsewhere,[17] the conclusion to be derived is that most respondents were either in favour of regulating the Eurohypothec, according to the model foreseen in the Basic Guidelines 2005, or proposed another model.

[17] See *Nasarre-Aznar, Sergio,* Reacciones en torno a la Eurohipoteca al Libro Verde de la Unión Europea sobre el crédito hipotecario, at Muñiz, Nasarre y Sánchez Jordán, "Un modello para una Eurohipoteca. Desde el Informe Segré hasta hoy", Cuadernos de Derecho Registral, Madrid, 2008, Colegio de Registradores de la Propiedad y Mercantiles de España.

Despite the positive response to the idea, the EU Commission relied only on the European Mortgage Federation to study the feasibility and interest of the institution, which created an ad-hoc group that was surprisingly closed during 2006 without any enthusiastic support for the creation of the Eurohypothec.[18]

However, other sub-groups created by the EC Commission for the purpose of investigating other areas of the Green Paper worked more actively and with more enthusiasm towards European convergence in their fields of knowledge. In fact, they seized the opportunity to raise certain issues surrounding the mortgage market that substantially coincide with the features of the Eurohypothec, as foreseen in the Basic Guidelines. The two main reports relating to these issues included those of:

A) The Mortgage industry consumer dialogue group (MICDG).[18a] Composed of consumers and lenders, few agreements were concluded because of variations in opinions, which related to important matters. Conclusions in three very relevant areas were however achieved namely:

a) Precontractual information
- When should it be given? The question was related to whether it should be given before or after the customer had provided his details – the latter being the bank's option- and in which timeframe.
- Improvements to the ESIS (European Standardized Information Sheet), that is, whether the ESIS should include more accurate information in relation to the mortgage that the consumer was going to take out.
- Efficacy of the Code of Conduct on mortgages. While today, this is only a matter of voluntary application by some credit institutions in Europe, consumers in the sub-group wanted to make it compulsory, while banks

[18] This outcome ressembles to the one of the Directive Project 14-10-1998 on distant financial services to consumers. Also mortgages were excluded from the Directive 2008/48/EEC (Official Jornal of the European Union 22-5-2008, L 133/66) on credit agreements for consumers.

[18a] Many of these issues are adressed in the above mentioned Directive Proposal of 31.3.2011 on credit agreements relating to residential property, such as the right of consumers to be properly informed in the pre-contractual phase (art. 9), the obligation to adapt this information in order to allow the consumer to evaluate if the offered mortgage credit is adapted to his needs and possibilities (art. 11), the obligation for credit institutions to assess the credit worthness of the consumer and the impossibility to grant him a mortgage credit that he would be unable to repay according to the result of that assessment (art. 14), the obligation to the member states to allow the consumers to legally or contractually prepay the mortgage credit (art. 18) and even a model of a "European Standardised Information Sheet" (ESIS) to provide to consumers with a set of relevant issues of the contract (Annex II).

considered that this would lead to more rigidities in mortgage operations.[19]

b) Assessment
- INFORMATION (description of the product) should be differentiated from ASSESSMENT (recommendation of the product) and from RISK WARNING (lender should rate the indebtedness capacity of the borrower).

c) Pre-payment rights
- Significant differences exist between this being a contractual right (lenders) or a statutory right (consumers). In addressing country opinions, countries like Spain have granted to consumers a statutory right to enable prepayment of any amounts of the loan at any time – although in Spain, credit institutions are able to charge extra fees to compensate for the losses they may incur (prior to the Mortgage Reform 2007 -which attempts to address the problem- such losses were unduly calculated). The situation in other countries is the opposite: credit institutions and consumers may agree to foresee (more expensive mortgages, that is, worse conditions and higher interest rates for consumers in exchange of the freedom) or not to foresee (less expensive mortgages) prepayment rights for consumers.

This report was interesting for the Eurohypothec conception process because it made clear the point that the "contractual" aspect of a mortgage loan relationship is one thing, whilst its "real" (right in rem) part is another. The Eurohypothec has not necessarily connection to the contractual aspect of a mortgage loan (the loan contract itself); it is only related to the "right in rem" (security) aspect in the sense that it only deals with a model of security right on real estate, that is, the mode in which the lending contract, which will include all necessary consumer-protection issues, will be secured. Some other issues, like prepayment rights, may have a direct impact on the passive operations of the mortgage market, that is, the "stability" and "foreseeability" of mortgage securities (especially, covered bonds).

B) The Mortgage funding expert group (MFEG), composed only of lenders, of course, concluded more agreements. The issue relating to mortgage securities was precisely the central discussion point addressed by the MFEG. These discussions have produced some interesting points:

[19] See more details of the situation of the code of conduct (inspired by the European Mortgage Federation) at http://www.hypo.org/content/default.asp?PageID=224 and at http://www.cml.org.uk/cml/policy/issues/113 (UK Council of mortgage lenders).

a) The concept of **"mortgage market"** is a complete one, as it includes both active operations (lending) and passive operations (mortgage funding). It now seems definitely clear that mortgage lending operations cannot be understood without a complete and well-functioning (from a financial and from a legal point of view) mortgage funding system. This crucial idea should be taken into account by any future harmonisation of the European mortgage law.

b) Need to **integrate the mortgage market passive operations.** The fact that the well known US risk concept of "lending long, borrowing short" may still be a reality in Europe, implies the existence of inefficiency. 60 % of all European mortgage loans (long term) are still inadequately funded by deposits (short term), which may cause mismatches, due to liquidity and interest rate changes (risks). As a consequence, only 17.5 % are funded through covered/mortgage bonds whilst 10.5 % are funded through mortgage-backed securities (MBS).

- **Larger and more diversified** mortgage pools. The geographical diversification is one of the most important types of diversification that exists within those pools backing both the MBS and covered bonds. This is today, rather too complicated to be achieved at a Paneuropean level due to the low level of foreign mortgages that an EU credit institution has, mainly due to lack of a common mortgage instrument (the Eurohypothec).
- Greater **diversity of mortgage products.** There are still several jurisdictions that lack specific well-functioning mortgage funding instruments, either covered bonds or MBS or both.
- What characteristics should this Paneuropean mortgage market possess? **Completeness, competitiveness, efficiency, transparency and stability.** Completeness implies that every EU credit institution should possess the required facilities and capacity for choosing the mode of mortgage funding that it considers most appropriate; competitiveness refers to a subordination of all barriers to facilitate negotiation of cross-border loans with mortgage loans (obviously, the Eurohypothec should play an important role here); efficiency implies greater liquidity and product diversification, forgetting the importation of the US model of the Federal Agencies (Fannie Mae, Ginnie Mae and Freddie Mac), which have recently (first in 2004 and after then in 2008) been revealed as inadequate for a healthy mortgage market, although there have been some attempts to create the European Mortgage Finance Agency; product diversification in passive operations markets is difficult to achieve in an environment in which there is scarcity of transnational mortgage business; **transparency** infers that mortgage securities' legal and financial structures should be more comprehensible both for investors (both professional and non-professional) and for rating agencies; in fact, this has been one of the most important reasons for the internationalization

of mortgage market crisis of Summer 2007: lack of transparency of the real risks that were borne by investors in MBS backed by sub-prime US mortgages, such as European professional investors linked to banks, funds or insurance companies; and stability refers to a process whereby passive operations of mortgage markets should bring about enough risk diversification into the mortgage markets.

- **Active operations:** pre-payment rights? – the same issue that is addressed by the MICDG but this time, due to the lack of consumer's participation in MFEG, clearer goals are achieved-; land valuation standards; flexibility of trans-national transfer of mortgages; efficient Land Register; efficient mortgage enforcement and consumer data protection.
- **Passive operations:** introduction of new legislations on covered bonds, to reduce risk in MBS pools and to create a truly Paneuropean market on mortgage securities. This is, of course, the ideal counterpart in the "passive side" for the Eurohypothec.

Therefore, even if the **White Paper 2007** of the EU Mortgage Credit had not specifically mentioned the Eurohypothec (it did in two Annexes), many of its principles and objectives would already be there. In essence, the creation of a true Paneuropean mortgage market cannot be achieved by addressing only the passive operations side.

Therefore, these are the key points of the White Paper 2007:

a) The mortgage credit market represents 47 % of the European Union GDP. Therefore it is an important area, which should be **integrated.** This integration has been calculated to allow for an increase of 0.7 % of the EU GDP.

b) The EU Commission aims to **facilitate the cross-border supply** of mortgages (p. 3; bold is mine).

c) The EU Commission aims to facilitate cross-border funding of mortgage credit. It literally states that: "The existence of differing legal and consumer protection frameworks, fragmented infrastructures (e.g. credit registers), as well as lack of appropriate legal frameworks in some instances (e.g. for mortgage funding), **create legal and economic barriers, which restrict cross-border lending** and prevent the development of cost-efficient, pan-EU funding strategies. The Commission therefore seeks to remove disproportionate barriers, thus reducing the costs of selling mortgage products across the EU" (p. 3; bold is mine). It continues: "However, economic and **legal barriers also exist which prevent mortgage lenders from offering certain products in certain markets** or opting for a given funding strategy" (p. 3; bold is mine).

Therefore, although it does not mention the Eurohypothec, in these three points the White Paper 2007 talks about the same goal that Eurohypothec pursues.

d) As regards mortgage securitisation, it states that "The aim should be to facilitate, and not restrict, the **development of a wide range of mortgage funding instruments"** (p. 4; bold is mine). As regards the use of pan-European mortgage loans to back covered bonds, it states that "the prohibition of including non-domestic EU mortgage loans in cover pools for covered bonds, which currently exists in some Member States, is compatible with the free movement of capital and the freedom to provide services" (p. 8). It envisages the creation of an Expert Group on Securitisation for 2008 (p. 9). The EU Commission refers to the same things we addressed with Eurosecuritisation and the cross-border transfer of mortgage loans to back covered bonds.[20]

e) The EU Commission seeks to **facilitate customers' mobility "**by ensuring that consumers seeking to change mortgage lenders are not prevented or dissuaded from doing so as a result of the presence of unjustifiable legal or economic barriers", thus avoiding "tying" practices (p. 5). See below new restrictions by Spanish Act 41/2007 and the advantages of the Eurohypothec at this point.

f) The EU Commission encourages member states to join **EULIS,** which is commented on below as a good complement to the Eurohypothec: one cannot be fully understood without the other.

g) As conclusion, it draws the following: "To be effective, any proposed measures must demonstrate that they will **create new opportunities for mortgage lenders to access other markets and engage in cross-border activity.** They should also demonstrate the capacity to facilitate a more efficient mortgage lending process, with economies of scale and scope, which should lower costs. The expected benefits should be weighed against the possible costs of these measures" (bold is mine).

h) Finally, the Eurohypothec expressly appears in two Annexes of the White Paper:

- Annex 2: Process (Commission Staff Working Document-Accompanying the White Paper on the Integration of EU Mortgage Credit Markets-Impact Assessment), which states that the Eurohypothec (referred to as "Euromortgage") is a matter of study after the Green Paper 2005 release.
- Annex 3: Impact assessment on specific issues (Commission Staff Working Document-Accompanying the White Paper on the Integration of EU Mortgage Credit Markets-Impact Assessment, pp. 168 and 169), in the field of transfer of mortgage portfolios, a solution would be "to issue a recommendation to Member States […], to issue legislation or to create the **'Eurohypothec',** as an alternative instrument for securing loans on property to existing national concepts of collateral" (bold is mine) and recommends further research.

[20] See below.

3. Need for the Eurohypothec

The creation of a complete European mortgage market would not require a common mortgage instrument if the current situation and facilities were conducive for it. However, figures reveal that currently, only 1 % of European mortgage lending operations are being undertaken cross-border (Green Paper 2005).

Broadly speaking, the European private law harmonization process has developed several ways of achieving integration but none of them have the capacity and resources required to create a single European mortgage market.

Therefore:

a) **Mutual recognition.** On the basis of the Cassis de Dijon resolution 1979, no barriers can be imposed on free circulation of merchandise if safety control requirements have already been fulfilled in an EU country. Several cases which followed Cassis de Dijon, like the Centros Case, Überseering and Inspire Art, have compelled other Member States to accept other EU states' corporative forms as the European Court of Justice recognises and acknowledges jurisdictions whose attributes make them valid anywhere in Europe. However, the mutual recognition principle applied to the diversity of mortgages in Europe (for sure more than 27) would mean that every national mortgage (each of the at least 27), as they are governed by the *lex rei sitae,* would be valid (should be able to be properly created) in every country, which would be completely chaotic for every jurisdiction (given the difficulty of integrating into one's jurisdiction more than 26 types of foreign mortgages).

b) In the field of **mortgages,** the most renowned case has been the Trummer and Mayer Case.[21] Austria had put in place a prohibition to create mortgages referenced to a foreign currency to avoid the publicity of a not-completely clear value of the mortgage (due to daily currency fluctuations). The European Court of Justice considered this reason as insufficiently strong to prevent the application of free movement of capital. Only if a national mortgage system were affected in such a way that it did not assure the rights of mortgage lenders and third parties, would this measure be acceptable.

c) **Transposition into a minus.** This principle implies that when a foreign right is incorporated into an EU country legislation, it should be applied in such a way that the owner of that right is not improved. However in the field of mortgages, this would mean that as regards a foreign mortgage, the mortgagee's position would be worsened when it was incorporated into a national jurisdiction's legislation.

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21 (C-222/97) ECR 1999, I-1661.

Therefore, the Eurohypothec is not only fully compliant with the objectives of the White Paper 2007 and the most appropriate instrument to achieve them but also it bypasses the barriers of traditional ways of EU law harmonisation. Moreover, in the current context of international crisis, the Eurohypothec brings also certainty, trust and transparency to all mortgage operations (e.g. for securitisation purposes as establishes a clear-cut system of mortgage conveyance through the Eurotrust), following the intentions of the EU Regulation 1060/2009[22] on rating agencies.

4. Idea behind the Eurohypothec

The Eurohypothec model presented in the Basic Guidelines 2005 was conceived as a **secure, flexible Paneuropean** instrument -which corresponds with the foundations of the White Paper 2007 on the integration of EU mortgage credit markets.

a) Security. The common core of all charges on land in Europe that may be used to secure obligations is that they can function as instruments enabling **land to be used as security** with some kind of **preference** – a claim that may be raised by a secured creditor. Apart from this starting point (using the land to secure debts with some kind of privileged right), no further common features may be found among any securing charge on land in Europe. The Eurohypothec should include this starting point in its foundations; however everything that is disconnected from it would appear unfamiliar to one or more legal jurisdictions (e.g. the contractual dependence arising from the secured obligation/s is not familiar to almost every South-European country; the fact that the Eurohypothec is able to secure all types of obligations – including the non-monetary ones – would come as a surprise to many common law lawyers, etc.). However, it would be unreasonable to discontinue with this integration for this reason. The Eurohypothec should be as **minimally intrusive** as possible to national jurisdictions but above every other thing, it should be **as much beneficial** as possible both to lender and borrower (this is its main cornerstone). To be effective, the Eurohypothec should have the same privileged rank in terms of foreclosure anywhere in Europe. However this cannot easily be achieved in the second phase; the above mentioned "third phase" is required, once a model has been agreed upon. This would be the optimal situation; if it is not legally possible, at least it should still have the same rank as other national mortgages (with which it would coexist). Finally, an excellent partner for the Eurohypothec would be a common European Land Register. A first step in this direction would

[22] Official Journal of the European Union 17-11-2009, L 302/1.

involve the *European Land Information Service* (EULIS) Project (www.eulis.org), which during its first stage (lasting till 2004),[23] included two aspects: an on-line portal to access the already computerized national land registers and the "legal part" that includes definitions of legal institutions (in English) which are required to understand the legal situation of a plot of land (property, land charges, etc.) and their translation from one national language to the other. In its current stage, EULIS is fully operational and 5 national land registers and cadastres can be accessed through EULIS portal. Plans currently exist to extend it to many other registers and cadastres. As currently conceived, EULIS would serve as a useful tool not only to increase transnational land conveyancing, but also for the **registration** of land charges (lenders can easily check from his home country for all legal and physical details of the land that is to be accepted as security for the loan they intend to grant), which should evolve to true European e-conveyancing relating to land in future (in a similar way to what the English Land Registration Act 2002 foresees).

b) Flexibility. In order to be able to employ the Eurohypothec in every business involving mortgages conceivable today (and many others that could be conceived in the future that require a flexible real estate security), it should be "released" from those legal ties which restrict its flexibility: its legal accessoriness to the secured obligations. The Eurohypothec, as a right, should be regarded as an entity **(value,** in economic terms) on its own, disregarding the purpose for which it is being used at a particular point in time: from the passive perspective of being a charge over land, it should evolve to the more active one of making value of land by the mortgagor (who is, at the end of the day, the owner of the Eurohypothec once it is created). Only in such case could the Eurohypothec be assigned (by the lender/mortgagee) separately from the secured loan for funding purposes or would the borrower be able to reuse it for as many times as desired with the same or with a different lender. This should be understood as a general rule, which can be overlooked in some cases for consumer protection purposes (e.g. in the case where the lender assigns the Eurohypothec and the secured loan separately to two different third parties and both want foreclosure their rights against the borrower; in such a case, the latter should be entitled to invoke the relevant exceptions in order to avoid paying twice; this should be possible on the basis of the principle of unjust enrichment and on grounds of misbehaviour on the part of the lending institution[24]).

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[23] Now EULIS holds a new project called Line (2010) to link EULIS system to the E-Justice programme.

[24] See below.

c) Paneuropean. This implies that the Eurohypothec should serve as a common instrument, accessible throughout Europe, disregarding any co-existence with other national types of mortgages. Based on what has already been said about its uses, flexibility and function as a security, finding an appropriate model for the Eurohypothec would be of great benefit. These are, broadly speaking, the basic hypothecs models currently in force in Europe:
- The continental accessory mortgage. This is the most widespread model type in Europe and this has led to some authors (e.g. Wachter,[25] Gómez Galligo[26]) proposing it as an ideal model for the Eurohypothec. It is present in almost every EU country but has disadvantages in relation to the independent mortgage. These disadvantages are linked to its legal accessoriness with the secured loan. This means that anything which happens to the contractual relationship between lender and borrower would also affect the hypothec (e.g. no hypothec may exist without a securing loan; once the loan is extinguished so is the hypothec; their assignment must take place at the same time etc.). However, authors supporting this idea do not provide any solutions that allow the accessory mortgages to undertake any type of business involving situations whereby the Eurohypothec can be combined with the Eurotrust.[27]
- The continental European independent mortgage. It has its origins in Germany *(Sicherungsgrundschuld)* and Switzerland *(Schuldbrief),* but its use is widespread throughout the East-European countries such as Estonia *(Hüpoteek),* Poland *(Dług na nieruchomości,* still a project), Slovenia *(Zemljišzi dolg)* and Hungary *(önálló zálogjog).* Its advantage consists in being able to operate with any type of business and its disadvantage involves the hypothetical reduced protection for the borrower.
- The Scandinavian independent mortgage.[28]

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25 *Wachter, Thomas,* Die Eurohypothek-Grenzüberschreitende Kreditsicherung an Grundstücken im Europäischen Binnenmarkt, "Wertpapier Mitteilungen – Zeitschrift für Wirtschafts- und Bankrecht", num. 2, January 1999, pp. 49 to 104.

26 *Gómez Galligo, Francisco Javier,* La eurohipoteca: el sistema hipotecario español como modelo de referencia, "Estudios de derecho de obligaciones: homenaje al profesor Mariano Alonso Pérez/coord. por Eugenio Llamas Pombo", Vol. 1, 2006, pp. 927-947. In the author's opinion, the Spanish mortgage should serve as a model for the Eurohypothec.

27 See below.

28 For all relevant information on this type of land charge, see *Jensen, Ulf,* Panträtt i fast egendom, 6th Edition, 2001, Iustus. As a general idea, one can agree that the Swede mortgage is an independent (from the loan) one and quite simple (the whole system of registration and dealing) compared to the majority of European models.

– The common law "mortgage", which is present, within the EU context, in the UK and in Ireland. Although certain features exist that make the common law mortgage as flexible as the continental independent mortgage (ie. its virtue to adapt to any type of loans, the possibility of creating or conveying it in equity, that is, with less requirements than with its legal form), the point is that the mortgage itself belongs to a specific legal environment: the common law and equity. The Anglo-American legal system cannot be exported as such, among other reasons, due to the fact that the mortgage entails a 3,000 year lease – which is still so in its legal nature – cannot be understood abroad; moreover, the fact that the mortgage is, at the same time, a loan and a *right in rem* is also a difficult concept to understand outside Anglo-American systems because civil law countries have a model of *rights in rem* that secure contracts and other obligations; and equitable mortgages (the ones normally used in many mortgage businesses) cannot be created or even understood in civil law jurisdictions. However, the wise use of the trust in combination to mortgage operations, rather common in common-law contexts, can dramatically improve the performance of the Eurohypothec.[29]

From these models, it can be concluded that the Eurohypothec model in the Basic Guidelines 2005, has adopted the most appropriate aspects of each of the stated models to achieve the maximum possible level of security and flexibility and it can also be said that the result, the Eurohypothec, is a *tertium genus.* This is explained in the next point.

5. Model of the Eurohypothec in the Basic Guidelines 2005

Here are the main features that help to build an operative concept of the Eurohypothec, which were incorporated in the Basic Guidelines 2005:

A) Concerning the legal nature

– It is a **real charge,** which confers on its owner a preferential right over a piece of land (i.e. using it as a security for a loan(s)).
– It does not substitute **national mortgages;** it should coexist with them in each national jurisdiction. This is fully in compliance with the aim of the White Paper 2007 of increasing the mortgage products' diversity (p. 4).
– It is **contractually dependent** on the obligations it secures; it may not require any obligation to exist.

[29] See the role of the Eurotrust below.

- To be used as a security, a **security contract** should exist. It should provide for minimum contents (which obligations to secure, use of the Eurohypothec, conditions for redemption and enforcement). Form: *lex rei sitae* and art. 4.1 (c) Regulation 593/2008 on the law applicable to contractual obligations (Rome I).[30]
- Possibility for **complete redemption** (devolution) or a **partial** one.
- It does not generate interests; its constitution costs should be the same as those of national mortgages; the Eurohypothec extends to chattels and fruits of the land; it can be created in relation to any currency of the EU.

B) Constitution

- Only the **owner** of the land can create it, with or without the intervention of the creditor.
- It must be **registered** in the Land Register to exist (amount, owner and form).
- It can adopt **two forms:** "register Eurohypothec" and "letter Eurohypothec". It can be managed electronically.
- Object: **any land in Europe** and any other, according to *lex rei sitae*.
- **"Trans-national eurohypothecs"** and **"multi-parcel eurohypothecs".**
- it is possible to hold a Eurohypothec or part of it on **trust** for another.

C) Transfer

- It will **depend** on the way it has been created: if it is a "register" Eurohypothec, transfer will be done through the Land Register; if it is a "letter" Eurohypothec, this will be done only by the delivery of the letter to the transferee.
- The Eurohypothec can be **conveyed independently of the secured obligation** to a different third party.
- The debtor can **oppose real pleas and objections** of the transferee. Therefore the security contract should affect third parties; if not, torts liability of transferor.

D) Extinction

- It is extinguished through **cancellation** in the Land Register, as a result of an agreement between the owner and, in its case, the creditor.
- **It is not extinguished** through passage of time.
- The **fulfilment** of a secured obligation **does not imply its extinguishment;** its effects will be determined in the security agreement.
- Soft law: enforcement, registration and implementation

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30 Official Journal of the European Union 4-7-2008, L 177/6.

- Its **efficacy** depends on the **process and duration of its enforcement** (max.12 months)
- The Eurohypothec is an **enforceable title** in itself *(lex rei sitae)* + constitutes an enforceable claim against the owner *(Schuldverprechung) (lex rei sitae;* that is, only in those jurisdictions in which this is allowed).
- It should end through **sale at a public auction** (interdiction of *the droit de voi parée).*
- In the case of pleas and objections, the **burden of proof** lies with the owner of the Eurohypothec.
- Higher **ranked** rights stand still; those with the same or worse are extinguished; possibility of enforcer's substitution, replacing him and occupying his rank
- **Insolvency.** Same security as in enforcement. Possibility of separate enforcement.
- An **efficient Land Register** is required: public charges, rank and publicity.
- **Implementation.** Model to tend to and regime 28th.

6. Questions about the model

According to our experience and feed-backs we have received, several questions have arisen whenever the model was explained.[31]

a) Lack of **financial studies.** If the implementation of the Eurohypothec is a rather long and difficult way to walk, some studies should show in advance if it is a worthwhile process, economically speaking. However, working on the assumption that one common single instrument is better than having at least 27 different ones, may be enough. Moreover, the White Paper 2007 (p. 13) requires that any new measures "should demonstrate that they will create new opportunities for mortgage lenders", although it already includes some numbers that illustrate the benefits of mortgage markets' integration (pp. 3 to 5).

b) The proposed **"contractual dependent mortgage"** is **generally unknown** in Europe: this could generate concerns. Moreover, some models of legally dependent mortgages are flexible enough. Two main concerns always arise: the Eurohypothec, as foreseen in the Basic Guidelines 2005, cannot operate in causal jurisdictions, that is, in jurisdictions where the *"causa"* is a relevant requirement to compound a valid *negotium (Rechtsgeschäft);* the other one, that a separate transfer of the obligation to a first third party and the mortgage (Eu-

[31] See a discussion about pros and cons of the Eurohypothec at European Bank for reconstruction and development, Mortgages in transition economies. The legal framework for mortgages and mortgage securities, United Kingdom, 2007.

rohypothec) to a second one will place the borrower in a difficult situation, as he would then have to face two different claims. Neither of both statements is true.

i. Topic of ***causa*** **and accessoriness.** Although studied in depth elsewhere[31a], Figure 2 shows those differences which exist between both: the *causa* refers to the obligation to create a security real right (or to use an already existing one) to guarantee an obligation/s *(pactum de hipothecando:* the obligation of the mortgagor to create or employ a mortgage to guarantee certain obligation/s) while the accessoriness, although there are many types, refers to the link and grade of dependency between the security right and the obligation/s, that is, what happens to the security right when the obligation is transferred, diminished, or extinguished.

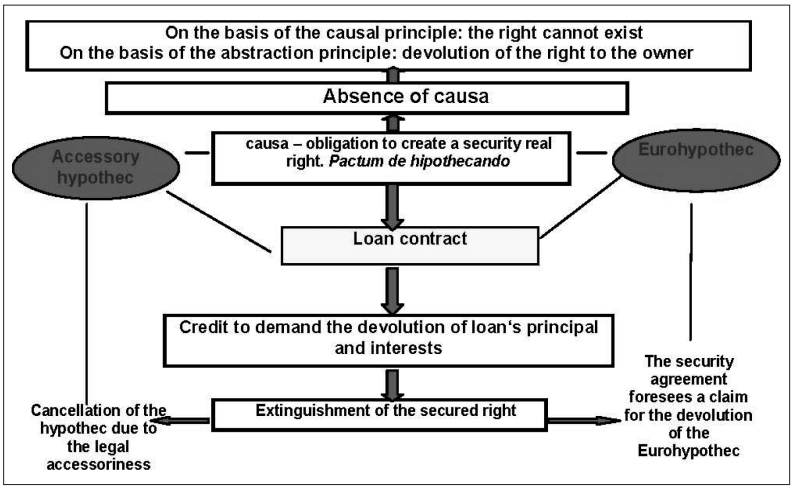


Figure 2: Causa and accessoriness. Source: Sergio Nasarre Aznar and Otmar Stöcker, *Un pas més en la 'mobilització' de la hipoteca: la naturalesa i la configuració jurídica d'una hipoteca independent,* "Revista Catalana de Dret Privat", Vol. I, 2002, p. 63.

ii. On the topic of risk (for the borrowers) of **separate transfer** of mortgage and loan. Although this may be possible only if agreed with the borrower and mortgagor in the security contract, it would be necessary in some way to allow a Euro-securitization process through a Eurotrust:[32] that is, the secured loan alone should be able to be transferred to a Special Purpose Vehicle (SPV) – that which issues the MBS – while the Eurohypothec itself would be held by the originator on trust for the SPV. Therefore the normal case would be that the

[31a] See *Sergio Nasarre-Aznar* and *Otmar Stöcker,* Un pas més en la 'mobilització' de la hipoteca: la naturalesa i la configuració jurídica d'una hipoteca independent, Revista Catalana de Dret Privat, Vol. I, 2002.

[32] See below.

originator would retain the Eurohypothec and would only transfer the loan for mortgage funding purposes, and this is what would be agreed between the mortgage loan parties. However nothing would prevent the originator from transferring the loan to a first third party and conveying the Eurohypothec to another, thus compelling the mortgagor to face two possible claims (one from the transferee of the claim an the other from the transferee of the Eurohypothec). See the structure in Figure 3.

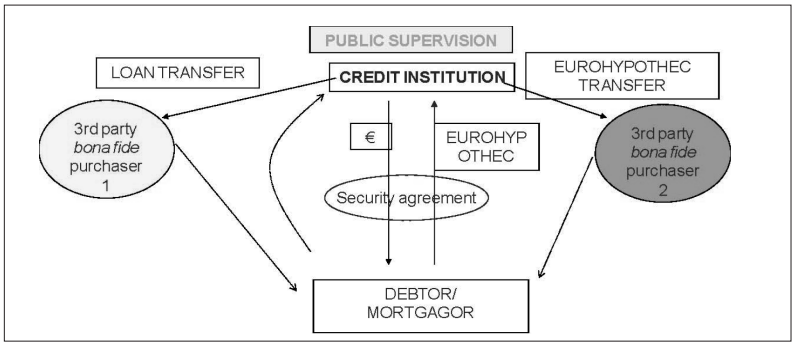


Figure 3: Debtor's risk facing two claims: from the lender and from the mortgagor. Source: own elaboration.

However, the debtor/mortgagor would be able to use all pleas and exceptions to protect himself, especially, that which states that he has already paid the loan, so he can stop the enforcement of the Eurohypothec. In any case, he would not need to pay twice.[33]

c) In a third stage, **some fields of law will probably be affected.** However, these changes will be carried out spontaneously by national legislators to improve their Eurohypothecs. If a jurisdiction has a defective enforcement system that prevents speedy full recovery of the borrowed amount to the lender, few or more expensive (higher interest rates and worse conditions) Eurohypothecs would be granted in that country when compared with other jurisdictions with better enforcement procedures. The same would happen with the insolvency context, the efficacy of the Land Register and all "soft law" that has been explained in the previous point, letter E. E.g. See in Figure 4 the significant dif-

[33] This is the result of the implementation of the new § 1192 Ab. (1a) BGB by the Art. 6 of the so-called Risikobegrenzungsgesetz 18-8-2008 (BGBl. I S. 1666 (Nr. 36)) by which the third party that acquires the Grundschuld is always affected by the contents of the security agreement, regardless whether he is or he is not a bona fide purchaser for value; thus, all exceptions and pleas – including the already paid premises on the mortgage – can be used by the debtor against him.

ferences throughout Europe in relation to the grade of acceptance of the *lex commissoria*.

Figure 4: Level of acceptance of *lex commissoria* in Europe. Source: "Runder Tisch", 2009.

d) Scope of the Eurohypothec: Should it be allowed only in the context of international transactions or also in domestic operations? Nothing should restrict the use of the Eurohypothec in domestic operations, if it would produce beneficial results for the parties involved. It should be presented as another option to them, separate from their national security rights on real estate. Should it be applicable only to professional lenders or also to non-professional lenders? This is not surprising to see in several national jurisdictions in which some security rights are only recommended for professional and controlled use (like the *Grundschuld* in Germany) or even legally limited to their use (the new *hipoteca recargable* in Spain).

e) Competence of the EU to implement it?

Under primary legislation, it is clear that the Eurohypothec is linked to the free movement of capital and people, which nowadays can only be achieved by an action of the EU, to which it is legitimated by art. 3b.3 EU Treaty. While the reference to free movement of capital is rather clear (trans-national active and passive mortgage operations will result in a Paneuropean movement of capital in relation to real estate), that which refers to people, implies the possibility of people easily financing their houses in another EU country from a national bank, not only for second-residences but also for geographical mobility of workers. They would be able to plan their movements abroad thus contracting with their national banks (theoretically with better conditions) in matters relating to the financing of their new house abroad.

The specific references in the Treaty of the European Union last amended by the Treaty of Lisbon 13-12-2007:[34] Art. 2.2 (freedom of movement and residence), internal market and economic union (arts. 2.3 and 2.4) and art. 6.1 which gives the Charter of Fundamental Rights of the European Union of 7-12-2000[35] last amended on 12-12-2007[36] the same legal value as the Treaties. In fact, it is this Charter that refers to the fundamental rights of property (art. 17.1), familiar, home and private life (art. 7), consumers' protection (Art. 38), help to families (art. 33.1), free movement and residence (art. 45), free movement of workers (art. 15) and, in general, the Charter of Rights seeks the „ free movement of persons, services, goods and capital, and the freedom of establishment" (Preamble).

In order to avoid too much intrusion in national laws, consideration of the application of the Eurohypothec as a "28th regime" seems to be a feasible solution.

f) The role of the **trust** in several civil law contexts is still in doubt. As we will see in the next part, the Eurotrust is an essential complement for the Eurohypothec.

III. The Eurohypothec and the Eurotrust

1. Introduction

Many financial operations do not take place internationally because they are too complex, expensive or, simply, impossible. The reasons may vary, but many of them are related not only to the lack of a common mortgage instrument in Europe (credit institutions do not wish to face the risk of granting a mortgage that implies the application of a foreign law, according to the applicable *lex rei sitae),* but also due to the lack of an instrument that would provide clarity and more-legal-friendly structures in many mortgage operations: a pan-European fiduciary instrument, the Eurotrust.

2. Concept of the Eurotrust

Although possibly with a misleading denomination (the Eurotrust is not related to the international Trust of The Hague Trust Convention 1985, but relates to "Euro" because of the "Eurohypothec" and "trust" because it entails both obliga-

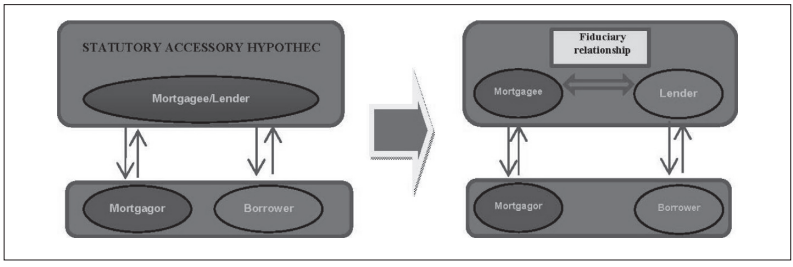
[34] Official Journal the European Union, 2007/C 306/01, Vol. 50, 17-12-2007.

[35] Official Journal the European Union, C 364/1, 18-12-2000.

[36] Official Journal of the European Union, C 303/15, 14-12-2007.

tional and real (fiduciary) effects, that is the isolation of assets from their holder), the Eurotrust has been conceived[37] as a **complement to the Eurohypothec.** This is so because the Eurohypothec, as a result of its legal nature as a contractually dependent real charge, requires the Eurotrust. It is a means of achieving greater **flexibility** in the link between credit and mortgage, allowing the fact that lender and mortgagee could be different persons, **without losing security.**

Figures 5 and 6 illustrate how lender and mortgagee could easily be different people thanks to the Eurotrust.



Figures 5 & 6: Legal and fiduciary relationship between lender and mortgagee. Source: own elaboration.

According to "Runder Tisch" 2009 conclusions, shown in Figure 7, only 7 countries in Europe are currently allowing such structure.

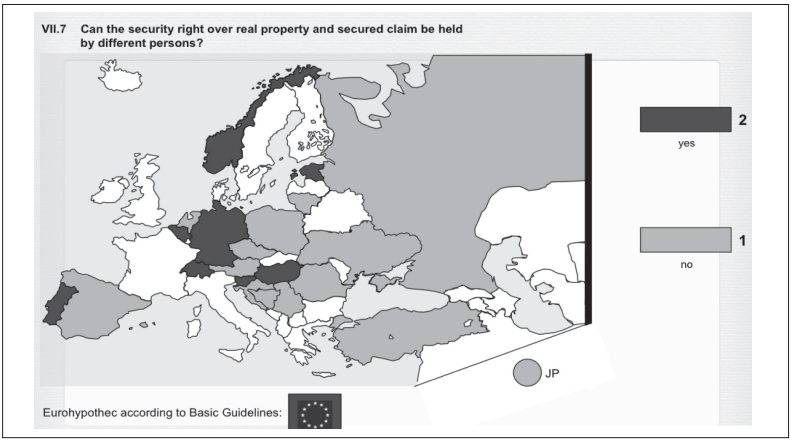


Figure 7: Jurisdictions in which mortgagee and lender can be different persons. Source: "Runder Tisch", 2009

[37] It was first referred to in *Nasarre-Aznar, Sergio and Stöcker, Otmar,* Eurohypothec and Eurotrust. Future Elements of a Pan-European Mortgage Market, in "Innovation in Securitisation. Yearbook 2006", *Jan Job de Vries Robbé and Paul Ali (Eds.),* The Hague, 2006, Ed. Kluwer Law International.

As a result, the Eurotrust would prove beneficial to any business requiring an efficient division between loan and mortgage:

Active operations: all those relating to the existence of several lenders under the same Eurohypothec

a) **Partial redemption** of loan A and new taking of loan B (see White Paper 2007, p. 5, about the desire to improve consumers' mobility among lending institutions)

b) **Total redemption** and **reuse** of Eurohypothec without loan (see the same idea at White Paper 2007, p. 5).

c) **Syndicate mortgage lending**

Passive operations

a) The acquisition of mortgage loans European-wide for purposes of pooling them to issue **covered bonds** (art. 22 UCITS Directive) or simply **using other credit institutions' mortgages** (held on trust) to secure one's covered bonds issuances (see White Paper 2007, p. 3).

b) Creating international pools of mortgages for **securitisation** purposes

In consequence, the Eurotrust combined with the Eurohypothec allows for the restructure of all businesses (useful for lenders and borrowers) that involve a **split between mortgage and loan.** Among **other uses** of the Eurohypothec itself due to its Paneuropean nature, it ensures that:

a) During the obligation, the loan/s is/are **permanently secured by the mortgage held by another,** which is enforceable where the security agreement states so.

b) In case **of insolvency of the mortgage holder,** the mortgage (Eurohypothec) should be treated as an **alien property** (and therefore not included in the insolvent's insolvency estate).[38]

3. Uses of the Eurotrust

A. Ongoing syndication

This type of financial operation is commonly used to fund a project, which either entails an important grade of financial risk – ie. of default – or involves a huge disbursement of economic resources, or both. In these two situations, a single lender is faced with so many inconveniences in funding the project that he is simply not prepared to do it alone. Therefore, he requires the borrower/

[38] This effect is not ensured, for example, by the Treuhand in Germany, according to the decision of the Bundesgerichtshof 24-6-2003 (WM 2003 pp. 1733 ff).

mortgagor to find – or finds by himself – other lenders that may be interested in sharing the risk/disbursement. If new lenders have entered the relationship since the beginning of the operation, it is called an "initial" syndicate lending. However, where those new lenders enter at a moment different from the initial one (when the financial operation was prepared), it is known as an "ongoing" syndication.

This difference is relevant to the usefulness of the Eurohypothec. Although it can be used in both situations, it is in the "ongoing" syndication where it plays a more important role, as it optimizes it or even allows it in legal contexts where it is not possible. Where it functions as an "initial" syndication, the operation can be organized through a common mortgage securing a loan in which the active side constitutes several lenders (joint and several credit). If nothing changes during the life of the project – that is, no new lenders come – the operation is properly structured. However, problems arise when new lenders come into the relationship – or where simply it was planned only for a single lender and a second or other ones are later added – who also want to be secured by the **same** mortgage. Ongoing lenders under a syndication are not comfortable when they are assigned second and further mortgages on the charged land. Depending on the concrete costs and in contexts where a split between mortgagee and lender is not possible (accessory mortgages), there are only two solutions, neither of which is optimal: either the mortgagor grants further mortgages to the newcomers – which makes the whole operation more expensive and even impossible, because this situation is not desired by new lenders under a syndication –; or the first mortgage relationship is modified (novation) in the Land Register, which may involve, in some contexts, the extinction of the first mortgage and the creation of a brand new one (extinctive novation). However, even if it is only a modificative novation, the need for reformulation of the whole first mortgage loan, makes the operation more complicated and expensive.

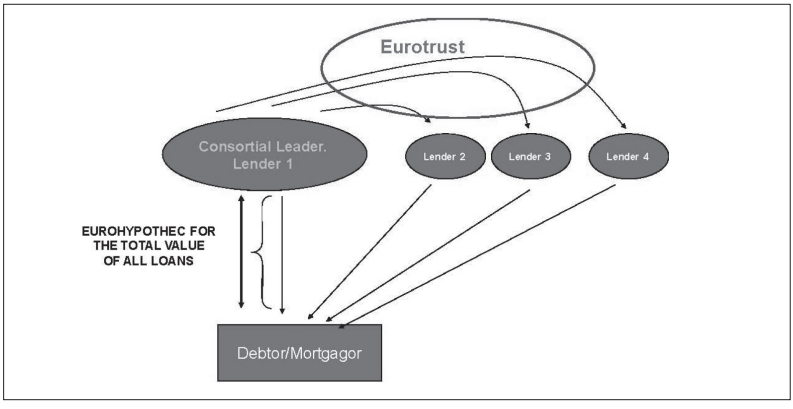


Figure 8: The syndication with the Eurohypothec & the Eurotrust. Source: own elaboration.

With the Eurohypothec and the Eurotrust, the ongoing syndication can be undertaken in an optimal way (see Figure 8 above): while the Eurohypothec allows for a split between mortgagee and lender, it is allowing the possibility of several lenders being secured by the same mortgage, either since the beginning of the relationship or in an ongoing syndication. However this is not enough, as no assurance is provided to the second and subsequent lenders that they are properly secured with the first single Eurohypothec with a simple contractual relationship between lender 2/3/etc. and the borrower and with another contract between lender 2/3/etc. and lender 1.

Because:

1) The "security contract" between lender 2/3/etc. and the borrower and lender 1, will only be enforceable between them, given the nature of a contract. Once lender 1 conveys the Eurohypothec, the assignee is not obliged to respect that contract (it does not affect him) and therefore, lender 2/3/etc. will no longer be secured by the Eurohypothec.

2) Even if lender 1 does not assign the Eurohypothec, the same problem can take place if lender 1 becomes insolvent and therefore the Eurohypothec will be included in his active estate. The same happens if lender 1 has remortgaged the Eurohypothec (ie. Sub-Eurohypothec) and a single enforcement is carried out by the owner of that sub-Eurohypothec. In both cases, lender 2/3/etc. will lose their contractual rights before the creditors of lender 1, who will be entitled to enforce or recover (in case of insolvency) from the Eurohypothec.

If the Eurotrust comes into play, it is now clear that the Eurohypothec is securing second and further lenders not only on the basis of an agreement between them and lender 1 and the security contact signed with the mortgagor, but also as a result of the agreement producing *erga omnes* effects, fiduciary effects through the fiduciary arrangement between lender 1 and subsequent lenders: from then on, the unaffected part of the Eurohypothec – that is, the part that has not been used to secure any loan at all, either because it never existed or because the mortgagor has partially repaid it – is going to cover lender 2/3/etc. although the Eurohypothec is still held by lender 1, both for himself – for the amount of his own loan – and for the other lenders – in amounts corresponding to each of the others' loans. This *erga omnes* fiduciary effect, will result in that part of the Eurohypothec that is securing other lenders' loans, being considered as an alien property, both in enforcement cases and, especially, in cases dealing with the insolvency of the first lender. In this latter case, the Eurohypothec will partially be conveyed to other lenders in most EU jurisdictions as it is considered an alien property, a different one from the property of the insolvent lender 1.

Ongoing syndication is nowadays only possible in 7 European countries, according to Figure 9.

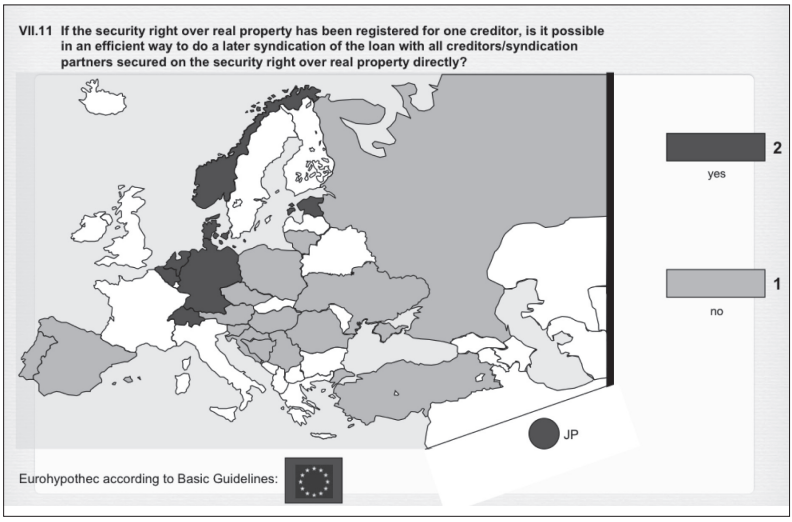


Figure 9: Ongoing/Later mortgage loan syndication. Source: "Runder Tisch", 2009.

B. Redemption

One of the most interesting advantages that the Eurohypothec would present to borrowers is greater freedom – understood as a **de-link** with a single lending institution and the possibility of dealing with several of them at the same time (i.e. taking different loans from each one and securing all of them with the same Eurohypothec). This is in addition to other advantages that the Eurohypothec provides. In two respects:

i. Because the Eurohypothec would help to create a true **Paneuropean mortgage market,** the concurrence among lending institutions would no longer exist only on a national basis but also at European level. With the development of new technologies, there are currently no restrictions or technical problems for consumers based anywhere in Europe in logging on to the internet, checking all mortgage offers offered by any European lending institution and calculating which is best for him, taking into account that the lending institution is willing and ready to grant the mortgage disregarding the location of the land that is to be purchased and used as security, thanks to the Eurohypothec. However, this is still not enough, because the lending institution should be aware of the physical and legal situation of the land, whose purchase it is funding. This can only be achieved by the so-called "Euro-land register", which is not a reality yet, but where advances and work have proceeded on the already fully-functional European Land Information System (EULIS) project. This project facilitates the

possibility of checking cadastres and land registers of eight European countries through a single portal, EULIS, together with a thesaurus that tries to address terminological questions and definitions of charges in different jurisdictions.

ii. The Eurohypothec should be seen as a **value on land,** that is, a means of negotiating with one's land value without conveying the land. The Eurohypothec, according to the Basic Guidelines, has been conceived more as value on land than as a charge. This conception implies in the first place that the Eurohypothec should always remain in hands of the mortgagor, disregarding in whose hands it is at different moments. This entails the possibility of disposal of the Eurohypothec by the mortgagor at any time, as soon as he has repaid the debt it had been securing. This can be concretized in three important aspects:

a. Complete subrogation

Regardless of the grounds (ie. the better the interest rates of the second lender, better treatment with other loans, etc.), the mortgagor – on the grounds of the special protection he deserves as a consumer (see, in this sense, White Paper 2007, p. 5) – should be able to change his lender, once he has repaid the first one. Through the subrogation, Bank B pays the debt the debtor/mortgagor has with Bank A with funds from the new loan it is granting the debtor/mortgagor in exchange of the mortgage he had granted the first lender, as it is shown in Figure 10. No change is required as regards the mortgage to ensure the complete success of this new operation. A private loan arrangement with the second lender is sufficient.

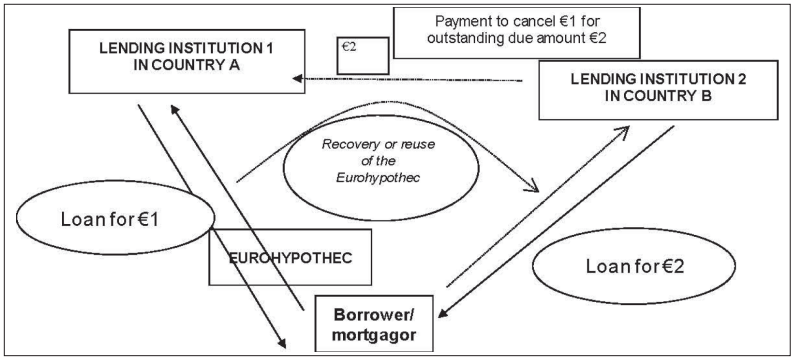


Figure 10: Scheme of complete subrogation of Bank B in Bank A. Source: own elaboration.

This operation is nowadays not always possible in every European country, as it is shown in Figure 11.

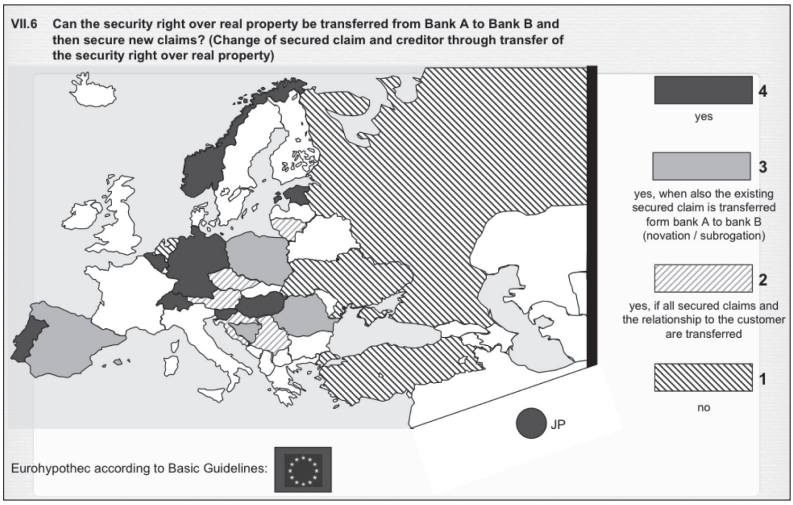


Figure 11: Flexibility in reusing the mortgage with another creditor. Source: "Runder Tisch", 2009.

b. Re-use of the Eurohypothec by the borrower

Even when the borrower has fulfilled his obligations to the lender, the Eurohypothec is not extinguished and does not need to be cancelled in the Land Register – automatic extinction of mortgages being linked only to those that are legally accessory.

Once the loan(s) is fully repaid, the mortgagor recovers the Eurohypothec and it does not consolidate with the ownership of the land – this usually occurs with the Eurohypothec as it had been agreed in the security contract. Instead, the mortgagor can keep it until he requires it once again for other purposes, such as the purchase of another house or to take advantage of other type of credits secured with the Eurohypothec, such as loans for holidays, cars, etc. As a result, there is no need to cancel the first one and create a new one thereafter, thus saving time and costs.

c. Reducibility and partial re-use

One of those rights of the mortgagor which illustrates the involvement of the Eurohypothec is exemplified in the possibility of reducing it whenever it is over-securing the loan in comparison to the over-collateralization that was agreed at the time the mortgage loan was granted (in relation to the loan-to-value,

LTV). That is, if the land is valued at 100 €, the mortgage on it may be arranged at, let us assume, 100 €, while the loan would be 80 €, that is, with overcollateralization of 20 %. At the very moment the debtor pays the first instalment, the overcollateralization is increased, which means that in practice, the lender is benefiting from an increasing overcollateralization for free, without compensating the borrower who is witness to his land being increasingly and unnecessarily overcharged: if the lender had agreed to grant a loan of 100 € with a coverage of only 100 € in the mortgage, why should he be entitled after each instalment to be increasingly more secured without any compensation for the borrower? These are overcollateralized mortgages (with a value, an asset, that in fact belongs to the mortgagor) from which the lenders are unduly making profits (unjust enrichment) i.e. with the issuance of mortgage securities. On this ground, several jurisdictions like Germany allow the mortgagor to unilaterally reduce the mortgage (of course, with an evidence from the lender of having partially repaid it) in the Land Register (like Germany, at §§ 1144 and 1145 BGB), while others forbid it on the principle that the mortgage is indivisible (i.e. in Spain, art. 122 LH[39]).

In fact, only a few countries in Europe allow the unilateral reduction of the mortgage by the mortgagor, as it is shown in Figure 12.

Figure 12: Unilateral reduction of the mortgage by the mortgagor. Source: "Runder Tisch", 2009.

According to rules of the Basic Guidelines which relate to the Eurohypothec, the mortgagor will therefore act with the released part of the mortgage according to the clauses in the security agreement: he would either cancel the mortgage

[39] LH: Spanish mortgage Act 1946.

partially in the Land Register or simply reuse it with the same or with another lender to secure another loan with him. Figure 13 shows this second possibility.

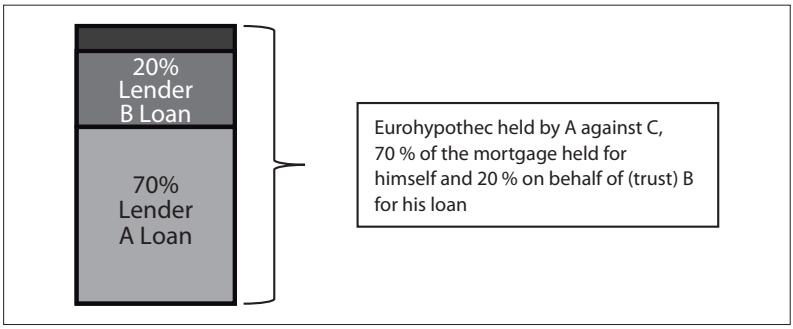


Figure 13: Partial cancellation and partial reuse of the Eurohypothec. Source: own elaboration.

Once again, the possibility that a single mortgage can segure obligations due to two or more creditors at the same time only exists in 6 European countries, as it is evidenced in Figure 14.

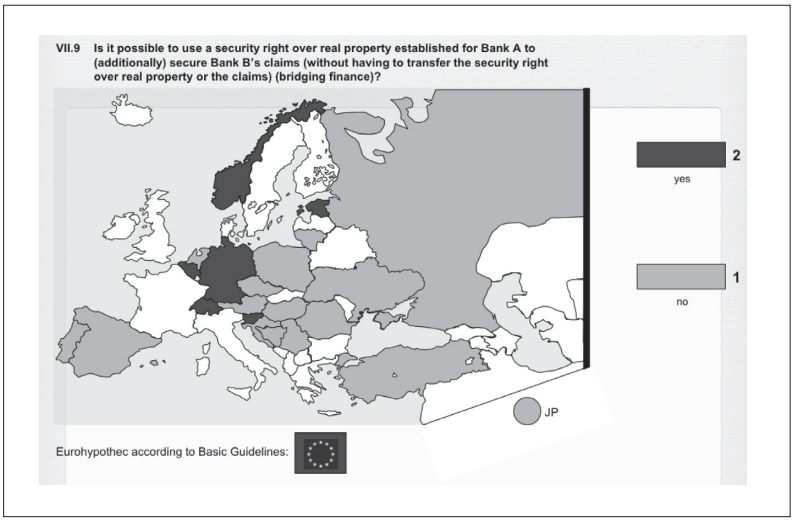


Figure 14: Countries in which a single mortgage can secure obligations that are due to two or more different creditors (bridging finance). Source: "Runder Tisch", 2009.

C. Eurohypothec's securitization

Another benefit of the Eurohypothec to lenders is the creation of a truly pan-European mortgage securities' market, that is, the possibility of using Eurohypothecs from all around Europe as assets to be securitized on a European-wide basis. Instead of pooling a wide range of commonly unknown securities on land (ie. in Spain, apart from the so-called *participaciones hipotecarias,* which are unique in Europe and quite insecure from a legal point of view, no mortgages are pooled for securitization purposes; in France, mortgages are conveyed only through a so-called *bordereau de cession;* in England, equitable mortgages are usually pooled; in Germany, until 2005, no securitization was possible), resulting in uncertainty for investors (and this is necessarily one of the reasons why mortgage securitization is not done nowadays at Europea-wide level), a single and known mortgage instrument/security on land could be pooled: the Eurohypothec. Although at a second stage, Eurohypothecs granted in different countries would have different grades of risk, as mentioned, because of the legal environment in each jurisdiction – which includes factors such as the efficacy of the Land Register, the insolvency and enforcement regulations, etc. –, the instrument would require acknowledgement from investors and they could demand a proper (and compensatory to risk) interest rate revenue, according to the amount of Eurohypothecs present in the pool coming from France, Germany, Spain, Poland, Romania, etc., whereby risks can be calculated (and compensated inside the covering pool) accordingly.

Apart from creating such a Paneuropean securitization market ("Eurosecuritisation", it could be called), the Eurohypothec would help to develop and compensate housing and mortgage markets all over Europe. Thus, if a national mortgage market lacks liquidity (that is, its lending institutions have been caught in a "lending long-borrowing short" crisis), their liquidity would come from an international pool of Eurohypothecs -selling to them those credits secured by the Eurohypothecs-, thus increasing the possibility of attracting foreign investors at better rates due to the risk compensation that would operate inside the pool, which would be created by Eurohypothecs from all over Europe (geographical risk diversification). See this structure in Figure 15.

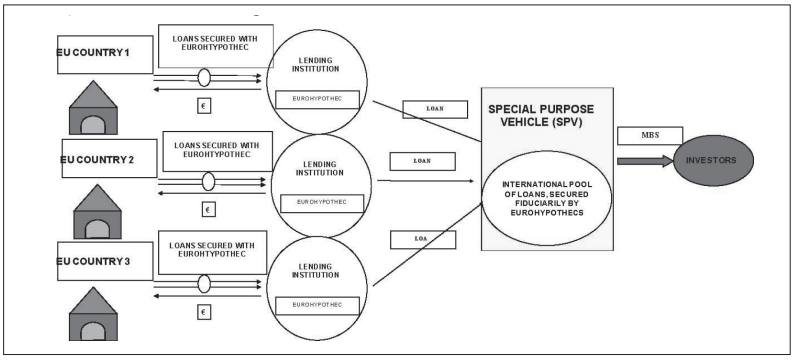


Figure 15: The Eurosecuritisation. Source: own elaboration.

The Eurosecuritisation process is technically feasible with the Eurohypothec because the Eurohypothec allows, through the Eurotrust, a secure split of the lender from the mortgagee. A common problem for all securitisation processes in civil-law jurisdictions (in some common law jurisdictions this is normally done by an equitable assignment of mortgages) has been how to convey in a secure and efficient way, thousands of mortgage loans. The mortgages in those countries -this is also true for legal mortgages in common law jurisdictions and this is why an equitable transfer to the SPV is used – are extremely "heavy" to convey, in terms of time and costs. The Eurohypothec resolves this issue in a legally-friendly way (avoiding the conception of creatures such as the *participaciones hipotecarias* or the *bordereau de cession*[40]) allowing only the transfer of the secured loans -which can be achieved through a private contract – whilst, at the same time, allowing the originator of the mortgage loans to retain the Eurohypothecs on trust (Eurotrust) for the SPV (the new "lender" or owner of the loans). Thus, all loans owned by the SPV – the issuer of the mortgage-backed securities – are at every moment fiduciarily covered by their respective Eurohypothecs, still held by originators. This is especially relevant in cases where the originators become insolvent. In such cases, Eurohypothecs would consolidate with the loans within the jurisdiction of SPVs, as they would be treated as alien property (property of the SPV).

40 For comments, see *Nasarre*-Aznar, Sergio, Securitisation & mortgage bonds. Legal aspects and harmonization in Europe, Saffron Walden (UK), 2004, Ed. Gostick Hall.

D. Using other credit institution's Eurohypothecs for issuing covered bonds

As said, the most frequently used mortgage finance instrument in Europe is the mortgage bond (also known as "covered bond", when it includes funding of loans granted to public institutions). Although for its issuance, the transfer of the mortgage bond to any SPV is not required (unlike MBS, the default risk in covered bonds is assumed by the originator of mortgages, as covered bonds represent debt to them), the problem remains similar: there is no European mortgage bond market (issuance of covered bonds backed by mortgages granted over land in a foreign country) because of, first, the low trans-national mortgage lending and, second, the lack of trans-national mortgage transfer due to the "burden" of transferring mortgages (for the same reasons explained above) together with the uncertainty of the legal environment (directly linked to the efficacy) that surround each national mortgage. The Eurohypothec, as shown in Figure 16, would banish all these doubts in relation to the legal working of mortgages in Europe while the Eurotrust would facilitate the easy transfer of mortgages, in the same way as has been explained above.

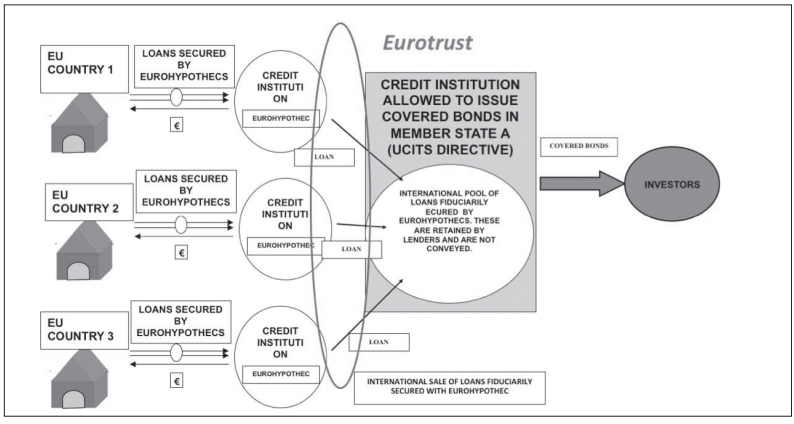


Figure 16: Cross-border issue of covered bonds. Source: own elaboration.

E. The multi-parcel Eurohypothec

The Paneuropean dimension of the Eurohypothec's most relevant example is the multi-parcel Eurohypothec, shown in Figure 17. Its main feature is reflected in its capability of admitting as security for a loan (or several loans), several pieces of land located in different EU countries.

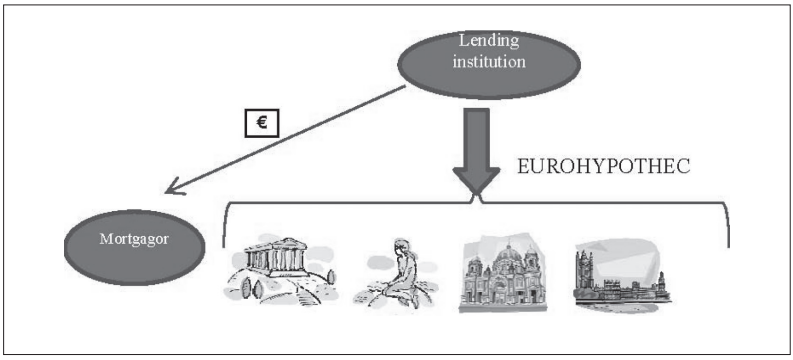


Figure 17: The Multi-parcel Eurohypothec. Source: own elaboration.

IV. Real case: Spanish mortgage reforms 2007

1. General overview of the Spanish mortgage reform 2007

Through Act 41/2007 7 December,[41] Spain has reformed its legislation on mortgages. It is perhaps, the biggest reform since 1946, dealing with the two faces of the mortgage market: active operations and passive operations.

This reform should be contextualized in the light of a wave of reforms in the European context in relation to the improvement of the mortgage market: France (the already quoted *Ordonnance* 23-3-2006 for mortgages and the *Loi* 2007-211, 19-2-2007[42] about the trust *(fiducie)*) and Germany (GNBSR 2005[43]). It should be also understood in the line of improvements in national legislations following the publication of the Basic Guidelines 2005.

As a starting point, it should be pointed out that the Spanish mortgage reform has improved Spanish mortgage efficiency both in active and in passive operations. However, it has not achieved its maximum potential, because further important much-needed amendments are still required.

Therefore, according to what has been said so far, Europe and the White Paper 2007 require:

a) Greater flexibility for lenders.

In this sense, Spain offers not only the possibility of creating a mortgage to secure lines of credit (art. 153 LH), but also that of creating a rechargeable

41 BOE 8-12-2007, num. 294, p. 50593.

42 JORF 21-2-2007.

43 Gesetz zur Neuorganisation der Bundesfinanzverwaltung und zur Schaffung eines Refinanzierungsregisters 2005 (GNBSR), BGBl 27-9-2005, Part I, pp. 2809-2819.

mortgage (art. 13.2 Act 41/2007). While these instruments are not yet present in every European jurisdiction (e.g. Bosnia), the Eurohypothec would make this a possibility.

b) Greater flexibility for borrowers.

i. The possibility for borrowers to change their lending institutions in a reasonable cheap way has been a reality in Spain since Act 2/1994 (art. 2). However, the Reform of 2007 has limited this possibility in an important way, following the Resolution of the Spanish High Court 25-11-2003, which is commented on below. As a result of the reform, mortgagors are no longer capable to change their credit institution if the first credit institution makes the same offer as the second one. As long as the reasons provided for changing credit institutions would be of any type (i.e. the first one has denied the borrower an extra loan while the second one would grant it to him), this is an important new limitation to mortgagors' rights, which goes against what would be desirable in the whole of Europe. In the context of this new situation, borrowers could be tied to the same lender for as long as such lender would like to retain him, taking into consideration that all further loans must necessarily be granted by the same lending institution if the borrower wanted to cover them under the mortgage, as the Spanish mortgage does not allow the separate co-existence of lender and mortgagee. The high costs of changing a mortgage lender, in situations beyond the scope of Act 2/1994, would discourage the borrower from changing the original lender.

ii. In relation to the possibility of partial reuse of the mortgage, Spain does not allow it on the basis of arts. 668.3 LEC[44] and 236 f.4 RH.

c) Eurosecuritisation and efficient systems of mortgage transfers.

Because the nature of Spanish *participaciones hipotecarias* has not been altered and clarified, the Spanish Mortgage Market Reform 2007 has not helped to achieve the so-called Eurosecuritisation.[45] In relation to an efficient – and of course, civil law-friendly – system of mortgage transfer, this has even been worsened following the introduction of the Spanish Reform 2007, with the new redaction given to art. 149 LH by art. 11.3 of Act 41/2007.

Until the reform, it was clear to jurisprudence (SSTS 29-6-1989 and 12-3-1985; SAP Granada 6-3-2000[46] and SAP Segovia 30-4-2002) that none of the requirements established in art. 149 LH (giving notice to debtor, notarial deed and registration in Land Register) were necessary for the operation of a mortgage loan conveyance, disregarding the misleading redaction of that article; therefore, mortgage conveyance in Spain was rather flexible. However with the new text, the legislator introduces yet again the word *"deberá"* (must) which

44 LEC: Spanish civil procedural Act 2000.

45 See the problematic at Annex 3 White Paper 2007, p. 167.

46 SAP: Spanish Court of Appeal Resolution.

implies that any transfer of mortgages must be carried out through notarial deed and registration. The problematic unnecessarily returns.

d) *Free mortgage loans' syndication.*

Because of the legal accessoriness of the Spanish mortgage, even after the reform of 2007, efficient (without altering the mortgage) ongoing syndications are not possible.

e) *A Euro-Land Register, together with a Paneuropean recognized title to register.*

As can be seen, the White Paper 2007 explicitly supports the Project EULIS (p. 8). Spain is a candidate to enter EULIS since 2010.

f) *A Paneuropean mortgage solution,* merely based on the title of the White Paper 2007: "Integration of EU Mortgage Credit Markets" and the requirement that any change should lead to the creation of new opportunities for cross-border mortgage activity.

Table 2 shows what was demanded by Europe in 2007, what incorporates the Spanish reform, how is the situation in other European countries and what improvements would the Eurohypothec bring.

Europe demands (including White Paper 2007)	**Spain (Mortgage Act 1946, Act 2/1994 and Act 41/2007)**	**European panorama (based on "Runder Tisch" 2010)**	**Eurohypothec (Basic Guidelines 2005)**
+ LENDER'S FLEXIBILITY	**Lines of credit:** yes, (art. 153 LH) **Recharchable mortgage:** yes (art. 13.2 Act 41/2007 that modifies art. 4 Act 2/1994)	Not a reality in every country (Bosnia; in most of them, with restrictions)	Possible, without restrictions
+ BORROWER'S FLEXIBILITY	a) **Subrogation:** yes, but with limits (art. 2 Act 2/94) b) Partial or complete **reuse** of the mortgage: no (arts. 668.3 LEC and 236 f.4 RH) c) **Reducibility:** no (art. 122 LH)	a) **Subro.:** not possible in Ukraine, Russia, Turkey b) **Reuse:** no in most European countries. Only possible in Norway, Belgium, Germany, Switzerland, Slovenia and Estonia. c) **Reduc.:** yes in Germany (§§ 1144 y 1145 BGB), Norway, Estonia, Switzerland, Austria, Greece and Croatia.	Possible, without restrictions
EUROSECURITISATION AND EFFICIENT TRANSFER OF MORTGAGES	a) **Fiduciary transfer of mortgages:** no. Important legal disruptions. b) **Massive transfer** of mortgages: too strict and even worse in Act 41/2007 (art. 1528 CC; art. 11.3 Act 41/2007)	a) Only possible in Norway, Germany (2003), Estonia, Switzerland, Slovenia and France. Equity solution under common law jurisdictions. b) Only in Sweden, Estonia, Germany, Belgium, Switzerland, Slovenia, Portugal and Hungary, the mortgage and the secured claim can be held by different persons, thus facilitating (in time and costs) the conveyance of the mortgage loan, as the loan can be transferred alone but it is still secured by the mortgage, held on trust by the transferor. Also this is possible in common law jurisdictions through equity.	All possible, without restrictions. Moreover: multiparcel Eurohypotec

Europe demands (including White Paper 2007)	Spain (Mortgage Act 1946, Act 2/1994 and Act 41/2007)	European panorama (based on "Runder Tisch" 2010)	Eurohypothec (Basic Guidelines 2005)
FREE MORTGAGE LOANS SYNDICATION	Only initial; not possible efficient ongoing syndication	Ongoing syndication only possible in Norway, Germany, Denmark, The Netherlands, Belgium, Switzerland, Estonia, Greece and France.	Possible, without restrictions
EURO-LANDREGISTER	Good Land Registry system (on-line consult through www.registradores.org, digital signature); but not in EULIS	– Some countries are in EULIS – Others have no computerised Land Registry (eg. Belgium) – Others, e-conveyancing (UK)	Fully compatible with EULIS
A PANEUROPEAN MORTGAGE SOLUTION	Most of the solutions that may suit under Spanish law may not suit under other countries' law (ie. Lack of notaries)	Countries tend to find "national" solutions, disregarding international mortgage business	The Eurohypothec facilitates a true European mortgage market

Table 2. Eurohypothec, new Spanish mortgage and European panorama. Source: own elaboration

2. Comparisons between the Spanish mortgage reform 2007 and the Eurohypothec

Although mortgage credit relationships between the same lender and same borrower have been optimized (ie. rechargeable mortgages), none of the businesses that require a split between the mortgage and secured obligation can be undertaken under the Spanish mortgage system or can be undertaken efficiently, as they can obviously be undertaken by employing the Eurohypothec and in those jurisdictions where the link between mortgage and secured loan is only contractual. These are the conditions for financial operations like securitization, the massive trans-national transfer of mortgages and the syndication on mortgage loans.

In addition, the Spanish reform does not provide an optimal solution for borrowers under Spanish jurisdiction, as they are permanently tied to a single lender, without an easy and cheap way of changing lenders or including another into the first's mortgage rights to obtain more advantageous loans. In fact, the land of the mortgagor is over-indebted following the first payment of the mortgage instalment as there is no possibility of unilaterally reducing its amount in the Land Register, while the mortgagor has no possibility of reusing the mortgage once he has repaid the full loan. Both the jurisprudence of the Spanish High Court (STS 25-11-2003[47]) and the administrative organ that decide the recourses against decisions of Notaries and Land Registrars (the

[47] STS: Spanish High Court Resolution.

DGRN; see the Resolution DGRN 21-7-1995[48]) on one hand, and art. 13 of the Mortgages' Reform Act (which replaces art. 2 Act 2/1994) have misinterpreted the function of Act 2/1994 (on the contrary, see a more appropriate interpretation at AAP León 24-2-1998[49]), which tried to give more dynamism to the mortgage market. Since the new 2007 Act has come into force, the borrower no longer has the right to freely change his lender and can only do so if he offers better conditions for the mortgage loan, with the possibility of the first lender matching these conditions. If this were to be the case, the borrower would have to stay with the first lender, disregarding the reason for changing the lender (ie. better treatment, concession of further loans, etc.). Therefore, at the end of the day, the fate of a borrower as regards the possibility of changing a lender would lie in the first lender's hands instead of the borrowers', which is a clear change of the intention of Act 2/1994 and even of art 1211 CC.[50]

Moreover, the DGRN sometimes still operates in a narrow Spanish perspective, vetoing deeds produced by notaries' from other European countries to be registered in the Spanish Land Register for land conveyance or other land-related operations, through the RDGRN 2-7-2005.[51] However, more than a year later, this Resolution has been found to be void and against not only EU principles, but also against the Rome Convention 1980 by SAP Santa Cruz de Tenerife 22-11-2006.[52] Perhaps the creation of a common title recordable in every EU Land Register – the Eurotitle[53] – would be advisable to avoid such problems in the future. Obviously the Eurotitle would serve as a good complement for the Eurohypothec.

And finally, while several mortgage-related topics have been addressed by Act 41/2007 with greater or less success, it has not addressed crucial needed

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48 DGRN: Spanish administrative Resolution by the Directing Body of Registers and Notars.

49 AAP: Spanish Court of Appeal Order.

50 CC: Spanish Civil Code 1889.

51 A similar situation took place several years ago during the registeration of a Swiss Notary title in Germany. This incident was also heavily criticized by the pro-European doctrine *(Heinz, Volker G.,* Beurkundung von Erklärungen zur Auflassung deutscher Grundstücke durch bestellte Notare im Ausland, "RIW", 12/2001, p. 928).

52 See the vision of a Spanish Notary in *Rivas Andrés, Rafael,* Notas sobre la recepción en España de poderes extranjeros no formalizados en escritura pública, "Notarius International", 3-4/2005, pp. 293 to 300.

53 *Ploeger, Hendrik, Nasarre-Aznar, Sergio and Van Loenen, Bastian,* EuroTitle: A Standard for European Land Registry. Paving the Road to a Common Real Estate Market, "GIM-International. The Global Magazine for Geomatics", December 2005, vol. 19, num. 12, pp. 34 to 37.

reforms in relation to mortgage securities *(cédulas hipotecarias* – Spanish covered bonds –, *bonos hipotecarios* and *bonos de titulización hipotecaria* – Spanish mortgage-backed securities, MBS –, essentially). Along with legal structural problems that still persist: legal nature of their guarantee, it constitutes an even worse regulation for covered debts *(bonos hipotecarios).* Moreover, inaccuracies in regulating the covering Register (in German *Pfandbriefgesetz* this is referred to as the *Deckungsregister),* lack of the fiduciary (the *Treuhänder* in Germany), uncertainties in their behaviour in insolvency proceedings, etc. still exist. On contrast, as seen previously, the Eurohypothec would allow for the so-called Eurosecuritisation while the Eurotrust would facilitate the massive transfer of mortgage loans on a trans-national level, bringing to the European mortgage market more efficiency and dynamism.

V. Conclusions

1. To create a true **Paneuropean mortgage market,** a Eurohypothec is needed – probably the model of the Basic Guidelines 2005 can help – which should be as secure, useful and flexible as possible, both for mortgage lenders and borrowers. The **Eurotrust** is a needed complement to the Eurohypothec in order to facilitate all types of fiduciary mortgage operations: securitisation, ongoing syndications, mortgage unilateral reduction by the mortgagor, unilateral change of lender by the mortgagor, etc.
2. An **integrated European mortgage market** would allow **every EU country** to engage in all kind of mortgage operations in an efficient way, which is not a reality nowadays (most of them do not even have the opportunity to structure them), thus negatively affecting the full achievement of the European freedoms.
3. Some **national regulations** for mortgages have been reformed to make them more flexible, following the development of the concept of the Eurohypothec in the Basic Guidelines 2005 but without Paneuropean awareness and without achieving its level of efficacy and efficiency. The White Paper 2007 could possibly help to push forward a true integration of the European mortgage market. But whereas it does not explicitly support the idea of the **Eurohypothec,** it does not propose any other effective instrument or effective way to achieve that goal but only a partial and segmented pathway in p. 14 to which it refers as "main tasks or activities". In fact, no development

is shown at EU official level towards mortgage integration of Europe since then.[54]

4. The Eurohypothec of the Basic Guidelines 2005 is **fully compliant** with the objectives of the White Paper 2007 (p. 13): it enhances "competitiveness and efficiency of EU mortgage markets which will benefit consumers, mortgage lenders and investors alike"; it demonstrates its ability to create "new opportunities for mortgage lenders to access other markets and engage in cross-border activity"; it enables "a more efficient mortgage lending process"; it leads "to improved product diversity and, potentially, lower prices for consumers"; it improves "consumer mobility through increased transparency and reduced product tying"; it enhances "market transparency, greater certainty […] and a broader range of investment opportunities as a result of enhanced product diversity both within primary and secondary markets".
5. Other partners for the Eurohypothec would be **EULIS,** the **Eurotitle** and the possibility of establishing a true mortgage **Eurosecuritisation.**

[54] Check the (non-)progress at http://ec.europa.eu/internal_market/finservices-retail/home-loans/integration_en.htm (last visited on 20th September 2010).

Table of Contents

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