

Eurohypothech: Drafting a Common Mortgage for Europe

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Abstract: The virtual lack of cross-border mortgage lending in the European Union (E.U.), even before the current mortgage and financial crisis, reveals the need to adopt a pan-European mortgage instrument. This article shows how it can be structured such that a common mortgage instrument for Europe could lead to the construction of a true pan-European cross-border mortgage market. It is the so-called Eurohypothech. The model is studied following the objectives pursued by the *E.U. White Paper* about the integration of the E.U. mortgage credit markets and also taking into account the causes of the current mortgage and financial crisis (mainly weak legal structures of mortgage securitization processes and their control, in addition to the lack of transparency in mortgage lending). The paper also shows how operations using or based on mortgage loans can be done efficiently, securely, and transparently throughout Europe through the so-called Eurotrust. In conclusion, the writer finds out that the combination of Eurohypothech and Eurotrust is fully compliant with the *E.U. White Paper*. Moreover, this combination could not only help with the creation of a true pan-European mortgage market but also would help to enhance current national mortgage legislations and to make more transparent and secure several financial operations that involve mortgages.

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Introduction

The idea of the Eurohypothech is now more than 40 years old. The object of this is to provide a solution to the lack of cross-border mortgage lending among European Union (E.U.)¹ countries through the creation of a common mortgage for Europe. The typical transnational situation that the Eurohypothech seeks to address is where the lender is in a different E.U. country than the piece of land that is the proposed security for the loan/loans to be granted to a borrower, irrespective of wherever he is. The most common current solution for this is the application of the mortgage law of the country where the land is (principle *lex rei sitae*). There are currently within the E.U. at least 27 different national-based mortgage laws² and land register systems,³ making transnational operations with mortgages (both lending and funding through mortgage-based securities) uncertain and/or insecure (lack of or not enough know-how) and consequently more expensive for lenders, borrowers, and investors in mortgage-based securities, such as covered bonds (explored later)⁴ and mortgage-backed securities (MBS) (Nasarre-Aznar 2003, pp. 29–33).

Moreover, the lack of certainty in mortgage lending and mortgage funding operations is, in fact, in the origin of the current mortgage and financial crisis: unfamiliar MBS structures [i.e., what is a true sale, that is, how can an insolvency-remoteness vehicle be achieved, what is the legal nature and requirements of

a special-purpose vehicle (SPV) and the pool of securitized assets, etc.] and unfamiliar types of assets backing those MBS (i.e., how strong is the mortgage that is securing the granted loans). The Eurohypothech could also help in this field, making both types of operations more secure and transparent with a single E.U. mortgage instrument, which can be recognizable by any stakeholder (either lender, borrower or investor in MBS) and as useful as possible for their interests and needs.⁵

Therefore, broadly speaking,⁶ the objectives of the Eurohypothech are the following: to achieve a major integration of the E.U. mortgage market, to facilitate the cross-border supply of mortgages, to avoid legal or economic barriers that could restrict cross-border mortgage lending, to promote the proper development of mortgage funding instruments, and to facilitate consumer mobility.

Despite all these advantages, it is only recently that the Eurohypothech has assumed prominence on agenda of the Commission of the E.U.⁷ (“The Commission”), with the release of its *Green Paper on the Mortgage Market 2005* (“the *Green Paper*”) (*European Commission Green Paper 2005*). This fully discussed the idea of the Eurohypothech, quoting a piece of research that contains the model of Eurohypothech, the *Basic Guidelines for a Eurohypothech 2005* (Drewicz-Tulodziecka 2005). This was created by a group of researchers after several years of studying the need of such an instrument⁸ (www.eurohypothech.com). In December 2007, the *Commission White Paper* (“the *White Paper*”) (*European Commission White Paper 2007*) was released, dealing with the steps required to advance with the integration of E.U. mortgage markets.

This article seeks to explain the Eurohypothech and the Eurotrust (a fiduciary relationship that allows many mortgage businesses when combined with the Eurohypothech) from the perspective of a *Green Paper* and *White Paper* from the European Commission described next. It also provides a real example of a

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new mortgage law (the Spanish one) that does not achieve the same degree of usefulness that the Eurohypothech proposes (Nasarre-Aznar 2008b).

Eurohypothech

This section explains the origins, nature and uses of the Eurohypothech.

Eurohypothech as an Ideal Model of a Pan-European Charge of Real Estate

When those Eurohypothech researchers tried to achieve a model for a “common mortgage” for Europe, they searched for an ideal model. This was not necessarily a real model, but one that would be as useful as possible for the main goal: creating a pan-European mortgage tool that facilitates the creation of a true pan-European mortgage market that does not exist yet within E.U. member states. Thus, the model currently presented in the *Basic Guidelines 2005*, described next, should prove to be more beneficial by allowing more mortgages and more secure mortgage businesses than is offered by the current ways of transnational mortgage lending and funding (i.e., 27 applicable mortgage laws). This should assist both the lender and borrower as follows:

1. *Lender*: the Eurohypothech should be able to facilitate the development of a legal framework for optimal⁹ pan-European mortgage lending (active operations of the mortgage market) and mortgage funding (passive operations of the mortgage market).
2. *Borrower*: he or she obtains greater freedom in choosing (and changing) the lender, due to increased competition. According to the report by Mercer, Oliver and Wyman in 2007 for the European Mortgage Federation (European Mortgage Federation and Mercer Oliver & Wyman 2007), a link exists between the decrease in costs of a mortgage and increased competition among credit institutions in several European countries in recent years, as illustrated in Germany, Ireland, Greece, France, and Belgium.

One important question to be addressed before drafting the model was the impact and the efficacy of the Eurohypothech, that is, what was to be changed in the European mortgage market and when? According to recent experiences and discussions (Muñiz et al. 2008), the current model of Eurohypothech generates or could generate three effects.

First, it would serve as:

- A model for jurisdictions that do not have yet a well-functioning mortgage system or that do not have any at all, as is still evidenced in some East European countries (Stöcker and Stürner 2008; European Bank for reconstruction and development 2007).¹⁰
- An inspiration to those jurisdictions that already have one, but are modernizing their law to meet new needs. An example of such needs is, in the context of the current financial crisis, the necessary transparency in all financial operations, as required in the recent Group of Twenty Declaration 15-11-2008 (Point 9.1 and throughout the whole Declaration).¹¹ The Eurohypothech, as shown next, provides “legal transparency” to many operations carried out through quasi-legal or obscure legal structures.¹²

In essence, it is intended to show the direction for mortgage law reforms in each national jurisdiction, to meet the challenges

of the modern law of mortgages in Europe. As a whole, what are the benefits of a cross-border mortgage? What answers should it provide and to whom?

In fact, following the Basic Guidelines 2005, two “traditional” mortgage systems were reformed: the French, through the *Ordonnance* 23-3-2006 and the Spanish one, through the *Act* 41/2007. These have some things in common: they both reconsidered their mortgage laws to make them more useful and flexible following the Basic Guidelines. However, neither of them, as we will see next in the Spanish case, has achieved the model Eurohypothech’s proposed level of flexibility and usefulness.

Second, the Eurohypothech should serve as a common instrument for the European mortgage market, thus helping to fulfill the goals of the E.U.: freedom of people and freedom of capital throughout E.U. member states. It was conceived as a useful¹³ and optimal common cross-border mortgage instrument and to be secure, which is important for investors and mortgage market stakeholders currently involved in the worldwide mortgage crisis. This second stage does not require any changes to national legal frameworks because the Eurohypothech does not seek to replace any existing national mortgages. Third, national jurisdictions could realize the importance of adapting their own legislation to maximize the benefits provided by the Eurohypothech such as by improving mortgage enforcement processes or the efficacy of land registration.

Why Talk about the Eurohypothech?

The idea, as already mentioned, is far from new. Prof. Claudio Segré began creating the concept of a common mortgage instrument in the 1960s for the Commission. His proposed model was the Swiss *Schuldbrief* (a flexible type of charge on land provided for by Arts. 842 ff. of the Swiss Civil Code 1907). Work on the Eurohypothech was undertaken in the following years by institutions such as the International Union of Latin Notaries and by well-known writers (Wehrens 1992, p. 557; Stöcker 1992; Stöcker 2007, p. 2255).

In 2004, a special research group was set up to study the Eurohypothech (www.eurohypothech.com). This group organized research events, and took part in seminars that resulted in the drafting of the Basic Guidelines in 2005. This involved the participation of researchers from different groups and backgrounds (academics and practitioners; civil law and common law lawyers; North Europe and Mediterranean Europe; East and West Europe). A few months later, the Directorate General for Internal Market Affairs of the Commission issued the *Green paper (European Commission Green Paper 2005)*,¹⁴ which tested our national views. The response was very positive as can be seen in Table 1.

Most respondents were either in favor of introducing a Eurohypothech, following the Basic Guidelines 2005, or proposed another model of Eurohypothech (Nasarre-Aznar 2008a).

Some subgroups created by the Commission following the *Green paper* (The Mortgage Industry Consumer Dialogue Group and the Mortgage Funding Expert Group) have worked actively and with enthusiasm toward European convergence in their fields of knowledge. In fact, they have seized the opportunity to raise issues surrounding the current mortgage market that would be substantially assisted by the proposed features of the Eurohypothech. For a more in-depth account, see Nasarre-Aznar (2008b).

Despite this, the *White Paper* did not mention the Eurohypothech in its main document, although the document’s conclusions fully agreed with the ones of the Eurohypothech study (the

Table 1. Responses to the EurohypotheC Question as Illustrated by the *Green Paper on Mortgage Credit in the E.U.*

	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 Republic Ireland Finland	Hungary Spain	Sweden	Estonia Germany Austria
Corporations	Citigroup Inc., International SearchFlow, U.K. Crédit Agricole (CA), FR Halifax Bank of Scotland plc (HBOS), U.K. Lloyds TSB Group, U.K. Royal Bank of Scotland Group (RBS), U.K.	BBVA, ES	Barclays PLC, U.K. GMAC-RFC Limited, U.K. HVB Group, DE	ABN AMRO, NL Banca Intesa, IT
E.U. institutions	European Central Bank European Economic and Social Committee			

Basic Guidelines 2005). Thus, the *White Paper* said (*European Commission White Paper* 2007):

1. Outstanding European residential mortgage credit represents almost 47% of the gross domestic product (GDP) of the E.U. (p. 2). This is an important economic activity, so the mortgage market should be integrated. This integration is thought likely to allow an increase of 0.7% of the E.U. GDP (p. 3).
2. The Commission aims to facilitate the cross-border supply of mortgages (p. 3), and of funds for mortgage credit: "The existence of differing legal and consumer protection frameworks, fragmented infrastructures (e.g., credit registers), as well as the lack of appropriate legal frameworks in some instances... create legal and economic barriers, which restrict cross-border lending and prevent the development of cost-efficient pan-E.U. funding strategies."
3. The Commission therefore seeks to remove disproportionate barriers, thus reducing the costs of selling mortgage products across the E.U. (p. 3).
4. For mortgage securitization (the funding of mortgage lending through SPV that issue MBS), "The aim should be to facilitate, and not restrict, the development of a wide range of mortgage funding instruments" (p. 4). The Commission wants to investigate the legality of prohibitions in some countries, which prevent the use of pools of covered bonds as security. This could be incompatible with E.U. principles for free movement of capital and freedom to provide services (p. 8). The Commission referred to the findings of the EurohypotheC Research Subgroup on this topic.¹⁵
5. The Commission also seeks to facilitate consumer 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 (such as by high legal or other fees) (p. 5).
6. The Commission wants to encourage member states to join European Land Information Service (EULIS) (www.eulis.org). This is a Web portal allowing investors access to information in several national land registers and cadastres.¹⁶ This innovation is as a good complement to the EurohypotheC: the one cannot be fully understood without the other.

The Commission concludes: "To be effective, any proposed measures must demonstrate that they will create new opportuni-

ties 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" (p. 10). The Commission also makes provision for further study, for impact assessments in Annexes 2 and 3 of the *White Paper* and suggests that the E.U. could issue a recommendation for member states to create national EurohypotheCs.

Need for the EurohypotheC

The creation of a complete European mortgage market would not necessarily require a common mortgage instrument if suitable alternative instruments could compensate for its absence. However, such instruments are not effective for cross-border lending. Figures reveal that, currently, only 1% of European mortgage lending operations are cross border, which is really a low figure (*European Commission Green Paper* 2005). The inadequacy of the current main instruments and tools of legal integration to achieve a single European mortgage market like the mutual recognition principle is explained in more depth in Nasarre-Aznar (2008b).

Idea behind the EurohypotheC

The EurohypotheC model presented in the Basic Guidelines 2005 was conceived as a secure flexible pan-European instrument, which corresponds with the foundations laid by the *White Paper* on the integration of E.U. mortgage credit markets (*European Commission White Paper* 2007). These foundations are:

1. **Security**—the common core (i.e., the common essence) of all charges on land currently existing in Europe is that they can function as instruments enabling land to be used as security with some kind of preference in favor of a secured creditor. The EurohypotheC should be as minimally intrusive as possible to national jurisdictions but above all, it should be as beneficial as possible to both lender and borrower. This is its main cornerstone. To be effective, the EurohypotheC should have the same privileged rank against other creditors in terms of enforcement as secured creditors anywhere in Europe. However, this cannot easily be achieved in the second phase; therefore, a third phase is required, once a model has been

agreed upon.¹⁷ Finally, an excellent partner for the Eurohypothech would be a common European Land Register, which would create true cross-border mortgage e-conveyancing, similarly to that provided for by the English *Land Registration Act* 2002. There are more details of this in Nasarre-Aznar (2004b). A first step in this direction would involve the EULIS described next.¹⁸

2. *Flexibility*—to be able to use the Eurohypothech in every business involving mortgages conceivable today,¹⁹ it should be “released” from those legal ties which could restrict its flexibility: its compulsory (by Statute) accessoriness to the obligation it secures. Some countries have rules insisting that no hypothech or charge can be created or exist without an obligation to secure, usually under a contract in the mortgage market. It will be seen that this can limit funding possibilities. The Eurohypothech, as a right, should be regarded as an entity existing in its own right (a value, in economic terms), even if separated from the original secured obligation, and disregarding the purpose for which it is being used at any point in time. This means that the Eurohypothech should evolve to a more active role: the owner of the charged property should be able to use the Eurohypothech in exchange for anything that could profit him or her such as to secure loans to buy or to build a house, to secure loans to buy cars or to pay his holidays; and all this with the same or with different lending institutions at the same time.
3. *Pan-European*—this implies that the Eurohypothech should serve as a common instrument to secure loans throughout Europe. It should be accessible throughout Europe and be capable of coexisting with other national types of mortgages. Based on what has already been said about its uses, flexibility, and function, finding an appropriate model for the Eurohypothech would be of great benefit.

There are currently four models of mortgages in Europe with many variants (Stöcker and Stürner 2008)²⁰ whose features have been taken into account to structure the proposed model of Eurohypothech: the continental accessory mortgage, such as in France, Spain, Italy (Wachter 1999; Gómez Galligo 2006, pp. 927–947),²¹ the continental European independent mortgage (i.e., not legally accessory to the secured obligation) mortgage (for example Germany-*Sicherungsgschuld*-, Switzerland-*Schuldbrief*-, Estonia-*Hüpotheek*-, Slovenia-*Zemljišni dolg*-, and Hungary-*önálló zálogjog*-), the Scandinavian independent mortgage (Jensen 2001),²² and the common law “mortgage” (e.g., England and Ireland).

Model of the Eurohypothech in the Basic Guidelines 2005

Although an extensive study of the Eurohypothech model in the Basic Guidelines is still required, some related work has already been published, most recently as a commented translation (Muñiz et al. 2008). However, for now, we will only highlight the main features that help to build an operative concept of the Eurohypothech.

Concerning the Legal Nature of the Eurohypothech

- 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 for national mortgages; it should coexist with them in each national jurisdiction. This is fully in compliance with the aim of the *White Paper* of increasing the

mortgage products’ diversity [*European Commission White Paper* (2007), p. 4].

- It is not legally dependent (i.e., linked to the obligation by the law) but contractually dependent, i.e., dependent only to the obligation through the contractual arrangement between mortgagor and mortgagee, the so-called security contract; who decides what obligations the mortgage secures, and how. Statute facilitates rather than creates the mortgage. The Eurohypothech may also not require any obligation under a contract to exist.
- Thus, to be used as a security, a security contract (i.e., a contract that links the Eurohypothech and the obligation/s to secure) should exist. It should have required minimum contents (obligations to secure, use of the Eurohypothech, and conditions for redemption and enforcement). The form should follow the *lex rei sitae* (i.e., the legislation of the country where the land is located) and Art. 9 Para. 6 of the Rome Convention 1980. It should also allow complete or partial redemption (devolution) of the Eurohypothech. In this circumstance, the borrower can choose among three options (if they are agreed in the security contract): to opt for a partial redemption of the Eurohypothech, or for its partial extinguishment or for reusing it with another credit institution to secure another loan or loans.
- The charge itself does not generate interest (only the loan does). Its costs of creation and registration should be the same as for national mortgages; the Eurohypothech extends to chattels and fruits (*fructus*) of the land.

Creation and Registration

- Only the owner (i.e., the one who holds the right to charge the land) of the land can create the Eurohypothech, with or without the involvement of a lender.
- The Eurohypothech must be registered in the national Land Register where the land is located to exist. The register should state the amount of the loan, the Eurohypothech’s owner, and should have the proper form (e.g., public deed).
- It can adopt two forms: a “register Eurohypothech”²³ or a “letter Eurohypothech.”²⁴ The Eurohypothech is designed to be capable of being managed electronically.
- Any land in Europe can be charged and any object classed as immovable property, according to *lex rei sitae*.
- There also may be “transnational Eurohypothechs” (i.e., Eurohypothechs charging two or more pieces of land located in several countries) and “multiparcel Eurohypothechs” (i.e., broadly Eurohypothechs charging more than one piece of land).
- It is possible to hold the benefit of a Eurohypothech or part of it on trust for another.²⁵

Transfer

- This will depend on the way it has been created: if it is a “register” Eurohypothech, transfer will be done through the Land Register; if it is a “letter” Eurohypothech, this will be done only by delivery of the letter to the transferee (who becomes the only one that can enforce the Eurohypothech if this is needed).
- The Eurohypothech can be assigned independently of the secured obligation (usually under a security contract) to a different third party.
- The debtor can raise defenses or legal objections against the transferee. Therefore, the security contract should have an effect against third parties. If this were not possible, tort liability of the transferor might be an alternative.

Extinguishment

- The Eurohypothech is extinguished through cancellation in the Land Register.
- It is not extinguished through the passage of time.
- The fulfillment of a secured obligation does not necessarily imply its extinguishment; The effect of this will be determined in the security agreement (e.g., the mortgagor could be able to recover the Eurohypothech for his or her own use and reuse it in the future to secure other debts with the same or with another lender). People might normally pay off their mortgage and discharge a hypothec, but if the Eurohypothech remains on the register, essentially as the property of the owner, and the owner wants to borrow again, this saves legal and other costs.

Enforcement

- Its efficacy depends on the process and duration of its enforcement (max 12 months would be ideal).
- The Eurohypothech is an enforceable title in itself (according to the law of where the land is) and constitutes an enforceable claim against the owner (*Schuldversprechen*) (only in those jurisdictions in which this is allowed).
- Foreclosed properties should be sold at a public auction (prohibition of the *droit de voie parée*, which means the mortgagee should never be entitled to win the ownership of the mortgaged land in case of default by the borrower, without, at the very least, first having a public auction of it).
- In the case of defenses or legal objections in court proceedings, the burden of proof lies with the owner of the Eurohypothech.
- Prior-ranked registered charges retain their priority over the Eurohypothech while those with the same or lower rank than the Eurohypothech are extinguished (those entitled to lower ranking charges are, in this case, repaid with any surplus obtained at auction; they already knew the risks when granting 2nd or lower ranked mortgages).
- Insolvency—the Eurohypothech would have the same prior security as in normal enforcement. There should be the possibility of separate enforcement.
- An efficient Land Register is required: charges need to be registered, with their rank relative to other mortgages and with publicity or notice of their existence being ensured.
- The Eurohypothech constitutes a model solution that might be turned into an optional 28th regime (i.e., another one apart from the currently already-existing 27 mortgage systems, one for each E.U. country).

However, some questions have arisen about the model, such as the lack of economic studies supporting it, the untested functioning of the model or the competence of the E.U. to legislate on this. However, all these concerns can be fully explained and even resolved (Nasarre-Aznar 2008b, pp. 17–21).

Eurohypothech and the Eurotrust

This section explains how the Eurohypothech can be even more useful when used in conjunction with a “Eurotrust.”

Introduction

In practice, many financial operations do not take place internationally because they are too complex, expensive or, simply, impossible (Nasarre-Aznar 2006, pp. 742–750).²⁶ The reasons may vary, but many are due not only to the lack of a common mort-

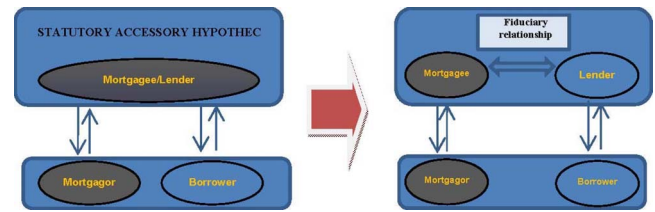


Fig. 1. Legal and fiduciary relationships between lender and mortgagee

gage instrument, which makes cross-border investment risky, but also due to the lack of clear and simple structures in many further mortgage operations using a pan-European fiduciary instrument, which may be called Eurotrust. Broadly speaking, for most possible business using the Eurohypothech combined with the Eurotrust the trustee would be the holder of the Eurohypothech and the beneficiaries would be those lenders whose loans would be secured by fiduciary obligations in that Eurohypothech, thus avoiding many costs, as well as time and legal complications.

Concept of the Eurotrust

The Eurotrust has a misleading name because it is not necessarily related to the “international trust” foreseen in the *Convention on the Law Applicable to Trusts and on Their Recognition* of July 1, 1985.²⁷ The word Eurotrust uses the prefix “Euro” because of its close relationship with the “Eurohypothech.” And the term “trust” because:

1. The Eurotrust entails fiduciary duties of the trustee (Lender 1 and owner of the Eurohypothech) for the other lenders (beneficiaries), whose loans are secured by the Eurohypothech. Therefore, the trustee is holding the Eurohypothech in part for him or herself (if also a secured lender as in the case of the leader of a syndicated mortgage loan) and on trust for those that do not hold the Eurohypothech, but are still secured by it under this trust arrangement.
2. The Eurohypothech should be isolated from the personal estate of its legal owner (the trustee) in case he becomes insolvent, so that the part of its value held on trust for the beneficiaries is not taken by creditors. The consequence would be that after the insolvency of the trustee or holder of the Eurohypothech the security continues to exist and is passed to the beneficiaries.

The Eurotrust was conceived as a complement to the Eurohypothech because the Eurohypothech is rendered more effective by the Eurotrust. This is a means of achieving greater flexibility in the link between credit and mortgage, which allows that lender and mortgagee to be different persons without losing security (Nasarre-Aznar and Stöcker 2006).²⁸

Fig. 1 illustrates how the lender and mortgagee could easily be different people thanks to the Eurotrust, which enables separate or wider financing, which cannot be the case with statutory (legally dependent) accessory hypothecs. This is the main reason why many businesses operations cannot be carried out with statutory accessory hypothecs in civil law contexts because property rights cannot split into legal and equitable rights. In common law jurisdictions some of these operations, such as securitization, can be undertaken through equitable mortgages (Nasarre-Aznar 2004a). As a result, the Eurotrust would prove beneficial to any business requiring an efficient division between loan and mortgage used as follows.

1. Active or Lending Operations (all those relating to the existence of several lenders under the same Eurohypothech): this would help with
 - a. The partial redemption of one loan and taking out another new loan [to improve consumer mobility, see *European Commission White Paper* (2007), p. 5].
 - b. Total redemption and reuse of Eurohypothech without a loan by the owner (for the same reasons).
 - c. Syndicated mortgage lending by multiple lenders.
2. Passive Operations (mortgage funding).

This would help with international pooling of mortgages for securitization purposes including the acquisition of mortgage loans across Europe for the purposes of pooling them to issue covered bonds (Art. 22 *UCITS Directive*) or simply using other credit institutions' mortgages (held on trust) to secure issuance of one's own covered bonds [see *European Commission White Paper* (2007), p. 3]. In consequence, the Eurotrust combined with the Eurohypothech allows the restructuring of all businesses that involve a split between mortgage and loan. Due to its pan-European nature among other uses, the Eurohypothech would ensure the existence of legal obligations under the loan by the contractually based Eurohypothech. This is permanently secured by a mortgage held by another, but which is still enforceable where the security agreement states so. Also, in case of insolvency of the mortgage holder, the mortgage (Eurohypothech) is treated as belonging to a third party (and therefore not included in the insolvent person's estate).

Detail of the Uses of the Eurotrust

Ongoing Syndication

This type of financial operation is commonly used to fund a project, which either entails an important level of financial risk, i.e., of default, or involves a huge expenditure of economic resources, or both. In these two situations, a single lender is faced with so many difficulties that it is simply not prepared to do it alone. Consequently, he requires the borrower/mortgagor to find, or finds by itself, other lenders interested in sharing the risk and expense. If new lenders have entered the relationship at the beginning of the operation, it is called an "initial" syndicate lending. However, where those new lenders become involved later then when the Eurohypothech was created, this is known as an "ongoing" syndication.

The Eurohypothech can be used in both situations. It is in the ongoing syndication that it plays a more important role, as it optimizes this type of syndication or even allows it in legal contexts where it would otherwise not be possible.

Where it functions as an initial syndication, the operation can be organized through a common mortgage securing a loan from several lenders (with joint and several liability). If nothing changes during the life of the project, in that no new lenders are required, 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 lender or more are added later who want to be secured by the same mortgage.

Additional lenders in syndication are not comfortable when assigned second and or further mortgages on the charged land. Depending on the concrete costs and in contexts where a split between mortgagee and lender is not possible (as for accessory mortgages described earlier), there are only two solutions, neither of which is optimal. Either the mortgagor grants further mort-

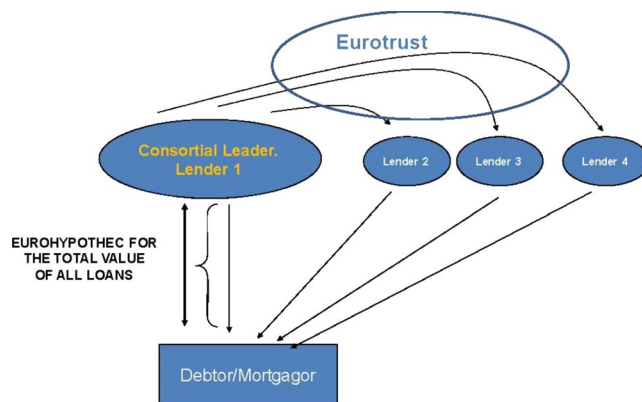


Fig. 2. Syndication with the Eurohypothech and the Eurotrust

gages to the newcomers, which makes the whole operation more expensive and even impossible because new lenders are not willing to do this under a syndication; or the first mortgage relationship is modified (by novation) in the Land Register. This may involve the extinction of the first mortgage and the creation of a brand new one ("extinctive novation"). However, even if it is only a novation modifying the security, the need for reformulation of the whole first mortgage loan makes the operation more complicated and expensive in many E.U. countries.

With the Eurohypothech and the Eurotrust, the ongoing syndication can be undertaken in an optimal way (see Fig. 2) because the Eurohypothech allows a split between mortgagee and lender and it also allows several lenders to be secured by the same mortgage either from the beginning of the relationship or in an ongoing syndication.

The Eurotrust covers this situation because the Eurohypothech by itself is not enough, as no assurance is provided to the second and subsequent lenders that they are properly secured by the Eurohypothech. This is so because there is a simple contractual relationship between the different parties but there is nothing else that assures subsequent lenders that the Eurohypothech also secures them.

Therefore:

1. The "security contract" among later lenders and that between the borrower and Lender 1 will only be enforceable between themselves because of the nature of contract law (which only binds the parties). Thus, where Lender 1 assigns the Eurohypothech to a third party, the latter would not oblige to respect the contract with the borrower (it does not affect him) and therefore, later lenders would no longer be secured by the Eurohypothech.
2. Even if Lender 1 does not assign the Eurohypothech, the same problem can take place if Lender 1 becomes insolvent and therefore the Eurohypothech is going to be included in the assets taken in insolvency. The same happens if Lender 1 has remortgaged the Eurohypothech (i.e., sub-Eurohypothech) and the owner of that sub-Eurohypothech carries out a single enforcement. In both cases, later lenders will lose their contractual rights before the creditors of Lender 1, who will be entitled to enforce or (in case of insolvency) recover from the Eurohypothech.

If the Eurotrust comes into play, it is now clear that the Eurohypothech secures the second and further lenders not only on the basis of agreements between them and the first lender and the security contract signed with the mortgagor but because the agreement produces erga omnes effects (it binds these third par-

ties). Subsequently, any unused part of the Eurohypothech which secures a fixed amount (see succeeding text) can be used to cover Lender 2 and all the others, even though the Eurohypothech is still held by Lender 1, both for himself, for the his own loan, and on trust for the money due to other lenders.

This erga omnes fiduciary effect will result in that part of the Eurohypothech that is securing other lenders' loans being considered as a property belonging to someone else, both in enforcement cases and, especially, in cases dealing with the insolvency of the first lender (because this "free part" of the Eurohypothech will not be taken by creditors of the first lender). Here, the Eurohypothech will partially be assigned to the other lenders in most E.U. jurisdictions, as it will be considered property belonging to a third party, not the property of the insolvent Lender 1.

Preventing Tying Practices

One of the most interesting advantages that the Eurohypothech would present to borrowers is greater freedom from ties to a single lending institution, thus allowing the possibility of dealing with several lenders at the same time, by taking different loans from each one and securing all of them with the same Eurohypothech. This is in addition to another restriction on borrowing—the geographical one. Because the Eurohypothech would help create a true pan-European mortgage market, competition among lending institutions would exist not only at the national level but also at the European level. With the development of new technologies, there would consequently be few restrictions or technical problems for consumers anywhere in Europe logging on to the internet, checking all mortgage offers from any European lending institution and calculating which is best for him or her. For this, lending institutions should be willing and ready to grant mortgage loans whatever the location of the European land offered as security. Thus lending abroad should not be riskier, more expensive or difficult than lending in one's country, thanks to the Eurohypothech. In the current climate this might pose some problems of realization in terms of consistent national depositor and borrower protection.

However, the lending institution still needs to be aware of the physical and legal situation of the land, the purchase of which it is funding. The so-called "Euro-land register," which is not a reality yet but a very long-term idea could achieve this. There have been advances on the already fully functional EULIS project. As mentioned earlier, this allows the checking of cadastres and land registers of eight European countries through a single portal. This has a thesaurus seeking to explain legal terms and definitions in different jurisdictions. Another way to research this is "the Euro-title," creating a standard marketable European form of ownership evidence, which could be an alternative to a Euro-land register in the meantime (Ploeger et al. 2005). Both the Euro-land register and the Eurotitle try to make the charges that burden a piece of land transparent to any lenders in Europe either by a common Register for European land with the same principles and type of registered rights, or by national registries issuing titles that can be accepted anywhere in Europe. It is clear that the register solution is challenging because of different national conceptions of ownership. These solutions are necessary to create a true European mortgage market because of the 27 different systems of land registration in the E.U., even though these can be classified into families: registration of titles system or registration of deeds system, constitutive or declarative registration of some or all titles, titles controlled by judges, notaries or civil servants or not controlled, and so on. This causes uncertainty for nonnational lenders about their prospective security (such as: Are there hidden

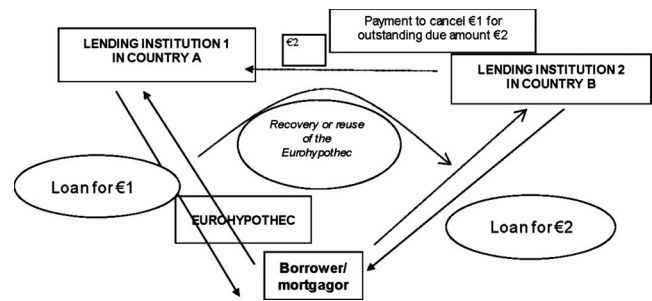


Fig. 3. Scheme of complete subrogation of Bank B in Bank A

charges? May there be unregistered mortgages? If a charge is registered, does this necessarily mean that it exists?).

The Eurohypothech should be seen as a value charged on land, or a means of negotiating for the value within one's land without selling the land. The Eurohypothech has been designed more as a way of extracting value from land than as a charge. This implies first and foremost that the Eurohypothech's negotiability should always remain in the hands of the mortgagor, regardless of who has the benefit of the charge at any given moment. This entails the right for the mortgagor to use the Eurohypothech in any way he desires and at any time, as soon as he, she, or it has repaid the debt secured. This has three important substantive aspects.

Complete Subrogation. Regardless of the reasons for redemption (such as better interest rates or more favorable terms from a second lender), the mortgagor should be able to change his lender, once he has repaid the first loan, on the basis of the special protection he deserves as a consumer [see *European Commission White Paper* (2007), p. 5]. An example is that Bank B pays the debt which the debtor/mortgagor had with Bank A with funds from the new loan he has granted the debtor/mortgagor, in exchange of the Eurohypothech (charge) that Bank A had as security for that loan (Fig. 3). To ensure the success of this, no change is required as regard to the charge although the loan contract can be changed to incorporate better conditions to the borrower, which might have been the main reason of the mortgagor to seek for another lender. In many European countries, changing the mortgage itself causes high costs and even delay. With the Eurohypothech, a private loan arrangement with the second lender will suffice, using the reused Eurohypothech as security for the second loan.

Reuse of the Eurohypothech by the Borrower. To facilitate this reuse of the charge against the land, even when the borrower has fulfilled his obligations to the lender, the Eurohypothech is not necessarily extinguished (as it would be under a standard accessory regime) and does not, therefore, need to be cancelled in the Land Register. Once the loan(s) is fully repaid, the mortgagor would recover the Eurohypothech and it would not necessarily consolidate automatically with the ownership of the land. Instead, the Eurohypothech, (as agreed in the security contract), could be kept by the mortgagor until he requires it once again for other purposes thus avoiding the extra legal costs of cancellation and recreation to borrow again for any purpose.

"Reducibility" and Partial Reuse. This is another right of the mortgagor that can be created by the Eurohypothech is the possibility of reducing the size of the Eurohypothech security whenever it is oversecuring or overcollateralizing the loan out-

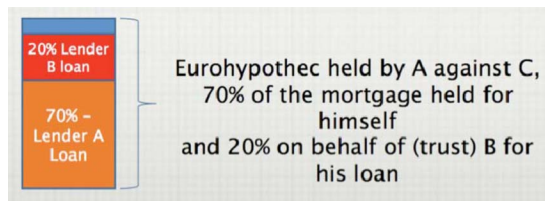


Fig. 4. Partial cancellation and partial reuse of the Eurohypothech

standing. This type of hypothec means that, if the land is valued at €100, the mortgage on it may be arranged to charge the whole value of the land even though the loan would be €80, that is, with overcollateralization of 20%. At the very moment the debtor pays the first installment, the overcollateralization is increased as the loan reduces, which means the lender benefits from an increasing overcollateralization for free, without compensating the borrower whose land is increasingly and unnecessarily oversecured even though the risk of default of the borrower is reducing. If the lender had agreed to grant a loan of €80 with an initial mortgage coverage of only €100, why should the excess security increase with every installment without compensating the borrower? These overcollateralized securities unreasonably include value or equity in the mortgage that in fact belongs to the mortgagor but lenders are unduly making profits (unjustified enrichment)²⁹ when they issue mortgage securities based on this. For this reason, several jurisdictions like Germany allow the mortgagor to unilaterally reduce the mortgage in the Land Register (like Germany, at §§ 1144 and 1145 BGB), while others unreasonably forbid such reduction on the principle that the mortgage is indivisible (e.g., in Spain, Art. 122 LH).

According to rules in the Basic Guidelines, the mortgagor of a Eurohypothech can take action on the partly repaid mortgage, within the terms of the security agreement: either to cancel part of the mortgage in the Land Register or to simply reuse it for a further loan. Fig. 4 shows this second possibility. In Fig. 4, Lender A holds 70% of the value of the Eurohypothech securing a loan against Debtor C; but Lender A also holds 20% of the same Eurohypothech on trust for Lender B to secure B's loan to C.

Eurohypothech and Securitization

Another benefit of the Eurohypothech for lenders is the creation of a pan-European mortgage securities' market, perhaps using Eurohypothechs from all around Europe as assets to be securitized, instead of pooling a wide range of mortgage securities that are not commonly understood. In Spain, for example, there are the so-called *participaciones hipotecarias*, securities which are unique in Europe and quite legally insecure as they "financially simulate" the assignment of mortgages without fulfilling the general civil law requirements like the need for a notarial deed or registration according to Art. 149 LH. Consequently, no mortgages are pooled for securitization purposes. This is also so in France, where mortgages may be assigned through a so-called *bordereau de cession*. In England, equitable mortgages (which do not exist in civil law countries) are commonly pooled when structuring a securitization process (Nasarre-Aznar 2004a).³⁰ Finally, in Germany, until 2005 with the creation of the fiduciary *Refinanzierungsregister*, no traditional securitization (except for a 2000 version) was possible, resulting in uncertainty for investors. This is one of the reasons why European-wide mortgage securitization is not done nowadays.

Now the Eurohypothech would allow a single known mortgage instrument, which could be pooled in European-wide SPVs and would allow the issue of "pan-European MBS." However, at a second stage, Eurohypothechs granted in different countries would have different grades of risk because of different legal environments; factors include the efficacy of the Land Register, insolvency rules, and enforcement rules. Because of this, investors in such MBS could demand an interest rate compensating the level of risk, according to the proportions of Eurohypothechs present in the pool coming from different countries. All this should bring more transparency to the whole system.

Apart from creating such a pan-European securitization market (which could be called "Eurosecuritization"), the Eurohypothech would help to develop and compensate for funding shortfalls in housing and mortgage markets all over Europe. Thus, if a national mortgage market lacks liquidity, this liquidity could come from an international pool of Eurohypothechs which can be securitized or attract foreign investors at better rates due to the risk assessment operating inside the pool, with geographical risk diversification in land across Europe. See this structure in Fig. 5.

The Eurosecuritization process is technically feasible with the Eurohypothech because this allows a secure split of the lender from the mortgagee through the Eurotrust. A common problem for all securitization processes in civil law jurisdictions has been how to transfer the benefit of thousands of mortgage loans in a secure and efficient way. The mortgages in most European countries are "heavy" to assign, in terms of time and costs. This is also true for legal mortgages in common law jurisdictions and this is one of the reasons why an equitable transfer to the SPV is used.

The Eurohypothech would resolve this issue in a legally friendly way, avoiding devices such as the *participaciones hipotecarias* or the *bordereau de cession* (Nasarre-Aznar 2004b), and allowing only the transfer of the secured loans, which can be achieved through a private contract. At the same time, this allows the lender originating the mortgage loans to retain the Eurohypothechs on trust (through a Eurotrust) for the SPV, which is the new lender or owner of the loans. Thus, all loans owned by the SPV, the issuer of the MBS, are at all times covered by fiduciary duties in their respective Eurohypothechs, still held by originators. This is especially relevant when the originators become insolvent. Here, Eurohypothechs would consolidate with the loans within the jurisdiction of SPVs, and not be lost in insolvency.

Using Other Credit Institutions' Eurohypothechs for Issuing Covered Bonds

The most frequently used mortgage finance instrument in Europe is the mortgage bond, also known as "covered bond,"³¹ where it includes funding of loans granted to public institutions (Nasarre-Aznar 2003).³² For its issuance, the assignment of the mortgage to any SPV is not required. Unlike MBS, the risk of default under the covering mortgage loans is assumed by the originator of those mortgage loans (or the one that has bought the mortgage loans that are securing the mortgage bonds), as covered bonds represent debt to them (i.e., bondholders are lenders to the lending institution for their bonds' value). This is one reason why covered bonds are stronger securities than MBS and more attractive for conservative investors. Properly regulated, they could be a good option in countries where only MBS are available, particularly in the current financial crisis.

Nonetheless the problem with their pan-European use remains similar. There is currently no pan-European mortgage bond market based on the issue of covered bonds backed by mortgages granted over pieces of land located in several countries in Europe.

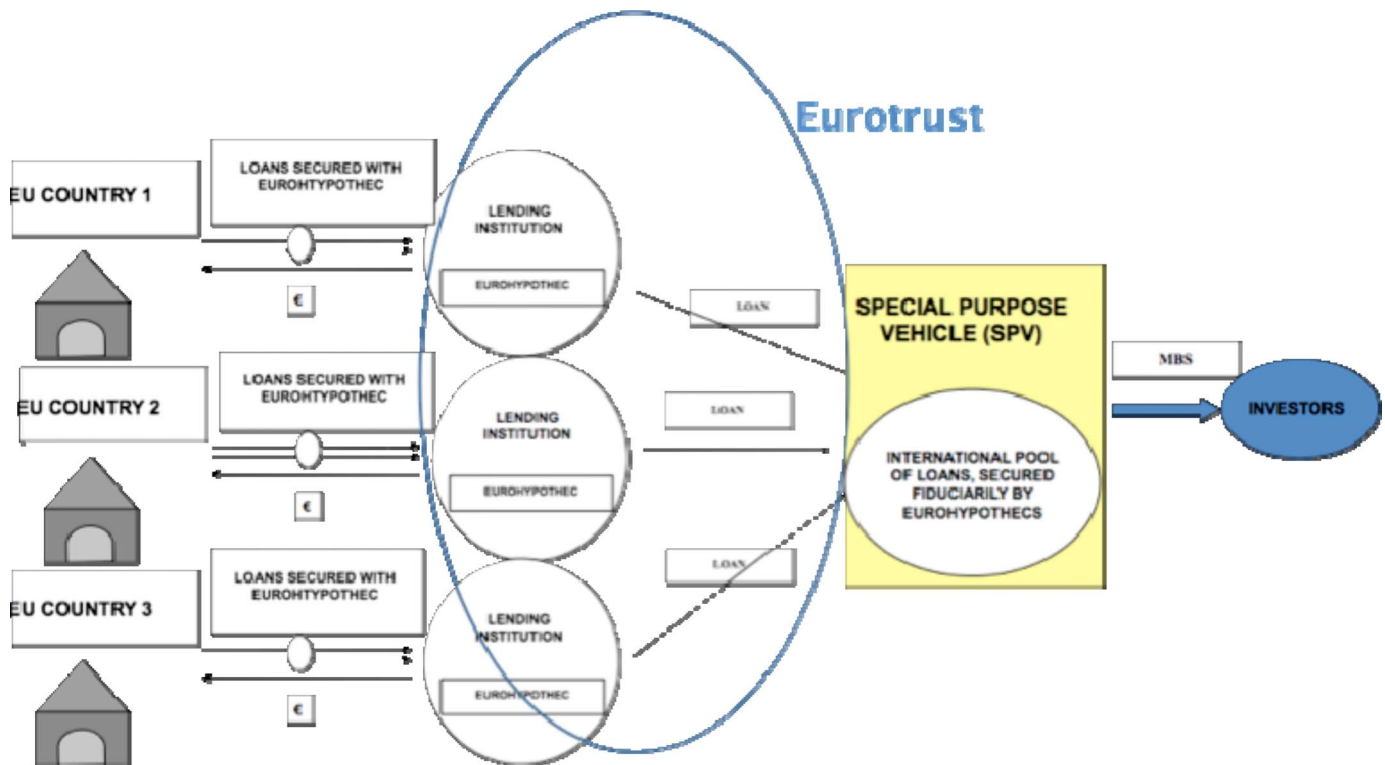


Fig. 5. Eurosecuritization

This is so, first, because of the low level of cross-border mortgage lending and, second, because of the lack of massive cross-border mortgage assignment due to the “burden” that it represents by the assignment of mortgages (as explained earlier). There is also the uncertainty of the different legal environments. The Eurohypothech would help to banish these doubts as to how mortgages work in Europe while the Eurotrust would facilitate the easy transfer of mortgages, as it is shown in Fig. 6.

Multiparcel Eurohypothech

The possible pan-European use of the Eurohypothech is illustrated by the multiparcel Eurohypothech, shown in Fig. 7. Its main feature is its prospective capacity to charge several pieces of land located in different E.U. countries as security for a loan (or several loans).³³

Real Case: Spanish Mortgage Reforms 2007

By a Statute of December 2007 (*Act 41/2007*), Spain has reformed its mortgage legislation. This is, perhaps, the biggest reform of Spanish mortgage law since reforms of 1946 and 1981 and it deals with the two aspects of the mortgage market: active operations (lending; mainly regulated by the *Mortgage Act 1946*) and passive operations (mortgage funding; mainly regulated by the *Mortgage Market Act 1981 (Act 2/1981)*).

This reform is part of a wave of reforms in Europe to improve the mortgage market: in France by the already quoted *Ordonnance* March 23, 2006 for mortgages and the *loi* no. 2007-211 of February 19, 2007 creating a contractual trust (*fiducie*) and in Germany by the *Gesetz zur Neuorganisation der Bundesfinanzverwaltung und zur Schaffung eines Refinanzierungsregisters* 2005. It should be also understood that these are intended to improve national legislation after the Basic Guidelines 2005. It

should be pointed out that the Spanish mortgage reform has generally improved the efficiency of both active and passive mortgage operations. Yet, further improvements would be necessary to meet the goals proposed by the *White Paper* and to achieve the usefulness and flexibility of the Eurohypothech.³⁴ This need for improvement is illustrated by the summary in Table 2, from Nasarre-Aznar (2008b).

Conclusions

The field of mortgage law is not harmonized in the E.U., nor there is a common mortgage instrument among all member states. Consequently, there is no real European mortgage market, despite the intentions of the *White Paper* to promote safer, more flexible, and more transparent common E.U. structures for mortgage lending and funding. This should be especially relevant in the current mortgage and financial crisis. In some ways the Eurohypothech and the Eurotrust might be thought by some as bringing the E.U. closer to the kind of fragmentation and securitization practices which were seen as causing problems in the credit crunch in common law countries. No mortgage system can of itself protect against poor banking regulation or excessive risk taking by investors, yet, these new legal tools can improve transparency of investments across Europe, they can help to avoid a major failing of financial instruments such as credit default swaps³⁵ or risky MBS transactions, and they can incite banks to lend where a failure to lend is the major problem of the crisis.

Although the *White Paper* refers to future “main tasks or activities” in p. 14 (essentially, to organize specialized groups and further studies without any common link in common), it does not specifically mention legislating on the Eurohypothech. How, then will the E.U. achieve its mortgage market objectives without the Eurohypothech? These fragmented activities are not enough to

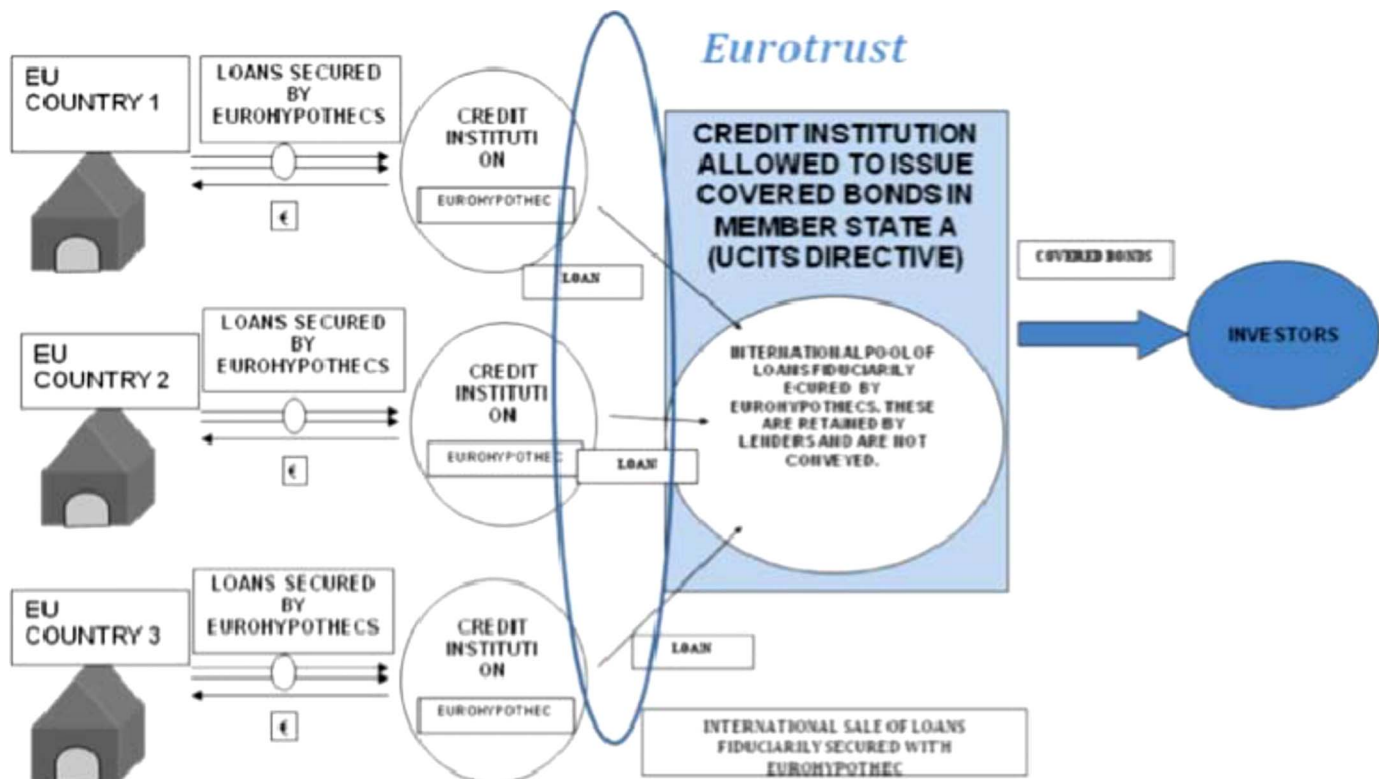


Fig. 6. Cross-border issue of covered bonds

achieve a true European mortgage market. One example is the recent reforms in E.U. member states that neither fully provide for European dimension of the mortgage market nor achieve the same usefulness and flexibility of the Eurohypothec envisaged by Basic Guidelines 2005 with their mortgage instruments.

The Eurohypothec, in combination with the Eurotrust and maybe with other partners like EULIS and the Eurotitle, could be the answer, as it achieves what the *White Paper* seeks (p. 13): it would enhance competitiveness and efficiency of E.U. mortgage markets which will benefit consumers, mortgage lenders and investors alike; it could demonstrate its ability to create new opportunities for mortgage lenders to access other markets and engage in cross-border activity; it could enable a more efficient mortgage lending process; it could lead to improved product diversity and, potentially, lower prices for consumers; it could improve consumer mobility through increased transparency and reduced product tying; and it would provide market transparency, certainty ... and a broader range of investment opportunities as a result of

enhanced product diversity both within primary and secondary markets. Some examples of these possibilities are given throughout the paper, such as the so-called Eurosecuritization process, the "multiparcel" Eurohypothec, the structure of an ongoing syndication of a mortgage loan and the possibility for the borrower to reduce the charge as soon as he has partially repaid the secured loan.

List of Statutes

The Convention on the Law Applicable to Trusts and on Their Recognition of July 1, 1985.

E.U. Legislation

Treaty establishing the European Community; consolidated text, Official Journal C 325 of December 24, 2002.

French Legislation

Loi 2007-211, 19-2-2007 (JORF 21-2-2007). *Ordonnance* no. 2006-346, 23-3-2006 *relative aux sûretés*.

German Legislation

German Civil Code 1899 (*Bürgerliches Gesetzbuch*). *Gesetz zur Neuorganisation der Bundesfinanzverwaltung und zur Schaffung eines Refinanzierungsregisters* 2005, BGB (*Bürgerliches Gesetzbuch*) I 27-9-2005, Part I, pp. 2809-2819.

Spanish Legislation

Spanish Civil Code 1889 (CCI). *Act 41/2007*, December 7 (BOE 8-12-2007, num. 294, p. 50593).

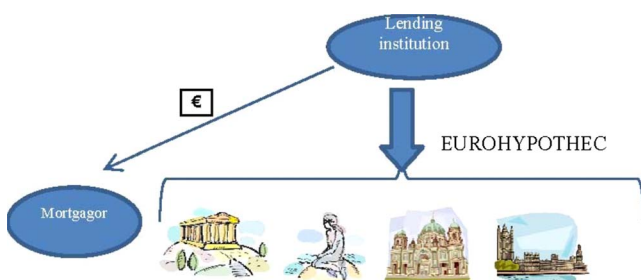


Fig. 7. Multiparcel Eurohypothec

Table 2. Eurohypothech, New Spanish Mortgage, and European Panorama

Europe demands [including <i>European Commission White Paper</i> (2007)]	Spain (<i>Mortgage Act</i> 1946, <i>Act</i> 2/1994 and <i>Act</i> 41/2007)	European panorama (may include non-E.U. countries)	Eurohypothech (basic guidelines)
+Lender's flexibility	Lines of credit: yes (Art. 153 LH) Recharcheable mortgage: yes (Art. 13.2 <i>Act</i> 41/2007 that modifies Art. 4 <i>Act</i> 2/1994)	Not a reality in every country (Romania, Bosnia)	Possible, without restrictions
+Borrower's flexibility	(a) Subrogation: yes, but with limits (art. 2 <i>Act</i> 2/94) (b) Partial or complete reuse of the mortgage: no (Arts. 668.3 LEC and 236f.4 RH) (c) Reducibility: no (Art. 122 LH)	(a) Subrogation: not in Ukraine, Russia, and Poland (b) Reuse: not in Russia and Romania (c) Reducibility: yes in Germany (§§ 1144 y 1145 BGB)	Possible, without restrictions
Eurosecuritization 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 <i>Act</i> 41/2007 (Art. 1528 CC; Art. 11.3 <i>Act</i> 41/2007)	(a) Only possible in Germany (2003), Estonia, Hungary, Romania, and Slovenia. Equity solution under common law jurisdictions. (b) Very flexible in Switzerland, Germany or common law jurisdictions.	All possible, without restrictions. Moreover: multiparcel Eurohypothech
Free mortgage loans syndication	Only initial; efficient ongoing syndication not possible	Only possible in Germany, U.K., Denmark, Switzerland, Estonia, and Sweden	Possible, without restrictions
Euro-land register	Good Land Registry system (Online) consult through www.registradores.org ; but not in EULIS	Some countries are in EULIS Others have no computerized Land Registry (Bosnia, Ukraine, and Romania) Others, e-conveyancing (U.K.)	Fully compatible with EULIS
Pan-European mortgage solution?	Most of the solutions that may be suitable under Spanish law may not suit under other countries' law (e.g., lack of notaries)	Countries tend to find "national" solutions, disregarding international mortgage business	The Eurohypothech facilitates a true European mortgage market

Act 2/1981, March 25, of the *Mortgage Market Regulation* 1947 (*Reglamento Hipotecario*).
Mortgage Act 1946 (*Ley Hipotecaria*).

Swiss Legislation

Swiss Civil Code 1907 (*Schweizerisches Zivilgesetzbuch*).

Endnotes

¹According to E.U. webpage (http://europa.eu/abc/12lessons/lesson_4/index_en.htm), "the European Union is more than just a confederation of countries, but it is not a federal state." Therefore, each E.U. country has its own legal system and laws. The E.U. is trying since its creation to harmonize some key areas (e.g., consumers' protection) through its legislation to achieve the three basic freedoms foreseen in the E.U. Treaties: free movement of persons, services and capital (Arts. 39–60 Treaty establishing the European Community; consolidated text, Official Journal C 325 of December 24, 2002). See more information at http://europa.eu/documents/comm/index_en.htm. See E.U. law at <http://eur-lex.europa.eu/en/treaties/index.htm>.

²See "Idea behind the Eurohypothech."

³See "Why talk about the Eurohypothech?" "Idea behind the Eurohypothech," and "Detail of the uses of the Eurotrust." Land registration is one of the key issues that allow the existence of a proper "system of land credit," that is the needed legal infrastructure that allows attracting loans to develop land (Nasarre-Aznar 2003).

⁴These are securities issued by a credit institution that represent debt to it.

⁵See "Eurohypothech as an ideal model of a pan-European charge of real estate" and "Detail of the uses of the Eurotrust."

⁶For more details see "Why talk about the Eurohypothech?"

⁷The Commission is the third part of the institutional triangle that manages and runs the E.U., with the Council and the Parliament. Its job is to uphold the common interest. As "Guardian of the Treaties," it has to ensure that the regulations and directives adopted by the Council and Parliament are being implemented in the member states. It has wide powers to manage the E.U.'s common policies, such as research and technology, overseas aid, regional development, etc., and the budget for these. The Commission's policy on the European Single Market and to seek the removal of unjustified obstacles to trade, in particular in the field of services and financial markets, is assisted in this area by the Directorate General on Internal Market and Services. More information about the EC can be found at http://europa.eu/abc/12lessons/lesson_4/index_en.htm.

⁸See the model proposed by this Group under “Model of the Eurohypothec in the Basic Guidelines 2005.”

⁹In terms of an instrument that allows the creation of a true cross-border mortgage lending system.

¹⁰This work is not very legally precise.

¹¹See all information about the G20 at <http://www.g20.org/>, including the full text of this Washington Declaration 15-11-2008.

¹²In some jurisdictions, lenders or investors have to use structures that contravene general rules of civil/private law to achieve financial goals. Some E.U. countries have used quasi-fiduciary structures to achieve the so-called “true sale” of assets for securitization where the trust institution is unknown and even not allowed (Nasarre-Aznar 2004a).

¹³See some examples in the following text.

¹⁴The *Green Paper* and the *White Paper* can be found at http://ec.europa.eu/internal_market/finservices-retail/home-loans/integration_en.htm.

¹⁵See the following text.

¹⁶The European Land Information Service (EULIS)’s Web page says: “EULIS provides subscribed land registry customers such as banks, lenders, estate agents and lawyers, reliable, direct and easy access to land and property information in member European countries.” This helps because there is, at least, one registration system per E.U. country, and some, like Germany or Romania, that have several of them. EULIS allows subscribers access to Land Registers and Cadastres through a single Web page, with a thesaurus with the translation into “Eulish” (EULIS English) of the charges in each country.

¹⁷See the aforementioned stages.

¹⁸See “Detail of the uses of the Eurotrust” for the Euro-Land Register.

¹⁹See the following text.

²⁰Twenty-two types of mortgages of 22 countries are compared.

²¹This is the most widespread model type in Europe.

²²Generally, the Swedish mortgage is charge independent from the loan and quite simple compared to most European models.

²³This is a Eurohypothec that “lives” within the Land Register, and everything that happens to it must be registered.

²⁴This is a registered Eurohypothec but which is contained in a document and can “live” outside the Land Register; e.g., to assign it, transferring the document suffices.

²⁵See the concept of the Eurotrust in the succeeding text.

²⁶Such as impossibility of structuring and efficient ongoing syndicated mortgage loans in Spain or of properly securitizing assets in Germany until 2005.

²⁷Art. 2.1 of the Convention says that “For the purposes of this Convention, the term ‘trust’ refers to the legal relationships created—inter vivos or on death—by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.”

²⁸This complementarity was first mentioned by these writers.

²⁹Because they are creating business with that unnecessary “extra” part of the charge, in fact belonging (with its profits) to the owner of the charged land.

³⁰See this, for more details, for the participaciones hipotecarias, the borederau de cession and the equitable assignment of mortgages in the U.K.

³¹The word “covered” is used here to denote bonds guaranteed/backed either by a pool of mortgages held by the issuer of the bonds (then they are also known as “mortgage bonds,” or “covered bonds” in financial parlance) or by loans given to public institutions also held by

the issuer (then called “public bonds,” or *Kommunalschuldverschreibungen*, in German).

³²This describes several types of covered bonds (and MBS) in Europe.

³³Despite the fact that some kind of Eurotitle or Euro-land register is needed for an optimal functioning of the multiparcel Eurohypothec (see “Preventing tying practices”), this European charge could work without them. Once adopted, they would be registrable in national land registries but the lack of a common register would adversely affect the cost of transactions.

³⁴An interesting work relating the Eurohypothec and the English mortgage can be found in Watt (2006) (pp. 173-193).

³⁵These financial instruments allowed financial institutions to insure against default on loans, but those undertaking such burdens were not always aware of the weakness of the underlying security.

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