

EDITORIAL NOTE

The editors welcome the submission of articles, precedents and casenotes and are pleased to give guidance in advance.

Articles Ideally articles should be between 3000 and 4000 words. Longer or shorter submissions will nonetheless be considered.

Casenotes In general the most acceptable length of casenotes is 2000–3000 words. However, clear, concise submissions that fall outside these limits will be considered.

Precedents In the selection of forms for publication in the Precedents, particular regard is paid to topicality and the development of innovations in content or style, but everyday forms are welcome.

Book Reviews There is a guideline of 1,000 words. The book will become the property of the reviewer on publication of the review.

All submissions may be sent direct to the appropriate editor, or to *The Conveyancer and Property Lawyer*, 100 Avenue Road, London NW3 3PE. If possible, please supply submissions on disk [saved either as a Word document or in rich text format] along with hard copy.

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THE EUROHYPOTHEC: A COMMON MORTGAGE FOR EUROPE

Dr Sergio Nasarre-Aznar¹

Europe, Hypothecation, Models, Mortgages

1. Introduction

Since the 1960s, interest in creating a common mortgage for the whole of Europe has been increasing, especially as regards the need for trans-national and pan-European mortgage lending in the context of European integration.

The main problems are the differences between the laws on mortgages in the different European countries. The benefits of an "Eurohypothec" would be great, both to consumers (borrowers) and to credit institutions. The former would benefit from an increase in the competence of the lenders (all European lending institutions would be allowed to lend under the same conditions anywhere in Europe), and the latter would benefit from a standardised type and regulation of mortgage. Therefore, the Eurohypothec would bring a huge development in the mortgage and the real estate markets throughout Europe.

This article will deal with all these matters, especially the uses and benefits that a more flexible mortgage would give to the market: easier ways for mortgage securitisation, easier mortgage refinancing, widespread syndicate lending, etc. As an example, most hypothecs currently granted in Europe are not flexible enough to be securitised (*i.e.* funded by issuing mortgage-backed securities), because they cannot be placed easily in an (international) pool of mortgages; the countries have been trying to find different ways of bypassing this problem either unsuccessfully or with success but threatening the pillars of their legal systems.

This article will also give a general overview of the situation of

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the hypothecs around Europe and discuss the main legal problems to reach an Eurohypothec, particularly the *ius loci* problem, the accessory of most mortgages in European countries and the different systems of Land Registration. Land is always a matter that countries like to regulate by themselves and they do not rely on the possible admission of supra-national structures and institutions that could deal with this matter. But the reality is that in a common Europe there should be no restrictions on the freedom of capital movement. Projects like EULIS or the works of research groups that try to find the common core of the private legal systems in Europe are helping in this objective.

The main features of the proposed model of Eurohypothec will also be presented. The last part of the article will deal with the methodology agreed to be used to study the Eurohypothec in the research group "The Eurohypothec: A Common Mortgage for Europe" in which the author is working.

2. A short history of the Eurohypothec

There have been different phases through which the Eurohypothec has been studied by several institutions and groups:

(a) *Segré Report* (1960s). This raised the idea of a flexible common mortgage for Europe. According to the report, this flexibility can be achieved through regulating an independent mortgage, which means, a right *in rem* which should be independent from the credit that it is securing at a certain point in time, so it can be negotiated apart from the secured credit. Moreover, the Eurohypothec should be able to be attached to a document/letter (*Brief*) which can be transferred from hand to hand without recording the transfers in the Land Register, operating like a security. The chosen model was the German *Grundschuld*. This was also the chosen model of the Report by the *Max Planck Institut für ausländisches und internationales Privatrecht* (Hamburg, 1971) which focused its study on the *Eigentümershypothek* or owner's mortgage, which meant that an owner of a piece of land would be able to create a mortgage for his own interest, without the need to have credit or a creditor.

(b) *The Report of the International Union of the Latin Notaries* (1987) used the term "Eurohypothec" for the first time and adopted another model for it: the Swiss *Schuldbrief*, which is even more flexible than the German *Grundschuld*.

(c) From then on, the question of the Eurohypotheck stayed in the hands of the legal literature with specialists like Wherens,² Stöcker,³ Wachter⁴ and Bernstoff.⁵

(d) Today there are some research groups that deal partially with harmonisation of property law in Europe, such as the group of Professor Von Bar (Study Group on a European Civil Code⁶) and the group at the European University Institute Florence (European Private Law Forum⁷). The recently created group "The Eurohypotheck: A Common Mortgage for Europe"⁸ deals specifically with the matter of a common mortgage for Europe. The next group is the so-called "Forum Group" created by the European Mortgage Federation.⁹ The project called EULIS defends the creation of a trans-national online Land Register and Cadastre¹⁰ and, finally, there is the research project called the European Mortgage Finance Agency Project ("EMFA") which pays attention to the harmonisation of trans-national mortgage lending through the harmonisation of the passive operations of the mortgage market, that is, through the creation of a Finance Agency in Europe like Fannie Mae and Freddie Mac in the United States.¹¹

3. Why a Eurohypotheck is needed

The starting point is the fact that currently trans-national mortgage lending is practically non-existent,¹² one of the reasons being the legal difficulties that foreign lenders experience when trying to compete with local lenders within European countries.¹³

² H.G. Wehrens, "Überlegungen zu einer Eurohypotheck" (1992) 14 *Wertpapier Mitteilungen-Zeitschrift für Wirtschafts- und Bankrecht* 557-596. See also H.G. Wehrens, "Real Security Regarding Immovable Objects. Reflexions on a Euro-Mortgage" in *Towards a European Civil Code* (2nd ed., Ars Aequi Libri, Kluwer Law International, 1998).

³ O. Stöcker, *Die Eurohypotheck* (Duncker & Humblot, Berlin, 1992).

⁴ T. Wachter, "Die Eurohypotheck-Grenzüberschreitende Kreditsicherung an Grundstücken im Europäischen Binnenmarkt" (1999) 2 *Wertpapier Mitteilungen-Zeitschrift für Wirtschafts- und Bankrecht*; "La garantie de crédit transfrontalier sur les immeubles au sein de l'Union européenne. L'Eurohypotheque" (1999) 4 *Notarius International*.

⁵ C.G. Bernstoff, "Das Hypothekenrecht in den EU-Staaten" (1997) 3 *Recht der Internationalen Wirtschaft*.

⁶ See www.sgecc.net.

⁷ See www.ius.it/LAW/ResearchTeaching/EuropeanPrivateLaw.

⁸ See www.eurohypotheck.com.

⁹ See www.hypo.org.

¹⁰ See www.eulis.org.

¹¹ See www.emfa.net.

¹² We can agree, to some point, that it exists but it is completely underdeveloped [see E. Klesta, "Experience in Cross-Border Residential Mortgage Lending in the EU: Examples from Portugal and Greece" (2003) *Housing Finance International* 15].

¹³ Although this is a fact, it has not been properly studied yet from a financial and economic point of view and full research should be undertaken focusing on the reasons why this happens.

From a legal point of view there are reasons for this, the basic one being that there are now 25 different types of mortgages and hypothecs in Europe. This means that each hypotheck/mortgage needs to be known and studied in detail by professional lenders (banks and other credit institutes) to properly risk lending in each member country. But even with this study, specially focused on the efficiency of each mortgage (how many preferred rights there are, Land Register working, speed and costs of registration and execution, reports from local lawyers, etc.), foreign lenders would never be able to compete in same conditions as local lenders because the instrument that they have to use (the mortgage) is not the same as in their local market so therefore they are not used to using it properly.

Of course this has a detrimental effect upon competition among credit institutions in the EU which prejudices the chance of borrowers benefiting from the availability of more lenders and from the fact that a more flexible mortgage than the accessory mortgages now regulated in most civil law countries would also give them more chance of refinancing their mortgages with their current banks or finding others which offer better conditions to their mortgage loans (see Fig.1).

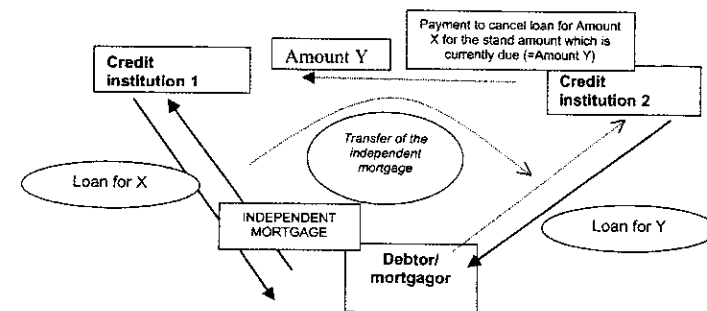


Fig.1. Borrower's mortgage refinancing

But this is not only a matter of borrowers' rights. Lending institutions are, according to the opportunity cost, losing business opportunities because there are several local and trans-national businesses that nowadays are not possible without an Eurohypotheck. These are the following:

- A) It may be possible to secure a loan or several loans with a mortgage on several properties located in different European countries. Currently this is not possible because several mortgages (with different requirements

and efficiency] may be granted for each country to secure different loans.

- B) It may be possible to finance pools of properties European-wide, with the possibility to exchange properties under the mortgage, disregarding in which country they are.
- C) It may be possible to change the borrower, regardless of in which country he is in.
- D) It may be possible to exchange lenders from any European country, which should involve the full development of the process of mortgage securitisation at an European level.¹⁴ Currently, securitisation cannot be developed properly around Europe due to the legal constraints, especially the ones related to the existing "dependent mortgage" which does not allow a free, quick and easy transfer of the pools of mortgages to special purpose vehicles. With a proper regulated independent Eurohypothech, different credit institutions may be able to create common separated pools of credits secured by mortgages which would be retained by the originator (lending institutions) on trust for them. It would be a similar (though with legal differences due to the particularities of the common law trust) structure as the English standard securitisation model. The structure of a mortgage securitisation process with an independent Eurohypothech could be as it is shown in Fig.2.

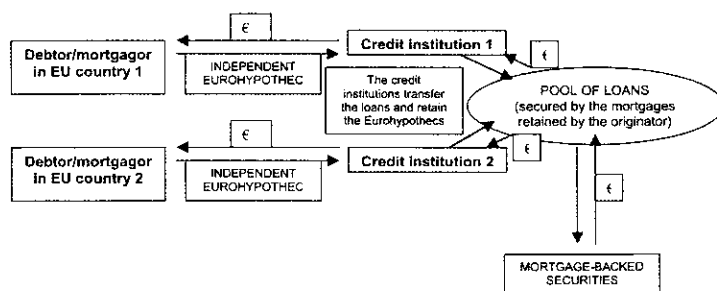


Fig.2. Mortgage securitisation with an independent mortgage

¹⁴ For more on the harmonisation of the passive operations of the mortgage market (securitisation and mortgage bonds), see S. Nasarre-Aznar, *Securitisation & Mortgage Bonds. Legal Aspects and Harmonisation in Europe* (Gostick Hall, Saffron Walden, 2004), pp.75-108.

4. Searching for a model for the Eurohypothech

The different studies from the 1960s to now have revealed that the most appropriate model of a Eurohypothech is one that would bring the chance to undertake/enhance several businesses that currently cannot be developed properly across European countries.

Apart from this, we have to take into consideration the idea of the European common core of the existing mortgages in Europe and it seems to be that a mortgage is a right that entitles its owner to a preferred right over a piece of land. From this common core on, everything is different.

From a general viewpoint, one can divide the existing mortgages in Europe into four main groups:

- a) The continental dependent mortgage. This is the most widespread model in Europe, which has led some authors (e.g. Wachter) to suggest it as a model for the Eurohypothech. It is present almost in every EU country but it has disadvantages in relation to the independent mortgage which are related to its accessory in relation to the secured loans lack of flexibility.
- b) The continental European independent mortgage. Its origins are in Germany and Switzerland, but it is widespread through the east European countries such as Estonia (*Hüpotek*), Poland (*Dług na nieruchomości*, still a project), Slovenia (*Zemljiški dolg*) and Hungary (*önálló zálogjog*).
- c) The Scandinavian independent mortgage.¹⁵
- d) The common law "mortgage" in the United Kingdom and Ireland. Although there are some features that make the common law mortgage as flexible as the continental independent mortgage, the point is that the mortgage itself belongs to a specific context: the common law and the equity. The Anglo-American law system cannot be exported at this point, because the fact that the mortgage contains a 3,000 year lease cannot be understood abroad; moreover, the fact that the mortgage is, at the same time, a loan and a right *in rem* is also difficult to understand outside Anglo-American systems because civil law countries have a model of rights *in rem* that secure contracts and other obligations.

¹⁵ U. Jensen, *Panträtt i fast egendom* (6th ed., Iustus, 2001).

Here follows Table 1 which compares the Anglo-American mortgage, the continental dependent hypothec and the independent one.¹⁶

¹⁶ More information on mortgages can be found in Nasarre-Aznar, above n.14.

Table 1. Comparison of Continental dependent hypothec, independent hypothec and English mortgage

MORTGAGE	CONTINENTAL HYPOTHEC	CONTINENTAL LAND DEBT
—England and Wales. This is the model compared in this table. —Similar institutions in other common law countries, like the United States, especially the mortgages of the title theory jurisdiction. ¹⁷	—All continental European countries. The Spanish <i>hipoteca</i> , the German <i>Hypothek</i> and the French <i>hypothèque</i> are the models taken into account in this table. —The most part of civil law legal systems around the world.	—Germany, Switzerland, Hungary, Estonia, Slovenia and Poland [project]. The German <i>Grundschild</i> and the Swiss <i>Schuldbrief</i> are the models taken into account in this table. —Always regulated together with the hypothec and related to it, except in Estonia, where the hypothec does not exist. —In Germany it is almost exclusively used to cover the mortgage bonds [hypothecs are rare]. ¹⁸
WHERE		
NATURE	—Long lease for 3,000 years (LPA 1925, s.85) —Charge (LPA 1925, s.87)	—Real right (BGB, § 1191 and Swiss Civil Code, § 793). —The Swiss <i>Schuldbrief</i> is also a security. ¹⁹

¹⁷ G.J. Siedel and J.K. Cheezem, *Real Estate Law* (4th ed., South-Western College Publishing, United States, 1999), p.310.

¹⁸ D. Bellinger and V. Kerl, *Hypothekendarstellungsgesetz* (4th ed., C. H. Beck'sche Verlagsbuchhandlung, München, 1995), p.546 and K.H. Schwab and H. Prütting, *Sachenrecht*, (27th ed., München, 1997), p.344.

¹⁹ H.G. Wehrens, "Der schweizer Schuldbrief und die deutsche Briefgrundschuld. Ein Rechtsvergleich als Basis für eine zukünftige Eurohypothek" (1988) 7 *Österreichische Notariats-Zeitung* 184.

	MORTGAGE	CONTINENTAL HYPOTHEC	CONTINENTAL LAND DEBT
CREATION	<p>—Legal: until the LRA 2002, they were created by deed. After it, by registration in the Land Register (constitutive title in a book entry/digital account) [LRA 2002, s 93].</p> <p>—Equitable: either a mortgage of equitable interest or estate over land or a complete legal mortgage.²⁰ If there is an agreement to create such a mortgage, it must be made in writing.²¹ Doubt about how to create this mortgage after the LRA 2002.</p>	<p>They are created either by:</p> <p>a) agreement between mortgage creditor and mortgage debtor, plus notarial deed, plus its entry into the Property/Land Register, like in Spain (LH, art.104) or Germany²² (BGB §§ 873, 1115 and 1116);</p> <p>b) or only by agreement between the parties plus notarial deed, like in France (Code Civil, art.2127).</p> <p>—In Germany, it is possible that a letter (<i>Hypothekenbrief</i>) is issued over the registered hypothec (BGB, § 1116).</p>	<p>—They are created by registering them in the Property/Land Register. For the German <i>Grundschuld</i>, see BGB, § 873,²³ and for the Swiss <i>Schuldbrief</i>, see art.799 of the Swiss Civil Code.</p> <p>—Over the German <i>Grundschuld</i>, once created, a letter may be issued (BGB, §§ 1192, 1195 and 1116) which enhances the flexibility of this real right.</p>
PURPOSE	<p>To convey an interest in land (a lease or sub-lease) as security for a credit or to charge an estate over land (freehold or leasehold) to secure a credit.²⁴</p>	<p>To charge the property on land or other real right on land to secure an obligation, normally a credit or a loan.</p>	<p>Normally used to secure credits (German <i>Sicherungsgrundschuld</i>) but it may be created without finality by the owner of the land.</p>
OBJECT	<p>—Land, chattels, leasehold [LRA 1925, s 86]²⁵</p> <p>—A mortgage can also be mortgaged (sub-mortgage).²⁶</p>	<p>—Land rights on land (real rights) (<i>Código Civil</i>, art.1874 and <i>Code Civil</i>, art.2118 for land and rights on land and BGB, § 1113 for only land).</p> <p>—Sometimes a hypothec can also be charged by another hypothec (subhypothec), like in Spain (LH, art.107.4). But this is not permitted in Germany, where the hypothecs can only be charged by a pledge (BGB, § 1273).</p>	<p>—Land (BGB, § 1191.1).</p> <p>—In Germany, the <i>Grundschuld</i> can only be charged by a pledge (BGB, § 1291).</p>

²⁰ See W. Clark (coord.), *Fisher and Lightwood's Law of Mortgage* (11th ed., Butterworths, 2002) pp.16 and 17 for other types and ways.

²¹ *ibid.*, p.15.

²² Schwab and Prütting, *Sachenrecht*, p.291.

²³ *ibid.*, p.344.

²⁴ Clark, above n.20, p.4.

²⁵ Clark, above n.20, p.7.

²⁶ Clark, above n.20, p.389.

	MORTGAGE	CONTINENTAL HYPOTHEC	CONTINENTAL LAND DEBT
RELATIONSHIP WITH CREDIT	<p>They may be split.²⁷</p>	<p>—They cannot be split.</p> <p>—The hypothec is always accessory to the secured obligation. The hypothec can exist while the secured obligation exists but once it is fully repaid, released, set off, etc., the hypothec must disappear (LH, art.104, BGB, § 1113.1 and <i>Code Civil</i>, art.1692).</p>	<p>They may be split (BGB, § 1192 and Swiss Civil Code, art.842).</p> <p>This is their main advantage: secured obligation and security are independent one to each other and they are only bound by a contract (<i>Sicherungsvertrag</i>). This has advantages for a securitisation process.</p>
TRANSFER	<p>—Secured obligation and mortgage may be transferred separately or one transferred and the other retained.</p> <p>—The transfer of the mortgage may be legal or equitable. If it is legal and the mortgage is over a registered land, the transfer must be entered into the Land Register and the debtor must be given notice. If it is equitable, neither are necessary. However, the equitable transfer of the mortgages will be virtually impossible when the compulsory electronic registration of rights on land comes into force (LRA 2002, s.93(2)).</p>	<p>—Secured obligation and mortgage may not be transferred separately (LH, art.149, BGB, § 1153 and <i>Code Civil</i>, art.1692).</p> <p>—Giving notice to the mortgagee is necessary but does not make void the cession, if it does not take place, the mortgagor is entitled to continue paying the original mortgage (LH, art.149, BGB, § 873 and <i>Code Civil</i>, art.1691).</p> <p>—To transfer a hypothec (together with the secured credit), a notarial document and an inscription in Land Register are normally needed (LH, art.149, <i>Code Civil</i>, art.2149 and BGB, §§ 1154.3 and 873).</p> <p>—An exception is the German hypothec called <i>Briefhypothek</i>, which can be transferred (together with the credit) with the transfer of the letter (<i>Hypothekenbrief</i>) (BGB, §§ 1154.1 and 1155).</p>	<p>—Secured obligation and land debt may be ceded separately (BGB, § 1192 and Swiss Code Civil, art.842).</p> <p>—To transfer the credit, an agreement between the transferor and the transferee is required. Only if the debtor is given notice should he pay the transferee (BGB, § 409).</p> <p>—The régime of the German land debt's transfer follows the one of the German hypothec (BGB, § 1192), but under the conditions agreed in the <i>Sicherungsvertrag</i> (BGB, § 873). For the <i>Grundschuld</i>, normally a letter is issued, thus improving its marketability (BGB, §§ 1195, 1192 and 1154).</p> <p>—The Swiss <i>Schuldbrief</i> is always a security, and follows the securities' regulation to be transferred.²⁸</p>

²⁷ Clark, above n.20, p.379.

²⁸ Wehrens, above n.19, p.184.

ENFORCEMENT	MORTGAGE	CONTINENTAL HYPOTHEC	CONTINENTAL LAND DEBT
<p>—The mortgagee can take possession of the land, foreclosure or sell it and appoint a receiver. Some of the remedies may be done by the mortgagee himself or through a court (equitable mortgages).</p> <p>—There can be priority problems among mortgages.²⁹</p>	<p>—Flexibility (few formal requirements and the type of mortgage depends essentially on the contract and the intention of the parties).</p> <p>—Cheap (low fees of the Land Register).</p> <p>—Fast (no notarial intervention).</p> <p>—Strong rights of the mortgagees.</p> <p>—All formal requirements may be avoided by the equitable transfer of the mortgages to the SPV.</p> <p>—Strong rights for the MBS investors (sub-mortgage).</p> <p>—Regulation that implies the rise of a constructive trust when the mortgage is</p>	<p>—Normally there is a judicial or a notarial process foreseen, to materialise the execution of the mortgagee's rights on the land (BGB, §§ 1147 and 1149).</p> <p>—The land is normally sold in a public auction. It is normally forbidden that the mortgagee can buy or retain the charged land for himself (<i>Código Civil</i>, art. 1859 and BGB, § 1149).</p> <p>—Rigidity (a sole type of mortgage is regulated).</p> <p>—Accessory (the life and behaviour of the hypothec depends entirely on the secured obligation).</p> <p>—Expensive (notarial and Land Register fees and constraints).</p> <p>—In some jurisdictions, the consent of the mortgagor is necessary to transfer the hypothecs and normally he must be given notice.</p> <p>—To transfer a hypothec, a transferee (natural or corporate person) is needed. This makes the securitisation of the</p>	<p>—The German <i>Grundschild</i> can be enforced against the charged land like the German <i>Hypothek</i> (BGB, §§ 1192, 1147 and 1149).</p> <p>—The Swiss <i>Schuldbrief</i> is an enforceable security, that can be enforced either as a pledge or as a real right directly against the land.³⁰</p> <p>—The security of the land debt is the same as the hypothec itself but has more flexibility, which comes from its independence from the secured credit. So the credit or the land debt can be retained and the other part can be transferred. This is possible because the link credit-land debt depends on the <i>Sicherungsvertrag</i>.</p> <p>—This chance of splitting makes it easier to the originator to continue dealing with the mortgagors (retaining, for example, the real right) and servicing the proceedings to the SPV.</p> <p>—It also allows the cheap and fast</p>

²⁹ E.H. Burn, *Cheshire and Burn's Modern Law of Real Property* (15th ed., Butterworths, 1995), pp.722 and 723.

³⁰ Stöcker, *Die Eurohypothek*, pp.264–267.

CONCLUSIONS. BEHAVIOUR IN A SECURITISATION PROCESS	MORTGAGE	CONTINENTAL HYPOTHEC	CONTINENTAL LAND DEBT
<p>transferred incompletely and allows the originator to continue dealing with the mortgagors.</p> <p>—Because of all the above-mentioned, there is a chance to place English mortgages in international pools of mortgages abroad to be securitised.</p> <p>—However, the position of the mortgagor is, in any case, weak.</p>	<p>hypothechs themselves difficult.</p> <p>—Although the security of the hypothec is normally very high, it is not flexible and expensive to constitute and to transfer. That is why two of the leading countries in the European securitisation, France and Spain, have had to "invent" other ways to transfer the mortgages in a securitisation process, that avoid all these constraints and expenses. But these are only patches for a concrete necessity and not a whole solution. For us, the global solution would be the flexibility of the mortgage via the land debt and the trust.</p>	<p>inclusion of assets into inland and foreign pools of mortgages to be securitised, because only the credits would be transferred (a faster and cheaper cession) and not the real right, which would continue being retained by the originator.</p> <p>—The retained real rights would still be securing the credits that back the MBS as they would be retained fiduciary by the originator. Here should exist a fiduciary between the originator and the SPV, through which the real right is retained fiduciary by the originator on behalf of the SPV/MBS holders, so he is obliged to service the payments incoming from the mortgagors.</p> <p>—Combined with the trust, it is the ideal legal background for the securitisation in civil law countries. It is also a good model for the Eurohypothec.</p>	

5. EULIS and EMFA projects

The aim of both projects is to harmonise indirectly the mortgage market in Europe in two completely different ways: the European Land Information Service ("EULIS"), on the one hand, tries to unify the Land Registers throughout Europe by way of an online Register and Cadastre; the EMFA Project Group, on the other hand, has studied the behaviour and the impact of the government-sponsored enterprises in the United States, Fannie Mae and Freddie Mac, and they have concluded that they have been useful for the development and the harmonisation of the mortgage market in that country.

In the context of the majority of national land registers still being anchored in the nineteenth century,³¹ EULIS³² is presented as a chance for online access and consulting of the associated national Land Registers and Cadastres.³³ To achieve this goal there are some difficulties to be overcome: lack of common principles in collecting and storing the relevant information, no common legal framework and lack of common principles regarding access to the information. The project wants to achieve common unique online access to trans-national information about a piece of land.

This project is quite limited when compared to the English Land Registration Act 2002 (LRA 2002) which foresees the e-conveyancing of land: the sale and charge of land would only be possible through the intranet without the need for physical books of the Land Register and any kind of paper deeds outside the e-Registry. Although not fully in force for several years, the LRA 2002 is an excellent example of the future role of the Land Register in a unified Eurohypothecc: the latter cannot exist without the former due to the important role that the Land Register should develop next to the Eurohypothecc, essentially, security and certainty (of property, charges, etc.). As currently there is no national Land Registry which is available only online (not only the consultation of the Register, but also the conveyancing of

³¹ There are a few European countries that allow online access to their national Land Registers: Denmark, Germany, Ireland, Holland, Austria, Sweden and partially Italy and Spain [European Mortgage Federation, *Recommendations for the Improvement of the Efficiency of the Mortgage Collateral* (2003), www.hypo.org]. The Spanish Land Registry (www.registradores.org) is preparing the project called "Hermes" which will allow, through an electronic signature, to send private and public documents to be recorded at the office of the Land Registry via email.

³² This is a project included in the Programme "e-Content" of the European Union (www.cordis.lu/econtent/home.html) which has been developed since January 2002.

³³ The original ones included are Sweden, Finland, England and Wales, Scotland, Austria, Holland, Lithuania and Norway. Recently also Spain has taken part in the project.

land itself) the EULIS project is, at the moment, more modest than the LRA 2002. The EULIS project was organised into 10 workgroups, the most interesting groups being 4 (which information should be available online?), 5 (which data interests the future users of this online service?) and 10 (what will be the impact on the mortgage market once the project becomes reality?). EULIS held its Closing Seminar in June 2004, but its members continue working on the project.

The EMFA project is quite original as regards the harmonisation of the mortgage as an economic matter. In November 2002 several European credit institutions³⁴ grouped under the EMFA project showed an interest in establishing a government-sponsored enterprise ("GSE") in Europe.

The basic idea is to promote mortgage loans at a fixed interest rate. This type of mortgage currently only represents 4 per cent of the total mortgage loans in Europe. On the basis that this type of loan is better for the mortgagor (who bears no interest risk) but too expensive for consumers to be more attractive than the variable interest rate mortgage, the solution is to compensate these higher interest rates that lending institutions should charge to the borrowers to protect themselves from interest rate risk. This compensation could be achieved by creating a circuit for financing these mortgages, which means, a standardised public-backed financial vehicle (EMFA) that would buy this type of mortgages from lending institutions to securitise them.³⁵

EMFA should be able to borrow money through securitisation at a better interest rate than other financial institutions (and could buy these fixed-rate mortgages) because of the implied support of the European Union (which should decrease the risk of default perceived by investors in EMFA's mortgage-backed securities ("MBS")).

This project has several advantages but also some disadvantages. The main difference between this project and the others is that this one does not take into consideration the legal matters of the Eurohypothecc but only financial and economic ones: as it would be an advantage for lending institutions to finance their fixed-rate mortgages through EMFA, theoretically lending institutions would adapt their mortgage products to the standards of EMFA including fixed-rate mortgages at better interest rates than now. But this project does not take into consideration important

³⁴ Northern Rock (UK), Crédit Agricole (France) and the Spanish Banco Bilbao-Vizcaya Argentaria. Also supported by the Irish Life & Permanent and the Portuguese BCP.

³⁵ For mortgage financing and securitisation matters, see Nasarre-Aznar, *Securitisation of Mortgage Bonds*, see n.14 above, pp.5-11.

legal matters, including the different efficiency of mortgages in different European countries and the possibility of making new trans-national mortgage businesses, etc. Table 2 shows a comparison of each advantage together with its related disadvantages:

ADVANTAGES OF EMFA

EMFA could help harmonising the mortgage market in Europe. It is another alternative to deposit-taking mortgage finance (which is dangerous for borrowing short and lending long).

EMFA could help to develop synthetic securitisation in Europe as it would be the counterparty for lending institutions.³⁶

EMFA would have a tacit warranty of the European Union.

DISADVANTAGES OF EMFA

The harmonisation, at some point, could be limited only to the passive operations of the mortgage market (mortgage funding through securitisation) which could bring standardisation of the features of the mortgage loans in Europe but not the harmonisation of the efficiency, constitution, enforcement, Land Registries in Europe, so it will not be a true pan-European mortgage market. As an alternative deposit-taking funding could be a solution but already several alternatives exist that are not fully exploited (securitisation, synthetic securitisation and mortgage bonds) due to legal constraints.

Synthetic securitisation is an incipient finance technique (since it was used in Germany for the first time in 2000) that is only used for risk relief purposes but which does not bring extra funding to the originators (lending institutions).

This is the way in which Fannie Mae and Freddie Mac began and after a recent crisis (2003–2004) The US Government is thinking of privatising them. According to

³⁶ See *ibid.*, pp.56–59 to read more about synthetic securitisation.

ADVANTAGES OF EMFA

EMFA could also help to develop housing policies and help to lend to low-income borrowers

Borrowers would be benefited with mortgages at a lower interest rate and better conditions in the mortgage products. It would also standardise interests at a European level.

DISADVANTAGES OF EMFA

several studies,³⁷ the American GSEs are not transferring the privileges they have (Government sponsoring, lines of credit, tacit support, tax reliefs, weaker supervision, etc.) to the borrowers as they have proved inefficient. Currently the US GSEs have a huge debt that, in event of default or unforeseen crisis, could not be paid because of the lack of own resources to pay it.

According to the US Housing and Urban Development (March 2000) the GSEs role in the low-income sector has been poorer than that carried out by the private finance institutions. Maybe direct subsidies would be more efficient than trying to carry out housing policy through GSEs.

Although the US GSEs seem to have helped to decrease the interest rate in mortgages from a 25 to 40 basis points, these results can also be achieved through other mechanisms, like private MBS³⁸ and mortgage bonds.³⁹

³⁷ W. Passmore, *The GSE Implicit Subsidy and Value of Government Ambiguity*, Preliminary Draft, (December 2003 (?)); T.H. Stanton, *On Shaky Ground: The Relentless Expansion of Fannie Mae and Freddie Mac in the US Housing Finance System* (January 29, 2003). Report for the Anthony T. Cluff Research Fund of the Financial Services Roundtable; H.-J. Dübel, *Scope and Effects of Public Credit Guarantees in Housing Finance. The Case of the US Government-sponsored Enterprises Fannie Mae and Freddie Mac* (October 2003 (?)); K.W. Colton, *Housing Finance in the United States: The Transformation of the US Housing Finance System* (Joint Center for Housing Studies, Harvard University, July 2002); H.-J. Dübel, *Praise be to Government: But There is Always Room for Improvement*, (2003 (?)); W. Poole, *Housing in the Macroeconomy*, "The Federal Reserve Bank of St. Louis" (March 2003). See also the recent speech in the US Senate by Alan Greenspan, *Government-sponsored Enterprises* (February 24, 2004), available at www.federalreserve.gov.

³⁸ D. M. Jaffee and B. Renaud, "Securitization in European Mortgage Markets", First International Real Estate Conference (Stockholm, June 28 to July 1, 1995).

³⁹ See Nasarre-Aznar, *Securitisation & Mortgage Bonds*, pp.13–22.

ADVANTAGES OF EMFA

Better development of the European capital markets

EMFA could help to stabilise the financial system

Unbundling, that is specialisation and division of business among financial institutions: originators for lending and EMFA for mortgage finance

DISADVANTAGES OF EMFA

Today the bond market in Europe is healthy, the mortgage bond being the most important security.⁴⁰ Moreover, mortgage bonds are more secure and less risky for borrowers than MBS.

The US GSEs and MBS were born as a reaction to several financial crisis, in the United States. But the European financial system is more stable than the American one: harmonisation through Directives, hard liquidity ratios, strong capitalisation mechanisms through mortgage bonds, etc.

Unbundling is not always good because it decreases the warranties of creditors of the originator and of the securitised pool of mortgages (fiduciary structures that are normally unknown in civil law countries). Moreover unbundling brings the necessity of more intermediaries between investors and borrowers and there are several financial institutions that rather prefer to fund mortgages by themselves and without intermediaries.

6. Basics of the contents that a Eurohypothech should have

On the basis of Arts 3 and 67 of the Treaty of the European Communities, the European Union should have the competence to establish a common mortgage for Europe through a legal instrument, like a directive. The question now is which kind of regulation it should be to achieve the goals described above.

From my point of view, these would be the basics of a future directive of the Eurohypothech:

1. The Eurohypothech may be configured as a right *in rem* which may be used to secure one or more credits.

⁴⁰ See the data in O. Stöcker, "Development of Legislation on Covered Bonds in Europe", Seventh Central European Covered Bond Conference (Berlin, October 13-14, 2003).

2. The Eurohypothech, should be as flexible as possible, created without any secured credit and by the owner of the land by himself or with the concurrence of the mortgagee.
3. The Eurohypothech may secure as many credits as the parties (*i.e.* lender and borrower) want to include under it ("umbrella mortgage").
4. Due to its flexibility the mortgage may be reused as many times as the euro-mortgagor wants, as he may be able to recover it and to reuse it to secure more credits granted by different lenders.
5. The Eurohypothech may help to develop a pan-European secondary mortgage market because the lending institutions (mortgagees) would be able to transfer the credits and to retain the mortgages under a trust. This would be especially interesting for civil law countries which are currently experiencing problems in achieving mortgage securitisation structures.⁴¹
6. The lack of legal accessory of the Eurohypothech should be balanced with a more flexible way to bind security (Eurohypothech) and credit or credits. This binding should be made through a private written "security contract" which establishes the kind of relationship between mortgage and each secured credit. The law regulating the Eurohypothech should foresee a minimum contents for the security contract.
7. In order to secure syndicate loans, the mortgage should be able to be separated from each of the credits that the members of the syndicate (partners) would grant to the mortgagor. So the leader of the syndicate would be able to hold the mortgage on trust for himself (for the part of the loan he has granted) and for the other partners (for their respective amount).
8. The Eurohypothech can be created as a book-mortgage (a mortgage which lives and develops within the Land Register) or as a letter-mortgage (a mortgage that is created in the Land Register but exists outside of the Land Register and is transferred from hand to hand without any record in the Land Register). The Eurohypothech may be also created in electronic form if the Land Register is an electronic one.

⁴¹ Nasarre-Aznar, *Securitisation e/ Mortgage Bonds*, above n.14, pp.50-74.

9. The Eurohypothech should also follow the requirements in each country to create rights *in rem* (i.e. to create interests on land in the United Kingdom after the Land Registry Act 2002 is completely in force it would need to record them in Land Register; no problem at all for the Eurohypothech). Normally the recording of the Eurohypothech in the Land Register would be constitutive.
10. Together with the executive title that includes the Eurohypothech against the charged piece of land, another executive title should be vested to the mortgagee in order for him to be able to foreclose the mortgagor's personal estate (and not only the land). This personal liability can be excluded in the case that the mortgagor is not the same as the debtor.
11. The Eurohypothech does not generate interests (only, in its case, the secured credit does). Once the credit is fully repaid (or partially repaid) the mortgagor can recover the Eurohypothech (or part of it).
12. The Eurohypothech can be denominated with any currency within the EU.
13. The Eurohypothech may charge several pieces of land in the same or in different countries within the EU.
14. The Eurohypothech comprises the rents and proceeds of the charged land.
15. The Eurohypothech ceases to exist when, if it is owned by the mortgagor, he agrees to or, if it is in the hands of the mortgagee, if there is an agreement between mortgagee and mortgagor.

7. Creating a Eurohypothech project

The research group "The Eurohypothech: A Common Mortgage for Europe"⁴² was established in January 2004, is funded by the Spanish bank BBVA and is currently supported by the Spanish Land Registry. Its main goal is to write a proposal for a directive on the Eurohypothech. The members of the group are not only academics, but also practitioners of the mortgage market (bankers, Land Registry representatives, etc.). They are mainly jurists but there is also one economist. There are researchers from Spain, Great Britain, Germany, Poland and Sweden.

⁴² www.eurohypothech.com.

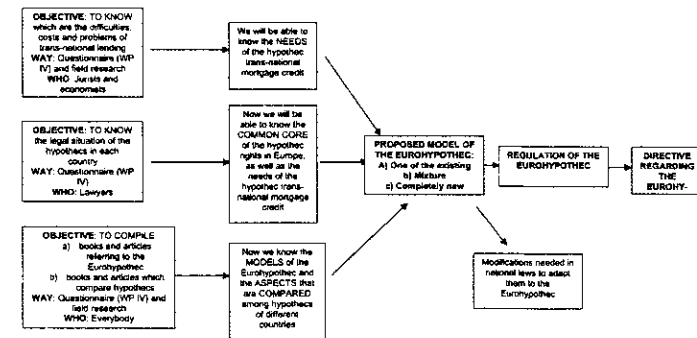


Fig.3. Research group's plan

With this methodology, the group are investigating the current needs of the trans-national mortgage market and compiling information about different mortgage regulations in Europe and materials (books and scientific articles) where this topic is assessed. The most important point at the second stage is to find the common core of the mortgages and hypothecs in Europe and, taking them into account, to create a first regulation on the Eurohypothech.

Currently, a first draft on the basic guidelines of the Eurohypothech has been released and the works are being directed to achieve a flexible but secure common mortgage.

8. Conclusions

It is a fact that the volume of the trans-national mortgage market is very low and one of the causes is the lack of standard regulation. This lack of dynamics in this market negatively affects the borrowers and those who need a credit not only to live but also to start a business or need room for offices. At a lower Eurohypothech market, there is lower competence among lenders and therefore less incentive for them to make better deals with customers.

If the necessity is clear, what is missing? Well, the main obstacle is to detect the wish of the mortgage industry (bankers, borrowers and Land Registry offices) to make an Eurohypothech. After that, the main problem will be the model, which should be a model that suits everybody. This can be achieved by creating a model based on the common core of the mortgages in Europe and after that would come the details (intervention of notaries, role of

Land Register, etc.). Several European research groups are working on this matter.

One thing that authors have agreed on so far, is that the Eurohypotheec should be regulated in a way that would allow for a better and more secure business than we have now. If this is not the case, the idea should be discarded. A good starting point may be in thinking of a mortgage that may be as flexible as possible to deal with several business that today are difficult to be successfully achieved in most European countries.

COMMONHOLD DEVELOPMENT RIGHTS—A COMPARATIVE ASSESSMENT

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LT Commonhold; Comparative law; Development; Germany; Land registration; New South Wales; United States

Introduction

On September 27, 2004, Pt I of the Commonhold and Leasehold Reform Act 2002 brought into existence commonhold, a new form of statutory freehold land tenure.¹ Commonhold facilitates the development of freehold units in subdivided buildings. The new tenure is available for residential and commercial units alike, or a mixture of both. It offers new opportunities to developers, as well as posing some problems arising from the complexity of the primary and secondary legislation.

The Aldridge Committee suggested that the purpose of the commonhold scheme is to regulate relations between owners of separate properties which lie in close proximity to each other and are interdependent.² This remains the case.³ The Government admits that it will be difficult for buildings held on long leases to convert to commonhold.⁴ The new tenure is, therefore, mainly of use for new developments, or for conversions of vacant freehold premises or where an existing leasehold building with a small number of units is involved.

Until now, developers wishing to put up a block of flats or to develop units in a multi-occupied commercial building have had to use the long leasehold system. This is because of the long-standing rule that the burden of positive covenants can, neither at common law nor in equity, run with freehold land against successors in title.⁵ Hence, only by making use of artificial

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¹ Commonhold and Leasehold Reform Act 2002 (Commencement No.4) (England) Order 2004 (SI 2004/1832) (hereafter "CLRA 2002"). On the origins of the expression "commonhold", see N. Roberts, "Commonhold—A New Property Term" [2002] Conv. 341.

² *Commonhold Freehold Flats and Freehold Ownership of other Interdependent Buildings*, Report of a Working Group, Cm.179 (1987) para 1.1. (hereafter "Aldridge Report").

³ The commonhold community statement (the commonhold constitution) must specify at least two relevant parcels of land as commonhold units (CLRA 2002, s.11(2)).

⁴ *Commonhold, Proposals for Commonhold Regulations* (2002), Annex F, Pt 1, para.9.

⁵ In *Rhone v Stevens* [1994] 2 A.C. 310, esp. at 321 (*per* Lord Templeman); J. Snape, "The Burden of Positive Covenants" [1994] Conv. 477.