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Foreword by
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THE INTEGRATION OF THE MORTGAGE MARKETS IN EUROPE (PART 2)¹

I. THE EUROHYPOTHEC AND THE EUROTRUST

1. INTRODUCTION

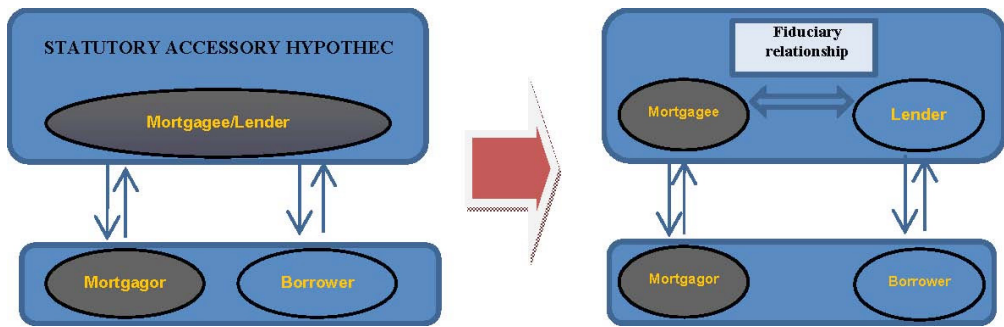
Many financial operations do not take place internationally because they are too complex, expensive or, simply, impossible. The reasons may vary, but many of them are related not only to the lack of a common mortgage instrument in Europe (credit institutions do not wish to face the risk of granting a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

2. CONCEPT OF THE EUROTRUST

Although possibly with a misleading denomination (the Eurotrust is not related to the international Trust of The Hague Trust Convention 1985, but relates to “Euro” because of the “Eurohypothech” and “trust” because it entails both obligational and real (fiduciary) effects, that is the isolation of assets from their holder), the Eurotrust has been conceived (Nasarre-Aznar, Stöcker, 2006) as a **complement to the Eurohypothech**. This is so because the Eurohypothech, as a result of its legal nature as a contractually dependent real charge, requires the Eurotrust. It is a means of achieving greater **flexibility** in the link between credit and mortgage, allowing the fact that lender and mortgagee could be different persons, **without losing security**.

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

¹ This contribution falls within the Research Project „Ways of home tenure to improve access to a dwelling“ of University Rovira i Virgili (Res. 2009AIRE-01).



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

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

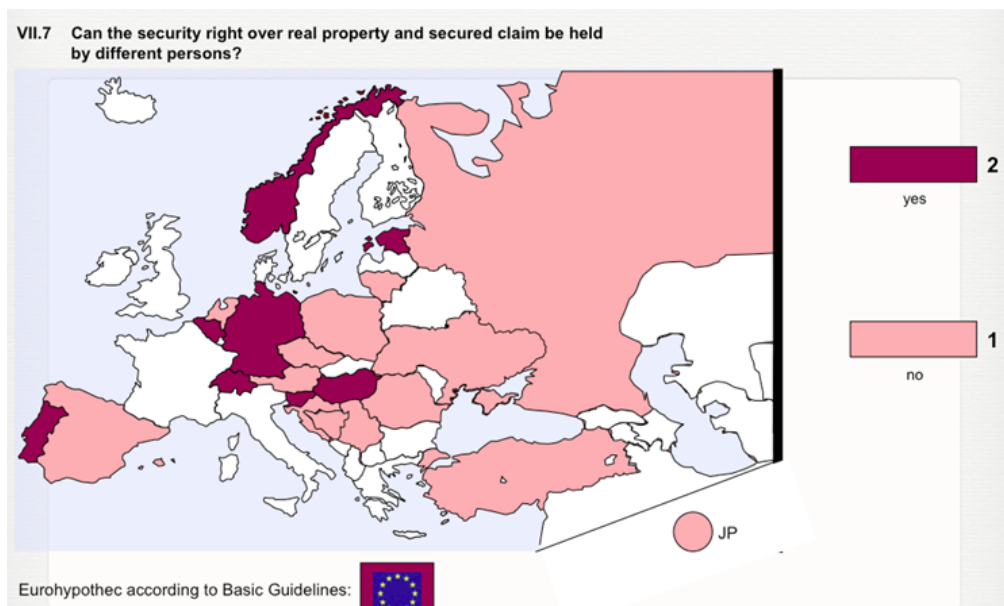


Figure 7. Jurisdictions in which mortgagee and lender can be different persons.
Source: “Runder Tisch”, 2009

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

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

- Partial redemption** of loan A and new taking of loan B (see White Paper 2007, p. 5, about the desire to improve consumers’ mobility among lending institutions)
- Total redemption** and **reuse** of Eurohypothec without loan (see the same idea at White Paper 2007, p. 5).
- Syndicate mortgage lending**

Passive operations

- a) The acquisition of mortgage loans European-wide for purposes of pooling them to issue **covered bonds** (art. 22 UCITS Directive) or simply **using other credit institutions' mortgages** (held on trust) to secure one's covered bonds issuances (see White Paper 2007, p. 3).
- b) Creating international pools of mortgages for **securitisation** purposes
In consequence, the Eurotrust combined with the Eurohypothecc allows for the restructure of all businesses (useful for lenders and borrowers) that involve a **split between mortgage and loan**. Among **other uses** of the Eurohypothecc itself due to its Pan-european nature, it ensures that:
 - a) During the obligation, the loan/s is/are **permanently secured by the mortgage held by another**, which is enforceable where the security agreement states so.
 - b) In case of **insolvency of the mortgage holder**, the mortgage (Eurohypothecc) should be treated as an **alien property** (and therefore not included in the insolvent's insolvency estate)².

3. USES OF THE EUROTRUST

A) ONGOING SYNDICATION

This type of financial operation is commonly used to fund a project, which either entails an important grade of financial risk – ie. of default – or involves a huge disbursement of economic resources, or both. In these two situations, a single lender is faced with so many inconveniences in funding the project that he is simply not prepared to do it alone. Therefore, he requires the borrower/mortgagor to find – or finds by himself – other lenders that may be interested in sharing the risk/disbursement. If new lenders have entered the relationship since the beginning of the operation, it is called an “initial” syndicate lending. However, where those new lenders enter at a moment different from the initial one (when the financial operation was prepared), it is known as an “ongoing” syndication.

This difference is relevant to the usefulness of the Eurohypothecc. Although it can be used in both situations, it is in the “ongoing” syndication where it plays a more important role, as it optimizes it or even allows it in legal contexts where it is not possible. Where it functions as an “initial” syndication, the operation can be organized through a common mortgage securing a loan in which the active side constitutes several lenders (joint and several credit). If nothing changes during the life of the project – that is, no new lenders come – the operation is properly structured. However, problems arise when new lenders come into the relationship – or where simply it was planned only for a single lender and a second or other ones are later added – who also want to be secured by the **same** mortgage. Ongoing lenders under a syndication are not comfortable when they are assigned second and further mortgages on the charged land. Depending on the concrete costs and in contexts where a split between mortgagee and lender is not possible (accessory mortgages), there are only two solutions, neither of which is optimal: either the mortgagor grants further mortgages to the newcomers – which ma-

² This effect is not ensured, for example, by the *Treuhand* in Germany, according to the decision of the *Bundesgerichtshof* 24-6-2003 (WM 2003 pp. 1733 ff).

kes the whole operation more expensive and even impossible, because this situation is not desired by new lenders under a syndication –; or the first mortgage relationship is modified (novation) in the Land Register, which may involve, in some contexts, the extinction of the first mortgage and the creation of a brand new one (extinctive novation). However, even if it is only a modificative novation, the need for reformulation of the whole first mortgage loan, makes the operation more complicated and expensive.

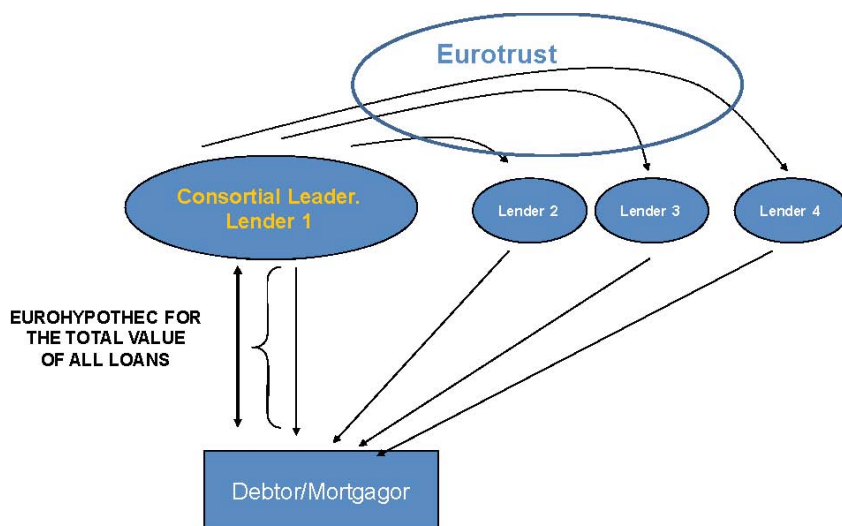


Figure 8. The syndication with the Eurohypotheque & the Eurotrust.
Source: own elaboration.

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

Because:

- 1) The “security contract” between lender 2/3/etc. and the borrower and lender 1, will only be enforceable between them, given the nature of a contract. Once lender 1 conveys the Eurohypotheque, the assignee is not obliged to respect that contract (it does not affect him) and therefore, lender 2/3/etc. will no longer be secured by the Eurohypotheque.
- 2) Even if lender 1 does not assign the Eurohypotheque, the same problem can take place if lender 1 becomes insolvent and therefore the Eurohypotheque will be included in his active estate. The same happens if lender 1 has remortgaged the Eurohypotheque (ie. Sub-Eurohypotheque) and a single enforcement is carried out by the owner of that sub-Eurohypotheque. In both cases, lender 2/3/etc. will lose their contractual rights before the creditors of lender 1, who will be entitled to enforce or recover (in case of insolvency) from the Eurohypotheque.

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

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

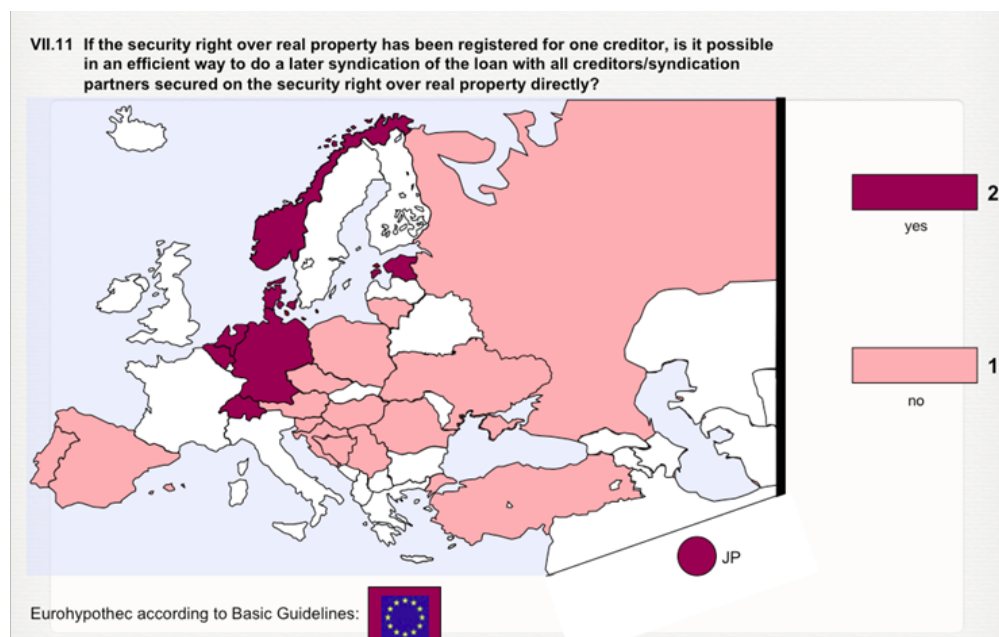


Figure 9. Ongoing/Later mortgage loan syndication.
Source: "Runder Tisch", 2009

B) REDEMPTION

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

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

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

A. COMPLETE SUBROGATION

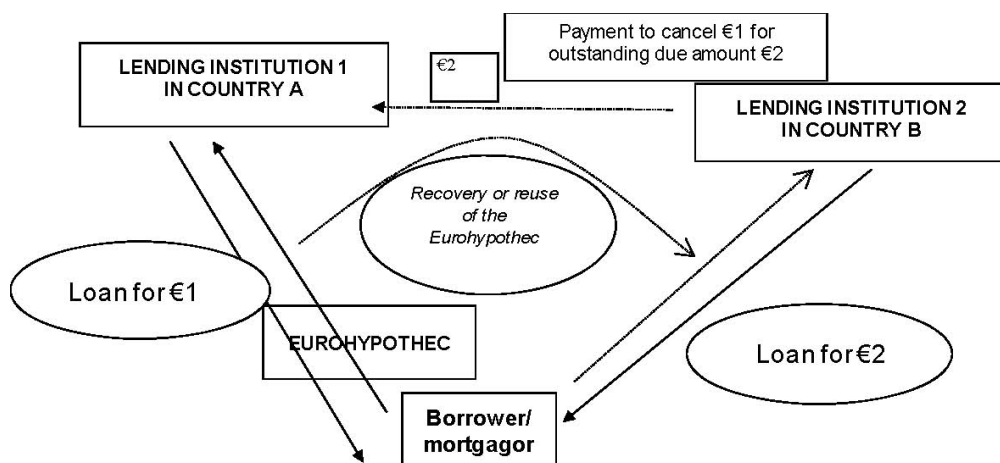


Figure 10. Scheme of complete subrogation of Bank B in Bank A.
Source: own elaboration

Regardless of the grounds (ie. the better the interest rates of the second lender, better treatment with other loans, etc.), the mortgagor – on the grounds of the special protection he deserves as a consumer (see, in this sense, White Paper 2007, p. 5) – should be able to change his lender, once he has repaid the first one. Through the subrogation,

Bank B pays the debt the debtor/mortgagor has with Bank A with funds from the new loan it is granting the debtor/mortgagor in exchange of the mortgage he had granted the first lender, as it is shown in Figure 10. No change is required as regards the mortgage to ensure the complete success of this new operation. A private loan arrangement with the second lender is sufficient.

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

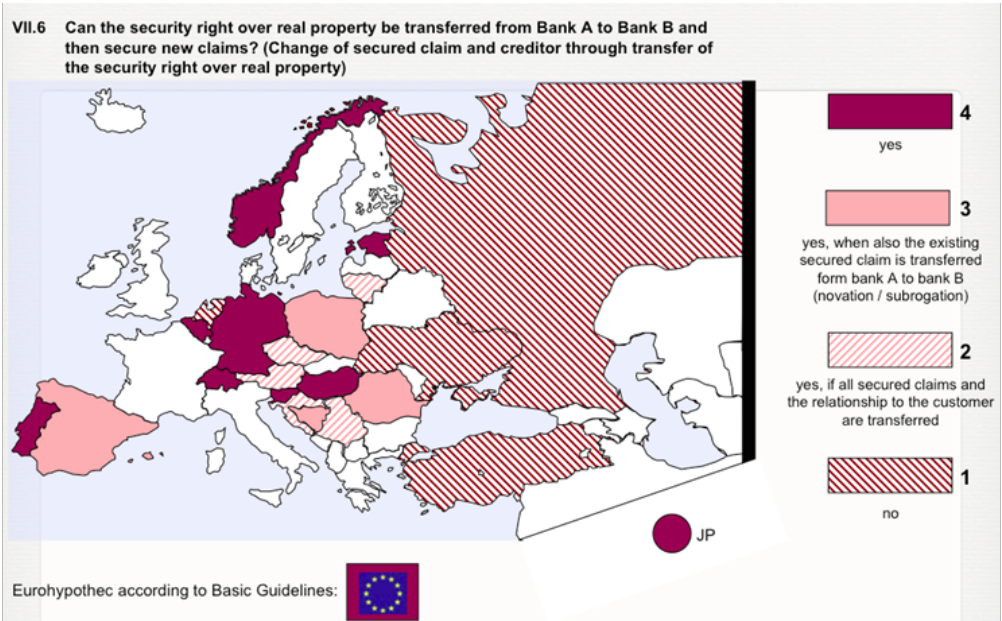


Figure 11. Flexibility in reusing the mortgage with another creditor.
Source: “Runder Tisch”, 2009

B. RE-USE OF THE EUROHYPOTHEC BY THE BORROWER

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

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

C. REDUCIBILITY AND PARTIAL REUSE

One of those rights of the mortgagor which illustrates the involvement of the Eurohypotheek is exemplified in the possibility of reducing it whenever it is over-securing the loan in comparison to the over-collateralization that was agreed at the time the mort-

gage loan was granted (in relation to the loan-to-value, LTV). That is, if the land is valued at 100€, the mortgage on it may be arranged at, let us assume, 100€, while the loan would be 80€, that is, with overcollateralization of 20%. At the very moment the debtor pays the first instalment, the overcollateralization is increased, which means that in practice, the lender is benefiting from an increasing overcollateralization for free, without compensating the borrower who is witness to his land being increasingly and unnecessarily overcharged: if the lender had agreed to grant a loan of 100€ with a coverage of only 100€ in the mortgage, why should he be entitled after each instalment to be increasingly more secured without any compensation for the borrower? These are overcollateralized mortgages (with a value, an asset, that in fact belongs to the mortgagor) from which the lenders are unduly making profits (unjust enrichment) i.e. with the issuance of mortgage securities. On this ground, several jurisdictions like Germany allow the mortgagor to unilaterally reduce the mortgage (of course, with an evidence from the lender of having partially repaid it) in the Land Register (like Germany, at §§ 1144 and 1145 BGB), while others forbid it on the principle that the mortgage is indivisible (i.e. in Spain, art. 122 LH³).

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

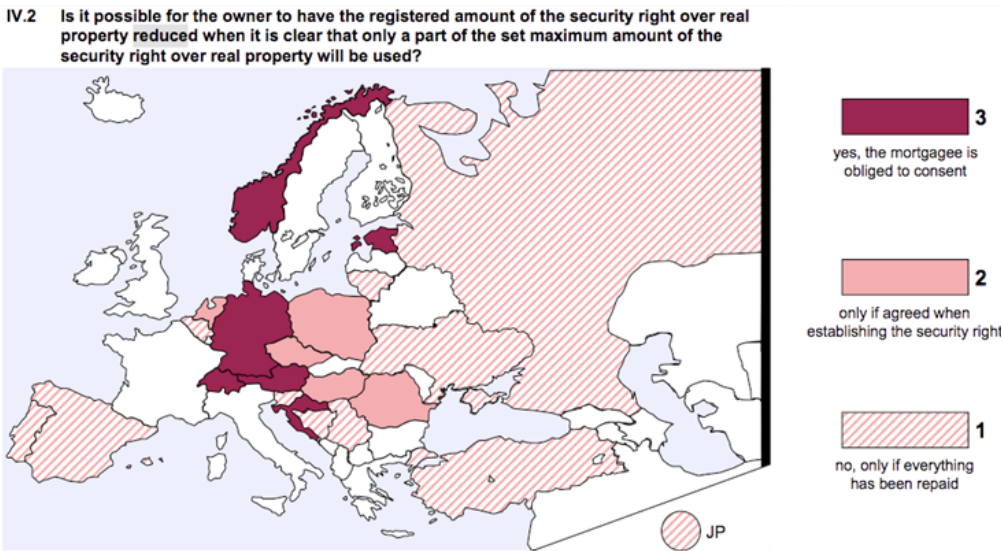


Figure 12. Unilateral reduction of the mortgage by the mortgagor.
Source: “Runder Tisch”, 2009

According to rules of the Basic Guidelines which relate to the Eurohypotheck, the mortgagor will therefore act with the released part of the mortgage according to the clauses in the security agreement: he would either cancel the mortgage partially in the Land Register or simply reuse it with the same or with another lender to secure another loan with him. Figure 13 shows this second possibility.

³ LH: Spanish mortgage Act 1946.

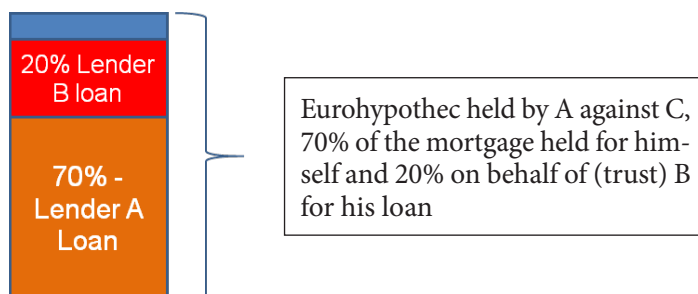


Figure 13. Partial cancellation and partial reuse of the Eurohypothesis.
Source: own elaboration

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

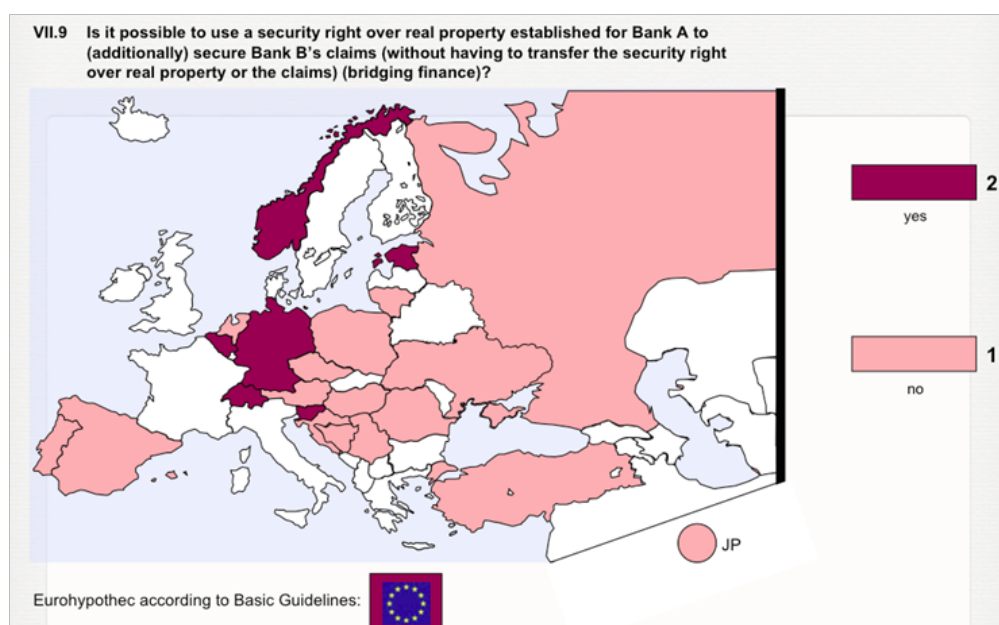


Figure 14. Countries in which a single mortgage can secure obligations that are due to two or more different creditors (bridging finance).
Source: "Runder Tisch", 2009

C) EUROHYPOTHEC'S SECURITIZATION

Another benefit of the Eurohypothesis to lenders is the creation of a truly pan-European mortgage securities' market, that is, the possibility of using Eurohypotheses from all around Europe as assets to be securitized on a European-wide basis. Instead of pooling a wide range of commonly unknown securities on land (ie. in Spain, apart from the so-called *participaciones hipotecarias*, which are unique in Europe and quite insecure from a legal point of view, no mortgages are pooled for securitization purposes; in

France, mortgages are conveyed only through a so-called *bordereau de cession*; in England, equitable mortgages are usually pooled; in Germany, until 2005, no securitization was possible), resulting in uncertainty for investors (and this is necessarily one of the reasons why mortgage securitization is not done nowadays at Europe-wide level), a single and known mortgage instrument/security on land could be pooled: the Eurohypothech. Although at a second stage, Eurohypothechs granted in different countries would have different grades of risk, as mentioned, because of the legal environment in each jurisdiction – which includes factors such as the efficacy of the Land Register, the insolvency and enforcement regulations, etc. –, the instrument would require acknowledgement from investors and they could demand a proper (and compensatory to risk) interest rate revenue, according to the amount of Eurohypothechs present in the pool coming from France, Germany, Spain, Poland, Romania, etc., whereby risks can be calculated (and compensated inside the covering pool) accordingly.

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

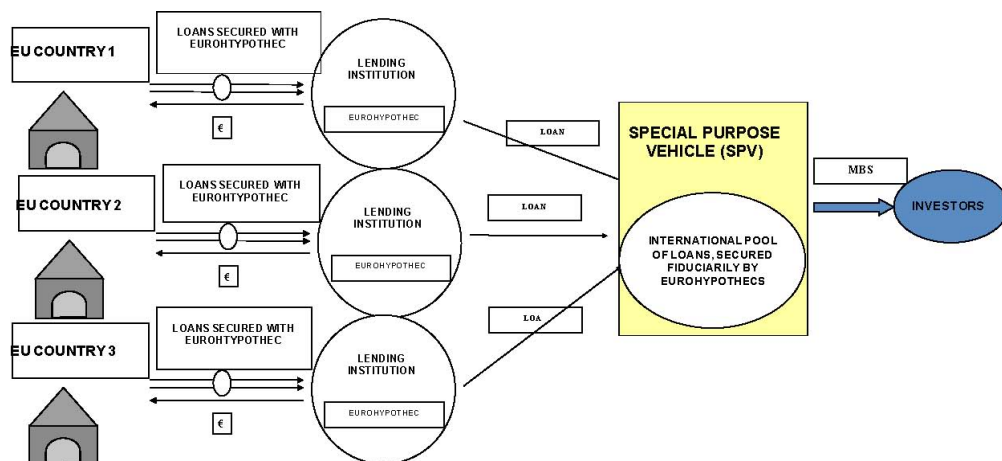


Figure 15. The Eurosecuritisation. Source: own elaboration

The Eurosecuritisation process is technically feasible with the Eurohypothech because the Eurohypothech allows, through the Eurotrust, a secure split of the lender from the mortgagee. A common problem for all securitisation processes in civil-law jurisdictions (in some common law jurisdictions this is normally done by an equitable assignment of mortgages) has been how to convey in a secure and efficient way, thousands of mortgage loans. The mortgages in those countries – this is also true for legal mortgages in common law jurisdictions and this is why an equitable transfer to the SPV is used – are extremely “heavy” to convey, in terms of time and costs. The Eurohypothech

resolves this issue in a legally-friendly way (avoiding the conception of creatures such as the *participaciones hipotecarias* or the *bordereau de cession* (Nasarre-Aznar, 2004)) allowing only the transfer of the secured loans – which can be achieved through a private contract – whilst, at the same time, allowing the originator of the mortgage loans to retain the Eurohypothechs on trust (Eurotrust) for the SPV (the new “lender” or owner of the loans). Thus, all loans owned by the SPV – the issuer of the mortgage-backed securities – are at every moment fiduciarily covered by their respective Eurohypothechs, still held by originators. This is especially relevant in cases where the originators become insolvent. In such cases, Eurohypothechs would consolidate with the loans within the jurisdiction of SPVs, as they would be treated as alien property (property of the SPV).

D) USING OTHER CREDIT INSTITUTION’S EUROHYPOTHECS FOR ISSUING COVERED BONDS

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

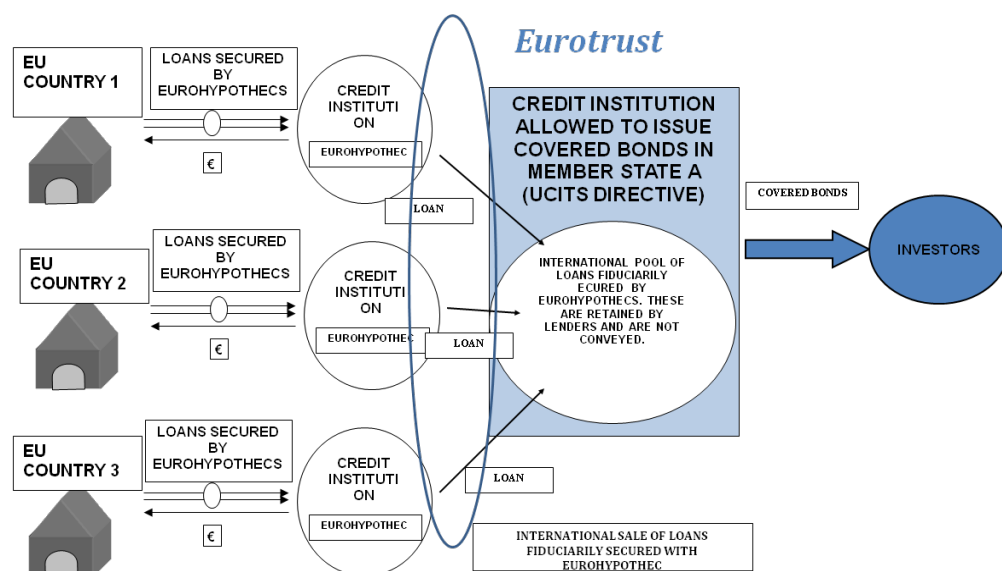


Figure 16. Cross-border issue of covered bonds. Source: own elaboration

E) THE MULTI-PARCEL EUROHYPOTHEC

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

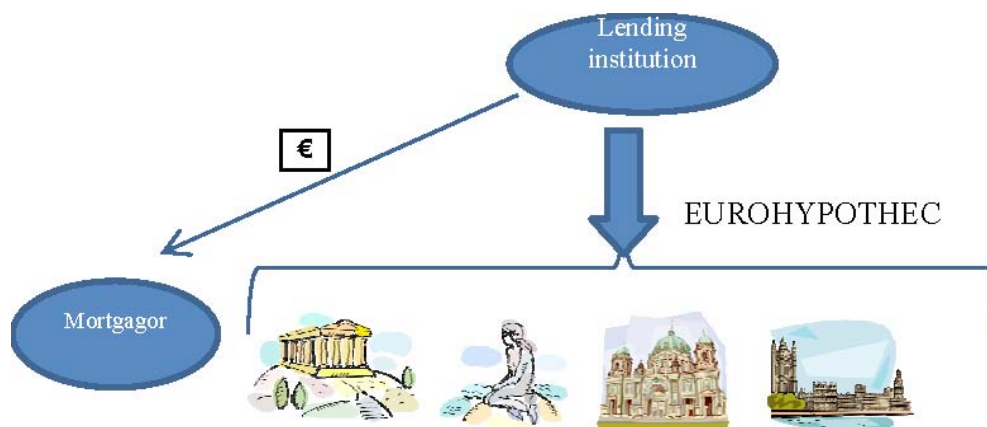


Figure 17. The Multi-parcel Eurohypothech. Source: own elaboration.

II. REAL CASE: SPANISH MORTGAGE REFORMS 2007

1. GENERAL OVERVIEW OF THE SPANISH MORTGAGE REFORM 2007

Through Act 41/2007 7 December⁴, Spain has reformed its legislation on mortgages. It is perhaps, the biggest reform since 1946, dealing with the two faces of the mortgage market: active operations and passive operations.

This reform should be contextualized in the light of a wave of reforms in the European context in relation to the improvement of the mortgage market: France (the already quoted *Ordonnance* 23-3-2006 for mortgages and the *Loi* 2007-211, 19-2-2007⁵ about the trust (*fiducie*)) and Germany (GNBSR 2005⁶). It should be also understood in the line of improvements in national legislations following the publication of the Basic Guidelines 2005.

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

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

⁴ BOE 8-12-2007, num. 294, p. 50593.

⁵ JORF 21-2-2007.

⁶ Gesetz zur Neuorganisation der Bundesfinanzverwaltung und zur Schaffung eines Refinanzierungsregisters 2005 (GNBSR), BGBl 27-9-2005, Part I, pp. 2809–2819.

a) *Greater flexibility for lenders.*

In this sense, Spain offers not only the possibility of creating a mortgage to secure lines of credit (art. 153 LH), but also that of creating a rechargeable mortgage (art. 13.2 Act 41/2007). While these instruments are not yet present in every European jurisdiction (e.g. Bosnia), the Eurohypothech would make this a possibility.

b) *Greater flexibility for borrowers.*

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

ii. In relation to the possibility of partial reuse of the mortgage, Spain does not allow it on the basis of arts. 668.3 LEC⁷ and 236f.4 RH.

c) *Eurosecuritisation and efficient systems of mortgage transfers.*

Because the nature of Spanish *participaciones hipotecarias* has not been altered and clarified, the Spanish Mortgage Market Reform 2007 has not helped to achieve the so-called Eurosecuritisation⁸. In relation to an efficient – and of course, civil law-friendly – system of mortgage transfer, this has even been worsened following the introduction of the Spanish Reform 2007, with the new redaction given to art. 149 LH by art. 11.3 of Act 41/2007.

Until the reform, it was clear to jurisprudence (SSTS 29-6-1989 and 12-3-1985; SAP Granada 6-3-2000⁹ and SAP Segovia 30-4-2002) that none of the requirements established in art. 149 LH (giving notice to debtor, notarial deed and registration in Land Register) were necessary for the operation of a mortgage loan conveyance, disregarding the misleading redaction of that article; therefore, mortgage conveyance in Spain was rather flexible. However with the new text, the legislator introduces yet again the word “*deberá*” (must) which implies that any transfer of mortgages must be carried out through notarial deed and registration. The problematic unnecessarily returns.

d) *Free mortgage loans' syndication.*

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

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

⁷ LEC: Spanish civil procedural Act 2000.

⁸ See the problematic at Annex 3 White Paper 2007, p. 167.

⁹ SAP: Spanish Court of Appeal Resolution.

As can be seen, the White Paper 2007 explicitly supports the Project EULIS (p. 8) and for 2008 a recommendation on land registration is expected (p. 11).

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

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

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

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

| | | | |
|--|--|---|---|
| FREE MORTGAGE LOANS SYNDICATION | Only initial; not possible efficient ongoing syndication | Ongoing syndication only possible in Norway, Germany, Denmark, The Netherlands, Belgium, Switzerland, Estonia, Greece and France. | Possible, without restrictions |
| EURO-LANDREGISTER | Good Land Registry system (on-line consult through www.registradores.org, digital signature); but not in EULIS | <ul style="list-style-type: none"> – Some countries are in EULIS – Others have no computerised Land Registry (eg. Belgium) – Others, e-conveyancing (UK) | Fully compatible with EULIS |
| A PANEUROPEAN MORTGAGE SOLUTION | Most of the solutions that may suit under Spanish law may not suit under other countries' law (ie. Lack of notaries) | Countries tend to find "national" solutions, disregarding international mortgage business | The Eurohypothecc facilitates a true European mortgage market |

2. COMPARISONS BETWEEN THE SPANISH MORTGAGE REFORM 2007 AND THE EUROHYPOTHEC

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

In addition, the Spanish reform does not provide an optimal solution for borrowers under Spanish jurisdiction, as they are permanently tied to a single lender, without an easy and cheap way of changing lenders or including another into the first's mortgage rights to obtain more advantageous loans. In fact, the land of the mortgagor is over-indebted following the first payment of the mortgage instalment as there is no possibility of unilaterally reducing its amount in the Land Register, while the mortgagor has no possibility of reusing the mortgage once he has repaid the full loan. Both the jurisprudence of the Spanish High Court (STS 25-11-2003¹⁰) and the administrative organ that decide the recourses against decisions of Notaries and Land Registrars (the DGRN; see the Resolution DGRN 21-7-1995¹¹) on one hand, and art. 13 of the Mortgages' Reform Act (which replaces art. 2 Act 2/1994) have misinterpreted the function of Act 2/1994 (on the contrary, see a more appropriate interpretation at AAP León 24-2-1998¹²), which tried to give more dynamism to the mortgage market. Since the new Act has come into

¹⁰ STS: Spanish High Court Resolution.

¹¹ DGRN: Spanish administrative Resolution by the Directing Body of Registers and Notars.

¹² AAP: Spanish Court of Appeal Order.

force, the borrower no longer has the right to freely change his lender and can only do so if he offers better conditions for the mortgage loan, with the possibility of the first lender matching these conditions. If this were to be the case, the borrower would have to stay with the first lender, disregarding the reason for changing the lender (ie. better treatment, concession of further loans, etc.). Therefore, at the end of the day, the fate of a borrower as regards the possibility of changing a lender would lie in the first lender's hands instead of the borrowers', which is a clear change of the intention of Act 2/1994 and even of art 1211 CC¹³.

Moreover, the DGRN sometimes still operates in a narrow Spanish perspective, vetoing deeds produced by notaries' from other European countries to be registered in the Spanish Land Register for land conveyance or other land-related operations, through the RDGRN 2-7-2005¹⁴. However, more than a year later, this Resolution has been found to be void and against not only EU principles, but also against the Rome Convention 1980 by SAP Santa Cruz de Tenerife 22-11-2006 (Rivas Andrés, 2005: 293). Perhaps the creation of a common title recordable in every EU Land Register – the Eurotitle (Ploeger, Nasarre-Aznar, Van Loenen, 2005: 34) – would be advisable to avoid such problems in the future. Obviously the Eurotitle would serve as a good complement for the Eurohypothech.

And finally, while several mortgage-related topics have been addressed by Act 41/2007 with greater or less success, it has not addressed crucial needed reforms in relation to mortgage securities (*cédulas hipotecarias* – Spanish covered bonds –, *bonos hipotecarios* and *bonos de titulización hipotecaria* – Spanish mortgage-backed securities, MBS –, essentially). Along with legal structural problems that still persist: legal nature of their guarantee, it constitutes an even worse regulation for covered debts (*bonos hipotecarios*). Moreover, inaccuracies in regulating the covering Register (in German *Pfandbriefgesetz* this is referred to as the *Deckungsregister*), lack of the fiduciary (the *Treuhänder* in Germany), uncertainties in their behaviour in insolvency proceedings, etc. still exist. On contrast, as seen previously, the Eurohypothech would allow for the so-called Eurosecuritisation while the Eurotrust would facilitate the massive transfer of mortgage loans on a trans-national level, bringing to the European mortgage market more efficiency and dynamism.

CONCLUSIONS

1. To create a true **Pan-European mortgage market**, a Eurohypothech is needed – probably the model of the Basic Guidelines 2005 can help– which should be as secure, useful and flexible as possible, both for mortgage lenders and borrowers. The **Eurotrust** is a needed complement to the Eurohypothech in order to facilitate all types of fiduciary mortgage operations: securitisation, ongoing syndications, mortgage unilateral reduction by the mortgagor, unilateral change of lender by the mortgagor, etc.

2. An **integrated European mortgage market** would allow **every EU country** to engage in all kind of mortgage operations in an efficient way, which is not a reality nowadays (most of them do not even have the opportunity to structure them), thus negatively affecting the full achievement of the European freedoms.

¹³ CC: Spanish Civil Code 1889.

¹⁴ A similar situation took place several years ago during the registration of a Swiss Notary title in Germany. This incident was also heavily criticized by the pro-European doctrine (Heinz, 2001: 928).

3. Some **national regulations** for mortgages have been reformed to make them more flexible, following the development of the concept of the Eurohypothech in the Basic Guidelines 2005 but without Paneuropean awareness and without achieving its level of efficacy and efficiency. The White Paper 2007 could possibly help to push forward a true integration of the European mortgage market. But whereas it does not explicitly support the idea of the **Eurohypothech**, it does not propose any other effective instrument or effective way to achieve that goal but only a partial and segmented pathway in p. 14 to which it refers as “main tasks or activities”. In fact, no development is shown at EU official level towards mortgage integration of Europe since then¹⁵.

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

5. Other partners for the Eurohypothech would be **EULIS**, the **Eurotitle** and the possibility of establishing a true mortgage **Eurosecuritisation**.

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¹⁵ Check the (non-)progress at http://ec.europa.eu/internal_market/finservices-retail/home-loans/integration_en.htm (last visited on 20th September 2010).

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