

# Looking for a model for a Eurohypothech

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## 1. Introduction

The idea of a common mortgage for Europe (Eurohypothech) officially began in the 1960s with the Report for the European Commission by Prof. Claudio Segré. After that piece of work, several institutions, like the International Union of Latin Notaries and several authors (like Wehrens<sup>1</sup> and Stöcker<sup>2</sup>) continued the research work on the Eurohypothech. Currently, the wave of “europeization” of the civil law in all patrimonial areas has lead to several research groups to focus their attention fully or partially<sup>3</sup> to the Eurohypothech institution.

Among them, the Eurohypothech Research Group ([www.eurohypothech.com](http://www.eurohypothech.com))<sup>4</sup> is a special-purpose group for the Eurohypothech. It has held several meetings<sup>5</sup> following a specific working methodology and has come to several conclusions, which have resulted in several speeches and publications world-wide<sup>6</sup>. Some of these conclusions are commented in this article.

## 2. Work methodology

One of the risks in dealing with the Eurohypothech is to fall into futurism or excessive theoretical matters, as it is not a reality yet and generates contradictory feelings among European countries and law institutions<sup>7</sup>.

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<sup>1</sup> WEHRENS, Hans G., *Überlegungen zu einer Eurohypothech*, “Wertpapier Mitteilungen”, num. 14, April 1992; WEHRENS, Hans G., *Der schweizer Schuldbrief und die deutsche Briefgrundschuld. Ein Rechtsvergleich als Basis für eine zukünftige Eurohypothech*, “Österreichische Notariats-Zeitung”, num. 7, 1988; WEHRENS, Hans G., *Real security regarding immovable objects. Reflexions on a Euro-Mortgage*, “Towards a European Civil Code”, 1st Edition, 1994, Hartkamp A.S. et al., Ars Aequi Libri.

<sup>2</sup> STÖCKER, Otmar, *Die Eurohypothech*, Berlin, 1992, Ed. Duncker & Humblot; STÖCKER, Otmar and WOLFSTEINER, Hans, *Diskussionspapier: Nicht akzessorisches Grundpfand für Mitteleuropa*, “Zeitschrift für Bankrecht und Bankwirtschaft” (ZBB), núm. 4, 1998.

<sup>3</sup> Take as an example the University of Trento research group “The common core of European private law” ([www.jus.unitn.it/dsg/common-core/](http://www.jus.unitn.it/dsg/common-core/)) or the European University Institute of Florence itself ([www.iue.it](http://www.iue.it)).

<sup>4</sup> These are the current member of the group: Shaun Bond, Pedro del Pozo, Martin Dixon, Gerwyn Griffiths, Ulf Jensen, Esther Muñiz, Sergio Nasarre, Elena Sánchez, Otmar Stöcker and Agnieszka Tulodziecka.

<sup>5</sup> First Plenary Meeting at University of Valladolid (June 2004; Tarragona, 1<sup>st</sup> Quarter 2005), and several multilateral meetings (Berlin, September and November 2004; Copenhagen, October 2004; Berlin, April 2005).

<sup>6</sup> GRUPO DE INVESTIGACIÓN EUROHIPOTECA, *Proyecto de investigación Europeo Eurohipoteca. Puntos para la discusión*, “Anuario de Derecho Civil”, Madrid, 2005; NASARRE AZNAR, Sergio, *The Eurohypothech: a common mortgage for Europe*, “The Conveyancer”, United Kingdom, 2005 (in press); MUÑIZ ESPADA, Esther, *Bases para una propuesta de Eurohipoteca*, Valencia, 2005, Tirant lo Blanch. STÖCKER, Otmar, *Die Eurohypothech – Akzessorietätsfrage als Dogma ?*, in process.

<sup>7</sup> The most “pro-Europeization” ones, like Germany (bank industry and notaries, for example), see the idea as something useful and necessary. Some other, like Spain (banks, essentially), considers that it is not needed and that their internal market works well enough (feelings are different throughout Notaries and Land Registrars).

That is why methodology should be scheduled cautiously and systematically. Following this idea, the steps of study are the following:

1. Do we really need a common mortgage in Europe (Eurohypothech)?
2. Which are the basic pillars of the Eurohypothech, according to the needs it should cover and that are not currently covered? Any models?
3. Which is its preliminary legal configuration and what are its implications?
4. Which are further steps that should be covered in a second moment after the basic guidelines of this institution?

It has been revealed essential that prior to writing a model for the institution, it should be explained to all interested parties (credit institutions, notaries, land registrars, consumers, public institutions, notaries, real-estate conveyancers, etc.) why the institution is useful, which type of businesses are not possible today or difficult/expensive to be done with the current system, what would it imply to the mortgage borrower and to the mortgage lender and which are the economical and financial implications of a European common mortgage.

The explained methodological system will be applied also to this article, which can be understood as a framework for further development of the figure.

### **3. Is a Eurohypothech needed? Uses and advantages**

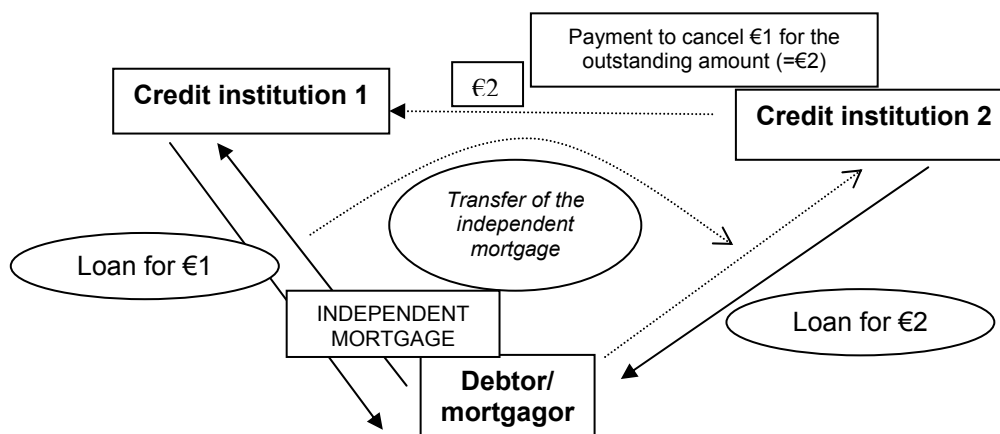
The Eurohypothech project's main goal is to achieve a common instrument to secure trans-national and pan European long-term loans, which is a **common mortgage for Europe**. This would help the creation of a **European mortgage market**, which would be beneficial for both consumers and lending institutions. In particular, a European mortgage market would lead to a **European housing market** (the mortgage being the most widely used instrument to fund housing, but not only for dwelling purposes but also for land development in general for hospitals, shopping centres, schools, office buildings, etc., which would mean and favour proper **land development everywhere** in Europe.

The main implications would be: easier access to a dwelling, better land development, more concurrence among lending institutions, better mortgage funding, allowance of more and more diversified types of trans-national businesses and, generally speaking, a wider and more open housing and mortgage markets in Europe.

The starting point is the fact that currently transnational mortgage lending is practically inexistent (it represents only 1% of the whole mortgage business), one of the reasons being the legal difficulties that foreign lenders experience when trying to compete with local lenders within European countries. It means that there is no real concurrence among European lending institutions, thus not accomplishing two essential objectives of the European Union: free movement of capital – because lenders behave on a national-based market - and free movement of workers – because borrowers need to refer to local lending institutions to finance their homes instead of continuing using their own. These two principles are also present in the European Constitution (S. I-4.1) together with some financial help to acquire a dwelling (S. II-34.3).

From a legal point of view, there are reasons for this, the basic one being that there are now, at least, 25 different types of legal frameworks for mortgages and hypothecs in Europe. This means that each hypothec/mortgage needs to be known and studied in detail by professional lenders (banks and other credit institutions) to assess accurately the lending risk 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 will never compete under the same conditions as local lenders because the instrument that they have to use (the mortgage) is not the same as they use in their local market, so they are not accustomed to using it properly.

Of course this has a negative influence on creating competence among credit institutions in the EU, which prejudices the chance of borrowers benefiting from more competence among 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 a better chance of refinancing their mortgages with their current banks or finding others which offer mortgage loans under better conditions (see Figure 1).



**Figure 1.** Borrower's mortgage refinancing

But this is not only a matter of borrowers' rights. Lending institutions, according to the opportunity cost, are losing business opportunities because there are several local and transnational businesses that nowadays are not possible without a Eurohypothec. The following would be desirable:

- A) 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) must be granted in each country to secure different loans.
- B) To finance pools of properties European-wide, with the possibility to exchange properties under the mortgage, regardless of in which country they are.
- C) To change the borrower, regardless of in which country he is.
- D) To exchange lenders from any European country. This should involve the full development of the process of mortgage securitisation at a European level. 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 properly regulated independent Eurohypothech, different credit institutions would 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 structure (though with legal differences due to the particularities of the common law trust) to the English standard securitisation model. The structure of a mortgage securitisation process with an independent Eurohypothech could be as shown in Figure 2<sup>8</sup>.

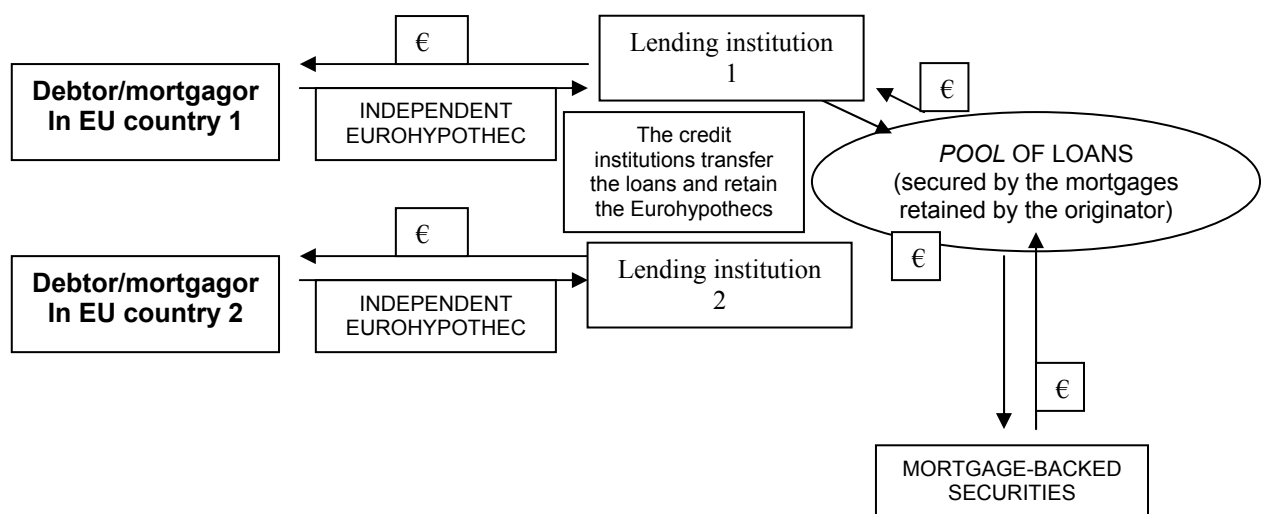


Figure 2. Mortgage securitisation with an independent mortgage

In conclusion, we may say that both borrowers (mortgagors, consumers) and lenders (mortgagee) currently experience a worse situation than would be possible with the Eurohypothech. On the one hand, **borrowers** should be able to:

- a) **Refinance** their mortgages with other banks anywhere in Europe. The process of electronic conveyancing that is being developed in most countries (i.e. the English Land Registration Act 2002) would allow contracting on-line (i.e. through the internet or through an intranet) of any type of mortgage product offered by any lending institution in Europe which is based on the Eurohypothech standards (established by the Directive that is pursued by the research network). This will be possible thanks to the different initiatives in Europe in merging Land Register and cadastre information, so anyone in Europe would be able to check the legal and the physical conditions of a piece of land which is sited anywhere in Europe. In addition, they would be able to contract the

<sup>8</sup> For more implications of a flexible mortgage for the mortgage refinancing market (covered bonds and securitisation, essentially), see NASARRE-AZNAR, Sergio, *Securitisation & mortgage bonds: legal aspects and harmonisation in Europe*, Saffron Walden, 2004, Gostick Hall Publications.

Eurohypothech with any lending institution on a European-wide basis (i.e. a Frenchman would be able to contract a Eurohypothech with an Italian bank to buy a plot in Sweden). This would be possible thanks to the same conditions of the Eurohypothech everywhere, which means the same costs and efficacy (especially in stress situations like insolvency of the mortgagor or in case of enforcement of the security). Every lending institution in Europe would be ready to lend based on the same product (Eurohypothech) and the final interest rate would vary depending on the conditions of the economy and market in one or in another part of Europe.

- b) Borrowers would benefit from better conditions and interest rates. The increase of concurrence among lending institutions would compel them to make their mortgage loans more attractive for every European borrower. Moreover, as the Eurohypothech would be more flexible to deal with than the current European dependent mortgages, it would be able to be managed in order to fund future lending operations (i.e. conveyance of thousands of mortgages to other banks, securitisation processes, etc.). This would allow lending institution not to focus only on the lending business, as their main profits could be collected from investors. In conclusion, lending institutions would not face the necessity to increase interest rates on their mortgage loans to earn money, because they would earn more money in funding operations. It would be more efficient, therefore, to grant as many mortgage loans as possible (making them cheaper) and therefore make more funding operations, which would be more profitable. Therefore, with the Eurohypothech the **profits of banks would come from institutional investors (those who have money) instead of from borrowers (those who need money)**.

On the other hand, **lenders** would benefit from:

- a) A **more flexible** mortgage, but just as secure. That means that operations that are not possible nowadays, would be possible (see supra).
- b) The creation of a true European mortgage market that would allow them to **expand their businesses** all over Europe, increasing their potential number of clients. The increasingly important e-conveyancing contractual system would assure that second-rank banks would be able to compete with high street ones.
- c) The operating of everybody in the same mortgage market would allow the carrying out of operations of **land development** in every area of Europe, especially in those still **underdeveloped or depressed** (the business opportunities there are higher).

Finally, it must be added that other alternatives to the Eurohypothech that follow the traditional private international law rules cannot bring the same results that are expected from the Eurohypothech (a common mortgage market in Europe that allows development in every region); thus they are not useful for our purpose. These are the *lex rei sitae* rule (which means that mortgage and loan are regulated by different national laws, making the whole business chaotic) and the mutual recognition (which would mean that in every European country 25 different types of mortgages would be applicable; it worked with the

banking supervision Directive 89/646, but this is not the case for the transnational mortgage business).

#### 4. Basic configuration of the Eurohypothech. Models

Figure 3 shows the three pillars on which should the Eurohypothech be built: security, flexibility and paneuropean.

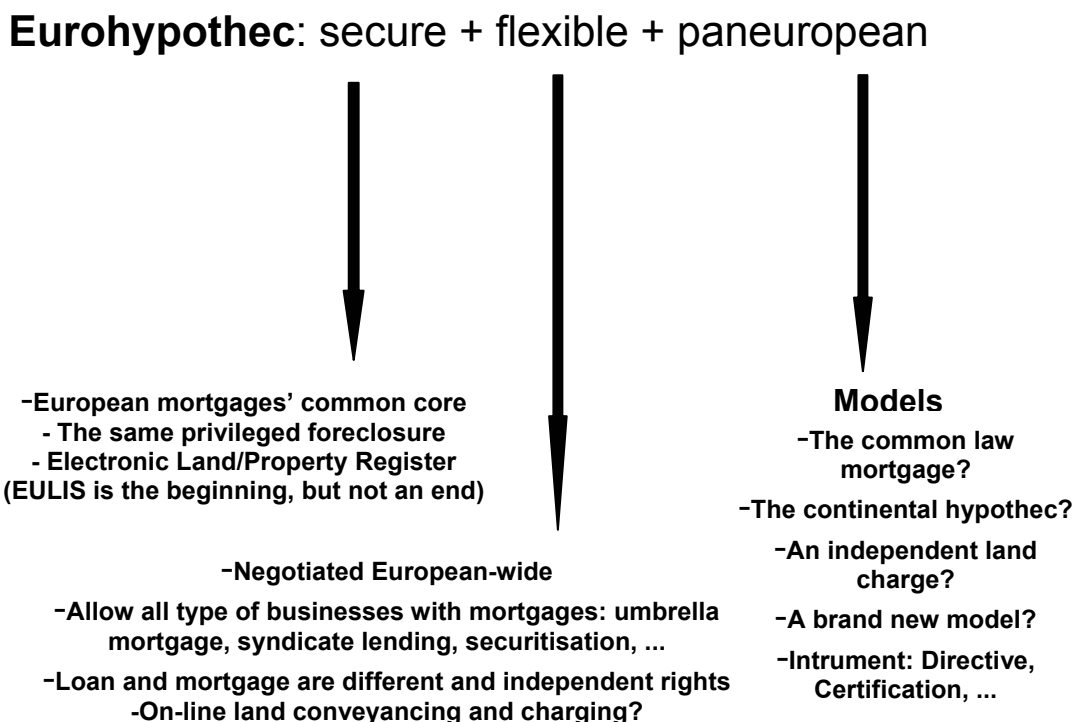


Figure 3. Pillars of the Eurohypothech

**a) Security.** The common core of all charges on land in Europe that may be used to secure obligations is that they are able to fix a piece of land to secure with some kind of preference a claim that may be raised by a proper creditor. Apart from this starting point (using the land to secure debts with some kind of privileged right) no more coincidences may be found among every securing charge on land in Europe. The Eurohypothech should include this starting point in its foundations, but everything that is aggregated to it would sound strange to one or more legal jurisdictions (i.e. the independency from the securing loan sounds strange to almost every Latin country; the fact that the Eurohypothech would be able to secure all type of obligations (including the non-monetary ones) would shock many common law lawyers, etc.). But it would be nonsense not to continue with this integration because of this; the Eurohypothech should be as less intrusive as possible to national jurisdictions but above everything it should be as much useful as possible both for lender and borrower (this is the main axis). To be effective, the Eurohypothech should have the same privileged rank in foreclosure everywhere in Europe. But this cannot be easily achieved in the first step; we need to wait until a second one, once a model has been agreed. However this is the optimal situation; if it is not legally possible, at least it should have the same rank as the national mortgages (with which it would

coexist)<sup>9</sup>. Finally, an excellent partner for the Eurohypothec would be a common European Land Register. A first step is the *European Land Information Service* (EULIS) Project ([www.eulis.org](http://www.eulis.org)), which currently<sup>10</sup> includes two aspects: an on-line portal to access to the already computerised national Land Registers and the “legal part” that involves definitions of legal institutions (in English) that are needed to understand the legal situation of a plot of land (property, land charges, etc.) and their translation from each national language to the others<sup>11</sup>. As it is currently conceived, EULIS would be a useful tool to increase transnational land conveyancing and charging, which should evolve to a true European e-conveyancing relating to land in future (in a similar way to the English Land Registration Act 2002 foresees).

**b) Flexibility.** In order to be able to use the Eurohypothec for every business already explained under part 3 of this article, it should be “liberated” by any tie that prevents it to be as much flexible as possible. The Eurohypothec, as a right, should be regarded as an entity by itself, disregarding for what it is being used in a particular point in time. Only in this case could the Eurohypothec be assigned separately from the secured loan for refinancing purposes or would the borrower be able to reuse it as many times as he wants with the same or with a different lender. This should be understood as a general rule, which can be surpassed in some cases for consumer protection purposes (i.e. in case the lender assigns separately the Eurohypothec and the secured loan to two different third parties and both want to foreclosure their rights against the borrower; in this case the latter should be entitled to oppose the necessary exceptions not to pay twice; this should be possible on the basis on the principle of the undue enrichment and the misbehaviour of the lending institution).

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<sup>9</sup> This is a minimum. Otherwise, the Eurohypothec would be useless and would not be used in favour of national mortgages because its lack of security for creditors. If, finally, there is no agreement on its rank (in relation to both explicit and implicit -i.e. Governmental, taxes, ...- charges on land), the Eurohypothec used in a particular country, because of its own configuration would be less efficient as the other Eurohypothecs, so it would be more expensive to be used.

<sup>10</sup> There is an intention to continue it, incorporating new countries. The current ones are Sweden, Finland, England and Wales, Scotland, Austria, Holland, Lithuania and Norway. Something about it may be found at PLOEGER, Hendrik and VAN LOENEN, Bastiaan, *EULIS – At the Beginning of the Road to Harmonization of Land Registry in Europe*, “European review of Private Law”, 3-2004, pp. 379-387. See also in Spanish NASARRE AZNAR, Sergio, *La reforma del derecho registral inglés. Un modelo de Registro flexible para una Eurohipoteca*, “Revista Crítica de Derecho Inmobiliario”, May-June 2004, num. 683.

<sup>11</sup> This part should be improved, as it should reflect not only the similar economic role of each national legal institution in each jurisdiction but also the differences that exist among them (i.e. the Austrian *Hypothek* is translated into “EULIS English” by the word “mortgage”; but the English (extended to common law) mortgage itself has few to do with the *Hypothek*, legally speaking (although economically they are more similar), so a better word would be “hypothec”, that also exists in the English language and reflects better the legal nature of the *Hypothek* (and of the French *hypothèque* or the Spanish *hipoteca*); they have done this with, for example the Roman “usufructus”, translating it as “usufruct” and not with the English law word “profits a prendre”. It should be put clear that it is not a translation from any language to English law institutions, but to the English language. However, this list of “EULIS English terminology” is another good source from which extracting similarities and coincidences among national institutions.

**c) Paneuropean.** This means that the Eurohypothec should be a common instrument, available throughout Europe, disregarding the existence of other national types of mortgages<sup>12</sup>. According to what we have already said about the uses, the flexibility and the security, it would be useful to find a proper model for the Eurohypothec. These are, broadly speaking, the basic hypothecs' models currently in force in Europe:

- a) The Continental accessory mortgage. This is the most widespread model in Europe, which has led to some authors (i.e. Wachter<sup>13</sup>) to suggest it as a model for the Eurohypothec. 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 loan. This means that everything that happens to the contractual relationship between lender and borrower would affect also the hypothec (i.e. no hypothec may exist without a loan to secure, once the loan is extinguished so is the hypothec, the assignment must be together, etc.).
- b) The continental European independent mortgage. Its origins are in Germany (*Sicherungsgrundschuld*) and in Switzerland (*Schuldbrief*), but it is widespread through the East-European countries such as Estonia (*Hüpoteek*), Poland (*Dług na nieruchomości*, still a project), Slovenia (*Zemljiški dolg*) and Hungary (*önálló zálogjog*).
- c) The Scandinavian independent mortgage<sup>14</sup>.
- d) The common law "mortgage", present in the UK and in Ireland in the EU. 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 years 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.

A good example of the evolution of the traditional accessory hypothec into new and more flexible types of security rights in rem can be the recent French Report for the *Inspection générale des Finances* and the *Inspection générale des Services Judiciaires*<sup>15</sup>. This report reveals the inefficiency of the French *hypothèque* in five main fields: 1) in France, mortgage lending is done in relation to the person and not to the security (the mortgage itself); 2) the *hypothèque* is no longer the main housing finance instrument in France

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<sup>12</sup> In any case would the Eurohypothec substitute other types of national mortgages in every country.

<sup>13</sup> WACHTER, Thomas, *La garantie de crédit transfrontalier sur les immeubles au sein de l'Union européenne. L'Eurohypothèque*, "Notarius International", Vol. 4, 1999.

<sup>14</sup> See everything about this type of land charge at JENSEN, Ulf, *Panträtt i fast egendom*, 6<sup>th</sup> Edition, 2001, Iustus. As a general idea, one can agree that the Swede mortgage is an independent (from the loan) one and quite simple (the whole system of registration and dealing) compared to the majority of European models.

<sup>15</sup> JACHIET, Nicolas et al., *Rapport d'enquete sur l'hypothèque et le crédit hypothécaire*, Inspection générale des Finances (N° 2004-M-052-02) and Inspection générale des Services Judiciaires (N° 32/04), 24-11-2004 (<http://www.finances.gouv.fr/minEFI/actualites/actu2/index.htm>).

(substituted by figures like the *caution*<sup>16</sup> and the *privilège de prêteur de deniers* (art. 2103 *Code Civil*)<sup>17</sup>); 3) the need, according to the report, of developing the *crédit hypothécaire mobilier* through a brand new security right in rem called “hypothèque rechargeable”<sup>18</sup>, which would be accessory<sup>19</sup> to the initially secured loan (and is causally dependent on it) but could be used to secure future loans and credits during a certain time and for a maximum amount; it’d be more easily and cheaply transferable<sup>20</sup>; 4) the lack of reliability of the existing security rights in rem in France (i.e. the sole inscription of the security right does not proof the existence and the validity of the loan); 5) French mortgages are too costly in their constitution and the procedure of their enforcement is too slow.

## 5. Basic features of the Eurohypothech

At the current situation<sup>21</sup>, the Eurohypothech would have the following features:

a) **Right in rem** to secure one or more obligations/loans. This is a necessary categorization to put clear that the Eurohypothech “goes with the charged land”, disregarding who is the land’s owner at each point in time. This contrasts with the efficacy of the rights in personam, which efficacy is only between the parties.

b) It does **not substitute** national mortgages. The Eurohypothech is an extra tool for lenders and borrowers in each European country. They would be able to choose among the range of types of national mortgages and the Eurohypothech for their businesses. This helps the Eurohypothech not to be very intrusive.

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<sup>16</sup> This is a kind of personal security arranged by contract, by which the developer of land (borrower and debtor) pays an amount to a particular or to a caution institution, which is proportional to the value of the loan, which is invested in a mutual fund plus a fee. It is used to socialize (widespread) the risk of default of the loan because it is the mutual caution institution (or particular) who pays in case the borrower defaults (it is an assumption of debt, which is a consequence of this protection fee that pays the borrower). More than 50% of the amount of the loans for land conveyancing given in 2003 were secured through caution.

<sup>17</sup> This is a type of privilege of repayment in favour of the lender, legally foreseen in art. 2103.2 *Code Civil* 1804. It is a notarial charge on land, that affects it to a preferred repayment, which has some advantages when compared to the *hypothèque*, essentially two of them: there is no need to pay the tax of land publicity (*taxe de publicité foncière*) and its privileged effects start from the date of the sale of the land if it is recorded within the first two months.

<sup>18</sup> It would work as follows: 1) First, there must be a loan contract (either for chattels or for land) to which could be added future loan contracts between the same parties while the first contracted loan is not fully repaid. 2) This contract should be done by a notary and together with the compromise of the borrower to create a *hypothèque*, which would be able to be used to secure every of these loans. 3) The *hypothèque* should be recorded with a special name (i.e. *hypothèque bancaire* or *hypothèque de crédit*).

<sup>19</sup> According to the report this would be the most feasible solution. Making this type of hypothech independent from the secured loan (which is the model thought for the Eurohypothech since 1960s) would deal to a global reform of the French (but also Spanish or Italian, for example) mortgage law.

<sup>20</sup> It is like other figures that already exist in Europe, like the German *Höchstbetragshypothek* (§ 1190 BGB) and the Spanish *hipoteca de máximo* (art. 153 Spanish mortgage law 1946). These figures are not only functionally more limited than the proposed model of Eurohypothech (an independent land charge from the secured loan) but also these are also partial solutions for a pan-European institution (each of these security rights in rem that allow securing several loans with a single security right in rem are different to each other and have their own particularities, so cannot be a model one to each other).

<sup>21</sup> December 2004. Further studies are being done to improve or alter the model.

c) **No need of obligation/loan** to exist. This is a crucial aspect that must be deeply discussed. This means that the Eurohypothec is independent from the loan or credit it secures at a certain point in time. This leads to affirm that the owner of the land by himself may be able to create the Eurohypothec, that the Eurohypothec must not necessarily be used for securing purposes<sup>22</sup>, that it is not affected by anything that happens to the loan (i.e. if it ceases to exist, the Eurohypothec simply returns to its creator from the hands of the lender) and that special rules for consumers' protection should be foreseen (i.e. see Figure 4, under "transfer").

d) It may include **as many obligations/loans** as mortgagor and mortgagee want to. Both parties may agree to arrange new loans that may be covered (secured) by the same already-created Eurohypothec.

e) **Security agreement.** It establishes the rules that govern the relationship between the Eurohypothec and the loan it is securing at a certain moment (i.e. what happens if the loan is fully or partially repaid, the power of the land owner to reduce the amount charged with the Eurohypothec if he has partially satisfied the lender or to recover the Eurohypothec if the latter is fully satisfied, the grade of freedom that may be achieved by the lender in dealing with the Eurohypothec, etc.).

f) May be used both for **trans-national** and for **domestic** mortgage relationships. As it must be a very useful and flexible multi-purpose instrument, one cannot find reasons to constrain the businesses that may be secured by the Eurohypothec.

g) It does **not generate interests**. Interests, if this is the case, are only generated by the loan secured by the Eurohypothec but not by the Eurohypothec itself. This could lead to problems of risk prediction for long-term loans (i.e. 30 years housing mortgage loan), because it is difficult to cover with a principal fixed amount (the one reflected in the Land Register when the Eurohypothec was created) the ups and downs of these types of loans.

h) It should **cost** the same as another national mortgage, in relation to taxes and fees. Because it is another instrument for land developing finance, neither the tax situation or the fees generated by its creation, transfer, etc. should be higher than the ones for other types of mortgages.

i) May be **denominated by any currency** within the EU.

Figure 4 shows the rules that might be applied to its creation, transfer, extinguishment and enforcement:

<b>Creation</b>	<ul style="list-style-type: none"> <li>* Only by the owner of the land for himself or for the mortgagee</li> <li>* Can be created either as a: <ul style="list-style-type: none"> <li>- Register mortgage</li> <li>- attached to a letter</li> <li>- electronically</li> </ul> </li> <li>* The details in the creation are left to national legislations</li> <li>* The Eurohypothec should be recorded in a Land Register</li> <li>* May be created over a pool of pieces of land and covers the substance of the property and fruits and other chattles</li> </ul>
<b>Transfer</b>	<ul style="list-style-type: none"> <li>* This is the cornerstone of flexibility</li> <li>* The assignment of the loan does not necessarily mean the conveyance of</li> </ul>

<sup>22</sup> This means that the Eurohypothec may or may not be used to secure a loan or credit. It means that the Eurohypothec is an asset by itself that may be traded separately from other assets in the market.

	<p>the Eurohypothech</p> <ul style="list-style-type: none"> <li>* The transfer of the Eurohypothech depends on the form it was created (i.e. by an entry in the Land Register if it is a Register mortgage; by delivery of the letter if there is a letter; or by an electronic form if its is an electronic Eurohypothech)</li> <li>* Pleas and objections under the original security agreement may prevail in case of an alone-assignment of the mortgage to another mortgagee (this is a consumer's protection measure)</li> <li>*It should be able to be held under a trust (i.e. for syndicated mortgage loans)</li> </ul>
<b>Extinguishment</b>	<ul style="list-style-type: none"> <li>* The holder of the Eurohypothech and the land owner's (if they are different) consents are necessary</li> <li>* The mortgagor may recover the Eurohypothech once the secured obligation is repaid.</li> <li>* The mortgagor can reuse the Eurohypothech</li> </ul>
<b>Enforcement</b>	<ul style="list-style-type: none"> <li>* It is enforceable by execution</li> <li>* It should lead to a public-auction sale</li> <li>* Judicial and other public-controlled enforcement processes are possible</li> <li>* In case of insolvency of the mortgagor, the Eurohypothech should secure a full satisfaction of the mortgagee</li> </ul>

**Figure 4.** Guidelines for the creation, transfer, extinguishment and enforcement of the Eurohypothech

## 6. Further steps

There are still many doubts among researchers and practitioners about the Eurohypothech and the model that it should follow.

Here there is a short list of problems that should be solved:

- Lack of economic studies on the need of a common mortgage in Europe
- The independent hypothech is unknown in most European countries: fears
- There is a risk with the independence of the Eurohypothech
- Causa and accessoriness topic
- Role of the trust in civil-law jurisdictions
- Many areas of national law are affected (land law, land registration law, consumers law, procedural law, etc.)
- Limited to trans-national transactions or to professionals (credit institutions) or wide-open it to domestic and non-professional transactions (fear of misuse of the Eurohypothech by the strong party: the lending institution)
- EU's competence? Some EU principles are affected (i.e. freedom of workers and freedom of capital), which are also in the EU Constitution project.

Some of these topics were firstly discussed in the mixed meeting Eurohypothech research group and Forum Group of the EU in Berlin (November 2004)<sup>23</sup>. Moreover, the following mixed working groups were created, whose conclusions would be presented and discussed in April 2005:

1. Objectives of the Eurohypothech.

<sup>23</sup> As an example, Dr. Otmar Stöcker discussed the causa and accessoriness problem; Mr. Andreas Luckow showed several businesses that should be able to be done with this common instrument and which currently are impossible or too expensive or difficult; Prof. Ulf Jensen presented a paper on computerization and the Eurohypothech; Dr. Shaun Bond dealt with the economic advantages of a common mortgage in Europe, among others.

2. Creation, transfer and extinguishment
3. Enforcement and insolvency
4. Security Agreement
5. Implementation and *lex rei sitae*
6. Economic profit and arguments for a Eurohypothec
7. Charts on businesses structures
8. Accessoriness
9. Case study in Poland
10. Special features on registration, including EULIS
11. Fees and taxes
12. Options of EU-Law to implement the Eurohypothec

These are preliminary studies on the model of this common mortgage. Everything is open, including the duration of the right (indefinite or for a concrete period of time), its relationship with the secured loan (independence vs. risks for mortgagor), trust dealing, how and what for should it be created, etc. It is still too early to discuss several other important matters that should wait to a second stage, essentially, those relating to the effects of the implementation of the Eurohypothec into each national legislation: changes in procedural, land, contractual and land registration law, enforcement rules and their efficiency, behaviour in case of insolvency in each country, degree and quality of implementation, etc.

First an agreement on the model should be achieved.

## 7. Conclusions

1. A true European harmonization on mortgage matters is a crucial area for national economics which cannot be done with current mechanisms. We need a new common instrument: the Eurohypothec.

2. The Eurohypothec is needed for operations and businesses that currently can hardly be done or are not possible to be done either by the mortgagee or by the mortgagor throughout Europe.

3. The definitive model of the Eurohypothec should join three main features: it must be secure, flexible and pan-European, to which go trends in Europe (i.e. new change proposal to French law). There is not an already existing perfect model for the Eurohypothec, so the works should seek for the most useful model, which, at the same time, should be as less intrusive as possible to national legislations.

4. There are already some works on the fields of creation, transfer, extinguishment and enforcement of the Eurohypothec although further studies should be carried out.

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