

Cross-border mortgages: the current situation

Current Status

Recently two reports¹ on the cross-border mortgage topic were issued and published as well as the comments² on these reports. As EuroGeographics we also delivered our comment³ on the report of the Mortgage Funding Expert Group (MFEG). In our comments we emphasized the importance of accessibility and reliability of land registers. We also agreed with the recommendations on property indices and the valuation of property.

From a recent speech by the European Commissioner for Internal Markets and Services, Charlie McCreevy⁴, can be derived that there is a report from the European Parliament (not published yet). Reports and comments will be used in defining the White Paper on the topic. Publishing of the White Paper is expected at the end of June 2007. Most likely the White Paper will contain several concrete measures⁵ for creating an accessible, transparent and secure mortgage-market in Europe. The paper will be the basis for an EU-action programme.

Developments

The most important question is what the White Paper will bring? At this stage all relevant information has been gathered to prepare the document. The paper itself will provide the guidelines and determines what our future actions as a representative body of the Member States will be. While we cannot be sure of what is exactly in the Paper we can make some predictions on the trends that are taken into account:

- First of all there are the (recent) speeches of Commissioner McCreevy⁶. In several of his recent speeches McCreevy emphasizes that regulations, however important, for creating confidence and trust in the market, should be slim, flexible, modern, open, good and make economic sense. Also he embraces the principles that there should be liquid markets, that equality should be obtained and that existing barriers should be eliminated. Competition should be intensified and a move beyond borders but also beyond traditional focus is in fact needed.
- Recommendations by the MFEG can be placed in the same category as well as the support provided in many comments. Words like 'competitive', 'efficient', 'transparency', 'stable/secure', 'transferability', 'equal access' can be found regularly.
- Comment by European Mortgage Foundation⁷. This influential organisation:
 - fully supports recommendations made by MFEG on land registry
 - is also very clear in its statements that obstacles such as variation in registration requirements should be addressed and that mortgages can be transferred from lender to lender easily, without the need to register a new loan or mortgage deed.
- In certain countries (Benelux, Germany, Austria, Denmark, Switzerland) the accessoriness (in fact the direct relation implying dependence) between loan/debt and mortgage has been more or less abandoned. These so called bank-mortgages, in which a part of the mortgage is not covered with a debt, are common. For example, a loan is provided for 30,000 euro while the security of mortgage is 50,000 euro, there is a space of 20,000 euro, that can be used for an overdraft). In this context also the euomortgage (see next paragraph) is mentioned as a possible option.

¹ Report of the Mortgage Funding Expert Group, 22 December 2006 and the report by the Mortgage Industry and Consumer Expert Group, 20 December 2006

² See the website "http://ec.europa.eu/internal_market/finances-retail/home-loans/integration_en.htm"

³ See our website http://www.eurogeographics.org/eng/05_groups_Cadastre.asp

⁴ Speech to the European parliament ECON committee "Exchange of views on the Internal Market", under the heading 'Retail Financial Services', 30 January 2007

⁵ See speech mentioned under footnote 4.

⁶ See his webpage: http://ec.europa.eu/commission_barroso/mcreevy/allspeeches_en.htm. We picked out the following:

- Speech transatlantic cooperation in financial services, 7 March 2007
- Speech as mentioned under footnote 4
- Speech public hearing on future single market policy, 29 November 2006

⁷ See footnote 2.

- Already cross border transactions take place. For example a credit-agreement can be described and signed in Germany in a notary document for a house in the Netherlands. The mortgage deed based on this agreement will be registered in the Netherlands.
- European economic developments and globalisation are influencing legal developments. It is expected that existing legal frameworks on mortgaging are shifting from a more accessory related mortgage to a more absolute and 'independent' mortgage.
- As a possible development the recent crisis-situation on the American mortgage market can still influence the content of the White Paper. While it is not possible to predict the economic consequences at this stage the current visible risks of credit mortgages could not only effect the home market in America but can also cross the Atlantic.

Some features on the euromortgage

As mentioned before, the euromortgage can be a realistic possibility to appear in the White Paper. It suits the needs and wishes of the European Commission for a cross border mortgage best. Some information on this entity. The euromortgage:

- is derived from the Swiss system (Schuldbrief) in which collateral (security) and loan/debt are disconnected. There is no accessoriness between mortgage and loan.
- consists of two parts:
 - legal security embodied in the mortgage deed. Content and registration are determined by national law. An advantage is that it can be easily adopted in countries throughout Europe. A loan is not necessary.
 - a certificate (Hypothekenbrief) which is delivered by the existing authorities in the country to the 'owner'. He can give it to a moneylender. Then the mortgage is in fact established.
- has advantages:
 - no supranational legislation needed
 - jurisprudence is available (experience is available)
- will be used as extra/optional instrument instead of replacement of national mortgages.
- will possibly involve two registers;
 - land registers: to determine the ranking of the mortgage,
 - banking register (to find latest lender)

Eurotitle

Besides the euromortgage and the implementation of EULIS the phenomenon of the Eurotitle can be mentioned here. This can be considered as the next step in harmonising european markets concerning real estate registering. However, while it is not directly in the scope of the upcoming White Paper on cross border mortgaging the topic is not being discussed here.

Conclusion

Currently the cross border mortgage topic is 'under construction' within the European Commission. Reports and comments have been published and these will be (part of) the basis for the White Paper.

Recommendations/Next steps by EuroGeographics Head Office

- Besides the published comment (February 2007) no relevant actions in relation to the White Paper can be taken *at this stage* by EuroGeographics
- Take actions as appropriate, following the publication of the White Paper
- Keep track of developments in the field of mortgaging, property indices, valuation and accessibility of land registers that may be relevant to our members.

Used literature

- JHM van Erp: Naar een ingrijpende herziening van het Franse Goederenrecht vanuit een 'vision d'ensemble'?, NTBR 2005/62
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- JB Vegter: Over het rechtskarakter van de Eurohypotheek, WPNR 6077
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- Hans G Wehrens: Real Security regarding Immovable Objects –Reflections on a Euro-Mortgage, Ars Aequi Libri, 2004

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