

CONTRIBUTION TO THE GREEN PAPER ON MORTGAGE CREDIT

The Green Paper on Mortgage Credit in the European Union, presented by the Commission of the European Communities on 19 July last {COM (2005) 327 final} formulates the basic issues raised in the consultation process to assess the merits of Commission intervention in the EU residential mortgage credit markets and to assess the advisability of a Commission-initiated study on the costs and benefits of further integration of these markets. The European Land Registry Association, whose members are the entities in charge of keeping the registries of property rights in England and Wales, Scotland, Northern Ireland, Greece, Lithuania, Belgium, Cyprus, France, Ireland, Luxemburg, Portugal and Spain, holds a direct interest in the subject at issue in the consultation, in those aspects of the proposed regulation that bear directly on the registration functions performed by its members.

For that reason, as invited by the Commission of the European Communities in the aforesaid Green Paper, the (Committee, Board or whatever) of the Association presents the following

REPORT

One. Guiding principles

We agree that there are potentially real gains for EU Member States through more complete, efficient and competitive mortgage markets.

We agree with the Commission's Green Paper that these gains will be most likely to be achieved by ensuring that mortgage credit can be demanded and offered with limited hindrance across the EU, and where market completeness, product diversity (including innovations like Shariah compliant home finance and price convergence are enhanced.

The important test for any action proposed by the Commission must be whether it helps or damages the development of these conditions.

In our view improving choice and competition is most likely to be achieved by making it simpler for firms to enter new markets, by simplifying the forms of credit documentation, enhancing access to information on consumers and on property, and further improving capital market efficiency.

However, the process of simplifying and integrating credit instruments must not restrict the freedom of credit institutions to configure their financial instruments as they see fit, because diversity is an essential part of the idea of competition within financial markets. Otherwise, any proposals aimed at facilitating cross border trade, but which would restrict the range of products available, would not enhance integration in any meaningful way.

There must be a careful analysis of the costs and benefits of each individual measure designed to aid integration. It will provide a helpful description of European mortgage markets, but that could be a good term of reference for an analysis of specific measures to bring about integration.

We note that a full impact assessment would undoubtedly be required in advance of any regulatory proposals. Should detailed analysis support the case for particular interventions, then the Commission should give priority to those actions which will best improve the completeness and competitiveness of national markets.

We also note that the analysis in the LE paper raises the prospect of dramatic changes in housing markets, house prices, and mortgage debt levels. These major developments require the most thorough analysis before attempts are made to bring about such reforms through regulatory interventions.

Together with this, it is vital to conduct an in-depth study of the different types of mortgage credits currently existing in each of the countries of the Union, to pave the way for comparative analysis. Only that way can a definition of residential mortgages be reached in an appropriate manner, in order to fully respect national legal traditions. The work must also take full account of the need to ensure access to long-term house purchase finance by consumers of all faiths, and should recognise that, as in France, not all long-term house purchase loans are directly secured by a link to the relevant property. Any definition proposed as a result of this work must be sufficiently flexible to meet the circumstances in all EU countries, including registration and legal issues.

Two. Should the Code of Conduct be replaced by binding legislation or remain voluntary?

It is the view of the European Land Registry Association that the Code of Conduct should remain voluntary. The Code has been in effect for a relatively short period of time and given the amount already invested by businesses to comply with this regime it should be given more time to become established and for benefits to be realised before changes are proposed.

The introduction of binding legislation would involve significant costs in terms of Commission resources and potential changes to industry systems. As there is no evidence that the absence of standardised product information is a primary barrier to integration, we do not think that legislation in this area would represent an efficient use of resources.

Three. What information should be given to consumers? A careful balance must be found between information deficiency and information overload

As the Green Paper notes, there is a major social and human dimension to housing and to mortgage credit. A decision as to which mortgage to buy will, for many consumers, be the most significant financial decision they make. It is therefore vital that there are proportionate protections in place to give consumers confidence that mortgages are sold in a fair and transparent way.

It would therefore be advisable to draw up a single regulation stating the requirements or minimum conditions that the internal legislations of Member States would have to abide by in matters of consumer information. A regulation that empowers consumers and ensures that they are properly informed, in a timely manner, about the products that they are purchasing. Information disclosure requirements must be designed to facilitate shopping around (thus encouraging competition) and shaped by careful consumer research to ensure that the content, language and presentation can be used by consumers.

In the first stage, the Commission work in this area would benefit from consumer research across EU Member States. This research should look not just at content, but also at both the presentation and format of disclosures, to ensure that consumers can make effective use of it. Consumer research must play a vital role in informing any Commission action in this area. Consumer research could sensibly proceed by developing a short series of model approaches that would be tested for their utility by consumers throughout Member State's.

Four. The Commission considers it fundamental that pre-contractual information is provided at a stage that enables the consumer to shop around and compare offers.

Can such a common EU stage be identified, given the variations in Member States' traditions and legislations?

Should an information provision regime apply only to lenders or to others such as brokers too? How can compliance with any such regime be ensured?

The European Land Registry Association strongly agrees with the Commission that it is fundamental that pre-contractual information is provided at a stage that enables consumers to shop around and compare mortgages. The principle objective should be to ensure that the consumer receives the disclosure and has the opportunity to consider it before being asked to commit to a particular product.

Consumer research should be used to establish the level of detail and quantity of information that best helps consumers compare offers. At all events, however, the European Land Registry Association considers that the information provision regime ought to be applied both to lenders and to all kinds of intermediaries, to guarantee that consumers actually do receive the information early enough that they can still shop around and back away from the contract, should they see fit.

In a market that operates through diverse distribution channels (such as the EU where a significant and increasing part of sales are currently through intermediaries), it is important that information provisions should be distribution channel neutral, in order to avoid imposing distortions on the market. Diversity of distribution channels and methods is makes a major contribution to innovation and competition.

Five. Should the provision of advice to the borrower be made compulsory or be a matter of choice?

The European Land Registry Association believes strongly that advice should not be compulsory.

In the first instance, not all consumers will require advice and therefore the creation of a mandatory advice regime will impose costs without discernable benefit. The costs of providing compulsory advice would inevitably be passed on to consumers.

However a further important concern around the compulsory provision of advice has been raised by UK consumer advocates. Their worry is that such measures would significantly harm consumer willingness to shop around. Evidence points to consumers being very reluctant to undergo repeated advice meetings with lenders. Given this consumer trait, there is a simple alternative: the danger that mandatory advice would favour intermediated sales at the expense of direct sales, thus distorting the mortgage market; or, to

the contrary, that advisors would be “tagged” by the major mortgage service providers, becoming mere “mouthpieces” for them.

Six. Should early repayment be a legal right or a matter of choice? If it is to be right, it also be made possible for a consumer to waive his right? Under what conditions? Should this right be subject to compensation in the form of fees?

How should such fees (whether under a right or through contractual choice) be calculated? Should there be caps, as is the case in some Member States?

How should the consumer be informed about early repayment? Is there scope for consumer education here?

The right of early repayment as “a crucial driver of competition”. The ability to repay a loan early clearly plays an important role in ensuring market liquidity.

Furthermore, early repayment is the main tool for protecting borrowers from changes in interest rates and reinforcing competition amongst financial institutions. Only if early repayment of loans and credits is allowed is it possible to force lenders to renegotiate terms in line with current interest rates.

We therefore support the right of consumers to have this facility, subject to an entitlement for business to recoup fair and reasonable costs associated with early repayment. There should be no arbitrary cap on these costs.

There should be clarity for both consumers and businesses as to how compensation will be paid and how that compensation will be calculated. The costs that a consumer would incur through early repayment should be subject to pre-sale disclosure. This disclosure should include illustrative cash amounts relating to possible charges. Consumers should NOT merely be presented with an arithmetic formula from which costs might be calculated. Where repayment charges cannot be predicted exactly (as they may, for example, depend on interest rates in force at the time of repayment) a reasonable estimate should be provided.

We welcome the reference to consumer education in this part of the Green Paper, but are uncertain why the issue is singled out in this context. Consumer education is potentially of enormous significance for consumers of financial services of every type.

Seven. What is the purpose of an APR? Information? Comparison? Both

Should there be a EU standard covering both the calculation method and the costs elements?

If so, what kinds of cost elements should such a EU standard include?

The purpose of an APR is twofold -it should provide consumers with both absolute and comparative cost information.

For the APR to be used effectively for either of these purposes however, it is critical that it properly understood by consumers. We would suggest therefore that disclosure of the actual APR should be accompanied by a brief explanation of the significance of that disclosure.

If APR information is to assist comparisons across borders, and empower consumers, data needs to be broadly inclusive, informative and standardised.

This is a complex issue that has been discussed quite thoroughly in the context of work on the Consumer Credit Directive, although we understand a final position has not yet been agreed. While mortgage and consumer credit differ considerably, (the former tending to greater complexity) we believe there may be useful lessons to be derived from the earlier CCD work.

Eight. The Commission welcomes views on the merits of providing separately information on all costs not specified in the APR, and on the presentation of the effects of the APR in concrete terms such as the cost per month or the overall cost of the loan.

Disclosure to consumers is most effective when it is succinct and clear. Accordingly the UK would suggest consumer information should focus on comparable disclosure of the full effective APR. As previously stated, we believe that consumer research is essential to understand the most effective way in which information should be presented.

Nine. What are the implications of usury rules for market integration (including any relationship with products such as equity release and mortgage insurance)?

Should this issue rather be examined in a broader, non-mortgage specific, context?

Do [interest rate variation caps & compound interest restrictions] hinder market integration?

What impact can they have on the development of particular products such as equity release products?

We believe that rate controls may inhibit the willingness of firms to offer credit to higher risk consumers; therefore excluding consumers from access to legitimate credit. They may also distort lender behaviour though encouraging cross subsidy within product offerings, leading to higher overall prices for consumers.

Caps on compound interest rates may have a particularly detrimental affect on the development of equity release products. In the EU a large number of these products rely on the compounding of interest, as there is no repayment of interest during the life of the loan. A restriction on compound interest would therefore be likely to restrict product development and consumer choice in this market.

Ten. The Commission welcomes views on the merits of the standardisation of mortgage contracts e.g. via the 26th regime instrument.

The creation of a 26th regime requires strong evidence based justification, which, in principle, is in opposition to the substance of contract law -properly for the national law of member states- and to the fully respect and plenty effect of the principle of subsidiarity.

Whether or not it would be wise to establish a 26th regime will depend, at any rate, on the specific content the regime will cover. An additional regime that moreover must be drawn up with full respect for each country's legislation's essential principles or principles of the general good; so, given the importance that the Member States' jurisdictions attribute to the leading aspects of the mortgage regime -essentially, foreclosure procedures- there is the risk that the result will merely be a compilation of descriptions of requirements, useful only for descriptive purposes.

Eleven. Should the Commission consider imposing on MS an obligation to ensure the existence of such alternative means of redress in the mortgage credit area?

The Commission welcomes views on ways to reinforce the credibility of existing alternative redress systems, particularly in the mortgage credit area

In the first instance it should be the responsibility of firms themselves to treat consumer complaints fairly. Firms should resolve complaints themselves as far as possible, however separate national complaint schemes can serve a useful supplementary purpose by ensuring the quality of complaint handling is high.

A wide range of Member States, -as the Financial Ombudsman Service of the UK- provides a complaints arbitration service, as a facility which is free to consumers. Consumers who have complaints about the sale or administration of regulated mortgages have access to this scheme. There maybe role for the Commission in promoting the wider development of effective redress arrangements or any other of such schemes.

At all events, it is necessary to ensure the effective independence of the organisation or institution that is to act as mediator or arbitrator, so it is unattached to credit institutions.

Twelve. Legal issues.

Transnational mortgage relationships pose major difficulties stemming from the cumulative application of different nations' laws. The difficulty of finding out about the terms of the applicable foreign rule and the uncertainty about the real consequences of its application especially make it impossible to appropriately assess the risks of inter-Community mortgage credit operations, and create considerable resistance to the spreading of credit activity in the intra-Community market.

There are three groups of rules that come into play in the regulation of a mortgage operation as a whole: first, the rules governing the secured obligatory relationship, which come under the freedom to choose the law applicable to the contract (article 5 of the Rome Convention); these rules differ from the rules governing the collateral itself (or the collateral agreement), which is subject to the rule of *lex rei sitae*; and, together with these two groups of rules, there is the modern consumer protection regime, which, although integrated into the first or second group of rules as a matter of form, is in practice dominated by the principle of the general good, forming an imperative regime that is generally linked to the borrower's domicile. There are, then, three jurisdictions in conflict: that of the lender's nationality, that of the location of the asset and that of the borrower/consumer's domicile.

The possibility of applying a single law to the entire secured relationship, which would disable the imperative application of the protection rules for the lender's domicile, is stymied by serious difficulties. This occurs with what is known as the **principle of mutual**

recognition, which stems from the consumer's supposedly free choice to apply the law applicable to the borrower's person. Notwithstanding our opinion, from an abstract standpoint, of this supposed freedom of choice and the attempt to reconcile it with the true EC principle of mutual recognition, the regime of pseudo-freedom of choice brings us to two immediate conclusions:

- First, a minimum standard of foreseeability of the situations affecting the law applicable to assets makes it impossible to apply in practice the pseudoliberal principle stated above: the harm done to the security of real estate transactions by the multiplication of liens that are impossible to foresee and even to find out about, because their terms are subject to the law applicable to the lender's person; the difficulty of working with security interests afterwards, when dealing, in their effects on the borrower and third persons, with legal systems that are radically different in terms of both protection -including court protection- of different kinds of rights, and in efficacy -including the efficacy stemming from registration- of such different rights and the procedure for transferring their ownership; and, above all, the complexity of the task of finding the right legislative classifications for institutions spawned by different systems of law, with all their cohort of issues concerning proof of the applicable foreign law, the intervention of plurilegisative systems, the sphere of the plea of the general good or the conflict of scrutinies. These make the effective application of mutual recognition impossible in practical reality.

- Second, when the law applicable to the person of the foreign credit institution is applied, the uncertainty is shifted onto the consumer. And the consumer's concern in selecting the financial product is radically different. For the consumer, the actual proximity of the customer to the lender, the suitability of the financing for meeting the true needs of the borrower, without legislative uncertainties stemming from the application of different legislations, full information about the contract's consequences and trust in the applicable measures of protection are contrary to the application of the eccentric principle of mutual recognition.

So, the prevalence of *lex rei sitae* is better, as the preferred criterion for regulating the complex legal relationship stemming from a mortgage, that must be applied for the mortgage deed and any related security agreement and mortgage registration process as well. The efficacy and validity of the mortgage right must be governed exclusively by the law for the location of the mortgaged property, which is the law traditionally in charge of regulating the entire legal question in practically all Member States. For the exclusive application of that law to the mortgage relationship, additional solutions must be turned to:

- First, the consumer protection regime must be unified, by (a) establishing unified criteria of information, the same for all citizens of any Member State, in line with the recommendations given in sections three, four and five of this report, and (b) unifying the minimum terms that a collateral contract must contain for full borrower/consumer protection.

- Second, the way of concluding contracts must be simplified in the light of a general criterion of favouring the mortgage security. Given the advantages stemming from the mortgage from the standpoints of both the single market and EU citizen well-being, the secured credit relationship must be subject to the general principle of *favor negotii -favor hypothecae-* which is recognised in most Member States, as a uniform general criterion that enables the validity of the title creating the security to be upheld, provided that it conforms to the laws of one of the countries involved in the security relationship.

The rule of the most favourable law for title validity not only is a good criterion for mortgage credits agreed to on paper, but is also in alignment with the process of spiritualization that mortgaging will undoubtedly have to undergo as electronic mortgaging and signing systems are developed. Advanced systems whose development the European Land Registry Association expressly recommends to the Commission.

Thirteen. Following the same approach as for consumer credit, the Commission considers that the priority could be to ensure cross-border access to [consumer credit] databases on a non-discriminatory basis. It welcomes comments on this

There are important considerations about the form of data held, and of consumer privacy that needs to be respected. Nevertheless cross-border access to consumer credit data should be increased. Ensuring that creditors have equal access to data is in our view a crucial prerequisite for increased cross border supply of mortgage lending and thus of further integration. This is therefore an area where further Commission work may well be beneficial.

It is the Association's view that this should be achievable through cooperative, non-legislative measures and the Commission should give priority to measures other than regulation. The emphasis should, in our view, be to address explicit or implicit discrimination against cross-border lenders.

At all events, if a European Credit Registry is created, it must be organised under the principle of public access and not restricted to credit institutions. It must observe precautions in regard to the informed consent of consumers and respect for consumers' rights as data subjects to check, correct and cancel data.

Fourteen. What are the merits of a single EU [valuation] standard, for both valuation processes and valuers?

What are the merits of Commission action to ensure mutual recognition of national valuation standards?

Valuation services are one of the crucial professional services that underpin mortgage lending. Lenders need to have a clear understanding of the basis on which valuations are compiled and have confidence in the integrity of those undertaking valuation work.

Trusted valuation standards will also underpin the development of more integrated mortgage capital markets. Global investors need to have confidence in the valuations that underpin such investments.

There are clearly two main strategies to enhance integration; to ensure greater understanding of national valuation standards or the migration towards a single standard. A single valuation standard holds some attractions for both providers and users of valuation services (a single interchangeable regime common across Europe).

In our view the practical way forward is for the Commission to promote work amongst industry practitioners and professional users to explore the scope to build on existing industry standards.

The Commission should bear in mind that a good deal of work has already been done in this area, and will no doubt wish to build on, and work with, the developments that have already taken place under the auspices of European and International professional bodies.

Fifteen. The Commission seeks views on the following gradual approach to encourage improvements in forced sales procedures: to first collect information on the cost and duration of these procedures in all MS and their effectiveness in protecting the interests of all involved, then present it in a regularly updated 'scoreboard' and, should this prove ineffective in the long run, consider putting forward more robust measures

The European Land Registry Association supports the Commission proposed gradual approach in this area, as a measure to reinforce competitiveness amongst the different national markets.

Beforehand, however, a general study should be made of the cost and efficiency of each Member State's mortgage credit foreclosure tool. Careful consideration will need to be given to understanding national forced sales procedures, and to ensuring that the data published is genuinely useful and comparable. With that object in mind, the study must try and identify the real reasons why foreclosure processes slow down and perform a comparative analysis of the term and efficacy of each national registration authority's intervention within the entire foreclosure process. Careful attention must also be paid to avoiding new regulatory burdens and should test any measures proposed in this area against a cost benefit analysis.

Mortgage collateral

Sixteen. [Land registers] Before making further assessments, the Commission would welcome input on all these issues [i.e., land register transparency, EULIS and funding]. EULIS

The Commission seeks views on land registers and the Euromortgage. A large number of the countries in the European Land Registry Association have attached particular importance to improving cross border access to information. The EULIS project has fulfilled an important function there. It is a model of collaborative working amongst important market infrastructure providers across boundaries.

Registered land titles and rights on land in those Registry Systems can already be viewed by the public worldwide via the internet. The Land Registry organisations in England and Wales, Scotland and Lithuania are members of EULIS, and provide guidance about registration matters on their websites. The Land Registers of Northern Ireland are currently in negotiation to join the service. All of them provide, and are continuing to develop, online access facilities for regular users.

Funding of EULIS, while an issue, is not the only significant point. It would be helpful if the Commission were able to ensure a degree of continuity in the short term, while in the longer term such a service could reasonably be expected to be funded by user charges.

Although the Green Paper does not pick up on the Forum Group's proposals for harmonising land registration, it may be worth reinforcing the message that we consider this almost impossible and undoubtedly impractical. The European Land Registry Association believes that measures to improve access to, and understanding of the contents of, national land registers would be more productive than any attempt to harmonise their contents. The latter would inevitably involve considering wider areas of legal and social policy (for example, the rights of spouses, cohabitants and other family members), and would likely prove to be an extremely challenging project.

The scope of any project to ensure mutual sharing of information also needs to be carefully considered. They must, for example, take account of the fact that in different member states, different matters are included on land registers. Some information relevant to the use or value of land may either not be recorded or be recorded elsewhere (e.g. in England and Wales in registers maintained by the local authority). Account must also be taken of unregistered land: i.e., the ownership of about half the land surface of England and Wales (but four-fifths of the separate titles) is now registered (this proportion is increasing year on year and the aim is to have a comprehensive register by 2012); in Ireland, approximately 1.8 million titles covering approximately 2.2 million land parcels are covered by the title registration system (it is estimated that this corresponds to 90% of the landmass of Ireland, representing approximately 85% of the titles in existence).

Any proposals must be compatible with existing land registration systems in all member states, including the systems being developed to transfer interests in land by electronic means ('electronic conveyancing'). The European Land Registry Association considers that special account must be taken on e-conveyancing systems being accelerated in member states.

Seventeen. Land registers record and to a certain extent determine legal property ownership rights. There is concern that such registers do not always accurately reflect all charges that could affect property rights.

For real estate markets to be safe and efficient, full-scale registration systems have to be established: with respect to third parties, it is necessary for mortgages and other charges on real property to be able to arise only because they have been registered. Otherwise, the existence of hidden charges causes information asymmetry -benefiting the current owner and harming the future buyer- which limits the possibilities of third-party access, sends transaction costs up and pulls the number of market transactions down. Therefore, it is a general principle that the title registration system must determine legal property ownership. The registration of deeds system must **record** legal property ownership completely. And mortgages must be referred to as 'charges' when affecting land registered in the title registration system, and they must be creatable only through registration.

In parallel, it is necessary that the in the title registration system of every member state no interest vests until registration of the ownership of the charge.

Nevertheless, there is a wide variety of land registration systems across the different EU member states comprising cadastral deeds systems, non-cadastral deeds systems, and various Torrens title registration systems. All are at different stages of movement towards electronic service delivery however a general thrust in that direction is evident.

An understanding of the content and operation of the various land registers would be essential for cross border credit. The European Land Registry Association feels that it is extraordinarily important to conduct an in-depth study reflecting the reality of the different registration systems, in the matters mentioned by the Forum Group:

1. An understanding of their content and operation, is crucial for cross border credit activity of any kind including funding.
2. Do the registers always accurately reflect all charges that could affect property rights?
3. An understanding of content and operation of land registers is crucial for cross border credit activity of any kind including funding?

The European Land Registry Association offers the Commission its utmost cooperation for such a study.

Eighteen. The Commission questions whether it should continue to play an active funding role in such initiatives. Given the use of such registers by lenders and investors one can assume that they have a direct interest in contributing and investing in such initiatives

The question is based upon the premise that the main gainers from title registration systems are lenders and investors. This statement is not entirely correct. In addition to lenders and investors other main beneficiaries of effective land registration systems, (particularly those compliant with the recommendations of paragraphs 30 to 33 of the Forum Group recommendations, (see Annex 11 of the Green Paper) are citizens, the community at large and indeed the economy as a whole.

The kind of system called a title registration system provides complete protection for registered rights, ensuring that registered rights truly are assigned to their buyers. Title registration systems are, therefore, an instrument for protecting legitimate confidence in registration records. This prevents unregistered situations from being enforced over registered rights. The direct beneficiaries of this protection, accordingly, are third persons who purchase rights from their registered holders. And, through these third persons, the real property market as a whole and the economic system in general benefit.

Arguably a pan-European approach in this area could result in significant social and economic gains for all member states.

Nevertheless, the land registration systems in most member states operate on a self-financing basis. A financing system that places the immediate costs of the registration system on the system's users, preventing, at the same time, the interposition of any tax-type barrier mechanisms, which would hamper market transactions. There is no reason why this should not continue.

A different issue is whether the Commission at this time should encourage and resource moves towards greater co-operation and a pan-European approach. It is submitted that, as with the EULIS pilot project, moves towards convergence should continue to be supported and encouraged by the Commission.

Nineteen. The Commission should ensure that Member States allow the lender or any beneficiary of a charge on real property, to appoint a representative (Mortgage Register Representative) vis-à-vis the Public Register. His/her position should be disclosed on the Register and not have any effect on the legal framework of the Register.

The act of creating a mortgage to secure credit transactions is almost always embodied in a contract offered by the credit institution. The consumer must accept or reject, in toto, the set of clauses laid out in advance by the lender and accommodate him/herself to the terms imposed by the lender. Therefore, the appointment of a representative of the beneficiary of the charge, broadly empowered with the Register to perform all kinds of acts concerning the mortgage, may become an extraordinarily strong weapon that gives the credit institution unilateral power to control the security, with or without the consumer's consent.

The Association is therefore entirely against any measure of that nature, until and unless the free, voluntary participation of the consumer is guaranteed in each act affecting the mortgage.

Twenty. The Commission invites view on the feasibility and desirability of the Euromortgage. It will, in any event, await the outcome of ongoing initiatives to inform its assessment of this issue.

The European Land Registry Association notes the theoretical work that has been completed in this area to date. Any proposal to develop a Euromortgage must be evidenced based a respect national legal tradition and administrative systems. At present the Association is unconvinced of the need for a Euromortgage. Creating a formal mortgage that will be recognised and effective within each of the 25 member states will require a lot of work and may be impracticable.

Furthermore, it must be possible to make the Euromortgage effective simultaneously in all EU countries. And the Member States have differences in the ways they handle mortgages and other charges, which make harmonisation very difficult (For example, while in Germany and Austria charges are enforced only on a share or part of the asset's value, in Spain, France and Italy a procedure for lining up security is applied, such that the charge created the earliest holds absolute preference over all charges created after it). Furthermore, in systems belonging to the Latin tradition, mortgages are subject to a maximum term. This follows from the application of principles that are considered fundamental in Latin-based legislations, so any change making it otherwise would cause extraordinarily important alterations that would be incompatible with the organisation of the property system in those States.

Measures of mutual recognition and enforceability may represent the best way forward. In the meantime, studies on the Euromortgage's viability must be expanded, and the necessary participation must be sought from the European university community and organisations of professionals from the sector.

The European Land Registry Association, however, considers it to be of extraordinary importance to eliminate the barriers of title formalisation between Member States. There is no reason in principle why a mortgage deed capable of registration in one land registry system cannot be prepared in other member states. Or indeed, why consideration could not be given to a common EU parallel instrument optional for the parties without substituting national rules. From a technical point of view no major issue arises.

In any event the Land Registries of several Association states (both in England and Wales and in Scotland, Republic of Ireland and Spain) are at an advanced stage of developing systems in which digital mortgages and transfer instruments, with digital signatures, will replace paper documents. Any Euromortgage would have to be capable of creation in a way that would be compatible both with these electronic conveyancing systems and with paper-based systems used in other jurisdictions. We think a specific warning about the need for compatibility with e-conveyancing is needed. The introduction of e-conveyancing is a key e-government target, currently due to be piloted in those countries.

Twenty-one. Funding of mortgage credit

The European Land Registry Association welcomes the Commission's willingness to explore the potential of market led initiatives. We also welcome the recognition of the merits of a more liquid funding market and the potential of a pan-European funding market. In our view innovative funding arrangements play a vital role in underpinning product innovation and the broadest access to mortgage credit. Equally, continuing diversity in funding arrangements should be protected and promoted.

Lenders should be free to choose the appropriate mix of funding mechanisms that are most suitable for their business model.

The development of a global market in securities backed by mortgage portfolios seems to us to be a source of welcome strength and diversity. Nothing that emerges from this work should damage the diversity and flexibility of capital market funding for mortgage credit.

Twenty-two. The Commission intends to create an ad hoc stakeholders working group to examine the need for a nature of action on the funding aspects (primary and secondary) of mortgage credit.

The European Land Registry Association welcomes this proposal and awaits Commission updates on progress with interest.

Twenty-three. It is interested to assess to what extent a pan-European market in mortgage funding can be promoted by market led initiatives e.g. on documentation standards and model definitions to be used in cross-border funding activities

The European Land Registry Association fully supports the proposal for further work on market led initiatives in this area.

The Association suggests that there is welcome evidence that industry-to-industry transactions can be facilitated by formal collaborative arrangements, such as the adoption of standard forms of contract and standard terms.

Twenty-four. In this respect (growth of non-deposit based mortgage loan funding), the Commission is interested to receive views on whether mortgages lending should necessarily be an activity which is restricted to credit institutions, or whether and under which conditions such activity could be performed by institutions which do not take deposits or repayable sums, and therefore do not fall within the scope of the EU definition of a credit institution and therefore of all related prudential rules.

Subject to the minimum protections necessary to ensure the stability of the financial system and to safeguard the interests of consumers, there should be no restrictions on the categories of business able to offer mortgage credit.

The mortgage market benefits from the participation of institutions that are not deposit funded. The availability of capital market funding is an important component of mortgage lending to consumers with impaired credit histories.

A number of innovative market entry strategies have, in addition, been built around this cost-effective form of lending, so funding diversity is an important foundation of innovation and market entry.

This report was made, for submission to the Commission of the European Communities, in Brussels on 30th November 2005.