(De-)Constructing Mortgages – Reflections on accessoriness, properties of good mortgages, and the development of new mortgage legislation for transition economies or even a future Euro-mortgage ('Eurohypothec').

*Hans Fredrik Marthinussen**

1. Introduction – the complex nature of mortgages and their accessoriness

'No-one, by the light of nature, ever understood an English mortgage,' wrote Lord Macnaghten in a famous English judgment from 1904.[1] I would not be surprised if someone were to claim the same about the German '*Grundschuld'*. Highly complex and, at least to some, confusing mortgage constructions are also found in countries where mortgages have been incorporated into mortgage certificates with fictitious claims, such as the Norwegian *pantobligasjon'*, the Danish *ejerpantebrev* and the Swiss *Schuldbrief*.[2]

Of course, there are complex reasons for the complicated structures of many mortgages. There can be little doubt, however, that the shortcomings of the Roman law on mortgages are one of the most significant reasons. Roman law mainly treated mortgages as a contract, with little regard for third-party interests, and it had no system for registration or publication. For this reason, a joint European foundation was lacking on which modern registration-based mortgages could be built. Nor was there a basic recipe for the integration of the fairly pragmatic *accessoriness* of Roman law mortgages into a system of registered mortgages. Therefore, mortgages have to a larger extent than much of the rest of European

* Professor of law and head of the research group for the law of property and obligations, University of Bergen. PhD. Email: hans.marthinussen@uib.no

[1] *Samuel v. Jarrah Timber and Wood Paving Corporation* [1904] A.C. p. 323

[2] I use the term *mortgage* to describe a security right *in rem* over real property in the absence of any other common European term in English for such security rights. The term mortgage is hence not reserved for the particular English mortgage (whether one includes the *charge* in this term or not). It comprises, for instance, all the European forms of 'hypothecs'. For a discussion of the terminology and 'mortgage versus hypothec', see Vincent Sagaert, 'Harmonization of Security Rights on Immoveables: An Ongoing Story', in Arthur Hartkamp et al. (ed.), *Towards a European Civil Code* (4th ed. Kluwer Law International 2011) pp. 1046–1048. On the terms mortgage and hypothec, see also Gary Watt, 'The Lie of the Land: Mortgage Law as Legal Fiction', in Elizabeth Cooke (ed.), *Modern Studies in Property Law*, Vol. 4 (Hart Publishing 2007), pp.73–96. It is rather cumbersome to have to use terms like 'proprietary security rights over immovables' or the like, which are sometimes chosen in comparative works in this field. Other possibilities are the terms 'charge' or 'lien', which, however, raise the same objections as to their specific content in Anglo-American law as the term mortgage. For an explanation of the terminology in English law (mortgage, lien, pledge and charge), see Stuart Bridge, Elizabeth Cooke and Martin Dixon, *Megarry & Wade, The Law of Real Property* (9th ed. Sweet and Maxwell 2019) pp. 1032–1034 and Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th ed. Oxford University Press 2009) p. 694. As for the terms mortgage and lien in American law, which are used slightly differently, see The American Law Institute, *Restatement of the Law (third), Property – Mortgages* (American Law Institute Publishers 1997) pp. 4 and 9.

civil law been developed in different ways, based on different legal heritages, in countries throughout Europe.[3]

The above-mentioned accessoriness of mortgages, is a joint heritage from Roman law, however. It has found its way in some form or another into the majority of European legal systems. The term *accessoriness* is used to describe a relationship between a security right and a secured claim, where the security is collateral to an obligation. The basic idea of accessory mortgages is relatively straightforward in terms of logic and purpose. Since the mortgage is created in order to secure the performance of an obligation, its life is inextricably linked to the obligation that it secures. Without the obligation, the security has no purpose and cannot exist.[4]

According to von Bar and Drobnig, 'one of the fundamental principles of genuine security rights is that these rights depend upon (are accessory to) the secured claim'.[5] For mortgages, this is definitely true in a historic context. Today, however, European mortgages are increasingly *independent* of the claims they are intended to secure. Practical needs have been the main driver for this development, which has often taken place through creative use of existing law, thereby creating complex mortgage structures.[6] These complex mortgage structures can lead to legal uncertainty, which is often costly in this area of law. It also makes it difficult to find good models for legal transplants when legal systems are considering mortgage law reform.

In this article, I will attempt to look beyond the many complex, and to some extent unnecessary, structures of many modern European mortgages, and identify which qualities a

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[3] A thorough description of the mortgages of Roman law and their characteristics can be found in Max Kaser, 'Studien zum römischen Pfandrecht', *Tijdschrift voor Rechtsgeschiedenis* 1976 pp. 233–289 and 'Studien zum römischen Pfandrecht II', *Tijdschrift voor Rechtsgeschiedenis* 1979 pp. 319–345. On the accessoriness of Roman mortgages in particular, see Wolfgang Mincke, *Die Akzessorietät des Pfandrechts* (Dunker & Humblot 1987) pp. 39–50.

[4] For more on the concept of mortgage accessoriness, see Christian von Bar and Ulrich Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe* (Sellier 2004) pp. 341–342 and L.P.W. van Vliet, 'Mortgages on immovables in Dutch law' in Monika Hinteregger and Tomislav Borić (ed.), *Sicherungsrechte an immobilien in Europa* (LIT 2009) pp. 287–288. For a thorough treatment of legal accessoriness in private law, see Dieter Medicus, 'Die Aksessorietät im Zivilrecht', *Juristische Schulung* (JuS) 1971 pp. 497–504. The term is usually not used in English law, and is, thus, to a certain extent unknown as a *legal term* in English, see Andrew J. M. Steven, 'Accessoriness and Security over Land', *Edinburgh Law Review* Vol. 13 (2009) p. 388. When the term accessoriness is occasionally used, it seems to be more by chance, and as a general description rather than as a legal principle or norm, see e.g. F. H. Lawson and Bernard Rudden, *The Law of Property* (3rd ed. Oxford University Press 2002) p. 129 ('any security interest is merely accessory to the claim which it secures'), cf. p. 127. The term does not seem to be applied in American law, although the idea of accessoriness is clearly also a basic notion in American mortgage law, as stated in the *Restatement on mortgages* (n. 2) p. 9: 'Unless it secures an obligation, a mortgage is a nullity.' See also the case law on p. 12.

[5] von Bar/Drobnig, *ibid*.

[6] Similarly, Caroline S. Rupp, *Grundpfandrechte zwischen Flexibilität und Schutz* (Mohr Siebeck 2015) pp. 508–509.

well-functioning mortgage should have. I will also investigate whether quality mortgages can be structured in transparent and simple forms.

2. The problem of mortgage accessoriness

Back in Roman law, when a mortgage was simply a contract, it was unproblematic to allow the security to arise upon disbursement of the secured loan. With today's land registration systems, which require that mortgages be registered in order to be protected against third parties or maybe even to be valid at all, it becomes more complicated. To quote a Danish-Norwegian book on the character of mortgages in the 19th century:

> 'If, by the drafting of the law, it was envisaged that the parties would first issue the mortgage letter and disburse the loan and then allow the registration of the mortgage to take place, so be it. At least this much is certain, that in practice one follows and must follow another approach. The mortgagee will usually not give up his money until he has full certainty that he will receive the presupposed mortgage, and there is thus nothing else to do but to have the mortgage letter issued and registered before the disbursement of money.'[7]

If strictly practised, the principle of accessoriness implies that the mortgage cannot exist before a loan is actually disbursed.[8] In England, this gave rise to a somewhat complicated system of registration involving official searches or priority notices, where the mortgagee cannot always be certain that he obtains the priority that is often the most important condition for the loan in question.[9] In other countries, accessoriness has led to a practice of notarial confirmation of disbursement of the loan before its actual disbursement, a practice that can be dangerous for the borrower.[10] In Scotland, the accessoriness of the mortgage led to the choice

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[7] Ernst Møller, *Dækningsadgang eller fordringsret* (Universitetsboghandler G.E.C. Gad. 1892) p. 157. This author's translation.

[8] Cf. *Rupp* (n. 6) p. 66.

[9] See Roy Goode and Louise Gullifer, *Goode and Gullifer on legal problems of credit and security* (6th ed. Sweet & Maxwell 2017) pp. 194–196 and *Bridge/Cooke/Dixon* (n. 2) pp. 148–149, 224–225 and 1136. Through the Land Registration Act 2002, most of these problems have been eliminated for mortgages on registered land, which is the only practicable form of mortgage over land. However, problems may arise where the mortgage is for future debts, where in some cases priority cannot be secured at the time of registration, see Richard Coleman, 'Further Advances under a Secured Loan: Land Registration Act 2002 p.49', *The Conveyancer & Property Lawyer* vol. 78 (2014) pp. 430–433 and Law Commission, *Updating the Land Registration Act 2002, A Consultation Paper* (Consultation Paper No 227) pp. 390–400. Cf. also Goode/Gullifer, *ibid*. pp. 188–189. See, by comparison, American law and the problem of future advances, *Restatement of the law, Mortgages* (n. 2) pp. 44–96. American law seems flexible on this point (p. 50): 'Every mortgage must secure some obligation. However, there is no objection to the creation of a mortgage to secure an obligation which has not yet been entered into or whose amount is not yet certain. Such arrangements are highly convenient, and cause no harm to any other party.'

[10] See Otmar M. Stöcker, 'Die Eurohypotek' (II), in *Jahresheft 2007 der Internationale Juristenvereinigung Osnabrück* pp. 66–67, footnote 18.

of full transfer of ownership to the creditor, with only a contractual claim to have the property returned after full repayment of all debts.[11]

Accessoriness may also make it difficult to secure current accounts or similar credit arrangements where several claims arising at different points in time are to be secured. It can be argued that this is not a problem caused by accessoriness alone, since accessoriness is usually not seen as an obstacle to securing future or conditional claims. However, when combined with a system of land registration, which, due to the need for publicity, requires that the sum of the claim be registered, it may be impossible to secure a claim for an uncertain amount.

If accessoriness is practised so that repayment of the secured debt leads to the extinguishment of the security, this is disadvantageous to the owner of the mortgaged property. If the owner of the mortgaged land wants to obtain new credit, it can be costly to register a new mortgage and it may also take time to register it. In the event of a second mortgage, the principle of accessoriness may lead to problems if the borrower wants to refinance the debt secured by the first-ranking mortgage.[12] If the debt secured under the first-ranking mortgage is repaid, this may lead to the extinguishment of this mortgage. In many legal systems, this, in turn, leads to the second ranking mortgage moving up to the position of a first ranking mortgage. The extinguishment of the mortgage due to the repayment of the claim might also be detrimental to the holder of the mortgage, if strictly practised. If a current account or overdraft credit secured by a mortgage is momentarily down to zero, the mortgagee will risk losing his security for future advances.

The aspect of the principle of accessoriness that still causes most challenges to modern financing is probably that the holder of the claim is by law also the holder of the mortgage, and that these positions cannot be separated. This can cause problems when syndicating loans or in connection with the creation and use of covered bonds or mortgage-backed securities.[13]

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[11] *Steven* (n. 4) pp. 397–398

[12] Cf. *van Vliet* (n. 4) pp. 299–300.

[13] See Otmar M. Stöcker, 'The Eurohypothec' in Sjef van Erp, Arthur Salomons, and Bram Akkermans (ed.), *The Future of European Property Law* (Verlag Dr. Otto Schmidt 2012) pp. 66–68, Otmar M. Stöcker, 'Die grundpfandrechtliche Sicherung grenzüberschreitender Immobilienfinanzierungen. Die Eurohypothek – ein Sicherungsinstrument mit Realiserungsschanchen', *Wertpapier-Mitteilungen* (WM) 2006 pp. 1941–1949 and Ekkehard Becker-Eberhard, *Die Forderungsgebundenheit der Sicherungsrechte* (Gieseking 1993) pp. 329–332. The latter questions whether this form of accessoriness is in fact a consequence of the security being an accessory to the secured claim. An illustrative example of the many problems caused by this form of accessoriness, and the intricate structures these problems cause, is the treatment of Dutch law in Angélique Thiele, *Collective security arrangements* (Kluwer Legal Publishers 2003) pp. 58–107 (available online at https://repository.ubn.ru.nl/handle/2066/146963).

For loan syndication, it can be less costly and also advantageous in other ways to have one security agent holding the mortgage on behalf of the creditors in the syndicate. For covered bonds, some countries demand that loans and mortgages be transferred to a separate entity.[14] Since the often highly regulated cover pools can be subject to constant changes to meet regulatory requirements, it can be important to hold open the possibility that the special entity can also hold the mortgage for secured credit offered by the transferring credit institution. A need to hold mortgages on behalf of other creditors may also arise in other financing situations.[15] If a market again arises for mortgage-backed securities, structuring them could be more efficient if the mortgage and the secured credit can be held by different persons, since, in general, it is normally sufficient to notify the debtor to have a valid and secure transfer of a claim, while the transfer of a mortgage may often require registration in the land registry.[16]

3. (More or less) independent mortgages

As shown, if strictly practised, many aspects of the principle of accessoriness cause problems for modern banking and financing business. The accessoriness of origin poses problems when establishing a secured credit relationship. The accessoriness of extent may cause problems for the securing of fluctuating debts, such as revolving credit lines and overdraft credits. The accessoriness of extinguishment causes problems for the mortgagor when he wants to reuse his security to save time and money, and when refinancing, and it may even also be problematic for the securing of fluctuating debts. Finally, the accessoriness of ownership

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[14] Norway is one example of such a regulation, see the Financial Institutions Act 2015 § 11–7. Another is the French regulation, outlined in Sergio Nasarre-Aznar, *Securitisation & mortgage bonds: Legal aspects and harmonization in Europe* (Gostick Hall Publications 2004) pp. 50–51. An overview of the different European regulatory models is given in Otmar M. Stöcker, 'Covered bond models in Europe: fundamentals on legal structures', *Housing Finance International*, Winter 2011, pp. 32–40. Switzerland provides an example of how holding the mortgage in trust for the creditors is practised on a large scale, for, i.a., covered bond purposes, see Dieter Zobl, 'Treuhänderische Verwaltung und Übertragung von Registerschuldbriefen', in *Schweizerische Zeitschrift für Beurkundungs- und Grundbuchrecht* (ZBGR) 2013 pp. 217–237.

[15] For examples, see Otmar M. Stöcker and Rolf Stürner: *Flexibility, Security and Efficiency of Security Rights over Real Property in Europe*, Volume III (2nd revised and extended edition Berlin 2010), Schriftenreihe des VdP Band 44 (available at https://www.pfandbrief.de/site/en/vdp/publications/vdp_schriftenreihe/vdp_No_44_Security_Rights.html) pp. 99–101. For a thorough description of these challenges for complex financing arrangements, that arise when a mortgage cannot be held by someone other than the creditor of the secured claim, see Stöcker, *Die Eurohypothek II* (n. 10) pp. 74–76.

[16] For a comparative European overview of the structures of covered bonds and mortgage-backed securities, see Nasarre-Aznar, *Securitisation & mortgage bonds: Legal aspects and harmonization in Europe* (n. 14). An overview of the different ways to structure covered bonds in Europe, showing how many regulations demand credits and mortgages to be transferred to a separate entity, is given in Stöcker, *Covered bond models in Europe: fundamentals on legal structures* (n. 14) pp. 32–40.

might make securitisation costly, and it could prevent the efficient exercise of secured syndicated loans or other large and complex financing transactions.

Due to these disadvantages of the accessory mortgage, most European countries have developed mortgages with independent (or 'non-accessory') elements, either through legislation or practice.[17] These mortgages can roughly be split into three categories: (a) the land debt, (b) mortgage letters with a fictitious claim or an abstract declaration of indebtedness, and (c) maximum amount mortgages.

> In the debate about models for an EU mortgage (known as the 'Euro-mortgage' or 'Eurohypothec'), mortgages are often only placed in one of two categories: accessory or independent.[18] In my opinion, this paints a too simplified picture of the different forms of independent mortgages or partly independent mortgages, as there are hardly any mortgages that are fully accessory or fully independent.[19] One source of confusion may be that, although accessoriness is thoroughly defined in many legal systems – through legislation, case law and literature – its counterpart, independence, has not been given the same attention. It is often simply seen as the implied counterpart and can be interpreted as anything from *any* deviance from a strict, logical principle of accessoriness to 'ordinary' independent rights that are only *used* as security.[20] In this text, independence will be used in the first sense – as any deviance from an inextricable link between the secured claim and the mortgage.

a. The land debt

The 'land debt' mortgage indicates that the land itself is charged with a sum of money. The obvious example of this type of mortgage is the German *Grundschuld*. Originally, the *Grundschuld* was not linked to a personal claim, and can be characterised as an undeveloped

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[17] Cf. *von Bar/Drobnig* (n. 4) pp. 341–342 and 354–355 and Stöcker, *Die Eurohypothek II* (n. 10) pp. 68–71.
[18] See i.a. Thomas Wachter, 'Die Eurohypothek – Grenzüberschreitende Kreditsicherung an Grundstücken im Europäischen Binnenmarkt', *Wertpapier-Mitteilugen* (WM) 1999 pp. 49–70 Hans G. Wehrens, 'Real Security regarding Immovable Objects – Reflections on a Euro-Mortgage', in Arthur Hartkamp et al. *Towards a European Civil Code* (3rd ed., Kluwer Law International 2004) pp. 769–783, Matias Habersack, 'Die Akzessorietät – Strukturprinzip der europäischen Zivilrechte und eines künftigen europäischen Grundpfandrechts', *Juristen Zeitung* (JZ) 1997 pp. 857–865, Bénédict Föex, 'L'Eurohypothèque', in Franz Werro (ed.) *L'européanisation du droit privé – Vers un Code Civil Européen?* (Éditions universitaire de Fribourg 1998) pp. 489–490, Steffen Kircher, *Grundpfandrechte in Europa* (Duncker & Humblot 2004) pp. 556–561, *Rupp* (n. 6) pp. 529–589 and Sjef van Erp, 'A Comparative Analysis of Mortgage Law: Searching for Principles', in Antonio Gambaro and María Elena Sánchez Jordán (ed.), *Land Law in Comparative Perspective* (Kluwer Law International 2002) p. 83.
[19] On this point, see Otmar M. Stöcker, 'The Eurohypothec – Accessoriness as legal dogma?', in Agnieszka Drewicz-Tułodziecka (ed.), *Basic Guidelines for a Eurohypothec* (Mortgage Credit Foundation Warsaw 2005) (available online at http://www.ehipoteka.pl/ehipoteka/content/download/107/498/file/Zeszyt%20Hipoteczny%20nr%2021.pdf) which on p. 46 draws a distinction between accessoriness of origin, scope, competency, extinguishment and enforcement. See also *Medicus* (n. 4), *von Bar/Drobnig* (n. 4) p. 341–342 and *van Vliet* (n. 4) p. 287.
[20] Compare, e.g., Stöcker, *The Eurohypothec – Accessoriness as legal dogma?* (n. 19) p. 46 with *Rupp* (n. 6) pp. 61–64.

and simple security right.[21] It was a claim (*in rem*) against a property and has its origin in old Germanic law.[22] Because of a wish to respect the divergent credit practices in different parts of Germany, it was included in the German civil code, although the accessory Hypothek seems to have been intended to be the main security interest.[23]

Afterwards, the so-called *Sicherungsgrundschuld* was developed in banking practice. Through a security agreement, the land debt mortgage was linked to a personal claim, or at least some specified obligation or creditor-debtor relationship, so that the right to hold the land liable was limited to what was actually owed. Through the security agreement, the mortgage becomes *contractually* accessory. In this way, the mortgagor is not entitled to collect both 'debts'; the land debt is just security for a claim.

The advantage of this model is that, *in rem*, the *Grundschuld* is fully independent of the secured claim. It can therefore be created before the loan is disbursed, and it is flexible in the sense that it can secure any claim as long as this claim can be described in the security agreement. Changes can be made to the secured claims without registration in the land registry being necessary.[24] Today, the *Grundschuld* totally dominates the German credit market, while the *Hypothek* is hardly in use at all.[25]

Here, one might draw a parallel with security arrangements where property rights are *used* as security, even though the right itself is not ordinarily, or at least not originally, seen as a security right. A typical example would be a transfer of ownership for security purposes, which dates all the way back to the Roman law concept of *fiducia cum creditore*, and which was the original construction of the English mortgage. The basic concept is that the establishment of an independent right through an agreement is made dependent on the repayment of a debt.[26] A current example is the French *fiducie-sûreté* which was introduced in 2007. The *fiducie-sûreté* permits the transfer of property to a trustee, where the property is

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[21] See Rolf Stürner, 'Die Grundpfandrecht zwischen Akzessorietät und Abstraktheit und die europäische Zukunft', in *Festschrift für Rolf Serick zum 70. Geburtstag* (Mohr Siebeck 1992) p. 379.

[22] The old Germanic root of the land debt, the *Satzung*, can also be traced to the Swiss *Grundschuld*-like mortgage of *Gült*, which has not, however, been developed in the same way as the German *Grundshuld*, and was hardly used in modern Swiss credit practice. It could not be coupled with personal liability for the debt and was solely a monetary burden on the property itself. See Wolfgang Wiegand, 'Theorie unde Praxis der Grundpfandrechte', in *Berner Bankrechtstag 1996* (Bern 1996) pp. 65–66 and 76–77. The Gült was abolished in 2012, see Jörg Schmid and Bettina Hürlimann-Kaup, *Sachenrecht* (5th ed. Schultess 2017) p. 581.

[23] See Fritz Baur, Jürgen F. Baur and Rolf Stürner, *Sachenrecht* (18th ed. C.H. Beck 2009) pp. 450–451.

[24] Baur/Stürner, *ibid.* pp. 455–457.

[25] *Stürner* (n. 21) p. 379.

[26] The English mortgage was originally based on such a transfer of ownership, but today it has been replaced by a *charge* on the estate, admittedly 'by way of legal mortgage' to uphold the previous regulation of it, see the Land Registration Act 2002 section 23 (1) and the Law of Property Act 1925 section 85 (1). See also *Gray/Gray* (n. 2) pp. 694 and 696. Also in the US, the traditional mortgage as a conveyance of title has almost disappeared, see Barlow Burke, *Real Estate Transactions* (6th ed. Wolters Kluver 2014) pp. 239–243.

held as security for an obligation.[27] This arrangement allows substantially more flexibility than other French mortgages.[28]

b. Mortgage letters combined with a fictitious claim

The second category comprises mortgages incorporated in documents with a combination of right of mortgage and a fictitious claim in the same document.[29] Through a security agreement, these mortgage letters are used in one way or another as security for an underlying debt. The dogmatic constructions vary slightly, but the main characteristics are found in one of the types of mortgages in Denmark (*ejerpantebrev*), Norway (*pantobligasjon*) and Switzerland (*Schuldbrief*).[30]

Similarly with the land debt mortgages, there are in theory two claims in this category, even though the goal was to obtain *security* for *one* claim. The fictitious claim satisfies the demand for pre-fixed determination of the claim when registering the mortgage, and it makes it possible for the parties to the security agreement to secure different claims up to the sum set for the fictitious claim.[31]

At least for the Norwegian and Danish mortgage models, the construction is the result of a different credit market in earlier times. These forms of mortgages were developed in times when credit was far harder to obtain, and lenders had much smaller portfolios than today. For these reasons, it was essential that the mortgage and secured claim were easy to transfer and secure to acquire, so that the lender could refinance, if necessary. These forms of

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[27] For an overview of the regulation of the *fiducie-sûreté*, see Laurent Aynès, Pierre Crocq and Augustin Aynès, *Droit des sûretés* (13th ed. LGDJ 2019) pp. 472–488.

[28] For a thorough treatment of accessoriness with regard to the *fiducie-sûreté*, see Christian Fix, *Die fiducie-sûreté. Eine Untersuchung der französischen Sicherungstreuhand aus deutscher Sicht* (Mohr Siebeck 2014) pp. 106–149.

[29] In some countries referred to as an abstract declaration of indebtedness. See further about securing 'abstract claims' *Rupp* (n. 6) pp. 660–665.

[30] I have provided an overview of the Norwegian mortgage construction in English in Hans Fredrik Marthinussen 'Country report Norway', in Otmar M. Stöcker (ed.) *Flexibilität der Grundpfandrechte in Europa*, Band II, (Berlin 2007), Schriftenreihe des VdP Band 32 (available online at https://www.pfandbrief.de/site/dam/jcr:107e8e6b-ea04-4026-86da-feedbdd86c2e/vdp_Nr_32_Stoecker_Flexibilitaet_II.pdf) pp. 17–45. The Danish *ejerpantebrev* is described in detail in Bent Iversen, Lars Hedegaard Kristensen and Lars Henrik Gam Madsen, *Panteret* (5th ed. Karnov Group 2015) pp. 172–182. For the Swiss *Schuldbrief*, see *Schmid/Hürlimann-Kaup* (n. 21) pp. 544–580. In Switzerland, it is also possible in a different form, the *Inhaberhypothekarbligation*/*obligation hypothécaire au porteur*, see Schmid/Hürlimann-Kaup, *ibid.* pp. 494–496.

[31] Another decisive factor for the use of a fictitious, 'abstract' claim is that it is often easier to enforce the mortgage (through execution) when the claim is specified, see, i.a., Lilleholt, 'Pantebrev i ny form', *Lov og Rett* (LoR) 2002 pp. 416–425 (for Norwegian law). For this reason, an abstract declaration of indebtedness is also used in combination with the German *Grundschuld*, even though the *Grundschuld* is independent, see Volker Hahn, 'Grundschuld und abstraktes Schuldversprechen', *Zeitschrift für Wirtschaftsrecht* (ZIP) 1996 pp. 1233–1234.

mortgages (including the Swiss ones) are therefore normally constructed as negotiable documents.[32]

> Interestingly, all these paper documents, with their proposed advantages of being negotiable documents, are being transformed into digitalised forms where there is no longer any need for a paper mortgage letter. The main driver for this reform is the constant digitalisation of the registration processes for rights over land. In Denmark, the possibility of using a paper document has been completely removed, while in Norway and Switzerland, this is still possible, but in practice avoided by the financial institutions.[33]

c. Maximum amount mortgages

The third category of independent mortgages comprises mortgages that function openly only as a security right (*in rem*) with a fixed upper limit for the secured credit. Examples of this category are found in the Nordic countries, the Norwegian and Danish *skadesløsbrev*, and the Swedish and Finnish *pantbrev*. Through the land law reform of 2002, it was also introduced into English law, according to the Law Commission partly inspired by the Swedish regulation,[34] although it was already well known throughout the US at the time in a much more similar form that the system in Sweden.[35] With the Scottish reform of mortgage law in 1970, Scotland introduced its so-called 'standard security'.[36] This makes it possible to secure future advances of any amount; an actual maximum amount is not mandatory.[37]

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[32] For an outline of the continental-European practice of *Wertpapierhypothek* (use of bills of exchange), see *Rupp* (n. 6) pp. 71–80 and 665–678. For the particular form of *Schuldversprechenshypothek*, see Christian von Bar, *Gemeineuropäisches Sachenrecht*, Band I (C.H. Beck 2015) p. 662.

[33] For Denmark, see Peter Mortensen, *Digitale panterettigheder – en oversigt* (Pejus 2007) p. 54, for Switzerland, *Schmid/Hürlimann-Kaup* (n. 21) pp. 549–550 and *Zobl* (n. 14) pp. 217-218, and for Norway, Jens Edvin A. Skoghøy, *Panterett* (4th ed. Universitetsforlaget 2018) pp. 163–166.

[34] See Law Commission and H M Land Registry, *Land registration for the twenty-first century: A conveyancing revolution*, Law Commission No. 271 (2001), para 7.35 (pp. 132–133), now to be found in the Land Registration Act 2002 section 49 (4).

[35] See *Restatement of the Law, Mortgages* (n. 2) pp. 45–70. Formally, Section 49 (4) of the English Land Registration Act 2002 only concerns the right to tack further advances, which technically differs quite substantially from the Swedish *pantbrev* system. Functionally, though, in both cases an upper limit is established for secured claims, which can be used freely without regard to lower-ranking proprietary rights.

[36] The standard security might appear to be more independent if it is created with 'form B' instead of 'form A', although in practice mortgagors seem to also come a long way with form A. See Scottish Law Commission, *Discussion Paper on Heritable Securities: Pre-default* (Discussion Paper No 168) pp. 69–70 (available at https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/heritable-securities/), cf. *Steven* (n. 4) pp. 394–395. In practice, it can be questioned whether there is an actual difference at all, and the Scottish Law Commission suggests abolishing the mandatory forms A and B, see *Discussion paper 168* pp. 74–77. For an explanation of the choice of the term standard security instead of e.g. mortgage, see the *Discussion Paper 168* pp. 29–30.

[37] See Scottish Law Commission, *ibid.* p. 71 and *Steven* (n. 4) p. 403.

This type of mortgage is also found, with a varying degree of independence, in most European countries with an accessory mortgage tradition in the form of maximum amount hypothecs.[38] The Continental European maximum amount hypothecs are often presented as a (minor) modification of the accessory mortgage, but, in reality, there are often few traces left of accessoriness. There might be a certain dogmatic tendency to fall back on the principle of accessoriness, however, when there is no clear deviance from it in the legal sources.[39]

A maximum amount mortgage is registered in the land registry with nothing more than a maximum amount for the claims to be secured. It is then left to the mortgagor and mortgagee to link claims to the security through a security agreement. As to enforcement, the maximum amount mortgage is accessory; it is a necessary condition for enforcement that the mortgagee is be able to present overdue claims that are secured by the mortgage in question. Apart from the accessoriness of enforcement, however, these mortgages are usually largely independent of the underlying credit. They are typically formed to circumvent the disadvantages of the old, traditional strictly accessory mortgages in order to make it possible, i.a., to secure future claims of an unknown amount and fluctuating debts.

> The French '*hypothèque rechargeable*' may be seen as a hybrid solution, i.e. a form of maximum amount mortgage, but with less derogation from the principle of accessoriness. It is, for example, not clear whether it is possible to register a maximum amount that is higher than the initial secured claim,[40] and hence it is also not clear whether the *hypothèque rechargeable* in practice allows the establishment of the mortgage before there is even an established secured claim, by securing a claim of 1 euro.[41] As the word rechargeable indicates, the main idea seems to have been to allow for the *reuse* of the mortgage, thus removing the accessoriness of extent.[42]

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[38] See *von Bar* (n. 32) pp. 661–662.

[39] An illustrative example can be found in Petra Kurzbauer, *Die Höchstbetragshypothek* (Manzsche Verlags- und Universitätsbuchhandlung 1999) p. 106, about the Austrian *Höchstbetragshypothek*: '… jede Ausnahme vom Akzessorietätsprinzip durch einen besonderen Grund zu rechtfertigen ist …'

[40] Cf. Michel Cabrillac, Christian Mouly, Séverine Cabrillac and Philippe Pétel, *Droit des sûretés* (10th ed. Lexis Nexis 2015) p. 683, *Aynès/Crocq/Aynès* (n. 27) p. 401, Michel Grimaldi, 'L'hypothèque rechargeable et le prêt viager hypothécaire', *La Semaine Juridique* 2006 p. 948 and Michel Dagot, *L'hypothèque rechargeable* (LexisNexis 2006) pp. 24–34.

[41] Formally, the existence of a secured claim is necessary in order to establish a hypothèque rechargeable, see *Aynès/Crocq/Aynès* (n. 27) pp. 400–401. The same question can be asked about English mortgages for further advances: Is it possible to make the initial advance for GBP 1, thus establishing the mortgage and making all future disbursements 'further advances', thereby avoiding the problem of the *Hopkinson v Rolt*-rule described in *Goode/Gullifer* (n. 9) p. 188?

[42] The *hypothèque rechargeable* was introduced into French law with the reform of the law on security rights in the Code Civil in 2006. It was not used very frequently and was abolished by loi n° 2014-344 du 17 mars 2014. It was then quickly reintroduced for 'professional debts' through loi n° 2014-1545 du 20 décembre 2014, see *Aynès/Crocq/Aynès* (n. 27) pp. 402–403 with further references. For an outline in English, see Vincent Sagaert, 'Main developments in immovable securities in French and Belgian law. A transition from tradition to modernity', in *Hinteregger/Borić* (n. 4) pp. 209–212. The innovation of being able to recharge a security was used also for the *fiducie-sûreté*. For the *fiducie-sûreté* it is even allowed to recharge the security without regard

As for the maximum amount mortgages that have developed from the accessory mortgages in Continental European traditions, accessoriness of ownership has often been retained. The financing techniques used where it is necessary to enable the security right to be transferred to another person than the creditor of the secured claim are relatively new, or are at least have only recently been used on a large scale. Thus, it is not surprising that legal traditions with a strong dogmatic focus on the principle of accessoriness may still have the form of accessoriness that compels the creditor of the secured claim to also be the holder of the mortgage.[43] Conversely, the Norwegian *skadesløsbrev* and the Scottish standard security are examples of maximum amount mortgages where the secured claim may be held by someone other than the holder of the mortgage.[44] Scottish Law illustrates how the basic approach to this question is affected by the point of departure for the legal analysis. In many countries, one would look for a legal basis for exceptions to a general principle of accessoriness.[45] In a Scottish case, when it was claimed that 'the person in whose favour a standard security is granted must also be the creditor in the obligation secured by the standard security', the court simply noted that it could not find such a rule in the present legislation.[46]

4. Qualities of a modern mortgage

In the following, I will analyse which qualities a modern mortgage should possess. By using the term 'modern', I already presuppose a certain degree of independence. Mortgages that are not capable of being registered and securing a rank in the land registry before the secured

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to the original amount secured, see *Aynès/Crocq/Aynès* (n. 27) pp.482–483 and *Cabrillac/Mouly/Cabrillac/Pétel* (n. 40) p. 648. In practice, the *fiducie-sûrete* seems more independent from the secured claim than both the *hypothèque rechargeable* and traditional Continental European maximum amount hypothecs. For more on this point, see *Fix* (n. 28) pp. 115–149 and 320–321.

[43] This is the case for, i.a., the French *hypothèque rechargeable*, see *Dagot* (n. 40) pp. 12–13, 39 (footnote 63) and 153, the German *Höchstbetragshypothek*, see *Baur/Stürner* (n. 23) p. 555, and the Austrian *Höchstbetragshypothek*, see *Kurzbauer* (n. 39) p. 10 . It also seems to be the case for the Danish *skadeløsbrev*, see *Iversen/Kristensen/Madsen* (n. 30) p. 192, and possibly (although unclear and disputed) the Swedish *pantbrev*, see Ulf Jensen, *Panträtt* (10th ed. Iustus 2016) pp. 65–66 and 68–69. See also the discussions of the Dutch *bankhypotheek*, particularly in relation to the Supreme Court Balkema-case (HR 16 September 1988, NJ 1989, 10), i.a. *Thiele* (n. 13) pp. 64–66 and 89–91, M. G. van 't Westeinde, 'De overgangsperikelen van een bankhypotheek' (I), *Weekblad voor Privaatrecht, Notariaat en Registratie* (WPNR) 1999, pp. 689–693 and P. Brown, 'Bankhypotheek in gezamenlijk verband', *Ars Aequi* 1996 pp. 407–415.

[44] For Norway, see Hans Fredrik Marthinussen, *Forholdet mellom panteretten og det sikrede kravet* (Cappelen Akademisk 2010) pp. 376–383, and for Scotland, Scottish Law Commission, *Discussion Paper 168* (n. 36) pp. 33–34 and *Steven* (n. 4) pp. 406–410.

[45] See the quote from *Kurzbauer* in footnote 39 above.

[46] [2016] SC EDIN 70, 2017 SLT (Sh Ct) 9, described in Scottish Law Commission, *Discussion Paper 168* (n. 36) p. 34.

credit is established, that are not capable of securing future advances of an unknown amount, and that, by law, cease to exist if there are no secured claims, are outdated mortgages. To a large extent, this is already a past stage in the development of mortgage law in most European countries.[47]

The question of protection of the debtor and owner of the mortgaged property is of course a central issue. However, this is far from the only important question as regards the basic construction of security rights, since the needs of modern financing must also be taken into consideration. At best, we can find mortgage constructions that ensure the protection of mortgagees and mortgagors, and the needs of the modern financial markets.

4.1. Protection of mortgagor against overpayment

The advantages brought by independent mortgages are for some forms accompanied by increased risks for the mortgagor. The combination of an extra debt and the right to rely on either what is registered in the land registry or what is written in a negotiable document creates a risk of an obligation to pay more than the actual secured credit.

As for the land debt model, the German *Grundschuld* as it was up until the German Limitation of Risk Act 2008 ('Risikobegrenzungsgesetz'), can illustrate this problem. The *Grundschuld* is *in rem* independent and can therefore be transferred separately.[48] The mortgagor could in principle hold the content of the security agreement against the acquirer of the *Grundschuld*.[49] However, since this objection was a *contractual* limitation of the *Grundschuld* as a fully independent claim against the land it encumbered, if the buyer had no actual knowledge of the objections, he acquired the *Grundschuld* for its full amount, as registered in the land register.[50]

The same risk of overpayment exists for mortgages formed as negotiable documents. The Norwegian *pantobligasjon* can serve as example. The mortgage document is a negotiable document with a (fictitious) declaration of indebtedness and a specification of the property to be mortgaged. The mortgagor can, in principle, hold the objections arising from the security agreement against a purchaser of the mortgage, but a bona fide purchaser can acquire the document free of such objections, in accordance with the document's written text.[51]

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[47] Cf. *von Bar* (n. 32) pp. 660–662.
[48] *Baur/Stürner* (n. 23) p. 591.
[49] BGB § 1157
[50] BGB § 1157 last sentence with BGB § 892 (1), see *Baur/Stürner* (n. 23) pp. 590–593.
[51] The Norwegian Debentures Act 1939 ('gjeldsbrevloven') § 15. For this reason, this form of mortgage is no longer allowed if the mortgagor is a consumer, see the Financial Agreements Act 1999 ('finansavtaleloven') §

It is occasionally argued that these risks are not important when trying to find the ideal mortgage model, as there are ways in which the mortgagor can protect himself against the risk of double payment. As for the German *Grundschuld*, it has been noted that the mortgagor and mortgagee could agree that the mortgage cannot be transferred, and this could also be registered in the land registry.[52] Another means of protection is for the mortgagor to make sure that instalment payments are registered in the land register, or noted on the mortgage document in the case of a letter-*Grundschuld*. In the case of Norwegian and Swiss mortgage letters, recording instalment payments on the mortgage letter would prevent any risk of double payment.[53]

However, these techniques are almost never used in practice and, realistically, they will not give the average consumer any protection. First of all, most consumers are unaware of the risks and, secondly, the banks completely control the terms of credit and security agreements. As for registration or recording of instalment payments on the mortgage letter, such measures prevent the flexibility these forms of mortgages are created to facilitate, and they may, for instance, complicate refinancing for both the mortgagor and mortgagee.[54] It will also cause mortgages with lower priority to advance in priority, so that the mortgagor cannot re-use the formerly vacant 'hole' in the priority chain for new credit (with credit terms reflecting the better priority).[55]

The advantages and risks of independent mortgages outlined above are consequences of their particular dogmatic construction, and of rules that allow a bona fide purchaser to rely on either the content of a land register or a negotiable mortgage document.[56] With a pragmatic approach, they can easily be eliminated.

The above-mentioned German Limitation of Risk Act of 2008 is a clear example. The reform was triggered by media coverage of sales of German mortgages in the form of

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55. Negotiability also makes the handling of these documents risky and costly; the mortgagor will have to exercise caution in order to ensure that they do not fall into others' hands.

[52] See *van Vliet* (n. 4) p. 295.

[53] For Norwegian law, see the Debentures Act 1939 ('gjeldsbrevloven') § 15 (5). For Swiss law, see *Schmid/Hürlimann-Kaup* (n. 21) p. 557 and Otmar M. Stöcker, *Die "Eurohypothek"* (Dunker & Humblot 1992) p. 272.

[54] Stöcker, *ibid*. and *van Vliet* (n. 4) p. 295.

[55] I will elaborate on these advantages of re-use in section 4.5 below.

[56] The risk of having to pay more than what is owed, stems from the double claim structure, and not from the independence of the mortgage itself. This is quite evident from the upcoming example of the maximum amount mortgages, which clearly do not provide for any possibility of extinction of debtor's objections. As the German *Hypothek* (in the regular form of *Verkehrshypothek*) shows, the risk of having to pay the full amount of the registered claim, notwithstanding what is owed, can exist also for accessory mortgages, if there is a right to rely on the sum of the claim registered in the land register. See *Baur/Stürner* (n. 23) pp. 458-459 and Johannes Köndgen and Otmar M. Stöcker, 'Die Eurohypothek – Akzessorietät als Gretchenfrage', *Zeitschrift für Bankrecht und Bankwirtschaft* (ZBB) 2005 p. 120.

Grundschuld to hedge funds before the financial crisis, when the sale of mortgage-backed financial instruments was still blossoming. This led to fear that these mortgages could be enforced for their full amount, even though the amount of the *Grundschuld* did not correspond with the underlying credit.[57] To prevent this from recurring, the German legislator, through the Limitation of Risk Act, added a new provision to the German Civil Code (BGB). The BGB § 1192 (1a) now states that objections arising from the security agreement must also be respected by subsequent holders of the *Grundschuld*, regardless of whether or not they were acting in good faith when they acquired it. Consequently, an owner of land in Germany who grants a security over his property in the form of a *Grundschuld*, is now well protected against any form of overpayment due to *bona fide* acquisition of the mortgage.[58]

For the mortgage constructions based on negotiable documents, the same solution can be used without completely eliminating the possibility of facilitating transfers through the possession of mortgage certificates instead of registration. The paper could still legitimise (with effect *in rem*) the possessor as the correct mortgagee, and the transfer of the paper itself could secure the transferee against the transferor's successors (first and foremost creditors). From a consumer protection perspective, the important thing is to exclude the possibility of extinguishing the mortgagor's objections arising from the underlying security agreement.[59]

Other, more limited solutions to this problem have also been proposed. One is to make the transferor liable in damages, which is clearly not a satisfactory solution. Since these problems arise from fraudulent behaviour on the part of the transferor (former mortgagee), an ordinary claim for damages is often not of much help. The transferor is often either insolvent or has disappeared. It is a better solution if the circle of possible mortgagees is limited to publicly supervised banks, combined with strict liability for any form of extinction of the

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[57] See Clemens Clemente, 'Neuerungen im Immobiliardarlehens- und Sicherungsrecht. Risikobegrenzungsgesetz und andere Entwicklungen', *Zeitschrift für Immobilienrecht* (ZfIR) 2008 pp. 589-591, *Baur/Stürner* (n. 23) p. 595, Peter Bülow, 'Die Sicherungsgrundschuld als gesetzlicher Tatbestand', *Zeitschrift für das Juristische Studium* (ZJS) 1/2009 p. 1, and *van Vliet* (n. 4) p. 293.

[58] See *Baur/Stürner* (n. 23) p. 584 and Jan Wilhelm, *Sachenrecht* (5th ed. De Gruyter 2016) pp. 842–844. This is also the solution for the new Hungarian independent mortgage, see Balázs Bodzási, 'Reregulated Non-accessory lien in the Hungarian Civil Code', in Zoltán Csehi (ed.), *Magyar kereskedelmi jogi évkönyv* (*Ungarisches Jahrbuch für Handelsrecht*), band IV (2017) pp. 29–34. The same solution was suggested for the proposed Euro-mortgage by the Eurohypothec workgroup, see *Drewicz-Tułodziecka* (n. 19) section B II 5.4 and 5.6 (p. 18). See also Stöcker, *The Eurohypothec – Accessoriness as legal dogma?* (n. 19) pp. 48–52. The German legislator refrained from a more complete reform of the security rights in the civil code, resulting in the German accessory *Hypothek* now being far riskier than the independent *Grundschuld*. See the critique in *Baur/Stürner* (n. 23) p. 595.

[59] When refinancing, it can be an advantage if any objections arising from the previous credit relationship can be extinguished through novation, so that a new creditor may safely use an existing mortgage. The important legal point is that the debtor's objections cannot be extinguished without his involvement.

debtor's objections when banks transfer mortgages.[60] The limitation of mortgagees must be combined with restrictions preventing these mortgagees from transferring mortgages to other companies than those that are accepted as 'original' mortgagees.[61] Under such a regulation, the consumer would be relatively well protected against the risk of double payment.[62] This solution can cause problems for mortgage financing, however, as most special entities holding mortgages for covered bonds or securitisation purposes, are not financial institutions under public supervision.

There seems to be little reason to prefer more limited solutions to the problem of consumer protection in this area. When reforming current mortgage laws or introducing new mortgage constructions that could potentially dominate the market, it would clearly be an advantage if these documents are also available to anyone who wishes to commit to a secured loan contract, since, over time, this will be the type of mortgage that lawyers, courts and jurisprudence in general will concentrate on. There is also reason to point out that, in crises, banks may pose a significant risk to consumers even under the strictest regulatory model allowing *bona fide* extinguishment of the debtor's objections.

In addition, there does not seem to be a real need to allow for the possibility of a bona fide acquisition of a mortgage free of the debtor's objections arising from the security purpose and the underlying secured claim. As shown in this overview,[63] only a handful of European countries allow for such acquisitions:

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[60] See Hans Wolfsteiner and Otmar M. Stöcker, 'Nicht-akzessorisches Grundpfand für Mitteleuropa', *Zeitschrift für Bankrecht und Bankwirtschaft* (ZBB) 1998 p. 265 (also available in English: *A non-accessory Security Right over Real Property for Central Europe*, Notarius International 2003 pp. 116–124), Stöcker, *Die "Eurohypothek"* (n. 53) p. 271, Wehrens, *Reflections on a Euro-Mortgage* (n. 18) p. 778 and Katrin Schmidbauer, *Nationale und internationale Aspekte der Kredithypothek* (Munich 2012) p. 218.

[61] The Hungarian independent mortgage can only be established by and transferred to financial institutions, see *Bodzási* (n. 58) pp. 16–17.

[62] However, he still has the burden of having to institute legal proceedings.

[63] The map is part of the project 'Round table – Security rights over real property', where experts on mortgage law from most European countries meet in Berlin at the Verband deutscher Pfandbriefbanken and present an overview of their mortgage law, also in light of general property, enforcement and insolvency law. The overview is provided in the form of maps such as the one shown here. A thorough, general description of the project can be found in Tim Lassen, Andreas Luckow and Mario Thurner (ed.), *Grundpfandrechte 2016 in Europa und darüber hinaus* (Berlin 2016), Schriftenreihe des VdP Band 54 (available online at https://www.pfandbrief.de/site/de/vdp/publikationen/vdp_schriftenreihe/vdp_Nr_54_Lassen_Luckow_Thurner_Grundpfandrechte_2016_EU.html), parts I and II. See also the homepage of the project at https://www.pfandbrief.de/site/de/vdp/agenda/think_tank/runder-tisch-grundpfandrechte.html. The maps have been published with commentaries in Otmar M. Stöcker and Rolf Stürner: *Flexibilität, Sicherheit und Effizienz der Grundpfandrechte in Europa*, Band III, (3. erweiterte Auflage Berlin 2012), Schriftenreihe des VdP Band 50, (available at https://www.pfandbrief.de/site/de/vdp/publikationen/vdp_schriftenreihe/vdp_Nr_50_Stoecker_Stuerner_Grundpfandrechte_Europa_BandIII.html). The latest available edition in English is Stöcker/Stürner: *Flexibility, Security and Efficiency of Security Rights over Real Property in Europe*, Volume III (2nd revised and extended edition Berlin 2010), Schriftenreihe des VdP Band 44 (available at https://www.pfandbrief.de/site/en/vdp/publications/vdp_schriftenreihe/vdp_No_44_Security_Rights.html). The

The traditional European maximum amount mortgages do not allow for extinguishment of a debtor's objections, since they openly secure an unspecified credit up to a certain amount, and thus do not give the impression of securing a specified credit in its full amount.[64] This does not appear to have created significant problems for banks in the many countries that have such mortgage constructions. In Norway, where the *pantobligasjon* allows for extinguishment of the debtor's objections, the maximum amount mortgage (*skadesløsbrev*) is almost exclusively used by the banks. Because of the risks for the debtor, the *pantobligasjon* is forbidden by law if the debtor is a consumer.[65] In addition, the new, fully electronic mortgages, which the banks may themselves register directly in the land register, are in the form of *skadesløsbrev*. The advantages of having one form of mortgage for consumers and businesses, and being able to register the mortgage directly, are clearly seen as more important than the possibility of a *bona fide* acquisition, free of the debtor's objections.

All in all, it is difficult to find good arguments for mortgage constructions that allow a *bona fide* acquirer of a mortgage to extinguish the debtor's objections arising from the underlying agreement on what is to be secured.

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off-map circles 'JP', 'CA', and 'NY' stand for Japan, Canada/State of Ontario and US/New York State, respectively. Maps reflect the law as of 17th of November 2020. European jurisdictions not represented in the project: Belarus, Moldova, Albania, Montenegro, North-Macedonia, Cyprus, Iceland, Northern-Ireland, Kosovo, Malta, Liechtenstein, San Marino, Monaco and the Vatican.

[64] See e.g. *Kurzbauer* (n. 39) p. 14.

[65] Financial Agreements Act 1999 ('finansavtaleloven') § 55.

If a possibility for *bona fide* extinguishment of the debtor's objections exists, then an important question is what it takes for the acquirer to no longer be in good faith. In German law prior to the Limitation of Risk Act of 2008, it was disputed whether it was sufficient to prevent extinction of the debtor's objections that the purchaser was aware of the security purpose. The prevailing opinion, which was also chosen by the German Supreme Court, was that it was not sufficient to prevent extinction: the purchaser had to know of the actual objection arising from the security agreement.[66] It is reasonable to question the legitimacy of protecting an acquirer who does not even try to find out what amount is actually secured.[67] In my opinion, the approach taken by the Swedish Supreme Court to the same problem strikes a fairer balance between the mortgagor and the acquirer of the mortgage: a Swedish financial institution acquired a portfolio of loans and the seller had guaranteed that the amount stated on the negotiable promissory notes corresponded to the actual outstanding loans. The Swedish Supreme Court noted that it is common for instalment payments to be made on such loans, that they are not noted on the document, and that a professional in the financial sector could not be deemed to be acting in good faith if he did not investigate what was actually owed.[68]

4.2. Burden of proof and enforcement

Another important aspect of legal protection of the mortgagor, especially consumer mortgagors, is the question of the burden of proof. This is again closely linked to the question of rapid enforcement when the secured claim is not repaid. What possibilities should the mortgagee have to easily and rapidly enforce the mortgage when the terms of the credit agreement are not met, and what objections should the mortgagee be allowed to invoke in enforcement proceedings?

This is an important factor in terms of explaining the use of mortgage forms or documents that themselves contain a specified debt. The declaration of indebtedness can shift the burden of proof from the mortgagee to the mortgagor and may also be necessary in order to qualify for simplified mortgage enforcement proceedings.

It is a common feature of mortgages that their specified amount very rarely corresponds with what is actually secured. The specified amount of the mortgage, whether it is explicitly a maximum amount, a fictitious claim or a land debt, is often set higher than the actual secured credit. Reasons for this can include a possible subsequent increase in the credit

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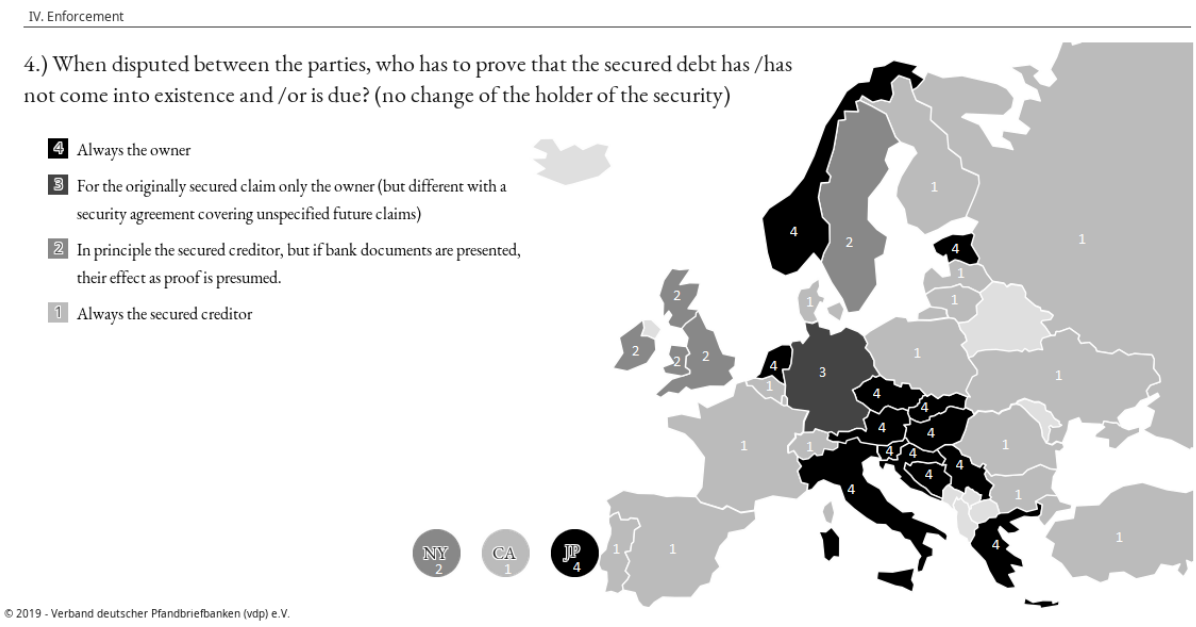
[66] BGHZ 59, 1. See also *Baur/Stürner* (n. 23) pp. 592–593 with further references in footnotes 3–5.
[67] For another approach to German law before 2008, which, at least in my opinion, yields a better result *lex ferenda*, see *Wilhelm* (n. 58) pp. 844–849. See also the critical comments in *Köndgen/Stöcker* (n. 56) p. 119, particularly footnote 38.
[68] NJA 2010 p. 467. The loans in question were not secured by mortgages, but, in all the Nordic countries, the question of good faith when relying on a negotiable document would be identical irrespective of whether the loans were secured or not. For loans secured by mortgages, this is explicitly stated for Norwegian law in *Marthinussen* (n. 44) p. 468.

or to secure interest and possible enforcement costs. Even when the sum is based on the actual secured credit, as in the case of the French *hypothèque rechargeable*, the first instalment payment will lead to a discrepancy between the secured credit and the amount of the mortgage. Given this, it is difficult to justify the specification of a given sum as grounds for shifting the burden of proof, or as having other as regards enforcement. Such advantages should instead be a seen as a sign of poor law on the enforcement of mortgages.

As shown in the European overview, a disturbing number of countries place the burden of proof on the mortgagor:



There can be many different legal explanations for this somewhat disturbing fact. Nor do the results follow the classical dividing lines between Europe's most flexible, independent mortgages, and those with a clearer accessory heritage.[69] The problem can also differ in its significance since the burden of proof can vary greatly between different legal systems. Furthermore, it is reasonable to assume that most legal systems will demand a certain amount of documentation from the lender no matter where the burden of proof is placed.

In my opinion, the burden of proof should ordinarily rest with the professional lender. This will usually promote good lending practice and most professional lenders should have no problem securing necessary proof of the extent of the secured credit. One might argue that placing the burden of proof with the lender could lead to the borrower not exercising the same amount of care with regard to securing documentation himself. In general, there is reason to

[69] Compare, for instance, with the first chart in section 4.4 – the possibility of separating the claim from the mortgage.

suspect, however, that most consumers are not sufficiently aware of, and thereby not affected by, such rules, and in particular not those who are most likely to end up in enforcement proceedings. Hence, in my opinion, using mortgage constructions that technically might lead to a shift in the burden of proof is generally not to be recommended, although, this issue could of course easily be explicitly regulated for forms of mortgages that rely on, e.g., a declaration of indebtedness to set the highest amount the mortgage may secure.

As to enforcement proceedings, this is a more complex issue. Most countries tend to allow fairly swift and simplified enforcement proceedings if certain procedures are followed upon the establishment of the debt and mortgage. In many countries, direct enforceability is achieved by using a notary who is responsible for informing the mortgagor of the risks involved.

In practice, mortgagors in general have no real possibility to refuse such simplified enforcement proceedings if they want to obtain credit. It is also to the benefit of society at large, and also the defaulting borrower, that enforcement proceedings can be conducted swiftly and cost-efficiently in clear-cut cases. For legislators, the focus should therefore be on ensuring that the borrower is properly informed and that there is also a fair level of protection of his objections in such procedures, regardless of how the mortgage itself is constructed. It is a bad idea to allow rapid and simplified enforcement proceedings solely on the grounds of a mortgage constructed through a declaration of indebtedness. Conversely, if such enforcement is based on informed acceptance and the enforcement procedure is balanced as regards the mortgagor's possibilities of raising objections stemming from the underlying agreement on the secured credit, it is less important what form that acceptance takes. An informed signature on a declaration of indebtedness may serve that purpose, of course, but it is an unnecessary complication compared to a simple informed consent to the simplified enforcement itself.

4.3. Transfer of mortgages and the needs of the modern financial markets

While, in many countries, mortgage loans are financed through customer savings and deposits combined with loans from national banks, it is becoming increasingly common to finance mortgage loans by issuing covered bonds. During the period leading up to the financial crisis of 2008–2009, securitisation of mortgage portfolios into mortgage-backed securities was also common.

When performing a securitisation transaction, a mass of mortgages, including both the mortgages and the secured credit, is transferred to a special entity for this particular purpose,

and is then used as security to attract investment.[70] For covered bonds, it may not be necessary to transfer the mortgages to a separate entity. In several jurisdictions, however, the pool of mortgages is separated from the bank's other assets by transferring it to an entity established specifically for the issuance of covered bonds.[71]

In section 4.1., I look at the need for purchasing a mortgage free of the mortgagor's objections, and conclude that no such need exists. It could be argued that if the acquisition of mortgages and debts free of objections is not a possibility, then these financing techniques will be jeopardised. The mass of securities is usually so vast, however, that 'faults' affecting one or a few mortgages can hardly affect the value of the mass as a whole. If strict liability for the existence of the secured claim is added for the transferring bank, this risk poses no actual threat to covered bonds or mortgage-backed securities.

The use of negotiable mortgage documents may be problematic, however. It is often impossible for the transferor to uphold the right to receive payment if the document is physically handed over to the transferee.[72] One possibility is to have a register that allows the transfer of mortgages for the purpose of securitisation without physical handover of the mortgage documents.[73] More generally, the idea that it is such a huge advantage to have the possibility of handing over a physical document seems to contradict modern developments. In the UK, the most important aspect of the Land Registration Act 2002 was to lay the foundation for a completely electronic (paperless) system for the establishment and transfer of rights to an estate, and transfers of mortgages facilitated by the handing over of a mortgage-document of some sort are completely unknown.[74] In Sweden, the burden of having to manage a huge amount of documents has led to the development of a special mortgage letter

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[70] Securitisation is a means by which existing loans can be packaged and sold to investors. The initial lender still collects the debt repayments on behalf of the investors, but he now has access to the capital that was previously tied up in the loan. When these loans are secured by mortgages of property, the security is called a Mortgage-Backed Security (MBS). For more about securitisation, see Eilís Ferran, *Mortgage securitisation: legal aspects* (Butterworths 1992). A comparative overview of securitisation in European countries before the financial crisis is provided in Theodor Baums and E. Wymeersch, *Asset-backed Securitization in Europe* (Kluwer Law International 1996), and Nasarre-Aznar, *Securitisation & mortgage bonds: Legal aspects and harmonization in Europe* (n.14). See also the report of the EU's Mortgage Funding Expert Group: http://ec.europa.eu/internal_market/finservices-retail/docs/home-loans/mfeg/final_report-en.pdf.

[71] See *supra* footnote 14.

[72] This is one of the reasons why securitisation has not been used by Norwegian banks for mortgage financing, see, i.a., Kåre Lilleholt and Søren Wiig, *Norway* in Theodor Baums and E. Wymeersch, *Asset-backed Securitization in Europe* (Kluwer Law International 1996) pp. 203–205.

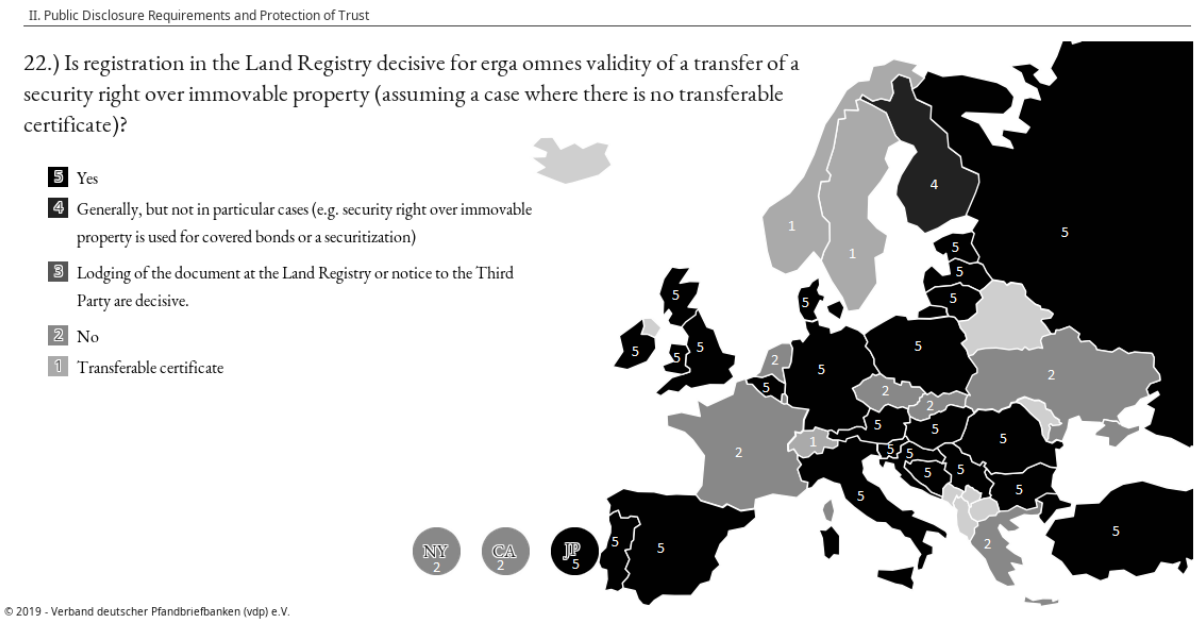
[73] This is the system in Sweden, see the Swedish Debentures Act 1936 ('Skuldebrevslagen', 1936:81) § 22.

[74] See Gary Watt, 'The Eurohypothec and the English Mortgage', *Maastricht Journal of European and Comparative Law* No 2 2006 p. 178 and *Law Commission* No 271 (n. 34), para 2.41. For an overview of the plans for electronic conveyancing, its implications, and its current careful, gradual introduction, see *Bridge/Cooke/Dixon* (n. 2) pp. 249–255.

registry.[75] In Denmark and Switzerland, the physical *ejerpantebrev* and *Schuldbrief* have been replaced by 'register letters', i.e. registered mortgages that are meant to retain the main traits and functions of the previous paper documents.[76] In Norway, full e-conveyancing is already in force, for the time being as a voluntary and efficient alternative to the use of paper documents.[77]

The reason for the continued use of mortgage letters, where the transfer of the physical document is the appropriate act for a valid transfer with effect *erga omnes*, is closely connected to the high fees for registration in land registers, and the relatively detailed and laborious procedures for registration (e.g. notarial confirmation). In a society that is increasingly moving away from the use of paper documents, it is a step backwards to hold on to transfers of mortgages based on the possession of a physical piece of paper. It causes problems for modern mortgage financing techniques, and it is costly. High cost of registering transfers should instead be addressed by simply reducing the fees for registering transfers. In Norway, for example, most mortgages can be transferred without registration, included the *skadesløsbrev*, which does not require the physical handover of a piece of paper, and the fee for registration of transfers of mortgages was significantly reduced to promote competition in the banking market. In Sweden, there is a separate register for electronic mortgage letters, run on a cost coverage basis. Given the number of European countries that do not require the registration of transfers, the best solution might simply be to let go of the idea that transfers of mortgages must be registered:

[75] See *Jensen* (n. 43) pp. 69–72.
[76] For Denmark, see *Mortensen* (n. 33) pp. 53–65 and, for Switzerland, *Schmid/Hürlimann-Kaup* (n. 21) pp. 547–551 and *Zobl* (n. 14) pp. 217-218. Such 'transformations' from physical paper to electronic register-papers (in reality an electronic entry in the register) can easily lead to unexpected difficulties, which the Swiss and Norwegian problems of transferring mortgages treated below in section 4.5 are illustrating examples of.
[77] See Thor Falkanger and Aage Thor Falkanger, *Tingsrett* (8th ed. Universitetsforlaget 2018) pp. 647–650.



4.4. The holding of a mortgage by a security agent or single creditor, for example for syndication purposes

The heritage of accessoriness is particularly apparent as regards the possibility of separating the positions of creditor of the secured claim and mortgagee. In very many European countries, the creditor of the claim is by law also the holder of the mortgage:

This can cause problems when establishing syndicated loans, particularly if the syndication will take place after the original establishment of the loan and mortgage. One model is to set

up a security agent that holds the mortgage on behalf of (or in trust for) the creditors. The security agent could be so structured that the risk of him becoming insolvent is minimal, typically when the security agent is a special purpose entity, and where the creditors in the syndicate are jointly liable for any debts of this entity. By allowing a separate holder of the mortgage, complex parallel debt-structures can be avoided, and a more secure position for the creditors can be established.[78]

A need to hold the security on behalf of (other) creditors can also arise in other situations. One bank may, e.g., wish to secure credit granted by another bank, without giving up control of the mortgage. Another practical example could be where one bank wants to transfer the credit and mortgage to another bank, while still retaining the right to secure possible further claims that may arise later under the established mortgage that is to be transferred.[79] As we have seen, it can also be advantageous when mortgages are transferred to a special entity for covered bonds that the mortgage can continue to secure claims belonging to the transferring bank.[80]

If securing claims of others than the holder of the mortgage is not accepted, this can also cause problems for established private law mechanisms relating to involuntary transfers. If several claims are secured under a mortgage and a third party choses or is forced to pay one of those claims, most European countries have a rule of subrogation (*cessio legis*). A guarantor, or an intervention payer with a sufficiently justified interest to pay, will usually step into the security of the original creditor of the claim at hand.[81] If the holder of the mortgage has further claims secured under the mortgage, a refusal to accept that the mortgage can secure other creditors may lead to the third-party payer losing his right of subrogation since subrogation is usually not allowed if it is to the detriment of the original creditor and security holder. This will be particularly harmful for guarantors and might lead to unnecessary refusals of otherwise rational postings of guarantees or intervention payments.[82]

It can be difficult to foresee all situations that might arise that may necessitate holding a mortgage on behalf of creditors. A current example from Norway can serve as an

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[78] See Stöcker/Stürner: *Flexibilität, Sicherheit und Effizienz der Grundpfandrechte in Europa* (n. 63) pp. 128–129, and Stöcker/Stürner: *Flexibility, Security and Efficiency of Security Rights over Real Property in Europe* (n. 63) pp. 101–102. See also Stöcker, *Die grundpfandrechtliche Sicherung grenzüberschreitender Immobilienfinanzierungen* (n. 13), and, for the illustrating example of Dutch law, *Thiele* (n. 13) pp. 58–107. For some of the challenges in French law. see *Aynès/Crocq/Aynès* (n. 27) pp. 476–479.

[79] See Stöcker/Stürner: *Flexibility, Security and Efficiency of Security Rights over Real Property in Europe* (n. 63) pp. 99–100.

[80] See sections 2 and 4.3 above.

[81] See, e.g., the Draft Common Frame of Reference (DCFR) art. III 4:107 (2) and III 2:107 (2).

[82] For an example, see the discussion of these issues for the Austrian Höchstbetragshypothek in *Kurzbauer* (n. 39) pp.171–204.

illustration: Norway recently put in place a full e-conveyancing system, allowing banks to register mortgages directly in the land register. During this process, it was decided to amend the Land Registration Act of 1935 so that the transfer of 'electronic mortgages' had to be registered in the land register to have third-party effect.[83] This immediately caused problems for Norwegian covered bonds, as mortgages pursuant to Norwegian law must be transferred to a special entity in order to serve as the basis for issuing covered bonds. These pools of credit and mortgages are constantly changing, and it is not unusual for some of the loans secured by these mortgages to be part of the cover pool, while other credits secured by the same mortgage are held by the bank itself. One proposed solution was joint ownership of the mortgage between the bank and the special entity, which raised some questions about the status of the joint ownership regulation in the event of a bank's insolvency. Another was to let the special covered bonds entity hold the mortgage, while simultaneously securing the other credits of the transferring bank linked to the mortgages in question.

A similar problem arose in Switzerland with the change from paper-*Schuldbrief* to register-*Schuldbrief*. The original paper was governed by rules on negotiable documents and could be transferred by being handed over to a new owner. Transfer of the register-*Schuldbrief* has to be registered, which involves significant costs and other burdens for the Swiss banking practice. This problem was solved by registering a third party entity as proprietor of all Swiss register *Schuldbriefs*, holding these in trust for the lending financial institutions.[84]

One possible argument against loosening the link between the mortgage and the secured credit in this connection is that it could facilitate fraudulent behaviour. In a situation where the mortgagor is insolvent, fraudulent agreements can be envisaged between the mortgagee and unsecured creditors, either real or fictitious, that their claims will be secured. As long as the law rests on the basic notion that new claims, irrespective of who holds them, can only be secured through an agreement with the mortgagor, this risk seems to be highly manageable.

> The English rules of tacking provides a good illustration of the balance to be struck when weighing the interest of the mortgagee against the interests of the mortgagor and other potential stakeholders. English

[83] Current Land Registration Act 1935 ('tinglysingsloven') § 22 (1).
[84] A thorough description of the problem, and the solution chosen, is provided by *Zobl* (n. 14).

mortgages are basically accessory by nature.[85] They do not allow a generally protected right to use a mortgage within a limit set upon creation, independent of lower-ranking proprietary rights. Instead, English law provides for 'tacking of future advances', which means that one allows certain future advances to have the same priority as the mortgage obtained when it was created.[86] Pursuant to Section 49 of the Land Registration Act, the right to tack a further advance, ranking in priority to a subsequent charge, only applies to 'the proprietor of a registered charge'. In the case of syndicated loans, the proprietor of the mortgage will often be a security agent acting as trustee for the lenders in the syndicate. In this case, the English rules on tacking do not allow the other lenders in the syndicate to secure priority for future advances. The Law Commission has therefore suggested amending the rules on tacking so that 'a beneficiary under an express trust of the registered charge' or 'creditors to whom the obligation secured by the charge is owed' are also allowed to tack future advances.[87] In the case of more generally independent mortgages, courts may have to strictly interpret agreements to secure 'all current and future claims between the mortgagor and mortgagee', so that the mortgagee may not singlehandedly acquire unsecured claims and then be entitled to secure them under his existing mortgage.[88]

From a mortgage law point of view, there do not seem to be good reasons to allow dogmatic ideas about the security right's accessoriness to the claim it secures stand in the way of the practical needs of the financial markets, and a good mortgage construction should also allow for the securing of claims that do not belong to the holder of the mortgage.[89] As can be seen from this European overview, most of the countries that struggle with syndications are countries that do not allow their mortgages to secure other creditors than the mortgagee:

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[85] Cf. *Kircher* (n. 18) pp. 339–340 with p. 86, *von Bar* (n. 32) p. 639, and Peter Sparkes, *European Land Law* (Hart Publishing 2007) pp. 398–400. See Astrid Stadler, *Gestaltungsfreiheit und Verkehrsschutz durch Abstraktion* (Mohr Siebeck 1996) p. 599 and pp. 578–579 for the American mortgage.

[86] For a simple explanation of the concept of tacking, see *Gray/Gray* (n. 2) pp. 812–813. For a more thorough description of its historic development, see *Bridge/Cooke/Dixon* (n. 2) pp. 1141–1145. I will return to the concept of tacking in section 4.5.

[87] See Law Commission, *Consultation Paper No 227* (n. 9) pp. 394–396. This may also serve as another example of the difficulties of foreseeing problems caused by mortgage accessoriness.

[88] As an illustration, see the discussion in Ross G. Anderson, 'Assignations of All Sums Securities' in Frankie McCarthy, James Chalmers and Stephen Bogle (ed.), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (Open Book Publishers 2016) pp. 73–95 (available online at https://books.openedition.org/obp/2077).

[89] For a comprehensive treatment of the issues in section 4.4, including cross-border financing scenarios and examples from banking practice, see Stöcker, *Die grundpfandrechtliche Sicherung grenzüberschreitender Immobilienfinanzierungen* (n. 13), cf. also Stöcker, *The Eurohypothec* (n. 13) for an overview in English.

4.5. Priority issues – creditor protection and protection of the priority of the mortgagor

Accessory mortgages are reduced in size in step with the reduction of the secured claim. As a result, the mortgagor's payment on a secured loan will free his property for an equivalent part of the mortgage. The mortgagor may then use the now unencumbered part of the value of his property as security for new credit. The accessory mortgage thus facilitates the replacement of old secured loans and mortgages with new ones, and it also protects against over-collateralisation.

A key issue relating to independent mortgages is securing the possibility for the mortgagor to use free capacity within existing mortgages, i.e. that when the mortgage is not filled up to its maximum amount, the mortgagor can offer the 'free space' within the bounds of the security right to another potential creditor and mortgagee. If not, one risks giving the existing mortgagee a form of monopoly over future credits to the mortgagor.[90] As I will return to, many different techniques have been developed in order to facilitate this solution for European independent mortgages.

The owner's possibility of using his property as effectively as possible, and thereby stimulating competition between banks, is an advantage.[91] There is reason to believe that, if the owner himself can use or dispose of free parts, this will generally be done in the most

[90] Cf. *Goode/Gullifer* (n. 9) p. 189, who points to this as a problem caused by the implementation of the Swedish mortgage model in English law. See also the discussion of this issue in Law Commission, *Consultation Paper No 227* (n. 9) pp. 400–403.
[91] See, i.a., *Drewicz-Tułodziecka* (n. 19) Part B.I. 'Objectives of the paper', pp. 11–12.

efficient manner. The owner can then either obtain more credit from the existing holder of the first-ranking mortgage, obtain credit on better terms from a competing bank that grants a new mortgage comprising the free part, or he can negotiate better credit terms with the holder of a lower-ranking mortgage in exchange for letting him have better priority, either through assignment or simply by disposing of the free part.

The following example illustrates both the advantage of independent mortgages, and why the holder of the second-ranking mortgage should perhaps not be able to make the first-ranking mortgage accessory by obtaining the free parts in advance by agreement: John Smith wants to purchase Goldacre. Its price is EUR 1 million. He is granted a loan by a typical 'mortgage bank', which only grants loans up to 80% of a property's value. He has EUR 100,000 of his own and borrows the remaining 100,000 at a rather high interest rate, secured by a second-ranking mortgage. Because Mr Smith's finances are rather 'stretched' by this acquisition, he opts for a fixed interest rate on the expensive second loan. Some years later, after repaying EUR 100,000 on his main first-priority loan, and EUR 50,000 on the second-priority loan, Mr Smith needs EUR 20,000 to fix a leak in the roof. If he has a right to re-use free parts of the mortgage, he may obtain new credit secured within 80% of the property's value, and thus receive better terms for the credit. If the second-ranking mortgage has moved up, either as a consequence of accessoriness or an agreement to take over any future free parts, Mr Smith can only offer rather poor priority for new credit.

We might say, if Mr. Smith gave up his right voluntarily, that he simply got what he bargained for. There is reason to suspect, however, that the creditor holding the second-ranked mortgage has not given much in return for the right to move up. Most banks have a large portfolio of secured credit, and it should be statistically possible to calculate the risks and the advantage of having a right of advancement. Nevertheless, in many countries, banks' secured credit is quite heavily regulated and closely linked to the value of a property at the time of the establishment of the mortgage. It should also be noted that, in the event of default, the risk of less being repaid on the better ranking mortgage is large. As a consequence, the average consumer may have a hard time obtaining full value for the improvement in the bank's position as regards security for the loan. In reality, there is reason to suspect that the holder of the second-ranking mortgage will achieve a better secured position than he has actually 'paid for' through the loan terms.

These economic advantages for the borrower were one of the main reasons, according to the preparatory Grimaldi report, for the French reform of 2006, which introduced the *hypothèque rechargeable* and the *prêt viager hypothécaire*. According to the report, the lack

of possibilities of utilising an increase in property value to obtain new credit was found to be harmful to the French economy.[92] However, an overview of current European legislation shows that this is an area where much remains to be done:

For the countries that allow re-use of free space, this is done in a variety of ways. For the German *Grundschuld*, the mortgagor has a right to demand that the unused part of the *Grundschuld* be transferred back to himself (*Rückgewähranspruch*). However, the most common approach in Germany is to establish a second *Grundschuld* with priority behind the existing one, and then transfer the *Ruckgewähranspruch* to the new mortgagee.[93] In Denmark and Sweden, the new mortgagee is given a pledge over the mortgage document, which not only gives him a right to the paper, but which is deemed to give the mortgagee a right in the mortgaged property to the extent that there is free space within the mortgage's maximum

[92] See *Grimaldi* (n. 40) pp. 947–951. Cf. also Philippe Simler and Philippe Delebecque, *Les sûretés. La publicité foncière* (7th ed. Dalloz 2016) p. 400. There were probably a wide range of factors that led to lack of use of the *hypothèque rechargeable*, see, e.g., Rolf Stürner, 'Das deutsche Immobiliarsachenrecht und die Funktion des deutschen Notariats im Spiegel der Rechtsvergleichung', *Deutsche Notar-Zeitschrift* (DNotZ) 2017 p. 931–933. One flaw is particularly relevant here, however: The *hypothèque rechargeable* allowed the mortgagor to secure new credit from other creditors than the original creditor and mortgagee, see *Aynès/Crocq/Aynès* (n. 27) p. 40. Since a *hypothèque rechargeable* had to be agreed by the mortgagor and mortgagee, and expressly stated in the original mortgage document, there is reason to suspect that the banks were not particularly eager to use this form of mortgage, considering the risk that the mortgagor could easily obtain credit from competitors. This was at least a concern voiced in the French legal literature in the early days of the *hypothèque rechargeable*, see, e.g., *Aynès/Crocq/Aynès* 2nd edition (2006) p. 286.

[93] See *Baur/Stürner* (n. 23) pp. 617–618.

amount. This secondary mortgage carries a right of advancement, as the pledge is considered accessory in both Denmark and Sweden.[94]

In Denmark, another option is what is known as a 'break-in mortgage letter'. This construction is similar to the German construction of transferring a mortgage back to the owner (actual use of the *Rückgewähranspruch*).[95] When a loan secured by a Danish mortgage letter is repaid, the unused part of the mortgage is considered to belong to the owner ('owner's mortgage') and he can 'break into' the existing mortgage letter with a new mortgage for the unused amount.[96] In Norway, the mortgagor is entitled to demand that the mortgagee reduces the maximum amount of the mortgage in the land register to the amount actually in use, and the mortgagor is thereby able to offer this space in the priority chain to a new mortgagee.[97] The Norwegian method and the Danish 'break in-mortgage' method do not confer a right of advancement on the new mortgage as the better ranking mortgage is further repaid. For the Swiss *Schuldbrief*, the free part of the mortgage has to be separated by formally splitting the mortgage, and then transferring it back to the mortgagor.[98]

> As the previous map shows, the British Isles has a particular solution that has caused problems in this area. In general, there is no requirement for a maximum amount to be specified for a mortgage in England, Scotland and Ireland. The mortgage is security for the debt it is created to secure, and, if the mortgage is made to secure future advances, in general such future advances may be secured without upper limitations ('tacking').[99] To prevent the first-ranking mortgagee obtaining a monopoly over the mortgagor's secured borrowing, notice of a lower-ranking mortgage generally stops the right to further tacking.[100] In Irish law, notice of a lower-ranking mortgage stops the right to tack future advances completely, even if the creditor has an obligation to provide more credit, in practice freeing him from this obligation.[101] Scottish law permits tacking of future advances after notice of a second mortgage if this is pursuant to an obligation to do so, while English law requires that such an obligation must be entered in the land register in order to qualify for tacking.[102] Another exception to the rule that notice of

[94] For Danish law, see *Iversen/Kristensen/Madsen* (n. 30) pp. 333–334, for Swedish law, see *Jensen* (n. 43) p. 149.
[95] Because of the right of lower-ranking mortgages to have the owner's mortgage (*Eigentümergrundschuld*) deleted, the so-called *Löschungsanspruch* (BGB § 1179a), this is not a practical solution in German law, see *Baur/Stürner* (n. 23) pp. 615–619.
[96] See *Iversen/Kristensen/Madsen* (n. 30) pp. 334–337
[97] See *Marthinussen* (n. 44) pp. 298–299.
[98] See *Rupp* (n. 6) p. 338.
[99] For references on the system of tacking, see *supra* footnote 86.
[100] The foundation for this rule is the House of Lords decision in *Hopkinson v Rolt* (1861) 9 HL Cas 514, 11 E.R. 829. The rule is now laid down in statute, see the English Land Registration Act 2002 section 49 (1), the Scottish Conveyancing and Feudal Reform Act 1970 section 13 (1) and the Irish Registration of Title Act 1964 section 75 (1).
[101] See J. C. W. Wylie, *Irish Land Law* (5th ed. Bloomsbury 2013) pp. 676–677.
[102] For Scotland, see Conveyancing and Feudal Reform (Scotland) Act 1970 Section 13 (1) (b) and George L. Gretton and Kenneth G. C. Reid, *Conveyancing* (5th ed. W. Green 2018) pp. 428–429; for England, see Land

> a lower-ranking mortgage prevents tacking, is the above-mentioned Swedish-inspired right, pursuant to the English Land Registration Act 2002 Section 49 (4), to set a maximum amount for future advances. A problem here, however, is that the English legislator did not include any of the techniques enabling the mortgagor to dispose over the unused parts of the mortgage, in practice giving the mortgagee a firm hold over the mortgagor's financing.[103] This is a good example of the care that needs to be taken when adopting foreign mortgage models. A wide range of different models for the problem of tacking of further advances, with and without a requirement for a maximum amount, can be found in American law.[104]

An obvious threat to the right to re-use free parts of a mortgage is that, in their standard terms, those granting second-ranking mortgages require the mortgagor to give up his right of re-use, thus for practical purposes eliminating this right. If this gave the mortgagor better credit terms, it could be claimed that this is only fair. However, although most banks have a large portfolio of secured credit and it should be statistically possible to calculate risks and the advantage of having a right of advancement, the banks cannot, at the time of the establishment of the secured credit, be sure whether the loan secured by a higher-ranking mortgage will be repaid and at what rate. It can also be noted that, in cases of default, there is a higher risk of less being repaid on the better ranking mortgage than normal. As a consequence, the average consumer may have a hard time obtaining full value for the improvement in the bank's position as regards security for the loan when giving up his right to re-use free space in higher-ranking mortgages. A good illustration of this is the German practice of registering a condition for loss of the owner's mortgage, the *Löschungsvormerkung*, which became so common that it was ultimately simply enshrined in the BGB as law.[105]

Instead of simply surrendering to a practice dictated by an uneven bargaining position, like the German solution, the Danish legislator chose the opposite solution and prohibited agreements where the mortgagor gives up his right to re-use future free space created by a diminishing accessory mortgage.[106] The rule has several exceptions, but it is a clear recognition of the value of free space for the mortgagor.[107] In my opinion, this free space, or 'the owner's mortgage' as it is labelled in many legal systems, should not be transferable, and

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Registration Act 2002 Section 49 (3) and *Bridge/Cooke/Dixon* (n. 2) p. 1145. It is not absolutely clear, however, to what extent a second-ranking mortgage under English law frees the mortgagee from his duty to provide further credit, see *Coleman* (n. 9) p. 432 and *Goode/Gullifer* (n. 9) p. 189, footnote 98 with p. 188, para. 5–19.

[103] See *Goode/Gullifer* (n. 9) p. 189.

[104] See *Burke* (n. 26) pp. 277–279 and *Restatement of the law, Mortgages* (n. 2) pp. 44–96.

[105] BGB § 1179a, see *Baur/Stürner* (n. 23) p. 614. Such a practice is also common in Sweden, see *Jensen* (n. 43) pp. 132–133.

[106] The Danish Land Registration Act ('tinglysningsloven') § 40.

[107] For a detailed treatment of the regulation, see *Iversen/Kristensen/Madsen* (n. 30) pp. 270–286

it should not be possible to waive the right to dispose over the owner's mortgage before the owner's mortgage has actually come into existence.[108]

> If one accepts that the mortgagor should be entitled to dispose of the free parts of mortgages as he pleases, and even to some extent to protect this right against being conceded without proper compensation, one might even ask if it should be available to unsecured creditors for seizure. I have written about that question, and also gone deeper into the questions discussed here about the free parts of independent mortgages, in the article 'Who should reap the benefits of free parts of non-accessory mortgages – owners, creditors or holders of lower-ranking rights?'[109]

4.6. Legal-technical simplicity

This article started with the famous quote on the impossible task of 'by light of nature' understanding an English mortgage. Highly complex mortgage constructions have probably been a source of many grey hairs among both academics and practising lawyers. In Scandinavia, there has long been harsh criticism of the complex mortgage letter structures. The criticism has been particularly strong in Denmark, where one could also say that no-one has probably ever by nature understood the owner's mortgage letter (*ejerpantebrev*), where the owner of a property gives himself a mortgage over it, for a claim against himself, which he then pledges as security for another (actual) claim.[110] It is probably not helpful that, today, the Danish owner's mortgage letter only exists in digital form, and that the pledge is replaced by a registered security right over this digital mortgage letter.[111] In Norway, legislation on consumer protection has as good as eradicated the mortgage letter (*pantobligasjon*), but its heritage is still a quite messy doctrinal picture as regards how transfers of mortgages obtain

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[108] Similarly, Christof Kiesgen, *Ein Binnenmarkt für den Hypothekarkredit* (Josef Eul Verlag 2004) pp. 231–233. The term 'owner's mortgage', although extensively used, can be very misleading. It is usually used to describe the owner of the mortgaged property's right to free space within a mortgage, an unused mortgage or simply a land registration system without a right of advancement ('fixed rank'). It is very seldom that the term owner's mortgage actually means that the owner has an actual right of mortgage over his own property. *von Bar* (n. 32) p. 640 appropriately introduces the term '*rangwahrender Eigentümerrechte'* (rank-conserving owners' rights). The only country I have found that actually gives the owner a right to receive payment during a forced sale of the mortgaged property based on an 'owner's mortgage' is Sweden's *ägerhypotek*, see *Jensen* (n. 43) pp.127–133. For more on this point, see von Bar, *ibid*. p. 641, footnote 767 and Otto Soergel and Otmar M. Stöcker, 'EU enlargement in Eastern Europe and dogmatic property law questions – Causality, Accessoriness and Security Purpose', *Notarius International* 2002 p. 243.

[109] In *Lassen/Luckow/Thurner* (n. 63) pp. 121–128

[110] See, i.a., Rammeskow Bang-Pedersen, 'Ejerpantebrevet – et aldrende instrument i afgiftsrespirator', *Ugeskrift for Retsvæsen* (UfR) 2005 B pp. 321–324 and Skovgaard, 'Skadesløsbreve utstedt til ihændehaver', *Ugeskrift for Retsvæsen* (UfR) 1978 B pp. 197–214.

[111] See *Mortensen* (n. 33) p. 55.

protection against third parties.[112] Sweden chose the wisest path and introduced a completely new system for mortgages in 1972.[113]

In Scandinavian legal practice, problems are first and foremost issues concerning which set of rules is applicable to the mortgage right itself and the fictitious claim carried by the mortgage right,[114] which is also a problem for the German *Grundschuld*. There is still no consensus on a clear distinction between when the mortgagor is paying the secured claim, and when he is paying the *Grundschuld* itself.[115] In general, there is reason to suspect that this could be a problem for most mortgages with a dual claim construction.[116]

The German *Grundschuld* also illustrates another important issue with regard to legal-technical simplicity: many of the independent mortgage models have developed through lending practice over decades, or even centuries. The German Civil Code hardly regulates the *Grundschuld*; its use has developed over more than a century, and the rules regulating it cannot always be easily identified. This makes the system less transparent and may reduce legal certainty in a field where this is considered to be especially important.

Complex legal-technical constructions are particularly problematic in the field of 'legal transplants'.[117] When mortgages are exported to different legal systems, legal-technical simplicity seems to be one key to success. There is at least some evidence that transplants of complex mortgages fail, even though they are meant to accommodate important shortcomings of the existing legislation. The German *Grundschuld* has served as inspiration for reform in several countries in Eastern Europe without much success. In both Slovenia and Hungary, it was abolished, and in the one entity in Bosnia that has introduced it, the Federation of Bosnia

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[112] Thoroughly discussed in Hans Fredrik Marthinussen, 'Rettsvern mot kreditorbeslag ved overdragelse og pantsettelse av panteretter', *Jussens Venner* 2011 pp. 87–130

[113] See *Jensen* (n. 43) pp. 29–30. The system is still not completely without traces of old ways of thinking, however, as the Swedish mortgage letter has to be pledged to the mortgagee as security for the secured claim, although the point is obviously to provide security over the property itself, not the mortgage letter. Swedish doctrine accepts that the pledging of the letter 'indirectly' gives a right of mortgage over the property in question. For more details, see Jensen, *ibid*. pp. 50–72.

[114] See *Marthinussen* (n. 44) pp. 445–479.

[115] See *Baur/Stürner* (n. 23) pp. 572 and 586–588. After the *Risikobegrenzungsgesetz* and its introduction of BGB § 1192a, this is currently probably more a theoretical than practical question.

[116] Cf. the problems surrounding the question of novation for the Swiss *Schuldbrief*, particularly before the new regulation in 2012. See *Schmid/Hürlimann-Kaup* (n. 21) pp. 572–573, *Rupp* (n. 6) pp. 342–345 and *Wiegand* (n. 22) pp. 95–96. The doctrine and jurisprudence have also struggled with the Danish *ejerpantebrev* in this regard, see *Marthinussen* (n. 44) pp. 227–233 and 238–244 with further references.

[117] Since Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press 1974), there has been an extensive debate about legal transplants. I make no attempt to summarise the debate or offer any opinion as to whether such transplants are wise or not. I simply recognise that they exist and that they are one of the most commonly used techniques in law reforms.

and Herzegovina, it is hardly ever used in practice.[118] As a legal figure, it might seem too foreign and complex to trust as a mortgage instrument, thus pushing the banks to use existing and known structures that at least provide legal certainty, despite their shortcomings. The current European experience of importing the German *Grundschuld* should serve as a warning against importing complex mortgage structures when reforming mortgage laws.[119]

5. Some closing remarks on good mortgages and mortgage reforms, including a possible pan-European mortgage

The discussion in section 4 sheds light on some of the good traits of a modern mortgage. First and foremost, a good modern mortgage must have a high standard of consumer protection. The current European mortgage laws show that a well-functioning mortgage market does not require a possibility for *bona fide* acquisitions of mortgages, free of the mortgagor's objections. Furthermore, the burden of proof should be placed with the professional creditor, and technical choices concerning the issuance of documents should not alter this basic balance. Professional creditors should be able to easily secure sufficient evidence of the secured debt, and it should be common basic knowledge that the amount of the mortgage is often higher than the actual secured debt. These basic consumer protection levels should be important factors in any mortgage law reform.

Nevertheless, it is in the interest of both society and the parties to the mortgage that enforcement is swift and simple in ordinary, non-complex cases. In many jurisdictions, this requires some form of abstract declaration of indebtedness or that the mortgage itself carries a claim for a specified amount. It is important to note, however, that the main point from a quality of law perspective is that the consumer is given proper information about the consequences of default and enforcement, and a reasonable way to invoke objections stemming from the credit- or security agreement. Simply relying on abstract declarations of indebtedness, or a maximum amount of a mortgage stated as a fictitious claim of some form, is more a sign of poor enforcement legislation than of a good mortgage.

An important part of the discussion about a pan-European mortgage has been the need for more flexible mortgages. As I have shown, flexibility is important in a range of situations.

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[118] See Meliha Povlakić, 'Die Grundschuld in Bosnien und Herzegowina', in *Lassen/Luckow/Thurner* (n. 63), p. 65. See also *von Bar* (n. 32) p. 638 and Norbert Csizmazia, 'Sicherungsrechte an Immobilien in Ungarn' in *Hinteregger/Borić* (n. 4) pp. 55–58.

[119] The complex structure is of course not the only reason why the *Grundschuld* have had limited success as a model for mortgage law reform. It is obviously a problem that the *Grundschuld* hardly is regulated at all in the German civil code, and there can also be cultural and political reasons why the German *Grundschuld* is often met with suspicion.

It is important that mortgages can be easily transferred, including easily transferred in bulk or in large quantities. It is furthermore important that mortgages can be held by someone other than the creditor(s) of the secured claim. This is important for more advanced modern financing, such as syndicated loans, covered bonds and mortgage-backed securities, but also for small-scale refinancing and the possibility of obtaining extra credit, or simply protecting a guarantor's right to be subrogated to a security. It must also be noted that flexible mortgages generally allow 'free parts' (or 'equity') to arise within the upper limit of the mortgage as debts are repaid, and these free parts should be reserved for the mortgagor to exploit in his best interest.

A simple legal-technical mortgage construction is particularly important when reforming mortgage laws. As shown, importing a complex mortgage construction, such as the German *Grundschuld,* seems to be difficult to do with success. The development in Switzerland, Denmark and Norway, where letter-based mortgages have been replaced by strange hybrid legal forms of 'digitalised mortgage letters' in an effort to eliminate physical papers, is a clear sign that these mortgages are not well suited as a model for reform.

The German *Grundschuld* and the Swiss *Schuldbrief* have dominated the academic debate about a possible pan-European mortgage, a 'Euro-mortgage' or 'Eurohypothec'.[120] The EU Commission's interest in such a mortgage seems to have ended abruptly with the white paper on the integration of EU mortgage credit markets in 2007[121] and the ensuing financial crisis, and such a mortgage does not seem realistic in the near future.[122] However, the discussion might still shed some light on how to carry out mortgage reforms, in the same way that the discussion about a Eurohypothec has contributed to the many mortgage reforms in Europe.[123]

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[120] See Claudio Segré et. al., *The Development of a European Capital Market*, Report of a Group of experts appointed by the EEC Commission (Brussels 1966), *Wolfsteiner/Stöcker* (n. 60) p. 265, *Schmidbauer* (n. 60) p. 219 and *Drewicz-Tułodziecka* (n. 19) p. 13, which opts for the *Grundschuld*, and Hans G. Wehrens, 'Der Schweizer Schuldbrief und die deutsche Briefgrundschuld, ein rechtsvergleich als Basis für eine zukünftige Eurohypothek', *Österreichische Notarzeitung* (ÖNotZ) 1988 pp. 181–191 on behalf of the UINL, Stöcker, *Die "Eurohypothek"* (n. 53) pp. 278–284 and *Kiesgen* (n. 108) pp. 76–77, which opts for the *Schuldbrief*. With the exception of Kiesgen, support for using the *Schuldbrief* seems to have vanished in recent literature. Both Stöcker and Wehrens have moved away from the *Schuldbrief* in later publications, see Stöcker, *The Eurohypothec* (n. 13) and Wehrens, *Reflections on a Euro-Mortgage* (n. 18). A broader approach is taken by Sergio Nasarre-Aznar, 'The need for the integration of the mortgage market in Europe' in *van Erp/Salomons/Akkermans* (n. 13) p. 95 who, i.a., points to the Swedish mortgage as a quite simple independent mortgage model.

[121] COM(2007) 807 final.

[122] For an overview of the work on a pan-European mortgage in the EU, see Sjef van Erp 'Security interests: A secure start for the development of European property law', in *Hinteregger/Borić* (n. 4) pp. 3–14 and Tatjana Josipović, 'Die Eurohypothek' in Jürgen Basedow, Oliver Remien and Manfred Wenckstern (ed.), *Europäisches Kreditsicherungsrecht* (Mohr Siebeck 2009) pp. 108–120.

[123] See, e.g., *Wolfsteiner/Stöcker* (n. 60) pp. 264–270, Wehrens, *Reflections on a Euro-Mortgage* (n. 18) pp. 781–782 and Stöcker, *Die Eurohypothek II* (n. 10) p. 95.

First and foremost, it should be pointed out that the false dichotomy between accessory and independent mortgages has come to dominate the debate. There are hardly any fully accessory mortgages left in Europe, and there are hardly any mortgages that are fully independent to the extent that they can be enforced if the mortgagee is not able to identify a secured claim.[124] There are many options besides the *Grundschuld* and the *Schuldbrief*, options that are far easier to accommodate into many European legal traditions, in particular maximum amount mortgages that exist in all European legal families.[125]

Several authors have warned against mortgage reforms that disregard the basic principle of accessoriness. Sparkes goes so far as to describe an independent European mortgage as 'suicidal'.[126] More balanced criticism of independent mortgages, based on the notion that mortgage reforms, especially on the pan-European level, should take the joint European principle of accessoriness as their point of departure, has been put forward by Habersack, Wachter and Rupp, among others.[127] The problem, however, is that accessoriness is the core of the problem that most mortgage reforms seek to amend; it is simply an obstacle to important financial needs, as shown in sections 4.4 and 4.5, in particular. The proposed solution by the aforementioned authors to accommodate the need to use accessoriness as the point of departure, while at the same time providing necessary flexibility for the financial sector, is the continental maximum-amount mortgage (*Höchstbetragshypothek*). This simply means choosing a model that is slightly more accessory, and thus does not meet some important criteria for good quality modern mortgages.

As shown, the real need for accessoriness is in relation to enforcement. A mortgage should not be possible to enforce if there is not a secured claim that is overdue. As this is a common trait of all the mortgages treated in this article, it should be easy to achieve. The main goal must be to achieve this also when mortgages are transferred, which seems to be easiest in the case of mortgages that are expressly security for a maximum amount, without

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[124] This is evident from the chart in Stöcker/Stürner: *Flexibility, Security and Efficiency of Security Rights over Real Property in Europe* (n. 63) p. 52, where no country allows enforcement independent of a secured claim. See also the commentary to the chart on pp. 50–51, and *Josipović* (n. 122) p. 88.

[125] In common law to a limited extent, such as the adoption of the Swedish mortgage model into English law and the many American similar mortgages for future advances up to a set amount, in the mixed system of Scotland, standard security, in the Germanic and Romanistic legal families as maximum amount hypothecs derived from the accessory hypothecs in different ways (see *von Bar* (n. 32) p. 661 footnote 868), and throughout the Nordic legal family in slightly different forms: *skadesløsbrev* in Norway and Denmark, *pantbrev* in Sweden and Finland. (The division into these legal families is taken from Konrad Zweigert and Hein Kötz, *Introduction to comparative law* (3rd ed., Oxford 1998, English translation by Tony Weir), see pp. 63–73) We also have more independent (as in without ties to the accessory hypothecs) Continental-European maximum amount mortgages in Estonia and Hungary.

[126] *Sparkes* (n. 85) p. 401.

[127] *Habersack* (n. 18), *Wachter* (n. 18) pp. 61–64 and *Rupp* (n. 6) pp. 588–589.

themselves giving any further information about which claims are currently secured. The German Limitation of Risk Act and the straightforward Hungarian regulation, which simply states that the security agreement also binds subsequent acquirers of the mortgage, show that this is relatively easy to handle for most mortgage constructions if a pragmatic approach is taken.[128]

As long as the mortgage is not possible to enforce independently of a secured claim, one of the most important factors is to make the mortgage completely independent in all other areas.[129] If a reform is based on classic European maximum amount hypothecs, which might be best from a legal simplicity perspective, it is important to explicitly regulate the independence of the mortgage in all forms, as these mortgages often tend to carry accessoriness with them to a certain degree. That so many maximum amount mortgages cannot be held by someone other than the creditor of the secured claim is one example of traces of accessoriness.[130] There can be even stronger links to accessory mortgages, however, as is the case for the Austrian maximum amount mortgage, which sets clear limitations on the possibility of securing an undefined mass of future claims between the mortgagor and mortgagee.[131] Scepticism about using maximum amount hypothecs as models for a Euro-mortgage or mortgage reforms may perhaps be part of the explanation for these traces of accessoriness that many jurisdictions are burdened with.[132] Again, the new Hungarian regulation, which simply states the mortgage's nature as independent, can serve as an example of good practice.[133] The goal must be to achieve a dogmatic approach such as that taken in the Scottish ruling presented in section 3c, which simply did not recognise accessoriness as a

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[128] Cf. Stöcker, *Die Eurohypothek II* (n. 13) p. 94. The independent mortgage is thoroughly regulated in the Hungarian Civil Code art. 5:100. A description of the new Hungarian independent mortgage can be found in *Bodzási* (n. 58) pp. 11–47 (also available in German, 'Das neu geregelte nicht akzessorische Pfandrecht im ungarischen Zivilgesetzbuch', pp. 120–163).

[129] Similarly, *Kircher* (n. 18) pp. 560–561 and Stöcker, *Die Eurohypothek II* (n. 13) p. 94.

[130] As an example of how the typical continental-European dogmatic mortgage accessoriness approach can limit practically sound separation of the positions of mortgagee and creditor, see *Rupp* (n. 6) pp. 517 and 557–559. See also Héctor Simón-Moreno, 'The Eurohypothec', *European Property Law Journal* 2012 pp. 201–202 in relation to the Spanish *hipoteca de máximo*. For an overview of the problems these traces of accessoriness can cause for maximum-amount mortgages, see the discussion of the Austrian Höchstbetragshypothek in *Kurzbauer* (n. 39) pp. 171–204.

[131] See *Schmidbauer* (n. 60) pp. 31–32. Generally, the requirement is that the claims must be identifiable through objective criteria at the time of the creation of the mortgage. An extensive discussion of Austrian maximum amount mortgages for 'current and future credit' can be found in *Kurzbauer* (n. 39) pp. 93–124. There are also similar, if not quite so strict, limitations to the Spanish *hipoteca de máximo*, see Simón-Moreno, *ibid*. pp. 200–201. For the French and Belgian *hypothèque pour toutes sommes*, see Sagaert, *Main developments in immovable securities in French and Belgian law. A transition from tradition to modernity* (n. 42) pp. 207–208, and more generally *Rupp* (n. 6) p. 66.

[132] Cf. i.a. Stöcker, *Die Eurohypothek II* (n. 13) p. 14.

[133] For references, see *supra* footnote 128.

legal point of departure that requires specific legal grounds to be provided if it is to be deviated from.

A key focus in mortgage reform should be on promoting good mortgage characteristics, while using known mechanisms in the legal culture in question. These characteristics are possible to regulate for a wide range of mortgage constructions. Simply stating that mortgages are independent of the claim in all other circumstances than enforcement will usually go a long way towards achieving a good mortgage. This is also perfectly possible for a right of mortgage called 'hypothec', such as the independent Estonian *hüpoteek*.[134] A more detailed description of a simple model for an independent mortgage can be found in the Basic Guidelines for a Eurohypothec, which is a 'non-accessory land charge', free from legal-dogmatic somersaulting.[135]

Attention should also be paid to the distinction between mortgage law and adjacent fields of law. The regulation of enforcement, the involvement of notaries, and land registration often strongly affect mortgages, but they should be considered as targets for reform themselves, as the examples of the simple enforcement and burden of proof questions that have been discussed here show.[136] Trying to solve these questions through mortgage law is one of the factors that typically lead to highly complex mortgage structures.[137]

Designing completely new mortgage structures might appear to presuppose letting go of the existing ones, as the financial institutions may seem to prefer old and certain solutions to new and flexible ones. The comprehensive reforms in Sweden and Scotland in the 1970s led to the firm establishment of new forms of mortgages, and the new independent mortgage introduced in Estonia after the country's independence was also a success. On the other hand, the introduction of new alternative options, such as the French *hypothèque rechargeable*, the Swedish-inspired maximum amount mortgage in England, and the *Grundschuld*-inspired mortgages in Hungary, Slovenia and Bosnia, has to a large extent failed to make a real impact.

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[134] A brief overview of the Estonian maximum amount hypothec can be found in Rein Tiivel, 'Über das estnische Grundpfandrecht im internationalen Rechtsvergleich' in *Lassen/Luckow/Thurner* (n. 63) pp. 79–84. A more thorough description is provided in Rein Tiivel, 'Länderbericht Estland' in Otmar M. Stöcker (ed.) *Flexibilität der Grundpfandrechte in Europa*, Band I, (Berlin 2006), Schriftenreihe des VdP Band 23 (available online at https://www.pfandbrief.de/site/dam/jcr:ba469533-08fe-4839-be44-13e0393e1e41/vdp_Nr_23_Stoecker_Flexibilitaet_I.pdf) pp. 117–155.

[135] See *Drewicz-Tułodziecka* (n. 19) pp. 11–22.

[136] For a clear case of a mix-up, see the Eurohypothec proposal from the UINL in Wehrens, *Der Schweizer Schuldbrief und die deutsche Briefgrundschuld, ein rechtsvergleich als Basis für eine zukünftige Eurohypothek* (n. 120) p. 191, which points to the Swiss system of fixed rank as an advantage of the *Schuldbrief* in comparison with the *Grundschuld*. The Swiss system of fixed rank in the land register will clearly not automatically follow the *Schuldbrief* into new jurisdictions as a property of the mortgage itself.

[137] For a pan-European mortgage, however, such regulations must be taken into account, as reforming regulations on enforcement, registration and notarial procedures for the entire EU will most likely constitute an insurmountable challenge.

This might also serve as a warning to those who are optimistic about what a pan-European mortgage can achieve. It seems rather likely that most banks will continue old lending practices instead of opting for a new European instrument that they are not familiar with. In the short term, a pan-European mortgage will most likely not lead to German consumers being able to buy holiday homes in France using an Italian bank, lending money secured by a Euro-mortgage on the property in question.[138] A pan-European mortgage might be used, however, for large-scale commercial property financing. If it is well designed, it would enable banks to lend against security in multiple commercial properties in multiple European countries, and might even facilitate portfolio transactions like covered bonds with a multi-national cover pool.[139] With actual use over time, we might even see banks becoming comfortable about using such a mortgage in their daily lending business. A relatively system-neutral Euro-mortgage, that can be used regardless of land registration system and national rules on notarial involvement, might consequently open further possibilities for the European financial market.

[138] Cf. Stöcker, *Die grundpfandrechtliche Sicherung grenzüberschreitender Immobilienfinanzierungen* (n. 13) pp. 1941–1942, *von Bar/Drobnig* (n. 32) pp. 360–363 and *Sparkes* (n. 85) pp. 382–383.
[139] Cf. Stöcker, *The Eurohypothec* (n. 13), Stöcker, *Die grundpfandrechtliche Sicherung grenzüberschreitender Immobilienfinanzierungen* (n. 13), Stöcker, *Die Eurohypothek II* (n. 10) pp. 79–80 and 86–87 and Nasarre-Aznar, *The need for the integration of the mortgage market in Europe* (n. 120).