

THE INTEGRATION OF THE EU MORTGAGE SUBMISSION OF LAW SOCIETY OF IRELAND

The following is the response of the Law Society of Ireland to those parts of the Green Paper of the European Commission concerning Mortgage Credit in the EU, as are concerned with legal issues or matters touching upon legal issues.

1. Applicable Law

- 1.1. Recommendation 19 of the Forum Group on Mortgage Credit (“the Forum Group”) which appears to be endorsed by the Commission at paragraph 33 of the Green Paper, states that the Commission should ensure that the applicable substantive law for the mortgage deed and any related security arrangement is the law of the member state where the property is located. The Law Society of Ireland (“LSI”) agrees with this recommendation.
- 1.2. A distinction is drawn, however, between the law that applies to the mortgage deed and the law that applies to the mortgage loan contract. Industry representatives on the Forum Group recommend that the Commission should ensure that the applicable law for the mortgage loan contract is defined by a general conflict of law rule based on the principle of free choice. Consumer representatives did not agree and instead recommended the retention of the specific rules on consumer protections contained within the Rome Convention, which in effect means that Mortgage Credit Contracts are subject to the same general principles as any other Consumer Contracts in which the parties are left to decide themselves on the law applicable to their contract, subject to the application (under some conditions) of the mandatory rules of the consumer’s country of residence.
- 1.3. LSI believes that it is preferable, where possible, that the law applying to the mortgage deed and the mortgage loan contract should be the same as it is undesirable that two sets of laws should govern the same transaction. This should be possible in cases where the consumer is granting a mortgage over property which is located in his country of residence.
- 1.4. LSI recognises, however, that this may not be possible or practical in cases where the property is located in a member state outside of the consumer’s country of residence. In such cases, LSI believes that the consumer ought to be able to nominate the law applicable to the Mortgage Loan Contract, but that in this regard the Consumer should be restricted to making a choice of law that is relevant to the transaction, i.e.:
 - 1.4.1 The Consumer’s country of residence, or
 - 1.4.2 The Lender’s country of residence, or
 - 1.4.3 The country in which the property the subject of the mortgage deed is located.

2. Property Valuation

- 2.1. In its Green Paper, the Commission has posed two questions:

- 2.1.1. What are the merits of a single EU standard, for both valuation processes and valuers?
 - 2.1.2. What are the merits of Commission action to ensure mutual recognition of national valuation standards?
 - 2.2. There are currently no enforceable standards for valuation processes and valuers in Ireland. Having regard to the importance of the valuation of property to the mortgage credit transaction as identified by the Commission, LSI agrees that it is desirable that such standards should be set, provided that they are capable of practical implementation and enforcement. If there is likely to be an increase in cross border mortgage credit, then it is probably desirable that there should be a single EU standard, but LSI acknowledges that this might be difficult having regard to the very varying markets throughout the EU. If therefore a single EU standard is not considered practical, then LSI is of the view that as an alternative, there should be an obligation on member states to establish valuation standards in accordance with criteria which would require mutual recognition across the EU.
 - 2.3. LSI believes that it is particularly important to establish valuation standards for the benefit of vulnerable clients who may, in certain circumstances, be required to accept a valuation of their property that is considerably less than the market value.

3. Forced Sales Procedures

- 3.1. The Commission notes the difficulties of achieving significant improvements in all aspects of forced sale procedures and seeks views on an information gathering approach in the first instance. The Commission notes that forced sales procedures vary widely in duration and cost throughout the member states and that such variety could have the effect of hindering cross border activity by perhaps adding to the price of mortgage credit or impacting on funding structures.
- 3.2. It is to be noted that the Forum Group specifically recommended that the Commission should promote measures to ensure that the duration of a forced sale procedure should not exceed a specified term, for example two years after the first step in the procedure is taken. The LSI would not agree with this recommendation. It may force lenders to repossess properties in circumstances where a lender might otherwise be satisfied to allow ejection proceedings continue, without an order, as long as an agreement with the mortgagee is being honoured. Moreover, it may not be possible to get ejection proceedings into Court within the two year period.

4. Registration of Charges/Mortgage Collateral

- 4.1. As regards registration of charges, the Forum Group recommended:

- 4.1.1. That all charges affecting real estate must be registered in a public register in order to be binding upon and take effect against third parties, regardless of their nature. LSI agrees.
 - 4.1.2. That the creation, modification or extinction of a charge on real property shall become effective as against third parties only at the point of registration in the public register. LSI agrees, although the matter is of little significance in relation to the “extinction” of a charge.
 - 4.1.3. That registered charges on real property in relation to the same estate shall rank in the order of priority disclosed in the public register. LSI agrees insofar as third parties only are concerned.
 - 4.1.4. That filings of applications for registration should allow member states to decide the priority be determined according to the time at which the application was received, as distinct from registration. The recommendation is that member states should ensure that filings of applications must be registered in the order of receipt. LSI agrees.
 - 4.1.5. Recommendation 32 states that the Commission should ensure that public registers make all relevant information available to all parties or their representatives. LSI agrees.
- 4.2. In its Green Paper, the Commission expresses little interest in this subject which it says has already been recognised by the Commission through its funding of the pilot phase of the EULIS Project. The Commission questions whether to continue to play any role in this area stating that, given the use of such registers by lenders and investors, “one can assume they would have a direct interest in contributing to and investing in such initiatives.” However, the Commission states that it will welcome further input on all these issues. LSI considers it desirable that the Commission should ensure that the minimum standards recommended by the Forum Group in Clause 4.1 above are imposed across the EU, especially having regard to the increased incidents of cross border purchases of property.

5. State Indemnity for Public Register

- 5.1. Recommendation 33 of the Forum Group Report states that member states should provide that the responsible Public Register Certifying Authority should have state indemnity. It goes on to state that in the event that such responsibility is delegated to a third party, such party shall be covered by appropriate professional liability insurance for an adequate sum. Presumably, this is in order to provide for the possible privatisation of state registries. The Commission does not appear to comment on this recommendation. However, LSI agrees that it is desirable that State Authorities should be required to take the responsibility for the contents of their Registers and indemnify Consumers against any loss occasioned by reason of inaccuracies in the same.

6. Nominated Representative for Register

- 6.1. Recommendation 37 of the Forum Group Report states that the Commission should ensure that member states allow the lender or any beneficiary of a charge on real property to appoint a representative for the purposes of the public register. This person would be entitled to deal with filings, registrations, notifications, etc. and to consent to any change or transfer of the charge and to act on behalf of the owner of the charge in relation to the discharge of the same. LSI considers this a sensible recommendation and that it might avoid difficulties associated with securing a vacate of a charge granted to a foreign lender.

7. Euro Mortgage

- 7.1. In principle, it seems difficult to argue against the concept of a mortgage that could be used across the EU, as long as it is registerable and enforceable across the EU. LSI is unable to say whether or not this is feasible as this would require a study of the requirements applicable in each member State .

8. Early Repayment

- 8.1. As one might expect, there were significantly divergent views within the Forum Group in relation to the area of early redemption of mortgages. Consumer groups recommended that consumers are afforded the right to terminate a mortgage agreement at any time and in any circumstances, and that any charge levied on the consumer exercising the right must be (a) appropriate in length of exposure (it should not be possible to charge an early repayment fee beyond the first few years of the agreement) and (b) calculated in a fair and objective manner to reflect the cost (if any) incurred by the lender in the wholesale markets and subject to a statutory ceiling and (c) clearly indicated in the pre-contractual summary document.
- 8.2. On the other hand, industry representatives argued that legally enforceable caps on early repayment fees are removed. They advocate that lenders should be entitled to ask for full compensation of losses (especially those linked to funding) and the costs resulting from early repayment.
- 8.3. The Commission suggests that the following questions merit close analysis:
 - 8.3.1. Should early repayment be a legal right or a matter of choice? If a right, might it be possible for the consumer to waive the right? If so, under what conditions? LSI is of the view that early repayment should be a legal right which cannot be waived.
 - 8.3.2. How should fees on early repayment be calculated and should there be caps on same? LSI is of the view that the recommendations of the Consumer Groups outlined above in relation to the calculation of the repayment charge are fair. LSI considers, however, that it would probably not be practicable to consider making the fees subject to a cap as this could involve a loss to the Lender.

- 8.3.3. How should the consumer be informed about early repayment requirements? LSI is of the view that this should be clearly indicated in the pre-contractual summary document.
- 8.3.4. LSI is also of the view that financial institutions should, when requested to provide redemption figures, provide unqualified redemption figures which may not later be varied or changed by the Lender, to the detriment of the Consumer. LSI notes that in this regard there has been an increasing trend in Ireland for Lenders to seek to place qualifications on redemptions figures, causing uncertainty to consumers and their legal advisers who in many cases will be relying upon the figures quoted for the purposes of subsequent transactions.

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The Conveyancing Committee
Law Society of Ireland