

LEGAL MORTGAGE *MODUS ACQUIRENDI*Radenko Jotanović<sup>1</sup>*Faculty of Law, University of Banja Luka*

**Abstract:** *In the Republic of Srpska and Bosnia and Herzegovina, the reform of procedural and material regulations related to immovable property and rights to nanotechnology has been carried out in order to create favorable conditions for economic development. There is no economic or any other development, without credit funds marketed by financial institutions (creditors), who in turn require an appropriate waiver of a given fund. The most common means of securing a loan is a mortgage that should provide maximum protection in the security phase, and especially in disbursement. Such a mortgage can only be achieved through the constitutive implementation of the principle of enrollment. Enrolled or registrable mortgage, irrespective of the legal base registration (contract, law, court decision or any other decision of the authority organ), provides legal certainty to all legal entities in real estate. In this context, it is especially significant that the statutory mortgage must be registered in the public register of the real estate and thus equated with all other forms of mortgage in accordance with the prior tempore potior iure principle.*

**Key words:** *immovable property, mortgage, statutory mortgage, public records of immovable property, constitutive effect, a declarative effect.*

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## 1. INTRODUCTION

As part of the reform of land registry and property law in the Republic of Srpska, creating a unique real estate register<sup>2</sup> is in progress, aimed at unifying all existing real estate records. Land Register<sup>3</sup>, Land Cadastre<sup>4</sup>, Real Estate Cadastre<sup>5</sup>, The Book of Agreements on the Purchase of Residential Buildings and Apartments<sup>6</sup>, and The Book of Agreements Concluded on the Sale of Business Buildings, Business Premises and Garages<sup>7</sup>, as the current records on the data relevant to the legal real estate turnover have shown as an obstacle to the further development of economic and overall relations in the Republic of Srpska. There are numerous shortcomings in these records, especially their obsolescence, inaccuracy, non-functionality, inefficiency, inadequacy, unreliability and so on, which contributed to the great discrepancy between the legal situation and the factual state of the real estate.<sup>8</sup> There was a puzzling need to digitize real estate data in order to establish a register that would be compatible with other public registers as part of the strategy on establishing a single digitalized society.<sup>9</sup> A unique record should provide service to citizens in one place, with one authority, in one excerpt from the public records, with a decrease in the average waiting time for deciding on a land registry application and a reduction in the monetary compensation for such a service.

A new, unique real estate record should contribute to the increase in the value of land and other real estate, provide them with secure legal transactions, and in particular speed up investment construction through access to credit facilities that would be provided through a mortgage.

One of the motives governed by the legislature passing the current Law on Survey and Real Estate Cadastre Act of Republic of Srpska (hereinafter: SRECA) is also the public law character that relates to fiscal policy. It is about creating the necessary preconditions for establishing a tax system for collecting tax and

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2 Survey and Real Estate Cadastre Act of Republic of Srpska, „Official Gazette of Republic of Srpska“, no. 6/12; Rulebook on Real Estate Cadastre of Republic of Srpska „Official Gazette of Republic of Srpska“, no. 11/14, 25/14 and 31/15.

3 Land Registration Act, „Official Gazette of Republic of Srpska“, no. 67/03, 46/04, 109/05 and 119/08.

4 Promoting and Maintaining Survey and Real Estate Cadastre Act, „Official Gazette of Republic of Srpska“, no. 19/96 and 15/10.

5 Survey and Real Estate Cadastre Act, „Official Gazette of Republic of Srpska“, no. 34/06, 110/08 and 15/10.

6 Rulebook on Keeping a Register of Residential Buildings and Apartments Purchase Contracts, „Official Gazette of Republic of Srpska“, no. 45/01 and 6/02.

7 Rulebook on Establishing and Keeping a Register of Business Premises, Buildings and Garages Sale Contracts, „Official Gazette of Republic of Srpska“, no. 60/05.

8 Radenko Jotanović, „Načelo upisa u katastar nepokretnosti u pravu Republike Srpske“, *Pravna riječ*, no. 47 (2016), 217.

9 *Ibid.*, 217.

non-tax benefits.<sup>10</sup> A commonly used mechanism in order to secure receivables that the Tax Administration has towards a taxpayer in case of failing to pay the tax liability within the maturity is a statutory mortgage.<sup>11</sup> Establishment of a legal mortgage on the property of a taxpayer is possible only if a real estate record has been established, which fully reflects the factual and legal (recorded) state of the real estate and the holders of the right to immovable property. Only the real estate records in which the consistent application of the basic principles will be achieved, primarily the principles of enrollment, trust, publicity and commitment, may provide security of legal immovable property. In doing so, one should not forget that there is no perfect means of securing claims that would prevent all potential hazards and risks, and thus guarantee settlement to the creditor, because “... *by arranging security, the creditor only raises the probability of actually settling his claims.*”<sup>12</sup>

## 2. THE TERMS OF AN (UN)ENROLLED MORTGAGE

Mortgage as a pledge is a basic property law collateral instrument that guarantees the collection of claims by the value of a mortgage item.<sup>13</sup> This is a much more effective protection of creditors than in the case of obligatory legal (personal) securitization because “*the larger is the guarantee in fact than in the face*”.<sup>14</sup> The basic credential of the creditor is the liquidation of the object of the pledge in order to settle its secured claim. Although in principle the role of securing claims is in practice, it is most often used in the function of obtaining loans because the conclusion of the loan agreement is conditioned by the possibility of providing adequate stocks, otherwise the borrowing conditions are significantly unfavorable.<sup>15</sup>

The modern mortgage law aims to establish such a security system that will maximally secure the legal status of the creditor, which lessens the debtors’ position to the satisfaction stage.<sup>16</sup> In the previous, socialist, socio-economic system, mortgage was marginalized, it had very little or almost no significance

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10 See Art. 7 of the Taxation Act of Republic of Srpska, „Official Gazette of Republic of Srpska”, no. 62/17.

11 See Art. 53 of the Tax Procedure of Republic of Srpska Act, „Official Gazette of Republic of Srpska”, no. 102/11, 108/11, 67/13, 31/14 and 44/16.

12 Nenad Tešić, *Registrovana zaloga* (Beograd: 2007), 50.

13 Miroslav Lazić, *Prava realnog obezbeđenja* (Niš: 2009), 65 and onward.

14 „Plus cautionis in re est, quam in persona“, Pomponius, *Digesta*, 50.17.25.

15 Dragor Hiber i Miloš Živković, *Obezbeđenje i učvršćenje potraživanja – Knjiga prva* (Beograd: 2015), 30.

16 Duško Medić, „Hipotekarnopravni odnos kao aspekt sadržine hipoteke“, *Srpska pravna misao*, no. 41 (2007), 233; Duško Medić, „Predmet hipoteke u pravu Republike Srpske“, *Pravna riječ*, no. 8 (2006), 177-178.

because the concept of loans was different, the scope of property rights was limited (the collective ownership was dominant in relation to individual property), which significantly reduced the possibility of their mortgage advocacy.<sup>17</sup> Post-socialist, market-based economic conditions require safe and effective means of securing claims, as there is an urgent need for money and loans.<sup>18</sup> Securing claims is one of the conditions for creating legal security and confidence, as well as incentives for investing and reviving the economy on market principles in the context of the revival of the loans that countries in transition face.<sup>19</sup> And not only the countries in transition, because in today's conditions of market competition, all countries have the primary legal and political objective of attracting investments through efficient arrangement of securing funds.<sup>20</sup>

In this context, a unique real estate record has the role of establishing security in the field of security means, because “... *the quality of credit securing means ... is a central economic issue of a country*”.<sup>21</sup> This is because the growing need for loans without the existence of an up-to-date record of real estate has led to the possibility of advocating unregistered real estate, and in accordance with the analogous application of the provisions on enforced execution on the registered real estate.<sup>22</sup>

Legislators in BiH have been using the new Enforcement Procedure Act of 2003 (hereinafter EPA)<sup>23</sup>, which replaced the previously applicable the Enforcement Procedure Act of the SFRY from 1978, to try and use the enforcement procedure in the unregistered real estate to reconcile the unenrolled and enrolled status of immovable property. This “task” has been entrusted to the prosecutor for execution as a person who has the greatest interest in triggering the execution, i.e. for the sale of unenrolled real estate.<sup>24</sup> According to the provisions of Art. 113 of both EPA, Entity Executive Court will, at the proposal of the enforcement agent, submit evidence that the executor is the owner of the real estate or there is a possibility of acquiring property in favor of the executor,

17 Obren Stanković i Miodrag Orlić, *Stvarno pravo* (Beograd: 1996), 270.

18 Duško Medić, *Novo stvarno pravo Republike Srpske* (Banja Luka: 2016), 169.

19 Duško Medić, *Hipoteka i ostala sredstva obezbjeđenja potraživanja – stanje i pravci razvoja* (Banja Luka: 2005), 17.

20 Hiber i Živković, *Obezbeđenje i učvršćenje potraživanja – Knjiga prva*, 225-226.

21 Meliha Povlakić, „Neki aktuelni problemi zalaganja nekretnina u entitetima BiH“, *Pravna riječ*, no. 8 (2006), 216.

22 Art. 186 of the Enforcement Procedure Act, „Official Gazette of SFRY“, no. 20/78, 6/82, 74/87, 57/89, 20/90, 27/90 and 35/91.

23 „Official Gazette of Republic of Srpska“, no. 2003, 85/03, 64/05, 118/07, 29/10, 57/12 and 67/13 and „Official Gazette of BiH Federation“, no. 32/03, 52/03, 33/06, 39/09 and 35/12. In the Brčko District of BiH it is the Enforcement Procedure Act of the Brčko District of BiH, „Official Gazette of the Brčko District of BiH“, no. 39/13.

24 Povlakić, „Neki aktuelni problemi zalaganja nekretnina u entitetima BiH“, 235.

to issue a decision on execution, and then to stop with execution until the immovable property is registered in the public register of real estate, if this is not contrary to the law.<sup>25</sup> If the procedure of registering immovable property is not in accordance with the law, then, as a subsidiary (surrogate) procedure, a listing of confiscated immovable property is carried out.<sup>26</sup>

However, although the provisions of Art. 113 declaratively allow execution on unenrolled immovable property, in a non-harmonized case-law by various executive courts, this provision is applied in particular.<sup>27</sup> In connection with this, some executive courts do not conduct a list of seized immovable property after they find that the registration of immovable property in public records is in contravention to the law.<sup>28</sup> In this way, the enforcement procedure is suspended if the registration of the immovable property is not carried out, and that it does not attempt to execute it through the redemption list.

In addition to the inconsistency between the enrolled and the unenrolled real estate, there is a discrepancy between the enrolled and the unenrolled titular on immovable property, which also complicates the enforcement procedure. It is about a case where one person is incorrectly entered as a titular on the deed of the land registry law, because the true titular is an unenrolled titular whose right was violated by untrue enrollment. When the enforcement procedure is conducted, the enforcement agent with the proposal for execution shall also submit evidence of the property of the executor on the real estate that is the subject of the enforcement.<sup>29</sup> If the immovable property is registered to another person, execution can only be carried out if the conditions for changing the land registry balance have been fulfilled.<sup>30</sup> However, in order to achieve this change, i.e. in order for the immovable property to be registered for the benefit of the executor, a corresponding tabular document is required and there is a problem because the EPA does not prescribe a further execution procedure. If the enforcement agent has obtained a tabular document, there is no sanction that would force him to conduct a land registry entry despite the principle of obligation. Likewise, the alignment of the enrolled and unenrolled titular of immovable property may also be carried out by means of a sweeping lawsuit filed by an unenrolled, former owner or his universal successor within the prescribed

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25 Formulation impossibility of registration is “contrary to law” is abstract and opens numerous questions, see Povlakić, „Neki aktuelni problemi zalaganja nekretnina u entitetima BiH“, 237.

26 Art. 113, para. 6 of both entity EPAs.

27 Rijad Hamidović, „Zakonska hipoteka kao sredstvo naplate poreza u Federaciji Bosne i Hercegovine“, *Nova pravna revija*, no. 1 (2017), 12.

28 See Rješenje Općinskog suda u Bihaću, no. 17 0 Ip 049818 13 Ip od 10.12.2013. god. as stated by Hamidović, „Zakonska hipoteka kao sredstvo naplate poreza u Federaciji Bosne i Hercegovine“, 12.

29 Art. 70, para. 1 of both entity EPAs.

30 Art. 70, para. 2 of both entity EPAs.

time limit,<sup>31</sup> which is not influenced by the prosecutor. The solution referred to by the jurisprudence regarding the possibility of execution on immovable property registered to third parties, which is proved to be the offender's property can be found in prescribing the possibility of registering the property right in favor of the ex officio executor when the necessary assumptions for enrollment in the public register of real estate are fulfilled.<sup>32</sup> In addition to incorrectly indicated immovable property titular, the incorrect entry of a mortgage creditor into the public records of the real estate may also occur.

The possibility of establishing unenrolled mortgages has created legal insecurity for both mortgage creditors and third conscientious persons.<sup>33</sup> Mortgage creditors, most often banks, have insisted on the unenrolled collateral because of the need for loan placement.<sup>34</sup> Third conscientious persons who acquired the immovable property in which there was an unenrolled mortgage were legally protected on the basis of the principle of trust (confidence) in the public records of the real estate and should not suffer the harmful consequences that may result from execution based on an unenrolled mortgage that exists on that real estate. The establishment of an unenrolled mortgage with the reform of the property and land registry law in BiH is no longer possible since the affirmation of the principle of registration and the principles of trust in the public records of real estate can only constitute an enrolled mortgage. The unenrolled mortgage lost its significance with the introduction of notaries into the BiH legal system in 2004<sup>35</sup> and 2002<sup>36</sup> respectively.<sup>37</sup> According to the provisions of the Notaries Public Act<sup>38</sup>, notaries have exclusive competence to draft a mortgage contract, so they will be able to instruct the parties on the defects of an unenrolled mortgage. What remains a practical problem are the previously established unenrolled mortgages and the possibility of their realization in the enforcement proceedings. In this context, special uncertainty is the so-called legal mortgage, both in terms of

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31 Radenko Jotanović, „Načelo povjerenja u katastar nepokretnosti u pravu Republike Srpske“, *Pravna riječ*, no. 40 (2014), 566 and onward.

32 Meliha Powlakić, *Transformacija stvarnog prava u Bosni i Hercegovini* (Sarajevo: 2009), 398-400; Hamidović, „Zakonska hipoteka kao sredstvo naplate poreza u Federaciji Bosne i Hercegovine“, 14.

33 Zoran Vasiljević, *Prava i obaveze iz ugovora o kreditu* (Banja Luka: 2015), 35.

34 Meliha Powlakić, *Stvarnopravno osiguranje kredita u BiH*, u Tatjana Josipović, (redactor) *Stvarnopravna uređenja tranzicijskih zemalja – stanje i perspektive* (Zagreb: 2009), 252.

35 Notaries Public Act, „Official Gazette of Republic of Srpska“, no. 86/04, 2/05,74/05, 91/06, 37/07, 50/10, 78/11, 20/14 and 68/17.

36 Notaries Public Act, „Official Gazette of BiH Federation“, no. 42/02.

37 In the Republic of Srpska notaries began with their work in March of 2008, in the Federation of BiH in May of 2007 and in the Brčko District of BiH in November of 2007.

38 Art. 68, para. 1, t. 4 of the Notaries Public Act of Republic of Srpska and Art. 73, para. 1, t. 4 Notaries Public Act of BiH Federation.

legal transactions in immovables, as well as in the enforcement of the executive and bankruptcy proceedings.

### 3. LEGAL MORTGAGE

Mortgage is most often used as means of securing loans,<sup>39</sup> but mortgage creditors can also be the so-called preferential creditors, which are claims of tax authorities, pension funds and other public claims. The most important reasons that motivate lawmakers in regulating public records of real estate in order to meet modern standards in this area are the provision of safe, fast and simple legal real estate transactions, protection of property rights titulars and protection of trust in legal transactions (legal security), loan development, and means of security. In addition, one of the most important reasons is the collection of taxes and other public charges (fiscal reasons). All these reasons of a private and public character should be equally satisfied so that favoring one for the benefit of others would not cause uncertainty in the legal movement of real estate and would be the cause of the difficult development and functioning of economic relations. To this end, the institute of legal mortgage is especially emphasized, which ensures the public interest for fiscal and parafiscal benefits.<sup>40</sup> It is about the law of the country by which it reserves itself the privileged lien of the highest rank.<sup>41</sup>

One of the most important issues related to legal mortgage is the moment of its creation, that is, constitution. According to the method of occurrence, the pledge right can be divided into contractual, judicial and legal lien.<sup>42</sup> Legal pledge law, according to the general definition, arises on the basis of the law, when the facts envisaged by law occur, without the need for *modus acquirendi*.<sup>43</sup> For this type of pledge, it is characteristic that a mortgage debtor agrees, without publicity, that he / she is entitled to priority over previously arising liens (contract and court) without the consent of the mortgage debtor. However, such a legal mortgage could jeopardize the entire system of securing claims, derogates the application of certain principles of land registry law and destabilizes public records of real estate. A conscientious acquirer on a legal mortgage that is not registered in the public records of the real estate cannot find out the most important thing, whether there is a legal mortgage at all in favor of a privileged creditor. A statutory

<sup>39</sup> Vasiljević, *Prava i obaveze iz ugovora o kreditu*, 28.

<sup>40</sup> A statutory mortgage on the property of a taxpayer is the most common category of lawful lien, but the legislator can regulate any category of legal pledge right for a claim.

<sup>41</sup> Hiber i Živković, *Obezbeđenje i učvršćenje potraživanja – Knjiga prva*, 56.

<sup>42</sup> Stanković i Orlić, *Stvarno pravo*, 234 and onward; Hiber i Živković, *Obezbeđenje i učvršćenje potraživanja – Knjiga prva*, 39 and onward.

<sup>43</sup> Stanković i Orlić, *Stvarno pravo*, 237; Hiber i Živković, *Obezbeđenje i učvršćenje potraživanja – Knjiga prva*, 55.

mortgage is a risk factor for other creditors.<sup>44</sup> The country, based on a statutory mortgage in the judicial enforcement procedure, has an absolute advantage over other mortgage creditors.<sup>45</sup> Therefore, it is necessary to reform legislation that regulates real-estate relations, land registry relations, enforcement procedure, bankruptcy proceedings, tax legislation and other regulations related to legal mortgage, as well as make their harmonization happen.

#### 4. THE CONSTITUTION OF A LEGAL MORTGAGE IN THE REPUBLIC OF SRPSKA

Regarding the statutory mortgage, the Property Rights Act that is applied in Republic of Srpska (hereinafter: RPARS)<sup>46</sup> regulates only that the legal lien shall be established in accordance with the provisions provided for by special laws, and that this right to immovable property will be entered in the public records at the request of the liable creditor.<sup>47</sup> A special law is the Tax Procedure Act of the Republic of Srpska (hereinafter TPARS)<sup>48</sup>, which regulates a statutory mortgage for securing claims in favor of the Tax Administration on the immovable property of the taxpayer in the event that he does not pay the tax liability.<sup>49</sup> At the same time it is regulated that the statutory mortgage is based on the date of registration in the real estate register, and it is deleted after settlement of the paid tax liabilities.<sup>50</sup> This regulation of the creation of a statutory mortgage in favor of fiscal has consistently applied the principle of enrollment, although this is contrary to the nature of this right.<sup>51</sup>

The entry into the public register of the real estate can have a constitutive effect (registration in the material sense, registration in absolute terms) and declarative effect (formal registration, enrollment in a relative sense). The constitutive effect of the principle of enrollment is regulated in several provisions of SRECARS and PRARS. According to Art. 62, para. 1 of SREARS: *“The property and other property rights on immovable property are acquired, transferred and restricted by enrollment in the cadastre of immovable property (constitution of registration), and cease by deleting enrollment.”*<sup>52</sup> From this provision, it

44 Powlakić, „Neki aktuelni problemi zalaganja nekretnina u entitetima BiH“, 226.

45 Art. 172 of the Enforcement Procedure Act of SFRY 1978 .

46 „Official Gazette of Republic of Srpska“, no. 124/08, 58/09 and 95/11.

47 Art. 152 of the Property Rights Act of Republic of Srpska.

48 „Official Gazette of Republic of Srpska“, no. 102/11, 108/11, 67/13, 31/14 and 44/16.

49 Art. 53, para. 1 of TPARS.

50 Art. 53, para. 2 of TPARS.

51 Ilija Babić i dr. *Komentar zakona o stvarnim pravima Republike Srpske* (Sarajevo: 2011), 483.

52 The constitutive effect of the principle of enrollment is regulated in Art. 54, para. 1, but this article should be deleted so as not to cause confusion as to which provision should apply in the specific case.

follows that all property rights regardless of the type and legal basis of the establishment constitutive effect get by enrollment. However, registration does not have an absolute effect because it is limited by the provision of Art. 63, para. 2 of SRECARS: “*In cases specified by law, property and other property rights may also be acquired prior to registration in the real estate cadastre, and by enacting it produces legal effect towards third parties (declaration of the entry).*”<sup>53</sup> Therefore, the property rights in certain cases may create constitutive effect even prior to enrollment in public records, and this depends primarily on the legal basis of acquisition. If the legal basis is a legal matter, then the *modus* is the acquisition of property rights registration, and if the legal basis of a court or other authority decision is law or inheritance, then registration has only a declaratory effect, and the constitutive effect arises earlier depending on the type of legal basis.<sup>54</sup>

Whether the enrollment has a constitutive or declarative effect depends on the kind of property right. Namely, the constitutive effect of the principle of enrollment is most consistently carried out with the mortgage, because the mortgage enrollment is a law *par excellence*.<sup>55</sup> This means that, regardless of the legal basis of the origin (contract, law or decision of the court, or decisions of another body), the mortgage acquires the constitutive effect only by enrollment. The reason why the registration of a *modus acquirendi* mortgage is in the very mode of its publicity, i.e. mortgage as a state-owned loan cannot exist otherwise than publishing in the public register of real estate, unlike other property rights whose publicity can manifest itself through the state of these property rights.

This further means that only the registered mortgage enrollment is valid, and that there cannot be an unenrolled mortgage because an unenrolled mortgage is *contradictio in adjecto*.<sup>56</sup> Only when acquiring property rights based on a legal transaction, that is, in the case of a mortgage, regardless of the legal basis of acquisition, registration has absolute effect, which makes it possible to harmonize the enrolled (legal) and unenrolled (factual) real estate and property rights on immovable property. This contributes to the safety of legal transactions, because the real estate condition is entered as valid, regardless of whether it differs from the unregistered, non-financial status (the principle of trust).

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53 The declaratory effect of registration is also regulated in Art. 54, para. 2 SRECARS, but this article, as well as in the case of double regulation of the constitutive effect of the enrollment principle, should be deleted so as not to cause confusion as to its application.

54 Radenka Cvetić, *Savremena evidencija nepokretnosti* (Novi Sad: 2009), 114-115; Jotanović, „Načelo upisa u katastar nepokretnosti u pravu Republike Srpske“, 227.

55 Stanković i Orlić, *Stvarno pravo*, 329; Powlakić, *Transpormacija stvarnog prava u Bosni i Hercegovini*, 95; Cvetić, *Savremena evidencija nepokretnosti*, 114.

56 Powlakić, „Neki aktuelni problemi zalaganja nekretnina u entitetima BiH“, 239.

Namely, in order for a mortgage creditor to be a conscientious acquirer he is obliged to investigate only the enrolled real estate, and he is not obliged to investigate the unenrolled state of the real estate. In this regard, only one reservation is required, and this is the so-called expanded conscientiousness.<sup>57</sup> Namely, if the mortgage creditor knew of the difference between the unenrolled and enrolled registry of the real estate in some other way, and not the insight into the public records of the real estate, it would still be considered unknowable. Of course, the burden of proof in this case is also on the one who claims the existence of a fact concerning the (non)conscientiousness of the acquirer.

The absolute effect of the mortgage achieved by enrollment has its own prerogatives. A mortgage creditor who has entered a mortgage, regardless of the legal basis of its acquisition, has the right to follow, which allows him to settle from the value of the real estate irrespective of the eventual change of the owner of the real estate. In this regard, the ban on the alienation and burden required by mortgage creditors when entering the mortgage is unnecessary.<sup>58</sup> The right of priority of a mortgage creditor is determined according to the timing of submission of the application for registration,<sup>59</sup> and is expressed in the phase of settlement. This means that according to the principle of *prior tempore potior iure* in the enforcement or bankruptcy procedure, the claim is secured by a mortgage regardless of the type of mortgage, i.e. a statutory mortgage has no priority over a contractual mortgage if the other is registered before a statutory mortgage. This is a positive change that contributes to legal security, unlike the solution in the 1978 SFRY Enforcement Procedure Act, which was applied earlier in this case, until the 2003 enforcement procedure was reformed. It also differs from the solution to the Law on Tax Administration of the FBiH that was valid until the amendments to this Law from 2012, according to which legal lien creditors have a privileged position because the entry has no constitutive effect.

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57 See Art. 56, para. 2 SRECARS and Art. 55, para. 2 of the RPARS in the part in which they stipulate that the acquirer is conscientious "... if he did not know, and, given the circumstances, he had sufficient reason to doubt ...".

58 Powlakić, „Neki aktuelni problemi zalaganja nekretnina u entitetima BiH“, 227-231 and *Stvarnopravno osiguranje kredita u BiH*, 238.

59 Art. 58, para. 1 of SRECARS.

## 5. THE CONSTITUTION OF A LEGAL MORTGAGE IN THE FEDERATION OF BIH

In the Federation of BiH, legal mortgage is regulated by the Tax Administration Act of the Federation of BiH (hereinafter TAABiHF)<sup>60</sup> which regulates that if the taxpayer does not pay the tax liability, then the amount of tax liability becomes the subject of a lawful lien right in favor of the Tax Administration<sup>61, 62</sup>. According to the original text of TAABiHF (until amendments to this Law from 2012), a statutory mortgage arises from the date of the tax deduction and lasts until its settlement.<sup>63</sup> By this kind of regulation legal mortgage in the Federation of Bosnia and Herzegovina is “invisible” because it is created unenrolled and ceases the same way, and the Tax Administration as a creditor can, but does not have to register it in the land registry because registration has no constitutive effect. As justified, the issue of the order (rank) of this mortgage is raised in relation to the registered mortgages in the land register. A statutory mortgage in a foreign currency for the benefit of the Tax Administration raises the question of the legal nature of the contractual mortgages, which the creditors have reaffirmed in the land register that there is no registered or previously created mortgage.<sup>64</sup>

The second controversial issue was opened by the provision of Art. 50, para. 3 of the original text of the TAABiHF according to which the Tax Administration has the possibility of collecting a legal mortgage in alternative (competitive) procedures - judicial or administrative. The administrative procedure provides priority settlement to the country regardless of the right of priority of other mortgage creditors. This compulsory collection procedure by the Tax Administration is regulated in detail by the Rulebook on Procedures for Forced Collection of Tax Liabilities<sup>65</sup> which are not adequately protected by the legal interest of the taxpayer-debtor, or other mortgage creditors.<sup>66</sup> Therefore, the Constitutional Court of the Federation of BiH intervened and with its Decision<sup>67</sup> it was established that Art. 50 TAABiHF (which has been elaborated in detail

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60 „Official Gazette of BiH Federation“, no. 33/02, 28/04, 57/09, 40/10, 27/12, 7/13, 71/14 and 91/15.

61 Art. 50, p. 1 of TAABiHF.

62 The formulation according to which “the amount of tax liability becomes subject to pledge” is imprecise because it deviates from the content of the pledge item regulated in Art. 139 of the Real Property Act of BiH Federation, „Official Gazette of BiH Federation“, no. 66/13 and 100/13 and establishes a general legal mortgage on the property of the taxpayer.

63 Art. 50, p. 2 TAABiHF.

64 Rijad Hamidović, „Zakonska hipoteka u svjetlu aktuelnih normativnih rješenja materijalnog poreznog prava Federacije Bosne i Hercegovine“, *Pravna misao*, no. 5-6 (2016), 74.

65 „Official Gazette of BiH Federation“, no. 50/02, 54/03 and 31/11.

66 See more in Hamidović, „Zakonska hipoteka kao sredstvo naplate poreza u Federaciji Bosne i Hercegovine“, 8-10.

67 Decision no. U-14/11 from 09.03.2011 published in „Official Gazette of BiH Federation“, no. 29/11.

in the aforementioned Rulebook) is not in accordance with the Constitution of the Federation of BiH. On the basis of this decision of the Constitutional Court, Amendments to the Tax Administration Act of FBiH was adopted, by which the irregularities referred to in Art. 50 TAABiHF were eliminated.<sup>68</sup>

Firstly, an irregularity was fixed in relation to the creation of a mortgage by stating that *“a mortgage is created by entering it in the land registry and terminating it by deleting it ....”*.<sup>69</sup> Thus, TAABiHF is in compliance with the Land Registers Act,<sup>70</sup> which in Art. 5 regulates that all rights to immovable property (except in the case of inheritance) arise only from the registration in the land registry. Registration in the land register gets absolute effect in the provisions of TAABiHF.

The second irregularity in regard to the possibility for the Tax Administration to be compulsorily charged in the administrative procedure, which violates the priority order of settlement of other mortgage creditors, has been tacitly removed by the omission of the disputed provision in Art. 50 TAABiHF. Implicitly, there is still a possibility of collecting a legal mortgage in the administrative procedure, and pursuant to the provisions of the Ordinance on procedures for enforced collection of tax liabilities that are not in compliance with the said amendments and supplements to this law.<sup>71</sup> If the possibility of enforcement through the administrative procedure was ignored, then the provisions of the Executive Procedure Act of the Federation of BiH<sup>72</sup> in the part referring to the priority order of settlement of mortgage creditors would be exclusively applied.<sup>73</sup> In this case, the ranking between multiple entries on the same real estate would be determined according to the rules of the land registry law, where the rule of priority of registration in the land registry is applied.<sup>74</sup>

By harmonizing the provision of Art. 50 TAABiHF with the Constitution of the Federation of Bosnia and Herzegovina, the Land Registers Act, the Executive Procedure Act of the Federation of BiH and the Property Rights Act of the Federation of BiH the consequences that resulted from the application of the earlier valid provision of Art. 50 TAABiHF have not been remedied, which relate to existing non-statutory mortgages. Namely, the legislator did not regulate the retroactive effect of this legal solution, i.e. forbade the creation of unenrolled

68 „Official Gazette of BiH Federation“, no. 27/12.

69 Art. 50, para. 6 of TAABiHF, regulated after the 2012 amendments.

70 „Official Gazette of BiH Federation“, no. 19/03 and 54/04.

71 See Hamidović, „Zakonska hipoteka kao sredstvo naplate poreza u Federaciji Bosne i Hercegovine“, 10-11.

72 „Official Gazette of BiH Federation“, no. 32/03, 52/03, 33/06, 39/09 and 35/12.

73 Art. 98, para. 1 in conjunction with Art. 74, para. 1 of the Enforcement Procedure Act of BiH Federation.

74 Art. 53, para. 1 of the Land Registration Act of BiH Federation.

legal mortgages in the future, but did not decide on the legal effect of unenrolled legal mortgages that had until then occurred in favor of the Tax Administration.

In such circumstances, as the only practical solution for securing legal security in the real estate market, it is proposed to check or prove the (non)existence of tax obligations of the real estate owners in the event of their mortgage advocacy. This way of knowing the (non)existence of an unenrolled mortgage would be applied until the expiration of three years from the date of entry into force of the RPABiHF, because Art. 361 of this Act regulates the obligation of the titular of all non-registered property rights to initiate the procedure for their entry in the land register in the mentioned deadline in order to publish all unenrolled rights.<sup>75</sup>

## 6. THE CONSTITUTION OF A LEGAL MORTGAGE IN THE BRČKO DISTRICT OF BIH

The Ownership and Other Property Rights Act of the Brčko District of BiH (hereinafter OOPRABDBiH)<sup>76</sup> explicitly prescribes the moment of constitution for each of the forms of mortgage so that a mortgage founded by a court decision is created by entering the land register<sup>77</sup> as well as the contractual mortgage.<sup>78</sup> Regarding legal mortgage this law regulates that it is created by fulfilling the assumptions determined by a special law for this purpose, and that it will be entered in the land register at the request of a mortgage creditor.<sup>79</sup> However, the compromise between statutory and other forms of mortgage in terms of their constitutive (enrolled and unenrolled mortgages), and therefore the safety of legal transactions, exists in a provision that regulates that a statutory mortgage cannot be opposed to the right of a conscientious person acting in accordance with the principle of trust in his / her land register entered his / her right before requiring the registration of a legal mortgage.<sup>80</sup> According to this decision, a legal mortgage acquires a constitutive effect by fulfilling legal assumptions, i.e. officially, but the statutory mortgagee will have a legal interest in subscribing because only by enrollment does he obtain a priority order in relation to other mortgages registered as a result of subsequent enrollment.

The previously applicable Enforcement Procedure Act of the Brčko District of BiH<sup>81</sup> provided for the primarily settlement of legal hypothecary creditors,

<sup>75</sup> Hamidović, „Zakonska hipoteka u svjetlu aktualnih normativnih rješenja meterijalnog poreznog prava Federacije Bosne i Hercegovine“, 84-86.

<sup>76</sup> „Official Gazette of Brčko District BiH“, no. 11/01, 8/03 and 40/04.

<sup>77</sup> Art. 130, para. 3 of OOPRABDBiH.

<sup>78</sup> Art. 132, para. 1 of OOPRABDBiH.

<sup>79</sup> Art. 131, para. 1, 2 and 3 of OOPRABDBiH.

<sup>80</sup> Art. 131, para. 4 of OOPRABDBiH.

<sup>81</sup> „Official Gazette of Brčko District BiH“, no. 8/00, 1/01, 5/02, 8/03, 19/07 and 2/08.

even in the event that they did not register the legal mortgage (Article 91). The new Executive Procedure Act of the Brčko District of BiH (hereinafter: EPABDBiH)<sup>82</sup>, as well as the Entity Enforcement Proceedings Acts<sup>83</sup>, provide for the possibility of execution on the unenrolled mortgage in the manner in which registration of an unenrolled estate into the land registry is carried out during the enforcement procedure.<sup>84</sup> EPABDBiH in Art. 119, which regulates primarily the settlement in the executive procedure, prescribes that the receivables of tax authorities, that is, receivables secured by a legal mortgage, are settled before other mortgage creditors. This decision is contrary to the decision in Art. 131, para. 4 OOPRABDBiH.

The Tax Administration Act of the Brčko District of BiH (hereinafter TAABDBiH)<sup>85</sup> does not prescribe the obligation to register a legal mortgage on the immovable property of a taxpayer since “... *the Administration may (underlined by R.J.) decide to register the pledge right on real estate ... of the taxpayer in favor of the District ...*”.<sup>86</sup> However, the TAABDBiH regulates that the pledge has the same legal strength as the court’s verdict,<sup>87</sup> which besides terminological inconsistency, also causes confusion regarding the constitutive nature of the statutory mortgage.

The provisions of OOPRABDBiH, EPABDBiH and TAABDBiH that refer to the constitutionality of a legal mortgage should be harmonized. Harmonization of the provisions of the laws that apply in the BDBiH is also required with the provisions of certain laws that apply in the entities in order to ensure the efficient application of a legal mortgage as the real right security means by the Indirect Taxation Authority of BiH. Namely, the Compulsory Collection of Indirect Taxes Act,<sup>88</sup> or the Amendments to the Compulsory Collection of Indirect Taxes Act,<sup>89</sup> stipulate that the registration of legal pledge law in public registries is carried out in accordance with the regulations of the Entities and the Brčko District of Bosnia and Herzegovina in this field, and that it arises on the date of registration in the land registry.<sup>90</sup>

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82 „Official Gazette of Brčko District BiH”, no. 39/13.

83 Art. 113 of EPA of Republic of Srpska and of EPA of BiH Federation.

84 Art. 88 of EPABDBiH.

85 „Official Gazette of Brčko District BiH“, no. 3/02, 42/04, 8/06, 3/07 and 19/07.

86 Art. 51, para. 1 of TAABDBiH.

87 Art. 51, para. 3. of TAABDBiH.

88 „Official Gazette of BiH“, no. 89/05.

89 „Official Gazette of BiH“, no. 62/11.

90 Art. 3, para. 2 of Amendments to the Compulsory Collection of Indirect Taxes Act, replacing the previous Ar. 14, para. 3. of the same Act.

## 7. CONCLUSION

In the Republic of Srpska, a real estate cadastre is being established as a unique record of immovable property and real estate rights, while in the Federation of BiH and the Brčko District of BiH, the land registry system is in use in the real estate register. Public records of real estate should meet modern criteria in terms of reliability, accuracy and functionality in order to provide secure legal traffic of real estate among all participants. In this context, the issue of mortgage and its entry into public records is particularly important.

Mortgage is most often a property loan collateral, but is often used by the country for the purpose of collecting claims on unpaid taxes. What creates legal uncertainty is the possibility of having unenrolled mortgages and their relationship to enrolled mortgages, and in a wider context it is also about other (un)enrolled property rights and on what legal effect their entry in public records is: constituent or declarative. In essence, the gap between the unenrolled and the enrolled real estate will continue to exist precisely because the entry does not have an absolute effect, as some property rights can be obtained as an unenrolled right, but not a mortgage.

Mortgage is the only right of enrollment *par excellence* because there is no unenrolled mortgage. This is particularly significant in the case of a legal mortgage that the Tax Administration has on the immovable property of a taxpayer who does not pay the tax liability. Namely, this is about the so-called privileged creditor for which a priority is reserved in collection of claims irrespective of whether the mortgage was registered in the real estate register. The existence of a unenrolled legal mortgage is a risk factor for other mortgage creditors who have entered their right into public records. Also, the risk factor is the possibility of an unenrolled retirement from the resulting mortgage in the administrative, not in the court proceedings. Therefore, the Federation of Bosnia and Herzegovina adopted the Amendments to the Tax Administration Act of FBiH from 2012, which remedied these irregularities in relation to future legal mortgages, but the legal fate of previously unregulated mortgage bonds was not solved.

The 2011 Tax Procedure Act of the Republic of Srpska stipulates that a legal mortgage is acquired by enrolling in the real estate cadastre. Thus, the unenrolled and enrolled situation regarding the mortgage is adjusted to the benefit of the enrolled mortgage. The Tax Administration is not a privileged mortgage creditor, because it enrolls in a priority order according to the time of filing the application for registration as well as other mortgage creditors.

Unlike the decision of the legislator in the Republic of Srpska, the legislator in the Brčko District of BiH accepted in the OOPRABDBiH a compromise solution according to which the registration of a legal mortgage is not of a constitutive

character, but that an unenrolled mortgage cannot be opposed to the right of a person who, in accordance with the principle of trust in the land register, entered his / her right before requiring the registration of a legal mortgage. However, ТААВДВБН and ЕРАВДВБН in the part regulating the legal mortgage are not compliant with this solution.

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## MODUS ACQUIRENDI ZAKONSKE HIPOTEKE

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**Apstrakt:** U Republici Srpskoj i Bosni i Hercegovini izvršena je reforma materijalnih i procesnih propisa koji se odnose na nepokretnosti i prava na nepokretnostima kako bi se stvorili povoljni uslovi za privredni razvoj. Nema privrednog, a ni svakog drugog razvoja, bez kreditnih sredstava koja na tržištu nude finansijske institucije (kreditori), a zauzvrat zahtijevaju odgovarajuće obezbjeđenje vraćanja datog. Najčešće sredstvo obezbjeđenja kredita jeste hipoteka koja treba da omogući maksimalnu sigurnost u fazi obezbjeđenja, a naročito u fazi namirenja. Takvo dejstvo hipoteke može se postići samo putem konstitutivnog dejstva načela upisa. Upisana, tj. knjižna hipoteka bez obzira na pravni osnov njenog upisa (ugovor, zakon, odluka suda ili drugog organa) daje pravnu sigurnost svim učesnicima u pravnom prometu nepokretnostima. U tom kontekstu posebno je značajno da i zakonska hipoteka mora biti upisana u javnu evidenciju nepokretnosti i da na taj način bude izjednačena sa svim drugim oblicima hipoteke u skladu sa principom *Prior tempore potior iure*.

**Ključne riječi:** nepokretnosti, hipoteka, zakonska hipoteka, javna evidencija nepokretnosti, konstitutivno dejstvo, deklarativno dejstvo.

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