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ACCESSORINESS OF MORTGAGE AND THE DEVELOPMENT OF A EUROPEAN MORTGAGE MARKET. CONSIDERATIONS FROM THE PERSPECTIVE OF POLISH LAW IN VIEW OF THE PROPOSAL OF A NON-ACCESSORY EUROHYPOTHEC

I. INTRODUCTION

The real estate market is one of the most important segments of the economy and its development depends on an efficient system of financing investments in real estate, in which a fundamental role is played by the banking sector. The main source of real estate financing are long-term loans secured by real (proprietary) security rights on immovables, primarily mortgages. Despite the standardised nature of mortgage credits offered by banks across Europe, the degree of integration of national mortgage lending markets in the European Union is low. This is the basis for formulating demands for the creation of a single European mortgage market and particular significance should be attributed to the proposal to adopt a "common mortgage for Europe", i.e. the Eurohypothec (also called Euromortgage)[1].

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[1] M. Kalasińska: *Kredyty i pożyczki hipoteczne jako podstawowe źródło finansowania nieruchomości* (in:) *Współczesna bankowość hipoteczna*, ed. A. Szelągowska, Warszawa 2010, p. 35; J. Kozińska: *Czy wprowadzenie eurohipoteki jest realne?*, Prawo Europejskie w Praktyce 2011, no. 11, p. 97 *et seq.*; B. Lepczyński: *Integracja transgraniczna rynku bankowego w UE*, Bank i Kredyt 2007, no. 5 (supplement), p. 21–22; S. Nasarre-Aznar: *Looking for a model for a Eurohypothec*, http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/Background%20Paper%20Eurohypothec.pdf (accessed: 4 January 2016), p. 2; *idem*: *The Integration of the Mortgage Markets in Europe*, part 1, Silesian Journal of Legal Studies 2011, no. 3, p. 47–48; P. Scalamogna: *"Euroipoteca", lo strumento per armonizzare il mercato*

The concept of the Eurohypothec, promoted from the sixties of the 20th century, aims at introducing a flexible pan-European security right on immovables that would encourage transnational mortgage lending. The supporters of harmonization of mortgage laws argue that diversity of national real estate collaterals hinders the development of cross-border mortgage credit operations in Europe. Moreover, the main obstacle to the process of integration of the mortgage lending sector is considered to be the accessory character of mortgage which serves as a dominant form of securing long-term loans. Accessoriness means that the mortgage is linked with the claim it secures so it cannot exist separately from the claim and anything that happens to the contractual relationship between the lender and the borrower affects the mortgage. For this reason the basic assumption underlying the proposal of the Eurohypothec is that the common security right would be non-accessory and therefore independent of the obligation to be secured. It is expected that such a solution would increase opportunities for the use of the future Eurohypothec and thus bring benefits to both borrowers and lenders[2].

Irrespective of the potential advantages for the mortgage markets, however, the above-mentioned plans raise doubts as to whether it is feasible and justified indeed to introduce a uniform security instrument. Controversies around the idea of the Eurohypothec concern, on one hand, the legislative competences of the EU, and the proposed structure of the common mortgage on the other. With respect to the latter issue, it should be emphasized that the basic function of accessoriness of proprietary security rights is to protect the owner of the encumbered object (the mortgagor). Unlike in case of accessory security rights, when a non-accessory instrument is concerned, although the loan is paid off, the real property still remains encumbered with the security right. Hence the implementation of the Eurohypothec as a non-accessory right might entail a risk for real estate owners, especially consumers, who are the weaker parties to credit transactions[3]. One of the crucial questions that need to be addressed when analysing the concept of the common non-accessory European mortgage regards therefore the way to resolve the conflict between the efficiency of the Eurohypothec and the protection of mortgagors.

The assessment of the Eurohypothec project in terms of the impact of non-accessoriness on the position of the owner should take into account the specificity of security rights on real estate being in use in different European countries. A com-

ipotecario europeo?, http://www.notariato.it/News/Relazioni_Pesaro/Scalamogna/OKScalamogna.pdf (accessed: 2 September 2014), p. 3–4; H. Simón-Moreno: *The Eurohypothec. A perspective from Spanish law*, European Property Law Journal 2012, no. 1, p. 191; D. Wojtczak: *Usługi bankowe w regulacjach Unii Europejskiej*, Warszawa 2012, p. 163; A. Wudarski: *W poszukiwaniu konstrukcji eurohipoteki*, Kwartalnik Prawa Prywatnego 2009, no. 1, p. 205; M. Kaczorowska: *Koncepcja eurohipoteki na tle praw zastawniczych na nieruchomościach w Europie*, Wrocław 2016, p. 42 *et seq.*, 77 *et seq.*

[2] A. Wudarski: *W poszukiwaniu…*, *op. cit.*, p. 221; S. Nasarre-Aznar: *Looking for a model…*, *op. cit.*, p. 8; *idem*: *The Integration…*, part 1, *op. cit.*, p. 49–50.

[3] A. Wudarski: *W poszukiwaniu…*, *op. cit.*, p. 221–222; P. Scalamogna: *"Euroipoteca", lo strumento…*, *op. cit.*, p. 23–24.

parative analysis of national regulations in question enables us to indicate current trends in legislation and establish whether preference is given to accessory or non-accessory forms of security rights on immovables. An illustrative example of directions of recent development of mortgage law is the regulation of mortgage adopted in Poland, that was thoroughly revised in 2009. The scope of the above amendment was to weaken the strict accessoriness of mortgage and to render it more flexible.

The present article aims at examining the regulations of security rights on immovables being in force in different European countries, with particular consideration of the Polish mortgage after the last amendment of mortgage law. The analysis will be focused on whether there are ways of ensuring effectiveness of mortgage while maintaining the principle of accessoriness, yet in a loosened form, or else non-accessoriness is a prerequisite for improving and intensifying mortgage lending transactions. Emphasis shall be put on the relation between the degree of accessoriness and the protective function of security rights. The conclusions to be drawn will serve as a basis for postulates regarding the concept of the Eurohypothec in the context of harmonization of mortgage markets.

II. REAL SECURITY RIGHTS ON IMMOVABLES AND THEIR ROLE IN MORTGAGE LENDING TRANSACTIONS — GENERAL REMARKS

1. THE FUNCTION OF REAL SECURITY RIGHTS ON IMMOVABLES IN THE SYSTEM OF SECURING BANK CLAIMS

The large category of securities includes various legal institutions falling within the scope of property law or law of obligations, whose common characteristic is their socio-economic function to strengthen the position of the creditor against the debtor. The traditional division of securities between personal securities and real securities (proprietary securities) is based on the criterion of the subject of debtor's liability[4]. In case of personal securities, such as guarantee, transfer of claims and promissory note, the debtor is liable with all their assets. Real security rights enable the creditor to receive satisfaction out of a specified asset, irrespective of whether it is owned by the debtor or a third party, with priority over the per-

[4] J. Gołaczyński: *Zastaw na rzeczach ruchomych*, Warszawa 2002, p. 4; E. Gniewek: *Prawo rzeczowe*, Warszawa 2014, p. 270–271; I. Heropolitańska: *Prawne zabezpieczenia zapłaty wierzytelności*, Warszawa 2014, p. 36 *et seq.*; J. Ignatowicz, K. Stefaniuk: *Prawo rzeczowe*, Warszawa 2012, p. 263 *et seq.*; P. Niczyporuk, A. Talecka: *Bankowość. Podstawowe zagadnienia*, Białystok 2011, p. 357; Z. Radwański, J. Panowicz-Lipska: *Zobowiązania — część szczegółowa*, Warszawa 2015, p. 255; G. Sikorski: *Funkcja, podstawa prawna i rodzaje zabezpieczeń wierzytelności bankowych w prawie polskim*, Przegląd Prawa Handlowego 1997, no. 9, p. 19.

sonal creditors[5]. This group of securities includes first of all pledge and mortgage which are classified as limited real rights (limited rights *in rem*). Pledge is established primarily over movable property, while the main subject of mortgage is immovable property.

Security rights used in banking practice are aimed at reducing the bank credit risk, i.e. the danger of loss of the entrusted funds in the event of default by the borrower[6]. Risk constitutes an inherent feature of banking activity. It is worth emphasizing that the proper functioning of the banking system is guaranteed primarily by adequate capital the banks have at their disposal. The so called legal forms of securing loans serve as a complementary while the main factors in this regard are the principle of purposefulness of credit and the evaluation of creditworthiness of the borrower. Hence it is particularly important that the banks offer the borrowers credits which are most appropriate in terms of their use and the probability of repayment.

Mortgage, as well as other equivalent security rights on real estate (such as land charge), play a crucial role in securing long-term loans (i.e. mortgage credits). It is justified by a significant value of real estate which constitutes the subject of the security right and the fact that real estate prices do not fluctuate over a longer period of time, unlike prices of other goods. For the above reasons mortgage is considered a sure form of security right that enables the bank to satisfy the claim in case the borrower defaults. At the same time it should be underlined that what also determines the usefulness of mortgage are well-functioning land registers, mortgage rank, as well as effective enforcement procedures. Other relevant factors are the process of real estate evaluation and the system of credit information exchange[7].

2. ACCESSORINESS OF SECURITY RIGHTS AS A PRINCIPLE

Traditionally security rights are based on the principle of accessoriness which is deemed a legal dogma, especially as far as mortgage is concerned[8]. Accessoriness

[5] See e.g. J. Gołaczyński: *Prawo zastawu* (in:) *System prawa prywatnego*, vol. 4: *Prawo rzeczowe*, ed. E. Gniewek, Warszawa 2012, p. 463 *et seq.*; F. Fiorentini: *Proprietary Security Rights in the Western European Countries* (in:) *European Private Law: A Handbook*, vol. 1, eds. M. Bussani, F. Werro, Berne 2009, p. 416.

[6] P. Niczyporuk, A. Talecka: *Bankowość…*, *op. cit.*, p. 356; G. Sikorski: *Funkcja, podstawa prawna i rodzaje zabezpieczeń…*, *op. cit.*, p. 19; J. Skąpski: *Rzeczowe formy zabezpieczenia wierzytelności (z wyłączeniem hipoteki)*, Studia Iuridica 1994, no. 21, p. 139; P. Soliński: *Dochodzenie przez banki roszczeń zabezpieczonych hipotecznie*, Prawo Bankowe 2007, no. 3, p. 102.

[7] J. Pisuliński: *Hipoteka* (in:) *System prawa prywatnego*, vol. 4: *Prawo rzeczowe*, ed. E. Gniewek, Warszawa 2012, p. 564; P. Niczyporuk, A. Talecka: *Bankowość…*, *op. cit.*, p. 365; V. Sagaert: *Harmonization of Security Rights on Immoveables: An Ongoing Story* (in:) *Towards a European Civil Code, Fourth Revised and Expanded Edition*, eds. A.S. Hartkamp, M.W. Hesselink, E.H. Hondius, C. Mak, C.E. du Perron, Nijmegen 2011, p. 1062.

[8] A. Szpunar: *Akcesoryjność hipoteki*, Państwo i Prawo 1993, no. 8, p. 17; K. Zaradkiewicz: *Tzw. zastaw nieakcesoryjny w polskim prawie cywilnym. Uwagi ogólne na tle ustawy o zastawie rejestrowym i rejestrze zastawów*, Kwartalnik Prawa Prywatnego 2000, no. 2, p. 293; I. Karasek: *Zabezpieczenia wierzytelności na zbiorze rzeczy lub praw o zmiennym składzie. Zagadnienia konstrukcyjne*, Kraków 2004, p. 24.

refers to a connection between the secured claim and the security right in a way that the existence of an accessory security right is dependent on the existence of a valid and enforceable claim. The above relationship may be considered in different aspects, namely in terms of emergence, transfer, termination or exercise of a security right[9]. It should be stressed that the linkage existing between a claim and an accessory security right arises by virtue of law and it cannot derive from a juridical act[10].

The origins of the principle of accessoriness go back to the Roman law. It is expressed in a Latin maxim *Accessorium sequitur principale* (An accessory thing follows the principal thing to which it is accessory)[11]. During the period of development of the Pandectistics the principle of accessoriness obtained the status of a rule of law, affecting the way of formation of contemporary legal systems[12]. It also found a widespread use in the process of civil law codification in European countries in the 19th century. A strictly accessory character was given to mortgage regulated under the French Civil Code (*Code civil*) of 1804[13]. Similarly, the provisions of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) of 1811[14] regarding mortgage were based on the principle of accessoriness. Accessory mortgage was also one of security rights on immovables envisaged in the German Civil Code (*Bürgerliches Gesetzbuch*) of 1896[15] (hereinafter referred to as BGB). Nevertheless,

[9] T. Czech: *Hipoteka. Komentarz*, Warszawa 2011, p. 21; *idem*: *Księgi wieczyste i hipoteka. Komentarz*, Warszawa 2014, p. 622; J. Pisuliński: *Hipoteka…*, *op. cit.*, p. 562; A. Gambaro: *Contractual Security Rights in Immoveables (Mortgage) and Contract Law* (in:) *The Interaction of Contract Law and Tort and Property Law in Europe. A Comparative Study*, eds. C. von Bar, U. Drobnig, München 2004, p. 354 *et seq.*; A. Raczyński: *Akcesoryjność praw zastawniczych na tle różnych przejawów zasady akcesoryjności w polskim prawie cywilnym* (in:) *Współczesne tendencje w dziedzinie zabezpieczenia wierzytelności*, ed. T. Sokołowski, Poznań 2013, p. 172 *et seq.*; A. Steven: *Accessoriness and security over land*, University of Edinburgh School of Law Working Paper Series 2009, no. 7, p. 6; J. Widło: *Zastaw rejestrowy na prawach*, Warszawa 2007, p. 181. See also S. Keessen: *Could a non-accessory mortgage be easily accommodated in a legal system with an accessory mortgage? A study on the functioning of the principle of accessoriness with regard to the non-accessory Euromortgage and the accessory Dutch mortgage*, http://dare.uva.nl/cgi/arno/show.cgi?fid=609368 (accessed: 4 February 2016), p. 5; O. Stöcker: *The Eurohypothec — Accessoriness as legal dogma*? (in:) *Basic Guidelines for a Eurohypothec. Outcome of the Eurohypothec workshop. November 2004/April 2005*, ed. A. Drewicz-Tułodziecka, Mortgage Bulletin 2005, no. 21, p. 46.

[10] Ł. Supera: *Ochrona właściciela nieruchomości obciążonej zabezpieczającym długiem gruntowym* (in:) *Wybrane zagadnienia prawa cywilnego*, eds. M. Warciński, K. Zaradkiewicz, Warszawa 2006, p. 264; K. Zaradkiewicz: *Nowa regulacja prawa hipotecznego*, Przegląd Prawa Handlowego 2011, no. 1 (supplement), p. 11. See also O. Soergel, O. Stöcker: *Rozszerzenie UE na wschód i zagadnienia doktryny prawa rzeczowego dotyczącego nieruchomości — kauzalność, akcesoryjność i cel zabezpieczenia*, Transformacje Prawa Prywatnego 2003, no. 3, p. 15.

[11] *Digesta* 34, 2, 19, 13. See also A. Wudarski: *W poszukiwaniu…*, *op. cit.*, p. 225–226; J. Gołaczyński: *Zastaw…*, *op. cit.*, p. 54; M. Kuryłowicz, A. Wiliński: *Rzymskie prawo prywatne. Zarys wykładu*, Warszawa 2013, p. 201; W. Rozwadowski: *Tradycje prawne* (in:) *System prawa prywatnego*, vol. 1: *Prawo cywilne — część ogólna*, ed. M. Safjan, Warszawa 2012, p. 15–16.

[12] A. Wudarski: *W poszukiwaniu…*, *op. cit.*, p. 226; A. Steven: *Accessoriness and security…*, *op. cit.*, p. 2.

[13] French Civil Code of 21 March 1804 (*Code civil*), consolidated version of 16 March 2016, https://www.legifrance.gouv.fr (accessed: 22 March 2016).

[14] Austrian Civil Code of 1 June 1811 (*Allgemeines bürgerliches Gesetzbuch*, Collection of Laws no. 946/1811, as amended).

[15] German Civil Code of 18 August 1896 (*Bürgerliches Gesetzbuch*, Federal Official Journal I 42, 2909; 2003 I 738, as amended).

in practice mortgage has been replaced by another form of security adopted in German law as an exception to the principle of accessoriness, namely a non-accessory land charge (land debt)[16].

The rule of accessoriness is common to civil law and common law systems, however it is applied with different degrees of rigidity in particular countries[17]. This issue will be discussed further in paragraph III.

3. CHARACTERISTICS OF NON-ACCESSORY REAL SECURITY RIGHTS

In contrast to accessoriness, non-accessoriness means a relation in which the security right is independent of the claim it secures. A security right is considered to be non-accessory if by virtue of law it is depending neither on the existence of an obligation, nor on whether the holder of the right is also the creditor of the secured claim[18]. Thus security rights falling into this category may be created in advance, prior to the emergence of claims to be secured. In consequence, ineffectiveness or invalidity of the contract giving rise to a claim affects in no way the existence of the security right[19]. Moreover, the security right and the claim may be transferred both together and separately[20]. Finally, repayment of a debt does not lead to the extinguishment of the security right so it is possible to pursue satisfaction out of the encumbered object regardless of the existence of a claim[21].

When creating a non-accessory real security right the parties may not subordinate the security to the claim with an effect at property law level, which is inherent to accessory real security rights. Instead, a connection between a claim and a non-accessory security right is created by a security agreement, therefore at the level of law of obligations. The security agreement is based on a fiduciary relationship — the creditor undertakes to exercise the right granted to him within the limits and for the purpose specified in the agreement[22].

[16] A. Wudarski: *W poszukiwaniu…*, *op. cit.*, p. 228–229; L. van Vliet: *The German Grundschuld*, The Edinburgh Law Review 2012, no. 16, p. 149.

[17] F. Fiorentini: *Proprietary Security Rights…*, *op. cit.*, p. 426.

[18] T. Karaś: *Pojęcia: kauzalność, abstrakcyjność, akcesoryjność i próba określenia ich wzajemnej relacji w świetle koncepcji causae generalis i causae specialis* (in:) *Wybrane zagadnienia prawa cywilnego*, eds. M. Warciński, K. Zaradkiewicz, Warszawa 2006, p. 126; O. Soergel, O. Stöcker: *Rozszerzenie UE…*, *op. cit.*, p. 17.

[19] S. Kostecki: *Kilka uwag na temat długu gruntowego w prawie niemieckim*, Rejent 2006, no. 9, p. 121.

[20] *Ibidem*, p. 123.

[21] J. Pisuliński: *O długu na nieruchomości*, Transformacje Prawa Prywatnego 2001, no. 1, p. 18; K. Pleyer: *Nowoczesne prawo zastawnicze na nieruchomości*, Monitor Prawniczy 1995, no. 8, p. 235; J. Zrałek: *Kilka uwag o projekcie uregulowania długu gruntowego*, Rejent 2008, no. 4, p. 123.

[22] J. Gołaczyński: *Umowa zabezpieczająca* (in:) *O źródłach i elementach stosunków cywilnoprawnych. Księga pamiątkowa ku czci prof. Alfreda Kleina*, ed. E. Gniewek, Kraków 2000, p. 126; J. Widło: *Umowa zabezpieczająca na wierzytelności* (in:) *Ius et veritas. Księga poświęcona pamięci Michała Staszewicza*, eds. D. Dudek, A. Janicka, W.S. Staszewski, Lublin 2003, p. 542; A. Wudarski: *Umowa zabezpieczająca jako surogat akcesoryjności długu*

It is worth noting that the distinction of the security agreement as a separate type of contract is justified by the evolution of economic relations and the development of legal forms of securities based on the principle of freedom of contract. Indeed, a stage at which the parties define the purpose and rules of exercising a security can be identified in every juridical act consisting of creation of a security right. There are three elements which may be combined in a single juridical act: security agreement, establishment of the security right and exercise of the security right. The conclusion of a security agreement is of particular importance with regard to non-accessory security rights, like a land charge, because in this case the functioning of the security right is dependent just on such an agreement. By contrast, when it comes to juridical acts that are statutorily defined as having a security purpose (like the establishment of pledge and mortgage), the security agreement is treated as their natural component so there is no need to distinguish it[23].

4. ACCESSORINESS VERSUS NON-ACCESSORINESS AND MORTGAGOR PROTECTION VERSUS EFFICIENCY OF REAL SECURITY RIGHTS ON IMMOVABLES

As indicated above, security rights on real property are created in order to enhance the position of the creditor (the bank) in terms of securing the repayment of the debt. The creditors are interested in the possibility of using the most effective and flexible forms of securing claims in the field of real estate financing. It is particularly vital in case of specialized techniques of mortgage lending, characterized by frequent changes regarding the secured claim. At the same time the security right encumbering real estate should provide an adequate level of protection to the owner (the mortgagor). In this context one should take into account the advantage of the banks over the borrowers, especially consumers, which is connected with the asymmetry of information[24].

Against this background a considerable difference between accessory and non-accessory security rights on immovables can be seen.

On one hand accessoriness of mortgage ensures the protection of the real estate owner. This is because an accessory security right is linked to the secured claim in such a way that it cannot come to existence and continue to exist without the existence of the claim. Consequently, the repayment of the debt entails the extinguishment

gruntowego, Kwartalnik Prawa Prywatnego 2010, no. 2, p. 437; J. Jastrzębski, K. Zaradkiewicz: *Akcesoryjny dług gruntowy a problem jawności i odpowiedzialności*, part 1, Przegląd Prawa Handlowego 2005, no. 5, p. 18; J. Pisuliński: *O długu…*, *op. cit.*, p. 14; Ł. Supera: *Ochrona właściciela…*, *op. cit.*, p. 260; O. Stöcker: *The Eurohypothec — Accessoriness…*, *op. cit.*, p. 45.

[23] J. Gołaczyński: *Umowa zabezpieczająca…*, *op. cit.*, p. 115; J. Widło: *Umowa zabezpieczająca…*, *op. cit.*, p. 546.

[24] D. Wojtczak: *Usługi bankowe…*, *op. cit.*, p. 163.

of the security right. The protective function of accessoriness is that the enforcement of the security is possible only if a debt is due. This means that a mortgage can no longer be enforced once the claim it secured is extinguished and that the scope of the mortgage is limited by the scope of that claim[25]. Moreover, as a result of accessoriness of mortgage, the owner of the real property who is not the debtor of the secured claim can raise not only defences available to him personally, but also those available to the debtor[26].

On the other hand, just for the reason of its accessory character, mortgage is regarded as an ineffective security right which does not meet the requirements of the modern mortgage market. It is argued that the strict connection between the real security right and the claim reduces the possibilities of use of the security in mortgage lending transactions. Among the most significant constraints resulting from the accessory nature of mortgage are mentioned the following: impossibility to secure with one mortgage several claims of the same creditor or of different creditors (it refers to the so called syndicated credits), as well as claims of fluctuating amount and purpose; restricted possibility to substitute the secured claim with another one; impossibility to secure a new claim with a mortgage previously created (because of the termination of mortgage in case of repayment of the debt)[27].

In line with the above arguments, contrary to mortgage, a non-accessory real security right is flexible because it continues to exist despite the claim it secured is satisfied and also despite the transfer of the claim or the change of its amount, creating thereby conditions for achieving different economic objectives. For the security is independent of the claim, there is no obstacle to secure new claims in addition to or instead of the original claim (which does not require a change of entry in the land register), as well as to secure a number of claims, both existing and future ones, which are held by the same creditor or by many creditors. For example, a land charge once established can be used again to secure a new loan taken out with the aim to repay the loan obtained before. Characteristic to non-accessory real security rights

[25] S. Kostecki: *Wierzytelność a rzeczowe zabezpieczenia na nieruchomości*, Warszawa 2014, p. 40; I. Ramus: *Przegląd zabezpieczeń rzeczowych wraz z perspektywą zmian (hipoteka, dług gruntowy, przewłaszczenie nieruchomości na zabezpieczenie)*, Acta Iuris Stetinensis 2015, no. 9, p. 47 *et seq.*; S. Keessen: *Could a non-accessory mortgage…*, *op. cit.*, p. 11; A. Steven: *Accessoriness and security…*, *op. cit.*, p. 39.

[26] J. Pisuliński: *Hipoteka…*, *op. cit.*, p. 593.

[27] I. Makowska: *Uwagi na tle reformy hipoteki* (in:) *Księga jubileuszowa prof. dr. hab. Tadeusza Smyczyńskiego*, eds. M. Andrzejewski, L. Kociucki, M. Łączkowska, A. Schulz, Toruń 2008, p. 89; J. Pisuliński: *Zabezpieczenie wierzytelności na nieruchomości — hipoteka czy dług na nieruchomości?* (in:) *Dziedzictwo prawne XX wieku. Księga pamiątkowa z okazji 150-lecia Towarzystwa Biblioteki Słuchaczów Prawa Uniwersytetu Jagiellońskiego*, eds. A. Zoll, J. Stelmach, J. Halberda, Kraków 2001, p. 402–403; S. Rudnicki: *Hipoteka na rozdrożu*, Rejent 1998, no. 1, p. 10; O. Stöcker: *The Eurohypothec — Accessoriness…*, *op. cit.*, p. 47; A. Śmieja: *Zalety i słabości hipoteki na tle ogólnej charakterystyki instytucji*, Rejent 1995, no. 1, p. 146; K. Zaradkiewicz: *Tzw. zastaw nieakcesoryjny…*, *op. cit.*, p. 297. In this context it is worth noting that accessoriness with respect to the creation of mortgage is connected with the principle of speciality, referring to the secured claim. In accordance with this principle only claims which are specified may be secured. See J. Pisuliński: *Hipoteka…*, *op. cit.*, p. 561 *et seq.*; *idem*: *Zasada szczegółowości i akcesoryjności hipoteki po nowelizacji* (in:) *Współczesne problemy prawa prywatnego. Księga pamiątkowa ku czci Profesora Edwarda Gniewka*, eds. J. Gołaczyński, P. Machnikowski, Warszawa 2010, p. 471–484.

is also that the holder of the right and the holder of the secured claim do not need to be one and the same person, which makes the security instrument useful whenever a transaction requires separating the credit from the security right (in case of accessory securities such separation is excluded)[28].

Nevertheless, at the same time non-accessoriness results in the lack of protection enjoyed by the real estate owners when using an accessory mortgage as a security[29]. The reason is that the repayment of a secured debt does not prevent the current holder of the land charge (in whom the security right has been vested as a result of its transfer) from demanding to be satisfied. Therefore, in extreme cases a possibility of unjustified double payment by the chargor is not excluded[30]. Such a risk is all the more probable since the chargor is not allowed to set up defences deriving from the juridical act underlying the obligation which has been fulfilled. As mentioned above, the statutory connection between the security right and the claim — characteristic to the accessory securities — is replaced here by contractual one, but the security agreement has effect only between the parties and not *erga omnes*, as it is in case of an absolute right[31].

In this context the issue of causality and abstraction of juridical acts should also be addressed. As regards non-accessory real security rights on immovable property, the weaker position of the owner is additionally connected with the principle of abstraction, applied in some legal systems — for example the German non-accessory land charge is also an abstract right. In such case the establishment of a security right is not conditioned by the existence of a valid obligation, the *causa*. The security agreement which aims at connecting a non-accessory security right and a claim is considered the *causa* of securing the claim with the security right. However, because of the abstract character of the security right, invalidity of the security agreement has no influence on the effectiveness of the increment[32]. As opposed to the principle of abstraction, the rule of causality, which is dominant in the legal systems of the continental Europe, envisages that it is impossible to carry out an effective juridical act involving increment without a valid *causa*[33]. With respect to

[28] O. Soergel, O. Stöcker: *Rozszerzenie UE…*, *op. cit.*, p. 21; O. Stöcker: *The Eurohypothec — Accessoriness…*, *op. cit.*, p. 45.

[29] S. Kostecki: *Wierzytelność a rzeczowe zabezpieczenia…*, *op. cit.*, p. 17.

[30] J. Zrałek: *Kilka uwag o projekcie…*, *op. cit.*, p. 123.

[31] A. Wudarski: *Umowa zabezpieczająca…*, *op. cit.*, p. 438.

[32] I. Karasek: *Zabezpieczenia wierzytelności…*, *op. cit.*, p. 27–28; T. Karaś: *Pojęcia: kauzalność, abstrakcyjność…*, *op. cit.*, p. 198; Z. Radwański: *Rodzaje czynności prawnych* (in:) *System prawa prywatnego*, vol. 2: *Prawo cywilne — część ogólna*, ed. Z. Radwański, Warszawa 2008, p. 199; Ł. Supera: *Ochrona właściciela…*, *op. cit.*, p. 266; K. Zaradkiewicz: *Numerus apertus abstrakcyjnych czynności prawnych w polskim prawie cywilnym?*, Kwartalnik Prawa Prywatnego 1999, no. 2, p. 287 *et seq.*; *idem*: *Tzw. zastaw nieakcesoryjny…*, *op. cit.*, p. 321. See also O. Stöcker: *The Eurohypothec — Accessoriness…*, *op. cit.*, p. 42–43.

[33] I. Karasek: *Zabezpieczenia wierzytelności…*, *op. cit.*, p. 29; Z. Radwański: *Rodzaje czynności prawnych…*, *op. cit.*, p. 193; O. Soergel, O. Stöcker: *Rozszerzenie UE…*, *op. cit.*, p. 12; G. Tracz: *Aktualność generalnej reguły kauzalności czynności prawnych przysparzających w prawie polskim*, Kwartalnik Prawa Prywatnego 1997, no. 3, p. 211.

pledge or mortgage, constituting accessory real security rights regulated by law, it is not necessary to apply the causality rule since the *causa* underlying increment (in the form of vesting a security in the creditor) is inherent in the very juridical act establishing the real security right. Accessoriness is therefore a sufficient means of protection of the owner[34].

5. METHODS OF INCREASING MARKETABILITY OF SECURITY RIGHTS ON IMMOVABLES WITHOUT ABANDONING THE PRINCIPLE OF ACCESSORINESS

Having discussed the relation between accessory or non-accessory nature of real security rights and their protective function or economic efficiency, it is worth considering how to achieve a balance in this respect and reconcile the interests of the owners, who merit adequate protection, and of the financial institutions acting in the developing mortgage lending sector. In this context it is important to emphasize that the above-mentioned criticism towards accessory mortgage refers to accessoriness in a strict (pure) form, whereas in fact principle of accessoriness is not absolute. There are many exceptions to this rule provided for in different legal systems, regarding various aspects of accessoriness[35]. Thanks to weakening the connection between the mortgage and the secured claim, the parties gain more freedom in shaping their legal relationship, though mortgagor protection is maintained. The point is, therefore, that depending on the extent of accessoriness, mortgage may be an advantageous security instrument for both the lender and the real estate owner[36].

One of exceptions to strict accessoriness is the maximum-amount mortgage, which is created up to a specified highest sum. This type of mortgage allows to secure claims whose amount is not determined at the moment of establishment of the security right, therefore not only the existing but also the future ones. In such case it is possible to transfer the secured claim without the mortgage, as well as there is no automatic expiration of the mortgage in case of repayment of the debt[37]. Accessori-

[34] I. Karasek: *Zabezpieczenia wierzytelności…*, *op. cit.*, p. 28; J. Widło: *Zastaw rejestrowy…*, *op. cit.*, p. 170.

[35] J. Pisuliński: *Hipoteka…*, *op. cit.*, p. 594; B. Swaczyna: *Hipoteka umowna*, Warszawa 2007, p. 28; A. Józefiak-Molnár: *Zasada akcesoryjności hipoteki po nowelizacji z dnia 29 czerwca 2009 r. — wybrane zagadnienia* (in:) *Nie tylko hipoteka… Zeszyt jubileuszowy dedykowany Profesorowi Jerzemu Pisulińskiemu*, eds. M. Kućka, K. Pałka, Warszawa 2015, p. 82 *et seq.*; A. Steven: *Accessoriness and security…*, *op. cit.*, p. 41. See also S. Kostecki: *Wierzytelność a rzeczowe zabezpieczenia…*, *op. cit.*, p. 42–43.

[36] J. Pisuliński: *Hipoteka…*, *op. cit.*, p. 594. See also T. Czech: *Hipoteka…*, *op. cit.*, p. 24. Cf. A. Drewicz-Tułodziecka: *The position of an owner of real estate, which is encumbered with a non-accessory right to property, based on the example of regulations in Poland* (in:) *Basic Guidelines for a Eurohypothec. Outcome of the Eurohypothec workshop. November 2004/April 2005*, ed. A. Drewicz-Tułodziecka, Mortgage Bulletin 2005, no. 21, p. 57 *et seq*.

[37] J. Gołaczyński: *Zastaw…*, *op. cit.*, p. 22; J. Pisuliński: *Hipoteka kaucyjna*, Kraków 2002, p. 59 *et seq.*; *idem*: *Zabezpieczenie wierzytelności na nieruchomości…*, *op. cit.*, p. 409–410; S. Rudnicki: *Hipoteka jako zabezpieczenie*

ness of the maximum-amount mortgage is manifested in connecting the security right not with a specific claim but with a determined legal relationship from which claims to be secured may arise[38].

Another example of loosened accessoriness is the right to dispose of a vacated mortgage position. This institution is based on a deviation from the principle of mortgage succession (*successio hypothecaria*) which means that upon termination of a secured claim a mortgage does not extinguish until it is cancelled from the land register and a mortgage with a subsequent ranking does not move forward. Thanks to this the real estate owner may establish a new mortgage with the ranking of the extinguished security right or else transfer a mortgage with another ranking to the vacated mortgage position[39].

A similar function is performed by the owner's mortgage, i.e. a mortgage which does not extinguish although the ownership of the encumbered immovable property and the secured claim are concentrated in the same hands. The owner may transfer the claim together with the mortgage to another person. It also refers to a mortgage created by the owner in their own favour[40].

Moreover, another form of weakening the bond between the security right and the claim is the rechargeable mortgage. Such a mortgage may be re-used to secure new claims, regardless of the fact that the former creditor has been satisfied[41].

In this context, taking into account the specificity of the mortgage market, what should be noted is the difference between mortgage credits offered to corporate borrowers (businesses) and those offered to individual borrowers (consumers). In case of credits granted to businesses the process of financing investment activity involves frequent objective and subjective changes of the credit relationship, which is connected with the use of different financing techniques and risk diversification. Economic undertakings on a large scale often need to be financed by several banks cooperating within a consortium[42]. By contrast, residential mortgage credits taken out by consumers are of a static character. Generally throughout the whole credit period the lender and the subject of security do not change[43]. When comparing the purpose and character of both above-mentioned types of credits, it can be observed

wierzytelności, Warszawa 2005, p. 18; A. Szpunar: *Akcesoryjność…*, *op. cit.*, p. 22. Cf. K. Zaradkiewicz: *Nowa regulacja…*, *op. cit.*, p. 22. See also T. Czech: *Hipoteka…*, *op. cit.*, p. 24.

[38] J. Pisuliński: *Zabezpieczenie wierzytelności na nieruchomości…*, *op. cit.*, p. 409–410; K. Zaradkiewicz: *Tzw. zastaw nieakcesoryjny…*, *op. cit.*, p. 325.

[39] B. Swaczyna: *Rozporządzanie opróżnionym miejscem hipotecznym i hipoteka właściciela (uwagi na tle projektu Komisji Kodyfikacyjnej Prawa Cywilnego)*, Kwartalnik Prawa Prywatnego 2003, no. 1, p. 211 *et seq.* See also J. Pisuliński: *Hipoteka…*, *op. cit.*, p. 710.

[40] B. Swaczyna: *Rozporządzanie opróżnionym miejscem hipotecznym…*, *op. cit.*, p. 214 *et seq.*

[41] See e.g. S. Kostecki: *Uwagi o nowelizacji przepisów o hipotece*, Rejent 2011, no. 9, p. 23. Cf. K. Zaradkiewicz: *Nowa regulacja…*, *op. cit.*, p. 22. See also T. Czech: *Hipoteka…*, *op. cit.*, p. 24.

[42] P. Niczyporuk, A. Talecka: *Bankowość…*, *op. cit.*, p. 183–184.

[43] *Ibidem*, p. 284 *et seq.*; J. Pisuliński: *Umowa kredytu. Kredyt konsumencki* (in:) *System prawa prywatnego*, vol. 8: *Zobowiązania — część szczegółowa*, ed. J. Panowicz-Lipska, Warszawa 2011, p. 425.

that flexibility of security rights on immovables is desirable in professional transactions but consumers are not likely to make use of the opportunities connected with loosening accessoriness to a similar extent, instead they expect to be sufficiently protected[44].

III. POLISH MORTGAGE AGAINST THE BACKGROUND OF LEGISLATIVE TENDENCIES IN EUROPE

1. CLASSIFICATION OF REAL SECURITY RIGHTS ON IMMOVABLES ACCORDING TO THE DEGREE OF ACCESSORINESS

The analysis of different types of proprietary security rights on immovables existing in Europe lets us distinguish some categories representing particular legislative approaches to accessoriness and non-accessoriness. The classification proposed in the legal literature corresponds to a large extent with the traditional division of legal systems into main European legal families: Roman, Germanic, Nordic and Common law[45].

Accessory mortgage is a traditional security, applied primarily in the Roman legal systems, i.e. in France, Belgium, Italy, Spain, Portugal, Luxembourg. Moreover, it is known to the Austrian, German, Greek, Dutch and Scottish laws, as well as in the Central and Eastern European countries, like Poland, Czech Republic, Latvia and Lithuania[46]. However, the degree of accessoriness of mortgages differs among the national legislations. Weakened accessoriness is characteristic to some subtypes of mortgages, such as: the maximum-amount mortgage in Austria and Germany (*Höchstbetragshypothek*), Spain (*hipoteca de máximo*) or the Netherlands (*Bankhypothek*)[47], and the rechargeable mortgage in France (*hypothèque rechargea-*

[44] Cf. F. Fiorentini: *Proprietary Security Rights…*, *op. cit.*, p. 427.

[45] R. Tokarczyk: *Komparatystyka prawnicza*, Warszawa 2008, p. 62 *et seq.*; K. Zweigert, H. Kötz: *An Introduction to Comparative Law*, Oxford 2011, p. 63 *et seq.* See also S. Kircher: *Grundpfandrechte in Europa*, Berlin 2004, p. 41 *et seq.*

[46] J. Pisuliński: *Opinia w sprawie rządowego projektu ustawy o zmianie kodeksu cywilnego i ustawy o księgach wieczystych i hipotece oraz o zmianie niektórych innych ustaw (druk nr 3433) z uwzględnieniem zmian wynikających ze sprawozdania Podkomisji Nadzwyczajnej do rozpatrzenia w/w projektu z dnia 9 marca 2005 r.*, Biuro Studiów i Ekspertyz — Opinia Zlecona, Warszawa, 31 marca 2005 r., http://orka.sejm.gov.pl/rexdomk4.nsf/($All)/2AF38123BF3785FFC1256FC4004D6F5F/$File/I689_05.rtf?OpenElement (accessed: 24 February 2016), p. 6; *idem*: *O planowanej nowelizacji ustawy o księgach wieczystych i hipotece i wprowadzeniu długu gruntowego*, Kwartalnik Prawa Prywatnego 2005, no. 3, p. 843; C.U. Schmid, C. Hertel, H. Wicke: *Real Property Law and Procedure in the European Union. General Report*, http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/GeneralReport.pdf (accessed: 24 February 2016), p. 17–18, 87 *et seq.*

[47] J. Pisuliński: *Hipoteka kaucyjna…*, *op. cit.*, p. 23 *et seq.*; *idem*: *Rys prawnoporównawczy. Hipoteka w zagranicznych systemach prawnych. Eurohipoteka* (in:) *Hipoteka po nowelizacji. Komentarz*, ed. J. Pisuliński,

ble)[48]. Moreover, the right to dispose of the mortgage position is used e.g. in Austria[49] and Poland[50], whereas the owner's mortgage — e.g. in Austria and Germany[51]. Beyond that, a specific regulation of mortgage is envisaged in English and Irish laws, which distinguish legal mortgages and equitable mortgages. The English mortgage is classified as an accessory right[52].

A group of countries in which there are in use non-accessory real security rights on immovables, is formed — among others — by: Germany (land charge — *Grundschuld*), Estonia (mortgage — *hüpoteek*), Slovenia (land charge — *zemljiški dolg*)[53], Denmark (pledge — *ejerpantbrev*)[54] and Sweden (mortgage — *inteckning*)[55]. It is worth noting that in German, Estonian or Slovenian laws non-accessory real security rights on immovables coexist beside accessory ones[56]. A similar duality is also known to Swiss law[57].

On the basis of the above brief analysis a distinction may be made among four basic models of real security rights over real estate:

1) the accessory mortgage existing in most countries of the continental Europe,
2) the non-accessory mortgage in some other continental countries (Germany, Estonia, Slovenia),

Warszawa 2011, p. 46–47; C.U. Schmid, C. Hertel, H. Wicke: *Real Property Law and Procedure…*, *op. cit.*, p. 89; O. Soergel, O. Stöcker: *Rozszerzenie UE…*, *op. cit.*, p. 20.

[48] A. Józefiak: *Ograniczone prawa rzeczowe w prawie francuskim*, Studia Prawa Prywatnego 2008, no. 4, p. 28; A. Fusaro: *Le linee di tendenza del diritto europeo dell'ipoteca: Euroipoteca e ipoteca ricaricabile* (in:) *Studi in onore di Giorgio Cian*, eds. M.V. De Giorgi, S. Delle Monache, G. De Cristofaro, Padova 2010, p. 1024 *et seq.*; V. Sagaert: *Main developments in immovable securities in French and Belgian Law. A transition from tradition to modernity* (in:) *Sicherungsrechte an Immobilien in Europa*, eds. M. Hinteregger, T. Borić, Wien–Berlin 2009, p. 201–216.

[49] R. Cierpiał: *Ograniczone prawa rzeczowe w prawie austriackim*, Studia Prawa Prywatnego 2008, no. 4, p. 10–11.

[50] See paragraph III.2 of the present article.

[51] Ł. Przyborowski: *Ograniczone prawa rzeczowe w prawie niemieckim*, Studia Prawa Prywatnego 2008, no. 4, p. 55–56; B. Swaczyna: *Rozporządzanie opróżnionym miejscem hipotecznym…*, *op. cit.*, p. 214; S. Kircher: *Grundpfandrechte…*, *op. cit.*, p. 264 *et seq.*

[52] J. Pisuliński: *Rys prawnoporównawczy…*, *op. cit.*, p. 51; C.U. Schmid, C. Hertel, H. Wicke: *Real Property Law and Procedure…*, *op. cit.*, p. 89.

[53] A. Bieranowski: *Dług gruntowy (uwagi na tle projektowanej regulacji)*, Rejent 2004, no. 10, p. 87; R. Bucholski: *Dług gruntowy jako zabezpieczenie kredytów bankowych*, Opolskie Studia Administracyjno-Prawne 2008, vol. 5, p. 17; J. Jastrzębski, K. Zaradkiewicz: *Akcesoryjny dług gruntowy…*, part 1, *op. cit.*, p. 21; J. Pisuliński: *Opinia w sprawie rządowego projektu…*, *op. cit.*, p. 6; O. Soergel, O. Stöcker: *Rozszerzenie UE…*, *op. cit.*, p. 20; A. Wudarski: *W poszukiwaniu…*, *op. cit.*, p. 229–230; K. Zaradkiewicz: *Nowa regulacja…*, *op. cit.*, p. 5–6; *idem*: *Tzw. zastaw nieakcesoryjny…*, *op. cit.*, p. 295.

[54] O. Soergel, O. Stöcker: *Rozszerzenie UE…*, *op. cit.*, p. 20; K. Zaradkiewicz: *Nowa regulacja…*, *op. cit.*, p. 6.

[55] U. Jensen: *Real Property Law and Procedure in the European Union. Sweden Report*, http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealProperty-Project/Sweden.PDF (accessed: 24 February 2016), p. 5, 36; K. Zaradkiewicz: *Nowa regulacja…*, *op. cit.*, p. 5.

[56] C.U. Schmid, C. Hertel, H. Wicke: *Real Property Law and Procedure…*, *op. cit.*, p. 85.

[57] B. Swaczyna: *Ograniczone prawa rzeczowe w prawie szwajcarskim*, Studia Prawa Prywatnego 2008, no. 4, p. 78 *et seq.*; *idem*: *Szwajcarski Schuldbrief jako ewentualny wzór dla polskiego ustawodawcy*, Studia Prawa Prywatnego 2009, no. 2, p. 143 *et seq.*

3) the Scandinavian non-accessory mortgage,
4) the common law mortgage[58].

2. THE MODEL OF LOOSENED ACCESSORINESS OF MORTGAGE IN THE POLISH LAND AND MORTGAGE REGISTERS AND MORTGAGE ACT

Particular attention should be given to the recent modernization of mortgage law in Poland as an example of a new way of regulating accessory mortgages, ensuring both flexibility of the security right and mortgagor protection. The amendment to the Land and Mortgage Registers and Mortgage Act (*ustawa o księgach wieczystych i hipotece)* of 6 July 1982[59] (hereinafter referred to as LMRMA), which was enacted on 26 June 2009[60] and entered into force on 20 February 2011, introduced a new type of mortgage, based on the model of maximum-amount mortgage (it abolished the previous distinction between the ordinary mortgage and the maximum--amount mortgage).

According to the current definition of mortgage (*hipoteka*), in order to secure a particular claim arising from a specified legal relationship, the immovable property may be encumbered with a right under which the creditor may seek satisfaction out of the immovable property, irrespective of whose ownership it has become, and with priority over personal creditors of the immovable property owner (art. 65 para. 1 LMRMA). The Polish mortgage may secure pecuniary claims, including the future claims. A claim is secured up to a specified amount[61]. If security is excessive the

[58] S. Nasarre-Aznar: *Looking for a model…*, *op. cit.*, p. 8. See also C.U. Schmid, C. Hertel, H. Wicke: *Real Property Law and Procedure…*, *op. cit.*, p. 85 *et seq.*; *Round Table "Flexibility, Security and Efficiency of Security Rights Over Immovable Property in Europe" (as at 29 May 2012 / 3rd edition)*, http://www.pfandbrief.de/cms/_internet.nsf/0/55F2D358ACC6E6FEC1257AD20034E52F/$FILE/Slides%20Round%20Table%20english%203rd%20edition.pdf (accessed: 22 August 2014), p. 5 *et seq.*; O. Stocker: *The Eurohypothec* (in:) *The Future of European Property Law*, eds. S. van Erp, A. Salomons, B. Akkermans, Munich 2012, p. 71. See also M. Kaczorowska: *Koncepcja eurohipoteki…*, *op. cit.*, p. 125 *et seq.*

[59] Journal of Laws 2016, item 790, as amended. See *The Act on Land and Mortgage Registers and on Mortgage*, transl. D. Staniszewska-Kowalak, Warszawa 2015.

[60] Act amending the Land and Mortgage Registers and Mortgage Act and certain other acts of 26 June 2009 (*Ustawa o zmianie ustawy o księgach wieczystych i hipotece oraz niektórych innych ustaw*, Journal of Laws 2009 No. 131, item 1075).

[61] Explanatory memorandum to the draft law amending the Land and Mortgage Registers and Mortgage Act and certain other acts of 29 December 2008, Sejm Paper no. 1562, http://orka.sejm.gov.pl/Druki6ka.nsf/0/224D5E56572275EEC125753900444680/$file/1562-uzasadnienie.doc (accessed: 18 February 2016), p. 4. See also T. Czech: *Księgi wieczyste i hipoteka…*, *op. cit.*, p. 752 *et seq.*; E. Gniewek: *Hipoteka* (in:) *Zarys prawa cywilnego*, eds. E. Gniewek, P. Machnikowski, Warszawa 2014, p. 682; K. Górska, J. Kozińska: *Zmiany wprowadzone w konstrukcji polskiej hipoteki w perspektywie dyskusji o kształcie eurohipoteki*, Wrocławskie Studia Sądowe 2012, no. 2, p. 39 *et seq.*; I. Heropolitańska (in:) I. Heropolitańska, A. Tułodziecka, K. Hryćków-Mycka, P. Kuglarz: *Ustawa o księgach wieczystych i hipotece oraz przepisy związane. Komentarz*, Warszawa 2014, p. 266 *et seq.*; A. Józefiak-Molnár: *Zasada akcesoryjności hipoteki…*, *op. cit.*, p. 78 *et seq.*; J. Pisuliński: *Hipoteka…*, *op. cit.*, p. 581 *et seq.*; Ł. Przyborowski (in:) *Hipoteka po nowelizacji. Komentarz*, ed. J. Pisuliński, Warszawa 2011, p. 185

owner may demand that the amount of mortgage be reduced (art. 68 LMRMA)[62]. The mortgage may be used to secure several claims arising from various legal relationships and being due to the same creditor (art. 68^1 LMRMA), as well as several claims being due to different entities, if the claims are aimed at financing the same undertaking — in such case a mortgage administrator shall be appointed by the creditors concerned (art. 68^2 LMRMA). This regulation is intended to create favourable conditions for granting syndicated credits by a group of banks being participants within a consortium[63]. There is also a possibility to substitute a secured claim by another claim being due to the same creditor (art. 68^3 LMRMA). As a rule, in the event of remittance of the claim the mortgage shall devolve upon the acquirer, too, and the mortgage may not be transferred without the secured claim (art. 79 LMRMA). However, if the mortgage secures several claims being due to the creditor, in the event of remittance of one of them the mortgage shall devolve on the acquirer proportionally to the amount of the claims in relation to the sum of the claims secured by that mortgage, unless the parties have agreed otherwise (art. 79^1 para. 1 LMRMA). If a new claim may arise out of the legal relationship specified in the entry to the land and mortgage register, the parties may determine that the remittance of the claim does not cause devolution of the mortgage on the acquirer (art. 79^2 LMRMA). Similarly, the extinguishment of the claim shall result in the extinguishment of the mortgage, unless the given legal relationship may give rise to future subsequent claims being subject to security (art. 94 LMRMA)[64].

et seq.; *idem* (in:) *Ustawa o księgach wieczystych i hipotece. Postępowanie wieczystoksięgowe*, ed. J. Pisuliński, Warszawa 2014, p. 701 *et seq.*; M. Siemaszkiewicz: *Eurohipoteka a funkcjonujący w Polsce model zabezpieczenia hipotecznego*, Acta Universitatis Wratislaviensis, no. 3665, Studenckie Prace Prawnicze, Administratywistyczne i Ekonomiczne, vol. 17, ed. M. Winiarski, Wrocław 2015, p. 154 *et seq.* See also K. Zaradkiewicz: *Property Law — Introduction*, http://polishprivatelaw.pl/property-law-introduction/ (accessed: 2 January 2016).

[62] P. Armada-Rudnik: *Prawo hipoteczne po nowelizacji z 26.6.2009 r.*, Monitor Prawniczy 2010, no. 1, p. 11–12; T. Czech: *Hipoteka…*, *op. cit.*, p. 129 *et seq.*; *idem*: *Księgi wieczyste i hipoteka…*, *op. cit.*, p. 763 *et seq.*; M. Drela: *Roszczenie o zmniejszenie kwoty hipoteki oraz roszczenie o zwolnienie części nieruchomości spod obciążenia hipotecznego jako roszczenia procesowe o ukształtowanie treści hipoteki (art. 68 ust. 2 i art. 90 u.k.w. i h.)*, Wrocławskie Studia Sądowe 2012, no. 2, p. 17–27; T. Henclewski, D. Matczak: *Pojęcie nadzabezpieczenia hipotecznego*, Przegląd Prawa Handlowego 2014, no. 6, p. 23–28; I. Karasek-Wojciechowicz: *Nadmierność zabezpieczenia hipotecznego*, Monitor Prawa Bankowego 2011, no. 5, p. 53–68; Ł. Przyborowski (in:) *Hipoteka po nowelizacji…*, *op. cit.*, p. 189–193; M. Sekuła-Leleno: *Uprawnienie dłużnika hipotecznego do zmniejszenia sumy hipotecznej*, Rejent 2013, no. 10, p. 50–71; K. Zaradkiewicz: *Nowa regulacja…*, *op. cit.*, p. 16–19.

[63] Explanatory memorandum to the draft law amending the Land and Mortgage Registers and Mortgage Act…, *op. cit.*, p. 6. See also P. Armada-Rudnik: *Prawo hipoteczne po nowelizacji…*, *op. cit.*, p. 9; T. Czech: *Hipoteka…*, *op. cit.*, p. 161 *et. seq.*; *idem*: *Księgi wieczyste i hipoteka…*, *op. cit.*, p. 805; P. Gumiński: *Administrator hipoteki a konsorcja bankowe*, Przegląd Legislacyjny 2009, no. 3–4, p. 36–55; J. Kornas: *Administrator hipoteki — nowa instytucja w polskim prawie*, Przegląd Prawniczy Uniwersytetu Warszawskiego 2009, no. 1–2, p. 157–168; M. Kućka (in:) *Hipoteka po nowelizacji. Komentarz*, ed. J. Pisuliński, Warszawa 2011, p. 198–234; *idem* (in:) *Ustawa o księgach wieczystych i hipotece. Postępowanie wieczystoksięgowe*, ed. J. Pisuliński, Warszawa 2014, p. 720 *et seq.*; J. Kuźmicka-Sulikowska: *Administrator hipoteki. Wybrane zagadnienia na tle art. 68^2 ustawy o księgach wieczystych i hipotece*, Wrocławskie Studia Sądowe 2012, no. 2, p. 67–84; K. Zaradkiewicz: *Nowa regulacja…*, *op. cit.*, p. 23.

[64] Explanatory memorandum to the draft law amending the Land and Mortgage Registers and Mortgage Act…, *op. cit.*, p. 17–18. See also P. Armada-Rudnik: *Prawo hipoteczne po nowelizacji…*, *op. cit.*, p. 10; G. Bar:

What is more, a new instrument, namely the right to dispose of a vacated mortgage position, was implemented (art. 101^1–101^{11} LMRMA), which is an evidence of protection of the owner's interests. By establishing a new mortgage in the vacated position or, upon the consent of the holder of the right, transferring an existing mortgage encumbering the same immovable property to the vacated position, the owner may enjoy better credit conditions than when applying the rule of mortgage succession[65].

It also needs to be mentioned that the above reform of the accessory mortgage in Poland had been preceded by legislative works on a proposal to adopt a new non-accessory security right on real estate, the land charge, following the German and Slovenian equivalents[66]. Eventually those preparatory works had been waived, mainly because of the criticism expressed in the legal doctrine[67].

The characteristics of the Polish mortgage proves that a compromise between efficiency of accessory security right and protection of the real estate owner may indeed be reached. On one hand the current provisions of LMRMA provide new opportunities and offer more favourable conditions from the perspective of the lending practice, on the other — they are still based on the principle of accessoriness and moreover strengthen the position of the mortgagor.

Przeniesienie wierzytelności zabezpieczonej hipotecznie po nowelizacji z 29 czerwca 2009 r., Wrocławskie Studia Sądowe 2012, no. 2, p. 7–16; T. Czech: *Hipoteka…*, *op. cit.*, p. 322 *et seq.*, 378 *et seq.*; T. Henclewski: *Popularność stosowania instytucji opróżnionego miejsca hipotecznego po czterech latach od wprowadzenia do prawa polskiego*, Monitor Prawa Bankowego 2015, no. 11, p. 82–85; A. Piestrak: *Granice uprawnienia do rozporządzania opróżnionym miejscem hipotecznym*, Studia Lubuskie 2015, vol. 11, p. 33–55; J. Pisuliński: *Hipoteka…*, *op. cit.*, p. 603 *et seq.*; B. Swaczyna (in:) *Hipoteka po nowelizacji. Komentarz*, ed. J. Pisuliński, Warszawa 2011, p. 338 *et seq.*, 369 *et seq.*; *idem* (in:) *Ustawa o księgach wieczystych i hipotece. Postępowanie wieczystoksięgowe*, ed. J. Pisuliński, Warszawa 2014, p. 893 *et seq.*, 926 *et seq.*; K. Zaradkiewicz: *Nowa regulacja…*, *op. cit.*, p. 26.

[65] Explanatory memorandum to the draft law amending the Land and Mortgage Registers and Mortgage Act…, *op. cit.*, p. 18. See also T. Czech: *Hipoteka…*, *op. cit.*, p. 530 *et seq.*; J. Kornas: *Częściowo opróżnione miejsce hipoteczne i zastrzeżenie pierwszeństwa*, Wrocławskie Studia Sądowe 2012, no. 2, p. 48–66; A. Lipska: *Rozporządzenie wolnym miejscem hipotecznym — analiza w kontekście finansowania bankowego*, Monitor Prawa Bankowego 2011, no. 4, p. 56 *et seq.*; I. Makowska: *Uprawnienie do rozporządzania miejscem hipotecznym*, Przegląd Prawa Handlowego 2012, no. 5, p. 33 *et seq.*; M. Rzewuska: *Rozporządzenie opróżnionym miejscem hipotecznym*, Radca Prawny 2011, no. 9, p. 14–17; A. Stangret-Smoczyńska: *Rozporządzanie opróżnionym miejscem hipotecznym — uwagi wybrane*, Rejent 2012, no. 2, p. 91–106; B. Swaczyna (in:) *Hipoteka po nowelizacji…*, *op. cit.*, p. 439 *et seq.*; *idem*: *Rozporządzanie opróżnionym miejscem hipotecznym…*, *op. cit.*, p. 211–244; *idem* (in:) *Ustawa o księgach wieczystych…*, p. 1019 *et seq.*; D. Wierzbiański: *Granice rozporządzania opróżnionym miejscem hipotecznym*, Nieruchomości 2014, no. 10, p. 4–7; K. Zaradkiewicz: *Property Law — Introduction…*, *op. cit.*

[66] See explanatory memorandum to the draft law amending the Civil Code, the Land and Mortgage Registers and Mortgage Act and certain other acts of 8 November 2004, Sejm Paper no. 3433, http://orka.sejm.gov.pl/Druki-4ka.nsf/($vAllByUnid)/B048365D07E91924C1256F4F002EB6CB/$file/3433.pdf (accessed: 18 February 2016), p. 1 *et seq.* See also e.g. R. Bucholski: *Dług gruntowy…*, *op. cit.*, p. 16; J. Pisuliński: *O planowanej nowelizacji…*, *op. cit.*, p. 839; R. Sztyk: *Dług na nieruchomości — nowa forma zabezpieczenia sumy pieniężnej*, Rejent 2000, no. 3, p. 59.

[67] S. Kostecki: *Wierzytelność a rzeczowe zabezpieczenia…*, *op. cit.*, p. 23–31; J. Pisuliński: *O długu…*, *op. cit.*, p. 11; K. Zaradkiewicz: *Nowa regulacja…*, *op. cit.*, p. 4–5, 6.

3. COURSE OF DEVELOPMENT OF MORTGAGE LAW IN SOME OTHER EUROPEAN COUNTRIES

The last changes in the Polish regulation on mortgage outlined above correspond with a general tendency observed nowadays in the field of mortgage law in the European countries[68]. Reforms similar to the one introduced in Poland, with the aim of loosening the accessoriness of mortgages, have been carried out recently in France[69] and Spain[70]. Although at the turn of the 20th and the 21th centuries an increased interest of national legislators in non-accessory forms of real securities on immovables was noted, as evidenced by examples of Polish, Slovenian, Estonian and also Hungarian laws, that trend appeared not to be continued. In Poland the bill regarding a non-accessory land charge has never been passed, whereas in Hungary a non-accessory security right called independent pledge (*önálló zálogjog*), introduced in 1996, was abolished upon adopting a new civil code (which entered into force in 2014) due to insufficient protection granted to consumers[71].

What is more, by virtue of an amendment to BGB of 2008 a subtype of land charge, i.e. land charge with a security function (*Sicherungsgrundschuld*), was regulated (§ 1192 para. 1a BGB). Under the new provisions, in case of transfer of the security right the chargor is allowed to raise the defences he had against the original chargee against the subsequent chargee, which was impossible before the amendment. The need of the above change derived from the fact that the previous rule excluding the possibility to set up defences against a new holder of the security right had been misused by the buyers of credit portfolios, enforcing land charges for sums exceeding the amounts due according to the credit contracts. In consequence the German land charge acquired accessory character in the aspect of enforcement[72].

4. CONCLUDING COMPARATIVE REMARKS

The above brief comparative considerations lead us to a conclusion that currently relaxed accessoriness is of increasing importance and may be regarded as

[68] Cf. S. Kostecki: *Wierzytelność a rzeczowe zabezpieczenia…*, *op. cit.*, p. 306 *et seq*. See also M. Kaczorowska: *Koncepcja eurohipoteki…*, *op. cit.*, p. 202 *et seq*.

[69] M. Fervers: *Hypothèque rechargeable und Grundschuld*, Tübingen 2013, p. 28 *et seq.*; A. Józefiak: *Ograniczone prawa rzeczowe…*, *op. cit.*, p. 26, 28; K. Zaradkiewicz: *Nowa regulacja…*, *op. cit.*, p. 5.

[70] K. Zaradkiewicz: *Nowa regulacja…*, *op. cit.*, p. 5; S. Nasarre-Aznar: *Eurohypothec & Eurotrust. Two instruments for a true European mortgage market after the EC White Paper 2007 on the Integration of EU Mortgage Credit Markets*, Zentrum für Europäische Rechtspolitik, Diskussionspapier 7/2008, p. 31 *et seq*.

[71] N. Csizmazia: *Reform of the Hungarian Law of Security Rights in Movable Property*, Juridica International 2008, vol. 14, p. 192; *idem*: *Sicherungsrechte an Immobilien in Ungarn* (in:) *Sicherungsrechte an Immobilien in Europa*, eds. M. Hinteregger, T. Borić, Wien–Berlin 2009, p. 54 *et seq.*; L. Vékás: *Nowy węgierski kodeks cywilny*, Kwartalnik Prawa Prywatnego 2010, no. 3, p. 601 *et seq.*; A. Wudarski: *W poszukiwaniu…*, *op. cit.*, p. 232.

[72] A. Wudarski: *Umowa zabezpieczająca…*, *op. cit.*, p. 436–437; L. van Vliet: *The German Grundschuld…*, *op. cit.*, p. 166.

a dominant model. However, there are different methods of weakening the connection between the real security right and the claim applied by the national legislators.

As far as the non-accessory real security rights on immovables are concerned, it should be clearly indicated that in some legal systems in practice they play a greater role than accessory equivalents, as it is in Germany. At the same time, just the example of the German land charge demonstrates a tendency to at least modify the non-accessory nature of the security by regulating the security agreement, in such a way that it is assimilated to a certain extent to accessory security rights, the aim being to strengthen the position of the real estate owner.

IV. EUROHYPOTHEC AS A FLEXIBLE SECURITY IN CROSS-BORDER CREDIT TRANSACTIONS

1. BASIC ASSUMPTIONS OF THE CONCEPT OF THE EUROHYPOTHEC

The first proposal to prepare a project of a common mortgage for European countries was presented in 1966 on the initiative of EEC Commission by a group of experts in a report "The Development of a European Capital Market" (the so called Segré Report)[73]. The authors identified an approximation or harmonization of the laws on security rights within the Member States as a priority and stated that introducing a common mortgage would contribute significantly to integration of capital markets. Since that time the concept of the Eurohypothec has been developed by different organizations involved in the field of mortgage lending and groups of scholars, with the support of the institutions of the European Community. The effect of the preparatory works undertaken in the period from the seventies to the nineties of the 20th century were proposals and opinions regarding the notion of the Eurohypothec, submitted, among others, by: the Commission for European Affairs of the International Union of the Notaries, the Association of German Mortgage Banks, the Forum Group on Mortgage Credit and the European Mortgage Federation[74].

[73] J. Kozińska: *Czy wprowadzenie eurohipoteki…*, *op. cit.*, p. 97; A. Wudarski: *W poszukiwaniu…*, *op. cit.*, p. 210–211; S. Kircher: *Grundpfandrechte…*, *op. cit.*, p. 418–419, 442 *et seq.*; J. Köndgen, O. Stöcker: *Die Eurohypothek — Akzessorietät als Gretchenfrage?*, Zeitschrift für Bankrecht und Bankwirtschaft 2005, no. 2, p. 112; P. Scalamogna: *"Euroipoteca", lo strumento…*, *op. cit.*, p. 8; O. Stöcker: *Die „Eurohypothek"*, Berlin 1992, p. 216 *et seq.*; *idem*: *Eurohipoteka — instrument zabezpieczania* z *szansą na realizację* (in:) *Single European Mortgage Market*, eds. A. Drewicz-Tułodziecka, M. Mikołajczyk, Monitor Prawniczy 2005, no. 19 (supplement), p. 47; *idem*: *The Eurohypothec…*, *op. cit.*, p. 72; *idem*: *The Eurohypothec — Accessoriness…*, *op. cit.*, p. 39; M. Kaczorowska: *Koncepcja eurohipoteki…*, *op. cit.*, p. 77 *et seq.*

[74] J. Kozińska: *Czy wprowadzenie eurohipoteki…*, *op. cit.*, p. 97 *et seq.*; A. Wudarski: *W poszukiwaniu…*, *op. cit.*, p. 211 *et seq.*; H. Simón-Moreno: *The Eurohypothec…*, *op. cit.*, p. 191 *et seq.*; O Stöcker: *The Eurohypothec…*, *op. cit.*, p. 72–73.

The need to introduce a uniform real estate collateral was expressed officially in the European Commission Green Paper on Mortgage Credit in the EU, published in 2005[75]. According to the argumentation put forward in this document direct cross-border sales amount to merely 1% of overall residential mortgage credit activity. The small percentage of transnational credit transactions is due to significant differences that exist among national jurisdictions in the field of security rights with regard to immovable property. In consequence, as the participants of the trade from a particular European country are not familiar with foreign regulations, they are not willing to bear a risk connected with transnational credit agreements.

In the same 2005 a model of the future Eurohypothec was presented in the "Basic Guidelines for a Eurohypothec" which were edited by the Mortgage Credit Foundation with its seat in Warsaw — as a result of research carried out by experts and representatives of numerous academic centres[76]. The "Basic Guidelines" constitute a comprehensive study, including rules concerning the legal nature, the way of creation, transfer and termination of the Eurohypothec, as well as the legal environment for the common security right, i.e. registration, enforcement, insolvency proceedings, costs and state taxes. The proposed uniform European mortgage is designed as a flexible non-accessory security right (land charge) entitling the holder of the Eurohypothec to the payment of a certain sum of money out of the property right. Along these lines, due to the feature of non-accessoriness, there would be a possibility to secure several obligations of the same creditor and re-use the Eurohypothec once set up. This should lead to easier access to credits, reduction of costs and intensification of competition among lending institutions.

In accordance with the rules contained in the "Basic Guidelines" formal requirements as regards the declarations of the parties and registration of the Eurohypothec in a competent register would be the same as for other real estate charges (mortgages) under national law. The Eurohypothec could be structured either as a certificated right (letter right) or as a non-certificated right (registered only right or non-letter right). It is also foreseen that the common security should be used in combination with a security agreement which would stipulate conditions under which the holder of the Eurohypothec may keep and enforce the security right. Moreover, the Eurohypothec could be created in favour of the present owner himself (owner's Eurohypothec). The law applicable to the Eurohypothec would be the law of the Member State where the real property is located (*lex rei sitae*)[77].

[75] Green Paper — Mortgage Credit in the EU, COM (2005) 327 final.

[76] *Working Paper "Basic Guidelines for a Eurohypothec"* (in:) *Basic Guidelines for a Eurohypothec. Outcome of the Eurohypothec workshop. November 2004/April 2005*, ed. A. Drewicz-Tułodziecka, Mortgage Bulletin 2005, no. 21, p. 11–23. See also K. Górska, J. Kozińska: *Zmiany wprowadzone…*, *op. cit.*, p. 36 *et seq.*; J. Kozińska: *Czy wprowadzenie eurohipoteki…*, *op. cit.*, p. 98–99; M. Siemaszkiewicz: *Eurohipoteka a funkcjonujący w Polsce model…*, *op. cit.*, p. 154 *et seq.*; M. Kaczorowska: *Koncepcja eurohipoteki…*, *op. cit.*, p. 108–117; *eadem*: *Model eurohipoteki w podstawowych wytycznych Fundacji na rzecz Kredytu Hipotecznego*, Rejent 2010, no. 6, p. 23–38.

[77] *Working Paper "Basic Guidelines for a Eurohypothec"…*, *op. cit.*, p. 13 *et seq.*

As a pan-European instrument, the Eurohypothec would be introduced uniformly in all EU Member States. However, it is not supposed to substitute national mortgages but it could be used as an alternative to the existing national security rights on immovables, on the basis of a choice made by the parties to credit transactions. With respect to the scope of application, as proposed in the "Basic Guidelines", the Eurohypothec could be used not only to secure cross-border loans but also loans that only affect one country[78]. When it comes to the method of implementation under EU law, it is assumed that the Eurohypothec might be introduced by a regulation or by a directive. In case of applying the former option, the Eurohypothec would become a 26th, then, and now a 29th regime, existing alongside its equivalents used in individual Member States. The latter, in turn, envisages that the Eurohypothec could be implemented either by adapting an existing instrument or by creating a new type of mortgage[79].

2. CONTROVERSIES CONCERNING THE IDEA OF THE EUROHYPOTHEC WITH PARTICULAR CONSIDERATION OF THE FEATURE OF NON-ACCESSORINESS

Beside possible advantages connected with intensifying cross-border mortgage lending and reduction of transaction costs, the proposal to introduce a common non-accessory security right on immovables is controversial, since it might bring about negative consequences from both economic and legal points of view. Many doubts concerning the idea of Eurohypothec, and particularly its non-accessory nature, have been expressed during the consultations on the Green Paper on the Mortgage Credit in the EU held with the participation of consumers, financial institutions, Member States and other market actors[80].

As shown by the results of the comparative overview, in the majority of European countries, including Poland, there are still in use accessory mortgages, though the linkage of the mortgage with the secured claim is weakened. In addition, one should bear in mind that the types of real security rights on immovables differ with respect to the way of creation (formal requirements), subject or form (certificated rights and non-certificated rights)[81]. For the above reasons, when used as a security, the Eurohypothec could entail disadvantages for the consumers, unaware of the actual character of the common security right. Beyond that, as the security right would not expire despite the repayment of the debt, it would create a risk of abuses

[78] *Ibidem*, p. 16.

[79] *Ibidem*, p. 22.

[80] *Feedback on the Consultation on the Green Paper on Mortgage Credit 2006*, http://ec.europa.eu/internal_market/finservices-retail/docs/home-loans/feedback_gp-en.pdf (accessed: 18 February 2016).

[81] See e.g. C.U. Schmid, C. Hertel, H. Wicke: *Real Property Law and Procedure…*, *op. cit.*, p. 85 *et seq.*

by the holders of the Eurohypothec, as well as a risk connected with excessive security. One may also expect that increased competition among banks, due to the implementation of a common security instrument, would involve a threat of granting risky loans on a large scale[82]. Moreover, it is not excluded that the Eurohypothec could be applied not only in cross-border transactions but also in purely national ones, when chosen by the parties, which gives rise to additional doubts as to ensuring protection of the borrowers[83].

Furthermore, even if the Eurohypothec was not introduced instead of national security rights but as a concurrent instrument, it might cause problems with adaptation of the new right to the national legal systems. There is a risk of infringement of coherence of national legal systems, especially when *lex rei sitae* rule, commonly applied in private international law, and *numerus clausus* rule are taken into consideration[84]. The above doubts refer particularly to the option to adopt the Eurohypothec by way of a regulation.

Potential positive effects of introducing the Eurohypothec may be limited because of difficulties with application of the common security instrument. Many practical problems would result from divergences of national legal systems as regards not only proprietary security rights themselves, but even the scope of legal terms "real property" or "immovable assets"[85]. As it has been mentioned, one of key factors determining functionality of proprietary security rights is the efficiency of enforcement procedures, especially in case of the debtor's insolvency. It should be underlined that national regulations concerning enforcement of security rights are characterized by a high level of differentiation, e.g. in terms of formal requirements, the priority of satisfaction or the time the proceedings take. What is more, in continental Europe traditionally the mortgagee is satisfied in a judicial enforcement proceedings, whereas legal practice in England and Scotland is based on recourse to private enforcement techniques[86]. Important differences regard also insolvency proceedings. For this reason some common rules for the EU Member States have

[82] A. Wudarski: *W poszukiwaniu…*, *op. cit.*, p. 221–222; P. Scalamogna: *"Euroipoteca", lo strumento…*, *op. cit.*, p. 23–24. See also Ł. Supera: *Ochrona właściciela…*, *op. cit.*, p. 279 *et seq*.; M. Kaczorowska: *Koncepcja eurohipoteki…*, *op. cit.*, p. 215 *et seq.*

[83] J. Bełdowski, M. Zachariasiewicz: *Nowy etap harmonizacji prawa umów w UE*, part 1, Europejski Przegląd Sądowy 2012, no. 6, p. 7, 9–10; A. Wudarski: *W poszukiwaniu…*, *op. cit.*, p. 221.

[84] J. Gołaczyński: *Prawo prywatne międzynarodowe*, Warszawa 2015, p. 249; J. Górecki: *Prawo rzeczowe* (in:) *System prawa prywatnego*, vol. 20B: *Prawo prywatne międzynarodowe*, ed. M. Pazdan, Warszawa 2015, p. 940; P. Machnikowski: *Ogólne wiadomości o prawie rzeczowym* (in:) *System prawa prywatnego*, vol. 3: *Prawo rzeczowe*, ed. E. Gniewek, Warszawa 2013, p. 39 *et seq.*; M. Świerczyński: *Łączniki w normach kolizyjnych* (in:) *System prawa prywatnego*, vol. 20A: *Prawo prywatne międzynarodowe*, ed. M. Pazdan, Warszawa 2014, p. 239. See also M. Kaczorowska: *Koncepcja eurohipoteki…*, *op. cit.*, p. 218 *et seq.* Cf. E. Ramaekers: *European Union Property Law. From Fragments to a System*, Cambridge–Antwerp–Portland 2013, p. 202.

[85] See e.g. C.U. Schmid, C. Hertel, H. Wicke: *Real Property Law and Procedure…*, *op. cit.*, p. 9 *et seq.*

[86] See e.g. F. Fiorentini: *Proprietary Security Rights…*, *op. cit.*, p. 430 *et seq.*; A. Gambaro: *Contractual Security Rights in Immoveables…*, *op. cit.*, p. 358 *et seq.* See also M. Kaczorowska: *Koncepcja eurohipoteki…*, *op. cit.*, p. 135 *et seq.*, 205.

been established in the Regulation on the insolvency proceedings[87]. Similarly, the application of the future European common mortgage would be hindered by differences existing among national land registration systems. Initiatives aimed at harmonization of national land registers, like the European Land Information Service project (EULIS), have not brought expected effects so far[88]. In consequence, the use of the Eurohypothec in cross-border lending operations would require professional legal services in order to apply foreign provisions which would cause an increase of transaction costs.

Another questionable issue is the lack of direct legislative competence of the EU in the area of private law foreseen in the Treaty on the Functioning of the European Union[89] (hereinafter referred to as TFEU). It should be noted that matters concerning proprietary rights on immovables have not been directly subject to unification process so far[90]. The provisions considered as a potential legal basis for the Eurohypothec are mainly art. 114 and 352 TFEU. The first one, however, cannot be applied because it only refers to approximation of national legal systems and not to introducing provisions in addition to the existing ones, whereas the Eurohypothec is supposed to take the form of a 29th regime[91]. The latter authorises the EU to in-

[87] Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ L 160 of 30 June 2000, p. 1–18) will be replaced by a new Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ L 141 of 5 June 2015, p. 19–72) with effect of 26 June 2017. See e.g. T. Chilarski: *Upadłość transgraniczna w prawie Unii Europejskiej*, Warszawa 2008, p. 41; A. Hrycaj (in:) *Europejskie prawo upadłościowe. Komentarz*, ed. F. Zedler, Warszawa 2011, p. 33 *et seq.* See also M. Kaczorowska: *Koncepcja eurohipoteki…*, *op. cit.*, p. 136 *et seq.*, 205–206.

[88] See e.g. H. Ploeger, B. van Loenen: *Harmonization of Land Registry in Europe* (in:) *Proceedings of the FIG Working Week 2005 and 8th International Conference on the Global Spatial Data Infrastructure (GSDI-8) "From Pharaohs to Geoinformatics"*, eds. A. Abdelaal, A. Khalifa, A. Shaker, M. Radwan, S. Alghazaly, Y. Abdel-Aziz, Cairo 2005, p. 4 *et seq.*; M. van Opijnen: *Need for electronic networking of insolvency, business, land and other registers?* (in:) *Forum on judicial cooperation in civil matters: debate with National Parliaments, 2 December 2008. Session II. E-justice: a tool for citizens, practitioners and business. Background notes*, http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/752/752580/752580en.pdf (accessed: 2 March 2016), p. 38 *et seq.*; A. Wudarski: *Jawność ksiąg wieczystych. Analiza prawno-porównawcza w kontekście europejskim* (in:) *Rozprawy z prawa prywatnego oraz notarialnego. Księga pamiątkowa dedykowana Profesorowi Maksymilianowi Pazdanowi*, eds. A. Dańko-Roesler, A. Oleszko, R. Pastuszko, Warszawa 2014, p. 444–468; M. Kaczorowska: *Perspectives for the Creation of a European Network of Land Registers* (in:) *Party autonomy in European private (and) international law*, tome 2, eds. M.E. De Maestri, S. Dominelli, Rome 2015, p. 87–102; *eadem*: *Rola Europejskiego Serwisu Informacji o Gruntach w poszerzaniu dostępu do elektronicznych rejestrów nieruchomości w Europie* (in:) *Księga pamiątkowa z okazji dziesięciolecia Centrum Badań Problemów Prawnych i Ekonomicznych Komunikacji Elektronicznej i Studenckiego Koła Naukowego — Blok Prawa Komputerowego*, eds. E. Galewska, S. Kotecka, Wrocław 2012, p. 126–135. *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, eds. C. von Bar, E. Clive, H. Schulte-Nölke, Munich 2009. See also E. Kieninger: *European Regulation of Security Rights* (in:) *Divergences of Property Law, an Obstacle to the Internal Market?*, eds. U. Drobnig, H.J. Snijders, E. Zippro, München 2006, p. 170–171; W. Rank: *Harmonisation…*, *op. cit.*, p. 211 *et seq.*

[89] OJ C 326 of 26 October 2012, p. 47–390.

[90] C. von Bar: *Prace nad projektem Europejskiego Kodeksu Cywilnego*, Państwo i Prawo 2000, no. 10, p. 46; S. Kalus: *A Uniform Law of Property for Europe — Is It Plausible?*, Silesian Journal of Legal Studies 2010, no. 2, p. 96, 97; J. Kozińska: *Czy wprowadzenie eurohipoteki…*, *op. cit.*, p. 102–103.

[91] B. Ziemblicki: *Zbliżanie ustawodawstw państw członkowskich Unii Europejskiej w zakresie prawa prywatnego*, Folia Iuridica Wratislaviensis 2012, vol. 1, no. 1, p. 86; J.W. Rutgers: *European Competence and a European Civil Code, a Common Frame of Reference or an Optional Instrument* (in:) *Towards a European Civil Code,*

troduce complementary provisions even if there is no specific competence envisaged in the Treaty but at the same time it raises concerns as regards the principles of subsidiarity and proportionality, expressed in art. 5 of the Treaty on European Union[92].

As far as the legal instrument is concerned, in theory, from the perspective of the purposes of the future Eurohypothec, the best option would be a regulation as it is directly applicable in all Member States, nevertheless it can be argued that such solution would be contrary to the principle of proportionality[93]. In contrast to regulation, directive allows the Member States to choose forms and methods of implementation but just because of this it does not guarantee the full integration of mortgage markets which is the main objective of the Eurohypothec project[94]. Similar argumentation applies to a convention, which hypothetically could also be taken into account as an alternative source of law to implement the uniform mortgage. On one hand the provisions of a convention could be adopted voluntarily by the interested states, but on the other hand in the short term the harmonization of mortgage markets would be difficult to achieve because of a complicated process of negotiating the convention and a possible limited scope of application of the common rules[95].

3. THE OUTLOOK FOR REALIZATION OF THE EUROHYPOTHEC PROJECT

Because of serious doubts connected with the concept of the common mortgage for Europe, concerning both significant differences among types of real security rights on immovables, with particular reference to accessoriness as a prevailing

Fourth Revised and Expanded Edition, eds. A.S. Hartkamp, M.W. Hesselink, E.H. Hondius, C. Mak, C.E. du Perron, Nijmegen 2011, p. 316; C. Schmid: *Options under EU Law for the Implementation of a Eurohypothec* (in:) *Basic Guidelines for a Eurohypothec. Outcome of the Eurohypothec workshop. November 2004/April 2005*, ed. A. Drewicz-Tułodziecka, Mortgage Bulletin 2005, no. 21, p. 64; M. Kaczorowska: *Kontrowersje wokół unifikacji prawa prywatnego w Europie w świetle projektu Europejskiego Kodeksu Cywilnego*, Transformacje Prawa Prywatnego 2007, no. 2, p. 39 *et seq*.

[92] OJ C 326 of 26 October 2012, p. 13–390. See B. Ziemblicki: *Zbliżanie ustawodawstw…*, *op. cit.*, p. 87; C. Schmid: *Options under EU Law…*, *op. cit.*, p. 65. See also D. Wolski: *Wątpliwości dotyczące podstaw traktatowych projektu rozporządzenia w sprawie europejskiego prawa sprzedaży (Common European Sales Law)*, Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego 2012, vol. 10, p. 144; M. Kaczorowska: *Koncepcja eurohipoteki…*, *op. cit.*, p. 228 *et seq*.

[93] B. Ziemblicki: *Zbliżanie ustawodawstw…*, *op. cit.*, p. 88; W. Rank: *Harmonisation of National Security Rights* (in:) *Divergences of Property Law, an Obstacle to the Internal Market?*, eds. U. Drobnig, H.J. Snijders, E. Zippro, München 2006, p. 210; P. Scalamogna: *"Euroipoteca", lo strumento…*, *op. cit.*, p. 7; C. Schmid: *Options under EU Law…*, *op. cit.*, p. 65; M. Kaczorowska: *Koncepcja eurohipoteki…*, *op. cit.*, p. 241 *et seq.*; *eadem*: *Kontrowersje wokół unifikacji…*, *op. cit.*, p. 41–42.

[94] T. Pajor, P. Machnikowski: *Prawo prywatne w Unii Europejskiej i jego wpływ na prawo polskie* (in:) *System prawa prywatnego*, vol. 1: *Prawo cywilne — część ogólna*, ed. M. Safjan, Warszawa 2012, p. 284; B. Ziemblicki: *Zbliżanie ustawodawstw…*, *op. cit.*, p. 88; W. Rank: *Harmonisation…*, *op. cit.*, p. 210; C. Schmid: *Options under EU Law…*, *op. cit.*, p. 64–65; M. Kaczorowska: *Kontrowersje wokół unifikacji…*, *op. cit.*, p. 42.

[95] M. Czepelak: *Umowa międzynarodowa jako źródło prawa prywatnego międzynarodowego*, Warszawa 2008, p. 317; E. Ramaekers: *European Union Property Law…*, *op. cit.*, p. 235.

feature, and the EU legitimacy, the proposal to introduce the Eurohypothec should be considered at present as premature. An additional argument for this approach is that even if the Eurohypothec was implemented, it would be insufficient to integrate mortgage markets in Europe. The reason is that to achieve this effect it is necessary that the harmonization of mortgage law be accompanied by harmonization of land registers and regulations on enforcement and insolvency proceedings[96], while national legal systems diverge considerably in this regard, too, despite some steps towards integration undertaken so far. The process of creating a single European mortgage market appears to be complicated and long-lasting. Therefore, plans aiming at introducing a uniform security instrument should be implemented gradually, with respect for the autonomy of national legal systems in Europe and within the EU competences set out in the treaties.

Taking the above into account, for the time being the proposal of the Eurohypothec could take the form of non-binding model rules which could be used as a source of inspiration by the legislators in the EU Member States. Currently, model rules are becoming increasingly important as a flexible means of unification of private law in Europe. The basic point of reference in this field is the Draft Common Frame of Reference, containing principles, definitions and model rules of European private law[97].

As to the postulated character of the future common mortgage, in view of doubts raised by different stakeholders, including consumers, non-accessoriness should not be deemed to be its indispensable characteristic[98]. Therefore, it is desirable to find the optimal model of the Eurohypothec that would ensure both marketability and the protection of the real estate owners. To this end an adequate legal framework for the security agreement should be considered[99].

V. CONCLUSION

The analysis of the legislative tendencies as regards accessoriness and non-accessoriness of real security rights on immovable property, as well as the possible effects of implementing the Eurohypothec, justifies a sceptical attitude to the proposed concept of a common non-accessory mortgage. Undoubtedly, it is necessary to

[96] See e.g. A. Steven: *Accessoriness and security…*, *op. cit.*, p. 49–50.

[97] *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, eds. C. von Bar, E. Clive, H. Schulte-Nölke, Munich 2009. See also E. Kieninger: *European Regulation of Security Rights* (in:) *Divergences of Property Law, an Obstacle to the Internal Market?*, eds. U. Drobnig, H.J. Snijders, E. Zippro, München 2006, p. 170–171; W. Rank: *Harmonisation…*, *op. cit.*, p. 211 *et seq.*

[98] J. Köndgen, O. Stöcker: *Die Eurohypothek…*, *op. cit.*, p. 117 *et seq.*; O. Stöcker: *The Eurohypothec — Accessoriness…*, *op. cit.*, p. 42 *et seq.* See also A. Wudarski: *W poszukiwaniu…*, *op. cit.*, p. 233–234.

[99] J. Köndgen, O. Stöcker: *Die Eurohypothek…*, *op. cit.*, p. 117 *et seq*. See also A. Wudarski: *W poszukiwaniu…*, *op. cit.*, p. 233–234; M. Kaczorowska: *Koncepcja eurohipoteki…*, *op. cit.*, p. 256 *et seq.*

improve conditions for developing cross-border mortgage lending transactions. However, the economic aspect should not be treated as the only criterion when drafting new regulations aimed at creating a single mortgage market. Values and objectives of fundamental importance for private law at both national and European levels cannot be ignored[100]. This applies, among others, to the principle of transaction certainty and security, as well as the principle of equity. For the above reason particular emphasis should be made on adopting appropriate measures to protect the mortgagors in view of the risk of abusing the stronger market position by the holders of security rights. This issue is the more crucial given the effects of the global financial crisis and the consumer oriented EU policy in the field of mortgage credit transactions, which was reflected, for example, in the Mortgage Credit Directive of 2014[101], providing strict requirements regarding consumer protection[102].

As illustrated by the last changes in Polish legislation, accessoriness as such appears not to hamper mortgage lending transactions if the connection between mortgage and the secured claim is not strict but weakened. Exceptions to the principle of accessoriness with respect to origin, transfer or extinguishment of a security right increase the possibilities of its practical use (e.g. it may be used repeatedly and secure several claims). In fact, the current tendencies in the area of mortgage law suggest that the distinction between accessory and non-accessory real security rights on immovables is becoming blurred[103]. Besides, in some countries, such as Germany, security rights of both types do coexist. Nevertheless, such an argument is not sufficient to justify the need to introduce a common mortgage of a non-accessory character in order to intensify cross-border credit transactions. It should not be overlooked that the effect in the form of an integrated mortgage market could be achieved only on condition that comprehensive actions be undertaken, including also approximation of land registration systems and enforcement proceedings. Taking into account the current state of harmonization of national legal systems in the areas in question, it seems that many efforts need to be made before the above re-

[100] See e.g. J. Krukowski: *Prawo Unii Europejskiej a wartości chrześcijańskie* (in:) *Abiit, non obiit. Księga poświęcona pamięci Księdza Profesora Antoniego Kościa SVD*, eds. A. Dębiński, P. Stanisz, T. Barankiewicz, J. Potrzeszcz, W.Sz. Staszewski, A. Szarek-Zwijacz, M. Wójcik, Lublin 2013, p. 1164–1173; A. Kuś: *Kilka uwag o rynku wewnętrznym Unii Europejskiej* (in:) *Abiit, non obiit. Księga poświęcona pamięci Księdza Profesora Antoniego Kościa SVD*, eds. A. Dębiński, P. Stanisz, T. Barankiewicz, J. Potrzeszcz, W.Sz. Staszewski, A. Szarek-Zwijacz, M. Wójcik, Lublin 2013, p. 1181 *et seq.*; P. Machnikowski: *Zagadnienia wstępne* (in:) *Zarys prawa cywilnego*, eds. E. Gniewek, P. Machnikowski, Warszawa 2014, p. 23 *et seq.*; M. Safjan: *Zasady prawa prywatnego* (in:) *System prawa prywatnego*, vol. 1: *Prawo cywilne — część ogólna*, ed. M. Safjan, Warszawa 2012, p. 329 *et seq.* See also J. Stelmach, B. Brożek, W. Załuski: *Dziesięć wykładów o ekonomii prawa*, Warszawa 2007, p. 39 *et seq.*

[101] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No. 1093/2010 (OJ L 60 of 28 February 2014, p. 34–85).

[102] See e.g. T. Josipović: *Consumer Protection in EU Residential Credit Markets: Common EU Rules on Mortgage Credit in the Mortgage Credit Directive*, Cambridge Yearbook of European Legal Studies 2015, no. 16, p. 223 *et seq.* See also A. Steven: *Accessoriness and security…*, *op. cit.*, p. 47.

[103] See e.g. K. Górska, J. Kozińska: *Zmiany wprowadzone…*, *op. cit.*, p. 46–47.

quirement is met. Hence there is still a need for further discussion on the best solutions for the future of integration of mortgage markets, concerning not only an optimal security instrument (ensuring both efficiency and mortgagor protection), but also a way to facilitate the transnational exchange of information on real estate, as well as effective methods to satisfy the creditors.

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MARIA KACZOROWSKA

ACCESSORINESS OF MORTGAGE AND THE DEVELOPMENT OF A EUROPEAN MORTGAGE MARKET. CONSIDERATIONS FROM THE PERSPECTIVE OF POLISH LAW IN VIEW OF THE PROPOSAL OF A NON-ACCESSORY EUROHYPOTHEC

S u m m a r y

The subject of the paper is the analysis of current development of regulations regarding real security rights on immovables in terms of accessoriness and non-accessoriness of securities, in the context of prospects for the creation of a single mortgage market in Europe. The considerations are focused on assessing the impact accessoriness has, on one hand, on the economic efficiency of securities, and on the other hand — on the protection of the mortgagor. Among different types of securities belonging to the above category which are used in European countries, mortgage regulated under the Polish Land and Mortgage Registers and Mortgage Act, thoroughly amended in 2009, has been characterized in detail — as an example of a security based on loosened accessoriness. A point of reference within the comparative analysis of accessory and non-accessory instruments to secure loans is the proposed model of a common flexible security on real estate for the European Union Member States, i.e. the Eurohypothec. It is expected that thanks to its non-accessory character, the use of the Eurohypothec could contribute to encouraging cross-border mortgage lending and thus to the integration of the Member States' markets. However, the idea of a pan-European non-accessory real security on immovables also raises doubts, mainly because of the risk for the borrowers, resulting from breaking the link between the security and the secured claim. Examining the proposal of the Eurohypothec against the background of the dominant European tendencies in the field of real security rights on immovables provides a basis for drawing conclusions concerning actual possibilities to harmonize mortgage markets.