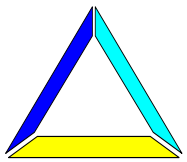
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Institutional Aspects of Land Market Development in Ukraine

Executive Summary

The status of land as private property has been institutionalised in Ukraine in recent years, which is a positive results of the agricultural land privatisation process. More than half of the land property certificates of former Kolkhoz members have already been transformed into state deeds on land property. But this is only the first step on the way of building a market for agricultural land. At the moment, land sales are prohibited by a moratorium which will expire on Jan 1st 2005. In order to finalize the privatisation process and enable a properly functioning land market in the future, Ukrainian lawmakers have to design an institutional framework for land market transactions, both for land sales and tenure, by January 2004. Important activities to be carried out within this institutional framework are: a) cadastral monitoring, b) land use planning in the framework of the respective legislation, c) registration of land property rights, d) registration of mortgages and other duties connected with ownership, and e) settling of legal conflicts.

International experience shows that there is no unique optimal example for such an institutional framework. Ukraine has decided to delegate this task to the State Committee of Land Resources (SCLR), thereby choosing a centralised approach instead of a multi-agency approach which has also been under discussion. However, a lack of constitutional checks and balances within this institutional set-up, and, consequently, a concentration of power within SCLR could be a consequence of this concentration of competences and tasks. Given the peculiarities in Ukraine, we would like to recommend the following guidelines:

- **Efficiency:** it should guarantee cheap and not too lengthy transactions by restricting the number of necessary bureaucratic procedures.

  ⇒ Efficiency is best achieved by creating **one national public organization** with local branches for the registration of all land transactions.

- **Checks and balances** among constitutional powers: the system should be governed by the rule of law, and conflicts of interest of the state organizations involved should be ruled out.

  ⇒ **Strengthening the position of the local registrar** whose decisions should be challengeable solely by the local courts upon appeal, and not to the SCLR, even though he/she will be working within this structure in order to guarantee "short ways" for clients and procedures.

  ⇒ The SCLR or its structural unit, the Centre of the State Land Cadastre, **should be accountable to the legislative power** (e.g. a special commission of V.R. or a body authorized by the legislative power).

1. Introduction

The status of land as private property has been institutionalised in Ukraine in recent years, which is a positive results of the agricultural land privatisation process. The land reform can be called a good example of successful agricultural reform in Ukraine. In spite of a long time of land reform development[1], it had a clear strategy – transformation of the state ownership of land into private ownership. This process was connected with development of land legislation, issuing of the land state deeds to the members of collective agricultural enterprises (CAE), restructuring of CAEs, and land lease market development. Also a very important issue of land reform is the changing of the peasants' mentality and their attitude to the agricultural reform itself and own life. After 70 years working as hired workers for the collective farms, they now become landowners. This is dramatically important for the acceptance of democracy. Now the new owners can make their own decisions what to do with their land.

More than half of the land property certificates of former Kolkhoz members have already been transformed into state deeds on land property. But this is only the first step on the way towards building a market for agricultural land. At the moment, land sales are prohibited by a moratorium which will expire on Jan 1st 2005. In order to finalize the privatisation process and enable a properly functioning land market in the future, Ukrainian lawmakers have to decide on an institutional framework for land market transactions, both for land sales and tenure, by January 2004. Important activities to be carried out within this institutional framework are, among others: a) cadastral monitoring, b) land use planning in the framework of the respective legislation, c) registration of land property rights, d) registration of mortgages and other duties connected with ownership, and e) settling of legal conflicts during or following land transactions.

International experience shows that there is no unique optimal example for such an institutional framework. Ukraine has apparently decided to delegate this task to the State Committee of Land Resources (SCLR). The goal of this paper is to outline some legal problems connected with the current plans to concentrate the responsibility for the monitoring of land transactions within one state body. Section 2 deals with alternative institutional solutions for transactions of land property, and discusses the underlying legal principles and their economic implications. Section 3 discusses the underlying legal problems connected with the draft legislation which at the moment seems most likely to be approved. Section 4 summarizes the paper and provides some recommendations.

2. Alternative Institutional Solutions for Transactions of Land Property

Regarding transactions on the land property market, two important elements have to be distinguished, the cadastre and the land plot registry:

- The **cadastre** serves the purpose to describe the **physical characteristics** of the land plot, consisting of a map and a registry of land plots where these characteristics are filed. Today, cadastres are often supported by GIS (Geographical Information System) techniques.

[1] Land reform in Ukraine is started by the Decree of Verkhovna Rada "On the Land Reform" (1990)

- The **registry of land plots** serves the purpose to describe the **property status** of the land plot. That means that both the current and former owners of the plot are recorded, and all property-related transactions. Moreover, other rights are mentioned, as for instance the right of third parties to use a road or path crossing the plot. Finally, mortgages are usually mentioned in the registry.

Information from one system may be mentioned in the other as a memorandum item. For example, the owner of a land plot can be mentioned in the cadastre, but the registry remains the legally binding document describing property rights. The registry, on the other hand, may contain copies from maps and descriptive parts of the cadastre.

The institutional framework within which these two elements are embedded can take various forms, depending on tradition and the relative importance of certain constitutional and legal principles. But the shape of the institutional framework of a land market is not a purely legal issue, but will have important economic consequences for the development of rural areas, which will be shown in the following section.

2.1. How to Awaken Land Capital to Life

The privatisation of land in Ukraine has, among others, the goal to endow millions of people with **capital**. As such, it can be used to generate utility for the future landowners: it can be leased out, used as a productive resource (e.g. agricultural production), as a site where to build a house (provided that this is permitted under the general land use plan), or to be used as collateral for a credit. Only when the landowner can exercise these **property rights** is the asset which he possesses not functionally 'dead'. The institutional set-up of a land market system is crucially important for the degree to which land can become a functional asset. The two most important issues are discussed in the following.

Efficiency and transparency of the exchange of property rights

Capital owners in many developing and transition countries suffer from the burden of bureaucracy. Starting a business, applying for a credit, or selling property often results in an odyssey through various authorities, paying fees and bribes worth half an annual salary, and lasting too long in order to take advantage of opportunities. This also applies to land market transactions and means that related procedures should be as simple as possible in order to facilitate a lively land market. Many transactions fail due to this, or are carried out in an informal manner on the basis of relatively insecure 'gentlemen's agreements'. In the case of the Ukrainian land market, this should be avoided, as the number of land market transaction most likely will climb rapidly after the moratorium is lifted. Therefore, the institutional responsibility for land issues should not be dispersed over numerous state bodies and administrative levels.

Security and reliability of the property title

On the other hand, if a landowner cannot quickly and reliably prove the fact of his ownership of a land plot including possible constraints (rights of third parties, mortgages etc.), it will be difficult for him to lease or sell the land, or use it as collateral. Insecurity related to property rights will increase the risk premiums in future land market transactions, and thus have a depressing effect on land prices. And exactly

this fear of too low land prices is the justification for the moratorium on land sales which is currently still in force. Insufficient checks and balances between constitutional powers in the area of land transactions will lead exactly to this kind of insecurity, particularly in a country like Ukraine where the executive branch of government is traditionally very powerful. If the state is both broker and landowner itself, the resulting conflicts of interest will probably lead to insecure property rights as long as there is lacking control from the side of the judiciary.

These two principles are contradicting to a certain extent. While efficiency is better achieved in a system where the monitoring of land market transactions is concentrated in one organization, the security and reliability of such transactions is better served with the involvement of several constitutional powers in the institutional set-up. However, a reasonable compromise can be found when taking into consideration that checks and balances need not necessarily require direct procedural involvement of all constitutional powers, but rather mutual control. Last but not least, reliable rights of the citizens to challenge administrative decisions in court under fair conditions are an effective way of controlling the abuse of power.

2.2. International Examples

The institutional responsibility for these two elements of a functioning land market regulation can be distributed in a large variety of ways, which is illustrated by two extreme examples. In countries such as **Sweden** or the **Netherlands** these two functions are carried out within one governmental institution, and the Swedish land surveyors, for instance, are still quite influential civil servants who carry out many different tasks related to land issues at one time. This system originates from a time when, due to land heritage practices, land parcels had become so fragmented that the state had to take action in order to allow for a property structure which was more conducive to the development of a productive agricultural sector. As a result, the surveyor not only carries out cadastral tasks, but also updates the land property register.

In **Germany** and **Austria**, on the other extreme, cadastral and property inventories are separated from each other, with the cadastre in the hands of the executive power, but the property inventory ('Grundbuch') in the hand of the local judiciary ('Amtsgericht'). There are reasons of tradition and practicability for the judiciary to be in charge of the title registry system, as problems arising in that area are usually legal in nature. Furthermore, in order to prevent conflicts of interest, the state as a major landowner, represented by the executive power, and pursuing its own interests in the area of land property transactions, should not be responsible for recording property rights.[2]

Both approaches have their merits and disadvantages. The Swedish system is more biased towards state interests, while the German system is rather designed to protect rights of the individual owners including both private and public entities. While the Swedish system allegedly is relatively efficient, the German system, even though 'fool-proof' from a legal perspective, is often regarded as cumbersome, slow, and costly.

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[2] Another justification behind the separation of cadastre and title registry is the fact that land market deals are mostly transactions between private persons, which means that an involvement of executive powers is not necessary *a priori*.

2.3. A Unified Cadastre and Title Registry for Ukraine?

After the enactment of the new Land Code of Ukraine, a dispute emerged between the Ministry of Justice of Ukraine and the SCLR concerning the question which of these executive authorities should conduct the registration of land titles. The President of Ukraine settled this dispute by the Decree "On measures for introduction of a single system of state registration of land parcels, estate property and rights to them within a land state cadastre"[3] as of February 17, 2003, and ordered the SCLR to carry out these tasks.

The creation of a single registration system of land property could possibly reduce bureaucratic problems of a decentralized multi-agency approach and thereby accelerate the process of land registration. This is the basic idea behind the system of land and other real estate registration to be designed by the SCLR with the assistance of a World Bank project.[4] According to this system, a centralized registration authority should be established on the basis of the existing SCLR structure.[5] The Centre of Land Cadastre is planned to become a separate independent body and deal only with land registration and not participate in land surveying and evaluation work.

The above mentioned Presidential Decree stipulates that that the preparatory work on creation of the system for state registration of estate property in 2003 would start from January 2004, i.e. after budget finances for the operation of this system will be allocated. The Verkhovna Rada plans to consider the draft laws on the land cadastre and on the title registry in the second reading before January 1, 2004.

Positive aspects of this approach are:

a) The land registration system would make use of an existing functioning structure, the SCLR, which is experienced in handling land issues in general.

b) The SCLR has a strong partner, the World Bank project mentioned above, which will fundamentally support the establishment of both cadastral work and procedures related to land title registration.

On the other hand, this centralized approach has also led to widespread criticism:

a) The SCLR is accused of aiming at becoming a monopolist in the area of land market regulation.

b) The SCLR is also accused of having already made decisions on fees for its services without waiting for governmental decisions.

c) The registration of land property and related transactions will be carried out by a "Centre of State Land Cadastre" (CC) under the supervision of the SCLR, which mixes up cadastral and registration issues.

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[3] Presidential Decree of 17 February 2003 "On measures for introduction of a single system of state registration of land parcels, estate property and rights to them within a state land cadastre".

[4] Rural Land Titling and Cadastre Development Project (RLTCD), to be started in January 2004. The financial volume of the project will be USD 195 m.

[5] On the regional level there are four main organizations under the State Committee of Land Resources management: the Main Regional Department of Land Resources; Centre of State Land Cadastre; the Oblast Institute of Land Surveying, and the State Regional Inspection of Protection and Utilization of Land.

d) Allegedly the CC is designed as a profit-oriented business. According to its statute, the centre is a business agent that is allowed to earn money in any field of economic activity.[6]

e) Land market transactions will be controlled by the executive branch of government, without explicit provisions for cross-checks by the judiciary.

Not all of the criticism mentioned above is justified. As for the monopoly argument, the task of land title registration is a task of the state. If any private agents were allowed to certify land titles, chaos on the land market would be the consequence. This is not to say that there should be no private service providers (brokers, notary services) in the land market, but the final certification and control of transactions has to remain in the hand of a state institution.

Nevertheless, as a consequence of the concentration of power at the SCLR, abuses could occur, as for instance high fees for services. Moreover, it is questionable whether the SCLR would act in a truly unbiased way in case of a conflict between a small private landowner and public owners, or when powerful private interests are involved. These kind of conflicts will inevitably occur by the thousands in the years to come.

It is not so much the 'monopoly position' of the SCLR which is a danger to functioning land markets. The fact that only one authority will be in charge will provide short ways for all parties involved in land deals - even though this is not granted. It is rather a possible lack of checks and balances in the procedures of the SCLR which could turn out to be problematic, but this can be improved with relatively little effort.

We therefore support the basic decision of the Government of Ukraine <u>not</u> to go for a multi-agency approach (as in the German example), but to concentrate procedures within the SCLR in order to give the future land market a chance to work efficiently. **Nevertheless, we consider an involvement of the legislative and judicial powers as very important** in order to increase the acceptance of the new institutional set-up and the titles it will guarantee. Suitable recommendations are given in the conclusions. Moreover, a number of legal problems should be solved before the SCLR can start its work, which are addressed in the following section.

3. Legal Problems of the Current Draft Legislation

Even though a new Land Code is effective since January 1, 2002, constitutional questions have emerged involving procedures for implementing a state land cadastre and title registry system. Currently, there seem to be three 'levels' of legal problems: incompatibility between legal acts and a draft law, a constitutional conflict concerning the draft law on title registry, and finally certain orders by the SCLR lacking sufficient legislative or executive authorisation required by the Constitution of Ukraine.

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[6] In its project appraisal report to the RLTCD project (mentioned above), the World Bank requires the Cadastral Centres to cease their commercial activities within three years after starting the cadastre and titling registry activities, see "Loan and Project Agreement Conditionality", p. 35.

A. Incompatibility between legal acts and a draft law on state land cadastre

While Article 204 of the Land Code of Ukraine as well as the Presidential Decree of 17 February 2003 stipulate that the State Committee of Land Resources (SCLR) should conduct the state land cadastre[7], the Draft Law "On State Land Cadastre", issued by the Committee on Agricultural Affairs of Verkhovna Rada (VR), proposes the participation of several levels of state administration (central, regional, local) as well as organs of local self-governance in addition to SCLR to carry out the above mentioned tasks.

Since the President has veto power (Art. 94 of the Constitution), he will probably overrule the Law if it will be adopted by the V.R.

B. Conflict between constitutional provisions and legal acts concerning the title registry system

While Article 6 of the Constitution stipulates the division of powers (legislative, executive, judicial), Article 75 determines the V.R. as the sole legislative power, and Article 14, 2nd sentence in combination with Article 92.7 require the legal regime of property to be exclusively based on law. It seems questionable whether the President would be authorized to determine the powers of SCLR when conducting the title registry system, as it is proposed in Article 6.2 of the Draft Law "On State Registration of Real Estate Rights on Immovable Property and its Limitations", issued by the Committee on Economic Policies, Administration of National Economy, Property and Investment of VR.

However, according to other articles of the Constitution (Articles 93, 2nd sentence, 94, 106.31, 2nd sentence), the presidential authority contains legislative as well as executive aspects. The relation between the cited articles of the Constitution concerning Presidential authority to determine powers of the SCLR for conducting the title registry system would be up to the Constitutional Court of Ukraine to decide (Article 150), if the above mentioned draft law should come into effect.

C. Orders of the SCLR lacking sufficient legislative or executive authorisation required by the Constitution of Ukraine.

On 23 May 2003, SCLR issued an Order "On creation of a single system of state registration of land parcels, estate property and rights to them within the state land cadastre and the structural improvement of the state enterprise 'Centre of the State Land Cadastre with the State Committee of Ukraine on Land Resources' to carry out the state registration of land parcels, rights to them and transfer of rights, provide services to natural and juridical persons in the sphere of using the data from the state land cadastre on a paid, cost covering basis", starting by 1 July 2003.

On 2 July 2003, SCLR issued another Order "On adoption of the temporary provision for state registration of land", to conduct state registration of ownership titles, of the right to use land plots on a permanent basis, and of land leasing contracts by structural units of the Centre of the State Land Cadastre within SCLR.

However, a Law "On the Local Self-Governance in Ukraine" as of 21 May 1997 is still in force, which stipulates that the village, town and city authorities should be in

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[7] Pavlo Kulynych, Ligal support to the owners of land parcels. Yurydychnyi Visnyk of Ukraine. #8, (February 22-28), 2003.

charge of the title registry system. Furthermore, the above cited Presidential Decree of 17 February 2003 does not contain details on title registration procedure. It only includes an instruction to the SCLR to take measures necessary to create an organizational infrastructure for the future title registry in order to be able to enforce the corresponding laws as soon as they come into effect.

In addition, the Presidential Decree commissioned the Cabinet of Ministers to set up within a month's term a list of additional paid services in the sphere of land utilization and usage of data from the state land cadastre, which SCLR may provide.

It has to be pointed out that the "Orders" of the SCLR seem to create a law-like basis for the state land cadastre and the title registry system; at least they resemble an executive order. Both laws and executive orders, however, are reserved to V.R. (Articles 14, 75, 92.7) and to the President (Article 106.31) or the Cabinet of Ministers (Article 117) , respectively. Therefore, the "Orders" of SCLR are likely to be unconstitutional, since **SCLR is not authorized to issue legal acts**, as laws are reserved to the VR, while executive orders have to be issued by the President or the Cabinet of Ministers.[8] As the registration of land parcels is an important stage in acquiring and exercising the rights of land ownership, it should be legitimised by a law, and not be based on a by-law.

4. Conclusions and Recommendations

The creation of a single system to manage state land cadastre and a title registry system seems reasonable from a practical point of view.[9] Registration of ownership rights to land and buildings should preferably be managed within *one* title registry system. Transparent, simple administrative structures are a necessary precondition to achieve the aim of a functioning state land cadastre and title registry system.

However, to ensure the rule of law in the area of conducting the state land cadastre und title registry systems, it would be advisable to provide for checks and balances between the constitutional powers.[10]

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[8] The new system of land title registration intends to charge a certain fee from persons whose land titles are registered by a state authority. For this reason the President commissioned the Cabinet of Ministers in the above Decree of 17 February 2003 to set up a list of additional paid services in the sphere of land use and use of data from the land cadastre which SCLR may provide. However, the SCLR decided the issue of charging fees on its own before a decision had been made by the Government.

[9] See also World Bank, Project Appraisal Document on a Proposed Loan in the Amount of USD 193.15 m to Ukraine for a Rural Land Titling and Cadastre Development Project, May 30, 2003, pp.15f.

[10] The World Bank considers recognition of legal obstacles and safeguards to ensure the rule of law for the realization of its land reform project as being less significant, see Project Appraisal Document, pp. 5. The experiences made in the LARIS Project, Russia, showed, however, the risks of possible redesign of the project in mid-term, when cadastral and registering work start prior to the adoption of the necessary laws, see footnote 3, p.19.

Recommendations

Amendment of the Draft Law "On State Registration of Real Estate Rights on Immovable Property and its Limitations": definition of powers of SCLR should preferably be determined by V.R., not by Presidential Decree/Order (Article 6.2).

Executive Orders on details of conducting state land cadastre and title registry system should be issued by the President or the Cabinet of Ministers after the respective laws have been adopted by the V.R. The validity of Orders by lower ranking executive bodies, like SCLR, should be brought to the attention of the Constitutional Court by the authorized state organs (Article 150).

Establishing checks and balances between constitutional powers in order to guarantee the rule of law in the sphere of state land cadastre and title registry:

- Strengthening the independent status of the **state registrar** (Article 8.4 of the above mentioned Draft Law) concerning his/her individual decision on registration issues by making him/her accountable not to higher levels of SCLR, but instead to a judge.
- Accountability of the SCLR or its structural unit, the Centre of the State Land Cadastre, to a special commission of V.R. or a body authorized by the **legislative** power.

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December 2003