

## **KEY NOTE: IMPACT OF LAND POLICIES AND LEGISLATION ON THE LAND MARKET**

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### **ABSTRACT**

The paper presents a short overview over some of the main topics for the development of land markets and related institutions in the CEE Countries with the aim to open a discussion on the numerous key questions that need to be addressed in this regard especially from the point of view of government policies and legislation.

### **KEY WORDS**

land policies, land market, land legislation

### **1 - INTRODUCTION**

Before discussing this topic it seems useful to spend a few words on my person and on the institution I am working for:

As a project manager I have been working with the Center of Legal Competence (CLC) for more than five years. The CLC is an Austrian non-profit research and consulting institution which serves the purpose of strengthening the legal and institutional reforms in the transition countries of Europe and Central Asia by way of research, further-training and counselling. The CLC considers it its prime task to support the transition states in improving their legal framework conditions when creating the structures for a market economy in such central areas as property rights and the protection of property.

In this regard CLC until now has implemented a number of projects in the area of „land administration”, thereby aiming also at introducing the legal norms of the European Union and European and international standards. Currently myself, I am engaged as a Pre-Accession Adviser with the National Agency for Cadastre and Land Registration in Romania.

The implementation of such projects always leads to a number of so-called „lessons learned”; also now – 15 years after the fall of socialism – it becomes more and more evident that the developments and problems encountered thereby for instance in the field of land administration and development of land markets are similar in many of the new European Member States and Candidate Countries, but also other transition countries in CEE. Information sharing and analysis of good practices is therefore essential.

In the following presentation I would like to raise a few questions with regard to the key issues in development of land markets and to analyse some examples from Western European Countries as well as from CEE Countries.

### **2 – KEY ISSUES IN DEVELOPMENT OF LAND MARKETS**

Private land property and functioning markets for rural land sales and leases are of vital importance to the overall economic development of the CEE Countries.

The UN-ECE “Land Administration Guidelines” talk about the (land) market as “a set of arrangements in which buyers and sellers are brought together through the price mechanism”.

When talking of development of land markets it is however often underestimated how manifold this field is: Whereas issues of land ownership, land registration and land restitution might be in the centre, the development of a cadastre, the rural land lease and the mortgage system are of the same high importance. But much in connection with these areas are the areas of banking, insolvency, agriculture, livestock farming, crop breeding, environment, transport, water management etc. Also the “European Land Policy Guidelines” issued in November 2004 state that “when there are significant imperfections in related markets (e.g. credit, labour, products etc.), liberalising land markets will not improve efficiency and may be counterproductive, leading to land concentration, exclusion of small farmers and less intensive practices.”

The key issues in the development of functioning land markets – on a general basis – can be grouped in several areas:

- 1) Policy issues – the responsible authorities (i.e. ministries) must develop efficient and effective policies with regard to the development of land markets and keep track on their implementation.
- 2) Legal issues – the national cadastre and land registration laws must be precise and must harmonise with other related laws; they must comply with international and European regulations and standards.
- 3) Institutional issues – the institutional capacity of the responsible authorities is of major importance for the functioning of the system. Training plays an important role here.
- 4) IT issues – the implementation of the technological developments is also of crucial importance, esp. the balance between latest state of the art on international basis and the necessity of its implementation in
- 5) Financial issues – the development of a functioning land market involves huge financial means, from the state and / or from the private sector.

For the development of a functioning land market all these key issues must be addressed in the one or the other way.

Whereas all these key issues are interrelated and dependent from each other, the first two – policies and laws – are the most important for the development of a land market as they form the basis for the other issues: If adequate policies are in place and legislation is clear, then the institutional, technological as well as the financial framework can be set up. We should keep this in mind during the following discussion.

### **3 – THE IMPORTANCE OF LAND POLICIES**

Land policy lies at the heart of economic and social life and environmental issues in all countries.

One question in this context must be: What actually is a “policy” and what is a land policy, e.g. a policy for developing functioning land markets. Generally a policy is a way of acting or proceeding, a bundle of regulations and provisions that together refer to a specific topic. The term has a strong content related dimension. With regard to land and land markets the term “policy” therefore comprises all national and international regulations, provisions, rules etc. that have impact on the development of the (national) land market.

The “European Land Policy Guidelines” similarly states that “land policy aims to achieve certain objectives relating to the security and distribution of land rights, land use and land management, and access to land, including the forms of tenure under which it is held.”

Policies must be adequate in order to reach their objective. But when is this case? What does “adequate” mean? On the one hand it is important that policies are adapted to the needs of the situation in question:

With regard to the land market special attention should be had to the economic situation of the country in question, especially whether a country's economy is more agriculturally oriented or more industrially oriented. To agriculturally oriented economies issues of enforcement of agriculture, livestock farming, crop breeding etc. are of different importance than to industrial economies, where focus is more on issues of development of new industrial or services sectors. Of course there will hardly be any purely agriculturally or purely industrially oriented countries, but most of them will follow a kind of mixed economy, like for example Austria does. It is also true that development goes towards industry gaining more and more importance, whilst agriculture is decreasing, although at the same time it has to be supported in order to secure the country's own agricultural production.

Where "land sales markets may be inaccessible to those with limited purchasing power and are distorted by imperfect information and lack of financial services in rural areas, land sales markets can lead to greater inefficiency and inequality through speculation, acquisition of rural land by urban or outside entrepreneurs, and distress sales by the poor." Here "land rental markets can be more efficient and fair, and there is evidence of fewer problems associated with markets in tenancy and secondary rights. Rental markets, given adequate guarantees of security for the transacting parties, provide flexible means whereby users can increase or decrease land holdings according to changing needs, without permanently reassigning underlying rights." [...] "Rental markets facilitate land access for the poor, as cash needs are lower, and offer a means of temporary or partial withdrawal from farming without loss of land as a capital asset." (European Land Policy Guidelines).

On the other hand it is also important to introduce standards and good and best practices in order to enhance the development of the land markets. However, policies must consider the actual situation in place. If they are too ambitious they will not be followed by those it addresses. Where is the border-line?

Policy must not be confused with "politics" which constitutes a more procedural dimension. But: Policies need political support. Without political support a land policy will hardly be successful. If for instance the parliament approves a law on institutional reform of the land administration it is very counter-productive if the various ministries involved keep struggling over the competences – as it is the case for instance in Romania, where ongoing disputes between several involved ministries severely disturb the implementation of the new reforms laid down by law.

#### **4 – THE ROLE OF THE LAW**

This leads to the next point: The law. What was actually first: The law or the policy? What can the quality of a law be if it was written without a policy behind? The policy on the other hand must be in line with the general laws. The "European Land Policy Guidelines" state that the "land policy is [...] further developed through legislation [...]."

Certainly the quality and effectiveness of an emerging land market depends on the quality of the underlying legislation. The quality of the legislation ultimately influences the expected results – ineffective laws usually do not bring what they are expected to. This is also true for the land market. A functioning land market can only develop if the underlying legislation is well thought-out and specifically designed for the expected results.

Especially in regard of CEE countries the status of negotiations with the European Union is of importance. How far have negotiations proceeded so far? Is there already any sort of EC-legislation that has to be taken into account when drafting new legislation? What about the pre-accession treaties? The new Member States of the European Union and also the Candidate Countries have taken over most of the so-called *acquis communautaire*, but have they also adapted their related secondary legislation?

A country's legal order usually follows a hierarchical structure, with the constitution as the highest and most important law to be followed. The constitution not only contains the aims and ideas a country stands for, but also outlines the general structures of a state system and the fundamental rights a country is willing to protect. Whether private real property is permitted for the individual, whether the right to be heard is accepted in judicial procedure, whether separation of powers is a principle accepted by the state, whether restitution is an aim and whether this should happen with or without compensation, all this can be taken from the constitution. The constitution is the highest law of every state, any changes of the legal order have to comply with the principles set out in the constitution.

Ratified international treaties are usually considered to have the same level than the constitution has. Some of them even become a part of the constitution, as for example the Human Rights Convention (HRC) sometimes does, which for property rights is of special interest as it contains the definition of property rights and their guarantee by state.

Below the level of the constitution there are federal laws and regulations that apply to the country as a whole. Below this level there can be several more levels of regional and communal legislation, each of which depends on all the upper levels' legislation.

This structure is of high importance considering the fact that in many countries laws are still written in a very vague manner leaving the opportunity to have a more precise definition in the subordinated regulations. This often leads to the fact that the regulation changes the law or in the worst case is even contradictory to the law in which case it shall be null and void.

This leads to the result that ultimately in some countries the law more or less becomes a "recommendation to the citizen which can be followed or not." A dangerous fact as it leads to legal insecurity. In the contrary the law must be considered as the binding expression of a policy that has been laid down by the stake holders. This goes hand in hand with the fact that citizens must trust in the system. This is only possible if the systems can keep its guarantees. This for examples refers to the factual existence of real property titles as well as to the security for mortgage lenders (banks) to get back their investments in case the mortgagee goes bankrupt. Therefore "to improve equity and promote agricultural productivity, policy must improve access to land and security of land-related rights. Rights are secure if they are not contested without reason and if, in case of contestation, they can be confirmed by the legal or arbitration authorities. Securing land rights is thus largely a question of having effective institutions and enforcement of rules for the management of land rights, and not merely a question of the formal legal nature of the rights themselves." (European Land Policy Guidelines).

Non-acceptance of legislation or legal instruments by the population usually leads to non-compliance with laws and ultimately to their total ineffectiveness together with the development of new "undercover" systems that have no legal justification, but function due to social acceptance (e.g. if the factual costs of transactions of land are too high, people will find ways to circumvent the legal provisions).

Another fact to be kept in mind is transparency of the system. The whole land law system can only function properly if people have sufficient access to information e.g., if they can see the registers and inform themselves about the legal status of the real property in question.

## 5 – EXPERIENCES AND QUESTIONS WITH REGARD TO POLICIES AND LEGISLATION

### **The implementation of laws**

As a matter of fact the legislation in place in most of the CEE Countries are of very good quality and cover the main issues with regard to land and land markets. However, there is the impression that still in some countries things do not work as they are supposed to do. So it can be assumed that the legal framework – more or less – is in place. But is it also adequate? In many cases foreign consultancy has been used to draft the primary legislation, some laws directly point to their origins usually somewhere between Netherlands / Denmark / Norway. Whereas taking over best and good practices is necessary and most important, excellent local experts are required to adapt them to the respective situation.

This brings up two important points:

A law cannot and shall not be seen as one single isolated piece of paper, but it needs the context to the overall legislation of the country. The legal tradition of a country (Common [case] Law or Civil Law) plays a major role. Most of the European countries by their tradition belong to the Civil law countries. The difficulties in implementation of for example Anglo-American instruments into traditionally Continental European influenced countries is well-known.

Secondly adequate legislation can only be drafted by those who live with it and the preparation of good laws needs time and cooperation of all stake holders in place. Foreign consultants can advise, but the final adaptation to the real country specific situation needs to be done by the responsables in the respective countries themselves.

Further, many countries suffer from simple overregulation, i.e. an uncountable number of laws and amendments for each field and nearly each situation to occur. This leads to the fact that even experts have to capitulate and the legal situation as intended by the legislator is open to interpretation. A consequence from this is that finally the laws become inapplicable and are not implemented in the real situation.

### **The adequacy of land policies**

Having discussed the adequacy of legislation the question arises whether the government policies adequate? Perhaps we shall even ask: Are there any government policies for e.g. the development of land markets in place? Or: Are there several overlapping and contradictory land policies existing? Of course this does not hold true for most of the CEE countries, however, in some countries and in some fields of expertise such situations can still be found.

An adequate policy requires that a team of responsables is appointed from the stake holder groups involved who together elaborate a e.g. a national policy. On the basis of this institutional strategies can develop. The necessity here lies again in two things:

First it lies in the involvement of all stake holders in the process of elaborating a policy and in the requirement of a mandate of their representatives in the decision-taking process. The elaboration of a policy must be a clear aim of the participants and the importance of this task must be considered as very high.

Talking about cooperation leads to another point: We often use the key word “public – private – partnership” (PPP), but should we not also – with the same effort – try to establish functioning partnerships within the institutions and between several institutions and / or ministries? In many countries the development of policies is essentially hampered by the fact that institutions do not cooperate, but compete with each other. Especially with regard to the upcoming Inspire policy of the European Union it is of outmost importance for the institutions involved in the land market to cooperate and to agree on clear defined policies and proceedings.

Secondly the policy shall be elaborated with the clear aim to be sustainable in the long run without the needs of drastic changes. Experience shows that policies fail not only because they are so bad – of course there are examples also for this – but more often, because they have been changed too often. There is a tendency to change policies with each change of government. Naturally this happens in each country, but the degree of change is important. E.g. in Romania, during the last fifteen years the policy on land markets has never been clarified for all the stake holders. Whereas bad policies have been identified, but remained unchanged, others – e.g. the approach to land registration and cadastre – have been changed too often. Only now some consolidation of the situation can be expected.

### **Inheritance in rural areas**

An important factor is also the relation of land markets with the demographic trends in rural areas. The rural areas in CEE Countries are not very attractive as living conditions are usually very hard. Apart from hard field work, lacking machinery, unclear property situation and poor income function as deterrents.

Counter productive inheritance policy adds to this unlucky situation: For example a family father has a farm with a size of 2 hectare and has five children. One of them is interested in continuing the farming, the other four however already live in the city. If all five children inherit one fifth of the farm the farm becomes nonviable.

In many countries there is usually no restriction to inheritance for farms which leads to the fact that more and more already small farms are further split between the heirs. The rural areas – already fragmented through restitution – become even more fragmented. Therefore especially young people move away from rural areas. This leaves an increasingly aged population in the rural areas and land that is often unused. As an argument for this it is often heard that the law must not restrict the private property right. But is this really true? Is it not also true that the state can impose restrictions on private property if this is in the interest of general welfare (e.g. a viable agriculture)?

The importance given to the “mechanism of price” is a crucial point of discussion in this context. If the market development is only left to the “mechanism of price” a functioning land market will eventually develop, but this will most probably take a very long time. Meanwhile the market is exposed to speculation and survival of the fittest. How to deal with this and which importance to give to market forces is certainly a policy issue.

There are a number of different models for government policies to support the transfer of farms to younger generation farmers. Referring to the example of the father with the five children for instance legislation could provide that family farms may not be split upon inheritance. In our case the child that is interested in farming could keep the farm; the compensation for the other four sisters and brothers would be so minimal that it would not state a problem for him; the other would receive some money instead of nothing. The wider benefit would be that agriculture is kept and landscape conservation is secured.

Also, because young people see their future in the cities the aged population remaining in the rural areas at some point is not able any more to farm. Land consolidation is an additional instrument to fight this development. Although especially in the CEE Countries this is a sensitive issue it is necessary to convince farmers of the necessity to come to a consent on the effective distribution of land. Land funds – in combination with pension schemes for farmers – could be an option. If at the same time a policy is developed to subsidise and encourage young small and medium size farmers (e.g. through subsidies, cheap credits etc.) this could support the development of a viable and sustainable agriculture.

For this it is also important to realise that the trend for small and medium size farms in Western Europe is away from big farms and mass production. The “European Land Policy Guidelines” state in this respect: “In the absence of trade and agricultural policies to support

the small farm sector the predominance of export-oriented agriculture, the liberalisation of agricultural imports and governments' withdrawal from the provision of rural extension services, have often resulted in land re-concentration and in exclusion and/or deprivation of vulnerable groups. Addressing these legacies and promoting both equity and productivity is thus a key issue.”

What becomes increasingly more interesting for the customers and by this more profitable for the farmers is to concentrate on new products, e.g. purely biological products, alternative products etc. This is the only way how small and medium size farmers could be kept alive in future. In a competitive environment it is necessary to produce niche products in order to survive. Special subsidy programs would support such development. For instance marketing products directly from / at the farm could be subsidised with lower taxes which would mean a higher income for farmers and would secure the local supply network – something which in times of big shopping centres is not self-evident any more.

### **Urban – rural relationship**

Another hot issue is the question of linkages between rural land markets and social policy in rural areas.

In Western cities (e.g. Austria) – because of improvement of life quality – the trend is to move to the suburbs of the main cities whereas the working place remains in the centre of the cities. This trend will also arrive in the main cities of the CEE Countries (e.g. Budapest, where the residential areas are around Buda and the business centre is Pest). The consequence from wrong infrastructure policy in the Western countries was that traffic was highly underestimated. No preparations were made to face the huge number of commuters who want to drive into the cities in the morning and to go back home again the evening. Huge traffic jams are the rule. Would it not be wise here to make preparations already at an early stage? How could that be looking like? (e.g., Reserving space for broadening main streets. Planning for Park and Ride premises).

Also this development of moving out of the cities brought along a considerable urban sprawl and high infrastructure costs for streets, water pipelines and canalisation. Would it not be better to make specific provisions in the land use plans for areas around the cities that are expected to become building areas? By this building activities could be better controlled without having massive restrictions / prohibitions on the sale of land.

The “European Land Policy Guidelines” state in this respect that “Expansion of agriculture or rapid urban growth can generate many land-related problems. The consequences of unplanned land use are most apparent in peri-urban areas and those regions receiving a major inflow of migrants or refugees. Changes in population and patterns of land use require some form of direction to minimise adverse impacts from poorly sited buildings, loss of green spaces, the need to set aside land for infrastructural development and service provision. Thus, land policy needs to be coherent with sound land use planning and, in turn, land use planning must comply with land and rural development policies aimed at strengthening poor people’s access to land. Expropriation for public interest, land consolidation, land readjustments must be implemented through an established transparent procedure, include prompt and fair compensation, and take into account effects on neighbouring properties. Administrative, legislative and legal procedures should guarantee that there is no resettlement without adequate rehabilitation and compensation.”

### **Ban on foreign ownership**

In this respect the role of the ban on foreign ownership of farm land in CEE Countries needs mentioning. The reason for such provisions lies in the fact that the respective countries want to protect their (agricultural) land from being bought up by foreigners. But what happens in

fact? The foreigners still find their ways to get the land – either by leasing it or by using some circumventive methods to buy the land (creating companies or using front men). The result is that the investor comes to the country and by creating a number of jobs enhances the economy. But what are the negative consequences? Speculators come and stay in a country because standards (environmental protection etc.) are low, because work force is cheap. They pursue a pure agricultural industry and exploit the country without careful and gentle farming. They do not undertake landscape conservation and they leave the country again as soon as conditions become less favourable or more attractive in another country. What remains are often high follow-up costs for the municipality. Within the European Union this ban will have to be lifted.

Here again a lot could be done with the instrument of land use planning.

### **Environment**

As mentioned above the survival of small and medium size farms is essential – of course not only – but also, because they contribute significantly to landscape conservation. In Austria for instance many activities that have been undertaken in the 1960ies to 1980ies with regard to landscape regulation are now considered not only old fashioned, but also detrimental to environment. So for instance government programs are developed to re-build the once regulated rivers, to re-vive landscapes that have been destroyed through over-dunging and monoculture (e.g. maize). The bigger the fields were, the bigger and the heavier the seeding and harvesting machines had to be. In consequence the soil was hardened and became infertile (e.g. around the river Po in Italy and around Graz in Austria). Few years ago the ground water was massively contaminated and many places had no ground water any more. This had to be fought against in a very tiring and expensive manner.

In the CEE Countries it there is the opportunity to avoid some of these mistakes of the past done in the Western European countries if land policies react swiftly and efficient.

So for instance government legislation may also impose conditions on land rights with the aim of achieving environmental goals, as when farmers must adopt certain soil conservation measures on their land, or where financial incentives are put in place to encourage new forms of land management. Legal measures should take into account the effective ability (political power and financial means) of national/local governments to enforce land use patterns in practice (European Land Policy Guidelines).

Especially water will become an issue of rising interest in the near future. Here different interests of different authorities will again have to be coordinated. And – like with land related provisions – many different aspects of substantive law are interwoven here, too. Problems of shrinking water resources on the one hand, pollution of rivers, lakes and the sea or contamination of ground water are just a few aspects. The same is true for forestry or protection of nature.

### **Forestry**

In Austria e.g. everybody can enter a forest. Collecting berries and mushrooms and / or driving through the forests by bicycles and / or motor bicycles may be prohibited. As a matter of fact foreigners come to Austria – equipped with walkie talkies – for collecting mushrooms (around 100 kilos per day). Only high fines can keep them away.

Also in Austria for instance forestry land is not tradable anymore because the costs for wood are not cost-covering anymore. As a consequence more and more forests return to nature again. This provides a good basis for pests. What can be done to prevent this?



## **6 – CONCLUSION**

As this superficial overview over some of the main topics for the development of land markets and related institutions may have shown there are numerous key questions that need to be addressed.

Hand in hand with the material issues discussed above the key questions must also be:

What are the key principles for successful land policies?

What is the role of the different stakeholders?

What are the essentials of an institutional framework?

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