

Process of Reprivatization of Agricultural Properties in the Selected European Countries

Adam Niewiadomski

Abstract—Political transition of agricultural properties in Poland and the former German Democratic Republic (GDR) after 1989 had to include not only Reprivatization but also the issue of returning the properties in kind to their former owners. Restitution in kind applied in GDR to all forms of ownership which were subject to expropriation between 1933 and 1989 except for properties taken over during Soviet occupation in 1945-49. This issue was one of the flashpoints during the process of ownership changes. Privatization, limited as it was, took place in unequal legal environment where only one group of owners was privileged. Executing restitution in kind created a feeling of uncertainty among potential real estate buyers.

Keywords—Reprivatization, agricultural properties, German Democratic Republic, Privatization

I. INTRODUCTION AND ANALYSIS

IN Germany [1], this issue was addressed relatively early by adopting a separate law in 1994 (Entschädigungs- und Ausgleichsleistungsgesetz – EALG) [2]. As it was mentioned before, a controversial solution included preservation of state ownership over those lands which were expropriated between 1945 and 1949. German government claims that its decision was influenced by the position of the Soviet Union as the Soviets would consent to reunification of Germany only provided that the German government preserved the legal environment existing at that time [3].

Pursuant to the EALG act, former owners not subject to reprivatization could receive a limited, relatively low financial compensation or be granted a right to preferential purchase a property of similar area to the one they had lost. The preferential prices amounted to about 50% of market value of properties in new Lands (states). The subject of preferential sales to previous owners may be all properties owned by the State Treasury, including those subject to lease agreements. Although the adopted principles of reprivatization were quite clear and unambiguous, the claims of former owners and their legal heirs still raise significant legal doubts. Out of 95,600 cases closed as of mid 2009, 60% of the claims were rejected [4].

At the same time 34,900 properties with total area of 509,000 ha were returned including 451,000 ha of agricultural properties and 58,000 ha of forests. Quite often, the procedure involves court proceedings. In case of certain claims, final adjudication is passed by the German Supreme Administrative

Court. Many claims are still being analyzed by courts at various instances.

In 2001 the EALG act was amended. Those amendments are unfavorable to former property owners. Preferential conditions of purchase were limited and thus the possible price reduction decreased from 50% to 35%. This amendment was accompanied by an increase in prices of real estates in the former GDR [5].

It is noticeable the reprivatization process began in somewhat hesitant manner [6]. This was due to the fact that political reunification had not been completed at that time.

It was still unclear when reprivatization claims are admissible. The property law was to address this issue [7]. This law dealt with privatization across the whole economy, not only agriculture. The first-line applicable law was the EALG act. Before it was adopted or if the EALG act did not provide a solution in a given situation– the law on property was applied (which has been amended nine times so far). According to the law on property, reprivatization claims may be raised in the following cases:

Expropriation took place without compensation – article 1, item 1b;

If the amount of compensation was lower than compensation for GDR citizens – article 1, item 1b (this provision applies to West Germany citizens, whose properties located in GDR were expropriated, and who received compensations lower than GDR citizens);

When the state, as administrator of the property, sold it to another buyer - article 3, item 1c;

If the property was expropriated pursuant to the so called government decision of 1972 [8] – Article 1, item 1d;

If structures or the land under the structures were taken over by the state due to outstanding debts [9] – article 1, item 2;

If private property was lost due to illegal actions of the government – article 1, item 3;

If adjudications or administrative decisions passed in the former GDR were cancelled or were subject to cassation – article 1, item 7 [10];

If the property was lost as a result of persecution due to racial, religious or political reasons between January 30.1933 to May 8, 1945 - article 1 item 6.

Another serious issue of the reprivatization process was defining the group of people who were entitled to file claims for returning property in kind. After a long debate, the following compromise was reached:

The entitled group are natural persons as understood by

A. Niewiadomski is with the University of Warsaw, Faculty of Law and Administration, Poland (phone: 48505272403; e-mail: adamn@adm.uw.edu.pl).

article 1 of the BGB (German Civil Code)

The entitled group are also legal persons as understood by the German Civil Code. Shareholders or partners in expropriated corporations may file their claims only to the relevant corporations. In order for a corporation to be returned, a claim must be filed by more than 50% of former shareholders [11];

Other entitled entities include unlimited liability partnerships, civil partnerships, limited partnerships and general partnerships.

Legal successors of all the categories listed above are also entitled to file claims.

However, the most important and the most problematic criterion was the definition of loss provided in article 1. The entitled individuals had to prove not only their legal title to receive property return in kind but also had to prove that they incurred losses as a result of property expropriation. Unfortunately, proving that was extremely difficult for legal successors of previous owners and in some cases it was impossible.

There was one more issue to be addressed. If the property could not be returned in kind for some reason, the claimant might seek financial compensation. The amount of compensation was defined quite clearly both in the law on property and in the EALG act. However, the valuation was still problematic and it was the basis for calculating the percentage of compensation. The guidelines for valuation were set forward by the law on German mark exchange rate dated April 18, 1991. During the property changes period, it was unclear whether valuation should reflect the value at the time of expropriation or at the time the relevant compensation act was adopted or maybe there was yet another relevant timeframe. Moreover, the list of assets comprising a property was not clearly defined. Even if old maps or deeds of ownership could confirm the area of lost property, proving that the structures or buildings which were destroyed or devastated actually existed was quite a challenge.

The law on property provides for return of industrial facilities and farms in kind if after October 7, 1949 (the date of declaring the GDR) unintentional loss of property occurred. The following circumstances refer to industrial plants and facilities.

Details for returning industrial and agricultural facilities in kind are listed in article 6 of the law on property. The initial resolution which was highly restrictive was amended and made more liberal by the subsequent act to facilitate restitution of industrial/agricultural facilities. Nevertheless, regulations concerning property return became even more ambiguous and complicated. Restitution regulations, pursuant to article 6 item 9 of the law on property should be amended by the regulation on returning industrial facilities.

The restitution principle was set out in article 6 item 1 line 1 of the law on property. According to the provision, an industrial or agricultural facility must be returned pursuant to claim filed by an entitled party if the industrial or agricultural facility is comparable to the one at the moment of

expropriation in reference to technical and economic development. Therefore a necessary prerequisite is the existence of the relevant industrial or agricultural facility with ongoing production cycle. If production has been suspended and it is not possible to re-initiate it then restitution of the facility is not possible (art. 4 item 1, line 2 of the law on property). In such cases, the claimant may only claim the assets which constituted their property at the moment of expropriation or assets which surrogated them later on. (art. 6, item 6^a, line 1 of the law on property). If returning the industrial facility or farm is not feasible or if the entitled parties decide against its return, they may seek compensation for the value of facility/farm at the moment of incurring the loss, taking into account the previously obtained depreciation amounts (article 6, item 7 of the law on property). However, combination of restitution and compensation solutions brings out many issues. Firstly, valuation of facility/farm includes only variables such as technical and general economic development. It is not defined precisely what "general" means. There are many differences between economic development of communist countries and countries located in Western Europe. Non-specific and ambiguous regulations are perceived as one of the faults of the reprivatization process in the former GDR. Compensation used as an ultimate solution seems to be a good decision, but the principles for granting and calculating the amount of compensation as well as specific regulations were changed several times.

Return of industrial or agricultural facility may be claimed only if the facility is comparable to the expropriated one (article 6, item 1, line 1 of the law on property). According to the legislator's intention, facilities are comparable provided that the products or services offered by the facility actually remained unchanged, taking into account technical and economic development (article 6, Item 1, line 3 of the law on property).

Restitution in kind should include entitled parties (art. 6, item 1, line 1 of the law on property). Entitled parties, as understood by the act on property are natural and legal persons as well as civil law companies whose assets were influenced by governmental decisions concerning expropriation as well as any legal successors of entitled parties (article 2, item 1 of the law on property).

Application of the regulation introduced by the law is quite complicated and therefore it did not accelerate the restitution process. The previous version of article 6 of the law on property provided a simpler regulation in this regard, under which the shareholders should receive shares in the company which today represents its predecessor company (article 6, item 5, line 1 of the law on property). Instead of total or partial return of ownership or membership to former shareholders, the legislator decided to reconstitute in a more detailed manner companies which are actually inactive or which may be activated only after a detailed and time consuming procedure is introduced. This regulation definitely does not facilitate accelerated restitution intended by the legislator.

A claim for restitution is directed to the disposing party as specified in article 2 item 3 of the law on property (article 6, line 1 of the law on property). When a facility is returned to the entitled party, the disposing party shall be understood as the party which is the actual owner or disposer of the facility as a whole or partially.

A decision on returning the facility is passed upon the entitled party's claim as a result of proceedings pursuant to article 30 of the law on property. Therefore, the restitution claim is analyzed not by the party obliged to return THA [12], but by the national body responsible for property issues (see Article 34, item 5 of the law on property).

Returning the expropriated industrial facility or farm to the entitled party is done by means of transfer of ownership rights regardless of the legal form of ownership (article 6, item 5, line 1 of the law on property). If only a part of existing industrial facility is to be returned, then the company might be dissolved (article 6b of the law on ownership) or restitution may be limited to a number of shares in the whole company (article 6, item 5, line 2 of the law on property).

If the participants of the proceedings are not able to agree on the means of restitution, then a competent national body may decide how to return the assets to the entitled parties (article 6, item 5a of the law on property). In general, restitution is executed in such a way that the shares and shareholders' rights belonging to the disposing party are transferred to the entitled party (e.g. transfer of shares in limited liability company). The law clearly defines that a restitution claim always covers the total assets of the company and it does not selectively or alternatively refer to certain assets, especially real estates. In general, it is forbidden for entitled parties to limit their claim only to individual assets which constituted their property in the past. Return proceedings based on the complex legal definition in article 6 of the law on property requires a relatively long analysis and decision making process. To avoid detriment to the involved company during restitution proceedings, the relevant authority should appoint the entitled parties, pursuant to their request, as temporary owners of the company that is subject to the proceedings (article 6, item 1, line 1 of the law on property). The legal grounds is that the entitlement as understood by article 6 of the law on property has been proved and there is no entitled party (as understood by article 3, item 2 of the law on property) who has priority. If entitled party has filed relevant request, it shall be analyzed by the competent national authority within three months (article 6, item 2, line 1 of the law on property). Pursuant to article 3^a of the law on property, THA may utilize the 3 month period to make and enforce its decision concerning investment and divestment to the benefit of third investor.

After 3 months or based on another decision the entitled party is introduced. As far as the relation between the entitled party and the disposing party during the restitution proceedings is concerned, it shall be governed by the regulations concerning company lease if the claim is undoubtedly grounded and the entitled party files a relevant

motion for disposal of the company (article 6, item 2, line 4 of the law on property). The lease rent or sale price are deferred until the proceedings is closed with a binding decision. Until the facility is finally and permanently returned to the entitled party, unlimited alternative claims are dismissed (article 6, item 2, line 6 of the law on property).

The process of reprivatization of agricultural properties in Poland is not as extensive. It must be admitted that the process in Poland is only residual. There is no uniform regulation which would finally specify the rights of former owners although it seems necessary not only regarding agricultural property but also the whole economy. Former owners and their legal successors are forced to seek their right in courts of law, which takes many years. Due to interpretation of various legal regulations, they are able to win their cases which allow them to seek financial compensation or sometimes restitution in kind. The problem is particularly evident if the property issues were not regulated by entries in land and mortgage register.

In Poland today there is no law similar to German law on property or EALG which could regulate the rights of former owners of agricultural property. In 2005 the Reprivatization Fund [13] was created which is a state special purpose fund gathering income from sales of 5% of State Treasury shares in each commercialized company and interest from those funds. The funds are meant to be assigned for addressing claims of former owners of property taken over by the State Treasury by:

a) payment of compensation resulting from binding court sentences and settlements as well as final administrative decisions passed in relation to nationalization of property,

b) payment of compensation granted pursuant to article 10 of the act on cancelling decisions concerning persons persecuted for enhancing independence of Poland dated February 23, 1991 (Journal of laws No 34, item 149 as amended),

c) covering the cost of court and enforcement proceedings, including remuneration to court experts for providing opinions, if the defendant (the State Treasury) is to pay for them,

d) covering the cost of legal representation in cases heard abroad,

e) covering the cost of remuneration paid upon civil law contracts for specialist opinions and analysis, which are a part of the aims specified in items a) - d) [14].

Regulations concerning assignment of 5% of from sales of 5% of State Treasury shares in each commercialized company and interest from those funds in order to address claims from previous owners are in force in Poland since 2000 [15]. They were introduced very late into the Polish legal system and thus are insufficient for the process of reprivatization.

The analysis of the above regulation announced on April 29, 2010 [16]. Leaves no doubt about the intended course of reprivatization. Polish legislator indicates quite clearly that the property is to be returned in the course of court proceedings or

upon decision of public administration authority. However, it is not specified what are the basis for judges' decisions or unspecified public administrative authorities. The fund was created more than ten years after the beginning of privatization process. Initially, 10% of the funds acquired from commercialization were assigned to the social insurance system. Since the process has been initiated so late, it might be insufficient, especially in situations where courts adjudicate in favor of former owners. It is probable that companies which are commercialized today, are just a small fraction of all companies assigned for commercialization since 1989. Funds gathered in the Reprivatization Fund will definitely be insufficient to satisfy all reprivatization claims. The process of restitution in Poland, according to residual assumptions of the regulation mentioned above, will be subject to court or administrative legal proceedings. However, there is no detailed law specifying the competences of public administration in the process of reprivatization. Creating such authority would undoubtedly make the reprivatization process more effective. It must be remembered that in new German lands it was the responsibility of the Trust Agency, which dealt with the entire German economy. In Poland even ANR does not have similar competences regarding agricultural property.

Lack of decision concerning reprivatization of agricultural property will cause an increase in the number of restitution claims filed with the courts. The process of sales of agricultural property which are leased today, which is the part of the planned amendment of act on management of State Treasury's agricultural property, will be completely paralyzed. It will not be possible to assign such properties for sale due to their legal fault being a reprivatization claim. It should be mentioned that the above situation may concern even 30% of leased lands.

It should also be noted that the above regulation does not directly apply to agricultural property. Although it refers to the total nationalized property without differentiating between industrial facilities and farms, the arrangement of regulations in the law concerning facilities, it is doubtful whether the regulation is an agricultural law in character.

Detailed principles of the Reprivatization Fund's operation are defined in the regulation of State Treasury Minister dated June 29, 2010 concerning detailed financial management the Reprivatization Fund [17]. According to article 5, item Of the above regulation "a decision to pay compensation or other financial benefit shall be made by the competent authority representing the State Treasury in the course of administrative or court proceedings". Such an authority, in proceedings concerning agricultural property belonging to the State Treasury, may be the Agricultural Property Agency (as a trustee). According to the Agency's scope of competence, it may not pass an administrative decision to return agricultural property to former owners or their legal successors. The only option the Agency has is representing the State Treasury in a court of law.

The existing legal solutions to this extent are a mere hybrid

of reprivatization process. When comparing German and Polish regulations, it is evident that the German solutions are more forethought. Today in Poland it is still required to define the group entitled to claim return of property, the relevant procedure, competent authorities and, what seems most important, the manner of finalizing each and every restitution process. Polish legislator seems to opt for compensation-based solutions. Taking into account the time since the beginning of the transition process, such solution seems to be the only feasible one. However, the method of defining the amount of compensation is still not defined. Valuation methods concerning real estates, agricultural property, buildings and personal property remain unknown. It seems that general guidelines as specified in the civil law proceedings will not be sufficient to value restitution claims. As for now, it is hard to imagine returning agricultural property in kind to their former owners. Since the expropriation often took place more than 60 years ago, and the number of new owners was actually unlimited over the last 20 years – allowing for restitution in kind may prove to be dangerous due to claims raised by new owners.

Reprivatization claims in Poland refer to c. 550,000 ha, which prevents permanent distribution of property comprising State Treasury Bank of Agricultural Property (ZWRSP). According to Paweł Czechowski [18], it may be assumed that the most effective compensation for reprivatization claims should be financial compensation based on the model of Compensation Fund for the so called "property left beyond Bug river". This solution is to be recommended as part of the future reprivatization law. The future law should also define a clear system of property valuation, which shall be subject to compensation proceedings. German regulations show examples of adequate solutions, although initially Germans faced certain problems. Since quite a long time has passed since the beginning of transition period in Poland, it might certainly be too late for reprivatization by means of returning property in kind. Nevertheless, it should be advocated that prompt action is taken in order to finally address the issue of reprivatization claims. Shall this issue remain unsettled, it will not be possible to finish the process of transforming Polish agricultural property and will definitely hinder the process of sales or lease of the property in question. The institution of reprivatization in Poland should be built on experience of all European countries. Compensation for lost property should be a remedy for expropriation processes. Based on the German regulations, the issue of valuation of agricultural property should be regulated in detail. The timelines for calculating the amount compensation must be clearly defined. Reprivatization requires a prompt legislative intervention also due to the fact that adjudications passed by international courts in favor of Polish citizens might be more expensive than a national restitution process.

II. CONCLUSION

Reprivatization as part of agricultural property transition process has a key role in both countries. In new German lands it was addressed very promptly both in terms of legal environment and judicial practice. However, criticism and mistakes were not avoided in this process. Returning property in kind was possible, since new owners to be considered in the whole process were not present at that time. In most case, reprivatization process was settled between the State and the former owner. In Poland, reprivatization process was neglected. Property, which today is subject of claims, has been sold. Now, the whole process involves buyers of the property and their ownership rights. The reprivatization process and law on reprivatization must also decide on the rights of new owners. Protection of property which is provided for in civil law regulations might prove to be insufficient.

A. Niewiadomski is PhD of law at University of Warsaw. Engaged in agricultural law, real estate law and civil law. The project was funded by the National Science Centre in Poland.

REFERENCES

- [1] G. Sinn, *Polityka sprzedaży prowadzona przez Urząd powierniczy jako strategia prywatyzacyjna*, in B. Błaszczyk, R. Woodward, W. Quaisser, *Prywatyzacja w Polsce i w Niemczech Wschodnich*, p.43, Warsaw 1998.
- [2] A. Kołodziej, "Przekształcenia własnościowe w rolnictwie byłej NRD – wnioski dla Polski", in *Agroprzemiany*, p. 2, issue 3/2001.
- [3] B. Forster, F. Isermeyer, *Transformation of Agriculture in East Germany – Agriculture in Germany*, edited by S. Tangermann, Frankfurt am Main, 2000.
- [4] A. Kołodziej, "Przekształcenia własnościowe w rolnictwie byłej NRD – wnioski dla Polski", in *Agroprzemiany*, p. 2, issue 3/2001.
- [5] In Poland – due to lack of final legislative solutions – in many cases the claims completely prevent and oftentimes hinder even lease of such property.
- [6] R. Kluger, *Szczególny przypadek Niemiec: reprivatyzacja w byłej Niemieckiej Republice Demokratycznej*, in: B. Błaszczyk, R. Woodward, W. Quaisser, *Prywatyzacja w Polsce i w Niemczech Wschodnich*, p. 247, Warsaw 1998.
- [7] Zweites Vermögensrechtsänderungsgesetz vom 14. Juli 1992, BGBl. I, S. 1257 (Journal of laws I 1992, item 1257).
- [8] Ministerratbeschluss 1972.
- [9] Such debts must have arisen since rent established by GDR government was low. Probably, the rent was too low to cover the cost of building maintenance.
- [10] Such claims are also provided for in the act dated October 29, 1992 concerning rehabilitation of persons sentenced pursuant to GDR criminal law and in art. 1 of the act dated June 23, 1994 concerning persons aggravated by GDR administrative law.
- [11] If no number is specified, the return is possible – art. 6 item 1a line 2 and 3, art. 17 of the law concerning return of facilities dated July 13, 1991.
- [12] Trustee Office.
- [13] See the act amending the law on public financing and other laws dated November 25, 2004 (Journal of laws 2004 No 273, item 2703).
- [14] Art. 1 item 1 of the act amending the law on commercialization and privatization, dated August 30, (consolidated text: Journal of laws 2002 No 171, item 1397 as amended)
- [15] See the act on amendment of the law on commercializing and privatizing national entities and the act on using financing from privatization of the State Treasury property to reform the social insurance system, dated March 29, 2000 (Journal of laws 2000 No 31, item 383).
- [16] Art. 1 item 1 of the act amending the law on commercialization and privatization – regulations introducing the law on public finance, dated April 29, 2010 (Journal of laws 2010 No 108, item. 685).
- [17] Journal of laws 2010 No 118, item 799.
- [18] P. Czechowski, "Agencja Nieruchomości Rolnych – restrukturyzacja czy likwidacja?", in *Przegląd Prawa Rolnego*, pp. 75-98, 2008, issue 2(4), HoweC550.