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REGULATING AGRICULTURAL LAND CIRCULATION: EXPERIENCE IN THE RUSSIAN FEDERAION AND LAW INITIATIVES IN UKRAINE

SUMMARY. This article contains an analysis of the latest drafts of legal acts regulating the Ukrainian farmland market in comparison with the Federal act of the Russian Federation dated 24/07/2002 No. 101-FZ "Regulation of Land Circulation". The author supports the opinion that prohibiting some persons or entities to own farmland, as well as imposing ceilings on land ownership, is unjustified. The pre-emptive right to purchase land which affects farmland circulation, set in the Federal act "Regulation of Land Circulation" is critically analyzed. Granting a pre-emptive right of purchase to public authorities seems unreasonable. It would be more appropriate to provide this right to land tenants and land co-owners. In any case, exercising the pre-emptive right should imply full advance payment for the land. Nullity of contract as a result of pre-emptive right violation is considered to be unreasonable.

KEY WORDS: Land market, land circulation, agricultural land (farmland), pre-emptive right to purchase.

Agricultural land is characterized by its specific nature. This land as a component of the "agricultural sphere", is "not only a materialistic factor of existence of human society, a source of its production independence" [1; 10], but also a key link to "a practical solution to the problem [...] of perspective of the existence of a nation" [2; 1, 11].

Due to this specific characteristic, the need for special regulation of agricultural land is apparently undisputable.

In the Ukraine, there is a special regulation, although it does not "work" because of the moratorium on the alienation of the major part of farmland (s. 15 part X "Transitional provisions", Land Code of the Ukraine). In the legal doctrine and national political community, it is commonly held that the existing regulation is insufficient, and the state requires additional regulation to set rules on farmland circulation. For a while it was an intention to introduce the Land Market Act, connected with part 15 of Section X of the Land Code. Adoption of the Land Market Act was a condition for lifting the moratorium on alienation of most farmland. Recently, the item has been changed: the Ukrainian Act № 5494-VI dated 20.11.2012 [3] made lifting the moratorium dependent on the adoption of the "Act on Agricultural Land". However, there is a risk that this version of the Act concerning farmland regulation would automatically reproduce the relevant part of a general land market law, which has already been approved by the Parliament in the first hearing, except for the land sales

part. Recently, the rules of bidding on land were formalized in the special Ukrainian Act № 5077-VI dated 05.07.2012 [4], which introduced corresponding amendments to the Land Code. It has obviously resulted in changing the wording in p. 15 of S. X of the Land Code.

Thus it is easy to notice that all legislative initiatives concerning the Land Market of the Ukraine are interlinked with RF Federal Act № 101-FZ dated 24.07.2002 "Regulation of Agricultural land" (hereafter, the "Regulation ..." Act) [5]. At the same time, a comparative analysis of the Ukrainian and Russian legislature enables us to say that the Russian regulation adopted in the Ukrainian Act was not critically analyzed by the Ukrainian legislators, which led to copying of the wordings of the Russian Act.

Here we suggest some improvements by comparing to the "Regulation..." Act the most topical Ukrainian "Land market" Act (registration number № 9001-D, hereafter referred to as Project 9001-D), proposed to regulate relations in the Land market in the Ukraine [6] and which has passed its first hearing.

The following groups of provisions can be singled out in Project 9001-D:

1. The first group might be called "techno-legal garbage". The Project is filled with meaningless and declarative text, which, at its best, will not have any effect on the regulation of social relations, except for a significant complication of the text of the Act. In the worst case, it would create a conflict and lead to misunderstandings and disputes. For example, there was no need to include in the Act any term definitions (referring to terms which are fairly clear or used unnecessarily in the Act, Article 1). It refers to description of the legal regulation of the Land Market in Article 2 (the Act is not a textbook; it should not contain any observations, including correct ones). It also concerns the list of subjects and objects of the Land Market in Article 3 (which adds nothing to the existing rules, except, perhaps, possible confusion); It includes the list of agencies that manage state-owned land for Agricultural purposes in Article 4 (this matter has been resolved by more general rules, and no new rules were introduced). It applies to rules of informing society in Article 5 (these rules are either declarative or replicate other legal norms); the same refers to the description of "consultative services for the Land Market" in Article 6 (these services do not have regulatory power), and much more of this kind. Although some technical and legal weak points can be found in the "Regulation..." Act, Project 9001 contains many more similar points. Therefore, " techno-legal garbage" is a personal achievement of the drafter and should not be considered in the comparative analysis.

2. The second group of provisions in Project 9001-D includes rules designed to substantially reduce the legal power of Land Market participants. In this sense, the Project is more developed than its Russian "prototype". For example, Art. 3 of the "Regulation..." Act prohibits "foreign citizens, legal bodies, individuals without citizenship and legal entities in which 50% of share capital belongs to foreign citizens, legal persons or individuals without citizenship" from owning agricultural land.

In the literature, this limitation is referred to as the intention of the legislator to "protect the interests of Russian manufacturers and guarantees equal terms of competition with foreign capital" [7]. In our opinion, in this case no restrictions or

prohibitions can guarantee fair competition. Capital is capital; therefore, Russian or Ukrainian capital is not better or worse than foreign. Therefore, imposing restrictions on land ownership based on nationality is totally unjustified.

At the same time, Project 9001-D in general prohibits legal bodies from purchasing land for commercial farming (Article 10). This option is provided only to citizens of the Ukraine, the State and territorial communities. This approach, instead of protecting farmers as declared by the drafter, would impact the farmers negatively by hindering the creation of a fully-fledged market and preventing them from buying land for a fair price.

It is evident that in the Ukraine there are not many people able to invest in agriculture; therefore, there is no high commercial demand for land. The amount of land shares is almost 7 million, their average area of 4 ha [8]. The majority of the owners are pensioners or city residents who have neither the opportunity nor the wish to farm the land. Moreover, it is impossible to operate a competitive agricultural farm of 4 hectares, so it is obvious that most of these shares should be alienated to establish a sound agricultural industry (the sooner the better) since Ukrainian citizens cannot buy all the shares at a fair price.

The banks do not invest in the security of land, as in the case of foreclosure the lands will not be liquid. It has already been mentioned that individuals who could buy land from foreclosure are unable to offer a fair price.

Thus, there is no perspective of investment in the country, which preserves the current catastrophic situation. No investment means no jobs, no salaries and no development of the social sphere. The problem is complicated by imposing the ceiling of 100 hectares on the amount of commercial farmland Ukrainian citizens may own (Part 1 of Art. 14 of the Project). Project 9001-D was developed more thoroughly than the "Regulation..." Act. Part 2 of Art. 4 of the "Regulation..." Act imposes a ceiling of not less than 10% of the total area of farmland located in the territory of a RF municipality for an individual or a legal body to acquire. At the same time, there are cases when the ceilings are much higher, i.e. in the densely populated Moscow region the limit is 25% of the total farmland area — see Art. 6 of the Moscow Regional Act № 75/2004-OZ dated 12.06.2004 "Regulation of agricultural lands in the Moscow Region" [9]. It exceeds the proposed norms of Project 9001-D several times (!). However, the policy of setting any limitation is highly disputable since "analysis of world practice allows for the deduction that restrictions on maximum sizes of land are set mainly in countries with high deficiency of land and simultaneous high demand" [7]. It is clear today that neither the Ukraine nor Russia are in that situation. And even if they were, imposing ceilings do not seem to be the best solution. Imposing ceilings on the land size that can be privately owned deliberately reduces the number of farms, which would be more competitive than the smaller ones. It means that the village raises less money to fund the rural population and rural infrastructure.

Opportunities to invest are limited even for those few people who can do it. There is however a risk of monopoly of a small number of land owners in the labor market in rural areas. This risk should be dealt with through creating alternative employment,

providing social guarantees for the unemployed, etc., instead of deliberate reduction of labour efficiency in agriculture (which is in fact setting restrictions on maximum land size). If monopoly abuse arises as a result of concentration in the agricultural industry, well-established means of struggle against anticompetitive conduct should be applied.

In addition to imposing ceilings on land ownership by a single legal entity, it has been proposed to set limits even on land lease for individuals "considering individuals and people in charge of land regulation" (Part 4 of Art. 14 of the project), which is innovative for Ukrainian law and unheard of in Russia.

Shrinking of the land market turnover will lead to disastrous effect on the country's economy and further depreciation of land owned by the Ukrainian farmers.

The current trend towards the extinction of rural communities would not just continue, but develop.

3. The third group of provisions of 9001-D applies to contract regulation of different types of transactions on the land market. First of all, it is a pre-emptive right to purchase farmland. If introduced, this rule will replace the existing unsustainable rules of pre-emptive right to purchase farmland stated in Art. 130 of the Land Code. Now this right is granted to a very broad and indefinite number of persons without an implementation mechanism.

Pre-emptive right to purchase is a serious limitation of turnover which would inevitably result in decreasing turnover dynamics, obstacles to investment in agriculture, and the passing of land ownership to more efficient owners, etc. Pre-emptive right in a particular contract is justified only when there is an absolute certainty that the benefits from exercising the right outweigh the side effects.

There is no such certainty when it comes to pre-emptive right for public entities (a subject of RF as set in the Federal "Regulation..." Act (Art. 8) or municipalities as set by the act of RF entities). It seems that the only argument for granting these subjects the pre-emptive right is prevention of sales at a low price. Thus the proper way to struggle with price reduction is establishing a developed and dynamic land market, instead of setting limitations. Therefore we should agree with the denial of a pre-emptive right to the state and municipalities in Project 9001-D (this right was stated in the previous version of the project). Granting tenants and land co-owners a pre-emptive right as implied in 9001-D seems reasonable, since it is aimed at closing the gap between farming and land ownership for the tenant and enlargement of land for the co-owner. Both aims encourage efficiency and prosperity in the agricultural industry.

Providing public entities with the pre-emptive right is subject to dispute, since the proposed implementation scheme of this right triggers corruption. According to the "Regulation..." Act, the pre-emptive right-holder can prevent the sale of land to a third party by simply expressing an intention to buy the land. It guarantees the land owner neither entering into a contract with the privileged buyer nor payment according to the contract. We approve that in order to exercise the pre-emptive right, project 9001-D stipulates the transfer of a deposit to a notary in addition to giving notice of

intention to enter into a contract. However, it is unreasonable to claim the nullity of a contract as a result of violation of the pre-emptive right (part. 7 Art. 18 Project 9001-D) followed by p. 4 Art. 8 of the "Regulation..." Act, since it would not protect anyone's interests to buy the land at the announced price. At the same time, the act penalizes both the owner and the buyer (who is probably bona fide).

There is a highly disputable provision in 9001- D which states that "in the case of putting a land plot out to tender, the pre-emptive right-holder can exercise this right by agreement with a price offered by other participants of the bidding" (part. 8 article. 18). At the least, this will complicate the bidding procedure and hinder competition, which will reduce the amount of money raised in the bidding. This part of 9001-D is worse than part 1 Art. 8 of "Regulation...", which declares the pre-emptive right not applicable to public bidding.

Project 9001-D closes the loophole in the "Regulation..." Act which means that the pre-emptive right can be bypassed through the donation of land or signing a separate contract on alienation (as well as exchange or rent). At least several authors agree with this interpretation [10; 44]. Project 9001-D forbids the donation of land property except to the family, the state and territorial community which aims to prevent evasion of law (Article 58).

Summing up, let us say that the practice of the Federal "Regulation of agricultural land" Act cannot be regarded as entirely positive and worthy of non-reflective copying in the Ukraine. The major means of farmland regulation such as limiting the number of subjects entitled to buy farmland, imposing ceilings on the share of land acquired by one owner, granting a pre-emptive right to public entities together with an imperfect implementation scheme and contract nullity as result of pre-emptive right violation, are highly disputable.

The scheme of imposing ceilings on land share (p. 1 Art. 4 "Regulation..." Act) presents some interest. However, the lack of standard requirements for the Russian Federation suggests that in this case it is impossible to establish any research-based standards suitable for every situation. It is better to suggest some evaluation criteria to be used when inspecting the feasibility of land division [11, 93, 113].

Also, it is reasonable to provide a pre-emptive right to land tenants and co-owners (there is no such provision in the "Regulation..." Act, so the provisions of the Ukrainian project could be interesting for Russian legislators). However, the effect of pre-emptive right violation should be a transfer of rights and obligations from the buyer to the pre-emptive right-holder instead of nullity of contract. It should be noted that to introduce most necessary changes in the Land Code, no additional act is required by the legislature. Besides, the author believes [12] that introducing the regular measures stated above should not be connected with the moratorium on the alienation of farmlands, which should be lifted as soon as possible.

REFERENCES

1. Kulinich, P.F. Legal issues of protection and use of agricultural lands in the Ukraine. Monograph. - Moscow: Logos, 2011. 688 p. (in Russian)

2. Sozinov A.A., Pridatko V.I., Burda R.I., Tarariko A.G., Kucher A.A. The most important indicators and characteristics of mega-agrosystem (agrosphere) of the Ukraine. — Agricultural biodiversities of the Ukraine: theory, methodology, indicators, examples. Ed. by A.A. Sozinova, V.I. Pridatka: In 2 volumes. Vol.2. - Moscow: Nichlava,2005. P. 17–19 (in Russian).

3. The Ukrainian Act of 20 November 2012 No. 5494-VI. «Introduction of changes in the Land Code of the Ukraine». - Voice of the Ukraine. No. 241. 2012, 19 December (in Russian).

4. The Ukrainian Act of 05 July 2012 No. 5077-VI « Introduction of changes in the Land Code of Ukraine, concerning the order of conducting land trades in the form of an auction». - Voice of the Ukraine. No. 153, 2012, 18 July (in Russian).

5. The Federal Act of 24 July 2002 No. 101-FZ (Ed. 29 June 2012) «The agricultural land circulation». - SPS Konsultant Pljus. Available at: http://base.consultant.ru/cons/cgi/online.cgi?req=doc; base=LAW; n=131970 (in Russian).

6. Project of the Ukrainian Act «The land market» (reg. No. 9001-d). — Voice of the Ukraine. No 14 (6264). 2012. 25 January. at: http://w1 (in Russian).

7. Kalinin N.I., Udachin A.A. Federal Act of 24 July 2002 No 101-FZ (revised, with additions of 07 July 2003 No 113-FZ) «Regulation of agricultural land circulation»: Article-to-article commentary (2nd ed., revised, with additions). Available at: www.valnet.ru/m7-145. (in Russian)

8. State Agency of the Land Resources of Ukraine (until 2013) (in Russian).

9. Moscow Regional Act of 12 June 2004 No 75/2004-OZ "Agricultural land circulation in the Moscow Region». - SPS Konsul'tantPljus. www://base.consultant.ru/cons/cgi/online.cgi?req=doc; base = MOB; n = 135818 (in Russian).

10. Volkov G.A. «Article-to-article commentary to the Act «Agricultural land circulation». - Moscow: Volters-Kluver, 2004. 112 p. (in Russian)

11. German I.E. Peasant land utilization (a course). - Moscow: Tipo-litografii V.F. Rihter, 1909. 208 p. (in Russian)

12. Miroshnichenko A.M., Jurchenko A.D. «Social-economic and legal aspects of the moratorium on tne alienation of private agricultural lands». Bulletin of the Ministry of Justice of Ukraine. 2006. No. 12 (62). P. 59–75. http://www.amm.org.ua/images/stories/Land_Law_Metarials/ Miroshnychenko_Yurchenko_Moratorij.PDF (in Russian)