

Protection of the property right in Poland

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SUMMARY

The property right, being the most important material right, is protected by every legal system. Protection of the property right is the basis for citizens' confidence in the legal system which is binding in their country. This protection is particularly important in relation to real properties. Mechanisms of protection of real estate property rights allow for the efficient development of the real estate market, and, largely, of the country's economic development.

The paper presents the analysis of mechanisms of protection of real estate property rights in Poland. Legal bases of such protection are discussed and related practical aspects are verified. The analysis of threats and anomalies resulting from assumed solutions was performed and proposals of corrections were presented

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1. INTRODUCTION

In Poland several legal acts exist which aim at ensuring the safety of legal transactions related to real estates, including the property rights to land real estates. It is important since real estate values have considerably increased, in particular, after Poland became the European Union member. Figure 1 presents the increase of real estate values in Poland in the period 2004-2015.

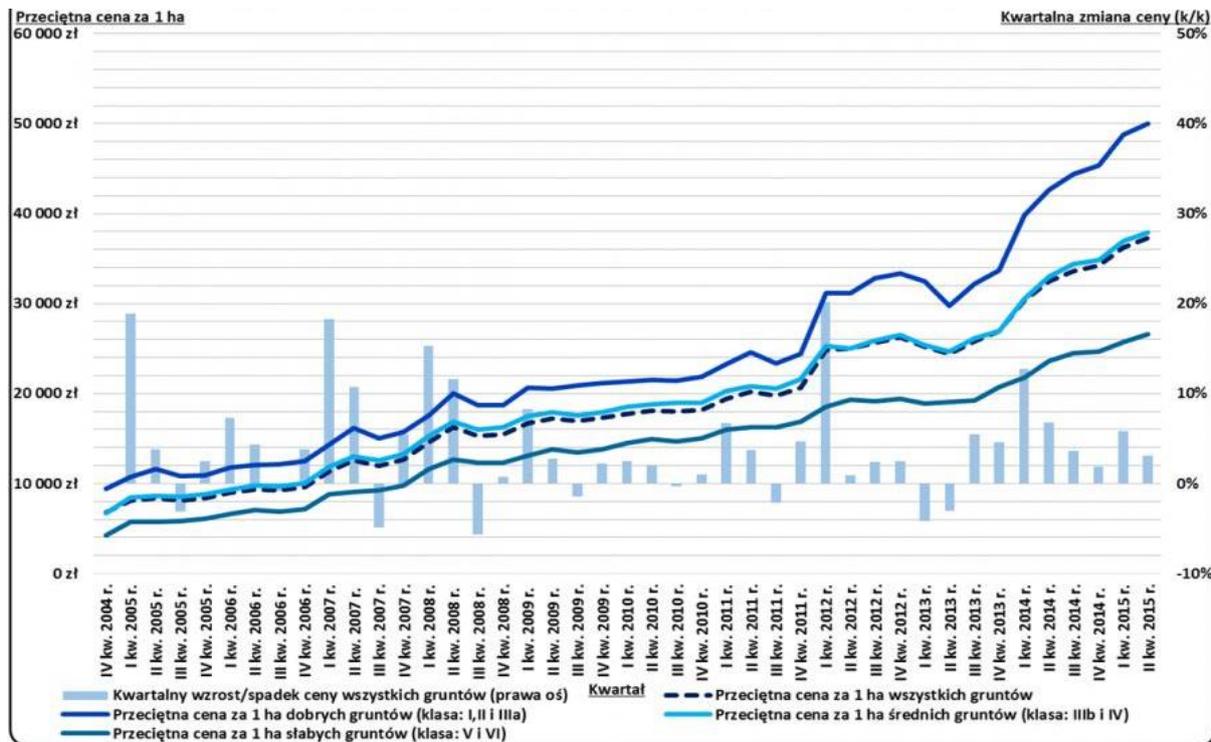


Fig. 1 Changes of agricultural real estate values in Poland in the period 2004-2015 [www.forsal.pl]

Protection of the property right is ensured in the Polish Constitution. Its Article 21 says: "*The Republic of Poland protects property and the right of inheritance*" and that "*Expropriation is permitted only when it is caused by public objectives*".

a real estate is defined in a legal act which regulates civil-and-legal relations between individuals and legal entities; this act is called the Civil Code (KC). This definition is also included in the Act on mortgage and property registers (KWH), as well as in the Act on real estate management (GN) which determines rules of management of real estates being the property of the State Treasury or local governments.

According to the KC, a real estate is a part of the Earth's surface being a separate subject of property (lands), as well as fixed buildings connected with lands or parts of such buildings, if - according to separate, detailed regulations - they are a separate property subject, independently on lands. On the other hand, according to the KWH a real estate is a part of the Earth's surface for which a property register has been created.

The GN defines a real estate as lands with other elements, excluding buildings and premises, if they are a separate property subject. In both cases a separate property subject means the case when buildings are the property of a perpetual land user (buildings constructed on lands of the State Treasury (SP) or local government units (JST), which were passed for perpetual usufruct of the owner of buildings (usually for 99 years). The land real estate is the subject of geodetic and legal division which results in distinguishing of land parcels, defined as not divided, continuous pieces of the Earth's surface being a part or an entire land property, which - as a result of assigning the number from the real estate cadastre (which is also called the land and buildings register) are becoming cadastral parcels, recorded in the real estate cadastre, as a result of the land division processes.

A land real property is composed of cadastral parcels (one parcel is the minimum). A cadastral parcel is defined in the Ordnance on land and buildings register (EGiB) and it is a continuous piece of land located within one cadastral district, uniform with respect to the legal perspective, distinguished by parcel lines from its surroundings.

Land and mortgage registers record property rights and the real estate cadastre - physical properties of cadastral objects, such as lands, buildings and premises. Referring to land real estates land and mortgage registers answer the question concerning rights which are assigned to lands and the cadastre answers the question concerning properties of those lands. It is worth to add that both systems are mutually related. Rights to cadastral objects are disclosed in the cadastre and description of real estates is acquired for the land and mortgage register from the cadastre. When disparate data exists in both systems, land and mortgage register is overriding referring to real estate marking.

2. LAND AND MORTGAGE REGISTERS SYSTEM

As it was mentioned, land and mortgage registers record rights to real estates. They also serve for ensuring safe legal procedures related to real estates. Land and mortgage registers contain four sections:

- 1) Section One covers real estate marking and records of ownership rights. Data from the real estate cadastre is used for marking real estates in the land and mortgage registers; if the real estate data and the real estate marking from the land and mortgage registers are disparate, appropriate corrections are entered based on data from the real estate cadastre, following the application from the real estate owner or its perpetual user. That

is why the unit which is responsible for maintaining the cadastre (the starost) ensures (free of any charges) the direct access to the real estate cadastre database for courts which maintain the land and mortgage registers, using an integrated system on real estates.

- 2) Section Two covers entries concerning the ownership and the perpetual usufruct. Such records are based on documents which confirms the transfer of rights to a real estate, such as notary acts, administrative decisions, court decisions, resolutions etc.
- 3) Section Three is dedicated for entries concerning limited material rights, excluding mortgage records, for entries concerning limitations in disposal or the perpetual usufruct of real estates and for entries concerning other rights and claims, excluding mortgage claims.
- 4) Section Four is dedicated for mortgage entries.

Since 2014 all land and mortgage registers are registered in the central database being the national set of land and mortgage registers maintained with the use of an IT system. Information from the central database is distributed by the Central Information of Land and Mortgage Registers by means of an information system. Everyone who knows the number of the property register may review the register but printouts of displayed information are not legally binding documents issued by the court. In the case when an application for issuing documents from the land and mortgage register is submitted by means of the information system, printouts of such documents have binding effects.

Land and mortgage registers are open. They are maintained for real estate, their maintenance is the responsibility of regional courts, corresponding to their locations. The objective of the maintenance of land and mortgage registers is to determine the legal status of real estates, providing that a separate register is maintained for each real estate. The openness of land and mortgage registers results that it is assumed that the open right from the register is assigned according to the real legal status and it is not possible to rely on unawareness of entries in the register or applications that are referred to in the register. Such reference is a kind of warning that the legal status disclosed in the register is invalid and that the real status is different. This may happen, for example, when a notary signs an agreement which transfers the property right. In this case, according to Art.92 of the Act of 1991 - The Notary Public Law (PN), the notary is obliged to perform the following operations, on the same day when the notary act is signed, using the information system:

” § 4. If the notary act contains a transfer, change or waiver of the right disclosed in the land and mortgage register, or establishing a right that may be disclosed in the land and mortgage register or includes an act transferring the ownership of a real estate, even if no real estate register is maintained for a given real estate, a notary, no later than on the day of its preparation, submits an application for entry in the land and mortgage register through the information system that supports court proceedings. At the request of a party, concerning

preparation of a notary act, the request includes a request to make another entry in the land register related to the notary act

§ 4¹. Submission of an application for entry in the land and mortgage register by a notary using an information system supporting court proceedings is considered as submission of an application by a party of notary operations.”

The rule concerning the warranty of public faith of land and mortgage registers is important for ensuring the safety of legal proceedings. This rule says that in the case of discrepancies between the legal status of a real estate disclosed in the land and mortgage register and the real legal status, the content of the register decides for the benefit of a party which gained the property or another material right by legal operations performed with an eligible party. At the same time, the warranty is not in effect against rights which legally burden a real estate, independently on entries, the annuity rights or easement.

Following that rule the State of Poland protects a person who purchases a real estate from a disclosed owner in the KW. Such purchase is in effect even in the case when the person disclosed in the KW is not a actual owner. The warranty is excluded by the reference concerning the change of the subject of rights. The warranty only refers to material rights, transferred for a fee in good faith.

3. CADASTRAL SYSTEM

The real estate cadastre is maintained by the starost at the district level of the public administration. The cadastre is used for economic planning, for spatial planning, for calculation of taxes and benefits, marking real estates in land and mortgage registers, for public statistics, real estate management and for the register of farms. This system contains information concerning:

- 1) lands - their locations, boundaries, areas, land use types and soil classes, marking real estates or sets of documents, if they have been created for a real estate which includes lands;
- 2) buildings - their locations, destination, useful functions and general technical specifications;
- 3) premises - their locations, useful functions and areas.

The cadastre also discloses information on owners, administrators, leaseholders and rights assigned to them to those lands, buildings and premises, including their address data.

Gaining appropriate legal records which guarantee stability of property borders is of key importance in relation to protection of property rights. Borders are defined by border points. The border points are mainly determined by 3 attributes: source of data concerning particular points, the mean error of point position and information about the method of the point stabilisation. Unfortunately, due to the fact that analogue maps are often the source of data concerning borders those attributes require modernisation which would increase their accuracy and reliability of borders.

Protection of real estate borders results from two legal acts: from the act of June 6, 1997 - The Penal Code (KK), the act of April 23, 1964 - The Civil Code (KC) and from the act of May 17, 1989 - The Law of Geodesy and Cartography PRGiK). The Law of Geodesy and Cartography specifies only obligations of owners of lands which are adjacent to protected border marks. The Penal Code is much more restrictive in the field of protection of border marks. Its Art. 277 says: "*who destroys, deletes, displaces or make border marks invisible or places them falsely, may be liable to fines, limitation of freedom or subject to imprisonment for up to two years*". What is important, this Article has been placed in the section "*Offences against reliability of documents*" what means that border marks are considered documents proving the extension of property rights. It is also worth to stress that this Article is directed towards real estate owners, who often contribute to damages of border "marks, as well as towards surveyors who sometimes "falsely place" border marks. This confirms the necessity to stabilise border marks in the frames of an appropriate procedure..

On the other hand, the Civil Code specifies that owners of adjacent lands are obliged to cooperate in the course of delimitation of lands and maintenance of stable border marks. Costs of delimitation, as well as costs of establishment and maintenance of stable border marks are covered by the land owners in equal parts. Real estate owners which border marks have been moved, damaged or destroyed may renew them if documents which allow for specification of their primary locations exist. However, in case of any disputes concerning locations of the border marks, the parties may apply to court to settle such disputes. Renewal of marks is performed after an application submitted by interested parties. Real estate owners may also delimit real estates if borders, including positions of their border marks, have become disputed. Delimitation is performed according to administrative procedures by a mayor/president who represents a municipality/city, or, in the case of lack of the positive, final settlement of the administrative procedure, it is transferred to the appropriate court. Then the dispute concerning borders is settled by the Common Court.

In the case when reliable data concerning borders is missing in the land and buildings register, the legal procedure called the determination of location of borders of cadastral parcels may be applied; according to that procedure the owner may apply to the Starost to use that procedure, which will be finalised by development of a protocol between the parties. Such operations are also initiated by surveyors who perform procedures related to real estate borders (such as real estate divisions), as well as by public administration units, according to procedures related to modernisation of documentation of the land and buildings register.

4. DATA SYNCHRONIZATION BETWEEN CADASTRAL SYSTEM AND LAND AND MORTGAGE REGISTERS SYSTEM

From the perspective of protection of rights it is important to ensure synchronisation between the KW and the EGIB Systems. Although the real estate cadastre covers all real estates in Poland, obligation to establish the mortgage register for a land property does not exist and such

mortgage registers were not established for many properties, particularly in rural areas. It is mainly caused by the lack of legal regulations which occurred at the time of the post-war enfranchisement of farmers. Then, in the course of administrative decisions such as land ownership acts (AWZ) or acts of granting, there was no obligation to transfer the ownership and (or) disclose the ownership in the mortgage register. On January 1, 1983, the statutory provision was introduced in the act on mortgage registers; according to that provision a real estate owner is obliged to immediately submit an application concerning disclosing his/her right in the mortgage register, but it refers to the current legal procedures.

Therefore, records in the mortgage registers and in the real estate cadastre are not the same with respect to Sections I and II. The establishment of the mortgage register and entries in the mortgage registers were initiated for many years by the real estate owner who was also obliged to cover the costs (except special situations, such as expropriation). Modernisation of the real estate cadastre resulted in modifications of records in the real estate cadastre, but the statutory obligation to modify the Section I of the KW in the field of modified marking of the real estate (change of number of the cadastral parcel, its size, land use types and soils classes, information on buildings on real estates etc.) did not exist. Such changes were introduced according to an application from the owner who also covered the costs of those changes. Such changes were introduced by the owner when it was necessary to settle the content of the mortgage register with the content of the real estate cadastre (e.g. in the case when legal transactions were required). If such needs did not exist, records in the Section I of the KW are still out of date and inconsistent with the real estate cadastre; records included in the Section I of the KW have been, by law, introduced from the real estate cadastre. An important legal breach was introduced in that rule, when the Ordinance on the mode of delimitation of real estates was introduced in 2004. It was decided in that Ordinance that if a map of the planned division of a real estate, borders of a real estate which is the subject of the division are assumed, first of all, in the result of investigations of the mortgage register of a real estate to be divided and of other documents which specify the legal status of the real estate, and then, using data presented in the real estate cadastre. In the case when discrepancies exist of the above data, borders of a real estate to be divided are assumed basing on data presented in the mortgage register of this real estate and on other documents which determine the legal status of this real estate. Those legal difficulties are even worsened by court decisions, such as, for example, the sentence of the Supreme Administrative Court in Warszawa of March 22, 2017 I OSK 960/15 „Basing on the above mortgage register it is not possible to decide about the current location and size of the land parcel. It should be agreed that - in the case of conditions described above - the unit could consider the records existing in the mortgage register as unreliable. Besides, the map included in the discussed mortgage register has not been adopted to the state resources of geodetic and cartographic data. However, it turns out from provisions of § 36 of the administrative act that locations of cadastral parcels is presented in the land register basing on surveying documentation adopted to the state resources of geodetic and cartographic data”.

In the case of discrepancies between the KW and the EGiB legal mechanisms have been created which regulate such situations; they are synchronising lists developed when in the mortgage register (or in other documents which determines the legal status of a real estate, when the mortgage register is missing), the real estate being the subject of division has different marks and size than in the real estate cadastre. The synchronising list is the source document being the basis for introducing changes in the EGiB, which allow for determining the origin of a real estate, created as a results of division of another real estate. However, it is not the document which is the basis for introducing changes in the KW, since extracts from the land and buildings register are such documents.

5. CONCLUSIONS

- Mechanisms of property rights protection existing in Poland are included in several legal acts. They guarantee both, the stability of rights and borders of those rights. However, many unregulated cases, which are mainly events from the past, still exist. The most important include:
- conditions of borders in Poland require many operations concerning modernisation of the cadastre. Many borders which determine the extension of rights granted by land ownership acts or by acts of granting, do not meet the accuracy requirements of current regulations. This requires time and covering high financial inputs.
- required stabilisation of borders in many places, in particular in the area of the past Austrian cadastre, is not possible before land consolidation works which will improve sizes, shapes and the structure of parcels. Parcels and narrow and long and stabilisation of borders would result in the lack of possibilities of agricultural activities due to the lack of possibilities to use agricultural machinery
- It is necessary to fully integrate the EGiB and the KW systems.

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