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1-1-2018

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Stefan Jacyno

Recommended Citation

Stefan Jacyno, *Reprivatization in Poland*, 41 Loy. L.A. Int'l & Comp. L. Rev. 351 (2018).
Available at: <https://digitalcommons.lmu.edu/ilr/vol41/iss3/4>

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Reprivatization in Poland

STEFAN JACYNO *

Poland has been praised for its remarkably successful shift from a socialist system to a capitalist free market economy. Yet, Poland is the only country from the former Eastern Bloc where the issue of restitution of nationalized property, primarily real estate, has never been resolved by the adoption of specific legislation, save for restitution of properties in favor of Christian churches and Jewish communities. The “religious restitution” proceeded under laws adopted between 1989 and 1997.

Despite the absence of reprivatization legislation—or rather because of it—there are a great number of reprivatization cases pending in Poland, reprivatization is a topic constantly discussed in the media, and the spectre of potential “reprivatization claims” worries investors. However, from a purely legal perspective, there is no general reprivatization process in Poland.

I. LEGAL “REPRIVATIZATION” MEASURES

All legal actions aimed at restitution of nationalized property or at obtaining compensation for such property are commonly called reprivatization in Poland.

Before actually describing reprivatization in Poland, we must be clear on what reprivatization is not. The essence of reprivatization in Poland is not to cancel or reverse the effects of nationalization, but rather to review and verify it. In other words, the purpose of reprivatization is to check whether the nationalization process has been legitimate. In this case, the term “legitimate” must be interpreted narrowly. It does not refer to justice, but to the law in force at the time the given property was nationalized, regardless of its contents, purpose or reason. The point of reference here is the system of legal regulations in force at the time and not today’s standards.

*Adwokat Stefan Jacyno, Partner in Charge of the Real Estate, Reprivatization & Private Client Practice at Wardynski & Partners, Warsaw, Poland.

As lawyers, regardless of our personal views, we must accept the position taken by Poland's Constitutional Tribunal in its ruling issued on November 28, 2001 (Case SK 5/01):

The Constitutional Tribunal ... takes the position that the matter of legitimacy of the actions of the State authorities imposed on Poland in 1944 belongs today to the sphere of historical and political assessment. Such assessment cannot be carried over directly to the sphere of legal relationships formed at that time. The lack of a constitutional foundation for such bodies as the Polish Committee of National Liberation [1944], the State National Council [1944–1947] and the Provisional Government [1945], as well as doubtful legality of institutions established subsequently, must not carry the consequence of ignoring the fact that effectively they did exercise State authority. Normative acts introduced by these bodies served as the basis for individual adjudications, which among other things shaped the ownership structure in the area of agricultural property, as well as legal relations across many areas of social life. The passage of time, which is not irrelevant from the legal point of view, endowed these relations with permanence, and today they are the foundation of the economic and social existence of a significant section of Polish society.¹

The fact that Poland underwent a systemic transformation in 1989 did not in and of itself invalidate nationalization decisions made after World War II. Legal acts issued immediately after World War II make up a part of the current legal system, which itself goes back to the rebirth of the Polish State in 1918. The communist government established in Poland at the end of World War II did not reject the system of the Second Polish Republic of 1918-1939. It established new laws, but within the framework of the existing legal order. The legal system of today's Third Polish Republic is also a continuation of the existing system shaped after World War II by the Polish People's Republic.

The enforcement of reprivatization claims is not an act of dispensation of justice, but a review of the legitimacy of the actions of the State authorities, i.e. actions based on the law and executed within the boundaries of the law, applied in accordance with its contents and in compliance with commonly accepted principles of legal interpretation. The point of the exercise is to verify whether the proceedings in individual cases were conducted with respect for the rights of the parties guaranteed by the rules of administrative procedure, and whether the decisions were based on correctly applied and interpreted regulations in force. In practice, however, the communist State did not respect its own

1. Trybunał Konstytucyjny [Constitutional Tribunal], SK 5/01, Nov. 28, 2001 (Pol.).

laws and its decisions were more likely to be based on the Marxist doctrine of class struggle. Hence, reprivatization in Poland relates to a judicial restitution mechanism where—according to Professor Roman Trzaskowski—the administrative authorities and courts seek to reverse the lawlessness that occurred throughout the years in the application of the nationalization rules. In other words, this quasi-reprivatization in Poland is based on a review of the legitimacy of nationalization in individual cases. Recognizing this characteristic may help one better understand the legal instruments of quasi-reprivatization related to the judicial restitution process in Poland and, ultimately, illustrate that the chances of recovery or compensation are very limited in the Polish quasi-reprivatization system.

An understanding of this principle can help to correctly assess, on the one hand, what individuals affected by nationalization can hope to achieve and, on the other hand, what the current owners of real properties that underwent nationalization should be concerned about. The appearances to the contrary notwithstanding, a real and direct conflict between these two groups is rare. This is because they have never had to face each other – all their dealings were conducted directly with the State. It was the State that conducted nationalization and deprived existing owners of their property, and it was the State that subsequently disposed of the same property as it wished.

II. SOCIAL CONFLICTS AND THE ROLE OF THE JUDICIAL SYSTEM

The non-conflicting situation between current and former property owners is one thing, but the potential conflict with current tenants of properties returned to their owners is something totally different. Tenants are afraid (often with good cause) that private owners will raise rents and expel them from their apartments in order to renovate them and sell them at market prices. It now emerges that there have been numerous cases where the beneficiaries of returned properties were not their former owners or their heirs at all, but rather individuals who bought the claim to the property from former owners at a very low, sometimes downright symbolic price, made an enormous profit on the transaction, and applied extreme pressure on tenants unwilling to vacate. This brought heavy public criticism of reprivatization as a whole.

But, it must be understood that the administrative authorities and courts in the Polish judicial restitution system have to focus on the very specific task of controlling the legitimacy of nationalization with no room for reflection on the social consequences of such control or society's expectations with regard to reprivatization. Therefore, I do not share the

criticism that Professor Ewa Łętowska has directed at judges, in particular administrative judges, for their myopic vision demonstrated, allegedly, in reprivatization judgements. They notice the consequences of their reprivatization decisions, including the negative consequences of reprivatization on the tenants of returned properties. Naturally, the judges know that invalidation of a nationalization decision opens the door to the possibility of seeking restitution or compensation. Nevertheless, courts merely apply the binding law and limit themselves to their task of reviewing the legitimacy of nationalization in each specific case. In the civil-law system, in contrast to the system of common law which is more flexible, judges cannot be primarily guided by the need to satisfy public expectations when deciding on a case. As Professor Marta Romańska remarked, courts cannot replace legislators in implementing a reprivatization act. They are not allowed to invent legal structures in order to pursue politics in the context of real estate management and to render a judgement that is fair in the public eye.

III. WHAT CAN BE RETURNED

Former owners may expect return of the real property in kind only if the illegitimately nationalized property was not subsequently sold, exchanged or contributed in kind to a capital company. As held by a seven-judge panel of the Supreme Court of Poland in its resolution of 15 February 2011 (case III CZP 90/10), the warranty of public reliance on land and mortgage registers also protects the acquirer of the right of perpetual usufruct in the event of an erroneous entry in the land and mortgage register of a State Treasury or territorial governmental unit as the property owner.² This warranty prevents the former owner from regaining the property in kind when its nationalization was conducted defectively; however, a subsequently executed contract established the right of perpetual usufruct of the property. This rule is a manifestation of the consistent protection of the rights acquired in good faith and supports the idea of the certainty of transactions.

When there was a violation of the owner's rights but the property cannot be restored in kind, the owner may seek compensation for the loss of the property from the State.

Therefore, if a defectively nationalized property was already acquired in the past by someone else in good faith, applications for its reprivatization filed now cannot affect the legal situation of the property and do not present any threat to the current owner or perpetual

2. Sąd Naczelny [Supreme Court], III CZP 90/10, Feb. 15, 2011 (Pol.).

usufructuary. Such applications may only lead to determination through a relevant proceeding (administrative or judicial, depending on the type of the case) that there was a violation of the nationalization regulations. Such determination will then constitute the grounds for seeking compensation from the State. Because—as noted at the outset—there is no specific reprivatization legislation in place, compensation is payable in the full amount. This amount is determined by applying current prices to the historic state and shape of the property at the moment of nationalization. This is undoubtedly costly but entirely consistent with universally accepted principles of law.

Also for this reason, both reprivatization and reprivatization claims belong essentially to the sphere of relations between former owners (or, realistically, their heirs) and the State — and not between former and current owners.

IV. ASSETS OF STATE ENTERPRISES

There is one area, however, which must be clearly distinguished as it is characterised by high risk and thus should be approached with particular caution. It has to do with the acquisition of shares in companies created as a result of commercialisation of State enterprises. Such companies are perpetual usufructuaries of land and owners of buildings erected thereon, but their title to that property came to them not through a civil-law transaction conducted in good faith, but through a decision of the State authorities.

Let me explain: until 1989, the State Treasury was the owner of all State-controlled real property, including nationalized property. State enterprises merely administered certain properties for the State Treasury.

Then, on December 5, 1990, an act (hereinafter the “Enfranchisement Act”) came into force under which State enterprises obtained the right of perpetual usufruct of real properties in their possession and administration—a step commonly referred to as the “enfranchisement” of State enterprises.³ This right had to be ratified by a decision of the provincial governor, and that decision provided the basis for entering the perpetual usufruct in the land and mortgage register maintained for the property.

If after assuming title to the property under the Enfranchisement Act the enterprise was converted into a commercial company—i.e. a joint-stock company (S.A.) or a limited liability company (Sp. z o.o.)—the

3. Ustawa z dnia 29 września 1990 r. o zmianie ustawy o gospodarce gruntami i wywłaszczaniu nieruchomości [Act of September 29, 1990 Amending the Law on Land Use Management and Expropriation of Real Estate] (1990 Dz. U. nr. 79 poz. 464) (Pol.).

creation of the company meant only a change in the legal form of the undertaking. The State enterprise became a company, but the legal status of its assets did not change at all.

However, the Enfranchisement Act provided that acquisition of the right of perpetual usufruct could not infringe the rights of third parties.⁴ Therefore, if the former owner can demonstrate that the nationalization process was defective, this may lead to overturning the decision of the provincial governor that ratified the acquisition of the right of perpetual usufruct. In this manner, the company loses its title and is forced to return the real property to its rightful owner.

But if the company sells the right of perpetual usufruct—even if it was defectively obtained—the person who acquired this right from the company in good faith will not be threatened at all by the rightful claims of the former owner. Even if the former owner subsequently files a reservation in the land and mortgage register or submits other motions, this will have no legal effect on the acquirer.

It must be stressed that the warranty of public reliance on land and mortgage registers protects good-faith acquirers of real estate and the right of perpetual usufruct, but does not protect acquirers of shares in companies holding real estate.

The true reprivatization risk—in the sense of the possibility of asserting effective claims to the detriment of the acquirer—arises only in the case of acquisition of shares in a company that is a converted State enterprise. Such cases are rarely encountered today.

V. REPRIVATIZATION BILL

A draft reprivatization bill was announced recently.⁵ It is an answer to several instances of restitution abuse and to the public outrage about the situation of tenants in some returned buildings. However, it is not a step towards ending the nationalization issue in a fair and equitable manner. In fact, the bill forecloses the possibility of returning the property and instead offers only compensation: 20% of the value of the illegitimately nationalized property.⁶ All pending procedures are to be discontinued and compensation can be granted only according to the new

4. *Id.*

5. Ustawa o zrekompensowaniu niektórych krzywd wyrządzonych osobom fizycznym wskutek przejęcia nieruchomości lub zabytków ruchomych przez władze komunistyczne po 1944 [Law to Compensate for Some of the Harm Done to Individuals as a Result Taking Over Real Estate or Movable Monuments by the Communist Authorities after 1944] (*draft*, Oct. 20, 2017) (Pol.).

6. *Id.*

regulations.⁷ Only Polish citizens and direct heirs would be eligible for compensation and the latter would be paid “according to the financial capabilities of the State.”⁸

If adopted, this “reprivatization law” will dramatically limit the group of eligible former owners and the amount of compensation available today under current legal practice based on reviewing the legitimacy of nationalization and general civil law principles. It will do away with the possibility of returning properties to their former owners and will bury the hopes for compensation of all those who lost their property due to the application of communist law.

7. *Id.*

8. *Id.*