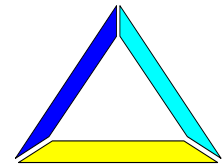




Bundesministerium für
Ernährung, Landwirtschaft
und Verbraucherschutz

**INSTITUTE FOR ECONOMIC RESEARCH
AND POLICY CONSULTING**

**GERMAN – UKRAINIAN AGRICULTURAL POLICY
DIALOGUE**



Reytarska 8/5-A, 01034 Kyiv
Tel. (+38044) 278-6342, 278-6360, Fax 278-6336
E-Mail: agro@ier.kiev.ua, <http://www.ier.kiev.ua>

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Legal and institutional aspects of agricultural land markets in Ukraine

Disclaimer:

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EXECUTIVE SUMMARY

Agricultural land markets in Ukraine have always been a point of heated discussions. During the last 15 years since independence politicians, economists, lawyers and agrarian lobby groups were debating upon its shape and functioning. But for various reasons decisions have been postponed and varying approaches invariably resulted in the absence of land markets in economic, institutional and legal terms. Having declared private property to land resources in the year 2001, Ukraine suspended market circulation of land contrary to international practices and experiences. Although the negative and undesirable outcomes of such restrictive policy became more and more visible.¹ Years passed by, but major legal and institutional elements necessary for the functioning of land markets are still not in place. Each year the moratorium on land sales was extended for a further year arguing that the institutional and legal framework was not in place yet. Ukrainian assets worth about 50-150 billion dollars are out of lawful market circulation reducing finance and investment for agricultural and rural development in Ukraine. Only a few well-connected mighty interest groups benefit of the current situation.

Agricultural land markets are important elements of the market economy and its institutional and legal infrastructure has already been explored, tested and established in developed countries around the world. Ukraine has a unique opportunity that pioneers of the land market did not have: to study, appraise and choose the best experiences and the best practices. This is the task of experts – to point out what are the possible options. And then it is the turn of politicians to make political choices in favour of the interests of the whole country.

Ukraine has decided to set up a multi-functional land cadastre and European-style state registry of rights to immovable property as a unified system. This decision was taken years ago, but public administration institutions are still debating whether unification of the cadastre and registry is viable. In this paper we are arguing that this is not the key-point for success and advising on necessary elements and provisions of cadastral and registration system which are recognized by many national governments and international organizations as essential for effective functioning of the system whatever design it has.

This paper shows that **political choices on the establishment and organization of a cadastre and registration system shall be based upon desirable features of the system: expediency, reliability, cost effectiveness and security.** Every political decision must be tested against these criteria. High level of interdepartmental interaction and cooperation is also needed. As soon as Ukraine passes this exam, it will have a bonus worth dozens of billion dollars added to the gross domestic product (GDP). Functioning land markets will increase the value of the agricultural land (at least to that of countries with similar land-man ratios and access to international commodity markets) and thus make the owners of land (many of them living in rural areas) richer in leasing or selling their land. It will increase living standards in the country and support international integration of Ukraine into the club of wealthy democratic market economies.

¹ See Klaus Deininger. Land Policies for Growth and Poverty Reduction, a World Bank Research Report, Oxford Press, 2003.

Introduction

Discussions about land markets in general and agricultural land markets in particular have been going on and on in Ukraine since the private ownership on land was declared. The Land Code of 2001 setting up principal legal foundations of the land market has not had a chance to be used as a regulation thereof because of moratorium over sales of agricultural lands which was imposed upon transactions simultaneously with the adoption of the Code. The moratorium originally applied provisionally, till January 1, 2005, was prolonged till January 1, 2007² and then till January 1, 2008. Results of the Parliamentary elections of 2002 and 2006 consistently showing Communists and Socialists losing popular support also pointed towards soon opening of fully-functioning land markets.³ Therefore, during the last year of the moratorium it is high time for making major political choices with respect of the organization of land markets, that need not only permission to operate but very strong legal and institutional infrastructure.

Ukrainian experience of transition proves that any reform depending on human factors are highly exposed to additional risks. Therefore, the establishment of a land market system as a sum of well-balanced institutions and adequate and stable legal regime is a task of utmost importance. Such system lies at heart of a successful land market which in turn is a corner stone of the national economy.

The goal of this paper is to contribute to the discussion about the agricultural land market in Ukraine as a key issue of market transformation. We will perform an independent analysis of institutional and legal aspects related to the functioning of land markets and develop specific recommendations for immediate action.

1. Major functions of a cadastre and land registration system
2. Purpose of a multi-functional cadastre and land registration system

Significance of land in the modern world is extremely high. Land is an "ultimate source of wealth" and at the same time it is a limited resource. Accordingly, it urges for special attitude towards this resource.

From the economic point of view, developed countries owe their high GDP to active involvement of land into market relations. According to United Nations Economic Commission for Europe (UN ECE), at least 20% of GDP of developed states originate from the land market (and inalienable from it real estate market).⁴

Land is a multi-aspect phenomena and has many properties: it is an object of material world, territorial basis for human activities, economic asset and factor of production, object of different rights, factor of spiritual life of the nation and factor of national unity.⁵

Land (urban, rural) and inalienable from it real estate have high economic values. Realization of this value is performed through **inclusion of land into market circulation**, first of all as **collateral** for loans and credits. Inclusion of land into circulation requires **formalization of ownership rights to land**, i.e. shaping of actual possession, use and disposal of land into forms suitable for selling, leasing and mortgaging land with lowest risk.

Meaning of **formalization of property rights to land** is best explained by the economist Hernando de Soto (Peru). In his book "Mystery of capital - why capitalism works in the West and nowhere else" he predicted that in the next 150 years 25 most developed countries would probably be joined by those developing and transformation countries spending their energies to create widespread property rights systems protected by the law, rather than those continuing to focus on the protection of domestic industries using outdated economic policies.

² In fact, there was a brief period between December 31, 2006 and January 13, 2007 when the moratorium was not in force.

³ About continuous legislative attempts of these parties in respect of further prolongation of the moratorium see section "Center's comments to draft laws" at www.myland.org.ua

⁴ Land Administration in the UNECE Region. Development Trends and Main Principles. ECE/HBP/140. – Geneva: UN, 2005. – p.29.

⁵ M. Fedorchenko, O. Yanov et al. Ukraine: Effective Land Resources management at the Local Level. – Kyiv: Center for Land Reform Policy in Ukraine, 2005. – p.244.

This position is substantiated by the idea that real estate is a dead capital if there is no possibility to start circulation of this property. So countries in transition which privatized housing facilities, state enterprises, land resources but failed to provide for the system for formalization and exchange of rights, in fact put out of economic relations assets worth of billions of dollars. It hampers investments and makes the state to support minimal living standards of majority of citizens on account of subsidies from the state budget. Replenishment of the budget is done through taxes, so the state has to apply unfavorable for business taxation policy, which entails shadowing of the economy and drain of capital to more welcome jurisdictions. That economy is very risky and growing in a lower rate. Growth of the economy usually is significant in sectors which are least controlled by the state (first of all, in all shadow sectors). Respectfully, the state cannot tax the activities which are not controlled and has to perform developing pressure upon legal sectors of the economy. Therefore growth of such economies is not leading towards improvement of living standards, because the state is incapable of redistributing GDP through the state budget. Moreover, putting out of economic life of real estate possessed by virtually every citizen (an apartment, a house, a land parcel) is limiting consumption and slowing development of small and medium businesses which are very important sources of the national wealth formation. According to unofficial data of one of Ukrainian leading industrial and financial groups, its spending for taxes is not exceeding 1% of its turnover, because there are opportunities to minimize taxes within the group. Small and medium enterprises do not have such opportunities, therefore their role in forming welfare of citizens is more significant.

The position of de Soto is common sense now and shared by many national governments and international organizations considering it a key point for economic flourishing and effective overcoming of poverty. Thus at the first, second and third forums of the Real estate Advisory Group of UN ECE (UNECE REAG) in Rome this position was strongly supported by representatives of European countries, and under auspices of the UN there was created a special group of advisors "On Legal Empowerment of the Poor" which will help developing countries to set up property rights systems. The UN itself in its Bogor declaration of 1996 stressed that "formalisation of rights in land, which are an integral component of an effective cadastral system, is very important for sustainable economic development and environmental management in both urban and rural areas".

A property rights system is the sum of the following elements: means of identification and description of land and real estate (**cadastre**); means of formalization (confirmation, attestation) of rights to land and real estate (**registry of rights**); instruments for circulation of rights (**land market or real estate market**); financial institutions and financial instruments (banks, credit unions, mortgages and mortgage bonds); dispute resolution bodies (**judicial system**).

Two elements are of crucial importance – **cadastre** and **registry of rights**, because these very elements allow for conversion of land into capital suitable for market circulation. In transition countries these elements are either absent or underdeveloped. However, land markets without cadastre and registry cannot operate, because it is important to trade in land immediately, its circulation is done through exchange of rights. Courts in turn cannot protect rights which may be claimed by unlimited number of persons.

The content of the cadastre depends upon its purpose (i.e. what aspect or aspects of land it describes). Historically, cadastres appeared in ancient societies already more than 2000 years ago, mostly as instruments of fiscal policies and registration of land transactions.⁶ With the development of society functions of cadastre also developed. Development of these functions resulted in the creation of two interrelated instruments of land resources management: land (real estate) cadastre and registry of rights.

Cadastres are mostly focusing on **physical properties of land parcels** (shape, area, coordinates, measurements, boundaries, quality of soil, monetary valuation, pollution, existing buildings, water objects, perennial plantations), while registries of rights concentrate on **legal characteristics of land** (rights to parcel, private and public encumbrances, claims of third parties).⁷

⁶ International federation of Surveyors (FIG). The FIG statement on the cadastre. Frederiksberg, Denmark, FIG Office, 1995. Publication No.11/1995; Cadastre-2014. Point 1.1.C. FIG; Larsson, G. Land Registration and Cadastral Systems: Tools for land information and management. Longman Scientific and Technical, Essex, England, 1991. ISBN 0-582-08952-2.

⁷ Guidelines on Real Property Units and Identifiers. – New York and Geneva, UN, 2004. – p.2.

It is clear that cadastre and registry describe one and the same object; respectfully, these two systems may hold certain identical information on land parcels (usually cadastral number, name of owner and plan of parcel). At the same time cadastre shall cover the whole territory of the state,⁸ and registry may contain information about objects which are circulating or capable of circulation on the market (state lands, land exempt from circulation may be not registered; the very fact that they are not registered prevents them from being traded).

In some cases cadastre and registry are melted into a unified system, in other cases they are working in parallel and subordinated to different institutions. In Sweden, Finland, Italy, the Netherlands, Cyprus, Czech Republic, Georgia cadastre and registry are in a single system (unified system), while in Austria, Croatia, Denmark, France, Germany, Greece and Ireland cadastre and registry are divided between different institutions (two-tier system). Romania, Norway, Iceland are currently uniting cadastre and registry under the auspices of a single body. Ukraine has been trying to set up a unified system, which undertaking was unsuccessful, and at the moment is trying to switch to a two-tier system.

At the same time cadastre and registry has principal differences. **Cadastre** describes an object of material world – a land parcel (and attached to it buildings, plants, waters etc). Critical parameters noted in cadastre are location (coordinates, address) and boundaries. Singling out of an object out of all others is done with the help of different identifiers (name, number, index) which are unique and inimitable and prevent mixing up of different objects.⁹ Thus cadastre is a data base holding description of real estate objects and identifying every object with a special number (index).

The phenomenon of property right to land has a consequence that all real estate objects, including land, buildings, plantations, have one very important attribute making similar objects very different. It is the fact of **belonging to a certain person**. It is possible to say that existence of rights of different persons to certain parts of Earth's surface makes it necessary to single out separate parcels of massive of land. Rights of different persons make legal boundaries of parcels; these boundaries have crucial importance for the market economy where the economic development depends on economic effects of exchange of rights. To give this phenomenon a proper shape a **registration system** is employed.

A Registration system is fixing diverse legal rights in respect of objects described in the cadastre, i.e. **it focuses on the legal side of real estate. First of all, the system registers property right; afterwards the system collects data about rights of lower level (servitudes, mortgages, leaseholds) as well as about transfers and change of rights.**

These two systems may run in parallel but absence of either one (or both) makes the functioning of land markets impossible. The **cadastre provides for the certainty in respect of what object is transacted, and the registration system provides for the certainty in respect of the authority of a person to transact.**

So, cadastre defines physical (real) boundaries of real estate of different owners, and the registration system defines legal boundaries thereof. According to professor Jo Henssen, cadastre answers questions "where" and "how much" property is, and registry answers questions "who" and "on basis of what" owns that property.¹⁰

In the modern world there is a tendency to compile in cadastres diverse data for additional tasks. Such cadastres are called **multi-functional**,¹¹ i.e. their information is used for the purposes of land management, control of land use, taxation, valuation, consolidation, spatial planning, environmental monitoring etc. Accordingly, cadastre is enriched with new attributes of land and may be applied to new problems. Moreover, collection of diverse data within the framework of one parcel-based system allows for better administration of data and cheaper operation and maintenance of the system. Multi-functional cadastral and registration systems create new possibilities and opportunities for raising importance and value of land-related data on account of

⁸ Cadastre-2014. FIG.

⁹ Guidelines on Real Property Units and Identifiers. – New York and Geneva, UN, 2004.

¹⁰ Cadastre-2014. FIG statement on cadastre.

¹¹ Guidelines on Real Property Units and Identifiers. – New York and Geneva, UN, 2004. – p.3; Cadastre-2014.

processing thereof, it also provide for broad application of data on domestic and international markets.¹²

This multi-functional approach is adopted in Ukraine also, because data of land cadastre is a basis for cadastres of other natural resources.¹³

There are examples of narrowing of functions of cadastre to merely fiscal purposes. As a rule, that narrowing sooner or later leads to reforms in order to make cadastre more universal a tool. The cadastre of France established by Napoleon Bonaparte, principles of which became a model for such cadastres as the Austrian and German, gradually limited itself to one – fiscal – function. In fact, the French cadastre collected data not only about real estate but also about owners of real estate as taxpayers. The cadastre turned into a data base of taxpayers. It did not meet the requirements for real estate transactions. Therefore, France introduced procedures for clearing titles (as in the USA), in order to collect evidence that the seller of real estate is legal and true owner thereof.

The registration system may also serve many purposes. Having fixed for the first time property rights to a certain object, the system provides for circulation of this right and for burdening it with smaller rights. Property rights may be burdened (limited) with rights of leasehold, servitudes and mortgage. Reliable fixation of property rights and other rights stemming from it is increasing certainty of parties of market transactions and predictability of their results. In general it is improving the investment climate. It is stated in documents of the Working Party on Land Administration of UN ECE (WPLA UNECE) that *“no country can sustain stability within its boundaries, or economic development within the wider world, unless it has a land rights policy that promotes internal confidence among its people, its commercial enterprises, and its government... States that prosper promote widespread and secured private ownership of land as a foundation of social and economic policy.”*¹⁴

Contemplating upon multiplicity of functions of the cadastre and registration system, one may conclude that the combination of multi-functional cadastre and multi-functional registry in one unified system also may take place. New systems hold such huge volumes of information and allow for performing so diverse functions that it may be regarded as an extended land information system (LIS). This combination is not something exceptionally new. In the EU a project EULIS (European Land Information System) is implemented, starting in 2006, uniting in real time cadastral and registration systems of Sweden, The Netherlands, Lithuania, England, Wales and Norway. It holds data of about 1.5 million square kilometers of land and 39 million properties. During one year the system registered 2.5 million mortgages and 5.6 million transactions. EULIS has recently been joined by Austria, Finland, Scotland and Ireland. The transformation of traditional cadastres into comprehensive land information systems is forecasted by many experts as a logical evolution and it shall take place within the nearest decade.

Mentioning only one additional function of the registry – registration of mortgages – allows for considering a multi-functional registration system to become one of the cornerstones of economic development. For example, mortgage-related funds circulating in the economy of Spain amount to 56% of GDP;¹⁵ in Denmark this figure is reaching 60-70% of GDP. In total, aggregate mortgage assets in 2004 accounted for 40% of the EU GDP.¹⁶ Our analysis of data on GDP of several European countries shows clearly the link between GDP of the country and volume of the mortgage market. The next table gives an overview on some relevant indicators in Europe.

¹² Land Administration in the UNECE Region. Development Trends and Main Principles. ECE/HBP/140. – Geneva: UN, 2005. - p.31

¹³ Land Code of Ukraine, article 193.

¹⁴ UNECE WPLA. Social and Economic Benefits of Good Land Administration. – New York and Geneva, UN, 2006.

¹⁵ Land Administration in the UNECE Region. Development Trends and Main Principles. ECE/HBP/140. – Geneva: UN, 2005. - p.28.

¹⁶ EU Commission Green Paper on Mortgage Market.

Table 1

European countries ranked by GDP'04 (output approach) with reference to area and population¹⁷

	Country	Area, thous and sq.km	Ratio of area that of Ukraine	Pop ulation, mln.	Ratio of populati on to that of Ukraine	GDP, USD bln.	Ratio of GDP to GDP of Ukraine	Value of mortgage bond market, EUR bln.
1	Germany	357	0.56	82	1.71	2163.826	8.41	208.694
2	France	551	0.87	62	1.29	1651.518	6.42	44.351
3	UK	241	0.38	60	1.25	1649.315	6.41	0
4	Italy	301	0.48	58	1.21	1497.075	5.82	0
5	Spain	505	0.80	41	0.85	909.982	3.54	25.266
6	Poland	312	0.50	38	0.79	438.480	1.71	n/a
7	Sweden	450	0.71	9	0.19	258.356	1.004	70.906
8	Ukraine	630	1	48	1	257.176	1	n/a ¹⁸

The best description of a joint functioning of the cadastre and registry is the following ideal case: there are two land parcels located nearby. Cadastre certifies that these parcels are located in a certain place (spatial coordinates are used), have certain shape and area and are adjacent. It also certifies that these parcels are having joint boundary – **endlessly thin plane dividing** lands of two persons – and are not overlapping or having no-man land in between. Identification of parcels is done with unique indices, and visual depiction – with cadastral plan¹⁹ and index map.²⁰ Registry certifies that land parcels with such and such indices are certain persons. It also fixes rights of third parties and transfer of rights to parcels. In case a dispute emerges, data of the registry is undisputable prove of rights. If the system errs, state as a guarantor of reliability of system will reimburse all losses.

1.2. Possible options

Though the essence of cadastre and registry in any given country may be limited to basic functions described above, there are no two countries where these systems are working similarly. Cadastre and registry are a part and parcel of the national social infrastructure²¹ and have been formed under influence of factors that influenced formation of nations. Accordingly, there is a certain diversity of cadastral and registration systems in the world. And when cadastres are differing in volume of data and number of collected attributes, registries are having even deeper divergences.

Diversity of registration systems may be narrowed down to two main types; within either one there may be singled out sub-types (national variants of the first of the second type).

The first type of the registration system – **rights registration system (title system)** – provides for fixing data about rights to land parcels. On the basis of defined by the law set of documents (contracts, decisions of competent bodies), facts (acquisitive prescription), events (inheritance), the registrar is fixing rights and holders of rights and issue a **certificate which has the status of the only undisputable proof of rights to land**. Any other document is not

¹⁷ M. Fedorchenko, O. Yanov et al. Ukraine: Effective Land Resources management at the Local Level. – Kyiv: Center for Land Reform Policy in Ukraine, 2005. – p.246. Data on mortgage bond market – European Mortgage Federation. Mortgage Banks and Mortgage Bond in Europe. 4th edition. 2003.

¹⁸ It looks like market of mortgage-backed securities in Ukraine has not started yet. Aggregate value of mortgage loans in 2006 in Ukraine amounted to UAH 24 billion (USD 4,75 billion) – data of Ukrainian national mortgage association.

¹⁹ Cadastral plan depicts only one parcel and shows its shape and objects located upon parcel as well as zone of special legal regimes (public and private limitations and restrictions, servitudes).

²⁰ Index map reflects certain territory (cadastral block, cadastral district) and parcels within the district with their cadastral identifiers. It gives the idea how parcels are situated towards each other.

²¹ Guidelines on Real Property Units and Identifiers. – New York and Geneva, UN, 2004. – p.3; Klaus Deininger. Land Policies for Growth and Poverty Reduction, a Worldbank Research Report, Oxford Press, 2003.

a proof of rights to land. The person stated in the certificate may not be addressed with a vindication claim. The state declares and guarantees that data of the system is reliable and indisputable. To compensate possible losses resulting of errors or crime of the registrar the state sets up a special fund.²²

This system is common for countries of continental Europe, and therefore it is often called "Central-European" (or title system). This system usually covers the whole country, but in some cases registration of rights is being done when property is transacted (this type of registry is called *Torrence system*).

The main document of the Central-European system is a **Land register** (*Land book, Grundbuch*). This name is explained by the fact that the register – a book – contains a separate page for every "land", i.e. the registration is parcel-based (just like cadastral registration). At this page data about rights, holders of rights and transfers of rights are indicated. As a rule, the Land registry is parcel-based, but there may be registered rights to a separate apartment in a block-house, buildings erected upon leased parcels etc.²³ The land book is open to the public (with certain limitations).

The formation of such system requires significant investments at the initial period. The significance of investments is explained first of all by the need to create a nation-wide system for description and identification of real estate and land (cadastre). Such investments may be provided only by the state. Further functioning of the system is covered by user fees. This system is expensive at the beginning, but operation and maintenance thereafter is not expensive for users. Moreover – and that is highly important for a market economy – this system provides for high level of security of transactions. A fool-proof system, in particular important for the development of mortgage financing tools.

The second type of registration system – **deed registration system** – provides for holding data about different foundations giving rise to rights to property (contracts, documents, events). Information of this system is having rather referential nature; certificates of this system are not confirming rights to property. Rights themselves are confirmed by those documents on the basis of which data were entered into the system. Such system usually guaranties nothing, and its functions are limited to registration of contracts. Therefore in the course of transactions first a clearance of title is performed, i.e. a retrospective investigation in order to make sure that within the last 30 (in France) or 40 (in the USA) years rights to the property were acquired lawfully. Such investigation may give the full-proof guaranty (because registration of contracts has nothing to do with checks upon their legality), and thus transactions are additionally insured against possible vindication claims of third persons. There are specialized law firms and insurance companies providing respective services. Expenses are borne by parties to transaction. For instance, the turnover of specialized insurance companies in the USA in 1980 amounted to USD 1.26 billion.²⁴

Such system is created and functioning on account of its users. Its formation is performed gradually, as far as property is transacted, and perspectives of establishing complete data base in respect of real estate are quite remote. The state does not provide any guaranties to transacting parties. In our opinion, this system is typical for countries with highly liberalized economies and Anglo-Saxon legal system (first of all USA). As a rule, the system operates without a unified state cadastre; description of property is done immediately in contracts and stored in data bases of private entities providing insurance and legal services to transacting parties.

It is also pertinent to mention that combinations of cadastre and registry are also providing grounds for further classification. In some countries functions of cadastre and registry is carried out by a single body (Albania, Armenia, Czech Republic, Greece, Netherlands, Italy, Lithuania, Luxembourg, Slovak Republic, England and Wales²⁵, Sweden, Scotland²⁶). In other countries cadastre and registry are divided:

²² Guidelines on Real Property Units and Identifiers. – New York and Geneva, UN, 2004. – p.20.

²³ Nikonov, Zhuravskyy. Real estate, cadastre and world systems for registration of rights to real estate. – SPb.: Roza mira, 2006. Ukraine will employ similar approach.

²⁴ Nikonov, Zhuravskyy. Op cit.

²⁵ In England there is a strange situation: out of 21 million estates registered in the registry only 17 million estates are reflected in cadastre. – M. Fedorchenko, O. Yanov. Land Law of Ukraine: manual for practitioners in 2 volumes. Vol.1: Land relations in settlements. – Kyiv., 2006. – p.350.

- In Spain and Portugal registration of rights is done by **private registrars**, subordinate to the Ministry of Justice; cadastre is first of all a fiscal instrument and under auspices of the Ministry of Finance;
- in France, Scandinavian countries, Poland, Slovenia, Croatia, Estonia and Bulgaria registration of rights is executed by public bodies – **courts or notaries public** (under Ministry of Justice), and cadastres are administered by different organizations under different ministries or even municipalities;
- in Germany, Austria, Latvia, Switzerland registration is entrusted to **specialized public bodies** (Grundbuch offices having status equal to that of courts), and cadastres are under different organizations under different ministries.

We would add that recently Norway and Iceland have decided to unite registries with cadastres, and to transfer registration from courts (notaries) to cadastral bodies. Among countries in transition similar reform was undertaken by Romania.²⁷ At the same time there are no cases of unification of registries and cadastres under judicial bodies (courts, notaries, ministries of justice).

In general, according to UN ECE information, in 38% countries of Europe registries are under ministries of justice, in 23% - under ministries of natural resources, in 11% - under ministries of finance and in other cases under other ministries.²⁸

Thus, all diversity and richness of world practice and experience in the field of cadastre and registration of rights may be grouped into **three major options**:

1. the American system of registration of rights (deed system) working without unified state cadastre;
2. the Title (Central-European) system combined with cadastre;
3. the Title (Central-European) system parallel with cadastre.

Further classifications are also possible (for instance, on the ground of subordination of cadastre and registry). Here we are not reproducing arguments in favor of any given system, for Ukraine has already made its political choice: the system of registration of rights provided for by the Law of Ukraine "On state registration of real rights to immovable property and limitations thereof" of July 1, 2004, bears all signs of the title (Central-European) system.

We would add that so far there is no full-fledged registry provided by the said law, therefore Ukraine at the moment employs half-American, half-European hybrid with strong Soviet inheritance:

- Cadastre (State registry of lands) is collecting information on land parcels. It works under the State Committee of Land Resources (Derzhkomzem)²⁹ and administered by registration offices of the Center of State Land Cadastre;
- Registry of contracts is collecting information on contracts with real estate and land. It functions under the Ministry of Justice and administered by notaries;
- Registry of rights to immovable property is collecting information about rights to buildings and houses. This registry is functioning under the Ministry of Justice and is served by Bureaus of Technical Inventory, BTI - a Soviet relic.

As far as the cadastre (State registry of lands) does not possess legal titles of registry of rights (not mentioned by the Law of Ukraine "On state registration of real rights to immovable property and limitations thereof"), it gives priority legal meaning to the registration of contracts (which is mandatory under the Civil Code). This conclusion is in contradiction with the official position of Derzhkomzem, but current laws of Ukraine do not allow for other conclusions. With entering into force of the said Law the registration of parcels under the Land code (in the State registry of lands) is provisionally keeping its dubious meaning due to the absence of the registry of rights. Another law in force – Law of Ukraine "On local self-governance in Ukraine" – makes its meaning

²⁶ Dorine A. J. BURMANJE. Spatial Data Infrastructures and Land Administration in Europe. – FIG, 2005 (www.fig.net).

²⁷ Helge Onsrud. Land administration in Europe. FIG, 2004.

²⁸ Study on Key Aspects of Land Registration and Cadastral Legislation, 2000 (www.unece.org).

²⁹ Nowadays State Agency of land resources of Ukraine.

even more dubious for it still reserves the rights to register real estate to executive bodies of local councils.

It is obvious that there is no ideal solution for the unification or separation of cadastre and registry,³⁰ though some experts are strongly supporting unification of their functions under cadastral bodies (not under judicial institutions).³¹ Respected international organizations have also made their views known. For instance, the Council of Ministers of the Council of Europe advised to take the registration of property away from courts as a non-judicial function;³² the International Federation of Surveyors (FIG) predicted that in the nearest future national cadastral and registration services would merge into unified systems.³³

International bodies point out that the historical context should be taken into consideration. In those countries where cadastre emerged as a fiscal tool, it was subordinate to the Ministry of Finance, and registry of rights became a responsibility of judicial institutes (Germany, Spain, Portugal). In those countries where cadastre and registry were introduced within the course of reform of land resources management and spatial planning, they are combined (Sweden, Finland).³⁴

The main problem of parallel functioning of the two systems is that they are developing on different technical platforms and with varying speed. It complicates the regulation of information flows between the two.³⁵ If the exchange of information is not formalized and is done through submission, consideration and adjudication of requests, information is duplicated and the whole process of property and resources management acquires additional degrees of complexity.

In Ukraine there is not a simple discussion about the problem, a real struggle is going on. Since 1999 Derzhkomzem and Ministry of Justice³⁶ are claiming the registration of rights for their own offices. We would point out that developed European countries employ both variants, though recently there is a trend to unified cadastre and registry under auspices of cadastre (such reform was undertaken in Italy and Romania, and it is going on in Norway and Iceland). Here we are presenting arguments in favor of both solutions.

Advantages of **unification of cadastre and registry** are the following:

1. Allows for *one-stop shopping* (single windows principle) and instantaneous reflection of relevant information in both sub-systems (though countries where they are separated normally have good arrangements to cope with the transfer of data³⁷). This is an advantage for users first of all;
2. The profitable system – registration of rights³⁸ – is subsidising the unprofitable - cadastre. This is an advantage for the state budget.

Advantages of the **separation of cadastre and registry** are the following:

1. Cadastre and registry are two principally dissimilar activities based upon knowledge of different sciences, thus effective cadastre and effective registry pledge for specialization in one field only;
2. Parallel and independent systems allow for certain competition and mutual control (democratic checks and balances) in order to exclude errors and abuses which are more available in case of a unified system;

³⁰ Institutional aspects of land market development in Ukraine. Institute for Economic Research and Policy Consulting. German Advisory Group on Economic Reform with the Ukrainian Government. – T17.

³¹ Helge Onsrud. Land administration in Europe. FIG, 2004.

³² Recommendation № R (86) 12 dated September 16, 1986.

³³ Cadastre 2014.

³⁴ Land Administration in the UNECE Region. Development Trends and Main Principles. ECE/HBP/140. – Geneva: UN, 2005. - p.31.

³⁵ Op.cit.

³⁶ The State Committee on Construction and Architecture also took part in the struggle.

³⁷ Dorine A. J. BURMANJE. Spatial Data Infrastructures and Land Administration in Europe. – FIG, 2005 (www.fig.net). – p.4.

³⁸ In most European countries revenues of registries are exceeding their expenses - Dorine A. J. BURMANJE. Spatial Data Infrastructures and Land Administration in Europe. – FIG, 2005 (www.fig.net).

3. Conflicts of interest are minimised (formation of real estates in kind and registration of legal rights are divided); this aspect is particularly important in transformation countries with high risk of corruption.

In Ukraine the creation of cadastre and registry was performed with an active participation of the World Bank (*Rural Land Titling and Cadastre Development Project*). In documents of the Project (of May 2003)³⁹ it was strongly suggested to establish a title registry with a title registry and cadastre law passed clearly establishing the procedures and responsibilities for registration of titles to all immovable property under a single unified, land parcel-based system, managed by one agency. The Bank pointed out that decisions of the Government supported inefficient multi-agency institutional arrangements that exists at that time. In 2006 the Bank obviously changed its position for one of the managers of the Project said that the Bank would be indifferent towards separation or unification of cadastre and registry. The Bank had seen success of both ways. The main thing was finally to create the cadastre and the registry.

1.3. Institutional elements

Necessary institutional elements of functional cadastral and registration systems are the following::

1. State system for description and identification of real estate (cadastre). The system is parcel-based;
2. Administrator of cadastre – state institution;
3. Bodies whose activities provide information for cadastre (surveyors, valuers, experts, notaries);
4. State registry of rights holding information about rights to and encumbrances upon properties listed in cadastre (ownership, leasehold, mortgage);
5. Defined by the law points of access to information of cadastre and registry (Land book, special web-site);
6. Administrator of registry – public body;
7. System of formalized links and for exchange of data between cadastre and registry (if they are separated), among cadastre, registry and local public bodies entrusted with or involved into management of property;
8. Fund for reimbursement of losses caused by errors or crimes of registrar;
9. Fund for reimbursement of losses caused by errors of cadastre.

A further important issue is the way to fill cadastre and registry with information. In principle, there are only two ways: the first is complete coverage of the country with cadastral maps and complete registration of property; the second is sporadic coverage and registration. Sporadic means that information is filed when the property is transacted. As a rule, complete coverage and complete registration are done within the framework of the state program and on account of the state budget. It gives a complete data base on real estate and land property within state borders. Sporadic registration is done on account of interested parties, may last for ages and never end.

Land reform in Ukraine started with inventory of all lands, but in fact inventory was drawn only in respect of agricultural lands. Within the last 10 years that inventory as well as economic appraisal of land has not been updated. In settlements the inventory has been completed by 50%. Inventory of land and real estate are going on without any coordination, and land parcel and buildings located there upon cannot become a single property unit.

Recently, the pace of inventory is slowing down. The Verkhovna Rada of Ukraine several times postponed the deadline for formalization of rights to land, but complex procedures and increasing costs suspended the process. In 2004 the Parliament limited the price for drawing land titles within the course of gratuitous privatization, but that price is still high for citizens and unprofitable for surveyors. The absence of agricultural land markets, monopsonistic⁴⁰ markets for

³⁹ Project appraisal document for Rural Land Titling and cadastre Development project, Report No 25920-UA, May 30,2003.

⁴⁰ In a monopsony the market power is in the hand of the buyers.

lease of agricultural land, risky character of land transactions have also been hindering formalization of rights and inventory.

Derzhkomzem applied its utmost energies to issuance of land titles to former collective farmers. This work is mostly completed today, but there is no registry of rights capable to serve land markets. It is like a vicious circle: while there is the moratorium on land sales, there is no need for registry, and while there is no registry, there is no need to lift the moratorium. It looks attractive to create the registry within the cadastre and under auspices of Derzhkomzem, because that is the part of the cadastre where land titles are registered (State registry of lands). This may almost automatically become a part of the registry (there are no buildings on agricultural lands, so there is no need to cooperate with intractable BTIs to get the complete information). Unfortunately, almost exclusively paper-based registration of parcels and titles in the State registry of lands renders impossible the formation of a modern unified registry of rights.

1.4. Legal issues and needs for improvement

The national legal system shall contain certain set of rules in order to support effective and reliable functioning of the national cadastral and land registration system. A detailed study of this set was undertaken under auspices of UN ECE.⁴¹ Here we are mentioning the following mandatory provisions:

- Law recognizes only registered rights and renders unregistered rights non-existent. In Ukraine section 1 of article 182 of the Civil Code and sections 1 and 7 of article 3 of the Law of Ukraine "On state registration of real rights to immovable property..." follow this rule. On the other hand, these laws allow for the conclusion that unregistered exists, because there is no negation of such rights, only declaration of priority of registered rights. Probably, such lenient approach is explained by the fact that in transitional periods many actual holders of property have not formalized their rights yet;
- Law requires mandatory registration of rights to property. In Ukraine there was a deadline for formalization of actual possession of land, but in September 2005 it was declared unconstitutional;
- Law defines procedures and rules for initial recognition of the property right (privatization, prescriptive acquisition, construction). Procedures must be precise and detailed enough in order to secure the clearness of the title being entered into the registry and exclude any doubts in respect of lawfulness of further transactions. Unfortunately, in Ukraine these rules are not effective enough, and rights to land and real estate are often recognized on the basis of court decisions that may not be considered lawful. Moreover, norms of the new Land Code allow for different interpretation of executive bodies; they are not applied in a uniform manner throughout Ukraine, contrary to the principles of rule of law;
- Law forbids claiming property from a purchaser acting in a good faith (bona fide purchaser) whose rights have been registered. In Ukraine this rule is not applicable due to article 388 of the Civil Code providing for the legal possibility to vindicate property from bona fide purchasers. This means that introduction of the registry of rights does not improve the level of protection of investments and security of mortgage;
- Law on registry shall be free from rules leaving principal issues to the discretion of executive bodies (provision of information, fees, publicity of Land book etc);
- State registrars shall have high level of legal and social protection. In Ukraine there is no such protection. State registrars have not been granted with a status of state official, they are merely employees of a state enterprise. Illegal influence on registrars does not entail extraordinary measures of legal liability. Thus, declared by the Constitution of Ukraine principles of inviolability and inalienability of private property are not completely realized;
- Full liability of the state for losses resulting from the functioning of the registry. Ukraine has not yet defined principles and limits of liability and ways for creation of the special fund;
- Full liability of the state for losses resulting from the functioning of the cadastre (for instance, in cases of double cadastral registration, issuance of two land titles for one parcel, mistaken or

⁴¹ Report on Key Aspects of Land Registration and Cadastral Legislation.

improper cadastral registration etc, i.e. in cases of misrepresentation or distortion of spatial information). In Ukraine, there is no such liability.

1.5. Democratic needs for checks and balances

Cadastre has always been and will likely remain a function of the public domain for private entities would not have direct interest to provide the needed services. However, registration of rights is more complex a phenomenon from the institutional and political point of view. The state is usually the biggest landowner,⁴² but not the only one, and therefore in the relations of land ownership and in land transactions the state shall participate on equal footing with all other landowners. At the same time the state is a guarantor of protection, inviolability and inalienability of property rights recognized (and registered) by the state. Accordingly, concentration in the hands of the state of all public institutions providing for formalization and circulation of rights renders the state with substantial advantages and superiority towards all other landowners, though one of the principles of modern property systems is equality of all proprietors.

From this perspective, concentration of technical functions (surveying, cadastral registration) and legal functions (registration of rights) in the hands of one institution looks like an extraordinary concentration of power giving rise to additional and unnecessary risks in transactions. At the same time separation of those functions between two, in essence administrative, bodies, is not providing for any security, because in any case the whole set of functions is left in hands of the executive branch of powers. Transfer of registration of rights to courts is also a problem: first of all, courts are there to administer justice, i.e. to solve disputes about rights, and their involvement into the regular process of recognition of rights (registration) casts serious doubts upon their impartiality in adjudicating on rights which have been recognized by the same courts. Secondly, courts (at least, Ukrainian) are strongly dependent upon executive power, and judges are in state of legal vacuum – they are practically uncontrolled and irresponsible. So, **unification or separation of cadastre and registry as such does not improve security and reliability of the system and does not support confidence of investors!**

In our opinion, if separation of powers with mutual checks and balances is a common principle of all civilized democratic states, including Ukraine, that principle shall be implemented in every sphere of public administration, including land management and regulation of real estate (land) market.

Accordingly, **legal foundations** (legal framework) of cadastre and registry functioning must be defined by legislative power by passing necessary laws. Such laws shall precisely set up procedures for entering, change and deleting data, legal status of data and information, levels of access of different users to data, fees, protection against unauthorized access, duplication (reserve copying) of data and protection thereof under force-majeure circumstances (natural disasters, political turmoil, wars etc), reimbursement of losses caused by errors and abuses. Laws shall not leave too much space for bureaucratic discretion of executive power. Practical carrying out of cadastre and registry must be performed by an agency (agencies) representing **executive power** or controlled by it (**institutional framework**). Actions or inactivity of executive agencies must be challenged in **courts** competent to adjudicate upon status of data, functioning of cadastre and registry, including disputes of institutions involved into cadastral and registration work.

At the same time introduction of the principle of separation of powers shall not destroy the unity of the cadastral and registration system and the integrity of state land resources management, which are probably major attributes of the modern cadastral and registration systems.⁴³

In Ukraine these requirements are either ignored or only partly observed. Even in those cases when respective measures are provided by laws, they are not implemented. Below we are describing the way Ukrainian system works nowadays, and this description implies insufficient reliability of the system. For instance, information into registries of contracts and mortgages are entered by notaries that are strongly dependent upon the Ministry of Justice issuing licenses and supervising their activities. Functioning of the said registries is regulated by decisions of the Ministry of Justice, which decisions were drafted, passed and registered by the Ministry itself.

⁴² State of Ukraine owns about 49% of all lands in the country.

⁴³ Recommendation of UN ECE “Workshop on modern cadastre and land registration systems” / HBP/1999/2 (п.21).

Such active rule-making of the Ministry (executive branch) under lack of respective laws proves incomplete separation of legislative and executive powers.

Derzhkomzem as a body responsible according to the law for carrying out cadastre and registration of rights (а згідно законопроектів уряду – лише частково відповідальним за ведення кадастру) is in no sense controlled by legislative power. Mind you that legislative power has high legitimacy comparing to the government, and therefore an institution responsible for important public functions (cadastre and registration of rights) shall be accountable to the parliament having an exclusive right to define legal regime of the property. A relevant example is the State Property Fund of Ukraine, which is not a part to the Cabinet of Ministers and reports directly to the Verkhovna Rada. Regulation of the Fund, list of enterprises to be privatized and list of enterprises exempt from privatization are passed by the Parliament.

A similar position is justified for the case when cadastre and registry of rights are separated. Powers may not be considered separated and mutually controlled, if a law enforcer is not accountable to the lawmaker, and decisions of a lawmaker are not tested against Constitution.

2. How the Ukrainian system is designed and now operating

A legal basis for the cadastre and land registration system in Ukraine has been established quite recently but not completely. Though land reform was declared in 1990, Law of Ukraine "On state registration of real rights to immovable property..." was passed on July 2004 only. Laws on land cadastre⁴⁴ and land markets are still missing or under preparation in the year 2007.

The Land Code (in force since January 1, 2002) has not created sufficient legal basis for functioning of cadastre and registry. Registration of rights as such is not regulated by the Code at all, and general rules on cadastre refer to a special law on state land cadastre. It substantiated the position that respective norms of the Code are not directly applicable, and Derzhkomzem does not have competence to issue orders in respect of cadastre and its functioning; issued orders are lacking legitimacy.⁴⁵ This position is quite reasonable because legal regime of property is defined exceptionally by laws of Ukraine, i.e. by legislative power.

Although the volume of normative material existing and in force in Ukraine as of April 2007 is not complete it is obvious to conclude that in Ukraine should be established a unified cadastral and registration system. It should have the following design:

Component	Function / Task	Holder / Administrator / User
State land cadastre (automated)	Cadastral zoning, cadastral surveying, quality of soil, land valuation, state registration of land parcels, monitoring of quantity and quality of lands	Derzhkomzem / State Enterprise (SE) "Center of State Land Cadastre"
State registry of lands (within cadastre)	Registration of land parcels, land titles and lease contracts	Derzhkomzem / SE "Center of State Land Cadastre" / registration offices
State registry of real rights to real estate (within cadastre)	Registration of rights to real estate (land parcels, buildings, constructions), encumbrances (servitudes, interdictions, arrests, mortgages). Holds information about owners of rights, technical characteristics of real estate, cadastral plans, data about contracts in respect of real estate	Derzhkomzem / SE "Center of State Land Cadastre" / registration offices

⁴⁴ Law of Ukraine "On state land cadastre" passed by the Verkhovna Rada of Ukraine on March 20, 2007 was vetoed by the President of Ukraine on April 13, 2007.

⁴⁵ P.F.Kulinich. State registration of rights to land real estate and land cadastre: notion, interrelation and legal basis // Juridichnyy Zhurnal, # 11, 2005.

However, the Ukrainian cadastral and registration system has never gained this shape. Requirements of laws and other acts have either been ignored or boycotted by respective institutions, and at the moment these laws and acts are in the stage of review obviously leading to the establishment of a different system (see below). Instead of the unified cadastral and registration system there is a sum of weakly linked components created without proper legal basis. This sum looks like follows:

Component	Function / Task	Holder / Administrator / User
State land cadastre as a unified automated system – DOES NOT EXIST	Cadastral zoning, cadastral surveying, quality of soil, land valuation, state registration of land parcels, monitoring of quantity and quality of lands	Derzhkomzem / SE "Center of State Land Cadastre"
State registry of lands (within cadastre), mostly paper-based	Registration of land parcels, land titles and lease contracts	Derzhkomzem / SE "Center of State Land Cadastre" / registration offices
Registry of property rights to real estate (since 2002, automated)	Registration of property rights to buildings, houses, constructions	Ministry of Justice (ME) / SE "Information Center of ME" / BTI
Registry of contracts (since 2004, automated)	Registration of contracts (in respect of land parcels and other real estates)	ME / SE "Information Center of ME" / notaries
Registry of mortgages (since 2004, automated)	Registration of mortgages	Ministry of Justice (ME) / SE "Information Center of ME" / notaries
Registry of interdictions to alienate real estate (since 1999, automated)	Registration of interdictions to alienate real estate	Ministry of Justice (ME) / SE "Information Center of ME" / notaries

2.1. Institutional role and functions of Derzhkomzem

Derzhkomzem all its lifespan (till reorganization in 2007) has been acting on the basis of regulations approved by Decrees of the President of Ukraine.⁴⁶

Regulation on Derzhkomzem effective in 1996-2000 defined it as a body responsible for realization of state policy in the field of land relations and carrying out of land reform. Interesting to note that Derzhkomzem of that period was a part of the national agrarian and industrial complex, i.e. it looks like measures of land reform with implementation of which Derzhkomzem was entrusted were first of all related to lands of agricultural use. No function in the field of registration of rights at that time was mentioned.⁴⁷

In August 2000 a new regulation on Derzhkomzem was passed, by which Derzhkomzem was defined as a body of executive power responsible for formation and realization of state policy in the field of regulation of land relations, land use, protection of soil, monitoring of land and carrying out of state land cadastre.

⁴⁶ Decrees of the President of Ukraine of January 6, 1996 № 34/96, of May 13, 1996 № 340/96, of August 14, 2000 № 970/2000.

⁴⁷ One of the first draft laws on registration of rights was dated 1999, and Derzhkomzem was only one out of four pretenders for the position of a registration authority.

On January 1, 2002 the new Land Code became effective, and Derzhkomzem (at the level of a law passed by the Parliament) was entrusted with the task of carrying out state land cadastre, including state registration of land parcels (point "r" of article 15).

In our opinion, those tasks of Derzhkomzem, described above, had very little in common with administration of registry of rights. The only link was that article 193 of the Land Code defined the cadastre as a unified system of cadastral works which sets up the procedure for recognition of the fact of acquisition or cessation of property right or use right to land parcels and holds a sum of data and documents about location and legal regime of land parcels, their valuation, classification of lands, distribution of land among owners and users. Drawbacks of such definition are:

1. It is unclear how the system of WORKS may hold sum of DATA and DOCUMENTS;
2. The result of functioning of cadastre is recognition of the fact of acquisition or cessation of rights to a land parcel, though traditionally this is a function of the registry;
3. Cadastre is limited rights of property and use and does not provide for registration or confirmation of other rights or encumbrances;
4. Cadastre is limited to description of land parcels and does not provide for integration of data about other real estate.

In 2003 the Regulation on Derzhkomzem was supplemented by the function withdrawn from the Ministry of Justice. Derzhkomzem was entrusted with registration within the cadastre of land parcels, immovable property and rights thereto, land lease contracts, and with carrying out of the State registry of rights to land and immovable property (sub-point 11 of point 4 of the Regulation). In our opinion, the President overstepped the legal boundaries defined by the Code (as an act of higher legal power comparing to the Presidential Decree).

This situation something improved with adoption on July 1, 2004 of the Law of Ukraine "On state registration of real rights to immovable property..." which at the highest legal level decided that the registry is a part and parcel of the land cadastre. Derzhkomzem was appointed a holder of the registry and SE "Center of State Land Cadastre" – administrator thereof.

In practice, this Law has not been implemented. Having examined the current state of land relations in September 2005, the Verkhovna Rada of Ukraine decided upon necessity of completion of establishment of the state land cadastre and introduction of a unified state system for registration of rights in accordance with the Law of Ukraine "On state registration of real rights to immovable property...".⁴⁸

In fact, Derzhkomzem in the field of cadastre and registration limited itself to the following:

1. It introduced State registry of land to perform state registration of land parcels, land titles and land lease contracts (paper-based).⁴⁹ State registry of lands is a part of the cadastre, but there is still no cadastre. According to the last Head of Derzhkomzem Mr. Sidorenko, there are 650 cadastres in Ukraine – by number of units of administrative and territorial division; these cadastres are functioning on different technologies and do not allow for their integration into one system;⁵⁰
2. It set up State Enterprise "Center of State Land Cadastre" performing state registration of land parcels, land titles and land lease contracts nation-wide.
3. In our opinion, registration of land parcels in the State registry of lands is having purely cadastral nature and may not substitute real registration of rights to land parcels and limitations thereof. Moreover, registration of parcels is done separately from registration of buildings and houses. So, instead of a unified system for registration of rights to real estate

⁴⁸ Points 3.8 and 3.9 of Resolution of Verkhovna Rada of Ukraine # 2897-IV of 22.09.2005.

⁴⁹ In summer 2006 we visited the registration offices in Mykolayv oblast. We saw that registration was paper-based and only recently that office started to enter data into computer data base. Unfortunately, that computer was not a part of any network for transfer of data. Communication of data between registration office and regional office of SE "Center of State Land Cadastre" takes place from time to time. Role of human factor is extremely high in this system. Paper land books are not capable to resist registration unlawful, erroneous or distorted data.

⁵⁰ Announcement "Electronic land cadastre will support property rights of citizens to land" of March 5, 2007 at web-site of Derzhkomzem.

there are two independent systems for registration: registry of lands and registry of rights to immovable property (except for land). In fact, this is a preservation of the Soviet system, when BTI performed the registration of immovable property and cadastre performed registration of land parcels in possession and land parcels in use. In practical terms nothing has changed.

On April 4, 2007 the Cabinet of Ministers of Ukraine adopted the Regulation on State Agency of land resources of Ukraine (successor of reorganized Derzhkomzem). Out of an independent body subordinate to the Cabinet of Ministers, the Committee turned into an institution subordinate to the minister of natural resources and environmental protection. According to the Regulation, the Agency is securing the realization of the state policy in the field of regulation of land relations, land use, protection of soil, monitoring of lands, carrying out of state land cadastre as well as coordination and state regulation in the field of establishment of boundaries of oblasts, rayons, cities, towns and villages.

In the field of cadastre and registration of rights the functions of the Agency are limited to organization and support of carrying out state land cadastre and preparation of cadastral documentation. The Regulation does not provide for the registration of rights in real estate and/or land.

As without respective changes to the Land Code and the Law of Ukraine "On state registration of real rights to immovable property..." the decision of the Cabinet lacks legitimacy. The Cabinet submitted to the Verkhovna Rada of Ukraine draft law № 2597 of November 27, 2006. By this draft law the Cabinet suggests new reading of the Law of Ukraine "On state registration of real rights to immovable property..." and appoint the Ministry of Justice the central body of state executive power in the field of state registration of rights. One of the two opposition factions (Nasha Ukraina) on March 16, 2007 submitted to the consideration of the Parliament a draft resolution on rejection of the said draft law. Nevertheless, the draft law was upheld by the Rada in the first reading on March 21, 2007 (the next day after adoption of the Law of Ukraine "On state land cadastre") and on April 19, 2007 – in the second reading. The law has not yet been signed by the President of Ukraine (though we know that the President vetoed the law on cadastre).

Thus, the notorious problem of duplication of functions of Derzhkomzem by the Ministry of natural resources and environmental protection and Ministry of Justice has finally been solved: a reorganized Derzhkomzem along with functions duplicated by the environmental Ministry was included into that Ministry, and functions duplicated by the Ministry of Justice were transferred solely to the Ministry of Justice.

2.2. Institutional role and functions of the Ministry of Justice

After the adoption of the Land Code in 2001, between Derzhkomzem and Ministry of Justice emerged a long-term conflict with respect of which institution should perform registration of rights to land parcels and immovable things. Derzhkomzem insisted on unification of cadastre and registry under its reign. The Ministry of Justice favored separation of cadastre and registry and subordination of the registry to the Ministry. In our opinion, the ground for such dispute between bodies of executive power was a failure of the legislative power to decide upon the issue at the proper level. The Land Code allowed for creation by Derzhkomzem of a separate registration system (State registry of lands), and Ministry of Justice kept ruling the treasure inherited from the USSR – system of BTI having its legal basis in one norm of the Law of Ukraine "On local self-governance in Ukraine" entrusting executive committees of local councils with the function to monitor and register according to the law real estate objects (article 30). In our opinion, this norm was an insufficient legal basis.

The Ministry of Justice is a main (senior) body within the system of central bodies of executive power with regard to securing realization of the state legal policy.⁵¹ Its role in the registration of rights till 2004 was not defined by any law,⁵² as required by the Constitution; at the same time the Regulation on the Ministry of Justice (approved by the President of Ukraine) till February 2003

⁵¹ Regulation on the Ministry of Justice of Ukraine, approved by the Decree of President of Ukraine # 1396/97 of 30.12.1997.

⁵² This role was defined in a negative way: Law of Ukraine "On state registration of real rights to real property... entrusted with registration an enterprise subordinate to Derzhkomzem.

allowed it to perform registration of rights to real estate and administer respective registry. In February 2003 this function was withdrawn and assigned to Derzhkomzem by the Presidential Decree; later, on July 1, 2004 it was confirmed by the Law of Ukraine "On state registration of real rights to immovable property...". Strictly speaking, from the moment when the said law entered into force, all energy of the Ministry and Derzhkomzem should have been directed towards its implementation, i.e. at the creation of a unified registry. It seems though that both institutions boycotted the law, and kept struggling. If it was so, such mode of action contradicted recommendations of the UN ECE of 1996 requiring national governments to direct their efforts in the field of land policy towards reinforcing confidence of citizens and investors.

During the times of legal uncertainty of cadastre and registry the Ministry of Justice established in its subordination several other registries related to market circulation of immovable assets: Registry of rights to immovable property, registry of contracts, Registry of interdictions to alienate immovable property and Registry of mortgages. With the introduction of the single state registry of rights all those registries had to stop their activities.

With the adoption by the Parliament of new reading of the Law of Ukraine "On state registration of real rights to immovable property..." (on April 19, 2007) the Ministry of Justice has finally gained the status of the central executive body in the field of registration of rights. The reaction of the President of Ukraine may be predicted: he vetoed recently the passed law on land cadastre for it failed to provide for the creation of a unified cadastral and registration system administered by a single body.

One may note that the executive bodies of Ukraine are in fact making reform of cadastre and registry without necessary changes of respective laws. According to the protocol instruction of the Cabinet of Ministers of March 15, 2006, a special Working group on issues of improvement of legislation on functioning of unified registration system was set up. Upon consideration of the problem, members of the Working group supported the idea of creation of a unified registration system under the auspices of the Ministry of Justice. The World Bank by its letter of May 4, 2006, upheld this position under provision that respective decision of the Cabinet of Ministers would be adopted.⁵³ This information is published at the website of the Verkhovna Rada of Ukraine and signed by the Minister of Justice. Rather interesting that at the same day, when the Working group was set up, on March 15, 2006, at the website of Derzhkomzem it was announced that the Cabinet of Ministers decided to leave the registration within domain of Derzhkomzem which created all necessary technical and organizational preconditions.⁵⁴

On May 26, 2006, the Cabinet headed by Prime Minister. Ekhanurov, decided to transfer assets of SE "Center of State land Cadastre" into the subordination of the Ministry of Justice.⁵⁵ Only 2 months later that Cabinet decided to leave to Derzhkomzem assets of SE "Center of State land Cadastre" necessary for discharge of functions related to carrying out cadastre.⁵⁶ Those decisions were taken against the background of still valid rules of the Land Code and Law of Ukraine "On state registration of real rights to immovable property..." subordinating SE "Center of State land Cadastre" to Derzhkomzem. Soon, that Cabinet was dismissed, but its decisions were not reversed.

On January 31, 2007 the Cabinet of Ministers – headed by Prime Minister Yanukovich – decided to reorganize Derzhkomzem into the State Agency of land resources of Ukraine, and on April 4, 2007 a new Regulation on the Agency was approved by the Cabinet. This Regulation entrusts the Agency with administration of land cadastre, but not the registry of rights.

Whatever the reasons of these steps of the Government and the Parliament have been they are not backed by a consistent policy. It is fair to say that the recently passed (and vetoed) law on land cadastre is in contradiction with the new reading of the law on registry: the former regulates the State registry of lands, and the latter abolished that Registry at all (laws were passed one after another). The veto of the President is therefore highly predictable.

⁵³ Explanatory note to draft law #2597 dated 27.11.2006.

⁵⁴ Announcement "State registry of rights is to be administered by Derzhkomzem» at the official web-site of Derzhkomzem (www.dkzr.gov.ua), placed 15.03.2006.

⁵⁵ Order of the Cabinet of Ministers of Ukraine # 295-p of 26.05.2006.

⁵⁶ Order of the Cabinet of Ministers of Ukraine # 419-p of 24.07.2006.

Taking into account that legislative and executive powers in Ukraine at the moment are dominated by the coalition (opposed by the President), it is expected that draft laws of the Cabinet will be upheld by the Parliament which in case of Presidential veto will be effectively overcoming it. So, there is significant probability that in Ukraine a separate cadastre and registry of rights will be introduced. This construction is not doomed to success or failure merely on account of separation or unification of cadastre and registry; the most important thing is that two systems work and interact on generally accepted and recognized principles and foundations.

In view of the development of agricultural land markets in Ukraine, one must note that such lands are having distinctive features compared to urban lands. These lands are not used for development and construction. Therefore the separation of technical and legal information about these lands between Derzhkomzem and Ministry of Justice does not matter. The Ministry of Justice does not have any legal information about these lands (except for those parcels that circulated on the market under conditions of moratorium and registered in the Registry of contracts). The cadastre of agricultural lands is in fact a registry of rights to these lands. This feature was mentioned by the World Bank that in this respect advised to design a unified system of cadastre and registry.⁵⁷ It could be justified to introduce the registry within the cadastre for rural areas (such design is employed in Finland), but it has never happened. In our opinion, the main obstacle was the moratorium on trade of agricultural lands rendering the registry and cadastre unnecessary.

To conclude, we would say that the unified cadastral and land registration system is still provided for by the effective law; while it is in force, all and any actions directed towards different design of the system are lacking legitimacy.

2.3. Position of the President, Government and the Parliament with respect to necessary reforms

Currently, the President, the Government and the Parliament adhere to different ideas about the development of the cadastre and registration system. The situation is complicated by the absence of a coherent and public policy in the field; in any case, the ruling majority in the Parliament of the 5th convocation is revising approaches of the Parliament of the 4th convocation.

Recently, the President of Ukraine signed the Decree "On certain issues of organizational and legal support to formation and regulation of land market and protection of rights of owners of land parcels".⁵⁸ In that Decree there is no mentioning of registration of rights, but in its draft⁵⁹ it was advised to the Government to consider the merger of Derzhkomzem and State service of geodesy, cartography and cadastre into the Ministry of state land policy with diverse functions in the field of land cadastre, registration of rights and mapping. In the text signed by the President such point was excluded. Nevertheless, till now the Decree "On measures for creation of unified system for state registration of land parcels, immovable property and rights thereto within the state land cadastre" of February 17, 2003 N° 134/2003 is valid. It entrusts Derzhkomzem to administer cadastre and registry. These basic provisions of the Presidential Decree were significantly reinforced by the Law of Ukraine "On state registration of real rights to immovable property..." of July 1, 2004.

In our opinion, that Decree and that Law proves that activities of the Ministry of Justice regarding registries (contracts, rights, mortgages, interdictions) are lacking legitimacy.

As stated above, the President of Ukraine vetoed the Law of Ukraine "On state land cadastre" passed by the Parliament on March 20, 2007. One of the reasons for his veto was that the law violated the concept to create in Ukraine a uniform and unified cadastral and land registration system. Therefore, we may conclude that the **President is a supporter of merger of cadastre and registry.**

The Government of Ukraine during long time was passing decisions that did not facilitate reforming the existing system for protection of rights to real estate. Resolution of the Cabinet of Ministers of May 16, 2002 N° 661, of May 15, 2003 N° 689, of July 17, 2003 N° 1088 preserved

⁵⁷ Project appraisal document for Rural Land Titling and cadastre Development project, Report No 25920-UA, May 30, 2003.

⁵⁸ Decree of the President of Ukraine # 644/2006 of 25.07.2006.

⁵⁹ <http://www.myland.org.ua/ukr/12/171/191/363/4546/>

status quo and divided cadastre and registry between two bodies; Derzhkomzem was only nominated as responsible for both systems. Resolution of May 16, 2002 № 661 introduced complete duplication of data in two systems (it was in force for 1 year only).

The recent decision of the Cabinet of Ministers supports the opinion that the **Government favors the idea of separation of cadastre and registry**. So far the Parliament was upholding draft laws submitted by the Cabinet (see above). In fact, the **Parliament rejected the concept developed by the Rada of previous convocation (establishment of unified system)**.⁶⁰

We have also to stress that despite clear division of the Verkhovna Rada (ruling coalition of Party of Regions, Socialist Party and Communist Party and united opposition of BYUT and Nasha Ukraina), there were inter-faction submissions. People's deputies I. Kirilenko and E. Sigal (BYUT), V. Slauta (PR) and V. Silchenko (SPU) registered a joint draft resolution of the Verkhovna Rada of Ukraine on establishment of a **unified body in the field of land cadastre, mapping and registration of rights**.⁶¹ We would like to add that the position of the majority in the Rada seems to be in favor of separation of these three functions among three executive agencies.

2.4. Views of independent experts

There is a discussion among Ukrainian experts with regard to the redistribution of functions of Derzhkomzem. Mostly, they are discussing transfer of registration to the Ministry of Justice and control functions as regards protection of soils and grounds to the Ministry of Natural Resources and Environmental Protection. We are not aware of any discussions whether Ukraine shall accept deed registration system; there seems to be a consensus on the idea of title registration system that is widely accepted among experts.

Well-known Ukrainian experts are mostly insisting on separation of the land cadastre and registration of rights. For example, *Pavlo Kulinich*, Senior scientific assistant of the Institute of state and law of the National Academy of Sciences, stressed that till the registration system provided for by the Law of Ukraine "On state registration of real rights to immovable property..." and Agreement with the World Bank is created, the old system provided for by the Law of Ukraine "On local self-governance in Ukraine" is the only legitimate.⁶² That means that registration of rights must be performed by executive bodies of local councils, i.e. municipalities. From this position all activities of Derzhkomzem and Ministry of Justice in the field of registration look quite dubious. Mr. Kulinich considers the registration of rights within the cadastre as "gravely erroneous", though he acknowledges the merit officacy ("one-stop shopping" advantage).⁶³ Erroneous nature of such design of the registration and cadastral system he substantiates by the fact that unfortunate terminology of the Land Code allowed for creation of two registration systems: State registry of lands and State registry of rights to immovable property (and the Code is indeed applying terms like "registration of parcels", "registration of land titles" and "registration of rights to parcels"). Activities of Derzhkomzem in the field of registration of land parcel in the State registry of lands has uncertain legal meaning, outcomes of such registration are unknown, and fees for the registration are collected without proper legal basis.

Anton Tretyak, PhD, professor, correspondent member of Ukrainian Academy of Agrarian Sciences, Head of the Union of Surveyors of Ukraine, expressed a negative attitude towards concentration of functions and authority in hands of Derzhkomzem.⁶⁴ Though Mr. Tretyak was not directly opposing the idea of inclusion of the registry into the cadastre, he considered work of Derzhkomzem ineffective against the background of the Ministry of Justice which implemented and improved numerous registries in a fast pace. Later he definitely supported the withdrawal of registration from Derzhkomzem and transfer of the registry to the Ministry of Justice.⁶⁵ A similar position was expressed by *Mr. Kalyuzhnyy*, Head of the Association "Land Union of Ukraine".⁶⁶

⁶⁰ Resolution of the Verkhovna Rada of Ukraine # 2897-IV of 22.09.2005.

⁶¹ Draft resolution of the Verkhovna Rada of Ukraine.

⁶² R. Illichiv, S.Kovalenko. Arithmetic of reform // Business - #14 of 05.04.2004.

⁶³ P.F.Kulinich. State registration of rights to land real estate and land cadastre: notion, interrelation and legal basis // *Juridichnyy Zhurnal*, # 11, 2005.

⁶⁴ V.Chopenko. Land reform has stuck in ... land // *Zerkalo nedeli* of April 29, 2006.

⁶⁵ V.Chopenko. Land, poste restante // *Zerkalo nedeli* of 12.03.2005

⁶⁶ Whether in Ukraine there be created market system of the state land cadastre? – joint declaration of A. Tretyak and M. Kalyuzhnyy of 05.06.2006 (www.zsu.org.ua)

Foreign experts whose opinion was asked earlier by the Institute for Economic Research and Policy Consulting, advised to set up in Ukraine a unified cadastral and registration system.⁶⁷ This view is mostly common for European experts⁶⁸ and supported by international expert organizations.⁶⁹ In our opinion, in designing national cadastral and registration systems governments shall take into account views of the International Federation of Surveyors (FIG) predicting transformation of cadastre and registry into a unified land information automated system capable of solving diverse tasks and providing information to numerous users in different fields of activities. This concept is described in the well-known document **Cadastre-2014**.

At the same time such international organizations like UN ECE take due account of the fact that every national cadastral and registration system bears signs of the national sovereignty, and therefore they restrain from giving priority to any given design of the system. UN ECE diplomatically noted that in the future it is important either to integrate cadastre and registry or to secure effective formalized procedures and vehicles for exchange of information and data between them.⁷⁰

Experts convened by the UN in Bogor in 1996 expressed their support to the definition of cadastre suggested by FIG: "A Cadastre is normally a parcel-based, and up-to-date land information system containing a record of interests in land (e.g. rights, restrictions and responsibilities). It usually includes a geometric description of land parcels linked to other records describing the nature of the interests, the ownership or control of those interests, and often the value of the parcel and its improvements. It may be established for fiscal purposes (e.g. valuation and equitable taxation), legal purposes (conveyancing), to assist in the management of land and land use (e.g. for planning and other administrative purposes), and enables sustainable development and environmental protection."⁷¹ This definition, in our opinion, is based on the idea of unification of cadastre and registry.

3. Policy options

Our position is that state registry of rights to agricultural land parcels and other real estate shall be a part and parcel of the state land cadastre, and this complex shall create a single land information system. Provided legal, organizational and technical requirements described above are observed, such multi-functional land-information system would become an effective tool for spatial planning, management of territories, support of land market functioning, mortgage finance development, taxation and valuation.

Separation of cadastre and registry emerged in those times when technologies would not allow for combination of graphic and textual information: properties were depicted on maps, and in land books rights were written down. Nowadays modern technologies allow for creation of data bases uniting different kinds of information as well as more advanced space models with ability to collect, store, process, analyses and transfer many attributes of real objects.

At the same time one must admit that unification or separation as such is not crucial for the success of cadastral and registration system: *«success of a cadastral system is not dependent on its legal or technical sophistication, but whether it protects land rights adequately and permits those rights to be traded (where appropriate) efficiently, simply, quickly, securely and at low cost. However if the resources are not available to keep the cadastral system up-to-date then there is little justification for its establishment.»*⁷²

Unfortunately, during years of land reform in Ukraine almost nothing has been done for the establishment and functioning of such a land information system. The territory of Ukraine is missing adequate cartographical coverage, there is no unified automated system of cadastre, and there is no information to enter into that system. Registration of parcels (not rights to them) is still paper-based. For the protection of rights of land owners this registration does not have

⁶⁷ Institutional aspects of land market development in Ukraine. Institute for Economic Research and Policy Consulting. German Advisory Group on Economic Reform with the Ukrainian Government. – T17.

⁶⁸ Helge Onsrud. Land administration in Europe. FIG, 2004; FIG statement on cadastre (1995) ISBN 0-644-4533-1

⁶⁹ Cadastre-2014.

⁷⁰ Land Administration in the UNECE Region. Development Trends and Main Principles. ECE/HBP/140. – Geneva: UN, 2005. - p.31.

⁷¹ <http://www.fig.net/pub/figpub/pub13a/figpub13a.htm>

⁷² Bogor Declaration of UN Interregional meeting of experts on cadastre, 1996

decisive meaning and is rather performed for cadastral monitoring of distribution of land among users and owners. Information of the State registry of lands is not open to public. In our opinion, publicity and transparency of information about land parcels and rights to land parcels is one of the guarantees of legitimacy and legality of transactions with land.

According to information of the Accounting Chamber of the Verkhovna Rada of Ukraine, the system of Derzhkomzem was spending budget funds either ineffectively or with misappropriation.⁷³ Financing of the Component E "Development of the system of cadastre" (*Rural Land Titling And Cadastre Development Project*) was suspended by the World Bank because there was no progress in realization of that component. As regards the implementation of the Law of Ukraine "On state registration of real rights to immovable property...", the opinion of the Bank was similar: minimal progress.⁷⁴

At the same time the Ministry of Justice of Ukraine was consistently, though without sufficient legislative support,⁷⁵ establishing separate elements of the state registry of rights: Registry of interdictions to alienate immovable property (1999); Hereditary registry (2000); Registry of rights to immovable property (2002); State registry of contracts (2004); State registry of mortgages (2004). These registries are organized in a unified data base which is served and administrated by specialized state enterprise "Information Center of the Ministry of Justice". One must also take account the Civil Code of Ukraine requires notarization of contracts with real estate and land, therefore persons performing notarization (notaries) are in a better position to transfer data to the state registry of rights.

These two moments – absence of progress in actions of Derzhkomzem (as regards establishment of the automated cadastral system and registry of rights) and productivity of the Ministry of Justice (at least, as regards technical side of registration) – leads to the idea of the creation of a separate registry of rights under the Ministry of Justice.

At the same time it is impossible to assert that this decision is indisputably optimal. The mere fact that Derzhkomzem failed to create a registry of rights is not an irrefutable proof of success of the Ministry of Justice. Under success we mean not the creation of the registry as such, but an increased level of security of transactions with land and real estate.

We would like to point out that the separation of land cadastre and registry of rights is in contradiction with the concept of real estate introduced by the Civil Code of Ukraine (land and inseverable improvements). A similar position is adopted by the Land Code of Ukraine which provides for transfer of rights to land in case of transfer of rights to property. It looks like cadastre may be limited to technical information about land parcels, and other immovable property will not have any system for description of property. New reading of the Law of Ukraine "On state registration of real rights to immovable property..." mentions technical inventory of property (registration of rights is performed upon technical inventory), but it does not define the legal meaning and status of its results, and does not say where technical information goes and is stored. Accordingly, description, monitoring and taxation of real estate will either be complicated or barely possible.

The separation of tasks, done without necessary precautions, may turn transactions with immovable property into lengthy, expensive and exhaustive processes. The praised principle of "one stop shopping" is not applicable. Parties of a transaction with real estate and land would be exposed to a multi-stage procedure, additional expenses and risks.

At the same time unification of cadastre and registry in Ukraine encounters unexpected obstacles and hindrances. The human factor in this situation is of utmost importance. During decades land surveying in Ukraine was developing as purely technical activity based upon geodesy, topography and cartography. Within the course of land reform this situation has not been changed. For example, License Provisions for Land Surveying⁷⁶ contain requirements in respect of inclusion into

⁷³ Official press-release of the Accounting Chamber of 06.06.2006 (http://www.ac-rada.gov.ua/achamber/control/uk/publish/article/main?art_id=660114&cat_id=505)

⁷⁴ Letter of the World Bank of 4.05.2006.

⁷⁵ Under insufficient legal support we mean that fact that the Constitution of Ukraine requires legal regime of property be defined by laws passed by the Parliament. Any registry of the Ministry of Justice does not meet this requirement for it was not set up on the basis of a law.

⁷⁶ Order of the State Committee of Ukraine on Entrepreneurship and Derzhkomzem # 28/18 dated 13.02.2001.

personnel of a surveying company of specialist graduated with specialization "Land surveying and cadastre", "Cadastre". No requirements with regard to legal knowledge. Academic programs of surveying departments of Ukrainian universities offer students about ten different kinds of geodesy, but very few hours of land law and land management. We would add that modern technologies and equipment (first of all GPS) do not make necessary for a land surveyor to possess vast and diverse knowledge in the field of geodesy and mapping, and significantly simplify cadastral surveying and mapping.⁷⁷

Judicial profession in Ukraine is also very specialized and purely humanitarian, i.e. lawyers (advocates, notaries, judges) do not have technical knowledge on land laws and land management.

So, current state of these two professions, most important for cadastre and registration of rights, is such as to necessitate the separation of the technical and legal side of the work. Acknowledgement of this fact may be found in the Law of Ukraine "On state registration of real rights to immovable property...": article 8 says that the state registrar of rights must have a **university degree in law**. So, License Provisions requires from surveyors deep knowledge of geodesy and topography, and the Law requires from registrars extensive legal knowledge. In Ukraine everything related to legal profession is under the domain of the Ministry of Justice responsible for implementation of the state legal policy.⁷⁸

The level of professional training of employees of the system of Derzhkomzem as well as of notaries is still capable of improvement. As a result, their actions and decisions are often erratic. We have seen reports of the state land surveying expertise which were in clear contradiction of the current legislation. On the basis of such report land lease contracts were concluded and registered in the State registry of lands and State registry of contracts. We have also seen notarized contracts for sale of agricultural lands concluded and registered under the moratorium and land titles were issued on the basis of such contracts.

Officials performing cadastral and registration works are left unprotected against side influences⁷⁹, and courts are often facilitating actions now commonly referred to as "raiding".

So, licensing, professional attestation, qualification exams, state expertise do not guaranty quality of cadastral and registration works and security of property rights. One of the possible solutions is introduction of a fully automated system which will oppose incorrect actions of illiterate or mischievous users with technical and software means.

Another problem is the absence of existing or described in a law mechanism for exchange of information and data among agencies, enterprises and bodies involved into cadastral works and registration. Without such exchange it is hardly possible to set up an efficient registry. Moreover, there might appear a problem guarantying reliability of information of the registry; so far registration of rights to real estate is done by municipal enterprises (BTI), but the state must be guarantor and the one to reimburse the losses.

According to our view, the most important reason for slow and inefficient reform in the field of cadastre and registration of rights is of political or rather economic and political nature. There are two land reforms in Ukraine running simultaneously. There is the official one declared by the Resolution of the Verkhovna Rada of Ukraine. The result of this reform is initial privatization of land, change of the structure of land ownership in the country and creation of prerequisites for land market functioning. The second – shadow – reform is aiming at redistribution of land (first of all, agricultural) under the conditions of the moratorium. Land is sold with the use of different black and grey schemes, without sufficient control and – as a result – at low prices, and when the moratorium will be lifted and the land market legalized, its first players would be several hundreds of speculating landowners Ukraine-wide. They are not interested in functioning of open transparent land markets with multi-functional cadastre and reliable registration system – till the moment when grey redistribution of land is complete. Transparent and secure land markets will

⁷⁷ Cadastre-2014, p.41.

⁷⁸ Regulation on the Ministry of Justice of Ukraine, approved by the Decree of President of Ukraine # 1396/97 of 30.12.1997.

⁷⁹ Under protection from influence one shall understand restriction of possibilities for making influence, liability for influence or attempts to perform influence as well as amenability towards side influences.

immediately attract serious foreign investors with whom Ukrainian capital cannot compete.⁸⁰ Thus, before completing that shadow reform there are strong and influential lobby groups to prevent the development of cadastre and registry and the lifting of the moratorium. Taking into account that in Ukraine the power and the capital are closely connected, public administration are incapable (and not really interested) to adopt and implement decisions directed towards the creation of a functioning cadastral and registration system. That inability and indifference have already been noted by various NGOs.⁸¹

Taking into account this situation, we think that impartial expert advice on either option may be undesirable and inexpedient: **Ukraine's attempts to switch to unified cadastral and registration system have proved to be unsuccessful, and there are no ground to believe that attempts to develop separated cadastre and registry will have better results.** There are examples of effective land markets under conditions of integrated cadastre and registry as well as under conditions of their separate functioning. That means that **effectiveness of the market is not critically dependent upon integration or separation of cadastre and registry.** The main task and challenge is the establishment of a cadastral and registration system (or systems) providing easy access to land resources, secure rights to land and to support effective circulation of rights at reasonable cost.⁸² Therefore we are leaving the choice to those responsible for and entrusted with political choices and restricting our advice to the following:

Laws on cadastre and registry shall not leave too much space for discretion and rule-making of executive power;

Laws on cadastre shall be directed towards creation of a unified nation-wide data base. At the same time there are no reasons to oppose creation of municipal cadastrals, provided they are employing identical with the state cadastre technologies and standards, working in the same reference system, and support complete integration of state and municipal data bases;

Laws on cadastre and registry shall not have contradicting and mutually exclusive rules. Even under conditions of separate cadastre and registry they are part and parcel of one and same system, the unity of which is crucial for effective state management of land resources;

The Land Code of Ukraine must be improved in respect of procedures for acquisition of rights in order to exclude diverse interpretation of its rules by local executive and self-governance bodies and to introduce nation-wide uniform procedure for acquiring rights in land;

Registration of rights to property must be mandatory, and fees for registration must be cost-covering;

Filling of cadastre and registry with data must be staged; first of all, there shall be information necessary for transactions. At later stages all other additional information may be added. Every attribute of the property to be included into cadastre requires significant expenses that may not be justified for a country in transition. Therefore, analysis of cost and benefits shall be performed first, and the cadastre and registry shall be affordable for the country at any given moment;

Registry of rights must be single and state-owned throughout the country. State shall guaranty reliability and trustworthiness of its data. Losses caused by errors or abuses of registrars or third persons must be reimbursed by the state in full on account of the special fund formed on account of fees;

State registrars shall have high level of legal and social protection guaranteed by the state, and bear severe criminal liability for wrongful, malicious or negligent attitude to their duties;

Professional training of land surveyors shall include full-fledged courses of land law and management of land resources;⁸³

⁸⁰ According to the Association of Ukrainian banks, aggregate capital of Ukrainian banks – members of the Association, as of March 1, 2007 reached USD 8,83 billion. Capital of one Russian bank – Saving Bank – as of April 1, 2007 amounted to USD 24 billion.

⁸¹ Draft law 1037-1: all land to peasants. And to nobody else (<http://www.myland.org.ua/ukr/12/169/110/4790/>)

⁸² Bogor Declaration of UN Interregional meeting of experts on cadastre, 1996.

⁸³ Recommendations of UN ECE “Workshop on modern cadastre and land registration systems” / HBP/1999/2

The State must facilitate establishment of professional self-regulated bodies of surveyors (just like auditors and appraisers have). Such associations must introduce unified standards of surveyors' services;

Registered rights shall be considered lawful. Any person whose rights are not registered shall have no recourse to vindication of property from bona fide purchaser whose right is registered. Bad faith of a purchaser shall be proven only in the courts;

Information of the registry must be stored in a data base with high level of technical and physical protection. The copy of the registry must be also securely stored;

Administration of cadastre and registry must be as automated as possible: it will reduce influence of human factor, speed up processing of data, create possibilities for analysis and transfer of data as well as for interaction of different state information systems;

Access to information of the registry shall be open to the public with limitations and restrictions related to protection of privacy provided for by the national legislation and international treaties;

Access and level of access of bodies of public administration to cadastre and registry shall be defined by their status and also automated. Rules like "local councils have the right of access to data of cadastre / registry if their requests for information is within their competence" suggest that employees of the registry and cadastre will be adjudicating upon competence of bodies of public administration. Adjudication upon competences is in domain of judicial power, i.e. such rules are contradicting principles of separation of powers. In our opinion, rules like this are at the heart of anarchy and unlawfulness in access to the registry and cadastre;

Laws on cadastre and registry shall precisely define links and ways for exchange of data among all institutions involved into cadastral and registration functions. If there is an effective mechanism for data exchange between cadastre and registry in place, the separation of cadastre and registry will not have effect upon functioning of the land market and of systems themselves (cost, complexity of operation and maintenance);

Information on land resources and rights to property which has no restrictions related to protection of privacy and state secrets shall be open to the public in a way excluding administrative discretion and abuses in giving access to information (for instance, via special Internet site);

The cadastre shall cover the whole territory of the state with no exception, and its information shall be up-to-date at any given moment (in fact, establishing an automated cadastral system is less complex than keeping it up-to-date);

The registry shall contain information about rights of private persons, municipalities and the state;

Land surveying works throughout Ukraine must be carried out in a single reference system. Nowadays there are cases when land parcels allocated in kind in local reference system, from the point of view of the national reference system are abroad or lying across the border;

Land surveying works throughout Ukraine must be carried out with mass application of GPS technologies and GPS equipment. GPS is considered a cheap, precise and fast method for drafting cadastral maps and performing cadastral surveying. GPS in principle minimizes needs for permanent geodetic reference networks and allows for saving significant public and private funds.

Authors: Max Fedorchenko, Alex Yanov

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