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THE "RIGHT OF OFFSET" OF THE VALUE OF PROPERTY LEFT BEYOND THE PRESENT POLISH BORDERS

Summary. This article describes one form of the right to compensation for property left beyond the present borders of the Polish State. The issue of compensation for property left by Polish citizens in the territories annexed to the USSR, was intended to be regulated in domestic law, according to a series of so-called "republican agreements". The Polish State took upon itself the obligation to compensate persons who were "repatriated" from the "territories beyond the Bug River" and had to abandon their property there. On 8 July 2005 the Sejm passed the Act on the realisation of the right to compensation for property left beyond the present borders of the Republic of Poland, which entered into force on 7 October 2005. The right to compensation shall be realized in one of the following forms: offsetting of the value of the property left beyond the present borders of the Polish State against: the sale price of property or the right of perpetual usufruct owned by the State Treasury; the fees for perpetual usufruct of land owned by the State and the sale price of buildings and other premises or dwellings situated thereon; or the fee for transformation of the right of perpetual usufruct into the right of ownership of property, a pecuniary benefit to be paid from the resources of the Compensation Fund.

Keywords: Repatriate property, right to compensation, real estate of the State Treasury, „right of offset"

„PRAWO ZALICZENIA" WARTOŚCI MIENIA ZABUŻAŃSKIEGO

Streszczenie. Niniejszy artykuł omawia wybrane aspekty zarządzania nieruchomościami Skarbu Państwa w odniesieniu do osób, które realizują uprawnienie do rekompensaty z tytułu pozostawienia mienia poza obecnymi granicami Państwa Polskiego. Postanowienia umów republikańskich dotyczyły ewakuacji zabużan oraz zasad opisu mienia pozostawionego przez nich poza granicami Polski, nie zawierały jednak szczegółowych postanowień w zakresie

rekompensat za pozostawione mienie. Prawo to zostało skonkretyzowane w ustawodawstwie krajowym, począwszy od lat czterdziestych po chwilę obecną. Sposób kompensowania był oparty, co do zasady, na jednolitej koncepcji normatywnej – możliwości zaliczenia wartości pozostawionego mienia na poczet ceny kupna nieruchomości lub opłat z tytułu dzierżawy, lub użytkowania wieczystego nieruchomości państwowych. Zatem przedmiotem rozważań będą: tzw. „prawo zaliczenia", wybrane aspekty wyceny nieruchomości zabużańskich, dokonywanie zbycia tychże nieruchomości oraz charakter prawny prawa zaliczenia.

Słowa kluczowe: mienie zabużańskie, prawo do rekompensaty, nieruchomości Skarbu Państwa, „prawo zaliczenia"

1. Introductory remarks

Migrations of the polish population were a result of WWII and the establishment of a new political map of Europe. The conclusion of the War brought about modifications of the territory of the Polish State[1]. On 27 July 1944 the Polish Committee of National Liberation (PKWN) signed an agreement with the government of the USSR concerning the Polish-Soviet border, according to which the Curzon line was to become a base line of the frontier with a couple of corrections in favor of Poland. Settlements concerning the population of Polish, Ukrainian, Belarusian, Lithuanian and Jewish nationalities were also a consequence of the new shape of the border[2].

From the moment of delimitating the eastern frontier of Poland along the river Bug, the main stream of which was the base the Curzon Line, the former Borderlands – understood as the eastern territories of prewar Poland – were referred to as "areas beyond Bug." As a result, the term "property left beyond Bug" refers to immovable assets left by repatriates on the

[1] Provisions of the August 1939 Ribbentrop – Molotov Pact enabled the seizure of Eastern Polish territories by the Red Army, initiated on 17 September 1939. Territories of Western Belarus and Ukraine were incorporated to USSR. C.f. J. Żołyński, *Włączenie polskich ziem wschodnich do ZSRR (1939-1940). Problemy ustrojowe i prawne*, Acta Universitatis Wratislaviensis Prawo 1994, No CCXXXIII, p. 88 ff.; W. Czapliński, *Wybrane problemy prawne związane z paktem Hitler-Stalin*, „Przegląd Zachodni" 1991, No 3, p.73 ff.; P. Łaski, *Refleksje na temat żądań odszkodowawczej zabużan z tytułu utraty mienia na Kresach Wschodnich w świetle prawa międzynarodowego i prawa polskiego*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2002, v. 2, p. 41.

[2] These were settlements from 9 September 1944 r. between PKWN and the government of BSSR (Belarussian Soviet Republic) concerning evacuation of Polish citizens from the territory of B.S.S.R. and Belarussian population from the territory of Poland, and the government of USSR (Ukrainian Soviet Republic) concerning evacuation of Polish citizens from U.S.S.R. and the Ukrainian population from the territory of Poland; as well as the settlement from 22 September 1944 with the government of LSSR (Lithuanian Soviet Republic), concerning the evacuation of Polish citizens from L.S.S.R. and the Lithuanian population from the territory of Poland, and the agreements from 6 July 1945 between TRJN (Polish Temporary Government of National Unity) and the government of USSR on the right to change Soviet citizenship of persons of Polish and Jewish nationality resident in WSSR into Polish and their evacuation to Poland, and on the right to change Polish citizenship into Soviet of persons of Russian, Belarussian, Ukrainian and Lithuanian nationalities resident in Poland and their evacuation to the USSR.

territory of the Belarusian SSR, Lithuanian SSR and Ukrainian SSR after WWII as a result of the modification of borders of the Republic of Poland[3].

The invoked "republican agreements" obliged the Polish state to create a mechanism of compensation for persons displaced to the territory of Poland within its new borders. The compensations provided for in the agreements were justified by the necessity to enable relatively normal existence to the displaced Polish citizens together with their families, once these people declared their attachment to the Polish nation, which decision was expressed in the willingness to move onto the territory of the Polish State. The value of the compensation was to be determined by the insurance value of immovable assets left behind the new border, calculated in Polish Zlotys (PLN) for the period before 1 September 1939.

Initially questions concerning the offset rights were regulated incidentally, while enacting on other issues, such as awarding farming properties or managing municipal and settlement areas, later they were included in laws concerning the administration of immovable property. The authorities strived to organize a new place of residence and job vacancies for the repatriates, possibly similar to the ones left behind. As a consequence peasants were assigned to developed agricultural properties, while city dwellers received property in the form of a flat. Then, the promised compensation took the shape of settlement of the sale price for the property or fees for perpetual usufruct. An offset took place according to the size of the acquired property, whether farming or not, as a part of sales transaction of particular assets.[4]

Both the Act of 12 December 2003 on setting off the value of the property left beyond the present borders of the Polish State against the sale price of property or the right of perpetual usufruct held by the State Treasury,[5] as well as the currently binding Act of 8 July 2005 r. on the realization of the right to compensation for property left beyond the present borders of the Republic of Poland[6] provide a complete regulation of the question of compensations. This is a consequence of heavy criticism prompted by the previous fragmented enactments, and the

[3] Under the impact of the USSR from the Teheran Conference (28 November - 1 December 1943) the allies' concordance grew when it comes to acceptance of Polish territorial expansion in the west of the country as compensation for Polish eastern territories annexed by the USSR. The line of the eastern border was later confirmed in Yalta (4 - 11 February 1945). C.f. S. Ciesielski, *Przesiedlenia ludności polskiej z Kresów Wschodnich do Polski 1944-1947*, Warszawa 1999, p.14.

[4] C.f. R. Trzaskowski (in:) Sadomski J., Trzaskowski R., Zaradkiewicz K.: *Mienie zabużańskie jako otwarta kwestia majątkowa w prawie polskim,* Warszawa 2002, p. 60; G. Bieniek, *Mienie zabużańskie* (in:) *Nieruchomości. Problematyka prawna* (ed.) G. Bieniek, S. Rudnicki, Warszawa 2006, p.150 ff.; A. Grzesiok, *Rekompensaty za mienie zabużańskie, część I.* „Nieruchomość", 2006, v.2, p.15 ff., G. Bieniek (in:) *Komentarz do ustawy o gospodarce nieruchomościami*, Zielona Góra 2000, p. 375; J. Szachułowicz (in:) *Gospodarka nieruchomościami*, Warszawa 2005, p. 513; J. Siegień, *Ustawa o gospodarce nieruchomościami. Komentarz.* Jaktorów 1999, p. 352; M. Wolanin, *Ustawa o gospodarce nieruchomościami. Komentarz.* Warszawa 1998, p. 361; S. Kolanowski, A. Kolarski, *Ustawa o gospodarce nieruchomościami. Komentarz.* Warszawa 1998, p. 294 ff.; J. Wołasiewicz, *Analiza prawnohistoryczna uprawnień zabużańskich*, „Biuletyn Biura Informacji Rady Europy" 2002, v.3, p.28.

[5] DzU (Journal of Acts) 2004, No. 6, pos. 39.

[6] DzU 2005, No. 169, pos. 1418 later amended.

will to satisfy definitely the claims of persons who left immovable assets behind the contemporary state borders, reducing at the same time the value of the compensation. The 2003 Act introduced for the first time an arbitrary reduction of the equivalent value to 15% of the abandoned property.

The currently binding 2005 Act provides for a compensation which amounts to 20% of the value of immovable assets left behind the border. The compensation may assume the form of either a payment of money or the "right of offset" – the latter being the subject of this paper. According to the Act, also people who evaded evacuation or displacement, and as a result did not undergo the evacuation procedure, are entitled to receive the compensation. Moreover, the Act of 8 September 2006 amending the Act on the realization of the right to compensation for property left beyond the present borders of the Republic of Poland and certain other Acts[7] broadened the scope of the entitled persons, granting the right of compensation to people who left property behind the contemporary border of the Republic of Poland in accordance with the agreement between the Republic of Poland and the Union of Soviet Socialist Republics on the modification of the border between the two states from 15 February 1951.[8]

The requirements that a person entitled to compensation for the property left abroad has to meet are: Polish citizenship on the starting date of the War, residence in the "Borderland" and the fact of abandoning these areas as a result of War, as well as current Polish citizenship[9]. The data of the Ministry of Treasury show that presently there are over 100,000 of persons entitled to compensation, and the average value of compensation amounts to PLN 42,000.

2. Realisation of the right of offset

As far as the offset right is concerned the Act currently in force provides for the possibility to set off the value of the abandoned real property against the sale price of a property owned by the State Treasury, or against the price for acquiring the right of perpetual usufruct of immovable assets owned by the State Treasury, as well as against the initial and subsequent fees for the right of perpetual usufruct of a land property and the sale price of buildings and other constructions or premises situated on this land.

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[7] DzU No. 195, pos. 1437.

[8] C.f. H. Kaśnikowska, *Opinia do ustawy z dnia 8 września 2006 r. o zmianie ustawy o realizacji prawa do rekompensaty z tytułu pozostawienia nieruchomości poza obecnymi granicami Rzeczypospolitej Polskiej oraz niektórych innych ustaw*, Biuro Legislacyjne Kancelarii Senatu (Legislative Office of Senate Chancellary); K. Zaradkiewicz (in:) *Mienie zabużańskie*.., p. 16.

[9] C.f. R. Sztyk, *Realizacja prawa do rekompensaty za nieruchomości pozostawione poza obecnymi granicami Rzeczypospolitej Polskiej*, „Rejent" 2006, No. 3, p. 49; M. Wolanin, *Mienie zabużańskie – nowe regulacje prawne*, „Nieruchomości. C.H. Beck", 2006, No. 4, p. 6; S. Kolanowski, *Kresy Wschodnie i mienie „zabużańskie*", p. 34; G. Bieniek, *Mienie zabużańskie, op. cit*., p. 179.

Most basically, the law in question provides that repatriates are entitled to the setoff of the value of the real estate left behind the border against various types of liabilities that these persons owe to the State Treasury. The liabilities may be the fees for the right of perpetual usufruct or the sale price of building land, as well as the sale price for buildings located on the acquired property, construction or other premises, and the sale price of farming properties owned by the State Treasury.

Provisions of the Act award to repatriates the compensation for immovable assets left abroad. The compensation may be expressed in the form of ownership or the right of perpetual usufruct, as well as in the entitlement to acquire these rights.[10]

Another way of the realization of the right of offset is the possibility to transform the right of perpetual usufruct already held of a property owned by the State Treasury into ownership of that property without the necessity to pay additional fees arising from the transformation of the title (from the right of perpetual usufruct of the property belonging to the State Treasury into its ownership). This procedure seems justified by the willingness to achieve a comprehensive regulation of the questions concerning property left abroad by repatriates. As opposed to the Act of 4 September 1997 on the transformation of the right of perpetual usufruct held by natural persons into the right of ownership, the entitlement awarded by 2005 Act does not assume the shape of gratuitous transformation[11].

The scope of possible realization of the right of offset was additionally broadened by the amendment of the Act of 30 August 1996 on commercialization and privatization. The amendment added art. 53 paragraph 4. Pursuant to the new provision the entitled persons may set off 20% of the value of the abandoned property ascertained by an administrative decision or certificate against a part of the sale price of an enterprise corresponding to the value of rights to immovable property owned by the enterprise specified in the enactments on the realization of the right to compensation for property left beyond the present borders of the Republic of Poland. The confirmed value of compensation may also be set off against a part

[10] C.f. A. Grzesiok, *Realizacja uprawnień zabużańskich w aktualnym stanie prawnym,* Zeszyty Prawnicze Wyższej Szkoły Ekonomii i Administracji w Bytomiu, v. 2, Bytom 2006, p. 51 ff., S. Kolanowski, *Kresy Wschodnie i mienie „zabużańskie"…*, *op. cit*., p. 36; M. Wolanin, *Mienie zabużańskie - nowe regulacje prawne*, „Nieruchomości. C.H. Beck", 2006, No. 4, p. 9 ff.; R. Sztyk, *Realizacja prawa do rekompensaty za nieruchomości pozostawione poza obecnymi granicami Rzeczypospolitej Polskiej*, „Rejent" 2006, No. 3, p. 51 ff.

[11] Such a gratuitous entitlement is owed only to persons who were awarded the right of perpetual usufruct of a property in exchange for expropriation in favor of the State Treasury before 5 December 1990, as well as persons expropriated pursuant to the decree on "Warsaw land." C.f. A. Cisek, J. Kremis, *Ustawa o przekształceniu prawa użytkowania wieczystego ..., op. cit*., p. 48 ff.; A. Cisek (in:) *System Prawa Prywatnego, Prawo rzeczowe*, Vol. 4, ed. E. Gniewek, 2004, p. 182 ff.; B. Burian, *Pierwszeństwo nabycia nieruchomości*, Zakamycze, 2004, p. 44; S. Jarosz-Żukowska, *Konstytucyjna zasada ochrony własności*, Zakamycze, 2003, p. 154; M. Wolanin, *Przekształcenie prawa użytkowania wieczystego we własność,* Zielona Góra 2001, p. 97; G. Bieniek (in:) Bieniek G., Hopfer A., Marmaj Z., Mzyk E., Źróbek R.: *Komentarz do ustawy o gospodarce nieruchomościami,* Zielona Góra 2000, p. 374.

of the sale price or fees for perpetual usufruct of immovable assets sold as property which does not constitute a component of the enterprise, taken over by the State Treasury after the expiry or termination of a contract for awarding the property to the enterprise for non-gratuitous use.

The value of immovable property left beyond the contemporary borders of Poland is set off against the price to the amount of 20% of the value of the real estate – after a valorization; the setoff takes place in the procedure of acquisition of the property by entitled persons.[12]

The alienation of the assets is administered by authorities and entities entrusted with the task of exercising ownership rights in relation to immovable assets of the State Treasury. Among these we may enumerate the Military Housing Agency, Military Property Agency and Agricultural Property Agency, as well as starosts and mayors of cities of the poviat status. Entities administering the assets of the State Treasury in the course of their sales must not refuse to accept the payment of price of the sold property as the realization of the right to compensation in the form of offset of the value of the property left beyond the contemporary borders of the Republic of Poland against the sale price[13].

As accepted in practice of tender organization, the tender announcement includes additionally information concerning the possibilities of participation in the proceedings of persons entitled pursuant to the 2005 Act. The note informs such offerors about exemption from the obligation of submitting vadium to the amount which does not exceed the value of the ascertained right to compensation. The amount should be determined in a decision of a Voivode issued in compliance with the Act or in a proper note of the Voivode made in the decision or certificate issued in compliance with separate enactments.[14]

As regards persons who have already realized their entitlement in part after the date when the decision was issued – the exemption from the obligation to submit vadium concerns only the remaining value of the setoff right, the remaining part of the compensation limit stated in

[12] C.f. M. Wolanin, *Mienie zabużańskie…*, *op. cit*., p. 10; R. Sztyk, *Realizacja prawa do rekompensaty…*, *op. cit*., p. 51; S. Kolanowski, *Kresy Wschodnie i mienie „zabużańskie”*, *op. cit*., p. 36; G. Bieniek, *Mienie zabużańskie…*, *op. cit*., p. 181 i nast.

[13] C.f. M. Wolanin, *Mienie zabużańskie…*, *op. cit*., p. 10; S. Kolanowski, *Kresy Wschodnie i mienie „zabużańskie”*, *op. cit*., p. 37; R. Sztyk, *Realizacja prawa do rekompensaty…*, *op. cit*., p. 47.

[14] The offset rights were provided in: art. 16 of the decree of 6 September 1944 on agricultural reform, art. 18 § 1 pt. 4 of the decree of 6 September 1946 on organization of agriculture and settlement on Western Territories and the former Free City of Gdańsk, art. 9 of the decree of 6 December 1946 on the transfer by the State of non-agricultural immovable property on Western Territories and the former Free City of Gdańsk art. 14 of the decree of 10 December 1952 on the cession on the part of the State of non-agricultural immovable property for housing purposes and individual construction of detached houses, art. 8 of the Act of 28 May 1957 on the sale by the state of housing premises and building land, art. 21 of the Act of 12 March 1958 on the sale of state owned agricultural immovable property and settlement of certain matters connected with agricultural reform and agricultural settlement of persons, art. 17 of the Act of 14 July 1961 on the administration of terrain in cities and settlements, art. 88 (81) of the Act of 29 April 1985 on the management of land and immovable property expropriation, art. 212 of the Act of 21 August 1997 on the administration of real estate.

the decision. The exemption is connected with the necessity to submit to the president of the tender commission a written declaration to pay an amount equal to the value of the vadium (which would be submitted otherwise) should the offeror abstain from entering into the contract. The declaration should be submitted along with the original decision or certificate ascertaining the right to compensation in the form of offset of the value of the abandoned property against the sale price. In the case of accession to the tendering by legal heirs it is necessary to present a court decision ascertaining the acquisition of inheritance or dividing the inheritance.

Where the entitled person is exempted from the duty to submit vadium up to the value corresponding to the worth of property left beyond the border, he shall be admitted as a participant if he pays the remaining part on general terms.

As far as acquisition of immovable property is concerned the provisions of the Act on the administration of real estate[15] concerning the determination of ways and periods of use and development of land properties are not applied. Similarly non-applicable are the provisions regarding rebates of the determined sale price of immovable assets and the obligation of their return in case of a further sale, as well as norms concerning the municipality's right of pre-emption in case of such sale.[16]

The amount of compensation assuming the shape of the sum corresponding to the value of the immovable property left beyond the borders of the Republic of Poland possible to set off against the sale price is calculated in the process of multiplication of the valorized value of the abandoned property by 0,2.

The situation should be considered where the sale price of a property owned by the State Treasury is lower than the determined value of compensation. In such cases the realization of the right of offset would not be possible in a single transaction. As a result, the total sale price is going to be settled by means of exercising the offset right, and the remaining part of the compensation due may only be availed of while purchasing another immovable property of the State Treasury. In the light of currently binding enactments it does not seem acceptable to set off only a part of compensation against the sale price of a particular property owned by the State Treasury, "leaving" at the same time the rest of the awarded entitlement for further setoff.

An notation concerning the consumption of the total or a part of the right to compensation prevents the possibility of the use of the same document for a couple of times. The notation is made on the original certificate or decision concerning the selected form of the right to

[15] Act of 21 August 1997 on the administration of real estate (Dz. U. 2004, No 261, pos. 2603 later amended).

[16] C.f. M. Wolanin, *Mienie zabużańskie...*, *op. cit*., p. 10; R. Sztyk, *Realizacja prawa do rekompensaty..., op. cit*., p. 48; S. Kolanowski, *Kresy Wschodnie i mienie „zabużańskie", op. cit*., p. 36; G. Bieniek, *Mienie zabużańskie…*, *op. cit*., p. 182.

compensation. The note includes the date, name, surname of the public notary and the reference symbol of the notarial deed of sale of the property or granting the property as perpetual usufruct, where such a form of realization of the offset right was chosen, and the amount corresponding to the realized right to compensation and its percentage in relation to the value of immovable property left beyond the present borders of the Republic of Poland. In case of doubt concerning the content of the notation included in the certificate or decision – the entity responsible for the sale of the particular immovable property may call the entitled person to submit documents ascertaining the value of the acquired assets.[17]

In practice it may happen that a couple of private persons tender for a single immovable property of the State Treasury as one offeror, willing to acquire the property as co-owners. In order to exempt such an offeror from the duty to submit vadium up to the value of the confirmed right to compensation, taking into account the lowest of amounts specified in the submitted documents, it is necessary that all the persons intending to acquire the property should be entitled to compensation. *A contrario,* one may conclude that the offeror is obliged to submit the full sum of vadium in order to be admitted to tender proceedings should one of such jointly acting persons not be entitled to compensation.

Similarly there are no restrictions concerning the sale of the property to a number of private persons as co-owners, where the transaction of sale is a single realization of the entitlements of a number of vendees within the frames provided by the Act, that is up to 20% of the value of the abandoned property.

Hypothetically a situation may occur in which the person applying for the realization of the offset right happens to be the heir of the owner of the property, specified in the decision along with other person as entitled to compensation. It shall be possible to realize the entitlement only jointly, in relation to all specified persons. It is necessary that they join the tender personally or through agents and submit originals of the decisions or certificates ascertaining their rights of compensation for the immovable property left beyond the borders.

Heirs may be exempted from the duty to submit vadium only if they can evidence their Polish citizenship and submit the decision confirming the acquisition of inheritance or its division, as well as the declaration of the remaining heirs in the form of a deed with signatures affirmed by a notary or public authority, possibly a Polish Consulate, appointing the heir as the person entitled to the right of offset. For obvious reason this requirement does not need to be met in the situation where the person joining the tender is the sole heir of the person specified in the decision or certificate ascertaining the right to compensation.

[17] C.f. R. Sztyk, *Realizacja prawa do rekompensaty*…, *op. cit*., p. 52; M. Wolanin, *Mienie zabużańskie*…, *op. cit*., p. 10; S. Kolanowski, *Kresy Wschodnie*..., *op. cit*., p. 36.

The Act provides for the possibility to apply for the ascertainment and implementation of the offset right also to those entitled persons who have already realized partly or in whole in accordance with previously binding provisions their right to an equivalent, the so called "complementary setoff." The realization may amount up to 20% of the value of property left beyond the present Polish borders, in compliance with the general rule specified in the Act. This solution is a continuation of the interpretation found in a body of jurisdiction concerning the complementary offset provided in art. 88 of the Act, which norm has been later expressed in art. 212 paragraph 2 of the Act on the administration of immovable property.[18] As a result of previous consumption of the right to compensation by acquisition of a property or the right of its perpetual usufruct, the sum possible to set off against the value of the abandoned property becomes diminished by the value of the acquired ownership or the right of perpetual usufruct of the land property and buildings situated on that property and other installations or premises by entitled persons as well as their legal predecessors.[19]

In this situation the entity selling the property of the previously set off property is going to determine by himself the amount of compensation valid on the date of the realization of the right, which day is always the date specified in the notarial deed of the contract of sale of the property on the basis of information regarding the value of abandoned properties included in the decision of a Voivode. When it comes to decisions or certificates in which the Voivode only specifies the information regarding the value of compensation determined for the date of making the notation – it is going to be necessary, after the tender proceedings and before the conclusion of contract, for the entity alienating property to apply to the Voivode so that the latter could appoint the valorized values for the date of notation which may serve as a base for determining the due amount of compensation.

The value of compensation "remaining for further realization" is determined by multiplying the valorized value of the abandoned immovable property by 0.2, and diminishing the result by the valorized value of the rights acquired before the date of issuing the decision and after that day. Proper notation should be placed on the ascertainment or decision on the day of the realization of the right to compensation.

One of the assumptions of the majority of laws concerning the "right of offset" was the necessary activeness of the interested repatriates and their rightful legal successors, manifest in their participation in tenders in which properties owned by the State Treasury were sold. The size of this paper does not allow to point to instances of exclusion of the possibility to set off the value of property left beyond the borders of the Republic of Poland against the sale

[18] G. Bieniek, *Komentarz do ustawy o gospodarce nieruchomościami* .., *op. cit*., p. 374; J. Szachułowicz, *Gospodarka nieruchomościami* …, *op. cit*., p. 512 i nast.; J. Siegień, *Gospodarka nieruchomościami*, *op. cit*., p. 348; S. Kolanowski, A. Kolarski, *Ustawa o gospodarce nieruchomościami, op. cit*., p. 293.

[19] C.f. R. Sztyk, *Realizacja prawa*…, *op. cit*., s. 51; M. Wolanin, *Mienie zabużańskie* ..., *op. cit*., p. 10.

price of a property or fees arising from perpetual usufruct. Such examples could show that the legal construction expressed in the provisions of substantive law may be negated by defectively framed rules which implement substantive entitlements. However, it should be added in this place that the restrictions excluding considerable parts of assets from the compensatory procedure have paralyzed the possibility of the beneficiaries of repatriate entitlements to obtain financial support[20].

Moreover, the Agency of Agricultural Property often refused to conclude contracts with entitled repatriates, which entails legal actions aimed at obliging the Agency to make a proper declaration of will regarding the transfer of ownership of an agricultural property where the value of immovable assets left beyond the borders of the Polish State was set off against the sale price.[21]

The Supreme Court has pointed in its judgments that it is not in a position to deny repatriates the right to set off the value of the property left beyond the post-war borders of Poland against the value of the assets acquired in public tenders, stating at the same time that binding provisions of law were violated by the Agency and ordering the Agency to conclude contracts of sale with the exercise of the offset right of the immovable properties left beyond Polish borders. The construction contained in the provisions specified above demonstrates that the contractor is obliged to accept the declaration of the entitled person concerning the right of setoff of the abandoned property, correlated with the claim of the entitled person. Should the duty not be fulfilled by entities managing the assets of the State Treasury, the entitled person may sue the particular unit of the Treasury for the implementation of the obligation with the results provided in arts. 64 CC and 1047 of the Code of Civil Procedure. As a result the Agency has to make the declaration of will expressing consent to amortize the price or accept payment by setting off the value of the abandoned property.[22]

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[20] E.g. The amendment of the Act on the administration of agricultural immovable properties of the State Treasury from 29 December 1993, art. 89 of the Act on the accommodation of the Armed Forces of the Republic of Poland, Acts on the management of certain components of the assets of the State Treasury and on the Military Property Agency. As regards the so called "factual expropriation" c.f. S. Jarosz-Żukowska, *Konstytucyjna ochrona*…, ; *eadem*, *Spory wokół pojęcia wywłaszczenia,* „Państwo i Prawo" 2001, v. 1, p. 18; B. Załęska-Świątkiewicz, *Mienie zabużańskie - rekompensaty w aktualnym stanie prawnym*, „Rejent" 1998, No. 6, p. 176; R. Trzaskowski (w:) *Mienie zabużańskie*…, p. 93; J. Szachułowicz, *Zasady i organizacja reprywatyzacji, op. cit*., p. 33; R. Pessel, *Rekompensowanie skutków naruszeń prawa własności,* Warszawa 2003*,* p. 72; M. Masternak-Kubiak, *Glosa do wyroku z 19 grudnia 2002 r.,* K 33/02, „Państwo i Prawo" 2003, v. 6, p. 119 ff.;

[21] C.f. the judgement of the Court of Appeal in Białystok, 18 March 2004, ref. I Ca 89/04, Orzecznictwo Sądów Apelacyjnych 2005, No. 1, p. 41 ff.

[22] Resolution of the Supreme Court dated 20 April 2006 (III CZP 25/06, Orzecznictwo Sądu Najwyższego – Izba Cywilna 2007, No 2, pos.26) concerned the obligation to make a declaration of will of sale of an agricultural property with the exercise of the right to set off the value of property left Beyond the borders of contemporary Poland against the sale price, tha case was brought against the Agency of Agricultural Property by a person applying for the acquisition of the agricultural property who won the tender when art. 212 of the Act on the administration of real estate was binding in the shape achieved as a result of the judgment of the Constitutional Tribunal from 19 December 2002.

It is also worth mentioning at this point that the sale of immovable property performed as realization of the right to compensation has been exempted from the tax on civil law transactions up to the amount corresponding to the value of the realized entitlement.[23]

With the view to assuring clarity of the regulation concerning compensations for the property left beyond the contemporary borders of Poland, a number of *de lege ferenda* remarks may be formulated.

The currently binding Act should contain clear references to laws regulating the stages of the implementation of the right to compensation. This could allow – already from the normative perspective – to legibly point to the ways in which the realization of the right to set of the value of property left beyond the borders takes place. From the theoretical point of view, it might seem advisable to transfer all rules governing the right of offset to a single statute. However, the analysis of such a radical resolution demonstrates that the proposed solution could evoke unnecessary confusion. In the light of the above, it seems more appropriate to aim for the complementation of the currently binding laws in the suggested way.

3. Legal status of the "right of offset"

A fully uniform concept of the legal character of repatriate rights has not been elaborated. The material and hereditable character of the right of offset is undisputed. So is the conviction that the content of the entitlements of the repatriates is neither the possibility to claim directly adequate compensation from the State Treasury nor the demand to conclude the contract of sale of a property or award it for perpetual usufruct. There is, however, certain dispute concerning the character of the right and claim of setoff and the resulting receivable. The question is whether these are private or public law entitlements.[24]

The right of offset was also an object of interest of the European Court of Human Rights. In the case *Broniowski v Poland* representatives of the government tried to prove that no civil law obligation arises until the decision is issued by a proper authority concerning the setoff of the value of repatriates' assets. Only decisions of this type award the entitlement to repatriates and determines the content of this entitlement. In this view, the right is not correlated with the corresponding duty of the state authority to sell a property owned by the State Treasury. On the other hand, the complainant contended that the possibility of offset itself creates

[23] This happened by the inclusion of pt. 15 in art. 9 of the Act of 9 September 2000 on the tax on civil law transactions (DzU 2005, No. 41, pos. 399 later amended).

[24] C.f. R. Trzaskowski, *Mienie zabużańskie*…, *op. cit*.,, s. 77, *tegoż, Charakter prawny możliwości zaliczenia wartości pozostawionego mienia zabużańskiego (art. 212 ustawy o gospodarce nieruchomościami)*, „Przegląd Sądowy" 2003, z. 11-12, s. 12.

expectative rights to acquire the ownership right without a pecuniary payment, which accounts for the civil right status of the claim.[25] In the relevant judgment from 22 June 2004 the Court decided as to the effects of the right of offset, not its character.

In the light of the provisions of the 2005 Act the right to set off the value of the abandoned immovable property is classified as a public material right which carries out a special function of remitting specific pecuniary obligations. Such a qualification entails the necessity to cover the right with further guarantees, e.g. art. 1 of the Additional Protocol № 1 to the 1950 Convention for the Protection of Human Rights and Fundamental and the protection provided in art. 64 paragraph 2 of the Constitution.[26]

Opinions found in scholarly sources concerning the legal character of repatriate rights are relatively rare but also diversified.[27]

The size of this paper does not allow for broader investigations concerning the legal status of the right of offset. Before I present my own views in this respect, it should be signaled that in the light of the currently binding enactments governing the realization of the setoff right the construction may give rise to various readings. The right of setoff itself seems to be a civil law right, entitlement to establish a legal relationship. As a result of the declaration of will of the entitled person a part of the price is remitted. However this is not a remittal realized in the same way as in the civil law construction of set-off in the strict sense, because the remitted amount is the pecuniary receivable analyzed together with the right to compensation. In the classic sense of the term, set-off may be applied where the receivables are of the same kind. Another difference is the lack of exemptions, e.g. concerning garnished receivables in the case of set-off. By the very declaration of exercising the right of offset analyzed from the civil law perspective the entitled person causes a remittal of a part of the price. The application of this construction seems more favorable from the point of view of the repatriate's material interests. In the case of refusal to realize the right of offset the entitled party may sue state authorities for payment. One can also treat the right of offset as a claim, a right to demand that the value of the abandoned immovable property be calculated as a part of the sale price or

[25] Z. Cichoń, W. Hermeliński, *Sprawa mienia zabużańskiego przed Europejskim Trybunałem Praw Człowieka w Strasburgu...*, op. cit., p. 132 ff.; K. Drzewicki, T*raktatowe podstawy roszczeń zabużańskich.., op. cit.*, p. 129; P. Filipek, S*prawa „mienia zabużańskiego" przed Europejskim Trybunałem Praw Człowieka*, Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego, vol. I, A.D.MM III, p. 162 ff.

[26] C.f. the Supreme Court resolution from 20 April 2006 (III CZP 25/06) Orzecznictwo Sądu Najwyższego – Izba Cywilna 2007, v. 2, pos. 26.

[27] C.f. J. Mojak, Gloss to the S.C. resolution from 22 June 1989, III CZP 32/89, „Państwo i Prawo" 1991, No. 1, p. 118 ff.; J. Wołąsiewicz, *Analiza prawnohistoryczna uprawnień zabużańskich,* „Biuletyn Biura Informacji Rady Europy" 2002, v. 3, p. 17 ff.; J. Szachułowicz (in:) *Gospodarka nieruchomościami.* p. 513; *Zalety i wady ustawy o gospodarce nieruchomościami*, by the same author, „Przegląd Sądowy" 1999, v. 3, p. 7; idem, *Regulacja rekompensat za mienie pozostawione na terenach nie wchodzących w skład terytorium Polski* (in:) *Zasady i organizacja reprywatyzacji…*, op. cit., p. 33 ff.; G. Bieniek, *Mienie zabużańskie*…, op. cit., p. 158 ff.

fees for the right of perpetual usufruct. In such a situation the judgment of a court substitutes the declaration of will of the public entity obliged to realize the offset right.

4. Valuation of the abandoned property

The assessment of value of the immovable properties left in the East is a difficult task, because it is impossible to inspect the real estate on the date of valuation, namely the date of displacement of departure from the old territories of the Republic of Poland. The value of the assets is assessed according to current market prices, shaped under completely different social and economical circumstances. Based on experiences concerning the application of earlier laws, and for the sake of assuring the comprehensive character of regulation concerning the assessment of abandoned property, the principles of drafting the valuation survey, thus far contained in delegated legislation, were moved to the 2005 Act.

The norm of art. 11 of the Act of 8 July 2005 on the realization of the right to compensation for property left beyond the present borders of the Republic of Poland provides an explicit way of assessing the market value of immovable properties left beyond the current borders of Poland. The value of the lost assets is assessed according on the factual and legal condition of the real property on the date of the loss of property, understood as the condition on the day of departure, and prices from the day of the entry into force of the 2005 Act. Since the scope of compensation for the property left beyond the eastern borders was confined to real property only, other assets not classified as immovable do not undergo valuation. Such other assets may be: livestock and dead stock, agricultural machines, reserves, housing equipment or collected building materials.

The National Board of the Polish Federation of Valuers' Associations passed on 13 April 2007 the National Valuation Standard – Specialist № 1.1. (KSWS 1.1). The document "Valuation of immovable property left beyond current borders of the Republic of Poland for the purpose of realization of the right to compensation" was grouped among Standards of valuation for public purposes which replaced the former Standard IV.3 – "Valuation of immovable property abandoned in the areas not included in the current territory of the Polish state." In the period until 1 March 2008 the newly passed standard was consulted and recommended as a pattern for interpretation. On the aforementioned date KSWS 1.1 gained the status of a binding professional standard.

The methods of valuation are defined separately for each of constituent or functional parts of the valuated property. After the calculation of the value of particular components of the property, a table depicting those values should be placed in the valuation survey, and the their sum should be multiplied by the "repatriate" coefficient proper for the particular

Voivodeship. The assessment takes into account average prices in at-arm's-length transactions obtained for similar properties, situated in localities of approximately the same number if residents, comparable degree of urbanization and administrative character, as compared to the locality where the property in question is situated.[28] The final value is rounded off to the nearest tens or hundreds of PLN.[29]

For the lack of at-arm's-length transaction prices the replacement value of buildings is assessed. The value of immovable assets covered with forest or plantations of perennial plants is assessed as the summed value of the land and standing timber or perennial plants.

For of assessing the value of land the method of land evaluation ratings is applied, and for the valuation of trees, fruit and decorative bushes in parks and gardens the applied ones are the methods proper for expropriation, estimating the cost of planting and fostering plants. In the case of fruit plants the value of lost profits until the lapse of harvest period is taken into consideration. Should any problems occur connected with the establishment of similarity, it is necessary to Take into consideration the lapse of time, changes in the building craft and techniques. One element which should be omitted in the valuation process, as far as the catalogue of factors determining similarity is concerned, is the role of social relations before WWII, e.g. prestige. The valuer concentrates on rational and measurable technical and economical criteria.[30]

If it is impossible to apply the above methods, the 2005 Act additionally allows for assessment with undefined methods. The society of valuers postulate to apply the method of correcting the average price, or comparison in pairs. At this place the reader may be referred to abundant literature sources in this respect.[31] I shall agree with those who acknowledge the specific character of valuation of former repatriates' property. The methods of assessment are characteristic for this type, among other reasons taking into account that the valuated property is not subject to market transactions and is supposed to determine a base value for estimating

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[28] The Voivodeships Lwowskie and Podkarpackie are considered comparable with the use of coefficient 1,00; Tarnopolskie is comparable with Małopolskie (coefficient 0,67) and Podkarpackie (coefficient 0,76); Stanisławowskie Voivodeship with Małopolskie (coefficient 0,74) and Podkarpackie (coefficient 0, 84); Wołyńskie Voivodeship with Lubelskie (coefficient 0,84) and Świętokrzyskie (coefficient 1,02); Poleskie Voivodeship with Podlaskie (coefficient 0, 71); Wileńskie Voivodeship with Podlaskie (coefficient 0,64) and Mazowieckie (coefficient 0,41); Nowogródzkie Voivodeship with Podlaskie (coefficient 0, 80) and Mazowieckie (coefficient 0, 52) Białostockie Voivodeship with Podlaskie (coefficient 1,00); the city of Lvov is comparable with Cracow, (coefficient 1,00) as well as Vilnus with Lublin (coefficient 1,00).

[29] C.f. S. Kolanowski, *Kresy Wschodnie i mienie zabużańskie, cz. VIII - operat szacunkowy nieruchomości „zabużańskiej*", „Nieruchomości C.H. Beck", 2007, No. 4*,* p. 32; J. Konowalczuk, *Wycena nieruchomości zabużańskich,* "Nieruchomość" 2006, v. 1, p. 12.

[30] C.f. S. Kalus (in:) Bieniek G., Kalus S., Marmaj Z., Mzyk E.: *Ustawa o gospodarce nieruchomościami. Komentarz*. Warszawa 2005, p. 463 ff.

[31] M. Prystupa, *Metody wyceny nieruchomości* (in:) E. Mączyńska, M. Prystupa, K. Rygiel, *Ile jest warta nieruchomość,* Warszawa 2009, p. 137 ff.; the same author, *Ile jest warta nieruchomość? Metodologia wycen nieruchomości* (in:) M. Prystupa, K. Rygiel, *Nieruchomości. Definicje, funkcje i zasady wyceny,* Warszawa 2003, p. 113 i ff.

the compensation. What is more, particular parts of the immovable property – constituent and functional ones – are assessed according to diversified methodic principles.[32]

Except the abandoned buildings, the assessed elements are: wells, fences, pond constructions, silos, containers, cellars, cold rooms, as well as trees and bushes in orchards and gardens, unharvested crops and plants on farming land.

Hypothetically, the situation should be considered where the abandoned assets encompass a couple of immovable properties situated in various localities. In relation to properties located within one Voivodeship it is assumed that they may be assessed in a single valuation survey. Where the assets are located in two Voivodeships, they should be valuated within two separate surveys. Scholarly writings suggest that it is possible to draft one valuation survey in such a situation, separating at the same time the procedures of assessment applied for particular properties and multiplying the values by different repatriate coefficients. Such a solution seems more favorable for persons applying for compensation, because they do not need to cover the cost of two valuation surveys.[33]

The applied method of valuation of the abandoned property is also influenced by the fact that the currently binding 2005 Act provides for the possibility of complementary setoff. As a result the value of the due compensation is diminished by the value of previously consumer rights, understood as the "setoff" value of immovable properties acquired previously from the State Treasury. In relation to properties acquired before 1 January 1998 the assessment should be performed according to the condition on the day of acquisition and prices or replacement costs on the day of drafting the valuation survey. Where immovable property was acquired after that date, the price becomes valorized. Valuation of the acquired property consists in the assessment of market value or replacement costs, and concerns the right of ownership of a land property, perpetual usufruct of land property, ownership of buildings and other constituent parts of the acquired immovable property and ownership of flats.[34]

The modification introduced with the Act of 8 September 2006 on the amendment of the Act on the realization of the right to compensation for property left beyond the present borders of the Republic of Poland and certain other Acts[35] should be evaluated positively.

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[32] More information In: S. Kolanowski, *Kilka uwag na temat stosowania przepisów prawa w wycenie nieruchomości,* „Nieruchomości C.H. Beck", 2009, No. 1, p. 36 ff.

[33] Scholars invoke the analogy to including two different properties in a single land and mortgage register if the properties belong to the same owner and remain functionally connected. C.f. S. Kolanowski, *Kresy Wschodnie i mienie zabużańskie, cz. VII Kresy Wschodnie i mienie zabużańskie, cz. VII – przystąpienie do wyceny mienia zabużańskiego – uwagi praktyczne,* „Nieruchomości C.H. Beck", 2007, No. 3, p. 33.

[34] C.f. S. Kolanowski, *Kresy Wschodnie i mienie zabużańskie, cz. VI- zasady określania wartości nieruchomości,* „Nieruchomości C.H. Beck", 2007**,** No. 2, p. 37; J. Konowalczuk, *Wycena nieruchomości zabużańskich, op. cit*., p. 13.

[35] H. Kaśnikowska, *Opinia do ustawy z dnia 8 września 2006 r. o zmianie ustawy o realizacji prawa do rekompensaty z tytułu pozostawienia nieruchomości poza obecnymi granicami Rzeczypospolitej Polskiej oraz niektórych innych ustaw*, Biuro Legislacyjne Kancelarii Senatu (Legislative Office of Senate Chancellary).

The amendment concerns the validity of valuation surveys confirming the value of the abandoned properties drafted at the expense of the applicants. As far as the periods of deciding „repatriate" cases are generally longer, one year period of validity of the valuation surveys considerably impeded the possibilities to apply for compensation for immovable assets left beyond the borders of Poland.

5. Summary

The aim of the above investigations was to present selected questions concerning the compensation for assets left beyond the contemporary eastern border of Poland. While assessing the management of immovable properties from the point of view of the so called "right of offset" it should be emphasized that it is a well consolidated form of realization of the repatriate entitlement.

In the first place we should evaluate positively the provision banning entities which administer immovable property owned by the State Treasury from refusing to alienate those immovable assets with the exercise of the offset right of the value of the properties abandoned abroad, under the sanction of invalidity. One may speak of continuity of legislation in that matter.

Also the facilitation of the compensation possibilities by means of broadening the set of immovable properties owned by the State Treasury accessible to former repatriates.

Another essential facilitation of the possibility to acquire a property owned by the State Treasury in tender proceedings is the exemption of the persons entitled to compensation from the duty to submit vadium up to the value of the compensation right ascertained in a valid administrative decision or certificate.

The clarity of the procedures of awarding the compensation for immovable properties left beyond contemporary borders of the Republic of Poland achieved due to a precise separation of the administrative part, regarding the confirmation of the due right to compensation from the civil law part concerning the realization of the right to compensation for immovable property left abroad.

A disadvantage of the regulation is the fact that repatriate claims may still be satisfied only from the assets of the State Treasury. Such a solution is a result of the assumption that the statutory measures implemented by the Republic of Poland concerning the compensation for the results of the loss of abandoned property should be realized only at the expense of the State Treasury. At this place there is a difference as compared to the processes of re-privatization, where plans are drafted to impose on the units of territorial self-government the

duty of partial several-percent participation in the financing of compensations from the Re-privatization Fund, which proposal seems justified for a number of reasons[36].

Firstly, the former national property was acquired free of charge by municipalities on special terms provided in the Act of 10 May1990 – Provisions introducing the Act on territorial self-government and the Act on self-governmental employees, pursuant to which relevant right and duties were transferred to communal entities. The aforementioned thesis was confirmed by the Supreme Court,[37] which contends that the rights and obligations of the hitherto entities administering state property transferred to municipalities are likewise subject to transfer to relevant municipalities. As a consequence, it should be accepted that the same applied to the duty to compensate for damages inflicted as a result of nationalization.

As far as the possibility to avail of communal property for the purpose of re-privatization is concerned, the Constitutional Tribunal consistently allows such measures.[38] The Tribunal justified the necessity of participation of municipalities with the character of rights held by the units of territorial self-government, which enables intervention of the legislator in a broader range than it is the case with entities from outside the scope of public administration. Moreover, municipalities – deriving their legal existence from a set of self-government Acts – should accept the possibility of restricting material rights vested in them wherever such restrictions are necessary for the sake of ordering the legacy left by the People's Republic of Poland under new constitutional circumstances. The Tribunal argued as well that the general part of municipality assets, especially immovable property comes from the communalization of assets of the State Treasury performed by the legislator's will, and that in consequence communal property is to serve public Policy and realization of public goals.

In summary, it should be stated that although provisions of law are far from perfect as far as the compensations for property left beyond the present borders of Poland are concerned, the solutions implemented by the legislator, and consequently the management of real property owned by the State Treasury in this respect, may on the whole be evaluated positively.

[36] There are also scholarly papers devoted to the possibility to impose on the units of self-government the duty to participate in financing compensations. C.f. R. Pessel, *Rekompensowanie …*, *op.cit*., p. 98 ff. The opposite approach is represented by S. Jarosz-Żukowska, *Konstytucyjna zasada ochrony…*, *op.cit*., p. 288; *eadem*, *Spory wokół pojęcia wywłaszczenia*, *op. cit*., p. 140 ff.

[37] C.f. resolution of the Civil Chamber of the Supreme Court dated 8 January 1991, III CZP 70/90,OSNC 1991, v. 7, pos. 81.

[38] Decision dated 17 October 1995, K 10/95, OTK 1995, v. 2, pos. 10, datek 9 January 1996; K 18/95, OTK 1996, v. 1, pos. 1; dated 20 November 1996, K 27/95, OTK 1996, v. 6, pos. 50.

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