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SOCIAL MARKET ECONOMY VALUES IN LEGAL REFORM PROJECTS IN SOUTH EAST EUROPE (SEE)

Summary

German Technical Development Cooperation legal reform advisory projects are geared towards strengthening the principles seen in social and ecological market economies, by developing legal frameworks for private business activities and for transforming planned economic systems into market-oriented ones. The main focus is on projects which aim to introduce and strengthen the rule of law as part of good governance practices, as detailed in sub principle 1, and the improvement of business environments (sub principle 4). Although services provided in this advisory capacity do not have a value in themselves for the creation of social welfare, they do serve as a valuable tool in this regard. Additionally, appropriate regulation of market systems provides a mechanism for the state to monitor and compensate for the failures of the market, particularly with regard to socio-economically disadvantaged groups. The social market economy model developed this way, based on legal traditions which are related to the legal systems of the states of South Eastern Europe. The principles of a social and ecological market economy, as published by the German Federal Ministry on Economic and Development Cooperation have also significantly contributed to this development. Legal fields, which characterize a social market economy, namely labour laws, social and corporate laws, must be developed. Along with the explicitly cited consumer protection law, this is particularly true for a non-dispute related judiciary (notaries and property rights including related institu-

tions)[1] *but is also true for the area of enforcement, where social aspects take on special importance. In contrast with the approaches of other organizations active in development cooperation in the field of legal reforms, the orientation towards the principles of a social and ecological market economy represent a unique feature of German Development Cooperation in this field.*

Key words: *social market economy, legal reform projects, market-oriented system.*

I Introduction

The collapse of the socialist system and subsequent expansion of global economic relationships have presented the States of the former Soviet Union, East– and South East European[2] with the challenge of transforming their plan oriented economic, political and legal systems to a market oriented system. Part of this transition is a comprehensive reform of the legal system and the implementation of this by institutions and organizations.

Far from being homogenous, each country and region has specific differences. The situation in former COMECON states, independent development in South Eastern Europe (the former Yugoslavia on one hand and Albania on the other) and development in Asia cannot be compared exactly. What they have in common is, that the functions fulfilled by the main institutions in market-oriented economies also differ greatly from those in plan-oriented economies. In market oriented economies, private business activities are based on two pillars of freedom: contract and property rights. Freedom of contract ensures that entities doing business have something to act on, while property rights, protects the individual benefits. Both allow the pursuit of individual interests. In plan-oriented economies, contracts were used as a way of delegating the completion of a given plan, whilst state property effectively meant that decisions regarding production assets were made by the political regime[3].

From the very beginning, transition economies were supported during consecutive reforms by development agencies. Unilateral organizations such

1 See Markus Sikora, *Der Notar im sozialen Rechtsstaat* (Notary in the Social Constitutional State), Hamburg, 2007, p. 119.

2 The states of East and South-East Asia, e.g. China and Vietnam are not covered by this contribution because of the author's lack of experience in these countries.

3 It should not be forgotten that even in plan-oriented economies, facilities exist to delegate business decisions to (state) enterprises through rights of usage and rights of management in order to enable business to be conducted.

as USAID, GTZ, CILC[4], IRZ[5], SDC[6], ADA[7], SIDA[8], CIDA[9], DFID[10] were, and are, involved with multilateral organizations, in particular the World Bank[11], EBRD, OECD and the EU.

In most transition countries, comprehensive programs were established to support private business activities through the reform of institutions and by implementing organizations. The aim was to strengthen welfare gains in order to prevent impoverishment. A consensus existed between these organizations to ensure the introduction of freedom of contract and also to guarantee that property rights were fundamental elements of these reforms.

The impact of these programs should not be underestimated. In most important legislative projects, either one or many organizations were involved, as individual states did not have sufficient resources to implement the plans alone. The lack of expertise for the implementation of these programs, partly a legacy of decades of socialist rule, and partly due to budget limitations reducing the availability of external intellectual resources. This was further exacerbated by the setting of completion timeframes as a condition for financial support.

Alongside the need for comprehensive and effective coordination when several organizations are involved, the delivery of policy advice is heavily influenced by different approaches from the various organizations that are involved. These differences result from different legal systems in the organizations' countries of origin and also because of the various origins of the contracted advisors. In particular, differences between the Anglo-American and Continental-European approaches are important, whilst differences between the approaches of Continental Europeans are not so obvious because of a focus on approximation to the *acquis communautaire* of the EU.

In this paper, the approach to legal reform projects by the development cooperation conducted by the Deutsche *Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH* will be presented and reviewed in line with the guiding principle of a social market economy. It will be shown that these

4 (Dutch) Center for International Legal Cooperation.

5 *Deutsche Internationale Stiftung für Internationale Rechtliche Zusammenarbeit* (German Foundation for International Legal Cooperation).

6 Swiss Development Cooperation.

7 Austrian Development Agency.

8 Swedish International Development Agency.

9 Canadian International Development Agency.

10 British Department for International Development.

11 Partly by group members IFC (International Financial Cooperation) and IDA (International Development Association).

projects followed the objectives of international development cooperation as set out, for example, in the Millennium Development Goals. However, a specific approach has been developed which has a substantial impact on market economy reforms in transition economies. This can be seen in the projects conducted in South Eastern Europe.

II The overall concept of a social and ecological market economy

The key purpose for introducing the concept of a social market economy into development cooperation is the role this plays in preparing transition economies for the challenges of globalization[12]. With regard to the legal system[13], the concept was restricted to the fields of company, social and labour law[14].

Whilst social law is not covered by GTZ legal reform projects, labour law was the only one of these topics selected in certain states of Central Asia and Southern Caucasus. With respect to company law reform, it has to be considered that Continental-European and Anglo-American company law is currently undergoing a process of mutual approximation.

The concept of social market economy has been profiled in several publications, circulated mainly within GTZ, which seek to provide an outline and confirmed interpretation[15]. These publications state that the starting point for German development assistance and collaboration, with regard to the fight against poverty or at least the prevention of impoverishment, is only sustainable within the economic system, if, social and ecological factors are observed alongside growth orientation[16]. The concept of a social market economy is not opposed to the pro-poor growth approach of the World Bank,

12 See Twesten, *Institutions and the Role of the State in Transition Economies in the Context of Globalisation*, Eschborn, April 2006.

13 Legal systems or law, is seen with by this contribution not for its dimensions as a sociological phenomena, but rather as a law, set by states.

14 See Ricardo Gomez, *Soziale Marktwirtschaft im internationalen Systemwettbewerb* (Social market economy in the international competition of systems), p. 4 (on Company Law), p. 7 (on labor and social law), Hans Jürgen Rösner, "Soziale Marktwirtschaft und internationale Trends in der sozialen Sicherung" (Social market economy and international trends in social security), in GTZ (publ.), *Die soziale Marktwirtschaft als Leitbild für die Entwicklungszusammenarbeit* (Social market economy as a principle of development cooperation), Eschborn, 2005.

15 See GTZ (publ.) (previous note); GTZ, Goethe Institut (eds.), *Kulturelle Voraussetzungen für die Entwicklung von Demokratie und sozialer Marktwirtschaft* (Cultural preconditions for the development of democracy and a social market economy), Frankfurt on the Main, 2005.

16 See GTZ (publ.) (supra note 13), Preface by the managing director of GTZ, Eisenblätter, p. i.

but is based on different assumptions and reflects a specific German approach and the concretization of it[17].

In August 2007, the Federal German Ministry for Economic Cooperation and Development (BMZ) presented the "Principles of a social and ecological market economy in German development cooperation"[18]. The main principle stated that German development cooperation is led by 8 sub-principles, namely to:

1. Support the introduction of a rule of law;
2. Seek distributed growth;
3. Strengthen the private sector;
4. Improve the business environment;
5. Prepare the economy for the future;
6. Establish social partnerships;
7. Ecologically orientate the economy;
8. Assure equal opportunities.

Projects based on supporting legislative framework reform for private business activities can be attributed to sub-principles 1, 4, 6 and 8 (rule of law; market framework, social partnership, equal opportunities), particularly for the rule of law, as the projects support the creation of legal frameworks. As stated in the principles, the creation of a legal norm and its implementation to support the behaviour of the state, based on the rule of law, are the main focus of German development cooperation. The ability to enforce rights within the framework of capable judiciary, equal treatment of economic participants is strengthened and through this, so are equal opportunities and participation which are integral elements of a social and ecological market economy.

Improved market conditions for business alongside this judicial framework is an obvious requirement, calling for a consideration of the importance of the law of competition and the area of consumer protection, although neither have been included as characteristic of a social and ecological market economy so far.

Less obvious is the reference to social partnerships, stated in company law, as this sub-principle also covers mid– and long-term corporate decisions.

The alignment of economic policy advice, regarding the reform of legal frameworks based on the principles of a social and ecological market

17 See Tilman Altenburg, Detlef Radke, "Wirtschaftsreform und Aufbau der Marktwirtschaft: Betrachtung des EZ-Schwerpunktes aus der Sicht der TZ" (Economic reform and building up a market economy: Considering the focus of development cooperation form the perspective of technical assistance), p. 146, in GTZ (Publ.) (supra note 13).

18 Available at: *www.bmz.de/de/service/infothek/fach/konzepte/konzept157.pdf*.

economy, will then be shown through examination of the results of practical experience in South Eastern Europe.

III Description of the orientation of German legal reform projects based on the principles of a social and ecological market economy[19]

Only areas of civil law will be covered in this paper. No comments will be made regarding the extent to which the principles are relevant within the law of public administration. However, for example, the law on concessions (i.e. public franchises) is more directed at good governance, which is of great importance for all legal reform projects. Whilst the law on competition tries to compensate for failures in the market by concentrating on the power of the market, dealings in securities fall under company law. An attempt is being made to extend consumer protection to capital markets. Although this target group cannot be defined as socially disadvantaged, the value of their capital, and their investments for retirement in pension funds makes these protections worth considering, particularly in light of anticipated shortfalls in state based pensions schemes.

1. Company Law

Even before the publication of the principles, company law was identified as an area of particular importance for social market economy principles[20]. In addition to the organizational framework, employee participation in the supervisory board (or the board of directors in a monist system) was seen as being characteristic of a social market economy, and therefore an important focus for project planning. Latter topics were integrated to a lesser extent, due to a perceived lower relevance to practice. Differences in approach became evident, particularly with regard to closed corporations, specifically, with limited liability companies. Here the main source of dispute between projects concerned the retention of the minimum capital requirement for company registration. This dispute reflected the discussions taking place between EU member states. The German response to this issue involved the introduction of the "*Unternehmergesellschaft*" (Entrepreneurial Compa-

19 The term "principles" refers to a policy statement of the German Federal Ministry on Economic Cooperation and Development, emphasizing that German development cooperation policies will be informed by the principles of a social and ecological market economy. Cf. the website of the Federal Ministry: *www.bmz.de/en/issues/wirtschaft/ index.html*.

20 See II. supra.

ny) which has no capital requirements for registration, allowing rather for this capital to be accumulated during operation.[21] Although this approach was more in line with recommendations made by other organizations[22] it cannot be said to have been overly persuasive:[23] the model that was eventually introduced retained a minimal capital requirement, although dramatically reduced in relation to other partner countries[24]. This retention of minimum capital requirements in the regulations also observes the interests of debtors and minority shareholders[25].

Another point of major discussion was the matter of organizational structure, which rose to particular prominence with regard to joint stock companies. Here, the high level of regulation at the EU level effectively ruled out any discussion regarding minimum capital requirements. In this discussion, Anglo-American advisors recommended transition economies should move away from the continental European two-tier organization structure (which differentiates between a supervisory board and a management board), and adopt the Anglo-American system with a unitary board instead. Where both structures remain possible, this does not seem to be overly problematic particularly, if the two-tier system is retained for existing joint stock companies[26]. As the ability of two-tier systems to support mid-term oriented corporate strategies has been acknowledged,[27] it can be assumed the two-tier system will remain in South Eastern Europe for joint stock companies that are traded on the stock exchange[28]. This approach however, has more to do with South-east Europe's legal traditions and their relationship to the conti-

21 *Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG) vom* 23.10.2008, *BGBl. I, S.* 2026 (Law on Modernization of Limited Liability Companies and the Prevention of Misuse).

22 See OECD Paper, *General Principles of Company Law for Transition Economies*, 1999, p. 21 et seq.

23 See comparable findings for Caucasus and Central Asia, Rolf Knieper, *Juristische Zusammenarbeit: Universalität und Kontext* (Legal Cooperation – Universality and Context), Bremen, Ferriere, 2003, Point B.I.3., *www.cis-legal-reform.org/publication/articles-reports/juristische-zusammenarbeit-universalitaet-und-kontext.de.html.*

24 In Bosnia and Herzegovina it was reduced to 2,000 BAT, which is the equivalent of 1,000 €, see Art. 314 par. 1 of the Law on Companies of the Federation Bosnia and Herzegovina and in Serbia to 500 € (Art. 112 par. 1 of the Serbian Company Law of 2004 (*Official Gazette of Serbia*, No. 125/2004).

25 Which is also of particular importance in the Anglo-American approach.

26 See Art. 329 par. 1 Serbian Law on Companies, where joint stock companies can choose between either form, but public traded companies need a second board which can be also be an external controller.

27 See R. Gomez, *op. cit*., p. 5.

28 The former Yugoslav approach can even use a third body. Alongside the supervisory board and the management board the Administrative Council exists.

nental European system than the advantages of midterm oriented corporate strategies[29].

Approaches to company registration also differed widely, with the main debate connected to the effect of registration and the evaluation of the preconditions for company registration. Additionally, heated discussion has surrounded the question of where registration should take place, remaining with the courts, or whether new agencies will have to be established. While retaining the effect of the constitutional requirement to register a company through an act of the state, many countries have established new agencies for this purpose, which often lack the authority or the ability to check suitability of applications as against the criteria for registration.

The legal reform projects undertaken as part of German development cooperation have not yet expressly been related to the principles of a social and ecological market economy, nor only focused on the impact of socially balanced reforms. Instead, they have sought to develop more general approaches within policy advisory projects, in particular in the area of legal reforms. Reform does not have to be radical change, rather an alteration or amendment to a pre-existing substantial institutional structure[30]. This reduces the costs of transition by easing the educational burden for those who must apply the new rules – educating judges, attorneys, public clerks and businesses on the changes as they apply to them, rather than learning a whole new system. Training may be based on existing knowledge, and, to draw on the example of company law, should not require changes to organizational matters purely as a result of changes in the legal framework. An additional benefit, is the prevention of conflicts between institutions, particularly with regard to the shifting of authority from one body to another, or the establishment of new organizational structures where these were not been essential for transition. Newly established organizations must continue to exist after development cooperation with them has ended in order to maintain long-term stability. Last but not least, the creation sustainable and stable legal systems in transition countries mean they should not be used as laboratories for testing new regulatory concepts in European and International Company Law[31].

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29 See for Bosnia and Herzegovina Rajčević, Simić, *Harmonization of Laws on Companies – Companies in Bosnia and Herzegovina*, the Judicial Training Centre of the Federation of Bosnia and Herzegovina, Sarajevo, Banja Luka, 2005, p. 4.

30 A summary of this approach can be found in, R. Knieper, *Juristische Zusammenarbeit: Universalität und Kontext*, point A.

31 The example given concerns cumulative voting in Art. 309, in the Serbian Law on Companies, which was introduced on the advice of an Anglo-American advisor.

2. Law on Bankruptcy

German legal reform projects in most countries have been involved in the reform of bankruptcy laws[32]. These reforms must be seen in the context of general company law reforms. As a result of the involvement of different organizations, former unitary legal systems have introduced different approaches, with some following the "German" approach, and others orienting themselves more around Anglo-American system[33]. Similar linkages apply in the development of reforms to the system of enforcement, particularly for supporting privatisation measures. Bankruptcy is declared after the failure of a privatization procedure for state owned companies[34]. Within the bankruptcy proceedings, arrangements for employees are also an important, but not decisive difference. The setting of laws however does reveal some significant differences, mainly due to differences between the national legal systems. These reforms satisfy sub principle 1 "support of the rule of law" and sub principle 4, the "improvement of business environment" of the BMZ principles: an effective bankruptcy law supports the reintegration of private assets back into a business along with the enforcement of claims made during bankruptcy proceedings.

3. Law of Obligations

Next to property law, the law of obligations is a central element in any civil law system. In contrast to other transition countries, a modern law was already in force in the former Yugoslavia. It followed the essence of the Swiss Law of Obligations and was implemented through a dedicated legal practice and academic base. Despite that, legal reform projects were[35] and have been[36] active in the field in order to integrate EU directives into the current

32 This is true for all countries covered by the Open Regional Fund for South East Europe – Legal Reform (Albania, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia), except for Macedonia, which is participating in a related component of the ORF (on Company, Bankruptcy and Enforcement Law).

33 See Jasnica Garašić, *Das Ohrid Symposium* (The Ohrid Symposium), Edition Temmen, 2004, Robert Gourley, Mahesh Uttamchandani, "From Sea to Shining Sea: How Serbia and South-Eastern Europe Have Taken the Lead on Insolvency Law", *International Corporate Rescue*, February 2005, p. 5 (which criticized mainly the lack of harmonization in regional developments from different point of views).

34 See R. Knieper, *Juristische Zusammenarbeit: Universalität und Kontext*, point B.I.7.c).

35 In Albania, the set up of the Civil Code has been supported since the beginning of the 90's and was enacted in 1994.

36 In Bosnia and Herzegovina, the comprehensive completely new draft stagnated in a constitutional debate, after it was planned to enact the law on the Common State level. The draft was used for the new Law on Obligations in Kosovo, as the same international experts were in charge (Prof. Rüssmann from the University Saarbrücken). Following

law. These activities were often undertaken in conjunction with other related projects, under the regulations of special laws to ensure coherency with the legal system in general and the law on obligations in particular. For example, drafts for the Law of Financial Leasing in Serbia were presented which were inconsistent with the Law on Obligations. An acceptable solution was developed with the assistance of the bilateral project in Serbia.

In general, the introduction of modern types of contract, and the concomitant trend for special legislation represents an important issue in international cooperation regarding legal reform. Often reform projects have been commenced even when contracts can be managed through the application of the existing law on obligations. Despite this, special regulations seem to have received a certain level of promotion, have generated training opportunities and reflect current legislative needs, which cannot be managed through law of obligations integration, where at least a mid-term approach is needed[37].

The activities of German legal reform projects are all well aligned with the principles of a social and ecological market economy, and therefore, sub principle 4, the "improvement of the business environment". This effect is derived from interfaces with the legal framework for market activities, but also touches on sub principle 1, the "introduction of the rule of law" which is one of the cornerstones of the civil law system.

In addition to managing modern contracts, one main subject regarding the work surrounding the law of obligations, is the integration of consumer protection law in South East Europe. In most countries, special laws have been enacted to regulate aspects of consumer protection regarding public administration of civil laws. This carries an inherent risk of inconsistency, as seen in the current[38] Law on Consumer Protection in Serbia, which was enacted in 2005. In the current Law of Obligations, articles 142 and 143 deal with general contract terms. To be in line with current consumer protection directives, clause examples of invalid or unfavourable terms, along with regulations regarding main contract duties and the introduction of collective action suits, had to be introduced[39]. A conflict within the new regulations, regarding the law on consumer protection, shows[40] that the provisions in the law of obligations are slightly more biased towards consumers and are therefore,

that, activities in Montenegro were supported and a Serbian expert (Prof. Perovic from Belgrade) was involved.

37 See Thomas Meyer "The need for legal regulations on new types of contracts in countries with civil law tradition", conference paper for the annual meeting of the Association of Business Lawyers, 2005.

38 There is currently a working group preparing a new draft law on consumer protection which is supposed to be introduced during 2009.

39 The latter is regulated in procedural laws.

40 Independent because of the fact that the law from 2005 is partly not in line with EU standards.

to some extent, more suitable for approximation to related EU directives. In court practice, judges now have to deal with the task of defining relationship between the new Law on Consumer Protection and the regulations from the old Law of Obligations. To the present date it is unclear whether or not the old rules were made obsolete, superseded by the newer Law on Consumer Protection. Clarification is also needed as to whether the new law only applies in the regulations which are not included in the Law of Obligations. These questions make the implementation of the Law on Consumer Protection more complicated, a situation which could have been prevented through broad discussions in the Yugoslavian legal community, drawing on the existing familiarity with the Law of Obligations.

As consumer protection is specifically named in the principles for a social and ecological market economy operating with development cooperation[41], relevant activities do follow these newly formulated principles. Through modern consumer protection, asymmetries concerning regulations regarding information in the market can be identified and compensated for, alleviating the perceived inferiority of consumers, compared to those who are selling the products. This is a response seeking going beyond a mere approximation with the *acquis*. German consumer protection locates consumers within the principles of a social state based on the protection of disadvantaged persons, whilst the term "consumer" relates purely to the market in the European context[42].

The support of legal reforms in the field of consumer protection within German development cooperation follows these principles. Reforms, even when focused on achieving approximation to the *acquis communautaire*, generally achieve a broader outcome.

4. Property Law

Property law reforms are key aspects of German development cooperation in the field of legal reform in South Eastern Europe, although these activities are less related to restitution, which is often a politically sensitive issue. German expertise was sought, drawing on the experiences of reunification (although this is not directly comparable to the situation of transition economies) despite the political risks inherent in basing reforms on external advice. In this field, social elements are seen as important whilst general considerations have to be fair and relevant[43].

41 See sub principle 4 at the end.

42 See Hans-Wolfgang Micklitz, *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (Munich Commentary on the German Civil Code) (following: MüKo/Author), Premarks to §§ 13, 14 BGB, side no. 95, 5. issue, 2006.

43 See Option Paper, "Privatization of Construction Land in Urban Zones Including Restitution", Center of Legal Competence, which was supported in cooperation of German GTZ, Austrian ADA and Swiss DEZA (not published), 2006 p. 50.

For countries with developing and transitional economies, the importance of property rights been always understood on a totally different basis for property rights in contrast with the function of the same in market oriented systems[44], particularly for former socialist countries[45]. Despite a decreasing importance regarding property rights in material terms and in terms of the means of production in developed legal systems[46], support for the reform of a substantial property law for material items, represents an essential part of the advisory services in South Eastern Europe. This is, especially true for property rights for immovable objects, where the introduction of indisputable rights is important to open access to credit by providing security rights on immovable objects. The administrative structures for implementing authorities (land registries etc.) are a core element, which are only partly covered by special projects form an important part of the reform of actual substantial property law[47]. Since intellectual property rights are limited by the scope of the WTO special projects on accession handle these issues. The legislative situation is comparatively well developed, as special laws on trademarks, patents, utility patents and author's rights existed during the former Yugoslavia. Substantive property law, however is quite different: Under the former federal structure this was controlled by the respective republic, while at the federal level, only a basic framework of laws existed. The wars in the Balkans and the subsequent need for urgent action led to a ragged approach across the partner countries. German projects focused on property rights regarding material things and rights on immovable.

As in other fields, German projects benefit from the similarity of the legal structures in South Eastern Europe to the German tradition, due to their Austro-Hungarian influence. This is particularly true regarding property law, where similarities are even more visible than with the law of obligations, which also have a French influence.

Differences between projects run by other organizations, particularly USAID, have arisen due to their different legal traditions. Within the Anglo-American legal systems, no detailed differentiation between absolute and

44 See Hernando de Soto, *The Mystery of Capital*, 2000.

45 See remarks in the introduction. See Rolf Knieper, *Rechtsform und Gesellschaftsform, Festschrift für Rolf A. Schütze* (Legal Form and Social System, Festschrift for Rolf A. Schütze), Munich, 1999, p. 389 ff.

46 See Rolf Knieper, "Von Sachen und Gütern – in neuen und alten Kodifikationen", (Of Things and Goods – in new and old codifications), in: Rolf Knieper (ed.), *Rechtsreformen entlang der Seidenstraße* (Legal Reforms Along the Silk Road), Berlin, 2006, p. 189–202, p. 190

47 The example given refers to a land management project in Bosnia and Herzegovina, carried out with co-financing from Sweden and Austria, and was established as a result of preparatory work done within the project "Economic Law Reform". The subsequent GTZ project in Serbia on land management is partly based on preparation work carried out by the project "Advice for Legal Reform in the Federal Republic of Yugoslavia".

contractual rights exists[48]. In practice, American projects, which rarely focus on property law, deal predominantly with registered pledges on movables. Within these projects, partial drafts have been presented, which are neither consistent with civil law approaches nor fit with legal traditions present in South Eastern Europe[49]. In other regional countries, local legal traditions were better respected in projects supported by the EBRD[50].

Even if the introduction of legal security, as contained in sub principle 1 of the BMZ principles, is of major relevance, German property law shows that social elements, e.g. the principle that the sale of goods does not terminate a rental contract[51], are a special feature of German law[52]. Despite these social aspects[53], it must be stated that the support of property is mostly focused on legal security, specific regulations to protect socially disadvantaged persons are only considered in connection with other issues, particularly regarding the enforcement of the law.

5. The Registration of Proprietary Rights

Property law reforms are accompanied by a reform of the register for rights on immovable and registered pledges on movable objects. The register of rights on immovable objects exists in Continental and European legal traditions, as a source of information which benefits from constitutive effects of registration. Changes to rights disregarding this register do will produce legal effects only under very limited circumstances. Whilst this permanency applies to the register for immovable object rights, other organizations have demonstrated a focus on information and in particular information regarding credit related to business. German projects, tend to focus mainly on the implementation of general principles for registration[54]. This includes a le-

48 See Thomas Meyer "Structural differences between Anglo-American and Continental-European property law" (in Serbian Language), *Pravni život*, No. 10/2006.

49 E.g. the Bosnian Framework Law on Pledges, which came into force in 2004.

50 E.g. the Serbian Law for the Registration of Pledges on Movables, which was enacted in 2004. See also an overview of the region: Thomas Meyer, Christian Athenstaedt, "Introduction of non possessory registered pledges in South East Europe", Contribution to the conference "Problems of contract law in the states of Caucasus and Central Asia", 10 and 11 April 2008, under publication.

51 See § 566 BGB.

52 See MüKo-Häublein, § 566 BGB, RN. 6, 4. issue, 2004, see in conflict with § 1120 of the Austrian Civil Code, where it is regulated, that only registered rental agreements continue to exist after sale, which is not possible under German law.

53 And other aspects, arising from acquiring a monopoly of legal positions through legal regulations, see R. Knieper, "Von Sachen und Gütern – in neuen und alten Kodifikationen", p. 191.

54 See the opinion paper prepared by Prof. von Schuckmann on the Serbian draft Law on Cadastre, surveying and Registering Rights on Immovable Objects, see also the commentary by Weike, Tajic on the Law on the Land Registry in BiH.

gal check up of the state authorities involved in the registration process, to prevent state influencing of registration, and guarantee the independence of registrars, thus preventing undue influence from the executive branch. The systems in place vary across the region, for those regions which were under Austro-Hungarian influence land registration is carried out by courts, which have come to play the role of a third pillar in the division of power required for the aforementioned independence. However, a similar court administered land register also exists in Slovenia, Croatia, Bosnia and Herzegovina and parts of Serbia (in particular Vojvodina but also urban areas), where a court system was established after World War I. No uniform rule exists in territories which were influenced by the Ottoman Empire (South– and East-Serbia, Albania, Macedonia) or in those which were not directly connected to the Austro-Hungarian sphere (Montenegro). Other systems involve a collection of documents, which can be compared with the Turkish system, whilst in other parts, registration was carried out with the cadastre (land registry) or no register exists at all.

GTZ's approach has always been neutral regarding institutional setting. As there is a need for independence regarding the registration process, court based systems are often reasonable, particularly as they can be easily set up within general court independence procedures ruling out state liability for incorrect registration to some extent. However, experience has shown that working systems can be set up outside the court system. Other organizations, in particular the World Bank, insist on integrated solutions referring to the poor state of the court systems in general, which may cause delays in the establishment of registers[55].

Social aspects are slightly outweighed by considerations regarding the strengthening of the rule of law, as stated in sub principle 1 of the BMZ principles. These is however a social element introduced by the fee structure for entries. Where these are calculated according to the value of the real estate, the question of cross-subsidy of fees for high value entries arises, fees are higher with higher value based entries, although the necessary resources for registration are comparable. As a result, transaction costs for real estate transfers (or the establishment of security rights for example) are less than those for high value transactions. Thus it could be said that there is a social component in the real estate market, which is connected to the orientation of the principles of a social and ecological market economy, and beyond the scope of sub principle 1 (the introduction of the rule of law)[56].

It should not be overlooked, that elements of a social market economy did well exist before the term "social market economy" was introduced into

55 Surveys show that with a court system, timely registration is also possible whilst the main delays are generally caused by the initial registration of a plot, also where integrated systems are in operation.

56 See comparable argument regarding the fees of notaries.

political debate during the second half of the 20th century[57]. Similarly, land registries had already been introduced early in the 19th century. What we commonly classify as a social market economy is not a invention of recent politics. Instead, it was built up and developed (along with other systems) in a way which is documented in sub-principle 1of the BMZ principles. The same holds true for Company Law, where a two-tier system in joint stock companies was introduced in the 19th century.

6. Notaries

The process of introducing latin notaries into the countries of South East Europe ranges from commenced[58], to completed processes[59]. In Bosnia and Herzegovina, Montenegro and Serbia this process happened with the support of GTZ legal reform projects in close cooperation with activities carried out by the German Foundation for International Legal Cooperation[60] and other organizations, for example, the Konrad Adenauer Foundation[61]. Latin notaries represent an important part of a reformed institutional setting together with the judiciary. In reflecting Austro-Hungarian and German traditions, notaries assume duties in the field of voluntary (non-contentious) jurisdiction, while the judiciary performs its function on the basis of a "two pillar" model of non-contentious justice[62]. Registers are another example of this kind of institutional setting for the prevention of disputes, holding specific powers for registering rights, and guaranteeing the correctness of those rights and facts, regardless of whether they have been established within courts or by independent authorities. In all cases, these registers strengthen legal security regarding important economic resources or facts[63]. The second pillar, which was named in the former Yugoslavia as a "non-dispute judiciary", works well with local legal traditions including those which were followed during the socialist era.

57 Alfred Müller Armack, *Wirtschaftslenkung und Marktwirtschaft* (Steering of the economy and of the market economy), 1946.

58 In Bosnia und Herzegovina, Latin notaries started to work on 5 May 2007, whilst in the Republic of Serbia, they started to be present early in 2008. In Montenegro, the introduction of Latin notaries will take place soon, whilst in Serbia the law is still under the process of being completed.

59 Slovenia, Croatia, Macedonia, Hungary, Romania, Bulgaria, Czech Republic and Slovakia introduced Latin notaries, in part, 15 years ago and have had positive experiences with this.

60 In particular Albania, Bosnia and Herzegovina and in Serbia.

61 Project involved carrying out political preparations in Montenegro.

62 See *www.bnotk.de/Service/BNotK-Intern/2007/BNotK-Intern_2007_1_01.html*.

63 E.g. on the legal representatives of corporate bodies.

Latin notaries differ from the notary public in common law legal systems as they can fulfil state functions in civil law countries, rather than merely officially witnessing signatures. This subject is currently under discussion within the European Union, but is acknowledged in several legal acts determined by the EU[64]. One of the main functions of Latin notaries is to create evidence in legal relations, to give impartial legal advice and on some occasions, provide an insurance function.

This creation of legal evidence is one of the key functions of the Latin notary. The involvement of an impartial third party, appointed by the state, who creates a legal document from the original documentation and hands over official copies only, ensures that original texts cannot be falsified. Notarised documents (deeds) are awarded a special trust in legal transactions because of these procedures[65]. The evidence they provide is given extra weight in national court proceedings and they were granted the status of an executive title in the European Union[66].

One of the most important duties of Latin notaries[67] is the provision of impartial advice, comprising comprehensive information on the entire content legal content of a notarized document. Along with legal security regarding the expectations of involved parties, this service serves as a primary source of providing information to a less informed party. This function allows, notaries to compensate for irregularities in information provided, creating equality between parties recognised by civil law[68]. On the basis of the information received, the third party may withdraw from a legal transaction, based on the advice given regarding legal consequences,. Should the party choose withdraw, it cannot invoke a claim of nescience without engaging an attorney for additional legal advice[69]. This process contributes much towards the prevention of disputes and improving legal security, in turn reducing both the costs of general legal advice, and for the costs of legal representation in

64 See Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (*OJ* L 143, 30.4.2004) and Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (*OJ* L 255, 30.9. 2005), where Latin notaries are excluded because of their state function.

65 See no. 1.1. par. 1 of the "European Codex of Notarial Practice" prepared by the *Conférence des Notariats de l'Union Européenne* in the version by 9 November 2002, available in French, Italian and German only, see *www.cnue-nouvelles.be/en/002/003. html*.

66 See Regulation (EC) No 805/2004.

67 See Art. 80 and 81 Law on Notaries oft he Federation Bosnia and Herzegovina. See no. 1.1. par. 3 and no 1.2. par. 2 of the "European Codex of Notarial Practice".

68 See M. Sikora, *op. cit*., p. 341, where the role of notaries within consumer protection is reflected.

69 Attorneys were in opposition to the introduction of notaries, See *Dnevni Avaz* by 25 July 2007.

trials. The reintroduction of notaries into South East Europe where no duty to notarise real estate transactions exists, it can be seen that Latin notaries clearly serve a public need, as most real estate transfers are notarized on a voluntary basis[70].

A valuable element of the services carried out by notaries in relation to notarizing legal transactions, is their professional indemnity insurance. This obligation to hold appropriate liability insurance to cover potential damages and also carries special appointment procedures and further training obligations. This means that parties engaging a notary do not need to check qualifications, but can be certain that they will not suffer loss or damages, as this is covered by professional liability insurance even if the notary cannot personally pay compensation due to lack of funds[71].

A social element to this process is introduced again through the fee structure[72]. Thus, the involvement of notaries increases legal security, but also increases transaction costs. These costs however are partly shifted to less valuable legal transactions. The social element is further enforced by the use of registries, which provide greater information and access to legal advice for lower socio-economic groups in the community, who may previously have not sought to protect their legal rights in this manner in order to reduce costs[73].

The support from German development co-operations for the introduction of Latin notaries as part of overarching legal reforms, was guided by the principles which govern a social and ecological market economy. These services have had the additional benefit of strengthening legal security (sub Principle 1), correcting information asymmetries and redistributing related costs according to social criteria[74].

7. Enforcement Law

The enforcement of civil claims did not feature in plan-oriented economies, as the private sector did not play a significant role in the economy. For market oriented-systems however, the importance of enforcement and its apparent central role in the system cannot be overstated. Reforms to sub-

70 The number of rejected applications made to the land registry in Croatia decreased dramatically as a direct result, of the involvement of notaries in real estate transactions.

71 See M. Sikora, *op. cit*., p. 395, Thomas Meyer, "Professional liability insurance for (legal-) advisory professions in Germany" prepared for the annual meeting of insurance lawyers association of Serbia in September 2004 in Budva, Montenegro.

72 See M. Sikora, *op. cit*., p. 383, 396.

73 See M. Sikora, *op. cit*., p. 397.

74 See M. Sikora, *op. cit*., N 72, p. 237.

stantive law, and the adjustments made for a market-oriented system does not provide any benefit if the state does not provide a court system to try civil claims. If enforcement must be carried out through the legitimate use of physical force, under the German approach state authorities should exercise this use of force[75]. Enforcement laws must be strictly regulated to ensure that social elements are not overlooked in the exercise of state power. These social elements include ensuring that debtors retain a sufficient level of assets required to maintain a level of existence with dignity during the enforcement process without impinging on debtors' dignity[76]. As these principles are often overlooked or under-emphasised by other international organizations, these principles should be included as a matter of course into legal reform projects particularly in the areas of enforcement, even when not explicitly called for in sub principle 1 of the BMZ principles of a social and ecological market economy[77].

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ВРЕДНОСТИ СОЦИЈАЛНЕ ТРЖИШНЕ ПРИВРЕДЕ У ПРОЈЕКТИМА ЗА ПРАВНУ РЕФОРМУ У ЈУГОИСТОЧНОЈ ЕВРОПИ

Резиме

Саветодавни пројекти за правну реформу Организације за техничку сарадњу Немачке су усмерени на јачање принципа препознатих у друштвеним и еколошким тржишним економијама, тако што развијају правне оквире за приватне пословне подухвате и за претварање планских привредних система у тржишно оријентисане. Главни фокус је на

75 See Rolf Knieper, "Privatization of Enforcement is not the Answer", in Rolf Knieper (ed.), *Rechtsreformen entlang der Seidenstraße* (Legal Reforms Along the Silk Road), p. 291, 292.

76 Potentially different approaches of other organizations is different documented by a contribution of a representative of IFC (International Finance Cooperation) on the Conference "Collateral Reform and Access to Finance" (at EBRD in London 2006) where he reported on good experiences with the destruction of pledged vehicles or/and the publication of photographs in daily press.

77 See supra, III.

пројектима који теже увођењу и јачању владавине права као делу праксе доброг управљања, како је наведено у првом потприципу, и побољшању пословног окружења (потпринцип 4). Иако услуге које се пружају у том саветодавном оквиру немају вредност у оквиру самих себе за стварање социјалног благостања, оне служе као драгоцено средство у том погледу. Осим тога, адекватна регулација тржишног система обезбеђује држави мезанизам за надзирање и компензовање неуспеха тржишта, посебно у погледу социјално-економски угрожених група. Модел социјалне тржишне привреде је развио тај начин, на основу правних традиција које се односе на правне системе држава југоисточне Европе. Принципи социјалне и еколошке тржишне привреде, које је објавило немачко Савезно министарство за економску сарадњу и развој Немачке, су такође значајно допринели овом развоју. Правне области, које одликује социјална тржишна привреда, то јест радно право, социјално и корпоративно право, морају се развити. Уз изричито наведено право заштите потрошача, то се посебно односи на правосуђе у делу који се не односи на решавање спорова (нотари и својинска права укључујући сродне институције), али се односи и на поље примене, у коме социјални аспекти имају посебан значај. За разлику од других организација које су активне у сарадњи за развој у области правних реформи, усмереност на принципе социјалне и еколошке тржишне привреде представља јединствено обележје Организације за сарадњу Немачке у тој области.

Кључне речи: *социјална тржишна привреда, правна реформа, тржишно оријентисани систем.*