

A Swiss perspective on pre-emption rights: impact without application

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How is pre-emption implemented in Switzerland?

Unlike France (→ *Melot*), the Netherlands, Germany, or Austria, the implementation of an unlimited state pre-emption right on building land is, in Switzerland, very limited. There is no explicit mention of this instrument in the federal legislation, and only two cantons – Vaud and Geneva, both located in western Switzerland – have introduced such an instrument in their current legislation. The canton of Geneva introduced a pre-emption right in favour of the state and the municipalities in 1993. Pre-emption can potentially be applied on all land plots located within existing – as well as future – building zones that are likely to be used for the construction of housing stocks, industrial development, the implementation of public facilities and airport infrastructures, or the protection of heritage buildings. It aims at providing state authorities with the capacity, first, to set up land reserves and, second, to prevent speculation leading to overpriced land transactions, which could hamper public interest within planning processes. Pre-emption has proven to be quite efficient in Geneva as it helped both state and local authorities create favourable land property conditions for the implementation of land use policy objectives. It is, however, worth noticing that the full potential of pre-emption is rarely used by public authorities; the latter being, for example, very reluctant to use pre-emption in the case of building zone extension as allowed by law (Prélaz-Droux et al. 2009). The canton of Vaud has, for its part, very recently (12 February 2017) introduced in its cantonal Housing Act a limited pre-emption right on buildings and building land in favour of municipalities. It aims to promote the renovation of old housing stocks as well as the construction of new ones.

Although there exists, to our knowledge, no systematic survey on the implementation of a pre-emption right at the local (i.e. municipal) level in Switzerland,¹ one can claim, with very limited risk of error, that this type of land property instrument is absent from the policy instruments toolbox of most Swiss municipalities.

This reluctance to provide public authorities with policy instruments limiting private property rights may be explained by the persistence of a

'communitarian' ideology as well as the historic significance of (neo-)liberal ideas in Swiss political culture (Knoepfel and Schweizer 2015). Both phenomena have contributed to the development of a popular feeling of mistrust about (increasing) state power and have led political parties to fight for a limited and controlled transfer of decision-making powers to public authorities. The central political role played by civil society organisations and non-governmental organisations (NGOs) in solving public problems, as well as the very central importance of the 'subsidiarity principle' in Swiss polity (Linder 2010), both illustrate this kind of 'anti-state' ideology. It is, however, interesting to notice that there are significant differences between cantons regarding the role (to be) conferred to the state and public authorities. Whereas the cantons of Central and East Switzerland are good examples of this 'liberal', and, to a certain extent, 'anti-state' conception, cantons of western Switzerland (including Bern) have proven to be less reluctant to develop more interventionist public policies. It is thus not surprising to find the more interventionist land use policy instruments in this part of the country, such as taxes on added-value in Bern and pre-emption rights in Geneva and Vaud.

Effectiveness, efficiency, legitimacy, and practicability of pre-emption right

Empirical evidence from France (cf. *Melot*) and to a certain extent from Switzerland (Bellanger 2013; Prélaz-Droux et al. 2009; Tanquerel and Bellanger 2009) shows that the pre-emption right may be *effective* as well as *efficient* (notably in the case of indirect impacts: see developments below). However, as most interventionist instruments, *legitimacy* is a sensitive issue that tends to be tightly linked with *practicability*. These four criteria are further discussed in this section.

Effectiveness

A pre-emption right can impact landowners in *direct* and *indirect* terms. Direct impacts compel (private) landowners, willing to sell their plots, to cede them to state authorities (mostly local or regional). The main (positive) effects of such mandatory transfers of private land property titles to public ownership are twofold. Not only do public authorities gain access to strategic land plots that are crucial for implementing planning objectives of public interest, but the instrument also drastically limits speculative or hoarding behaviours of private landowners who seek to prevent the realisation of these objectives. In this regard, state pre-emption may also impede local (informal 'little') arrangements between private landowners, architects, and construction firms.

Indirect impacts consist mainly of pressure on landowners through the threat of pre-emption as well as an increase in the control of the local land market by public authorities, which is a resulting consequence of publicity

and the transparency obligations imposed on landowners willing to sell their land plots.

Like many interventionist (property right oriented) instruments, the effectiveness of a pre-emption right results as much from its direct as from its indirect impacts: the public authorities' threat to use pre-emption is often a sufficiently strong signal to convince (private) landowners to use their property (land plots or buildings) in accordance with planning objectives. In the same way, the increased transparency of local land markets resulting from the obligation of publicity imposed on landowners provides public authorities with a substantial increase in their capacities to control these markets.

Efficiency

The efficiency of a pre-emption right varies significantly between direct and indirect impacts. Whereas direct impacts can be rather costly for public authorities depending on the size and the (market) value of the pre-empted plots, indirect impacts are very efficient, for the most part, as they are nearly free by-products.

It should, however, be noted that an interdependent relationship exists between the two types of impacts. Indeed, the strength of indirect impacts depends, to a certain extent, on the scope and frequency of the use of pre-emption by (local) public authorities: if never used, pre-emption will cease to be considered a threat by the landowners.

Legitimacy

Legitimacy depends first of all on the capacity of public authorities to enable the recognition and acceptance, by the citizens, the other political actors as well as civil society organisations, of public problems as sufficiently important to be solved through state intervention. Pre-emption's legitimacy will thus depend on the relationship – or the 'ratio' – between the type and importance of public interests at stake and the (perceived) scope of limitations imposed to private property. The acceptability of which depends on the dominant view of private property protection within the society.

Legitimacy also strongly depends on the power relationships between the actors negatively affected by pre-emption (first the landowners) and the beneficiaries of its implementation (municipalities, citizens, tenants, etc.). The broader the group of beneficiaries, the more legitimate the instrument. Conversely, the more powerful the negatively affected actors are (landowners, architects, construction firm, investors, etc.), the less legitimate the instrument. In particular, the strength of landowners' opposition will depend on the (real or imaginary) loss in value of their property. Therefore, legitimacy of pre-emption could probably be substantially increased through the integration of the developers, investors, and construction firms in the group of pre-emption beneficiaries.

But legitimacy of pre-emption also depends, on a more practical level, on its efficiency as well as on its concrete impact on public finances: if too expensive for the taxpayers, the instrument could also be contested by a part of its supposed beneficiaries.

Finally, it is worth noting that pre-emption contributes to the strengthening of the executive to the detriment of the legislative: municipal executives are given the power to drastically intervene on the land market with only loose control by the parliament.

Practicability

The implementation of an unlimited state pre-emption right usually requires at a minimum the following four steps: (1) zoning of the planning area concerned with pre-emption, (2) provision of funds for the acquisition of pre-empted land, (3) assessment of property value by an independent land commission, and (4) completion of land purchase by public authorities.

The main conditions for achieving these steps are the following:

- Existence of a clear legal basis;
- Strong political support from citizens, other political actors (notably legislative body), as well as civil society organisations;
- Availability of public funds;
- High reactivity and processing speed of the executive authorities.

Concluding remark

The Swiss example shows, by contrast, the rather high intervention capacity of French public authorities on land markets, in particular through the use of pre-emption. The latter is one of the main instruments allowing land acquisition, which can then be used for strengthening land use policy implementation. Whereas Swiss public authorities are most of the time obliged to negotiate, sometimes bitterly, with a number of more or less cooperative individual and/or collective landowners in order to implement their planning objectives and development projects, French authorities can rely, when interacting with private landowners, on the convincing power provided by the threat of pre-emption.

Notwithstanding this significant difference between the two countries regarding the power configuration in between private and public actors, as well as the intervention capacity of public authorities, it is uncertain if French land use regime can guarantee a better way of dealing with land scarcity. If it is likely that the intervention capacity of French authorities is allowing them to implement rather quickly planning decisions and projects, numerous examples have proven that (centralised) state planning processes with limited local and/or private counter-powers do not automatically lead to optimal decisions when dealing with land scarcity issues.

Thus, as the Swiss case shows, the obligation for public authorities – owing to the very limited public ownership on land – to negotiate with private landowners or investors (and, what’s more, under the control of direct democracy) can sometimes lead to similar if not more optimal planning decisions with regard to a careful land use; the major problem being the huge amount of time necessary for the realisation of such development projects.

Note

1 On 1 January 2017, Switzerland had 2,255 communes/municipalities (Source: www.bfs.admin.ch/bfs/fr/home/bases-statistiques/agvch.html), which render such a survey rather hard to realise.

References

- Bellanger, F. (2013) Déclassement et autres mesures de planification dans le canton de Genève, in: Foëx, B. (ed.) *Planification territoriale. Droit fédéral et spécificités cantonales*, Bâle Schulthess Verlag, Genève, Zürich, 85–112.
- Knoepfel, P. and Schweizer, R. (2015) Le local et le global: quatre défis de la codification du droit foncier dans le cadre du processus de rédaction du Code civil suisse de 1907, in: Travési, C. and Ponsonnet, M. (eds) *Les conceptions de la propriété foncière à l'épreuve des revendications autochtones: possession, propriété et leurs avatars*, Pacific-Credo Publications, Marseille, 79–93.
- Linder, W. (2010) *Swiss democracy: Possible solutions to conflicts in multicultural societies*, Palgrave Macmillan, Basingstoke.
- Prélaz-Droux, R., Maunoir, A. and Tranda-Pittion, M. (2009) Politique foncière et aménagement du territoire dans les cantons de Genève et Vaud, *Projet d'agglomération franco-valdo-genevois*, 10(3), Genève.
- Tanquerel, T. and Bellanger, F. (eds) (2009) *La maîtrise publique du sol: expropriation formelle et matérielle, préemption, contrôle du prix*, Schulthess Verlag, Zürich.