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**Cross – border acquisitions by non – agricultural capital of agricultural land.**

Poland, even though land area systematically decreases, has significant resources of agricultural areas (15.5 million ha), which constitute 49% of the country's area. The average size of agricultural holdings is much diversified, e.g. an agricultural holding in Zachodniopomorskie Voivodeship exceeds 30 ha, while in Małopolskie Voivodeship does not exceed 4 ha. Legal rural legislation holds a protective hand over family agricultural holdings, i.e. between 1 ha – 300 ha of agricultural areas. Agricultural areas in Poland offer attractive location in the centre of Europe, outstanding natural and landscape features, including a high level of biodiversity, relatively low level of soil degradation owing to rather not extensive agriculture, a low price in comparison to the Western European countries. The specified features the Polish agricultural real estate can result in an interesting offer for the foreign acquirers.

Poland, like many other EU Member States, has restricted freedom of the real estate trading and introduced control over it. The control over real estate transactions involving foreigners shall be carried out using instruments of public law and private law.

**I.**

In terms of public legislative solutions the acquisition by foreigners of the right of ownership and the right of perpetual usufruct to real estate located in Poland is the subject to special legal regulations, repeatedly amended of the Act of 24.03.1920 on the Acquisition of Real Estate by Foreigners, hereinafter referred to AAREF<sup>1</sup>. It should be noted as a preliminary remark that the trading of Polish real estate for the benefit of the foreign entities from the European Economic Area and the Swiss Confederation in the last decade as a consequence of Polish accession to the EU. At present, restrictions in the acquisition of real

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<sup>1</sup> Consolidated text: Journal of Laws: Dz. U of 2014, pos. 1380.

estate in Poland by the foreigners refer first of all to real estate located in the frontier zone and agricultural real estate. They reflected in annex XII to the Treaty of Accession dated 16.04.2003r.<sup>2</sup> On the basis of the regulations of the Treaty the transitional periods have been implemented, by virtue of which the provisions of Union law are temporarily suspended in strictly defined subjective and objective scope. Irrespective of direct effect of the Treaty of Accession, solutions exercising the subjective Treaty provision have been adopted in AAREF.<sup>3</sup>

In view of the adopted solutions, AAREF classifies foreigners in two categories: the foreigners from the European Economic Area (EEA) and the Swiss Confederation and foreigners from other countries<sup>4</sup>. With regard to the foreigners outside EEA and Switzerland, the principle expressed in Article 1 of the Act shall be applied, which states that the acquisition of real estate by the foreigner requires a permit issued by way of an administrative decision, with some exceptions provided by Article 8 sec. 1 of the Act. While a separate principle, established in Article 8 sec. 2 of the Act shall be applicable regarding citizens and business operators from EEA and Switzerland. Obtaining the permit, with certain exceptions, shall not be required with regard to this category of foreigners.

The permit for acquisition of real estate is issued in Poland by the minister in charge of internal affairs, unless an objection is raised by the Minister of National Defence, and in case of agricultural real estate, unless an objection is raised by the minister of rural development. The provisions of the Act cited shall be applicable to the acquisition of real estate, as well as the right of perpetual usufruct, on the basis of 'any legal event' (Article 1 sec.4). The provisions of AAREF shall not define in particular way the acquisition types, which are subjected to the obligation to obtain the permit by the minister in charge of internal affairs. Therefore, the acquisition of real estate can take place on the basis of such legal events which may result in the acquisition of real estate, e.g. on the grounds of a contract for disposal, a donation agreement, an agreement for the exchange, an annuity agreement, an articles of association (an in-kind contribution) and a marriage contract, as well as on the basis of other events. Legal actions of a nature of the limited real rights in rem in immovable properties (e.g. usufruct, mortgage, easements) and mutual consent agreements (e.g. tenancy, rent) shall not be governed by AAREF. In the case the foreigner acquires real estate to satisfy needs of life

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<sup>2</sup> Journal of Laws: Dz. U. no. 90, pos. 864, including annex XII.

<sup>3</sup> Check against B. Jeżyńska, R. Pastuszko, Ramy prawne obrotu nieruchomościami rolnymi po 2016 roku (Legal frameworks of real estate trading after the year 2016) (Opinions and Expert Judgments – OE - 197, 2012).

<sup>4</sup> Check against J. J. Skoczylas, Cywilnoprawny obrót nieruchomościami przez cudzoziemców (Civil-Law real estate trading by foreigners), Warsaw, 2008.

(e.g. residential needs), the area of real estate may not exceed 0.5 ha, and with regard to business or agricultural activity conducted within the territory of Poland, by virtue of the regulations of the Polish law, the area shall be justified by actual needs arising from the nature of pursued business activity (Article 1a sec.5 of AAREF).

In the substantial matter, the provisions of AAREF shall not draw a distinction between the legal position of natural and legal persons regarding the necessity to obtain the permit to acquire real estate by the foreigners. The Act provides the autonomous concept of the foreigner relating to the Act of 12.12.2003 on foreigners<sup>5</sup>. By virtue of Article 1 sec. 2 of AAREF, the foreigners are natural persons without Polish citizenship; legal persons based abroad, non-corporate company of persons above referred to, based abroad, established in compliance with the legislation of foreign states, legal persons and non-corporate commercial company based in the territory of the Republic of Poland, controlled directly or indirectly by persons or companies specified above.

The permit is issued upon request of the foreigner, if the acquisition of real estate does not pose any risk to the defensiveness, national security or public order and is not in contradiction with social policy and public health considerations, as well as when the foreigner proves that there are the circumstances confirming its bonds with the Republic of Poland.

From 1st May 2014 the foreigners who are citizens of EEA or the Swiss Confederation have not been required to obtain the concerned permit, except the permit relating to the acquisition of agricultural or forest estate. The referred exception is effective in 12-year transitional period from the date of accession of Poland to the EU up to 30.04.2016 and does not refer to the acquisition of agricultural real estate located, as follows:

- a) in Dolnośląskie (Lower Silesia Voivodeship), Kujawsko – Pomorskie, Lubuskie, Opolskie, Pomorskie, Warmińsko – Mazurskie, Wielkopolskie, Zachodniopomorskie Voivodeship – after the expiry of 7 years from concluding an agreement of lease with a certified date, if during this period they personally pursued agricultural activity and legally resided in the territory of the Republic of Poland,
- b) Lubelskie, Łódzkie, Małopolskie, Mazowieckie, Podkarpackie, Podlaskie, Śląskie (Silesia), Świętokrzyskie Voivodeship – after the expiry of 3 years from concluding an agreement of lease with a certified date, if during this period they personally pursued agricultural activity and legally resided in the territory of the Republic of Poland.

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<sup>5</sup> Journal of Laws: Dz.U. of 2013, pos. 1650, as later amended.

The principles of the acquisition of real estate by the foreigners shall apply also to ‘the acquisition of real estate’ through the acquisition or take-up by the foreigner of shares (stocks) in the commercial company based in the territory of the Republic of Poland, which is an owner or a perpetual usufructuary of (land, buildings or premises) real estate, if the referred company (the foreigner gets more than 50% of votes at the meeting of shareholders or at the general meeting of such a company or has a dominant position within the meaning of the provisions of the Polish Commercial Companies Code<sup>6</sup>), or if such a company has already been controlled and shares or stock acquires or takes up a new strategic investor, who is the foreigner. It means that where the acquisition or take-up of shares (stocks) in such a company shall not require to obtain the permit by the foreigners seated in EEA or the Swiss Confederation, while the foreigners outside this area shall generally be obliged to obtain the permit. What is more, pursuant to the current position of the acquisition or take-up by the foreigners from EEA and Switzerland of shares (stocks) in a commercial company with its registered office in Poland shall not require the permit even though such a company is an owner or a perpetual usufructuary of agricultural or forest estate.

Moreover, AAREF in Article 6 provides the sanction of absolute nullity, should real estate be acquired and shares or stocks be acquired or subscribed contrary to the provisions of the Act.

In 2014 the foreigners obtained jointly 271 permits to purchase land estate with total area of 1036.35 ha, including 166 permits relating to agricultural and forest properties with total area of 1029.74 ha, representing 99% of areas of all land estates subject to the permits. However, the data is not complete, what results from the informal acquisition of agricultural real estate by ‘dummy persons’, as well as gaps in the provisions of AAREF which allow to subscribe or acquire shares or stocks in companies who are owners or usufructuaries of agricultural real estate by the foreigners from EEA and Switzerland.

In Poland the informal trading is an important shortcoming, and indeed occurrence of the acquisition of agricultural real estate by ‘dummy persons’, acting for the benefit of big economic entities, frequently connected with foreign capital. The concerned persons are able, without excessive difficulties, to satisfy the requirements restricted procurement procedures organized by the Agricultural Property Agency (Agencja Nieruchomości Rolnych (Agency (APA))), by virtue of Article 29 sec. 3b of the Act on the Management of Agricultural

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<sup>6</sup> Act of 15.09.2000 of the Commercial Companies Code, consolidated text – Journal of Laws: Dz.U. of 2013, pos. 1030, as later amended.

Property of the State Treasury, who are individual farmers within the meaning of provisions of the Act on Shaping of Agricultural System, intending to extend their family agricultural holding, who reside in a commune where real estate is exposed to the market in tender procedure or in a commune next to such commune. The following measures shall counteract the informal trading:

- a. to extend the circumstances, where APA may exercise the contractual right to repurchase by adding the cases in which the acquired agricultural real estate is used for other objective than agricultural activity, and when agricultural activity conducted on the acquired estate is not conducted in person by the acquirer. After the repeal of Article 29 sec. 5 of Act of 19.10.1991 on the Management of Agricultural Property of the State Treasury, as a result of the judgment of the Constitutional Tribunal, who concluded its incompatibility with the Polish Constitution<sup>7</sup>, by virtue of the ordinance of the President of the Agency there adopted guidelines on the disposal of real estate owned by the Agricultural Property Stock of the State Treasury, and concerning also to the right to repurchase real estate by APA in the cases indicated herein above.
- b. in the cases of contracts for disposal of agricultural real estate on instalment securities in the form of mortgage established on real estate and submission to APA an in blanco bill of exchange shall be applied, although the Decree of Ministry of Agriculture and Rural Development of 30.04.2012 providing detailed disposal ways of real estate, as well as its components, owned by the Agricultural Property Stock of the State Treasury, terms for the decrease of sales price of real estate entered in to the register of historic monuments and estimated rates of lands<sup>8</sup>, provides in § 25 sec. 2 also other security methods.
- c. participation of Chambers of Agriculture in tender committees was considered to a greater extent (more than 50% of participation in a committee of representatives of Chambers of Agriculture).

Nevertheless, the primary mechanism for taking over the rights to agricultural lands in Poland by the foreigners from EEA and Switzerland is the acquisition (subscription) of shares (stocks) in companies with Polish capital, who are owners or perpetual usufructuaries of agricultural properties. To perform such action the foreigner shall not have to get the permit issued by the minister in charge of internal affairs, therefore transactions shall be legal. By

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<sup>7</sup> Journal of Laws: Dz. U. of 2010, no. 48, pos. 287.

<sup>8</sup> Journal of Laws: Dz.U. of 2012, pos. 540.

acquisition of shares (stocks) in companies, the agricultural real estate in Poland has been purchased mainly by the foreigners from the Netherlands, Denmark and Luxemburg.<sup>9</sup>

According to the position of the Polish Supreme Audit Office (NIK – acronym of the Polish name), which inspected the land trading by the Agricultural Property Agency, the data with the Minister of Internal Affairs can be significantly reduced, as the companies controlled by the foreigners do not have to submit information on lands owned.

Furthermore, in terms of public legislative solutions quantitative and qualitative preservation of agricultural lands is also ensured. The preservation is performed by virtue of provisions of the Act of 3.05.1995 on Preservation of Agricultural and Forest Lands.<sup>10</sup> The procedure provided by the Act materially limits the acquisition of agricultural real estate, including also acquisitions by non-agricultural capital. Under the quantitative preservation specific regime with regard to non-agricultural purposes of agricultural lands has been introduced. The legislature indicates what agricultural lands may be first intended for the objectives not related to the earlier purpose. Besides, legal rationing also covers a procedure to reclassify agricultural lands for different purposes, and for actual exclusion from the agricultural production. At the same time, the role of local development plans is significantly increased, as such actual position encourages to elaborate a local development plan, in which contents area purposes (for agricultural production purposes) and ways of their management, as well as for other purposes, can be easier determined<sup>11</sup>.

## II.

In terms of private legislative solutions, it is to note the acquisition of real estate by foreigners in compliance with Article 1a, sec. 6 of AAREF shall be governed by regulations of the Act of 11.04.2003 on Shaping of Agricultural System, hereinafter referred to AShAS (Act on ShAS)<sup>12</sup>. At present, legislative work on its amendment is well advanced. The Act has been adopted by the Polish Parliament (Sejm RP), and its contents have been submitted to the Marshal of the Polish Senate (Senat) and the Polish President. Hence, the further discussions will refer to regulations of the draft version of the Act<sup>13</sup>.

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<sup>9</sup> The data after NIK inspection concerning the sales of land belonging to the State Treasury in the years 2011–2013 (up till April) in three branches of the Agricultural Property Agency: in Szczecin, Warsaw and Wrocław.

<sup>10</sup> Consolidated text: Journal of Laws: Dz.U. of 2013, pos. 1205, as later amended.

<sup>11</sup> Check against J. Bieluk, D. Łobos – Kotowska, Ustawa o ochronie gruntów rolnych i leśnych. Komentarz. (Act on Preservation of Agricultural and Forest Lands. Comment.) Warsaw 2015.

<sup>12</sup> Consolidated text 2012, pos. 803.

<sup>13</sup> Parliamentary document no. 3109.

Act on ShAS implements new regulations into the Polish legislation, purposed to improve area structure of Polish agricultural holdings, counteracting excessive concentration of agricultural real estate and assurance of operating agricultural holdings by persons suitably qualified. The Act has strengthened the position of a family agricultural holding introducing the regulations which counteract unreasonable partition through limitation of admissibility of transfer of ownership to agricultural real estate. Into the trading (a contract for disposal, an agreement for the exchange, a donation agreement, an annuity agreement, etc.), there have been introduced inter alia, a basic standard of utilised agricultural areas; ban of division of real estate (or its part), should no access to a public road be after division; limits in the acquisition of agricultural real estate for non-agricultural purposes; participation of the Agricultural Property Agency in sales transactions by giving its consent to divide an agricultural holding.

The primary state instruments to control the transfer of ownership to agricultural real estate are the right of pre-emption executed by APA and so called the right to acquire.

By virtue of Article 9 sec. 1, 2 and 5 of AShAS, in case of disposal of agricultural real estate with surface not lower than 1 ha by a natural person and a legal person other than APA and non-performance of the right by a tenant/leaseholder or an individual farmer who is an owner of agricultural real estate sharing borders with the disposed real estate, the Agency acting for the benefit of the State Treasury shall be entitled to the right of pre-emption. Exclusions of the right of pre-emption are set forth in Article 9 sec. 6 of AShAS. Among the most significant transactions the acquisition of agricultural real estate by a person close to a seller within the meaning of Article 4 item 13 of the Act of 21.08.1997 on Real Estate Management<sup>14</sup> and the increase of a family agricultural holding up to a surface not greater than 300 ha.

A family agricultural holding means an agricultural farm operated by an individual farmer, where total surface of agricultural areas is not greater than 300 ha. And, an individual farmer means a natural person who is an owner, a perpetual usufructuary, an owner-like possessor or a lessee of agricultural real estate, whose total surface of agricultural areas does not exceed 300 ha, with agricultural qualifications and a resident of a commune for at least 5

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<sup>14</sup> According to Article 4 sec. 13 on Real Estate Management, a person close means spouses, descendants, siblings, siblings' children, a spouse, persons adopting and adopted, as well as a person, actually remaining with the seller in cohabitation, consolidated text – Journal of Laws: Dz.U. of 2015, pos. 782.

years, where one of agricultural real estate composing an agricultural holding is located and who runs a holding for such period in person.

The other form to limit the real estate trading is the right to acquire resulting from Article 10 sec. 1 of AShAS. If a transfer of ownership to agricultural real estate with a surface not smaller than 1 ha results from conclusion of an agreement different than a contract of disposal, the Agency acting for the benefit of the State Treasury can make a statement on acquisition of such real for payment of a monetary equivalent. Exercising the right to acquire shall be subject respectively to provisions of the Civil Code relating to the right of pre-emption. Exclusions of the right to acquire are stipulated in Article 10 sec. 4 of AShAS and they are of similar nature as the prerequisites repealing performance of the right of pre-emption by the Agency.

In order to prove meeting the requisites, which exclude the entitlements of the Agency to execute statutory entitlements (the right of pre-emption and the right to acquire), it is necessary to present statements and documents set forth in AShAS. In particular, the evidence, which acknowledges managing an agricultural holding by a person himself/ herself shall be a statement in writing made by a person running a farm, the statement shall also be a sufficient proof regarding surface of owned agricultural areas, while a certificate on residence issued by the authority competent in the population registration matters shall be a proof for residence. The requirement to be a holder of agricultural qualifications shall be proved with relevant documents.

The severity of solutions indicated has been set forth in Article 16 of AShAS providing the sanction of invalidity of a legal transaction concluded against the provisions of the Act or without notice to the Agency.

These short descriptions of control measures applied by the Agency for the acquisition of agricultural real estate allow to conclude that AShAS has provided the Agency with the opportunity of interference in almost every acquisition under a contract of agricultural real estate with surface of at least 1 ha. The Agency is right to decide whether a given action is beneficial for the required agrarian structure and agricultural system. APA relatively infrequently exercises its entitlements. From 2003 till the end of June, 2012 the Agency exercised its right of pre-emption and acquire in 542 cases, only. The Agency intervened on the private market with regard to 11.9 thousand ha of lands with the transaction sum at total amount of PLN 122.3 million.

To ensure the required agricultural structure in Poland inspection over the agricultural real estate trading is of significant importance. It is carried out through creation of legal measures enabling to remove legal actions from the trading which violate the absolutely applicable regulations of the Polish law. The purpose, inter alia, is satisfied due to the register created by the Minister of Internal Affairs which is purposed to examine the legality of the acquisition of real estate by the foreigners, indication of areas of the country, where most often actions of the real estate trading involving the foreigners are carried out, as well as a number of acquired (subscribed) shares or stocks in companies is determined. The referred register is held by the minister in charge for interior affairs, and the entry into it shall cover real estate, shares and stocks acquired or subscribed by the foreigners without the permit in cases set forth in Article 8 sec. 1, 2 and 2a, as well as real estate, shares and stocks acquired or subscribed by the foreigners on the basis of the required permits, referred to in Article 1 sec. 1 and Article 3e sec. 1 and 2 of the Act on the acquisition of real estate by foreigners.

In the Polish system the control over real estate trading transactions is provided by the common courts. However, the Polish legislature has neither appointed special courts, nor provided special procedure to remove from the legal trading transactions effected in breach of the regulations of the Act on the Acquisition of Real Estate by Foreigners and the Act on Shaping of Agricultural System. The common courts, civil divisions which decide on the basis of regulations of the Civil Procedures Code are competent in the cases to state the invalidity of legal action performed contrary to the regulations of the cited acts. The approach that decisions in the agricultural cases are made by on the basis of regulations of the Civil Procedures Code, fits well into the general principle applicable in the Polish legal system.

Should it be established that the acquisition of real estate by the foreigner within the territory of the Republic of Poland took place contrary to the provisions of the Act on the Acquisition of Real Estate by Foreigners, or the acquisition of shares or stocks in companies who are owners or perpetual usufructuaries of real estate in breach of the provisions of the cited Act, such transaction shall be affected by the sanction of absolute nullity. Invalidity shall be stated by way of classical plea for establishing (Article 189 of the Civil Procedures Code). A lawsuit for establishing invalidity of the acquisition of the ownership rights (perpetual usufruct) or ownership of shares (stocks) can first of all be filed by an owner or a perpetual usufructuary, who disposed real estate and a foreigner who acquired real estate contrary to the applicable regulations. The minister in charge of internal affairs, and also a head of commune

(wójt) (a mayor or president of the city), a starost (a district governor), marshal of voivodeship, a voivode as well as a public prosecutor, the Polish Ombudsman and everybody who has a legitimate interest in it shall be actively identified. The court decision shall be of declaratory nature. Absolute nullity shall occur by virtue of the law itself, and the decision shall merely confirm it and operate ex tunc.

The same sanction of absolute nullity is provided in the Act on Shaping of Agricultural System. With regard to this case, a law suit can be filed by a person who has a legitimate interest in it and by the Agency, as well.

### **Conclusion.**

According to official data, surface of agricultural areas acquired by foreigners is rather small. However, it should be noted that even the current regulations envisage the possibility to acquire agricultural real estate without the permit by the minister in charge of internal affairs, and irregularities occurring in practice even expand the scale of the acquisition beyond the control of agricultural real estate by the foreigners. In that regard, the applicable legislation appears inadequate.

The end on 30.04.2016 of the transition period in the acquisition of agricultural real estate by the foreigners from EEA and Switzerland placed new challenges before Poland for preparation of legislation enabling control of trading of real estate in concern. It inter alia results in the need to amend the Act on ShAS and create a coherent concept of principles for agricultural real estate trading. Moreover, the practice of the European Union Member States is not without importance, where the legislation of these States shapes the terms of agricultural real estate trading and professional qualifications running agricultural holdings, as well. The adopted solutions shall ensure economic efficiency to agricultural holdings, in particular family farms which in view of Article 23 of the Polish Constitution form the basis of the agricultural system.