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The agricultural land trade – Theory and practice\*\*

*Abstract*

*This paper aims to provide a report on the conference titled The agricultural land trade. Theory and Practice, which was held on 26 November 2020 by Adam Mickiewicz University (UAM) in Poznań. The conference report deals with the three sessions of the conference in separate chapters, and in the end, it contains concluding remarks. In parallel with the presentation of the sessions, legal literature is provided in connection with each issue.*

**Keywords:** conference report, agricultural land, land trade, theory, practice.

## 1. Introduction

An online scientific conference entitled ‘The agricultural land trade. Theory and Practice’ was held on 26 November 2020 by Adam Mickiewicz University (UAM) in Poznań (Poland).<sup>1</sup> This one-day event was co-organised by the Department of Agricultural Law of Adam Mickiewicz University, Notarial Chamber in Poznań, Ministry of Agriculture and Rural Development, and National Support Centre for Agriculture<sup>2</sup> (hereinafter: Government Agency). The conference provided an excellent opportunity for experts and practitioners to share their experiences and seek solutions to the difficulties arising under the interpretation of the Act of 11 April 2003 on Formation of the Agricultural System, which constitutes the main legal act governing the trade of private farmland in Poland (hereinafter: AAS).<sup>3</sup>

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<sup>1</sup> The original title of the conference: *Obrót nieruchomościami rolnymi. Teoria i praktyka.*

<sup>2</sup> A state institution whose main tasks include managing agricultural property of the State Treasury (sale and lease), the free transfer of land and non-returnable financial assistance, supervision of companies of special importance for the national economy, issuing decisions regarding consent to private turnover land, promoting Polish agri-food products in the country and abroad, and developing and disseminating information related to the implementation of active agricultural policy mechanisms on the markets of agricultural and food products.

<sup>3</sup> Ustawa z dnia 11 kwietnia 2003 r. o kształtowaniu ustroju rolnego (Act of 11th April 2003 on Formation of Agricultural System), published in *Dziennik Ustaw* (Journal of Laws) of 2003 No. 64, item 592 as amended. For a more detailed work on the Polish framework for the agricultural land trade, see: Kubaj 2020; Stacherzak, Heldak, Hájek & Przybyła 2019; Źróbek-Różańska & Zielińska-Szczepkowska 2019; Kalinowski 2017. For Hungarian framework for the agricultural



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The conference was divided into 3 sessions, during which 14 presentations were made. This report focuses on the key issues addressed at the conference, contributing to the discussion on restricting agricultural land trade, which is a subject of great concern both in Poland and Hungary.

The conference was opened by *Prof. dr hab. Bogumiła Kanińska*, the rector of UAM. Thereafter, the participants were welcomed by the representatives of all four organisers. *Prof. dr hab. Roman Budziniowski*, chairman of the Polish Association of Agrarian Lawyers, delivered the opening lecture, during which he reminded the audience that the tradition of joining efforts by scholars and practitioners in the field of agricultural law dated back exactly 20 years. The first conference of this kind was held in 2000 in Rydzyna, and was followed by several meetings and scientific conferences countrywide.

## 2. First Session

During the first session, *Prof. dr hab. Paweł Czechowski* and *dr hab. Konrad Marciniuk* (University of Warsaw, Warsaw)<sup>4</sup> delivered the keynote address, providing a brief overview of the main concepts underlying the regulation of the agricultural real estate market in Poland. They explained that the restrictions imposed on the free trade of real estate during the communist regime were liberalised after the political transformation in 1989. However, since the adoption of the AAS in 2003, state interventionism in the agricultural real estate market has reappeared, significantly restricting the free enjoyment of ownership rights. The latter, according to the classic approach in civil law, includes the rights to possession, to use and derive income, and to disposition. In Poland, restrictions on ownership rights with regard to agricultural property are twofold. First, such restrictions have been introduced through the adoption of regulations that are *lex specialis* to the Polish Civil Code<sup>5</sup>, for example, the AAS and Act of 19 October 1991 on the management of the agricultural property of the State Treasury.<sup>6</sup> Consequently, the Civil Code framework for sale and purchase, lease, or donation agreements has been significantly modified in case the aforementioned agreements are concluded with respect to agricultural real property. Second, state control over the agricultural real estate market is exercised through the application of pre-emptive rights or provisions allowing the State Treasury to acquire shares in companies that own farmland or hold the right of perpetual usufruct.

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land trade see: Csák 2010; Csák, Kocsis & Raisz 2015; Olajos 2017; Raisz 2017; Szilágyi 2016; Szilágyi, Csák, Olajos & Orosz 2019.

<sup>4</sup> Title of presentation: *Współczesne uwarunkowania prawne rynku nieruchomości rolnych (Contemporary legal framework of the agricultural real estate market in Poland)*. Authors' other works include: Czechowski & Niewiadomski 2016; Czechowski & Niewiadomski 2015; Czechowski & Niewiadomski 2013; Czechowski & Wiczorkiewicz 2006; Marciniuk 2020; Marciniuk 2017.

<sup>5</sup> Ustawa z dnia 23 kwietnia 1964 r. - Kodeks cywilny (Act of 23rd April 1964 on the Civil Code), published in *Dziennik Ustaw* (Journal of Laws) of 1964 No. 16, item 93 as amended.

<sup>6</sup> Ustawa z dnia 19 października 1991 r. o gospodarowaniu nieruchomościami rolnymi Skarbu Państwa (Act of 19th October 1991 on the management of agricultural property of the State Treasury), published in *Dziennik Ustaw* (Journal of Laws) of 1991 No. 107, item 464 as amended.

The privileged position of the Government Agency in the agricultural real estate market in Poland is another prime example of state interventionism. Czechowski and Marciniuk emphasised that the Polish legal framework applicable to agricultural land transactions was tantamount to introducing serious restrictions on ownership rights, which negatively affects legal certainty. In their opinion, the choice of subjects for the conference exposed the shortcomings and deficiencies of the Polish regulations governing the agricultural real estate market.

In her address, *dr Joanna Mikołajczyk* (University of Łódź, Łódź)<sup>7</sup> identified several legal gaps that render the interpretation of the notion of ‘agricultural real property’ highly difficult in practice. A legal professional herself, she highlighted the importance of classifying a real property as agricultural real property to properly determine the scope of application of the AAS. According to Article 46<sup>1</sup> of the Civil Code, agricultural real property shall be understood as immovable property, which is or may be used for carrying out agricultural production activity within the scope of plant and animal production, not excluding gardening, horticulture, and fishery production. For the purposes of the application of the AAS, agricultural real property shall be understood as the agricultural real property within the meaning of the Civil Code, excluding the properties located in areas designated in the local zoning plan for purposes other than agricultural (Article 2 point 1). First, a question arises as to the application of the AAS with respect to agricultural real properties situated in areas without local zoning plans. The practical importance of this inaccuracy is due to the fact that only 1/4 of the territory of Poland is regulated by local zoning plans. Therefore, she suggested aligning the provisions of AAS with those of the zoning law. Another issue of concern Mikołajczyk addressed was related to the evolution of the definition of agricultural property. The notion of agricultural real property was introduced into the Polish Civil Code in 1990 during the regime transformation with the view of liberalising the market, and has remained unchanged for years. She expressed her concern that the definition under Article 46<sup>1</sup> of the Civil Code, to which the AAS refers directly, might not be compatible with the principles underlying the AAS, namely the restriction of farmland trade. She pointed out that the range of agricultural real properties entering the scope of application of the AAS had been constantly changing because of frequent amendments, which further limited its scope of application as new exemptions were introduced.<sup>8</sup> For this reason, Mikołajczyk suggested that the conceptual and linguistic framework for the definition of agricultural real property under the Civil Code and AAS be reviewed.

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<sup>7</sup> Title of presentation: *Problem kwalifikowania nieruchomości jako rolnej - studium przypadku* (The issue of classifying a real property as an agricultural real property – case study). Author’s other works include: Mikołajczyk 2014; Mikołajczyk 2016.

<sup>8</sup> The AAS does not apply *inter alia* to agricultural real properties (a) smaller than 0,3 ha, (b) which belong to the State Treasury’s Agricultural Property Stock, (c) which are internal roads, (d) which have been sold to former tenants in a special procedure (Act of 19 October, 1991 on the management of agricultural property of the State Treasury, Journal of Laws of 2020, item 396, as amended), and (e) which are covered with ponds over more than 70% (Article 1a of AAS, see also Article 1b and 1c of the AAS).

*Prof. UAM dr hab. Aneta Suchoń* (Adam Mickiewicz University, Poznań)<sup>9</sup> explored the subject of the acquisition of agricultural real property by a lessee. In her opening remarks, she reminded the audience that lease was a very common form of land management in Western European countries (e.g. France or Italy).

In these countries, lease is a safe and stable institution, unlike in Poland, where it is a short-term legal arrangement that lacks stability. However, it has been observed that lease is becoming increasingly popular in Poland despite its uncertain legal environment. This can be explained by the fact that the requirement laid down in the AAS, according to which the ownership of agricultural real property can be acquired by individual farmers only, does not apply to lessors. Consequently, a natural person who does not meet the requirements to be considered an individual farmer as well as any legal person may become a lessor of agricultural real property. One main point Suchoń highlighted addressed the uncertainties related to the transfer of agricultural property in leases. It should be considered whether it is possible under the AAS to transfer the ownership of farmland that has been leased. Under Article 2b para. 1 of the AAS, the acquirer of agricultural real property is required to run the agricultural holding the agricultural real property became part of for a period of at least five years. If the acquirer is a natural person, agricultural activity shall be conducted personally. Suchoń expressed her concern that it would not be possible for the new owner of the agricultural land to run the agricultural holding personally as long as the land was in lease. As long as the lease agreement remains in force, the agricultural activity on the farmland concerned is to be carried out by the lessee. She suggested a possible amendment to the AAS that would provide for a new legal arrangement applicable to the transfer of farmland in lease. The Government Agency should be able to issue a permit allowing the owner of the agricultural real property to transfer the ownership of the land, and at the same time, allowing the lease to be continued until the expiry of the term, thus exempting the new owner from the obligation to personally carry out agricultural activity on the acquired farmland. In that case, agricultural activity would be carried out by the lessee until the end of the lease agreement. During the discussion that followed the presentation, representatives of the Government Agency and Ministry of Agriculture and Rural Development commented on the proposed amendment. They confirmed that in accordance with the provisions of law, a transfer of the ownership of agricultural real property in lease was not legally possible based on the obligation laid down in Article 2b para. 1 of the AAS (i.e. the obligation to personally run an agricultural holding on the acquired land). This obligation applies to the acquirer of the agricultural real property regardless of whether or not the acquirer is a relative of the previous owner. Before the 2019 amendment, the obligations under Article 2b para. 1 did not apply to acquirers of the agricultural property who were relatives of the previous owner. The need to adopt new regulations that would solve the issues addressed by Aneta Suchoń was acknowledged.

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<sup>9</sup> Title of presentation: *Nabywanie własności nieruchomości rolnych przez dzierżawców – nieruchomości prywatne, z Zasobu Własności Rolnej Skarbu Państwa i jednostek samorządu terytorialnego* (The acquisition of the ownership of agricultural real properties by a lessee – in the case of private agricultural lands, lands owned by the State Treasury and local government units). Author's other works include: Suchoń 2017; Suchoń 2016; Suchoń 2018; Suchoń 2019; Suchoń 2012a; Suchoń 2012b; Suchoń 2014.

*Prof. UmB dr hab. Jerzy Bieluk* (University of Białystok, Białystok)<sup>10</sup> devoted his presentation to the obligations of a company owning agricultural real property in the case of a transfer of shares. Pursuant to Article 3a para. 1 of the AAS, the Government Agency acting on behalf of the State Treasury has a pre-emption right to purchase shares in the case of the transfer of shares in a company that owns agricultural real property or holds the right of perpetual usufruct, providing that the surface area of the real property is at least 5 ha. Bieluk examined the respective provisions of the AAS to examine the scope of obligations imposed upon the company whose shares were to be transferred. Article 3a para. 4 of the AAS suggests *prima facie* that the company should notify the Government Agency about the content of the sale contract.<sup>11</sup> However, the company is a third party to the transaction of the transfer of shares; therefore, according to Bieluk, this obligation cannot be clearly deducted from the provisions of the AAS. Note that the AAS provides for several documents that shall be submitted while notifying the Government Agency (certificate from the land registry, extract of land and building registration, balance sheet and profit and loss account, list of shareholders, statement of the board of directors on the value of contingent liabilities). Bieluk pointed out that in addition to the fact that some requirements were inconsistent with other provisions of law (e.g. the Accounting Act), obtaining some of the documents might be expensive (certificate from the land registry) or difficult (list of shareholders, value of contingent liabilities). He concluded that the 2019 amendment to the AAS had introduced into Polish law a new kind of company, to which he referred as an ‘agrarian company’. The shares in companies owning agricultural real property over 5 ha or holding the right of perpetual usufruct could be transferred only if the board of directors was willing to apply for or issue all necessary documents to comply with the company’s obligation to notify the Government Agency; otherwise, the share deal agreement would be null and void.

### 3. Second Session

During the second session, *dr hab. Paweł Blajer* (Jagiellonian University, Cracow)<sup>12</sup> spoke about the obligations imposed by the AAS on the acquirer of an agricultural real property. The subject matter of his address constitutes the crux of the AAS regulation,

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<sup>10</sup> Title of presentation: *Zbycie akcji lub udziałów w spółkach będących właścicielami nieruchomości rolnych - wybrane problemy* (The alienation of shares in companies owning agricultural real estate – selected issues). Author’s other works include: Bieluk 2018; Bieluk 2020; Bieluk 2016.

<sup>11</sup> Article 3a para. 4 of the AAS stipulates that to the right of pre-emption of shares referred to in Article 3a para. 1, Article 3 paras. 8, 8a, 10, 11, and the provisions of the Civil Code relating to the right of pre-emption of real estate shall apply accordingly, except that the declaration on the exercise of the right of pre-emption shall be made within two months from the day of receipt by the National Centre [National Support Centre for Agriculture] of the notification from the company referred to in Article 3a para. 1., whose shares constitute the object of the conditional contract of sale.

<sup>12</sup> Title of presentation: *Praktyczne aspekty stosowania art. 2b ustawy o kształtowaniu ustroju rolnego po nowelizacji z 2019 roku* (Practical aspects of the application of Article 2b of the AAS after the 2019 amendment). Author’s other works include: Blajer 2018; Blajer 2013; Blajer 2016a; Blajer 2007; Blajer 2016b; Blajer & Kokoszka 2011.

being one of its most sensitive and problematic issues nowadays. Under Article 2b paras. 1 and 2 of the AAS, the acquirer of an agricultural real property has a twofold obligation. The obligation of a positive nature requires the acquirer to run the agricultural holding that the agricultural real property became a part of for a period of at least five years. If the acquirer is a natural person, the agricultural activity shall be conducted personally. On the other hand, the negative obligation imposed on the acquirer requires them to refrain from selling the agricultural real property or transferring its possession for a period of at least five years. However, neither of these restrictions is absolute in nature or definitive. The general director of the Government Agency may exempt an acquirer from the negative obligation to refrain from selling farmland within the prescribed five-year period. The exemption is granted by means of an administrative decision issued upon the request of the acquirer if such a request is justified by the acquirer's important interest or by public interest. The obligations at issue were introduced into the AAS with effect as of 30 April 2016.<sup>13</sup> Since then, the number of requests for exemption has been constantly growing. Nevertheless, the AAS also provides for several exemptions when the obligations stipulated in Article 2b paras. 1 and 2 do not apply. The exemptions provided for under Article 2b para. 4 refer to the acquirer himself (e.g. a relative), to the type of acquisition (e.g. by inheritance), or to the location of the agricultural real property (e.g. in the city, if the area of the real property is less than 1 ha). Blajer expressed his concern that the presented legal arrangement might pose considerable problems in practice. He pointed out, *inter alia*, the vague wording of the acquirer's obligation to refrain from selling an agricultural real property or transferring its possession within five years from the day of acquisition. He illustrated this with the case of the owner of a farmland in lease, who donated the land in lease to one of his descendants, who in turn granted usufruct rights to the donor. The question arises as to who shall perform the responsibilities set out in Article 2b para. 1, since in each case (ownership, lease, usufruct), a different person might be obliged to run the agricultural holding, and equally in each case, it might be the owner upon whom rests the obligation to perform the agricultural activity on the farmland concerned. Blajer continued his consideration of the subject matter during the discussion following the conference. To understand why so many controversies have arisen in Poland over the obligation of running agricultural activity, one must look at a broader perspective. Unlike other trade-restrictive measures such as pre-emptive rights or governmental permits, the obligation to conduct agricultural activity on farmland after its acquisition is not common in other European countries. It was introduced in Switzerland and adopted in Hungary in 2013. From Hungary, the Polish legislator took over the idea of introducing the obligation to run agricultural activity after the acquisition of farmland. While creating the AAS, the Polish legislator referred to the Hungarian legal arrangements. However, the outcome differed significantly from that of the original Hungarian framework. In Hungary, the obligation to run the agricultural holding is justified and makes sense, because only individual farmers are supposed to acquire agricultural property, and neither a company nor other entity is allowed to purchase farmland.

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<sup>13</sup> I.e. on the last day of the transitional period provided for Poland in the accession treaty to the EU.

The only exception relates to relatives, who according to Hungarian law, can acquire agricultural real property even if they are not individual farmers. They are also exempted from the obligations to run agricultural holdings on acquired farmland and from refraining from selling it. However, the general principle is that only a farmer may acquire agricultural property, which seems a coherent regulation according to Blajer. In Poland, the AAS formally declares in Article 2a that only an individual farmer can acquire agricultural real property, although this is actually untrue: Agricultural real properties with an area of less than 1 ha can be acquired by anyone without any restrictions, while agricultural real properties with an area of more than 1 ha can be acquired by persons that are not individual farmers if they have permission from the Government Agency. Here, we face the problem of the obligation to conduct agricultural holding by persons and entities that are not farmers. This is unavoidable unless Article 2b of the AAS and the definition of agricultural real property are reviewed and improved.

*Dr Małgorzata Szymańska* (Maria Curie-Skłodowska University, Lublin)<sup>14</sup> in her address looked at the regulatory objectives underlying the obligations set out in Article 2b of the AAS to identify the *ratio legis* behind the trade-restrictive regulation and exceptions therefrom. She attempted to determine the meaning of conducting agricultural activities. Even though the AAS does not define conducting agricultural holding, the case law of Polish courts gives some indication as to the scope and meaning of this expression. In its judgement on 24 April 2014, the Voivodship Administrative Court in Poznań (Case II SA/PO 93/14) stated that the sole possession or ownership of an agricultural holding did not qualify as running it if no agricultural activity was being performed with relation to it, including decision-making regarding farming activity. The notion of running an agricultural holding may encompass the farmer's personal engagement in plant production and livestock farming, management of the work of persons employed on the farm, decision-making regarding what plants and livestock are to be produced, concluding contracts on the sale of crops, decision-making related to the purchase and sale of agricultural machinery, decisions regarding the use of fertilisers, and so on depending on the economic profile of an agricultural holding. The reasons for adopting the restrictive obligations set out in Article 2b paras. 1 and 2 AAS include ensuring the food security of Polish citizens and preventing the speculative turnover of farmland that could undermine the structure of the Polish agricultural system. The latter, according to the Polish Constitution, is based on family farming. Szymańska provided a detailed, word-for-word analysis of the provisions laying down exemptions from the obligations set out in Article 2b paras. 1 and 2 of the AAS. She explained that the extensive, albeit closed catalogue of exemptions served various purposes and reflected several different motives, among which she highlighted the protection of family connections and inheritance, reasons for public interest, the need to guarantee proper socio-economic use of the agricultural real property, and importance of supporting the use of EU funds.

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<sup>14</sup> Title of presentation: *Wyłączenia obowiązków nabywcy nieruchomości rolnych i ich znaczenie dla kształtowania ustroju rolnego (Exemptions from the obligations imposed upon the acquirer of agricultural real estate, and their importance for the shaping of agricultural system)*. Author's other works include: Szymańska 2018; Szymańska 2020a; Szymańska 2020b; Szymańska 2020c.

*Dr hab. Przemysław Litwiniuk* (Warsaw University of Life Sciences (SGGW), Warsaw)<sup>15</sup> explored the subject of the exercise of pre-emptive rights by the Government Agency. He emphasised that the regulations allowing for the pre-emption right constituted a limitation to the protection of ownership enshrined in Article 21 and Article 64 of the Polish Constitution.<sup>16</sup> According to the general limitation clause in Article 31 para. 3 of the Constitution, any limitation on the exercise of constitutional freedoms and rights may be imposed only by statute and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health, or public morals, or the freedoms and rights of other persons. Such limitations do not violate the essence of freedom and rights. Article 64 para. 3 provides for a limitation clause relating specifically to the protection of ownership, pursuant to which the right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right. Litwiniuk expressed his concern that while the provision allowing the Government Agency to exercise pre-emption rights did not violate the essence of the right to ownership, the purpose justifying the limitation of this right was not specific enough. Bearing in mind the case law of the Polish Constitutional Court (judgement of 18 March 2010 Case K8/08), it might be doubtful whether the current arrangement would stand the proportionality test. Equally, a lack of normative clarity remains about the preconditions that allow the Government Agency to exercise pre-emptive rights in a given case. For example, under the existing framework, it is not possible to determine whether the Government Agency is allowed to exercise pre-emptive rights in pursuit of a business goal, for example, to purchase real property at an advantageous price and sell it for profit. Furthermore, Litwiniuk reminded the audience that under the provisions of the AAS, the legal arrangement for the pre-emption right in favour of the Government Agency was that of a fiduciary legal relationship. Pursuant to Article 3 para. 4 of the AAS, while exercising pre-emptive rights, the Government Agency is acting in its own name but on behalf of the State Treasury. However, note that the practical application of this provision differs greatly from one notary public to another. It is not uncommon to indicate in the notarial act certifying the exercise of the right of pre-emption that it is the territorially competent Government Agency that exercises the pre-emptive rights on its own behalf, thus omitting the State Treasury and being contrary to the letter of the law. He also referred to the sequence of obligations related to the exercise of pre-emptive rights by the Government Agency under the AAS. Pursuant to the provisions of the AAS, the Government Agency is supposed to first send to the party obliged on account of the right of pre-emption the notarial act

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<sup>15</sup> <sup>15</sup> Title of presentation: *Przesłanki i sposób wykonania prawa pierwokupu nieruchomości rolnej przez Krajowy Ośrodek Wsparcia Rolnictwa (Prerequisites for the exercise of pre-emption right by the National Support Centre for Agriculture and the rules governing the exercise thereof)*. Author's other works include: Litwiniuk 2020; Litwiniuk 2018a; Litwiniuk 2018b; Litwiniuk 2017.

<sup>16</sup> Pursuant to Article 21 para. 1 of the Polish Constitution, the Republic of Poland shall protect ownership and the right of succession, while pursuant to Article 64 para. 1 everyone shall have the right to ownership, other property rights, and the right of succession. Article 64 para. 2 states that everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights, and the right of succession.



certifying the exercise of the right of pre-emption by a registered letter against confirmation of receipt. Only having complied with this obligation, is the Government Agency allowed to publish the notification on its website. If this order has not been respected, that is, a notification on the website was published prior to sending it by registered mail, then according to Litwiniuk, such exercise of right by the Government Agency shall be of no force and effect.

*Dr Rafał Michałowski* (University of Białystok, Białystok)<sup>17</sup> in his address referred to the issue of the legal consequences of non-compliance with the provisions of the AAS, more specifically to the grounds of invalidity laid down in Article 9 para 1. While it might seem that the sanction on invalidity is a relatively easy way to ensure compliance with the provisions of law, the misapplication of this sanction might have the opposite effect, creating various problems rather than solving them. According to Article 9 para. 1 of the AAS, the acquisition of an agricultural real property or of a share in the co-ownership of an agricultural real property, as well as the acquisition of the right of perpetual usufruct and the acquisition of shares in a company that owns agricultural real property with an area of at least 5 ha, shall be invalid if carried out contrary to the provisions of the AAS. In particular, failure to comply with the obligation to notify the person entitled to pre-emption or to inform the Government Agency in cases specified by the AAS (Article 3b and Article 4 para. 1) will result in the invalidity of the respective legal transaction. Michałowski emphasised that these two cases, although both included in the same provision of the AAS, constituted two separate grounds for invalidity, and thus should be considered separately. While it is widely accepted that the sale of agricultural real property results in invalidity if performed unconditionally, without the party entitled to pre-emption being notified, it is questionable whether the other case of non-compliance results in the same effect. He stressed the difference between the breach of the obligation to notify the party entitled to pre-emption and non-compliance with the obligation to inform the Government Agency in cases specified in Article 3b and Article 4 para. 1 of the AAS.<sup>18</sup> According to Michałowski, the latter refers to an obligation that is subsequent to the legal transaction resulting in acquisition, which does not constitute one of its elements. Therefore, he suggested that an acquisition should not be considered invalid *ab initio* and *ipso jure* if the Government Agency had not been properly informed about the transaction. Instead, it should be assumed that after obtaining knowledge from any source that the acquisition has taken place, the Government Agency could still exercise its rights under Article 3b and Article 4 para. 1. within one month.

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<sup>17</sup> Title of presentation: *Naruszenie regulacji ustawy o kształtowaniu ustroju rolnego w kontekście sankcji nieważności* (Non-compliance with the provisions of the Act on Shaping of the Agricultural System in the context of the sanction of invalidity). Author's other works include: Michałowski 2020.

<sup>18</sup> Article 3b of the AAS provides for the right of the Government Agency to acquire an agricultural real property with an area of at least 5 ha at a price corresponding to its market value in the case of a change of partners in a partnership owning agricultural real property or holding the right to perpetual usufruct with respect to this agricultural real property. Article 4 para. 1 of the AAS lays down the right of the Government Agency to acquire an agricultural real property in the case that the acquisition of property rights is not a result of a sale-purchase agreement, for example, in the case of a donation or an acquisition by prescription.

*Mgr Patryk Bender* (Jagiellonian University, Cracow)<sup>19</sup> delivered a speech on the alienation of inheritance comprising an agricultural real property. He devoted the main part of his presentation to the relation between the general rules of inheritance under the Polish Civil Code and the provisions of the AAS governing the acquisition of farmland. Pursuant to Article 1051 of the Civil Code, an heir who has accepted the inheritance may alienate the entire estate or part of it. According to the rule of universal succession laid down in Article 1053 of the Civil Code, the party that acquires the estate shall assume the rights and obligations of an heir. Therefore, the acquirer assumes liability for the totality of the transferred estate, not to specific items of property. Article 1070<sup>1</sup> of the Civil Code refers specifically to the alienation of an inheritance comprising an agricultural holding. It states that where alienating an estate or part of an estate or a share in the estate comprising an agricultural farm or an agricultural real property within the meaning of the AAS, the provisions of the AAS on the alienation of agricultural real property shall apply. Bender explained that Article 1070<sup>1</sup> was introduced into the Civil Code in 2003 and amended in 2016. During the period 2003-2016, the then legal framework provided specifically that in case of the alienation of an inheritance comprising an agricultural holding, the right of pre-emption set out in Article 3 and right of acquisition by the Government Agency in Article 4 of the AAS applied. The 2016 Civil Code amendment moved from the specific reference to Articles 3 and 4 of the AAS toward a general reference to the AAS as a whole. According to Bender, the reason behind the amendment was to extend the scope of application of the AAS beyond Article 3 and Article 4 in the case of the alienation of an inheritance comprising an agricultural real property. Consequently, the general restrictions provided for by virtue of Article 2a para. 1 of the AAS, according to which only individual farmers may acquire agricultural real property, shall equally apply to the alienation of inheritance. The year 2016 also witnessed a substantial amendment of the AAS itself, as a result of which all types and means of acquisition of agricultural real property now fall into its scope of application. The AAS, as amended in 2016, lays down in Article 2 a very broad definition of farmland acquisition, encompassing acquisition by legal transaction or other event of legal significance, as well as acquisition by virtue of a court ruling or an administrative decision. Such a broad understanding of ‘acquisition’ leads to the conclusion that the statutory restrictions provided for in the AAS apply *inter alia* to the acquisition by means of sale and purchase agreement, by donation, by prescription, and by court ruling. Therefore, it can be assumed that they equally apply to the acquisition of farmland by inheritance. Under these circumstances, Article 1070<sup>1</sup> of the Civil Code is redundant and superfluous, as it repeats the regulation already covered by the AAS and as such shall be repealed. The other point addressed by Bender was the legal consequences of non-compliance with the AAS in the specific context of the alienation of inheritance comprising an agricultural real property. In case of non-compliance with the provisions of the AAS, the entire acquisition of inheritance is deemed invalid, even if the agricultural property constitutes only a small part of the whole inheritance mass. Bender reflected on whether it would be possible to limit the legal consequences of non-compliance, that is, the invalidity of acquisition, only to the

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<sup>19</sup> Title of presentation: *Zbycie spadku obejmującego gospodarstwo rolne lub nieruchomości rolną (Alienation of inheritance comprising an agricultural holding or an agricultural real property)*.

agricultural real property, even though it would not be consistent with the rule of universal succession. He pointed out that in Germany and the Czech Republic, the provisions providing for universal succession in case of the alienation of inheritance were dispositive in nature, which allowed excluding certain items of property within the inheritance mass from the transfer of property. While this is not the case in Poland, it can nevertheless be argued that several provisions of law provide for the possibility of distinguishing a particular article from the inheritance mass as a whole (e.g. Article 981<sup>1</sup> of the Civil Code relating to specific bequest or Article 1054 of the Civil Code). For this reason, Bender suggested that the general rule of universal succession applicable to the alienation of inheritance could be overcome by introducing an additional contractual clause allowing for the exclusion of the agricultural real property from within the entire inheritance mass. It shall be possible for the parties to the contract to indicate that they have no knowledge as to whether the inheritance comprises an agricultural real property; however, shall that be the case, they wish to exclude it from the transfer of the inheritance mass. The application of such clauses would reduce the risks associated with the transfer of an entire estate under universal succession. Further, it would allow the preservation of the validity of the acquisition as a whole by limiting the scope of possible legal consequences of non-compliance with the AAS solely to the invalidity of the transfer of farmland.

#### 4. Third Session

The third session was devoted to food law-related aspects of the legal framework governing agricultural land trade in Poland. The keynote address was provided by *Prof. UW dr hab. Paweł Wojciechowski* (University of Warsaw, Warsaw), who spoke about the restrictions on trade in agricultural property in relation to food security.<sup>20</sup> Under Polish law, a the principle of food security and notion of food safety is distinguished. The principle of food security aims to ensure the availability of food, which encompasses four essential elements: the physical existence of food, its economic availability (i.e. at an affordable price), the adequacy of food, and stability of food supplies. During the outbreak of the COVID-19 pandemic, we had a sample of what could happen if the stability of food supplies became an issue. While addressing the question of constitutional background, he noted that the Polish Constitution did not explicitly refer to food security. However, it should be kept in mind that food security is a means of ensuring the right to adequate food. The latter, although not guaranteed directly by Polish law, can be derived from other rights laid down in the Constitution, for example, from the right to the protection of life and health. Furthermore, it is guaranteed by several international human rights instruments, notably the UN Universal Declaration of Human Rights and International Covenant on Economic, Social, and Cultural Rights (ICESCR). The ICESCR recognises that the right to adequate food is protected under the right of an adequate standard of living, and it goes

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<sup>20</sup> Title of presentation: *Bezpieczeństwo żywnościowe a ograniczenia w obrocie nieruchomościami rolnymi (Food security and restrictions on the free trade of agricultural real estate)*. Author's other works include: Wojciechowski 2018; Korzycka & Wojciechowski 2017; Wojciechowski 2016; Korzycka & Wojciechowski 2014; Wojciechowski 2010.

further by recognising the fundamental right of everyone to be free from hunger. Therefore, the principle of food security is anchored in the Polish Constitution, regardless of the fact that it contains no specific reference to the notion of food security. Wojciechowski reminded the audience that the idea of food security was also closely related to the 2030 Agenda for Sustainable Development. While the 17 goals were defined by UN member states in relation to sustainable development, goal no. 2 aims to end hunger, achieve food security and improved nutrition, and promote sustainable agriculture. A close relationship is evident between ensuring food security and the idea of sustainable agriculture, which also requires equal access to farmland and other natural resources. The guidelines provided for in the 2030 Agenda with regard to the implementation of goal no. 2 include doubling the agricultural productivity and incomes of small-scale food producers. This conforms to the fundamental principle underlying the entire Polish agricultural system, which shall be based on family farming according to the Polish Constitution and AAS. The implementation of the principle of food security included in the preamble to the AAS requires proper regulation of the agricultural land market. The European Parliament and European Commission have both declared that within their farmland policy, the EU member states ensure access to agricultural land for farmers, who are supposed to carry out agricultural production. In Wojciechowski's opinion, the measures adopted by the Polish legislator (e.g. the acquisition of farmland by individual farmers, ban on alienating farmland within five years, obligation to carry out agricultural activity, pre-emption rights) are insufficient to fully meet this goal. Nevertheless, they contribute to the overall aim of avoiding the excessive concentration of land and in supporting farmers running small family holdings. Although these measures place a significant burden on the trade of agricultural land, they are entirely justified in the context of food security.

*Prof. UW dr hab. Adam Niewiadomski* (University of Warsaw, Warsaw)<sup>21</sup> in his speech looked at the impact of the AAS regulation on environmental protection. He argued that although the preamble to the AAS referred to the need for environmental protection in explicit terms, its provisions were irrelevant with respect to the protection of the environment. The AAS was designed to protect the interests of the state to prevent the excessive concentration and speculative acquisition of farmland, and it does not provide for instruments specifically dedicated to environmental protection. Neither the requirement imposed upon individual farmers to have agricultural qualifications nor the 300 ha threshold on the area of acquired farmland can be considered environment-related provisions. Niewiadomski raised doubts as to whether the AAS, whose title directly refers to the 'shaping of the agricultural system', was indeed able to shape the Polish agricultural system. How is it possible to shape the agricultural system without any concern as to matters pertaining to environmental protection?

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<sup>21</sup> Title of presentation: *Obrót nieruchomościami rolnymi a wyzwania ochrony przyrody (The turnover of agricultural real estate and challenges of environmental protection)*. Author's other works include: Czechowski & Niewiadomski 2013; Czechowski & Niewiadomski 2015; Niewiadomski & Czechowski 2016; Niewiadomski 2011; Niewiadomski & Niewiadomski 2012; Niewiadomski 2013; Niewiadomski 2014a; Niewiadomski 2014b; Niewiadomski 2016a; Niewiadomski 2016b; Niewiadomska & Niewiadomski 2012;

## 5. Concluding remarks

During the 17 years that have passed since its adoption and entry into force, the Act of 11 April 2003 on the Formation of the Agricultural System (AAS) has given rise to many questions both in terms of its fundamental principles and its implementation in practice. The 2016 amendment to the AAS, adopted at the end of the transitional period provided for in the European Union accession treaty, has put new restrictions on farmland trade, substantially changing the existing legal framework. The choice of subjects for the conference reflected the challenges posed by the current regulations governing the agricultural real estate market in Poland. In particular, the difficulties in determining the meaning of ‘agricultural real property’ and establishing the scope of application of the AAS (Mikolajczyk) were referred to. The statutory formulation of the principle according to which only individual farmers can acquire farmland is not fully consistent with the desired aim of the legislator, and gives rise to practical difficulties, especially in relation to the obligation to carry out agricultural activity on the acquired farmland (Blajer). Several uncertainties were pointed out in connection with the legal consequences of non-compliance with the AAS (Michalowski), with special regard to the issue of the alienation of inheritance comprising an agricultural holding (Bender). The coherence and practical application of the provisions imposing upon a company owning agricultural real property the obligation to notify the Government Agency in case of a transfer of shares was questioned (Bieluk). Furthermore, reference was made to a legal gap that makes it impossible for the owner of a farmland in lease to transfer the ownership of such land based on the obligation to run the agricultural activity personally (Suchoń). General concern was expressed about the casuistic and highly restrictive character of the AAS, which in addition to its frequent amendments, runs afoul of the rule of legal certainty (Czechowski, Marciniuk). While the overall impact of the AAS on food security is positive (Wojciechowski, Szymańska), the issue of environmental protection is not adequately addressed in the AAS (Niewiadomski). The conference participants expressed their hope that further amendments of the AAS would bring solutions to the issues of concern.

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