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The Regulation on Cross-Border Land Acquisition in Poland²

- **ABSTRACT:** *The aim of this article is to present those regulations of Polish law that have the most significant impact on the phenomenon of cross-border land acquisition in Poland. This issue is currently one of the most intensively discussed questions, both at a political and a strictly theoretical level, primarily in the context of land grabbing. Without exaggeration, this problem has a decisive impact on the current shape of real estate trading in Poland.*

The implementation of the assumed research goal is carried out by the analysis of the basic protective instruments contained in the Act on the acquisition of real estate by foreigners, as well as in the Acts relating to the transactions concerning agricultural and forest land, i.e. in the Act on shaping the agricultural system and in the Act on forests. As a result of the research carried out in the article, it was indicated that today – in view of the diminishing importance of traditional protective instruments specified in the Act on the acquisition of real estate by foreigners – the most significant influence on the phenomenon of cross-border land acquisition in Poland have legal acts relating to the transactions concerning agricultural and forest land, which is the result of broadly defined definitions of “agricultural real estate” and “forestry land”. In practice, these acts also significantly affect the acquisition of real estate located in cities, as well as real estate whose agricultural and forestry functions are more than questionable. The system of protection against uncontrolled purchase of real estate by foreigners in Poland, provided for in the above-mentioned legal acts, is relatively tight and comprehensive, and even complicated, which obviously influences the increased investment risk when acquiring real estate in Poland.

- **KEYWORDS:** land acquisition, land grabbing, cross-border land transactions, foreigner, agricultural real estate, forestry land.

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I. Introduction

The issue of proper regulation of the acquisition of a real estate by foreigners in Poland is currently one of the most intensively discussed issues, both at the political and strictly theoretical level, primarily in the context of the so-called *land grabbing*³ phenomenon. It is no exaggeration to say that this problem has a decisive influence on Poland's current shape of real estate trade. Traditionally, this phenomenon was subject to public control under the Act of March 24, 1920, on foreigners' acquisition of real estate (AAREF)⁴. However, the significance of this legal act from the viewpoint of its restrictive function has significantly diminished since May 1, 2016. This was when the 12-year protection period for purchasing Polish agricultural and forestry land by foreigners coming from the states—parties to the Agreement on the European Economic Area (EEA) and the Swiss Confederation⁵—ended. Consequently, these foreigners became participants in Poland's agricultural and forestry real estate trade on the same terms as Polish citizens and organizational units with their registered office in Poland. In this circumstance, it was perceived that after May 1, 2016, agricultural and forest land in Poland would be subject to the increased interest of purchasers from other European Union countries, especially those where the prices of agricultural land are much higher than in Poland and where strong legal barriers are preventing the acquisition of agricultural land by foreigners. The result of these concerns was a profound correction of the general rules of trading in agricultural and forest land in Poland, brought about by two amendments to the Act of April 11, 2003, on shaping the agricultural system (ASAS)⁶ and the Act of September 28, 1991, on forests (AF)⁷, which in both cases came into force on April 30, 2016⁸. Their undisguised aim was to strengthen the protection of agricultural and forest land in Poland against speculative purchases by foreigners who do not guarantee the use of the acquired land in accordance with the social interest⁹.

This study aims to present the regulations of Polish law that have the most significant impact on the cross-border acquisition of land in Poland by analyzing the basic protective instruments contained in the AAREF, ASAS, and AF. In the course of

3 More widely: Pastuszko 2017, pp. 147–156 and the literature cited therein.

4 Journal of Laws 2017, item 2278.

5 This period was established in paragraph 4.2 of Annex XII to the Act of Accession of the Republic of Poland to the European Union, signed in Athens on April 16, 2003, Journal of Laws 2004, No. 90, item. 864.

6 Journal of Laws 2020, item 1655, as amended.

7 Journal of Laws 2021, item 1275 as amended.

8 These changes were introduced, respectively, by the Act of April 14, 2016, on the suspension of the sale of properties of the Agricultural Property Stock of the State Treasury and on the amendment of certain acts (i.e., Journal of Laws 2016, item 868, as amended) and the Act of April 13, 2016 on the amendment of the Act on Forests (Journal of Laws 2016, item 586).

9 Cf. Justification to the Act on the suspension of the sale of properties of the Agricultural Property Stock of the State Treasury and on the amendment of certain acts.

further considerations, the widely discussed in Polish literature issue of compliance of these regulations with the Constitution of the Republic of Poland was omitted, particularly in the context of constitutionally guaranteed protection of property rights and freedom of economic activity and compliance with the principles of the European Union law. These issues, although extremely interesting, exceed the scope of this study and deserve a separate in-depth analysis. Thus, conclusions are drawn regarding the current regulation of cross-border acquisition of real estate in Poland and, more broadly, with regard to the shape of the real estate market in Poland.

II. Act on Acquisition of Real Estate by Foreigners (AAREF) and its current impact on cross-border land acquisition in Poland

■ 1. Concept of ‘foreigner’

To determine the scope of the Polish regulation limiting the acquisition of a real estate by foreigners, the notion of a foreigner as defined in the AAREF is of fundamental importance. Under Article 1.2 of this Act, a foreigner within the meaning of the Act is:

- 1) A natural person who does not have Polish citizenship, in other words, a foreigner within the meaning of the Act, is stateless person, but not a person who holds citizenship in a foreign country, if apart from that, this person also holds Polish citizenship. The only criterion for determining whether a given natural person is a foreigner within the meaning of the Act is the fact that he holds Polish citizenship. Polish nationality alone, Polish origin, or residence in the territory of the Republic of Poland does not allow us to conclude that a given person is not a foreigner within the meaning of the Act if these circumstances are not accompanied by Polish citizenship.
- 2) Legal persons established abroad the concept of a legal person include commercial companies with legal personality and cooperatives, associations, foundations, churches, and religious associations¹⁰ if they have legal personality under the country’s law where the organizational unit has its seat. The only criterion for determining whether a given legal person is a foreigner within the meaning of the Act is that its registered office is located outside the territory of the Republic of Poland.
- 3) A company of persons referred to in point 1 or 2 above, without legal personality, established abroad, created under the laws of foreign countries; it is, therefore, the foreign law that determines whether a given organizational unit is a company and whether it may acquire real estate effectively. The literature also indicates that this provision should also be applied by analogy to organized

10 Wereśniak-Masri, 2021.

entities other than companies (associations, trusts, funds), which do not have legal personality and which are able—in accordance with the law of their state of the seat—to acquire real estate effectively¹¹.

4) A legal person and a commercial partnership without legal personality having its registered office in the territory of the Republic of Poland, controlled directly or indirectly by persons or companies listed in 1, 2, and 3 above. The Act specifies in detail when a legal person or a commercial partnership without a legal personality entitled to acquire real estate is considered to be controlled by foreigners. This involves the following circumstances (Article 1, paragraph 3 of the AAREF):

- When a foreigner or foreigners hold directly or indirectly more than 50% of votes at the meeting of partners or the general meeting of a commercial company, also as a pledgee, usufructuary, or based on agreements with other persons.
- When a foreigner or foreigners are entitled to appoint or dismiss the majority of the management board members of another capital company (dependent company) or a cooperative (dependent cooperative), based on agreements with other persons.
- When the foreigner or foreigners are entitled to appoint or dismiss the majority of the supervisory board members of another capital company (dependent company) or a cooperative (dependent cooperative), based on of agreements with other persons.
- If the foreigner or foreigners hold directly or indirectly the most in the dependent partnership or at the general meeting of the dependent cooperative, also based on agreements with other persons.

The literature also notes that the issue of what should be regarded as direct or indirect control in entities other than commercial companies' partnerships and cooperatives is not regulated in the Act. It applies to legal entities with the participation of foreigners, with their registered office in the territory of the Republic of Poland, such as associations and foundations. Therefore, it is proposed that, by way of analogy, the provisions of Articles 1, 2, and 4 of the AAREF be applied in this case. This means that a foreigner is, for example, an association in which foreigners directly or indirectly hold more than 50% of votes at the general meeting or have an influence on appointing the majority of members of the management board or the supervisory board (or bodies performing such functions)¹².

A foreigner within the meaning of the Act is also a European company (*Societas Europea-SE*), a *European Economic Interest Grouping* (EEIG), a European cooperative

11 Wereśniak-Masri, 2021.

12 Wereśniak-Masri, 2021.

society (*Societas Cooperativa Europaea*, SCE), as well as a foreign country acquiring real estate in Poland¹³.

However, even though the cited definition – contained in Article 1.2 of the AAREF – does not differentiate between foreigners according to any specific criteria; it is clear from further provisions of the AAREF that it provides for a completely different regime regarding the acquisition of real estate in Poland depending on whether a foreigner is a citizen or an entrepreneur of a state—a party to the Agreement on the European Economic Area¹⁴ and the Swiss Confederation, or whether he is a citizen or has registered office in another state (Article. 8.2 of the AAREF).

■ 2. Acquisition of real estate in Poland by foreigners who are citizens or established in countries outside the European Economic Area and the Swiss Confederation

Regarding foreigners who are citizens of, or have their registered office in, countries outside the European Economic Area and the Swiss Confederation (as a country associated with the European Union), the principle expressed in Article 1.1 of the AAREF is applicable. According to the principle, the acquisition of real estate located in Poland by such a foreigner requires permission. The concept of “acquisition of real estate,” as defined in Article 1.4 of the AAREF needs to be analyzed to present this principle properly. Following the said provision, the acquisition of real estate within the meaning of the Act is an acquisition of ownership rights to real estate or the right of perpetual usufruct¹⁵. Consequently, the Act does not apply to the acquisition by foreigners of any limited rights *in rem*, entitling them to use another person’s real property, such as usufruct or easements (both land and personal easements). The AAREF also does not regulate the lease of real estate located in Poland by foreigners; it does not introduce any restrictions in this respect.

The scope of objects, the acquisition of which is subject to restrictions provided for in the AAREF, is extended by Article 3e of this Act. According to this provision, the acquisition by a foreigner shares or stocks in a commercial company with its registered office on the territory of the Republic of Poland and any other legal transaction regarding shares or stocks, if as a result of such transaction the company which is the owner or perpetual usufructuary of real estate on the territory of the Republic of Poland becomes a controlled company, also requires the permission of the minister competent for internal affairs. In addition, such permission is required for the acquisition

13 Szymański, 2021, p. 880.

14 Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom, Croatia, Iceland, Liechtenstein, Norway.

15 The right of perpetual usufruct is a real right specific to Polish civil law (Articles 232-243 of the Civil Code) concerning real estate, one of the three types of rights *in rem*, next to ownership and limited rights *in rem*. It consists in handing over for use a piece of land owned by the State Treasury, local government units, or an association of such units to a natural or legal person for a specified period – as a rule 99 years (exceptionally shorter, but no less than 40 years).

by a foreigner of shares or stocks in a commercial company with its registered office in the Republic of Poland, which is the owner or perpetual usufructuary of real estate in the territory of the Republic of Poland, if this company is a controlled company and the shares or stocks are acquired by a foreigner who had not been a shareholder or stockholder of the company before¹⁶.

In that case, it follows from the said regulation that not every acquisition of shares or stocks in a company with its registered office in Poland and owning real estate requires permission. This obligation does not apply; for example, if a foreigner acquires shares or stocks in a company in such a number, it does not lead to the company becoming a foreigner. Permission is also not required when the shares or stocks in a company that is already a foreigner are purchased by a foreigner who is its shareholder or shareholder. Permission is also not required if the company is not the owner or perpetual usufructuary of real estate or if the real estate owned by the company is located outside the borders of the Republic of Poland¹⁷.

Another issue that needs to be clarified here is the scope of legal events leading to acquiring the above-described objects regulated by the AAREF. Pursuant to Article 1. 4 of the Act, it refers to “any” legal event, i.e., acquisition not only by way of a legal transaction, including in particular a contract, but also acquisition by way of a court ruling, administrative decision, or by force of law (acquisitive prescription, inheritance). Article 7 of the Act contains a modest list of events resulting in the acquisition of real estate (or shares in a commercial law company) to which the restrictions arising from the Act will not apply. These events include the following:

- Transformation of a commercial company¹⁸
- acquiring real estate (and shares or stocks in a commercial company owning or perpetually usufruct real estate in the territory of the Republic of Poland) by inheritance by persons entitled to statutory inheritance. Suppose the law applicable to the inheritance does not provide for a statutory inheritance; Polish law shall apply to assess whether the acquirer of the real estate is a person entitled to statutory inheritance. The provision of Article 7.3-3a of the AAREF further specifies that if a foreigner who has acquired real estate forming part of the inheritance based on a will, and does not belong to the circle of heirs entitled to the statutory inheritance—fails to obtain permission pursuant to an application filed within two years from the day on which the inheritance was opened, the ownership right to the real estate or the right of perpetual usufruct is acquired by persons who would be appointed to the inheritance by operation of law. In the case of acquisition through a legacy (specific bequest), failure to obtain permission by a foreigner based on an application filed within

16 Dudarski, 2009, p. 35; Hartwich, 2010, p. 26.

17 Wereśniak-Masri, 2021.

18 Chyb, 2010.

the same time limit results in entering the real estate (shares or stocks) to the inheritance¹⁹.

The rule is expressed in Article 1.1 of the AAREF stipulates that the acquisition of the above-described objects, based on the indicated legal events, by a foreigner who is a citizen or resident of a state outside the European Economic Area and the Swiss Confederation requires “permission.” The permission referred to in this provision is issued, by way of an administrative decision, by a relatively high-level government administrative body—the Minister responsible for internal affairs. This decision may be issued if:

- The Minister of Defense will not object,
- In the case of agricultural real estate, if no objection is raised by the Minister competent for rural development²⁰.

In addition, the refusal to grant permission is made by the administrative decision of the Minister responsible for internal affairs. In the case of refusal to grant permission for the acquisition of real estate, a foreigner has the right to apply for reconsideration of the case to the same authority that issued the refusal (Article 127.3 of the Code of Administrative Proceedings) and if the refusal is upheld, then court-administrative proceedings²¹.

The permission itself is issued at the request of the foreigner. This means that it cannot be issued *ex officio* or at the request of the seller of the real estate, provided that:

1. A foreigner’s real estate acquisition does not pose a threat to state defense, security, or public order. and it is not precluded by considerations of social policy and public health.
2. The foreigner demonstrates that circumstances are confirming his ties with the Republic of Poland. These circumstances include, in particular, (but not exclusively):
 - Possession of Polish nationality or Polish origin
 - marrying citizens of the Republic of Poland
 - Possession of a temporary or permanent residence permit;
 - membership in the managing body of entrepreneurs—legal persons and commercial companies with registered office in the territory of the Republic of Poland;
 - Economic or agricultural activity in the territory of the Republic of Poland, in accordance with the provisions of Polish law.

¹⁹ Pazdan, 2000, p. 10; Hartwich 2012.

²⁰ The objection referred to in this provision shall be expressed, by a decision, within 14 days from the delivery date of the address of the Minister responsible for internal affairs.

²¹ Regulated by the provisions of the Act of 30 August 2002 – Law on proceedings before administrative courts (Journal of Laws 2019, item 2325 as amended).

The control exercised by the minister competent for internal affairs following the provisions of the Act is preventive, which means that a foreigner should obtain permission to acquire real estate before the acquisition. However, it is not possible to grant a permit *ex-post*, that is, after the acquisition. If the acquisition of a real estate by a foreigner took place in violation of the provisions of the Act, it was invalid. Consequently, a legal transaction leading to the acquisition has no legal effect and cannot be validated (Article 6.1 of the AAREF). This regulation, understandable in relation to legal transactions, raises several doubts in the case where acquisition of the real estate by a foreigner occurs based on other legal events, for example, based on a court ruling or an administrative decision, or by force of law²².

From the perspective of Poland's real estate trade practice, exemptions from the obligation to obtain permission provided for in Article 8.1 of the AAREF are of significant importance. These include the following cases:

- purchase of a dwelling (apartment)
- acquisition of commercial premises with garage use or a share in such premises, if this is related to meeting the housing needs of the purchaser; acquisition of real estate with other uses already requires permission;
- acquisition of the real estate by a foreigner residing in the Republic of Poland for at least five years after the granting of a permanent residence permit or a residence permit for a long-term EU resident;
- acquisition by a foreigner married to a Polish citizen and residing in the Republic of Poland for at least two years after granting a permanent residence permit of real estate, which, due to the acquisition, will constitute the spouses' statutory community.
- acquisition of the real estate by a foreigner, if on the date of acquisition he is entitled to statutory succession within the meaning of Polish law after the transferor of the real estate, and the transferor has been the owner or perpetual usufructuary of the real estate for at least five years.
- acquisition by a company controlled by foreigners, for its statutory purposes, of undeveloped real estate, the total area of which does not exceed 0.4 ha in urban areas throughout the country;
- acquisition of the real estate by a foreigner, who is a bank and at the same time a mortgage creditor, by way of taking over the real estate due to an unsuccessful auction in enforcement proceedings;
- acquisition by a bank, which is a legal person controlled by foreigners of shares or stocks in a company, in connection with the bank's pursuit of claims arising out of banking activities.

In the market practice, the first of the aforementioned exemptions concerning the acquisition of a dwelling constitutes a significant convenience for foreigners from

22 Szewczyk, 2012.

outside the European Economic Area, investing their funds on the residential market in Poland.

However, it has to be stressed that the aforementioned exemptions do not apply if the real estate to be purchased is located in a border zone or constitutes agricultural real estate exceeding 1 ha (Article 8.3 of the AAREF). In such cases, there is a return to the general rule that the acquisition of a real estate by a foreigner who is a citizen or resident of countries outside the European Economic Area and the Swiss Confederation requires permission. According to the statistical data, the most frequently stated reason for invalidation of contracts on acquisition of a real estate by foreigners was the acquisition of real estate located in the border zone without permission²³.

■ **3. Acquisition of real estate in Poland by foreigners who are citizens or entrepreneurs of countries – parties to the Agreement on the European Economic Area or the Swiss Confederation**

De lege lata acquisition of real estate located in Poland by foreigners who are citizens or entrepreneurs of countries—parties to the Agreement on the European Economic Area or the Swiss Confederation—does not require, as a rule, the permission of the Minister responsible for internal affairs, regardless of the type, area and location of the real estate (Article 8.2a of the AAREF)²⁴. In other words, the aforementioned entities acquire real estate in Poland in the same way as Polish citizens. In particular, it should be emphasized that the so-called transition periods provided for in the AAREF, during which foreigners being citizens or entrepreneurs of countries—parties to the Agreement on the European Economic Area or Swiss Confederation were obliged to obtain permission for the purchase of a real estate have expired. These periods were negotiated by the Republic of Poland in the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, and the adjustments to the Treaties on which the European Union was founded²⁵. They were concerned with the following acquisitions:

23 Report of the Minister responsible for internal affairs on the implementation in 2019 of the Act of 24.3.1920 on foreigner's acquisition of the real estate by foreigners (Parliament print No. 292).

24 Some doubts arise only as to whether this exemption should also apply to organizational units with their seat in the territory of a state – party to the Agreement on the European Economic Area – which are not entrepreneurs (e.g., foundations or associations). However, the prevailing view in the literature is that this exemption may be applied in this case. Wereśniak-Masri, 2021.

25 OJ EU L of 2003. No 236, p. 33 as amended, Annexes V-XIV

- 1) An agricultural and forestry real estate, for 12 years from the date of accession of the Republic of Poland to the European Union (the deadline expired on 1 May 2016)²⁶;
- 2) A second home for five years from the date of accession of the Republic of Poland to the European Union (the deadline expired on May 1, 2009), whereby the acquisition of a second home was understood as the acquisition by a foreigner, who is a citizen of a state—a party to the Agreement on the European Economic Area or the Swiss Confederation (i.e., a natural person) of real estate intended for residential development or recreational and leisure purposes, which will not constitute a permanent residence of the foreigner²⁷.

Thus, currently, the mentioned categories of real estate, including in particular agricultural and forestry real estate, are acquired by a significant group of foreigners—all citizens or entrepreneurs of countries—parties to the Agreement on the European Economic Area or the Swiss Confederation—under the same conditions as Polish citizens. Moreover, the way the exemption from the obligation to obtain permission is formulated makes it relatively easy for foreigners formally covered by the obligation to obtain permission, foreigners from outside the European Economic Area or the Swiss Confederation, to purchase real estate in Poland. It is sufficient for such foreigners to establish a company with its registered office in one of the countries—parties to the Agreement on the European Economic Area or the Swiss Confederation (including the Republic of Poland)—for the company to acquire real estate in Poland without the need to obtain permission from the minister responsible for internal affairs. Consequently, the practical significance of the regulations contained in the AAREF has significantly diminished; at present, therefore, the core of the regulations affecting cross-border acquisition of real estate located in Poland is to be found in other legal acts, particularly in the ASAF and in the AF²⁸. The AAREF itself directly indicates that it is the first

26 With regard to agricultural real estate, the AAREF introduced exemptions from the obligation to obtain permission, within a transitional period, in the case of real estate leased by a foreigner for a specified period (3 or 7 years, depending on the voivodeship) from the date of conclusion of a written agreement with a definite date and running an agricultural activity on this real estate – provided the foreigner was legally residing on the territory of the Republic of Poland (Article . 8.2a item 1). Borkowski 2007, p. 35-58.

27 With regard to the acquisition of a second home, the need to obtain a permit was eliminated if the purchaser has legally, uninterruptedly resided in the Republic of Poland for at least 4 years or the acquisition was made to carry out business activity consisting in the provision of tourist services (Article .8.2a item 2).

28 However, the obligations imposed on notaries as set out in article 8a.1 of the AAREF are still of significance in the notarial practice. According to the provision, a notary sends, within 7 days from the drafting date, to a Minister responsible for internal affairs, *inter alia*, an excerpt from the notarial deed and a copy of an agreement with notarially authenticated signatures, by virtue of which a foreigner purchased real estate situated within the territory of the Republic of Poland or acquired shares, stocks or all rights and obligations in a commercial company which is the owner or perpetual usufructuary of real estate situated within the territory of the Republic of Poland. This obligation also applies if permission for acquiring these items is not required, e.g., because the foreigner is a citizen of a country – party to the Agreement on

of the mentioned acts that should be considered when purchasing agricultural real estate by foreigners (Article 1a.6).

III. The Act on Shaping the Agricultural System (ASAS) and the Act on Forests (AF) and their current impact on cross-border land acquisition in Poland

■ 1. Concept of ‘agricultural real estate’ and ‘forest land’

A characteristic feature of both the ASAS and the AF is that they define the subject of their regulation very broadly; in both cases, the notion of agricultural real estate and the notion of forest land have been defined with the use of undefined and generally formulated criteria. This situation is of considerable practical significance, given that it is precisely these two concepts that constitute the starting point for a special trading regime relating to agricultural land and forest land characterized by increased public control.

The definition of “agricultural real estate,” as a subject of separate legal regulation, is provided in Article 2.1 of the ASAS. It states that the term “agricultural real estate” should be understood as agricultural real estate within the meaning of the Civil Code, excluding real estate located in the areas designated in the spatial development plans for purposes other than agriculture. It is assumed in the Polish agrarian literature that classifying a given real estate as agricultural real estate is a two-stage process: first, it has to be established whether the given real estate is agricultural real estate under the Polish Civil Code and the next stage is to check whether the area where the given real estate is located covered by a spatial development plan and in case of a positive answer—what are the provisions of the plan with regard to the given real estate²⁹. Notably, to qualify the given real estate as agricultural from the viewpoint of the aforementioned definition, neither its area nor the fact that it is located within the administrative city borders is of any significance.

The definition of agricultural real estate at the level of the Polish Civil Code is provided in Article 46¹ of this Act. In accordance with its content, agricultural real estate is –or may be used for conducting productive activity in agriculture within the scope of plant and animal production, not excluding horticultural, fruit, and fish production. From the wording of this provision, it may be concluded that the agricultural

the European Economic Area. Failure to comply with this obligation is sanctioned by severe disciplinary responsibility of the notary, even if the notification to the minister is made only for statistical purposes. The notification itself triggers control proceedings in the Ministry of Internal Affairs, due to which, if it is found that the acquisition of real estate was made contrary to the provisions of the act, the invalidity of the acquisition is declared by the court at the request of the minister responsible for internal affairs or also at the request of the executive body of local government competent for the location of the real estate.

29 Wojciechowski, 2019, p. 164.

real estate within the meaning of the Civil Code is the real estate used for carrying out productive activity in agriculture and the real estate that may be intended for such activity in the future.³⁰ In this context, “productive activity in agriculture” should be treated as a kind of qualified agricultural activity, assuming the existence of “purposeful and organized human activity aimed at agricultural production.”³¹ In contrast, the literature stresses that the basic criterion for distinguishing agricultural real estate is the physical and chemical (agronomic) properties of the topsoil layer. This allows agricultural products to be obtained after applying appropriate agrotechnical procedures. Thus, it refers to the agronomic features of the land that make it physically possible to produce agricultural products³². Suppose real estate is not currently used for agricultural purposes; it should be examined whether recultivation procedures would make it possible to restore it to a state in which it would be suitable for conducting agricultural activities. The criterion for reasonable expenditures should be applied in this context. It has to be examined whether, if real estate was adapted for agricultural use, the economic results achieved would justify the expenditure incurred³³.

The above doctrine corresponds with theses arising from the case-law of Polish courts, where the notion of agricultural real estate is broadly interpreted. Pursuant to the ruling of the Supreme Court of January 28, 1999, III CKN 140/98, LEX No 50652, the decisive factor for recognizing the real estate as agricultural is the intended use of the land and not how the land is actually used. The purpose of land does not change when it is excluded from agricultural use, even for a longer period, either due to legal transactions (lease, tenancy, lending) or certain facts (machinery storage, separation of playgrounds), provided that the land does not permanently lose its agricultural properties in both cases. It does not lose them when they can be restored using treatment, for example, recultivation. Thus, the real estate that served the needs of industrial production for years may have agricultural character—‘subjected to recultivation procedures, it may be restored to its original purpose, or at least it may be used for industrial-agricultural purposes’. Thus, even if for some time, real estate was developed differently and used for commercial, service, or production purposes not related to agricultural production, as long as there is a potential possibility of using it for agricultural production activities with regard to plant and animal production—it cannot be denied agricultural character.

Finally, significant doubts arise in the Polish literature and jurisdiction over the issue of the so-called mixed real estate, that is, real estate, which, apart from the land suitable for agricultural use, also includes land that has another type of use. This problem results from the definition of agricultural real estate in Article 46¹ of the Civil Code and is only adjusted when the whole real estate can be developed uniformly. In this respect, it is possible to adopt two different solutions:

30 Lobos-Kotowska and Stanko, 2019.

31 Judgment of the Supreme Court of 14 November 2001, II CKN 440/01, OSNC 2002/7-8, item 99.

32 Lichorowicz, 2001, p. 88

33 Czech, 2020.

1. Determination of the dominant (leading) function of the real estate. Consequently, if after establishing the dominant function of the real estate, it turns out that this function is not agricultural, the whole real estate cannot be classified as agricultural³⁴.
2. Treating real estate in its entirety as agricultural. This view is considered to be dominant in practice, as it is most consistent with the principle of certainty of trade.

Consequently, the legal definition of agricultural real estate contained in the ASAS can be precise only in cases a spatial development plan covers the whole area of a given real estate. So it is possible to go to the second step in legal identification of land for specific regulations on agricultural land transactions. However, this possibility is currently only about 1/3 of the area of the Republic of Poland. Moreover, in a particular case, the designation of a given real estate in the spatial development plan may also cause doubts regarding its agricultural qualification. This results from the fact that many a time, the content of the plan is not unambiguous. Its provisions provide, for example, next to the basic non-agricultural designation, for an agricultural designation as an admissible or supplementary³⁵. A consequence of the above described broad and imprecise nature of the definition of agricultural real estate included in the ASAS is the “precautionary” approach dominating the practice of trade. It assumes resolving any possible doubts as to the nature of the real estate in favor of recognizing it as agricultural and subjecting it to the regulation of the ASAS³⁶. This approach contributes to expanding the scope of public law control over real estate trade in Poland.

The broad definition of agricultural real estate in the ASAS is accompanied by a spacious definition of the “forest land” in the AF. In this case, the text of the Act is more precise, as it is based on formal criteria and relatively easy to verify based on appropriate documents³⁷. According to art 37a of the AF, subject to public control is the circulation of land:

- 1) designated as forest in the cadastre of real estate or,
- 2) intended for afforestation as specified in the spatial development plan or the decision on conditions of development and land use, or
- 3) covered by a simplified forest management plan as defined in Article 3 of the AF, i.e., land with a continuous surface of at least 0.10 ha, covered with forest

34 Truskiewicz, 2017, pp. 58–59; Marciniuk, 2017, p. 101; Wojciechowski, 2019, p. 157.

35 According to the view prevailing in the practice of a trade, issuance of the so-called decision on land development conditions for a given land, which, under Article 4.2 of the Act of 27 March 2003 on spatial planning and development (Journal of Laws 2021, item 741), is a surrogate of the spatial development plan in areas not covered by it, does not result in the loss of the agricultural character of the real estate. Truskiewicz 2016, 141.

36 The “precaution” described above is also a consequence of a severe sanction in case of making wrong findings and qualifying the given real estate as non-agricultural when it should be subject to ASAS. This sanction (here we have to go back to the original wording) expropriation (Article 9 of the ASAS).

37 However, it is worth noting that land without a single tree can function as forest land in light of strictly formal criteria.

vegetation—trees, shrubs, and undergrowth—or temporarily deprived of it, designated for forest production or constituting a natural reserve or being part of a national park or entered in the register of historical monuments. Land related to forest management, occupied for forest management buildings and structures, water reclamation facilities, forest zoning lines, forest roads, areas under power lines, forest nurseries, timber storage areas and used for forest parking lots and tourist facilities.

■ **2. Administrative control of transactions concerning agricultural real estate with an area of at least 1 ha.**

From the perspective of cross-border real estate acquisition in Poland, it is worth underlining that—*de lege lata*—within the framework of public law regulation of trade in relation to agricultural real estate with the area of at least 1 ha, instruments of administrative nature predominate. Theoretically, the purchaser of such real estate can only be an individual farmer (Article 2a.1 of the ASAS), excluding the situation when the purchase is made by entities and under conditions specified in Article. 2a.3 or based on the consent of the General Director of the National Agricultural Support Center (NASC) (Article 2a.4 of the ASAS). However, the rule resulting from the above provisions of the ASAS should be interpreted slightly differently: the purchaser of agricultural real estate within the meaning of ASAS may be any entity, provided that it obtains the consent of the General Director of the NASC. Individual farmers and purchasers referred to in Article 2a.3 of the ASAS are exempt from the obligation to obtain the consent of the General Director of the NASC. This statement enables us to emphasize the meaning of administrative control instruments exercised by the NASC within the trade framework in agricultural real estate of an area of at least 1 ha, regardless of its location. Instruments of public control, in this case, resemble tools known from the AAREF; in particular, this remark concerns the following circumstances:

- Permission for the purchase of the real estate by a foreigner issued by the Minister responsible for internal affairs is replaced with the consent for purchasing agricultural real estate issued by the General Director of the NASC. However, if a foreigner coming from outside the European Economic Area and the Swiss Confederation intends to purchase an agricultural real estate, he must obtain permission issued by the Minister responsible for internal affairs and a consent issued by the General Director of the NASC.
- The obligation to obtain consent for the acquisition of agricultural real estate covers, in principle, all events leading to the acquisition of agricultural real estate with an area of at least 1 ha (Article 2.7 of the ASAS) and the right of perpetual usufruct of such real estate (Article 2c of the ASAS Estate), that is, acquisition based on a legal transaction, court ruling, administrative decision and by operation of law, with exceptions arising from Article 2a.1 and 2.3 of this Act.

Consent for the acquisition of agricultural real estate of an area of 1 ha or more shall be issued by the General Director of the NASC through an administrative decision. The Minister in charge of rural development is a higher-level authority, as defined by the Code of Administrative Procedure provisions, in matters concerning the issuance of the said consent (Article 2a.5 of the ASAS). The parties to the administrative proceedings concerning the granting of consent are the transferor and the purchaser of agricultural real estate. Within the framework of administrative proceedings initiated, in the vast majority of cases, upon request of the transferor (and not the purchaser) of agricultural real estate—which is a specificity of Polish regulations—the authority conducting these proceedings retains a wide scope of discretion regarding its granting. In particular, the authority should verify whether the prerequisites for granting consent were met, that is, whether the transferor proved that there was no possibility of transferring the real estate to a person having the status of the so-called individual farmer. Following Article 2a.4b of the ASAS, the transferor should prove that no individual farmer responded to the announcement of the intention to sell placed in the teleinformatic system, maintained by the NASC based on of Article 2a.4a of the ASAS—by the transferor or by a territorial branch of the NASC appropriate for the location of the agricultural real estate³⁸. Moreover, before issuing the consent, the authority should collect from the purchaser a commitment to conduct agricultural activity on the purchased real estate, sanctioned by the possibility of the NASC to apply to the court for declaring that the real estate has been purchased by the State Treasury (expropriation).

The requirement to obtain NASC's consent to purchase agricultural real estate with an area of at least 1 ha is waived for natural persons meeting the criteria comprising the definition of an individual farmer. Pursuant to Article 6 of ASAS, an individual farmer is a natural person who is the owner, perpetual usufructuary, or leaseholder of agricultural real estate with a total area of agricultural land not exceeding 300 ha, possessing agricultural qualifications, and for at least five years residing in the municipality in the area of which one of the agricultural real estate constituting an agricultural farm is located and personally running the farm during that period.

Traditionally, the literature distinguishes four criteria for the individualization of an individual farmer³⁹, which deserve to be discussed in more detail here:

1. Area criterion. An individual farmer is defined as an owner a perpetual usufructuary or agricultural real estate leaseholder whose total area does not exceed 300 ha. This criterion is supplemented by a parallel area criterion relating to a family farm run by an individual farmer. A family farm is deemed an agricultural farm whose total area of agricultural land does not exceed 300 ha (Article 5.1 of the ASAS).

38 <https://erolnik.gov.pl/#/>

39 Blajer, 2009, p. 212.

2. Agricultural qualification criterion. The ASAS distinguishes two categories of agricultural qualifications that an individual farmer should possess. These are the theoretical and practical qualifications⁴⁰.

The mere possession by an individual of theoretical qualifications as defined in Article 6.2 of the ASAS should be considered sufficient to satisfy the criterion of agricultural qualifications. Theoretical qualifications mean agricultural education: (a) basic vocational, (b) secondary vocational, or (c) higher. However, suppose a natural person does not have a theoretical agricultural qualification to become an individual farmer. In that case, they must prove a practical qualification, which the ASAS defines as the length of service in agriculture. The provisions of Article 6.3-3a of the ASAS indicate that the term length of service in agriculture should be understood as, among others, one of the following circumstances: 1) being subject to the social insurance of farmers, 2) conducting agricultural activity on an agricultural farm with a surface area of not less than 1 ha constituting its ownership, subject of perpetual usufruct, subject of the lease; 3) employment in an agricultural farm under an employment contract; and 4) performance of work related to agricultural activity as a member of an agricultural production cooperative.

3. Residence criterion. Pursuant to Article 6.1 of the ASAS, an individual farmer should reside for at least five years in the municipality where one of the agricultural real estate constituting an agricultural farm is located. In the context of this regulation, particular attention should be paid to the fact that notion of residence in Article 6.1 of ASAS is not identical to the notion of residence defined in Article 25 of the Civil Code; the proof of residence is a certificate of registration for permanent residence.

Pursuant to the current provisions of the ASAS, it is possible to add to the required 5-year period of residence as well as the residence time in another municipality immediately preceding the change of residence if, in this municipality, one of the agricultural real estate's constituting the farm of the individual farmer is or was located (Article 6.1a of the ASAS). Consequently, within the required 5-year period, the farmer may change his permanent residence as long as he maintains his residence in the municipality where one of the agricultural real estate that forms his farm is or was located during the whole period.

4. The Criterion of personal running on an agricultural farm: Following the definition included in Article 6.1 of the ASAS, an individual farmer should personally run an agricultural farm for at least five years. In turn, following Article 6.2 of the ASAS, a natural person, is considered to run an agricultural farm personally if: a) they work on this farm, and b) they take all decisions regarding the agricultural activity in this farm.

40 Blajer, 2009, p. 251.

The quoted wording of the criterion of running the agricultural farm on a personal basis raises many doubts, primarily due to the imprecision of the terms used and the vagueness of the obligation to work on agricultural farms. The legislator does not specify the capacity of a farmer to perform work on his farm. Given the above, the signaled doubts concern the following issues: 1. Does the work of an individual farmer on a farm presuppose that he should not take up employment elsewhere or, on the contrary, is he in no way constrained in his ability to provide work outside of agriculture? 2. Should work on a farm be understood as a farmer's continuous activity directly involved in agricultural production, limited to physical work directly related to the production of agricultural products, or does work on a farm carried out only occasionally, seasonally, or limited exclusively to administrative and managerial tasks suffice to meet that requirement?

Regarding the first of the outlined problems, it must be stated that the lack of explicit resolution of the issue of admissibility of the farmer's work outside the farm by the legislator supports the position that individual farmer may provide minimal work on a farm, drawing most of his income from the activity of a different character (e.g., widely understood economic activity) and devoting the majority of his working time to this non-agricultural activity. As far as the second of the indicated issues is concerned, farmers do not need to be engaged exclusively in agricultural activities. The definition of an individual farmer in the ASAS does not formulate the requirement that work is performed by them "directly on agricultural production". In contrast, as far as the issue of constancy of the farmer's work in the farm is concerned, an opinion has to be supported that personal work in the farm should not have casual, seasonal, occasional, or hobby character⁴¹.

The ASAS specifies in detail how all the aforementioned criteria are documented. Therefore, the evidence confirming the status of an individual farmer includes the relevant official documents (certificates of residence, diplomas from the relevant schools) and declarations regarding the number of owned farmlands and personal running of the farm. It should also be stressed that submitting an untrue declaration within the above scope implies criminal liability (Article 7.5a of the ASAS) and sanction of invalidity of purchasing agricultural real estate (Article 9.1 of the ASAS). The mentioned sanctions seem to be too severe in the context of the imprecise wording of the criterion of the personal running of an agricultural farm, being, for this reason, a subject of frequent interpretation in the judicature literature.

When analyzing the situation when an individual farmer purchases agricultural real estate, one should pay attention to two more significant circumstances in the practice of trade. Pursuant to Article 2a.2 of the ASAS, the area of the purchased agricultural real estate and the area of the agricultural real estate constituting a family farm of the purchaser cannot exceed the area of 300 ha of agricultural land determined following Article 5. 2 and 3 of the ASAS. The sanction for exceeding this standard

41 More widely: Blajer, 2020.

area is the invalidity of purchasing agricultural real estate. However, following Article 2a.3a of the ASAS, if the purchased agricultural real estate becomes a part of joint marital property, it is sufficient if the requirements specified in the Act concerning the purchaser of agricultural real estate are met by one of the spouses. Suppose the spouses are bound by a system other than the community of property or the purchase is made from their personal property, both spouses should have this status to benefit from preferences for an individual farmer provided for in the ASAS.

In the context of the cross-border acquisition of real estate located in Poland, it should be noted that the ASAS does not introduce the criterion of Polish citizenship for individual farmers. In other words, an individual farmer may also be a natural person who is a citizen of a country—a party to the Agreement on the European Economic Area or the Swiss Confederation—or even a person who is a citizen of another state⁴². Moreover, no provision of the Act requires individual farmers to reside in a municipality located in Poland. Therefore, it is argued in the literature that also a person residing and managing an agricultural farm fully or partially outside the Republic of Poland may effectively prove their status as an individual farmer provided that they submit evidence. The evidence should confirm the fulfillment of the listed criteria, which may be deemed “equivalent” to the documents provided for in the ASAS⁴³. However, the practical significance of this doctrinal view is more than limited due to problems with documents identification and functioning notions in other legal orders which would be “equivalent” to the documents and notions provided for in the ASAS (such as certificate of permanent residence, the notion of agricultural real estate, the notion of family farm.).

In addition to individual farmers, the purchasers are exempt from the obligation to obtain the consent of the General Director of the NASC for the purchase of an agricultural real estate with an area of at least 1 ha defined in Article 2a.3 of the ASAS. The catalog of these entities includes, among others, a close relative of the transferor, a local government unit, the State Treasury or NASC acting on its behalf, the so-called religious and church legal persons, a purchaser in execution, and bankruptcy proceedings. The most important practical meaning among the listed exemptions is the situation in which the purchaser is a close relative of the transferor. In the current legal state, the definition of a close relative includes, in addition to descendants, ascendants, siblings, children of siblings, spouses, adoptees, and adopted persons, and siblings of parents and stepchildren (Article 2.6 of the ASAS). In this case, the citizenship of the close relative is irrelevant from the viewpoint of rationing provided in the ASAS. Moreover, despite the lack of an unambiguous extension of this definition to the close relatives of the spouses (particularly to the son-in-law and daughter-in-law), it should be concluded that the general rule of Article 2a.3a of the ASAS applies to them. It states that if the purchased agricultural real estate becomes a part of joint marital property,

42 Górecki, 2017, pp. 40–41.

43 Górecki, 2017, pp. 44–46.

it is sufficient if the requirements specified in the Act concerning the purchaser of agricultural real estate are met by one of the spouses.

■ 2. *The right of pre-emption and the so-called right to purchase arising from the ASAS and the AF*

In the case of agricultural real estate within the meaning of the ASAS, the right of pre-emption vested in the NASC is the basic instrument of public control of the sale of real estate with an area between 0,30 ha and 0,9999 ha⁴⁴- regardless of its location. It is worth emphasizing that trade in this real estate category is not subject to administrative control (Article 2a.3.1a of the ASAS). Their purchaser does not have to have the consent of the General Director of NASC to purchase them, and the rule is resulting from Article 2a.1 of the ASAS, formally reserving the possibility of purchasing agricultural real estate for individual farmers, does not apply to him. In other words, the purchaser of such estate does not have to meet any criteria of an individual or obtain administrative consent in accordance with the ASAS.

However, it does not mean that the sale of agricultural real estate between 0,3 ha and 0,9999 ha is not subject to any regulation. However, its instruments have changed; instead of administrative control, the legislator refers, in a wider scope than before, to the civil law instrument, that is, the pre-emption right vested in NASC. Thus, if the sale contract subject is identified as agricultural real estate with an area between 0,30 ha and 0,9999 ha (regardless of its location), the contract should be concluded under the condition that the NASC does not exercise its pre-emption right under Article 3.4 of the ASAS. Pursuant to the content of Article 599 § 2 of the Civil Code and Article 9.1 of the ASAS, the sale conducted unconditionally is invalid. Thus, the most characteristic element of the content of the contract of sale of agricultural real estate limited by the right of pre-emption of NASC is the condition precedent that the NASC does not exercise its pre-emption right under Article 3.4. Consequently, following Article 157 of the Civil Code, the sale contract is exclusively obligatory and not real. After the conclusion of the sale contract, the obliged party (the seller) should immediately, inform the NASC, who has one month to exercise the pre-emption right (Article 598 of the Civil Code). This deadline is met if, before its expiry, the NASC makes a declaration in the form of a notarial deed about exercising the pre-emption right and then publishes it on the NASC website. The obliged party is deemed to have become familiar with the content of the declaration of the NASC about exercising the pre-emption right at the moment of its publication on the NASC website (Article 3.10-11 of the ASAS). Moreover, Article 3.8 and 9 of the ASAS indicate that if the price of the sold real estate grossly deviates from its market value, NASC may—within 14 days from the date of submission of the declaration on exercising the pre-emption right—apply to the court to establish the price of that real estate. The court determines the price corresponding to agricultural real estate market value.

44 The lower limit of 0,30 ha results from the content of Art. 1a.1b of the ASAS, which states that applying the Act's provisions to agricultural real estate of less than 0,3 ha is excluded.

Expiry of the time limit for exercising the pre-emption right or an earlier declaration by the NASC about giving up exercising that right allows the parties to the conditional sale contract to conclude another contract—a purely real contract resulting in a definitive transfer of ownership to the buyer. As in the case of a conditional sale contract, the form of a notarial deed is required for its validity.

The scope of applying the right of pre-emption vested in the NASC is undoubtedly influenced by the exclusions provided for in Article 3.5 and Article 3.7. The catalog of exclusions is very broad, but only some are of great practical importance. They include, in particular, the situation when the buyer is 1) a local government unit or the State Treasury; 2) a close relative of the seller; 3) an individual farmer to enlarge a family farm; however, up to the area of 300 ha of agricultural land, and the agricultural real estate being purchased is located in the municipality in which the purchaser resides or in a bordering municipality. In this respect, meeting the criteria comprising the definition of an individual farmer is significant for the trade-in agricultural real estate with an area from 0,30 ha to 0,9999 ha. Although the possibility of acquiring such agricultural real estate does not depend on the status of an individual farmer, the status enables acquisition of the real estate without pre-emption right of NASC if the criterion of the place of location of the real estate is met⁴⁵.

The right of pre-emption vested in NASC may also become effective in the sale of agricultural real estate with an area of at least 1 ha; however, in such a case, it is essentially supplementary in relation to the above-described instruments of administrative nature. It results from the content and scope of exclusions from applying the provisions concerning the pre-emption right vested in NASC, provided for in Article 3.5 and Article 3.7 of the ASAS. In particular, the meaning of Article 3.5 item 2 of the ASAS should be emphasized. According to these regulations the pre-emption right does not apply to NASC if the purchase of agricultural real estate is subject to the consent of the General Director of NASC, referred to in Article 2a.4 of the ASAS. Another important exclusion is provided for in Article 3.7 of the ASAS. It indicates that the right of pre-emption is not vested in the NASC when the buyer is an individual farmer intended to extend a family farm and the purchased real estate is located in the municipality where the individual farmer resides or in a bordering that municipality.

A correct reconstruction of a situation when NASC is entitled to a pre-emption right in the sale of agricultural real estate with an area of at least 1 ha requires comparing and contrasting the provisions of Article 3.5 and 3.7 of the ASAS with the regulations of Article 2a.1 of the ASAS and particularly Article 2a.3 of this Act which defines cases when the purchase of agricultural real estate does not require the consent of the General Director of NASC. The analysis of these provisions allows for indicating, *inter alia*, the following situations where the sale contract of agricultural real estate should be conditional because of the pre-emption right of the NASC: 1) where the buyer is an individual farmer, but the agricultural real estate to be purchased is not located in the

45 Blajer and Gonet, 2020.

municipality where the buyer resides or in a municipality bordering that municipality; 2) where the buyer is a religious legal person, but the seller is not a legal person of the same church or religious association, and 3) where the agricultural real estate to be sold is located in a mining area.

The Polish construction of the right of pre-emption provides that it may be exercised by the entitled person only if the current owner concludes a sale contract. However, it is obvious that in practice, not only a sale contract constitutes an instrument for purchasing agricultural real estate. Other contracts, such as donation contracts, exchange contracts, *datio in solutum*s, and contributions to a commercial company, also lead to the same effect. These contracts are also subject to public control by the NASC, although they take slightly different forms than in the case of the sales contract.

Similar to the case of the sale contract, with regard to other contracts in the market leading to the acquisition of agricultural real estate, the criterion of the area is important. A separate regime of public control functions with regard to real estate with an area of at least 1 ha on the one hand and real estate with an area from 0.3000 ha to 0.9999 ha. In relation to the first category, the rule is that the purchaser of those objects may only be an individual farmer (Article 2a.1 of the ASAS), excluding when the purchase is made by entities and under conditions specified in Article 2a.3 of the ASAS, or based on the consent of the General Director of NASC, expressed by way of an administrative decision (Article 2a.4 of the ASAS). Therefore, administrative control instruments exercised by the NASC within the framework of trade in agricultural real estate of at least 1 ha in area, regardless of their location, are of fundamental importance in this case as well.

Consequently, the so-called right to purchase an agricultural real estate of at least 1 ha, arising from Article 4 of the ASAS and formally vested in NASC, has a relatively modest practical meaning. This results from the content and scope of exemptions from the right of acquisition provided for in Article 4.4 of the ASAS. In particular, the importance of Article 4.4 item 2a of the ASAS should be emphasized. According to this regulation the right to purchase is not vested in NASC if the acquisition of agricultural real estate is made with the consent of the General Director of the NASC. Another important exemption is provided for in Article 4.4.1 which states that the right to purchase is not vested in the NASC if the purchaser is an individual farmer for the enlargement of a family farm and the purchased real estate is located in the municipality where the individual farmer resides or in a municipality bordering that municipality.

Consequently, the number of cases in which the NASC has the right to purchase an agricultural real estate with an area of at least 1 ha is modest and covers the following situations:

1) where the purchaser is an individual farmer, but the agricultural real estate being purchased is not located in the municipality where the purchaser resides or in a municipality bordering that municipality; 2) where the purchaser is a religious

legal person, but the transferor is not a legal person of the same church or religious association; 3) where the agricultural real estate is purchased located in a mining area, and 4) where the purchaser is a local government unit. Therefore, it is not difficult to conclude that the practical meaning of the aforementioned situations, in which NASC has the right to purchase in case of conclusion of a contract other than sale leading to purchase of agricultural real estate with an area of at least 1 ha, is more than limited.

In the case of contracts leading to the purchase of agricultural real estate with an area between 0,3000 ha and 0,9999 ha, the right to purchase vested in the NASC resulting from Article 4.1 of the ASAS should be treated as a public control fundamental instrument. The purchaser of such real estate does not have to have the consent of the General Director of the NASC to acquire it, and it is not necessary to have the status of an individual farmer.

The contract limited by the right to purchase of NASC, despite the order to adequately apply the provisions of the Civil Code regarding the pre-emption right (Article 3.5 of the ASAS) is unconditional. Its content should not include the condition that NASC does not exercise its right to purchase. This contract unconditionally transfers the agricultural real estate ownership to the purchaser, who becomes the owner. Consequently, according to the content of Article 4.5 item 1) letter a) of the ASAS, the purchaser of the real estate is obliged to notify the NASC about its right to purchase. The statutory regulations thus treat the purchaser of the real estate as its owner to whom the NASC should make a declaration about exercising the right to purchase⁴⁶. However, the construction of the right to purchase in a manner not fully explained in the literature and judicature makes the validity of the contract (and thus its real effect) conditional on subsequent notification of the right to purchase the NASC.

The purchaser's notification of the right to purchase to the NASC – the lack of which is sanctioned by the contract's invalidity – marks the beginning of the one-month period for exercising this right. To meet this deadline, it is sufficient that the declaration in the form of a notarial deed about exercising the right to purchase is published on NASC's website before the deadline expires.

As soon as the right to purchase is exercised by the NASC, the agricultural real estate covered by that right becomes the State's Treasury property (Article 8.1 of the ASAS). This effect occurs through unilateral legal action performed by the NASC⁴⁷. Consequently, when exercising the right to purchase, the NASC declares will without becoming a party to any contract. Thus the problem of binding the NASC with any contract provisions constituting the basis for exercising the right to purchase does not arise. This circumstance does not change the fact that the State Treasury, when acquiring agricultural real estate based on a declaration by the NASC, acquires it together with the encumbrances already existing on it⁴⁸.

46 Blajer, 2017, p. 58.

47 Górecki, 2003, p. 16; Bieniek, 2009, p. 187.

48 Matys, 2005, p. 30.

There are numerous exceptions to the aforementioned rule, according to which in the case of conclusion of a contract other than sale that leads to purchase of an agricultural real estate with an area from 0,3 ha to 0,9999 ha, the NASC on behalf of the State Treasury has the right to purchase. However, among the exceptions provided for in Article 4.4 of the ASAS, only two situations are of practical importance, that is, the case when: 1) due to transferring the ownership of agricultural real estate, a family farm is enlarged, but up to an area of no more than 300 ha of agricultural land, and the agricultural real estate being acquired is located in the municipality where the purchaser resides or in a municipality bordering on that municipality; 2) the purchaser is a close relative of the transferor within the meaning of Article 2.6 of the ASAS.

The NASC's right to purchase also constitutes the basic instrument of public control over the real estate trade in the case of divisions—both contractual and judicial (i.e., abolition of co-ownership, division of inheritance, and division of common property between former spouses). With reference to this category of legal events, the legislator generally resigned from the administrative control provided for in Article 2a of the ASAS; thus, the purchaser of agricultural real estate on their basis does not have to have either the consent to purchase expressed in the mode of Article 2a.4 of the ASAS by the General Director of NASC or the status of an individual farmer. However, these events generate the right to purchase of the NASC. The real estate purchaser (in the case of contractual divisions) or the court (in the case of judicial divisions) is obliged to notify the possibility of exercising this right⁴⁹.

The right of pre-emption and the so-called right to purchase are the basic public law control instruments in the case of forest land transactions; the AF does not introduce any administrative instruments of control similar to the consent to purchase provided in Article 2a.4 of the ASAS. Consequently, pursuant to Article 37a.1 of the AF, in the event of a sale by a natural person, a legal person, or an organizational unit without legal personality, to which legal capacity is granted by law, of forest land that does not constitute State Treasury property, the State Treasury, represented by the State Forests⁵⁰, has a pre-emption right to acquire such land. However, if the acquisition of such land takes place due to: 1) conclusion of a contract other than a sale contract, or 2) a unilateral legal action—the State Forests representing the State Treasury may make a declaration on the purchase of such land against payment of a pecuniary equivalent (right to purchase). The scope of exceptions from these regulations is very modest. It mainly includes cases where the purchaser is the transferor's spouse or direct relatives, a person related to the transferor by adoption, custody, or guardianship, and a local government unit, as well as cases where an agricultural farm is sold within the meaning of the ASAS.

49 Blajer, 2019a, p. 29.

50 The 'State Forests' National Forest Holding (Państwowe Gospodarstwo Leśne "Lasy Państwowe") is a state organizational unit without legal personality, unlike NASC; according to Art. 4 of the AF, it manages forests owned by the State Treasury.

The practical importance of these regulations is very important because of the broad definition of forest land, and the lack of any area limitations and the severe sanction of invalidity if the sale contract was concluded unconditionally or the State Forests were not notified about the possibility of exercising their right to purchase⁵¹.

In the context of the cross-border acquisition of real estate in Poland, it should be emphasized that exercising both rights by the NASC and the State Forests depends entirely on the autonomous and discretionary decisions of both institutions. No legal prerequisites for exercising both the right to purchase and pre-emption have been formulated. There is also no way of challenging declarations on exercising the pre-emption right or the right of purchase—these rights are of a civil law nature. Therefore the reasons and justification for exercising them are not subject to administrative or judicial control. The law in force in Poland does not impose any obligations on the NASC or State Forests regarding the management of real estate acquired due to exercising the right of pre-emption or right to purchase, in particular their distribution among farmers.

■ 4. *Obligations of purchaser of agricultural real estate*

The ASAS introduces two controversial and widely discussed obligations of the purchaser of agricultural real estate (the AF does not provide for this solution). These obligations are imposed on each purchaser of agricultural real estate with an area of at least 0,3 ha. That is, an obligation to run an agricultural farm that includes purchased agricultural real estate for at least 5 years from the date of purchase, and in case of a natural person—to run this farm personally (Article 2b.1 of the ASAS). A prohibition to dispose of the purchased real estate or let it be held by other persons within the same 5-year period (Article 2b.2 of the ASAS). These obligations may be repealed only following consent by the NASC, as provided for in Article 2b.3 of the ASAS, in cases justified by an important interest of the purchaser of agricultural real estate or public interest. These regulations can be undoubtedly regarded as the core of the current trading model in agricultural real estate in Poland, given the extremely severe sanctions for non-compliance with the aforementioned obligations. The invalidity of the sale or transfer to a third party of an agricultural real estate in case of violation of the obligation specified in Article 2b.2 of the ASAS or expropriation—in case of violation of the obligation specified in Article 2b.1 of the ASAS⁵².

The fundamental interpretation problem is the issue of proper determination of the scope of “the obligation to run an agricultural farm” imposed on the purchaser of agricultural real estate. The definition of the notion of “running an agricultural farm personally” is contained in Article 6.2 item 1 of the ASAS, according to which a natural person is deemed to run an agricultural farm in person if they work on this farm

51 It is also worth noting that in the case where the right of pre-emption for forest land is granted by law to several entities, the State Forests prioritize exercising their right of pre-emption. More on both institutions: Truskiewicz, 2021, pp. 881–895.

52 Blajer, 2021, p. 35.

and take all decisions concerning agricultural activity in this farm, provides little guidance in this respect. The content of this definition has been relativized only to natural persons, while the obligation of running an agricultural farm has a universal character. It also refers to other categories of purchasers of agricultural real estate, such as legal persons.

In the agrarian literature, it is noted that the obligation to run an agricultural farm that includes the purchased real estate and in case of a natural person—the obligation to run such farm personally—should be included in the categories of the obligation to run an agricultural activity⁵³. Pursuant to Article 2.3 of the ASAS, running an agricultural activity should be considered a productive activity in agriculture within the scope of plant or animal production, including horticultural, fruit, and fish production⁵⁴. In contrast, it should be stressed that the legislator refers to running an agricultural farm, which has a slightly different meaning in the Polish tradition. While the criterion of running an agricultural activity emphasizes only the features and attributes of the conducted activity, the criterion of running an agricultural farm consider running the administration of an agricultural farm. The meaning of this notion is best expressed by the phrase, which means ‘carrying out the occupation of a farmer on an agricultural farm and thus managing it’⁵⁵. Consequently, following the content of Article 2b.1 of the ASAS, a purchaser of agricultural real estate, who is a natural person, should for 5 years perform the occupation of a farmer in an agricultural farm. He should work in it and take all decisions concerning the performance of agricultural activities related to plant or animal production, including horticultural, fruit, and fish production⁵⁶. This statement, however, does not allow the determination of what constitutes running an agricultural farm by a purchaser being an organizational unit (e.g., legal person), although formally, this obligation also refers to this category of purchasers. In the ASAS, there are no indications of what would mean “carrying out the occupation of farmer” by organizational units.

The difficulty in defining precisely the scope of the obligation to run an agricultural farm acquires particular significance in the context of the interpretation direction dominant in the practice of a trade. Assuming that, as a matter of principle, each case of purchasing agricultural real estate of at least 0,30 ha, due to which the purchaser becomes the owner of agricultural real estate with a total area of at least 1 hectare, generates on his side the “obligation to run an agricultural farm.” This obligation also arises if the purchaser of the agricultural real estate has not hitherto had anything to do with agriculture. All that matters is that following the acquisition,

53 Łobos-Kotowska and Stanko, 2019.

54 The fact that the agricultural activity is to have the character of a qualified ‘productive’ activity is of significance, which means that, e.g., keeping the land only in good agricultural condition by setting it aside does not constitute conducting an agricultural activity within the meaning of the ASAS.

55 Blajer, 2009, p. 225.

56 Suchoń, 2019, p. 105.

he is—or becomes—the owner of an agricultural real estate or several agricultural real estates with a total area of at least 1 ha⁵⁷.

Practical consequences of these regulations assume particular importance in the context of sanctions for failure to start or for cessation of running an agricultural farm or, in case of a natural person, personally running an agricultural farm that includes the acquired agricultural real estate within the 5-year period referred to in Article 2b.1 of the ASAS. In the light of Article 9.3 of the aforementioned Act, the NASC could then apply to the court for the acquisition of the real estate by the State Treasury against payment of a price corresponding to its market value. Failure to fulfill this vaguely worded obligation exposes the purchaser to the loss of the purchased real estate, or at least lengthy and costly court proceedings, the outcome of which remains difficult to predict.

Further doubts arise with regard to the meaning of the obligations laid down in Article 2b of the ASAS for family transactions concerning agricultural real estate. According to the prevailing interpretation, relatives of the transferor who have purchased agricultural real estate are fully subject to the obligations laid down in Article 2b.1 and 2 of the ASAS, which means that these persons—within the five-year period following the purchase—may further dispose the purchased agricultural real estate only with the consent of the NASC referred to in Article 2b.3 of the ASAS or to entities and in situations specified in Article 2b.4 of the ASAS. The acceptance of this interpretation leads to significant practical effects. This is because each acquisition (e.g., as a donation) by a close relative of an agricultural real estate of at least 0,30 ha, where this person is already the owner (or perpetual usufructuary) of agricultural real estate of at least 1 ha, or due to the acquisition, he becomes the owner of real estate of such an area, can result in the application of sanctions from Article 9.3 of the ASAS if the NASC decides that the purchaser does not meet the obligation resulting from Article 2b.1 of the ASAS. To address this problem in more graphic terms, a division of a farm made by a farmer between descendants in the conditions described above may lead to the farm being taken over by the NASC acting on behalf of the State Treasury and, consequently, to the loss of family property.

Another aspect of the interpretation of Article 2b of the ASAS prevailing in practice, which deserves to be presented here, is the view that both obligations of real estate purchasers persist if the real estate loses its agricultural character during the 5-year period following the acquisition. In other words, despite the subsequent entry into force of the spatial development plan in which the real estate was designed for purposes other than agriculture, the acquirer of agricultural real estate is still bound by the general obligation to run the agricultural farm in which the acquired real estate is a part under the threat of losing its ownership. Moreover, he has the prohibition to transfer the real estate to third parties. Therefore, these obligations

57 The standard of 1 ha results here from the fact that following the definition contained in Art. 2.2 of the ASAS, such is the minimum area of an agricultural farm within the meaning of the Act.

continue to exist although the competent public administration body has decided that real estate is no longer needed for agricultural purposes. The interpretation of Article 2b of the ASAS prevailing in the practice of trade aims at preserving the restrictions resulting from this provision also with regard to the real estate separated from the purchased agricultural real estate of an area smaller than 0,30 hectare, i.e., real estate to which, following the explicit wording of Article .1a.1of the ASAS, the provisions of this Act do not apply. The justification of this thesis is sought in the assumption that actions of a strictly technical nature (e.g., geodetic division of real estate) should not negate the obligation to run a (personal) agricultural farm resulting from Article 2b.1 of the ASAS⁵⁸.

In the context of cross-border real estate acquisition in Poland, the regulation described above deserves special attention. A potential purchaser must consider that the acquisition of agricultural real estate in Poland is associated with certain obligations, the non-compliance with which, in turn, may ultimately lead to the deprivation of ownership of the real estate.

■ **5. Public law control of personal changes in commercial companies and partnerships which are owners or perpetual usufructuaries of agricultural real estate**

A characteristic regulation of the ASAS (not introduced in the AF) is the public control of personal changes in commercial companies. The scope of this control is even broader than in the AAREF; it also extends to partnerships. Pursuant to Article 3a of the ASAS the NASC, on behalf of the State Treasury, has a pre-emption right to purchase shares and stocks in a limited liability company and in a joint-stock company that is the owner or perpetual usufructuary of agricultural real estate with an area of at least 5 ha or agricultural real estate with a total area of at least 5 ha⁵⁹. This right is subject to the provisions of the ASAS and the Civil Code regarding the pre-emption right with regard to real estate, with the reservation that the deadline for submitting a declaration on exercising the pre-emption right is two months, counting from the date of receipt by NASC of a notification from the company whose shares constitute the subject of the conditional sale contract. The scope of exemptions from the pre-emption right is relatively modest. This right does not exist, inter alia, in the case of disposal of shares in companies whose shares are admitted to organized trading (in particular stock exchange trading), shares for the benefit of a close relative, and shares by the State Treasury.

This regulation is supplemented by the provision of Article 4.6 of the ASAS, according to which the NASC has the so-called right to purchase in the case when shares and stocks in a commercial law company that is the owner or perpetual usufructuary of an agricultural real estate with an area of at least 5 ha or of an agricultural

58 Blajer, 2019b, pp. 123–124.

59 Byczko, 2017, pp. 236–247; Bieluk, 2021, pp. 59–68; Muszalska, 2020, pp. 63–86; Grykiel, 2016, pp. 628–629.

real estate with a total area of at least 5 ha are acquired pursuant to events other than a sale contract. This right is also vested in NASC in the case of a share capital increase in a capital company. As a rule, it is excluded only if the purchaser of shares is: 1) a close relative of the transferor and 2) the State Treasury.

Infringement of the pre-emption right or right to purchase of the NASC in the aforementioned cases invalidates the acquisition of shares (Article 9.1 of the ASAS). Moreover, in both cases, prior to the acquisition of shares, the NASC has a very controversial right to inspect books and documents of this company and request information about encumbrances and liabilities not included in the books and documents.

Article 3b of the ASAS supplements the regulation concerning capital companies, referring to partnership changes (general partnership, professional partnership, limited partnership, and limited joint-stock partnership). According to its content, in case of change of a partner or accession of a new partner to a partnership that is the owner or perpetual usufructuary of agricultural real estate with an area of at least 5 ha or agricultural real estate with a total area of at least 5 ha, the NASC on behalf of the State Treasury may make a declaration on purchasing such real estate for a price corresponding to its market value. Consequently, in the aforementioned case, the right to purchase in the NASC is directed to the real estate, the subject of ownership or perpetual usufruct of such a partnership. This real estate may be lost due to changes in the composition of its partners. Exemptions from this form of the right to purchase are very limited; they concern only the situation when instead of the previous partner, a close relative becomes a partner or a close relative of any of the partners becomes a new partner.

IV. Summary

The analyses in this study make it possible to indicate that nowadays—due to the decreased significance of the traditional protection instruments laid down in the AAREF—the most significant impact on the phenomenon of cross-border acquisition of real estate in Poland is exerted by the acts formally referring to the trade-in agricultural and forestry land, which results from the extremely broad definitions of “agricultural real estate” and “forestry land.” In practice, these acts also significantly impact trade in urban real estate and real estate whose agricultural and forest functions are more than doubtful.

The above considerations have also shown that the protection system against the uncontrolled acquisition of a real estate by foreigners in Poland is relatively tight and comprehensive. It also covers personal changes in companies and partnerships that are owners and perpetual usufructuaries of agricultural real estate. However, it is also complicated, which impacts the increased investment risk when acquiring real estate in Poland. The breach of absolutely binding regulations is accompanied by severe civil sanctions, in the form of invalidity of the acquisition, and in certain cases,

even criminal sanctions (e.g. submitting false declarations on the basis of which the agricultural real estate is acquired). The control of trade exercised by the NASC in the first place, but also to some extent by the State Forests, is discretionary; extensive use of civil law instruments of control excludes, for example, the possibility of verifying decisions made by the aforementioned institutions in the administrative course of proceedings. Given the provisions of the ASAS, the control of the NASC extends to the very stage of acquiring the real estate and to the 5-year period after the acquisition, during which the purchaser may be effectively deprived of the real estate if they fail to perform obligations resulting from Article 2b of the ASAS.

Therefore, the currently binding regulations of the ASAS and the AF constitute an important factor that must be considered when purchasing real estate in Poland and in the cross-border context. In addition to their strictly protective function against uncontrolled purchases by foreigners, which cannot be questioned, these regulations also contribute to an increase in investment risk, both in the internal and cross-border aspects.

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