| Chapter 7 |

Poland: An Attempt at a Balance Between the Protection of Family Holding and the Freedoms of the European Union

Paulina LEDWOŃ

ABSTRACT

The aim of this article is to present the problem of acquisition (including cross-border acquisition) of agricultural real estates and agricultural holdings in the Republic of Poland, with particular emphasis on the issue of regulating the acquisition of agricultural real estates as an instrument for the protection of family farms. By analyzing current legislation, jurisprudence, and doctrine, the author tries to discern the key issues in the field of agricultural law. Starting from fundamental notions on which the whole article is based, such as real estate, agricultural real estate (land), agricultural holding, individual farmer, and family holding, the author proceeds to detail issues concerning the acquisition of ownership of agricultural land (holdings), including inheritance, acquisition of other rights on agricultural land, establishment of a bonding relation in the form of a lease of agricultural land, and acquisition of shares (stocks) in companies that own agricultural land. Next, the author presents the constitutional norm of the agricultural system of the Polish state and attempts to answer the question of whether the Commission proceedings have been initiated against Poland in connection with the breach of obligations. In conclusion, the author concludes that a considerable part of the issues taken up by the European Commission in the Interpretative Communication touches upon the Polish legal instruments of agricultural law.

KEYWORDS

agricultural land, agricultural real estate, agricultural holding, individual farmer, Act on Shaping of the Agricultural System, Act on Acquisition of Real Estate by Foreigners, Poland

1. Theoretical backgrounds and summary of the national land law regime

1.1. Introduction

The shaping of the agricultural system of the Polish state and the legal status of the family holding have a long history. The very notion of an agricultural system appeared in the interwar period. The Act of March 17, 1921 (the March Constitution) provided in

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art. 99 in fine that the agricultural system of the Republic of Poland was to be based on agricultural holdings capable of proper production and constituting personal property. This provision was kept in force by the April Constitution of April 23, 1935. A fundamental change in the approach to the agricultural system took place with the introduction of the socialist system in Poland. The political aim of the authorities of that period was to win peasants for the introduction of the socialist system and, subsequently, the collectivization of agriculture. In the People's Republic of Poland, the Constitution of July 22, 1952 emphasized the superiority of state and cooperative forms of management in agriculture over individual forms. The political decisions of that era, also concerning agriculture, changed under the influence of strong social movements such as that of October 1956, December 1970, and especially, the rise of solidarity in 1980. Since 1989, there has been no regulation of the agricultural system in the basic law. The provision referring to the agricultural system of the state and the family holding reappeared in the currently binding Constitution of the Republic of Poland of April 2, 1997 (hereinafter: the Constitution). It is worth mentioning that, at the beginning of the 1990s, Poland entered the orbit of the European Union. Both the fact that Poland became a party to the European Agreement establishing an association between the Republic of Poland and the European Communities and their member states and that it finally joined the EU in 2004 have had a significant impact on the country's current agricultural policy.[1]

1.2. Sources of law on the acquisition of agricultural land

The agricultural system of the Polish state plays a significant role in the systematics of sources of law, which is evidenced by the very fact that it is referred to in the Constitution, the main and fundamental legal act of the Republic of Poland. In accordance with art. 23 of the Constitution, a family holding is the basis of the state's agricultural system.

The second legal act that plays a key role in the acquisition of agricultural land is the Act of April 11, 2003 (hereinafter: a.s.a.s.), which defines the principles of shaping the state's agricultural system by improving the area structure of agricultural holdings, preventing excessive concentration of agricultural real estate, ensuring that agricultural activity is conducted on agricultural holdings by persons with appropriate qualifications, supporting the development of rural areas, and implementing and applying agricultural support instruments and active state agricultural policy (art. 1 of the a.s.a.s.).

Another legal act that influences the way in which the state's agricultural system is shaped is one of the most important acts in the Polish law: the Act of April 23, 1964 Civil Code (hereinafter: c.c.), which, *inter alia*, determines key definitions for agricultural law, such as agricultural real estates or agricultural holdings, and regulates the issues of co-ownership of agricultural real estates and agricultural holdings, the lease of agricultural land, or the inheritance of an agricultural holding.

1 Korzycka, 2019.

In addition, regulations concerning the acquisition of agricultural real estate (land) are included in such acts as the Act of March 24, 1920 on the Acquisition of Real Estate by Foreigners (hereinafter: a.a.r.e.f.) or the Act of October 19, 1991 on the Management of Agricultural Real Estate of the State Treasury (hereinafter: a.m.a.r.e.).

1.3. The concept of agricultural land

When analyzing the notion of agricultural real estate, firstly, the notion of real estate itself should be explained. Pursuant to art. 46 § 1 of the c.c., real estates are parts of the land that constitute a separate subject of ownership (land) as well as buildings permanently connected with the land or parts of such buildings, if under special provisions they constitute an object of ownership separate from the land. Based on this legal definition, three types of real estate can be distinguished: land real estate, building real estate, and premises real estate.

From the category of land property, the legislator distinguishes the subcategory of agricultural real estate.[2] Art. 46^1 of the c.c. in principio emphasizes the land nature of agricultural real estate. In accordance with this provision, agricultural real estate (agricultural land) is real estate that is or may be used for conducting manufacturing activity in agriculture within the scope of plant and animal production, not excluding horticultural, orchard, and fishery production. This provision may indicate that the concept of "agricultural real estate" is the same as that of "agricultural land." Agricultural real estate is a unit of property and is a concept of private law, whereas agricultural land is not a unit of property and is a concept of public law. However, for the purpose of this article, these terms are assumed to be interchangeable.

The specific feature that distinguishes agricultural real estate from other types of real estate is its intended use. Only those properties that are or may be used for agricultural production activities in the field of plant and animal production are considered to be agricultural, not excluding horticultural, orchard, and fishery production. The list of types of production is exemplary. Certainly, such manufacturing activity also includes beekeeping, cotton growing, or silkworm rearing.[3] On the other hand, the scope of production activity in agriculture does not include forestry production, although forest land may be included in an agricultural holding.[4]

As stipulated in art. 46^1 of the c.c., agricultural real estate is such real estate that is both actually used to conduct production activities in agriculture and potentially used in the future for such activities.

The definition of agricultural real estate from art. 46^1 of the c.c. is universal and applies to all other acts concerning real estate, unless they contain provisions to the contrary. An example of another act defining the notion of agricultural real estate—albeit with reference to the provision of the c.c.—is the a.s.a.s. Pursuant to art. 2 point 1 of the a.s.a.s., on the basis of this act, the term "agricultural real

2 Wierzbowski, 2014.
3 Stańko, 2018.
4 Wojciechowski, 2019.

estate" should be understood as defined in the c.c., excluding real properties located in areas designated in the zoning plans for purposes other than agricultural. As can be seen from the above definition, classifying real estate as agricultural is a multi-stage process. Firstly, it must be established whether, in the specific factual situation, a given real estate falls under the designations set out in art. 46^1 of the c.c. Once it is established that a given real estate meets the criteria of art. 46^1 of the c.c., it is necessary to determine whether the given real estate is covered by the zoning plan and what its intended use is. In the methodology of the application of the a.s.a.s., after it has been ascertained that an agricultural real estate is the subject of acquisition, it is then determined whether the real estate being acquired is not covered by exemptions from art. 1a-1c of the a.s.a.s. (e.g., the agricultural land is part of the Agricultural Property Stock of the State Treasury, has an area of less than 0.3 ha, or is an internal road). These features do not imply that the property ceases to be agricultural but only that the restrictions of the a.s.a.s. do not apply to it. In addition, if the real property does not meet any of the prerequisites specified in art. 2 point 1 of the a.s.a.s., legal transactions with its share take place, bypassing specific solutions from the a.s.a.s. Therefore, the quoted definition is a kind of definition by exclusion.[5]

1.4. The concept of agricultural holding and family holding

Another term that is immensely important on the grounds of agricultural law is "agricultural holding." In principle, an agricultural holding is defined in art. 55^3 of the c.c. In accordance with the current wording, it is considered to be agricultural land, including forestry land, buildings or parts thereof, equipment, and livestock, if they constitute or may constitute an organized economic unit, as well as rights connected with running an agricultural holding.

An agricultural holding in the sense given to it by the abovementioned article is a set of tangible and intangible components, among which the most important—and constituting the existence of an agricultural holding itself—is attributed to agricultural land. Their special position is connected with the fact that only the determination of the existence of agricultural land allows for the qualification of a given set of components as an agricultural holding within the meaning of art. 55^3 of the c.c.[6]. As stated by the Supreme Court in the decision of December 9, 2010 (signature: IV CSK 210/10), the definition of an agricultural holding in art. 55^3 of the c.c. has introduced a hierarchy of material components, putting agricultural land in the first place; without this component, there cannot be an agricultural holding.

Similarly, as in the case of agricultural real estate, the a.s.a.s. defines this notion of agricultural holdings independently. The definition of an agricultural holding, which can be found in art. 2 point 2 of the a.s.a.s., is shaped by two premises. The first is the fulfillment of the criteria necessary for classifying a particular production unit as an agricultural holding within the meaning of art. 55^3 of the c.c. The second is

5 Osajda and Popardowski, 2022.
6 Osajda and Popardowski, 2021.

the maintenance of a minimum area standard for an agricultural land or agricultural lands constituting an agricultural holding, which cannot be smaller than 1 ha. If both prerequisites are not jointly fulfilled, there are no grounds for concluding that a specific production unit is an agricultural holding for the purposes of application of the provisions of the a.s.a.s.[7]

A special type of agricultural holding is a family holding. Its considerable role is confirmed by the fact that the Constitution itself refers to it (art. 23). However, the definition is contained in art. 5 para. 1 of the a.s.a.s., according to which an agricultural holding is recognized as a family holding run by an individual farmer (i.e., a natural person who is the owner, perpetual usufructuary, spontaneous holder or leaseholder of agricultural real estate whose total area of arable land does not exceed 300 ha, possessing agricultural qualifications and residing in the commune where one of the agricultural lands constituting a part of an agricultural holding is located for at least 5 years and personally running this holding for that period [art. 6 para. 1 of the a.s.a.s.]), in which the total agricultural area does not exceed 300 ha.

1.5. Acquisition of agricultural land (agricultural holding) with particular reference to acquisition by inheritance

The acquisition of agricultural real estate is understood as a transfer of ownership of agricultural real estate or the acquisition of ownership of agricultural real estate as a result of a legal transaction or a court or public administration authority ruling as well as any other legal event (art. 2 point 7 of the a.s.a.s.). The definition of acquisition of agricultural real estate is broad and is not limited to a traditional real estate sale agreement.

The issue of acquisition of agricultural real estate, including the terms of acquisition, the buyer's obligations, or the right of preemption, is regulated by the a.s.a.s. The completion of all formalities enabling the acquisition of agricultural land carried out in compliance with the a.s.a.s. is extremely important, since the acquisition of ownership of agricultural real estate (as well as share in co-ownership of agricultural real estate and perpetual usufruct and purchase of shares and stocks in a commercial law company owning agricultural land with an area of at least 5 ha or agricultural land with a total area of at least 5 ha) made in non-compliance with the provisions of the act is invalid (art. 9 para. 1 of the a.s.a.s.). The provisions of the a.s.a.s. apply not only to the acquisition of agricultural real estate but also, respectively, to the acquisition of agricultural holdings (art. 4a of the a.s.a.s.).

A Polish legislator has introduced several mechanisms limiting the trade in agricultural land. Pursuant to art. 2a para. 1 of the a.s.a.s., only an individual farmer may be a purchaser of agricultural real estate, unless the act provides otherwise. Additionally, as mentioned above, an individual farmer is the only person who can run the family holding. Such provisions essentially limit the purchase of agricultural land and family holding by legal persons. In addition, the area of the purchased

7 Osajda and Popardowski, 2022.

agricultural land together with the area of agricultural land constituting a family holding of the purchaser may not exceed the area of 300 ha of agricultural land (art. 2a para. 2 of the a.s.a.s.). However, the legislator has provided for some exceptions to the above, thanks to which entities that are not individual farmers may also purchase agricultural land. In accordance with this, the limitations provided in art. 2a para. 1 and 2 a.s.a.s. do not apply to the acquisition of agricultural land by, *inter alia*, a close relative of the vendor, a territorial self-government unit, the State Treasury, or the National Agricultural Support Centre (hereinafter: NASC) acting on its behalf, certain commercial law companies, or national parks (in the case of acquisition of agricultural land for nature protection purposes). These limitations also do not apply to the acquisition of agricultural land, *inter alia*, with an area smaller than 1 ha, as a result of inheritance or bequest, as a result of division, transformation or merger of commercial law companies, or during execution or bankruptcy proceedings (art. 2a para. 3 of the a.s.a.s.). However, what is the legal situation of other legal persons who would like to acquire an agricultural land? The only way for them to acquire the ownership of the agricultural real estate—in addition to the abovementioned exceptions—is to obtain the consent of the Director General of the NASC, which is expressed by way of an administrative decision (art. 2a para. 4 in fine of the a.s.a.s.). Situations in which the Director General may express consent to the acquisition of agricultural land by such legal persons as capital companies, foundations, registered associations, or cooperatives are enumerated in art. 2a para. 4 of the a.s.a.s. No regulations allow the Director to take into account exceptional circumstances occurring in a given case; therefore, the decision issued by him is binding and not discretionary.[8]

In turn, in the context of acquiring agricultural land by inheritance (regardless of whether the appointment to the inheritance results from the act or the will), the above means that if the inheritance includes an agricultural land (an agricultural holding), the heir can be any entity having the capacity to inherit, does not have to be an individual farmer, and the maximum area standard does not have to be met. Moreover, in the case of an appointment under a will, a legal person may also be an heir. The fact that a person is an heir to an agricultural real estate (an agricultural holding) does not mean that they will definitely keep this agricultural real estate (an agricultural holding). This results from the institution regulated in art. 4 of the a.s.a.s., by which the NASC has the right to acquire agricultural real estate. The right to purchase is vested, *inter alia*, when agricultural land is purchased as a result of inheritance or legacy. The NASC, acting on behalf of the State Treasury, may make a declaration on acquisition of this real estate against payment of the cash equivalent corresponding to its market value and then it has priority to acquire the agricultural real estate in question. However, this right is not absolute and is excluded, *inter alia*, when the acquisition is made by a close relative of the seller as well as a result of statutory inheritance or inheritance by an individual farmer or by an individual farmer as a result of a windup bequest. Acquisition by the NASC is excluded only in the case

8 Bieluk, 2017, p. 28.

of statutory inheritance and where the appointment to the inheritance results from a will, and the exclusion of acquisition is possible only if the testamentary heir is an individual farmer.[9] The acquisition right vested in the NASC raises many doubts; however, it is interesting that art. 4 of the a.s.a.s. has been analyzed by the Constitutional Tribunal. As the Tribunal stated in the judgment of March 18, 2010 (signature: K 8/08), this article is consistent with the Constitution, and it does not infringe the principle of a democratic state of law (art. 2 of the Constitution) and the right to property (art. 21 and 64 of the Constitution).

Another restriction regarding the purchase of agricultural real estate is the fact that the purchaser of agricultural real estate is obliged to run the agricultural holding in which the purchased agricultural real estate is included for at least 5 years from the date of purchase of the latter, and in the case of a natural person, to run the holding personally. Within this period, the purchased real estate may not be sold or given in possession to other entities unless the General Director of the NASC gives their consent due to an important interest of the agricultural property purchaser or a public interest. However, this restriction does not apply, *inter alia*, to agricultural real estate sold or given in possession to a relative or acquired as a result of inheritance, division of inheritance, or legacy (art. 2b of the a.s.a.s.).

Apart from the abovementioned provisions of the a.s.a.s., the inheritance subject is regulated by the provisions of the c.c. Apart from general provisions of inheritance law (art. 922–1057 of c.c.), the Polish legislator has also distinguished provisions that strictly relate to the inheritance of agricultural holdings. These provisions are to be found in art. 1058 and subsequent articles of the c.c. However, due to the amendment of the c.c. of 1990, which repealed some of its provisions, and a judgment of the Constitutional Tribunal of 2001, in which the Constitutional Tribunal stated that some provisions of the c.c. are contrary to the Constitution and should not be applied, many provisions concerning inheritance are now outdated, which means that only the general provisions concerning inheritance should be used.[10]

The next part of the considerations should be devoted to the issue of acquisition of agricultural land by foreigners. Trade in Polish real estate on behalf of foreign entities from the European Economic Area (EEA) and the Swiss Confederation has been significantly liberalized as a consequence of Poland's accession to the European Union; since then, foreigners from the EEA and the Swiss Confederation have not needed a permit to acquire real estate and to acquire or take up shares in companies that are owners or perpetual usufructuaries of real estate located in Poland. The exception was the acquisition of agricultural and forestry properties for a transitional period of 12 years, which expired on April 30, 2016.[11]

Trading in agricultural land in relation to foreigners is regulated not only by the provisions of the a.s.a.s. but also by the a.a.r.e.f. The latter act essentially divides

9 Kremer, 2019.
10 Ibid.
11 Łobos-Kotowska, 2018, p. 28.

foreigners into two categories: foreigners from the EEA and Swiss Confederation and foreigners from other countries. The principle expressed in art. 1 para. 1 of the a.a.r.e.f. applies to the former group; according to it, acquisition of real estate by a foreigner requires a permit. The permit is issued, by way of an administrative decision, by the minister in charge of internal affairs, if the Minister of National Defense does not object, and in the case of agricultural land, if the minister in charge of rural development does not object either. A permit is issued to a foreigner upon application if their acquisition of the real estate will not pose a threat to state defense, security, or public order; if it is not opposed by reasons of social policy and public health; and if the foreigner can demonstrate their ties with the Republic of Poland (art. 1 of the a.a.r.e.f.). In 2020, the Minister of Internal Affairs and Administration issued 76 permits to foreigners for the acquisition of agricultural and forestry properties with a total area of 21.68 ha,[12] while in 2021, it issued 121 permits for the acquisition of agricultural and forestry properties with a total area of 20.50 ha.[13]

A foreigner's obligations to obtain a permit have certain exceptions, which are specified in art. 8 para. 1 of the a.a.r.e.f. (e.g., a foreigner can acquire real estate by residing in the Republic of Poland for at least 5 years after being granted a permanent residence permit, or a long-term EU resident does not require a permit to acquire real estate). However, with regard to citizens and entrepreneurs from the EEA and the Swiss Confederation, a separate rule applies, as set out in art. 8 para. 2 of the a.a.r.e.f: a foreigner belonging to this category is not required to obtain a permit for the acquisition of real estate.

The acquisition of real estate within the meaning of the act is not only the acquisition of the ownership right to real estate but also the acquisition of the right of perpetual usufruct based on any legal event (art. 1 para. 4 of the a.a.r.e.f.). However, it does not apply to limited property rights (e.g., usufruct, easement) or rights arising from contractual relations (e.g., lease). The provisions of the a.a.r.e.f. also do not apply, *inter alia*, to the acquisition of real estate by inheritance or bequest by persons entitled to statutory inheritance (art. 7 para. 2 of the a.a.r.e.f.). If a foreigner who has acquired real estate forming part of the inheritance on the basis of a will fails to obtain permission from the minister competent for internal affairs on the basis of an application submitted within 2 years from the date of inheritance opening, the ownership right to the real estate or the right of perpetual usufruct is acquired by persons who would be appointed to the inheritance pursuant to the act (art. 7 para. 3 of the a.a.r.e.f.). In turn, if a foreigner who has acquired real estate on the basis of a legacy bequest fails to obtain permission from the minister competent for internal affairs on the basis of an application filed within 2 years from the date of the opening of the inheritance, the ownership right to the real estate or the right of perpetual

12 Report of the Minister of the Interior and Administration on the implementation in 2021 of the Act of 24 March 1920 on the acquisition of real estate by foreigners, p. 28. [Online]. Available at: https://orka.sejm.gov.pl/Druki9ka.nsf/0/30C23D9A1C342EDEC125881C003A5002/%24File/2155.pdf. (Accessed: March 30, 2022).

13 Ibid, p. 27.

usufruct are included in the inheritance (art. 7 para. 3a of the a.a.r.e.f.). These regulations apply accordingly to shares or stocks in a commercial company that is the owner or perpetual usufructuary of real estate in the territory of the Republic of Poland (art. 7, para. 4 of the a.a.r.e.f.).

1.6. Acquisition of shares in a company that owns agricultural land

In principle, under the current legal status, there are no specific statutory requirements as to the status or qualifications of persons who may be partners (shareholders) in a company owning agricultural real estate. In particular, they do not have to be individual farmers or show any other connection with agriculture.[14]

Only with regard to the acquisition or taking up of shares or stocks in a commercial company with its registered office in the territory of the Republic of Poland by a foreigner from outside the EEA and the Swiss Confederation does the a.a.r.e.f. establish certain restrictions.[15]

Pursuant to art. 3e para. 1 of the a.a.r.e.f., such an acquisition or taking up, as well as any other legal action concerning shares or stocks, requires a permit from the minister competent for internal affairs if, as a result, the company that owns or perpetually uses real estate on the territory of the Republic of Poland becomes a controlled one. In addition, pursuant to paragraph 2 of the said article, the acquisition or taking up by a foreigner of shares in a commercial company with its registered office on the territory of the Republic of Poland, which is the owner or perpetual usufructuary of immovable property on the territory of the Republic of Poland, requires a permit from the minister competent for internal affairs if the company is a controlled one and the shares are acquired or taken up by a foreigner who is not a shareholder in the company. In this case as well, the a.a.r.e.f. provides certain exceptions to the obligation to obtain a permit; for example, a permit is not required if the company's shares are admitted to trading on a regulated market (art. 3e para. 3 in fine of the a.a.r.e.f.). Importantly, art. 6 of the a.a.r.e.f. establishes the sanction of absolute nullity in the case of acquisition of real estate and acquisition or taking up of shares contrary to the provisions of the act.

On the other hand, with regard to the acquisition of shares and stocks in companies owning agricultural land, the a.s.a.s. refers to the preemptive and acquisition right vested in the NASC acting on behalf of the State Treasury. Pursuant to art. 3a para. 1 of the a.s.a.s., the NASC has a preemptive right to purchase shares and stocks in a capital company (i.e., a limited liability company or 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 ha. This provision does not apply in the case of sale of, *inter alia*, shares and stocks to a relative (art. 3a para. 2 point 2 of the a.s.a.s.) or by the State Treasury (art. 3a para. 2 point 3). In art. 4 para. 1 of the a.s.a.s., the NASC was granted the right to acquire (buy out)—against

14 Czech, 2020.
15 Łobos-Kotowska, 2018, p. 30.

payment—for the benefit of the State Treasury, agricultural real estate which had previously been subject to trade (on a legal basis other than sale agreement). This right has been extended to purchase of shares (stocks) in a commercial law company, the assets of which include agricultural real estate with the total area of at least 5 ha (art. 4 para. 6 a.s.a.s.)—for example, when the shares (stocks) are subject to donation or contributed in kind to another company. This also applies to cases of taking up shares in a company as a result of its share capital increase.[16]

All shares of commercial law companies acquired by the NASC acting on behalf of the State Treasury are part of the Agricultural Property Stock of the State Treasury (art. 8 para. 1 of the a.s.a.s.). In turn, failure to exercise preemptive right by the NASC results in the fact that commercial law companies may, within the limits of the law and taking into account provisions of their statutes, voluntarily manage their shares.

1.7. Acquisition of other rights on agricultural land

The a.s.a.s. regulates the issue of acquisition of the ownership right to agricultural real estate (and agricultural holdings accordingly [art. 4a of the a.s.a.s.]). Additionally, pursuant to art. 2c para 1 of the a.s.a.s., the provisions of the act also apply accordingly to acquisition of perpetual usufruct of agricultural land or share in perpetual usufruct of agricultural land. Land owned by the Treasury and located within the administrative boundaries of cities and towns, land owned by the Treasury located outside those boundaries but included in the city's zoning plan and transferred for the performance of the tasks of the city's management, and land owned by local government units or their unions can be handed over for perpetual usufruct to natural persons and legal persons. In cases provided for in specific legislation, other land owned by the State Treasury, local government units, or associations thereof may also be subject to perpetual usufruct (art. 232 of the c.c.). The land is handed over for perpetual usufruct for a period of 99 years. However, in particularly justified cases, it is possible to let the land for a shorter period of at least 40 years (art. 236 § 1 of the c.c.). Perpetual usufruct generally provides that the perpetual usufructuary may use the land excluding other persons; within the same limits, the perpetual usufructuary may dispose of their right (art. 233 of the c.c.). However, such usufruct must be within the limits specified, inter alia, by other acts, one of which is the a.s.a.s. Consequently, all limitations regarding the acquisition of agricultural land under the a.s.a.s. should also apply to perpetual usufruct.

However, the scope of the act does not cover limited property rights, which in the Polish legal system include usufruct, easement, pledge, and cooperative ownership right to premises and mortgage (art. 244 § 1 of the c.c.). Consequently, these rights are acquired pursuant to the general principles of the c.c. and pursuant to separate provisions as regards the cooperative ownership right to premises and mortgage (art. 244 § 2 of the c.c.). Therefore, even if a given right is connected to agricultural land, the manner of its acquisition proceeds according to the same rules, as if it was not

16 Czech, 2020.

connected to this real estate. Purchasers of limited rights in rem on agricultural land do not have to fulfill any additional requirements to acquire such rights, unlike in the case of acquisition of ownership, share in co-ownership, perpetual usufruct, or share in perpetual usufruct of agricultural land.

1.8. Exploitation of an agricultural property for a longer period under a lease agreement

Similarly to the case of limited property rights, in the case of obligations whose subject matter is the exploitation of agricultural land for a longer period of time (e.g., lease or tenancy), the a.s.a.s. does not regulate this matter (except for the right of preemption of agricultural land by the tenant of such real estate). The general provisions of the civil law apply to them. However, because tenancy of agricultural land plays an important role in shaping Poland's agricultural system, it is worth devoting this part of the article to this issue.

Lease is a consensual and mutual agreement, in which the lessor undertakes to give the lessee something to use and collect benefits for a definite or indefinite period, and the lessee undertakes to pay the agreed rent to the lessor (art. 693 § 1 of the c.c.). Paid rent is a necessary feature of lease. The parties are free to determine the amount of rent and the manner of its determination and payment. It can be paid as a specific amount of money or in a fractional part of benefits or benefits of other kind.[17] If the rent is specified in benefits (e.g., one-fourth of the harvest), and the lessee does not obtain the harvest through no fault of their own, they are free from the obligation to pay rent; in this case, the lease is shaped as a partly fortuitous contract.[18] However, if due to circumstances for which the lessee is not responsible and which do not affect them personally, the ordinary income from the subject of the lease is significantly reduced, the lessee may demand a reduction in rent for a given marketing period (art. 700 of the c.c.). Examples of such circumstances are drought, rainfall, hailstorm, outbreak of infectious diseases with ineffective eradication, or free market games, causing excessive import of agricultural products and affecting the decrease in profitability of production.[19]

A property lease agreement concluded for a fixed term exceeding 1 year must be made in writing. If this requirement is not met, the lease agreement is treated as having been concluded for an indefinite term. Such a regulation results from the appropriate application of the lease provisions to the lease agreement (art. 660 of the c.c. in connection with art. 694 of the c.c.). In addition, a lease concluded for more than 30 years shall be considered as a lease concluded for an unspecified period of time after the expiry of this term (art. 695 § 1 of the c.c.). The lessee should exercise their right in accordance with the requirements of proper management and cannot change the purpose of the leased property without the lessor's consent (art. 696 of the

17 Nazaruk, 2022.
18 Ciepła, 2017.
19 Kozieł, 2014.

c.c.). It should be borne in mind that the requirements of proper economy depend on the subject of the lease. Therefore, in the scope that is of interest to us—the lease of real estate or an agricultural holding—the requirements may consist in the proper sowing and harvesting of land. Then, the profile of cultivation will not be allowed to change (e.g., plowing meadows into agricultural land).[20]

The lease agreement is additionally significant as it is also referred to in the a.s.a.s., albeit with regard to the preemptive right to purchase agricultural land. Nevertheless, a family farm may even be entirely based on leased agricultural land. Pursuant to art. 3 para. 1 of the a.s.a.s., in the case of sale of agricultural land, the preemptive right by virtue of the act is vested in its lessee. At the same time, this provision indicates two separate prerequisites of the tenant's preemptive right that must be fulfilled jointly for this right to be updated: formal and subjective. The formal prerequisite implies that the lease agreement must be concluded in writing and have a definite date and be executed for at least 3 years, counting from that date. On the other hand, the subjective condition of the tenant's preemptive right requires that the tenant has the status of individual farmer running a family holding, of which the sold real estate is a component. The content of the agreement on the sale of agricultural land is notified to the lessee of that real estate if the lease agreement has lasted at least 3 years from the date of its conclusion (art. 3 para. 2 of the a.s.a.s.). As a matter of principle, in the absence of the right of preemption referred to in art. 3, para. 1 of the a.s.a.s. or the failure to exercise that right, the right of preemption is vested by law in the NASC acting on behalf of the State Treasury (art. 3, para. 4 of the a.s.a.s.). However, the right of preemption is not vested in the NASC if, as a result of the acquisition of agricultural land, a family holding is extended (albeit up to an area of 300 ha) and the agricultural land being acquired is located in the municipality where the purchaser resides or in a bordering one. In addition, the above principles concerning the right of preemption do not apply, inter alia, if the purchaser of the agricultural land is a local government unit, the State Treasury, or a relative of the vendor (art. 3, para. 5 point 1 of the a.s.a.s.).

2. Land regulation in the Constitution and in the case law of the Constitutional Court

Contemporary constitutions rarely formulate separate principles concerning the agricultural system. Most often, they are implicitly included in the principles of the economic and social system.[21] However, the Polish Fundamental Law refers directly to the basis of the state's agricultural system, the basis of which is the family holding. Although the Constitution does not directly regulate the issue of agricultural land acquisition, it indicates the direction of shaping the agricultural system (including

20 Nazaruk, 2022.
21 Tuleja, 2021.

real estate acquisition) in other legal acts (e.g., in the a.s.a.s.). The obligation of statutory concretization of art. 23 of the Constitution is realized by, *inter alia*, establishing the principles of trade in agricultural holdings, which was stated by the Constitutional Tribunal in the verdict of March 18, 2010 (signature: K 8/08[22]). Conversely, agricultural land is a constitutive element of each agricultural holding.

The structure of art. 23 of the Constitution comprises two elements. The first formulates the principle of the agricultural family holding, while the second makes the reservation that this provision does not infringe the protection of property, inheritance, and freedom of economic activity, to which art. 21 and 22 of the Constitution refer. Art. 23 of the Constitution is contained in Chapter I, entitled "The Republic," which gives it a significant role and makes it to be perceived as a general principle of the state system, in accordance with which the other provisions of law placed in further chapters should be interpreted. However, it is a constitutional principle of the "second level" and complements and concretizes more general principles—in particular, that of social market economy.[23]

A significant problem that arises when analyzing art. 23 of the Constitution is that this provision does not formulate any subjective rights. It cannot be treated in the categories of provisions determining an individual's constitutional status, and the allegation of its infringement cannot constitute a self-contained ground of complaint in a constitutional complaint, as it is the case with art. 21 and art. 22 of the Constitution. Those provisions have in fact a dual legal nature and formulate both the principles of the economic system, as well as rights (freedoms) of a subjective nature[24]; thus, they may constitute an independent basis for a constitutional complaint.

Art. 23 of the Constitution has an important guarantee function as it orders the maintenance of such a structure in agriculture to ensure that agricultural family holdings are the basis of the state's agricultural system. It is not limited to ensuring the chance of survival of the family farm, but it also ensures the possibility of a resilient family farm, which to a significant extent shapes the agricultural system of the entire state. This provision also implies the obligation of the state to legislate in a way that will support family farms in the economic, social, and financial spheres and at the same time introduce legal regulations protecting the interests of family farm owners.[25] Nevertheless, art. 23 of the Constitution allows for the possibility of the existence of other types of farms. As indicated by the Constitutional Tribunal in the judgment of May 7, 2014 (signature: K 43/12), the principle expressed in art. 23 of the Constitution

> "does not exclude the existence of other types of agricultural holdings. However, it orders the maintenance in Polish agriculture of such a structure which ensures the character of family farms as 'the basis of the agricultural

22 Ibid.
23 Garlicki, 2016.
24 Ibid.
25 Skrzydło, 2013.

> system of the state'; thus, a family farm is to be an effective form of management, ensuring a 'decent' livelihood for farming families and satisfying the needs of society."

In the above-cited judgment, the Constitutional Tribunal indicated that a family holding is a holding whose ownership remains in the hands of a single family. However, the doctrine emphasizes that this term should not be understood literally as it also includes the situation in which the owner of the holding becomes a family member, and work in the holding is also performed by other family members.[26] It should be borne in mind, however, that both art. 23 of the Constitution and the concepts contained therein are dynamic in nature, and their meaning and interpretation change with the changing economic, social, or international context as well as with progressive globalization.

Summing up this part of the deliberations, it is worthwhile to draw attention to yet another provision of the Constitution—art. 31 para. 3, which provides that limitations to the exercise of constitutional freedoms and rights may be established only by statute and only when they are necessary in a democratic state for its security and public order; for the protection of environment, health, and public morals; or of the freedoms and rights of others. Such limitations may not impair the essence of freedoms and rights. In this perspective, it would be difficult to deny the existence of a strong public interest in the legislator's regulation of the issue of trading in agricultural land. In particular, it may concern the establishment of maximum and minimum area criteria to prevent both fragmentation and excessive accumulation of agricultural land. It is not possible to exclude the establishment of certain preferences resulting from the occupation of a farmer or the wish to maintain its agricultural character.[27] This thought is particularly important with regard to any regulations and limitations in the a.s.a.s. mentioned in the first part of the article. The precedence of the provisions of the Constitution over the regulations of the a.s.a.s. and the compliance of the act with the Constitution is stated as follows in the preamble of the a.s.a.s. itself: "In order to strengthen the protection and development of family holdings, which in accordance with the Constitution of the Republic of Poland constitute the basis of the agricultural system of the Republic of Poland (...) this act is enacted."

In the jurisprudence of the Constitutional Tribunal, the subject matter of individual elements of the agricultural system discussed by the Tribunal may be found more than once, which is evidenced by the above-cited judgments. In the publicly available database of rulings of the Constitutional Tribunal (Internet Portal of Rulings – https://ipo.trybunal.gov.pl/ipo), one can find judgments and decisions in which the Tribunal analyzed regulations concerning agricultural taxes, farmers' insurance, and agricultural reforms, among others. However, since the expiry of the EU derogation period, the Court's jurisprudence has not addressed issues relevant to the article. Therefore,

26 Tuleja, 2021.
27 Garlicki, 2016.

due to the limited volume frame of the article, the author decided not to cite the CT jurisprudence published since May 1, 2016.

3. No proceedings before the European Commission or the Court of Justice of the European Union

Admittedly, the European Commission has initiated a considerable number of proceedings for Poland's infringement of its EU treaty obligations. In 2021 alone, 24 cases were closed against Poland in the areas of environment, energy, taxation and customs union or justice, fundamental rights, and citizenship, among others[28]; however, none of them concerned the cross-border acquisition of agricultural land or farms. The database of infringement decisions of the European Commission on the official website of the Commission contains two decisions in the field of agriculture and rural development addressed to Poland, but they both concern the same case, namely the failure to notify measures transposing the Unfair Commercial Practices Directive by Poland (infringement number: INFR(2021)0318). The first decision, which was announced on July 23, 2021, was a letter of formal notice under art. 258 TFEU – art. 260(3) TFEU; the second, announced on February 9, 2022, closed the case. Accordingly, it may be concluded that Poland has not failed to comply with its EU obligations regarding the cross-border acquisition of land or farms.

4. Polish legal instruments in the context of the Commission's Interpretative Communication

This part of the article merely summarizes the issues raised above by referring to the national legal instruments of Polish agricultural policy in the context of the Commission's Interpretative Communication on the Acquisition of Agricultural Land and European Union Law (2017/C 350/05). Chapter four of the Communication presents some characteristics of the legislation regulating land markets that require special attention. It identifies 10 essential elements to which member states should pay attention when shaping their national policy on the acquisition of agricultural land. Therefore, it is worth briefly examining how the Polish legislator compares with the Commission's guidelines.

28 Data available from the European Commission's database of infringement decisions, located on the Commission's official website: https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions (Accessed: March 12, 2022).

a) prior authorization

The acquisition of agricultural land in the Polish legal system has been limited (as referred to in subchapter 1.5.) by the obligation to obtain the prior consent of the Director General of the NASC, if the entity is not an individual farmer or another entity that may also acquire agricultural land without prior authorization by way of a statutory exception. It is worth emphasizing that Polish law does not limit the possibility of purchasing agricultural land by foreigners from the EEA and the Swiss Confederation as they only need to meet the requirements of a.s.a.s. In turn, foreigners from outside the EEA and the Swiss Confederation must apply for the permit referred to in a.a.r.e.f.

b) priority rights (right of refusal) of farmers

The right of preemption of agricultural land by the lessee of such real estate is provided for in Polish legislation. Pursuant to art. 3 of the a.s.a.s., in the case of sale of agricultural land, the right of preemption is granted by law to its lessee. If no person is entitled to preemptive right, or if they do not exercise their right, then this is vested in the NASC acting on behalf of the State Treasury. The author refers to preemptive right in more detail in subchapter 1.8.

c) price controls

With regard to the acquisition of agricultural land, the Polish legal system enacts a kind of price control. Generally, agricultural land may be purchased by an individual farmer or other entities expressly indicated in the a.s.a.s. The acquisition of agricultural land by other entities requires the consent of the Director General of the NASC. After obtaining this authorization, it is possible to announce the intention to sell the agricultural land, to which potential buyers submit a response. According to art. 2a para. 4c point 1 of the a.s.a.s., a response to an announcement of agricultural land is deemed not to have been submitted if the proposed price of agricultural land is lower by more than 5% than the price specified in the announcement of agricultural land and has not been accepted by the seller of agricultural land. This means that even if a response to the announcement has been submitted, but the price contained therein does not exceed the specified ceiling, it is treated as if the response had not been submitted at all. On the other hand, pursuant to art. 3 para. 8 of the a.s.a.s. on preemptive right, if the price of the sold real estate grossly deviates from its market value, the person exercising such right may, within 14 days from the date of submission of the declaration on preemptive right exercise, apply to court to establish the price of such real estate. Thanks to such and other legal mechanisms, it is possible to control the price of real estate—whether it is abnormally low or high.

d) self-farming obligation

In art. 2b para. 1 of the a.s.a.s., the legislator introduces the obligation to personally manage an agricultural holding. In accordance with the provision, the acquirer of an agricultural land is obliged to run an agricultural holding, which includes the purchased agricultural land, for at least 5 years from the date of acquisition of the real estate—and in the case of a natural person, to run the holding personally. Exceptions to this obligation are provided for in paragraph 4, *inter alia*, in a situation where an agricultural land is sold or ceded to a relative. Even the very definition of individual farmer (i.e., an entity which, in principle, should be the purchaser of agricultural real estate on the basis of the a.s.a.s.) refers to the criterion of personal management.

e) qualifications in farming

One of the main objectives of the a.s.a.s., specified in art. 1(3) of the act, is to ensure that agricultural activity in agricultural holdings is conducted by persons with appropriate qualifications. In addition, the definition of individual farmer refers to the obligation to have agricultural qualifications (art. 6 para. 1 of the a.s.a.s.). Art. 6 para. 2 point 2 of the a.s.a.s. specifies what it means for a person to have agricultural qualifications. A natural person is deemed to have agricultural qualifications, inter alia, when they have obtained basic vocational, basic vocational, secondary, secondary trade, or higher agricultural education.

f) residence requirements

Admittedly, the Polish legislation does not introduce the requirement of inhabiting the agricultural land by the purchaser of such real estate; however, it has other requirements concerning the place of residence. One of the premises defining an individual farmer in art. 6 para. 1 of the a.s.a.s. is that they are a natural person who has been residing for at least 5 years in the commune of the area on which one of the agricultural real properties constituting an agricultural holding is located. In addition, if a given natural person applies for the acquisition of agricultural land on the basis of the consent of the Director General of the NASC, they must undertake to reside, within 5 years from the date of acquisition of the agricultural land, on the territory of the municipality where one of the agricultural land is located, which will constitute a family holding established by the purchaser or which is part of an existing agricultural holding (art. 2a para 4 point 2 letter c and point 3 letter d of the a.s.a.s.).

g) prohibition on selling to legal persons

Polish legislation does not prohibit legal persons from purchasing agricultural land. Admittedly, the provisions of the a.s.a.s., in principle, limit the acquisition of agricultural land by legal persons, which has been discussed in detail in subchapter 1.5.

However, this limitation is not absolute, and legal persons may also acquire non-movable agricultural land if they fulfill the remaining criteria resulting from the a.s.a.s.

h) acquisition caps

Polish legal regulations provide for ceilings regarding the area of land owned. Pursuant to art. 2a para. 2 of the a.s.a.s., the area of the purchased agricultural land, together with the area of agricultural land constituting a family holding of the purchaser, may not exceed 300 ha. Moreover, the sale of agricultural land belonging to the State Treasury is subject to an area limit of 300 ha (art. 28a para. 1 of the a.m.a.r.e.).

i) privileges in favor of local acquirers

As it was mentioned in paragraph (f) of this fragment, the legislator introduces a kind of preference for local purchasers—persons residing in the commune where the given agricultural land is located. This determines the granting of the status of an individual farmer or the possibility for other entities to apply for acquiring agricultural land.

j) condition of reciprocity

No provision in the laws referred to in the article refers to the condition of reciprocity. Polish law does not make the possibility of agricultural land being acquired by EU citizens from another member state conditional on their being able to acquire agricultural land in their state of origin. Polish law treats all the EEA states—including all the EU member states—and the Swiss Confederation equally in the matter in question.

Therefore, one may come to the conclusion that Poland has in many of the legal instruments referred to in the Interpretative Communication of the Commission its legislation. What is more, the Polish legislation is also enriched with other legal instruments; although they are not referred to in the Communication, their presence in the Polish legal order should be regarded as positive. An example is the exclusion of legal restrictions with regard to persons close to the vendor, thanks to which the vendor may freely acquire agricultural real estate (holding) after a relative.

Admittedly, the Polish legislation also contains instruments to which the Commission is not particularly favorable or the liberalization of which it postulates, such as the obligation of personal management of the holding, the requirements concerning the place of residence, or the privileges enjoyed by local purchasers. However, these may be explained by the implementation of the purposes of the a.s.a.s., which are set out in detail in the preamble and art. 1, and they do not infringe the principle of proportionality. This is evidenced by the fact that no infringement proceedings have been initiated against Poland before the European Commission or the Court of Justice of the European Union.

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