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The constitutional aspect of regulations limiting agricultural land transactions  
in Poland\*\*

*Abstract*

*The article aims to analyse the constitutional aspects of the regulation on land transactions in Poland. After the general introduction, it scrutinises the notion of agricultural real estate and the self-farming obligation. In the end, it concludes by shedding light on the constitutional law problems arising from the regulation in force. Moreover, the article gives an in-depth analysis on the current Polish land transaction regime.*

**Keywords:** Poland, regulation of land transactions, constitutional law, agricultural land.

## 1. Introduction

Since 30 April 2016, there have been in force in Poland specific rules for trading in agricultural real estate and agricultural holdings,<sup>1</sup> the basic shape of which has not changed since then, despite some significant corrections made in 2019.<sup>2</sup> The Polish model of rationing the agricultural real estate transactions is currently defined primarily by the provisions of the Act of 11 April 2003 on shaping the agricultural system<sup>3</sup> (ASAS), as amended in 2016, as well as the Act of 19 October 1991 on the management of agricultural real estate of the State Treasury<sup>4</sup> and the Civil Code.<sup>5</sup>

The introduction of the aforementioned regulations triggered a lively discussion in the Polish literature,<sup>6</sup> and the solutions adopted in 2016 became the subject of

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<sup>1</sup> Introduced into the Polish legal order by the Act of 14 April 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 (*Journal of Laws* of 2018, 868)

<sup>2</sup> Pursuant to the Act of 26 April 2019 amending the Act on shaping the agricultural system and certain other acts (*Journal of Laws* 2019, 1080), which entered into force on 26 June 2019.

<sup>3</sup> *Journal of Laws* 2019, 1362.

<sup>4</sup> *Journal of Laws* of 2020, 2243.

<sup>5</sup> *Journal of Laws* of 2020, 1740.

<sup>6</sup> Among the very many studies relating to the issue at hand, the following publications by authors specializing in agricultural law should be mentioned: Bender 2019, Bieluk 2016, Bieluk 2018, Blajer 2016, Blajer 2019a, Blajer 2019b, Blajer 2019c, Blajer 2021, Czechowski & Niewiadomski 2017, Czechowski 2018, Litwiniuk 2017, Litwiniuk 2019, Litwiniuk 2021, Łobos-



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analyses in many contexts.<sup>7</sup> One of them is the constitutional aspect of the current model of agricultural real estate transactions in Poland. This issue has even been devoted to a separate monograph.<sup>8</sup> This question is all the more important because several of the most significant regulations of the ASAS became the subject of two applications of the Polish Ombudsman in 2016 to declare the selected provisions of the ASAS inconsistent with the Constitution of the Republic of Poland, i.e. the application of 11 July 2016 and the application of 12 August 2016. This case, heard under the joint reference K 36/16, is still pending despite the passage of more than five years from the receipt of the relevant applications.

In the aforementioned documents, the Ombudsman devoted much attention to the issue of constitutionality of the solutions introduced in 2016, stressing their inconsistency with the fundamental constitutional principles of the Republic of Poland. Also in the literature, numerous arguments are raised in favour of the unconstitutionality of the Polish model of agricultural real estate transactions in its current form. Therefore the aim of this article is to present the most important issues raised in the current discussion on the compatibility of regulations limiting the trade in agricultural land with the Constitution of the Republic of Poland in a wider international forum. The modest framework of the article does not allow a comprehensive discussion of this extensive and complicated problem. Therefore, out of necessity, further considerations will be limited to two fundamental issues, causing the biggest doubts both in the constitutional aspect and in the practice of functioning of the Polish model of trading in real estate<sup>9</sup>. The first of them is the notion of agricultural real estate itself as a concept determining the scope of application of special regulations of the ASAS; the second one is the issue of 5-year-long obligation to run an agricultural farm as a result of acquiring agricultural real estate. Both these issues allow at the same time to indicate the most important fields of conflict between the agricultural law regulations and the fundamental systemic principles resulting from the Constitution of the Republic of Poland, as well as to determine the hitherto approach of the Polish Constitutional Tribunal to solving these conflicts, with the reservation that the jurisprudence of the Constitutional Tribunal analyzed in this paper has been shaped on the basis of the legal status binding before 2016.

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Kotowska & Stanko 2020, Łobos-Kotowska 2021, Marciniuk 2017, Michalowski 2020, Suchoń 2017, Suchoń 2019, Truskiewicz 2016, Truskiewicz 2019.

<sup>7</sup> The aforementioned solutions have been analysed, among others, in the context of their impact on the regulations of traditional civil law (e.g. Pisuliński 2016, Swaczyna 2017), civil procedure (e.g. Gniewek 2017, Szereda 2016), commercial law, including in particular commercial company law (e.g. Bieluk 2021, Bieluk 2019, Łobos-Kotowska 2018, Grykiel 2016), and food law (e.g. Wojciechowski 2021).

<sup>8</sup> Bidziński, Chmaj & Ulijasz 2017.

<sup>9</sup> It should be emphasized that the solutions adopted in the ASAS are currently among the most significant from the point of view of the practice of real estate trade in Poland. This can be confirmed both by the number of practical commentaries to this Act published after 2016. (Bieluk 2016, Łobos-Kotowska & Stańko 2019, Czech 2020, Blajer & Gonet 2020), as well as the number of conferences organized at that time, both strictly scientific in nature and aimed at real estate practitioners (e.g. Zombory 2021).

On the other hand, it should be emphasized that issues related to the compatibility of Polish regulations on agricultural real estate transactions with the European Union law remain outside the scope of the considerations carried out in this paper. Devoting attention to this complicated and multifaceted issue, widely analyzed in Polish literature,<sup>10</sup> would significantly exceed the framework of this study.

## **2. The notion of agricultural real estate within the meaning of the ASAS in the constitutional aspect**

In accordance with the justification of the project of the Act on suspending the sale of real estate from the Agricultural Property Stock of the State Treasury, by virtue of which, in 2016, the current model of public rationing of the agricultural real estate trade in Poland was introduced, it was pointed out that agricultural real estate is the most important and indispensable means of food production, and at the same time, due to the ongoing progress of civilization, intensive urbanization processes and climate changes, the resources of agricultural real estate are constantly decreasing or undergo total devastation. In view of the above, agricultural real estates, as 'non-monetizable public property', should be subject to detailed legal regulations of a protective nature. These regulations, establishing the principles and mode of agricultural real estate circulation, should allow for proper distribution of agricultural real estate. These ideas, in turn, have been reflected in the preamble of the amended ASAS, according to which its provisions should serve to ensure appropriate management of agricultural land in the Republic of Poland in order to ensure food security for the citizens and to support sustainable agriculture, which is carried out in compliance with environmental protection requirements and fosters the development of rural areas. Moreover, the aim of ASAS in its present form should be to strengthen the protection and development of family farms which, in accordance with Article 23 of the Constitution of the Republic of Poland, constitute the basis of the agricultural system of the Republic of Poland.<sup>11</sup>

Granting such an important meaning to agricultural real estate in Poland, resulting in creation of a completely separate model of trade in this category of real estate, should entail precise definition of this object at the level of the ASAS. However, the issue of legal individualization of agricultural real estate in the current legal state raises very significant doubts.

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<sup>10</sup> E.g. Wojciechowski 2020, Włodarczyk 2019.

<sup>11</sup> The content of ASAS, however, did not reflect other motives for introducing specific regulations concerning agricultural real estate transactions, which mainly included the fact that on 1st May 2016 the period of 12 years of Poland's membership in the European Union expired and, as a result, the protection period concerning the purchase of Polish agricultural land by foreigners, as specified 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 16th April 2003. Therefore, according to the author of the project, the lack of introduction of specific regulations would lead to a situation in which foreigners would be in possession of the majority of agricultural real estate in Poland, and the legal regulations would not impose the obligation to conduct agricultural production on these areas, which in turn would harm the food security of Poland and Polish farmers who, according to statistics, have the lowest incomes among farmers from European Union countries.

The definition of agricultural real estate, as a subject of separate legal regulation, has been included in art. 2.1 of ASAS, according to which ‘agricultural real estate’ should be understood as agricultural real estate within the meaning of the Civil Code, excluding real estates located in areas designated in spatial development plans for purposes other than agricultural. In Polish agrarian literature it is assumed that classifying a given property as agricultural real estate is a two-stage process; firstly, it has to be established whether the given property is agricultural real estate according to the Polish Civil Code and the next stage is to check whether the area where the given property is located is covered by a spatial development plan and in case of a positive answer – what are its provisions with regard to the given property.<sup>12</sup> Already at this point it should be stressed that in order to qualify the given real estate as agricultural from the point of view of the above definition neither its area nor the fact that it is located within the administrative borders of a town is of any significance.

The definition of agricultural real estate at the level of the Polish civil code is provided in article 46<sup>1</sup> of this legal act. In accordance with its content agricultural real estate is real estate which is – or may be – used for conducting manufacturing 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 can be concluded that the agricultural real estate within the meaning of the Civil Code is the real estate which is actually used for carrying out productive activity in agriculture but also the real estate which can be used in the future for such activity.<sup>13</sup> In this context productive activity in agriculture should be treated as a kind of qualified agricultural activity assuming existence of purposeful and organised human activity aimed at production in the field of agriculture.<sup>14</sup> On the other hand, the literature stresses that the basic criterion for distinguishing agricultural real estate is only physical and chemical (agronomic) properties of the top soil layer allowing to obtain agricultural products after applying appropriate agrotechnical procedures. Thus, it is about agronomic features of the ground from which it results that obtaining agricultural products on it is physically possible.<sup>15</sup>

It is also argued in the literature that from the definition of the agricultural real estate in the Civil Code it follows that the real estate loses its agricultural character at the moment of the actual development of the land making its further use for agricultural activities impossible.<sup>16</sup> In other words, when assessing the possibility of using for agricultural purposes one should take into account whether with the use of current technology it can be incorporated in the process of agricultural production.<sup>17</sup> The prerequisite of the use of land for agricultural purposes (actual and potential) should be assessed objectively. Its subjective perception by the owner or purchaser of the real estate is irrelevant.

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<sup>12</sup> Wojciechowski 2019, 164.

<sup>13</sup> Łobos-Kotowska & Stańko 2019.

<sup>14</sup> Judgment of the Supreme Court of 14 November 2001, II CKN 440/01, OSNC 2002/7–8.

<sup>15</sup> Lichorowicz 2001, 88

<sup>16</sup> Truszkiewicz 2007, 150.

<sup>17</sup> Wojciechowski 2019, 157.

In accordance with the view expressed in the literature, if the real estate is not currently used for agricultural purposes, it should be examined whether by way of recultivation procedures it is possible to obtain a state in which it will be fit for agricultural activity. The criterion of reasonable expenditure should be applied in this context. It has to be examined whether, if the real estate was adapted for agricultural use, the economic results achieved would justify the expenditure incurred. In simple terms, the planned income which could be generated by the agricultural activity using the real estate is compared with the costs of recultivation measures. When costs exceed revenues, the outlays cannot be considered reasonable. Therefore, if with the application of appropriate agrotechnical procedures, according to the criterion of reasonable outlays, the land can be adapted to agricultural activity, it should be regarded as agricultural real estate (within the meaning of Article 2.1 of the ASAS in conjunction with Article 46<sup>1</sup> of the Civil Code). If these prerequisites are not met, such land does not constitute agricultural real property and is not subject to the provisions of the ASAS.<sup>18</sup>

In connection with the above – mentioned doctrine statements, attention should also be drawn to very restrictive theses arising from the case law of Polish courts. Pursuant to the decision of the Supreme Court of 28 January 1999, III CKN 140/98, LEX No 50652, the decisive factor for recognising the real estate as agricultural is the purpose of the real estate, and not the way the real estate is actually used. The purpose of real estate does not change when it is excluded from agricultural use, even for a longer period of time, either as a result of legal actions (lease, tenancy, lending) or certain facts (machinery storage, separation of playgrounds), provided that in both cases the real estate does not permanently lose its agricultural characteristics. It also does not lose them when they can be restored by means of applied procedures, e.g. recultivation. Thus, according to the Supreme Court, the real estate which for years served the needs of industrial production 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.”* An even more radical view was expressed in the ruling of the Administrative Court in Poznań of 8 December 2011. IV SA/Po 558/11, LEX No 1154873 in which the said court stated that even in a situation where for a longer period of time the real estate was developed in a different manner and used for commercial, service or production purposes not related to agricultural production – as long as there is a potential possibility of using it to conduct production activities in agriculture with respect to plant and animal production – it cannot be denied its agricultural character.

The above quoted views, significantly broadening the scope of the notion of agricultural real estate in the light of the Civil Code, should be considered as prevailing both in the theory and practice of trade. However, it should be noted that they are also subject to justified and well-argued criticism in literature. First of all, it is argued that the character of the given real estate in the context of the definition included in Article 46<sup>1</sup> of the Civil Code should be verified each time by examining whether under specific circumstances (location, configuration, previous permanent manner of development) the given real estate may constitute an agricultural farm.

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<sup>18</sup> Czech 2020.

A negative result of this examination does not allow for qualification of the given land real estate as agricultural.<sup>19</sup> Consequently, according to this standpoint it should be assumed that in obvious cases the real estate – even if it includes agricultural land within the meaning of the provisions on land cadastre – is not an agricultural real estate if its specific features, such as area, shape, configuration of the terrain or the hitherto manner of development support this conclusion.<sup>20</sup>

The last of the quoted theses raises the question about the legal meaning of qualifying the given real estate as agricultural within the meaning of the provisions relating to the land cadastre – in particular, the provision of § 9 of the Regulation of the Minister of Labour and Technology Development dated 27 July 2021 on land and building<sup>21</sup> cadastre. Also in this respect, there is no uniform position in the judicature and the doctrine of law. On the one hand, currently the prevailing view seems to be that the gain or loss of the agricultural character of the real estate is not determined by the entry (or its change) in the land cadastre, because the data contained in this register are only informative. Consequently, reliance on the data entered in the land cadastre may in practice lead to erroneous conclusions as to the classification of the given real estate as agricultural real estate (within the meaning of Article 46<sup>1</sup> of the Civil Code and Article 2.1 of the ASAS).<sup>22</sup> A similar perspective is also sometimes adopted by judicature, e.g. the Supreme Administrative Court in the judgment of 12 December 2017, I OSK 1174/17, LEX nr 2430459, stated that the registration data are of informational and technical nature and refer to a specific registration plot. The cadastre only records the legal statuses resulting from specific official documents, and thus the statuses determined in another mode or by other authorized adjudicating bodies. For citizens and state bodies only the data regarding the land description (its location, boundaries, type of use, etc.) has binding force. The cadastre does not resolve any disputes concerning the land and buildings, and the registration authorities are not entitled to verify the documents on the basis of which they make changes to the register. This view was also reflected in the content of a fundamental document for the practice of trade in agricultural real estate in Poland, i.e. the Joint Position of the Ministry of Agriculture and Rural Development, National Support Centre for Agriculture and National Council of Notaries dated 27 February 2020 regarding the practical application of the ASAS. In accordance with the content of this document, data from the cadastre may be helpful in qualifying the real estate as agricultural. As such, they cannot be conclusive.

On the other hand, relatively recent jurisprudence has presented the view that in order to determine that the real estate has agricultural character – because it may be used for conducting production activity in agriculture in the scope of plant and animal production – the types of land use revealed in the land cadastre are absolutely decisive (Judgment of the Supreme Administrative Court of 12 March 2020 II OSK 1279/18, LEX nr 3020156).

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<sup>19</sup> Wierzbowski 2005, 96.

<sup>20</sup> Truskiewicz 2016, 148.

<sup>21</sup> Journal of Laws of 2021, 1390.

<sup>22</sup> Wojciechowski 2019, 157; Czech 2020; Lobos-Kotowska & Stanko 2019.

Finally, significant doubts arise in the Polish literature and jurisdiction over the issue of the so-called mixed real estates i.e. real estates which apart from the land suitable for agricultural use also include land which has another type of use. This problem results from the fact that the definition of agricultural real estate in Article 46<sup>1</sup> of the Civil Code is adjusted only to the situation when the whole real estate can be developed in a uniform manner. In this respect it is possible to adopt two different solutions:

(1) Determining the dominant (leading) function of the real estate. Supporters of this solution draw attention to the necessity of a functional approach to assessing the nature of the real estate, stressing at the same time that there is no sense in applying ASAS to a real estate comprising land, for example, designated as agricultural land, which does not and cannot have a major impact on the agricultural use of the real estate. Analogically one should assess real estates in which the area of agricultural land is relatively large compared with the remaining part of the real estate, but it cannot influence the use of the entire real estate due to the dominant (leading) function of the remaining part, e.g. locating on it a production plant, conducting mining activity, etc. 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 agricultural.<sup>23</sup>

(2) Treating the whole real estate as agricultural. This solution is supported in particular by some theses contained in the justification of the verdict of the Supreme Court of 5 September 2012, IV CSK 93/12, in which the Supreme Court emphasized that with regard to real estate of heterogeneous nature it is possible to take the view that: a/ it is not included in the ASAS regulation irrespective of the extent to which it is intended for other purposes; b/ the aforementioned statutory requirements are met by real estate the main purpose of which is to carry out production activity in agriculture; c/ the real property falls under its regulation if it is not used in its entirety and intended for purposes other than agricultural. In the opinion of the Court, the second position was based on the assessment of the character of the real estate in relation to the leading or essential use of the real estate and the intended use covered by the spatial development plan, also taking into account the purpose of the ASAS. The leading, or principal, use of the real estate would be considered to be when the area of the real estate is predominantly agricultural and the part related to other activities is not significant, which determines that the whole property is covered by the ASAS. However, the nature of these prerequisites may be evaluated, which could cause doubts and difficulties in the application of the ASAS. Thus the Court decided in favour of the third of the abovementioned positions, as it corresponds to the highest degree to the principle of certainty of trade, and its decision had a decisive influence on the current practice of trade, often leading to completely irrational results.

As a consequence, the legal definition of agricultural real estate contained in the ASAS can be precise only in those cases where the whole area of a given real estate is covered by a spatial development plan, i.e. it is possible to go to the second step in the process of legal identification of real estate for the purpose of specific regulation of trading in agricultural land.

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<sup>23</sup> Truszkiewicz 2017, 58–59.; Marciniuk 2017, 101; Wojciechowski 2019, 157.

However, it should be stressed that currently this possibility concerns only about 1/3 of the area of the Republic of Poland, because only such a modest area of Poland is covered by the local spatial development plans. 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 often the content of the plan is not unambiguous and its provisions provide e.g. next to the basic non-agricultural designation, for an agricultural designation as an admissible or supplementary designation.<sup>24</sup>

Summing up the comments made so far, it should be stated that in the vast majority of practical cases the open and extremely broad nature of the definition of agricultural real estate provided in the ASAS gives rise to considerable doubts as to whether a given piece of real estate, in particular undeveloped real estate, has agricultural character within the meaning of the ASAS; it is not clear what criteria should be taken into account when determining its character. As a result, there is uncertainty as to whether or not a given piece of land should be subject to the separate and strict rules for trade in agricultural real estate laid down in the ASAS. The sanction for incorrectly determining the nature of the real estate is the invalidity of its acquisition or the possibility of its expropriation (art. 9 ASAS).

The mentioned way of defining the agricultural real estate in article 2.1 of the ASAS raises significant doubts as to the compliance of this provision with the Constitution of the Republic of Poland. In accordance with the established line of jurisprudence of the Constitutional Tribunal, the principle of a democratic legal state, as expressed in Article 2 of the Constitution of the Republic of Poland, requires the legislator to observe the principles of correct (decent, reliable) legislation. This injunction is functionally connected with the principles of legal certainty and security, as well as with the protection of the citizens' confidence in the state and the law created by it (Judgement of the Constitutional Tribunal of 24 February 2003, ref. K 28/02). On the other hand, the principles of correct legislation include, first of all, the principle of determinacy of the law, which requires that the law be made consistently, clearly and comprehensibly for the citizens (Judgment of the Constitutional Tribunal of 16 June 2015, ref. K 25/12). The requirement of determinacy of legal regulation, thus finding its constitutional basis in the principle of a democratic legal state, applies to all regulations (directly or indirectly) shaping the legal position of a citizen (so Constitutional Tribunal in the justification of the Judgment of 18 March 2010, ref. K 8/08). The abovementioned principle of legal certainty prohibits the adoption of unpredictable norms, whereby the application of regulations containing vague premises, unclear and ambiguous, which do not allow a citizen to foresee the legal consequences of his actions, may also come as a surprise to an individual (Constitutional Tribunal Judgment of 14 June 2000, ref. P 3/00).

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<sup>24</sup> It should be emphasized that according to the view prevailing in the practice of trade, issuance of the so-called decision on land development conditions for a given land, which, pursuant to Article 4.2 of the Act of 27 March 2003 on spatial planning and development (Journal of Laws of 2021, 741.), is a surrogate of the local zoning plan in areas not covered by it, does not result in the loss of the agricultural character of the real estate. Truskiewicz 2016, 141.



On the other hand, the precision of a provision, which is related to its clarity, means the possibility to decode unambiguous legal norms from it, as well as their consequences, with the help of the rules of interpretation adopted on the grounds of a given legal culture. It should also manifest itself in the concreteness of the obligations imposed and rights granted, so that their content is obvious and allows for their enforcement (Judgment of the Constitutional Tribunal of 18 March 2010, case K 8/08).

It should also be noted that in the light of the existing jurisprudence of the Constitutional Tribunal, three assumptions are important in order to assess the compliance of the formulation of a specific provision of law with the requirements of correct legislation. Firstly, any provision restricting constitutional freedoms or rights should be formulated in a manner that makes it possible to unequivocally determine who is subject to the restriction and in what situation. Secondly, such a provision should be sufficiently precise to ensure its uniform interpretation and application. Thirdly, such a provision should be formulated in such a manner that its scope of application encompasses only those situations in which a rational lawmaker actually intended to introduce a regulation limiting the exercise of constitutional freedoms and rights (e.g. Judgment of the Constitutional Tribunal of 18 March 2010, ref. K 8/08). The current wording of the definition of agricultural real estate in Article 2.1 of the ASAS causes significant doubts as to the satisfaction of the above mentioned premises and may also be questioned from the point of view of the principle resulting from Article 31.3 of the Constitution of the Republic of Poland, according to which limitations to the use of constitutional freedoms and rights may be established only by means of a statute. The meaning of this principle was explained by the Constitutional Tribunal in the Judgment of 12 January 2000 (ref. P 11/98), in which it stated that *“making the admissibility of limitations of rights and freedoms dependent on their establishment 'only by statute' is more than a mere reminder of the general principle of the exclusivity of statutes for the regulation of the legal situation of individuals, which constitutes a classic element of the idea of the rule of law. It is also a formulation of the requirement of adequate specificity of statutory regulation. Since limitations on constitutional freedoms and rights may be established only by statute, this implies an obligation of completeness of the statutory regulation, which must independently determine all the basic elements of the limitation of a given right and freedom, so that already on the basis of a reading of the provisions of the statute it is possible to determine the complete outline (contour) of this limitation. It is inadmissible, however, to adopt blanket regulations in a statute, leaving the executive authorities (...) the freedom to prescribe the final shape of such limitations, and in particular to determine the scope of such limitations.”*

### **3. The obligation of running a farm following the acquisition of agricultural real estate in the constitutional aspect**

As mentioned above, determining the agricultural character of a given real estate being the subject of trade has a significant practical meaning. This is because such real estate is subject to a special legal regime provided for in the ASAS. In a necessary simplification, the assumptions of the Polish model of trade in agricultural real estate can be presented – *de lege lata* – as follows:

(1) Agricultural real estate with an area of at least 1 ha may be acquired on the basis of any legal event, i.e. based on a legal action, court ruling, administrative decision or by force of law (with few exceptions – e.g. inheritance) by any acquirer (e.g. both natural and legal persons, regardless of whether they are involved in agricultural activity) – only after obtaining consent of the General Director of the National Agricultural Support Centre (NASC) – i.e. a specialised government agency. This consent is an administrative decision of discretionary nature, issued on the basis of vague premises set out in Article 2a.4 of the ASAS. The lack of prior consent to acquire agricultural real estate renders the acquisition invalid. Only a few categories of purchasers are exempt from the obligation to obtain consent, including in particular so-called individual farmers (assumed to be professional farmers – Article 6 of the ASAS), relatives of the vendor, religious legal persons and certain public law entities (State Treasury, local government units). However, if the purchaser of agricultural real estate is such a privileged entity, the NASC's rights of civilistic nature may sometimes take place, i.e. pre-emption right or the so-called right to purchase, enabling the NASC to take over the real estate for the benefit of the State Treasury.

(2) Agricultural property with an area of at least 0.30 ha but not larger than 9,999 square meters may be purchased by any purchaser without the need to obtain prior consent of the Director General of the NASC. In such a case, however, NASC rights arise and should be regarded as a rule, i.e. the pre-emption right (when acquisition is made under a sales contract) or the so-called right to purchase (when acquisition is made under any other legal event). Failure to take into account the aforementioned rights of NASC also results in the invalidity of the acquisition. The pre-emption right or right to purchase of the NASC does not come into play only in exceptional cases, in particular when the purchaser is a close relative of the seller or an individual farmer, but only when the buyer resides in the municipality where the purchased real estate is located or in a municipality bordering on this municipality.

(3) As a rule, an agricultural real estate with an area of less than 0.30 ha may be acquired by anyone and without any restrictions. This solution is of great practical significance, in fact it resulted in the fact that in Poland after 2016 there was no complete paralysis of the real estate trade in cities without local spatial development plans; as indicated above, agricultural real estate within the meaning of the ASAS may also be real estate located even in the city centre.<sup>25</sup>

The constitutional aspect of the above mentioned regulations, although undoubtedly interesting and complicated, will not be the subject of further analysis; it has in fact been devoted to it quite a lot of attention in the literature<sup>26</sup>. *De lege lata*, much greater doubts arise, both in practice and in the context of compliance with the Constitution of the Republic of Poland, from two obligations of fundamental importance imposed on each purchaser of agricultural real estate with an area of at least 0,30 ha, i.e.: an obligation to run an agricultural farm of which the purchased agricultural real estate became part for a period of at least 5 years from the day on which the real estate is purchased and, in the case of a natural person, to run the farm personally (Article 2b.1. of the ASAS) and a prohibition to dispose of the purchased

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<sup>25</sup> More widely: Blajer 2019b.

<sup>26</sup> Bidzinski, Chmaj & Uliasz 2017, 43.

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 a consent of NASC, as provided for in Article 2b.3 of the ASAS – in cases justified by an important interest of the acquirer of agricultural real estate or in public interest, as well as they do not apply at all in situations listed in detail in Article 2b.4. of the ASAS, e.g. where agricultural real estate was acquired as a result of an inheritance or a division of an inheritance or is located within administrative borders of a city and has an area of less than 1 ha. These regulations can be undoubtedly regarded as the core of the current model of agricultural real estate trade in Poland considering extremely severe sanctions imposed for non-compliance with the abovementioned obligations in the form of invalidity of the transfer of the agricultural real estate to a third party 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 ASAS<sup>27</sup>.

The fundamental interpretation problem related to the content of art. 2b.1 of the ASAS 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’, contained in art. 6.2 of the ASAS, according to which a natural person is deemed to run an agricultural farm personally if he/she works in this farm and takes 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 universal character, i.e. it refers also to other categories of purchasers of agricultural real estates – e.g. legal persons.

In the agrarian literature it is noticed that the obligation to run an agricultural farm which includes the purchased real estate and in case of a natural person – the obligation to run such farm personally, should be understood in the categories of the obligation to run an agricultural activity.<sup>28</sup> Pursuant to art. 2.3 of the ASAS, running an agricultural activity should be understood as running productive activity in agriculture within the scope of plant or animal production, including horticultural, fruit and fish production.<sup>29</sup> On the other hand, it should be stressed that the legislator refers to the notion of running an agricultural farm, which in the Polish tradition has a slightly different meaning. 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 takes into account, first of all, running the management of an agricultural farm, administering it.<sup>30</sup> The meaning of this notion is best expressed by the formulation according to which it means exercising the occupation of a farmer in an agricultural farm and thus managing it.<sup>31</sup>

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<sup>27</sup> Blajer 2021, 35.

<sup>28</sup> Łobos-Kotowska & Stańko 2019.

<sup>29</sup> 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.

<sup>30</sup> Blajer 2009, 225.

<sup>31</sup> Błahuta, Piątowski & Policzkiewicz 1967, 99.

Consequently, it should be acknowledged that in accordance with the content of Article 2b.1 of the ASAS a purchaser of agricultural real estate who is a natural person should for five years perform the occupation of a farmer in an agricultural farm, i.e. work in it and take all decisions concerning management of productive activity in agriculture in the field of plant or animal production, including horticultural, fruit and fish production.<sup>32</sup> This statement, however, does not allow to determine what would constitute running an agricultural farm by a purchaser being an organizational unit (e.g. legal person), although formally this obligation refers also to this category of purchasers. In the ASAS there are no indications what would mean ‘carrying out the occupation of farmer’ by legal persons.

The difficulty in defining precisely the scope of the obligation to run an agricultural farm acquires particular significance in the context of the direction of interpretation dominant in the practice of trade, assuming that, as a matter of principle, each case of purchasing an agricultural real estate, as defined by the ASAS, with the area of at least 0,30 ha – as a result of which the purchaser becomes the owner of an agricultural real estate with the total area of at least 1 ha – generates on his/her side the ‘obligation to run an agricultural farm.’ According to NASC, this obligation arises also in the case where the purchaser of agricultural real estate is already the owner of agricultural real estate with a total area of at least 1 ha and the agricultural real estate purchased by him has an area of at least 0,30 ha. The obligation to run an agricultural holding also arises if the purchaser of the agricultural real estate has not had anything to do with agriculture so far. All that matters is that following the acquisition he is – or becomes – the owner of an agricultural real estate or several agricultural real estates with a total area of at least 1 ha.

Practical consequences of these regulations assume particular importance in the context of sanctions for failure to start or cessation of running an agricultural farm or, in the case of a natural person, personally running an agricultural farm which the acquired agricultural real estate became part of – within the 5-year period referred to in Article 2b.1 of the ASAS. In the light of Article 9.3 of the aforementioned legal act, the NASC may in such a situation apply to court for acquisition of the property by the State Treasury against payment of a price corresponding to its market value. Failure to comply with such a vaguely worded obligation, the contents of which can in fact be subject to very free interpretation by the NASC (in particular with respect to legal persons), therefore exposes the purchaser to the loss of the purchased real estate or at least to lengthy and costly court proceedings the outcome of which remains difficult to predict.

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<sup>32</sup> This is also the direction in which she interprets the relationship between the concept of ‘running an agricultural farm’ and ‘the concept of running an agricultural activity’ Suchoń 2019, 105, although the author further adds that running an agricultural activity or a farm does not have to be connected with the sale of agricultural products (it does not have to have the character of an economic activity). However, this does not change the fact that production of agricultural products remains an inherent feature of ‘running an agricultural farm’ within the meaning of the ASAS.

Further doubts arise with regard to the meaning of the obligations laid down in Article 2b of the ASAS for family trade in agricultural real estate. According to the prevailing interpretation – relatives of the seller who have purchased agricultural real estate from the seller 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 sell the purchased agricultural real estate only with the approval of NASC referred to in Article 2b.3 of the ASAS or to entities and in situations specified in Article 2b.4 of the ASAS. Acceptance of this interpretation leads to very 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 of an agricultural real estate of at least 1 ha, or where, as a result of the acquisition, he becomes the owner of a real estate of such an area, can result in the application of the sanction described in Art. 9.3 of the ASAS. In more graphic terms, a division of a farm made by a farmer between his children under the above described conditions may lead to the farm being taken over by NASC acting on behalf of the State Treasury and, consequently, to the loss of family property. It is worth emphasizing again that the legal basis for such consequences are the provisions of the act whose fundamental goal is to strengthen the protection and development of family farms which constitute the basis of the agricultural system of the Republic of Poland.

The last 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 stemming from it are maintained 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 local spatial development plan in which the real estate was designed for purposes other than agricultural, the acquirer of agricultural real estate is still bound by the general obligation to run the agricultural farm of which the acquired real estate is a part under the threat of losing its ownership (Article 9.3 of the ASAS) as well as the prohibition to transfer the real estate to third parties. Therefore these obligations continue to exist despite the fact that the competent public administration body has decided that the real estate is no longer needed for agricultural purposes. Moreover, 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 ha, i.e. real estate to which, in accordance with the explicit wording of Article 1a of 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 lead to negation of the obligation to run an agricultural farm resulting from Article 2b.1 of the ASAS.<sup>33</sup> However, in literature there is also no lack of opinions that both aspects outlined above of the dominant direction of interpreting art. 2b of the ASAS put a question mark on the security of legal transactions in Poland. In fact, they force market participants to make extremely detailed arrangements concerning the legal and factual state of a given real estate. From a practical point of view, determination of the legal regime to which a given real estate is subject *de lege lata* starts not with indication of its current designation in the local

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<sup>33</sup> Blajer 2019b, 123–124.

spatial development plan or determination of its area, but with indication of the date on which the real estate was purchased. If 5 years have not passed since this date, a series of further determinations aiming at determining whether the purchaser is burdened with the obligations resulting from Article 2b of the ASAS, including e.g. the date when the local spatial development plan came into force or the history of geodetic divisions of the property, follow. It is easy to point out that establishing the above described circumstances may turn out to be extremely difficult or even impossible in many situations. There is also a serious risk of a mere omission of one of the listed circumstances, each of which may be decisive in determining whether the current owner of the real estate is burdened with orders and prohibitions resulting from Article 2b of the ASAS.<sup>34</sup>

The above presented obligations of the purchaser of agricultural real estate, determined by provisions of the ASAS, should now be analyzed from the constitutional point of view. There is no doubt that as regards the wording of these obligations one can repeat many objections formulated already in relation to the definition of agricultural real estate contained in Article 2.1 of the ASAS. It seems justified to conclude that it does not meet the principle of correct (decent, reliable) legislation, which is one of the manifestations of the principle of a legal state (Article 2 of the Constitution). The content of the obligations imposed on the purchaser of agricultural real estate, through the use of a number of undefined and unclear phrases, such as 'running an agricultural farm which the acquired real estate became part of' was not formulated in a precise and clear manner, allowing for a number of different interpretations<sup>35</sup>. This circumstance directly influences the legal certainty and predictability of the state authorities' actions, conditioning the rational forecasting of the market participants' actions, and in accordance with the above quoted view expressed by the Constitutional Tribunal in the Judgment of 14 June 2000, ref. P 3/00, the principle of legal security prohibits the adoption of unforeseeable norms. Moreover, as indicated above, in the opinion of the Tribunal (Judgment of 12 January 2000, ref. P/11/98) it is unacceptable to adopt blanket regulations in a statute, leaving the executive authorities free to prescribe the final shape of such limitations, and in particular to determine the scope of such limitations. These statements assume particular significance in the context of the dominant practical interpretation of Article 2b.1 and 2 of the ASAS. It should be stressed that the basic results of this line of interpretation cannot be reconciled with the results of interpretation carried out on the

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<sup>34</sup> As an aside to the above considerations, it should be noted that the burden of making the above determinations falls particularly heavily on the notaries, as part of their duty to refuse to carry out an unlawful act, as well as to some extent on the courts keeping land registers (ground books), due to the relatively broad scope of cognition of these courts in Polish law, including the validity of a legal act which is the basis for registration. It is in this context that the interpretation of legal norms arising from Article 2b of the ASAS, which dominates the practice of trading, is perceived as a significant threat both to the notary public *par excellence*, as well as to the Polish ground books system, i.e. two pillars of the real estate trading in Poland. As a consequence, the provisions of Article 2b of the ASAS actually lead to reevaluation of the model of trading in real estate (not only agricultural) functioning in Poland so far and to the search for alternative ways of securing the parties to the transaction. See: Blajer 2021, 47–48.

<sup>35</sup>Bender 2019, 44, Blajer 2019a, 53; Blajer, 2019b, 120.

basis of traditional methods, i.e. linguistic, systemic and functional, and the only argument in its favour is the alleged (not resulting from the text of the legal act) will of the legislator.<sup>36</sup> Consequently, it seems reasonable to conclude that these provisions violate the principle of correct legislation derived from Article 2 of the Constitution – the clause of a state of law – as well as the principle of loyalty, understood as the citizen's trust in the state and the law created by it.

The regulations contained in Article 2b of the ASAS can also be examined from the perspective of the principle of property protection and inheritance rights (Article 21 of the Constitution of the Republic of Poland) and the principle of protecting the freedom of economic activity (Article 22 of the Constitution of the Republic of Poland). The analysed provisions of the ASAS directly restrict the aforementioned constitutional rights and civil liberties: they oblige to exercise the ownership in a specific way and restrict the right to dispose of it (on sanction of losing the ownership), as well as oblige to conduct a specific type of economic activity on the acquired land. At first glance, the constitutional justification of these limitations could be constituted by the principle expressed in Article 23 of the Constitution of the Republic of Poland, according to which a family farm is the basis of the agricultural system of the state. On the other hand, however, the same provision stresses that this principle does not violate the provisions of Article 21 and Article 22 of the Constitution. In other words, Article 23 of the Constitution does not formulate any subjective rights, and therefore, it cannot *per se* limit the rights and freedoms set out in Article 21 and 22 of the Constitution, as well as – in the opinion of the Constitutional Tribunal expressed in the Judgment of 31 January 2001, ref. P 4/99 – other constitutional principles, including in particular the principle of equality and the principle of protection of acquired rights.<sup>37</sup>

It also seems justified to question the proportionality and adequacy of limitations resulting from Article 2b of the ASAS. First of all, it should be stressed that it seems highly disproportionate to impose the obligation to run an agricultural farm on every purchaser of an 'agricultural real estate' within the meaning of the Act (as long as he already owns an agricultural real estate with an area of at least 1 ha or as a result of the acquisition becomes the owner of a real estate with such an area) – and thus also on a purchaser who has not had any connection with agriculture so far, as well as on a purchaser of a real estate which is agricultural only from a formal point of view; this is the above-cited problem of the overly broad definition in Art. 2.1 of the ASAS. This obligation could be justified only insofar as it would refer to a subsequent owner of an actually existing farm, forcing him to continuation of agricultural use of the land. If the currently dominant direction of interpretation is accepted, the aim the legislator wanted to achieve is not understandable. In particular, it does not seem rational to assume that actually every purchaser of real estate, which in fact has never been a part of a farm or used for agricultural purposes, would suddenly have to undertake agricultural activity on it – especially since, as indicated above, it is not entirely clear what this obligation would consist in at all. In such situations where the given real estate is agricultural only 'formally' (in name only) and in reality has nothing to do with farming, the obligation of its purchaser to use it in a specific way for many years and

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<sup>36</sup> Blajer 2019b, 120.

<sup>37</sup> Bidziński, Chmaj & Uliasz 2017, 52.

without real possibility of release from this obligation and on top of that sanctioned by deprivation of property – this accumulation of restrictions on the right to property is so far-reaching that the right vested in the purchaser transforms into an onerous obligation to such an extent that one may speak of a violation of its very essence. Moreover, it seems that this regulation should also be examined from the point of view of its compliance with Article 65 of the Polish Constitution, which guarantees everyone the freedom to choose and pursue a profession and to choose their place of work.

Introduction of a sanction for breach of the obligation to run an agricultural farm also seems to be constitutionally doubtful; as indicated above, it is the possibility of the NASC to apply to court for acquisition of the property by the State Treasury – against payment of a price corresponding to its market value (Article 9.3 of the ASAS) – i.e. the so-called expropriation sanction. However, in accordance with Article 21.2 of the Constitution of the Republic of Poland, expropriation is permitted only when it is carried out for public purposes and in return for fair compensation. However, it is difficult to indicate a public purpose justifying expropriation in the case of application of the sanction provided for in Article 9.3 of the ASAS. Moreover, there is a significant doubt as to whether payment to the expropriated party of a ‘price corresponding to the market value’ of the expropriated property actually means ‘fair compensation’ referred to in Article 21.2 of the Polish Constitution. Some authors even compare the expropriation sanction provided for in the ASAS to forfeiture of property as a criminal measure.<sup>38</sup>

In literature it was also noticed that the analyzed regulation is in contradiction with constitutional assumptions, the realization of which should serve the process of shaping the agricultural system (art. 23 of the Constitution of the Republic of Poland). It determines *de facto* individual, not family, way of running an agricultural farm under pain of subsequent expropriation.<sup>39</sup> This view is justified by highly unsuccessful definitions of a family farm and an individual farmer (art. 5 and art. 6 of the ASAS), depriving – paradoxically and contrary to its name – a family farm of its family character.<sup>40</sup>

#### 4. Summary

Conclusions resulting from the above discussion of the constitutional aspect of two key institutions of the ASAS make it impossible to fully accept the current model of trade in agricultural real estate in Poland. Unfortunately, one has to agree with the view that the analysed regulations violate the principle of correct legislation, weakening the trust of citizens in the state and legal security and raise doubts in the context of compliance with the principle of protection of property rights and economic freedom.<sup>41</sup> To present the problem in more specific terms: these regulations limit the freedom to take up and pursue professional activity and the right to choose the way of running an agricultural farm, including the choice of the way of using agricultural real estate.

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<sup>38</sup> Bidziński, Chmaj & Uliasz 2017, 65.

<sup>39</sup> Litwiniuk 2019, 64.

<sup>40</sup> Blajer 2021, 42.

<sup>41</sup> Bidziński, Chmaj & Uliasz 2017, 194.



Consequently, they lead to the lack of possibility to dispose of and freely exercise the ownership right, first of all by introducing a severe expropriation sanction in case of infringement of the obligation to personally run an agricultural farm. In Polish literature there are even opinions that the adopted solutions result in the fact that the ownership right to agricultural real estate and other property rights related to these objects become institutions of ostensible character.<sup>42</sup>

The hitherto considerations concerning the constitutional aspect of the ASAS provisions determining the shape of the definition of agricultural real estate and obligations of its purchaser allow to formulate a general assessment as to the reasons for the weakness of regulations within the scope of the model of trade in agricultural real estate in Poland. These regulations are created in a hurry, under clear pressure of time, which excludes a deeper constitutional and systemic analysis. Unfortunately, Polish lawmakers also make little use of the results of comparative research, despite the fact that they often formally declare being inspired by the experiences of other countries which introduce a separate regime for trading in agricultural real estate.

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<sup>42</sup> Bidziński, Chmaj & Ulijasz 2017, 198.

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