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CONSENT OF THE NATIONAL CENTER OF AGRICULTURAL SUPPORT FOR THE PURCHASE OF AGRICULTURAL PROPERTY AS A NEW INSTRUMENT FOR REAL ESTATE TURNOVER

Key words: farmer, agricultural land market, consent for the purchase of agricultural land

ABSTRACT. In 2016 the rules concerning the agricultural land market in Poland changed. This legal reform was aimed at closing access for EU foreigners to the Polish agricultural land market. Prior to these new regulations being introduced, it was speculated whether these changes would lead to the agricultural land market “freezing up”, as the relevant jurisdiction and responsibilities, formerly granted to the Agricultural Property Agency, were taken over by the National Center of Agricultural Support (KOWR). The analysis was conducted on the basis of subject literature and data was obtained from KOWR. The investigated problems included formal and legal aspects of issuing consents by KOWR for the acquisition of agricultural land located in the Republic of Poland, as well as actual use of the above mentioned instrument by KOWR’s branch unit in Cracow. The regulation, aimed at closing access for EU foreigners to Polish agricultural land, was constructed in such a way that access to agricultural land was either impeded or made impossible not only for foreign entities but also certain Polish citizens. In accordance with Art. 2a par.4 of the Act on shaping the agricultural system (UKUR), consent of KOWR is required in the case of agricultural land purchase by entities other than those mentioned in Art 2a par. 3 of UKUR. According to the data obtained from KOWR and presented in the paper, it is evident that this instrument is being practically applied in the Malopolska Province.

INTRODUCTION

One of the state’s responsibilities is defining priorities and policies. It is important to note that the most important contemporary policies are those allowing people to realize their most basic needs. According to Maslow’s hierarchy of needs, physiological and safety needs are the most fundamental. Therefore, the state should cater to these needs by, among others, determining the food policy [Mikuła 2012]. Agricultural land plays an important role in this policy, as it constitutes one of the key factors of agricultural production. Since the very beginning of European integration, the agricultural market has been the subject of intensive legal regulation. This approach is a direct reference to the assumptions of physiocrats [Włudyka 2015]. In this context, it is reasonable to state that the market mechanism is not the most important determinant of shaping the agricultural land

market; it is the “legal infrastructure”. Another characteristic element of the agricultural land market is the intensity of legal regulation as well as non-flexibility of land supply, among others [Marks-Bielecka 2010]. Therefore, many countries introduced regulations considerably limiting the possibility of agricultural land acquisition by foreigners to their legal systems. Such regulations are also reflected in Polish law and were already included in the law on property acquisition by foreigners in 1920 (UNNC) [JL1920.31.178].

The situation on the agricultural land market changed when Poland accessed the European Union (EU). At the time when the criteria of Poland’s accession to the European Union were under discussion, Poland negotiated a twelve-year closed access period to the agricultural land market. What was understood by the market being “closed” resulted from an obligation of obtaining consent for property acquisition issued by the Minister of Internal Affairs and Administration. Towards the end of the pre-accession period, the need to establish rules of the agricultural land market emerged. On the one hand, non-discriminating for foreigners belonging to the EU and, on the other, impeding access to this market. Such a situation is typical in the EU and actually used by all Member States.

Considering the fact that agricultural real estate acquisition may occur both through ownership transfer to a foreigner from the EU or, indirectly, by acquisition of stocks or shares of a partnership owning the property, it should be stated that efficient control of the agricultural land market requires diversified legal instruments. The regulations which came into force in 2016 still limit access to Polish agricultural land for foreigners from and outside the EU. One of the instruments, i.e. the consent of the National Center of Agricultural Support (KOWR) for property acquisition applies to all foreigners as well as Polish citizens.

The aim of the paper is a synthetic presentation of the proceedings of issuing consent by KOWR for the acquisition of agricultural property by an applicant. The applicant’s citizenship is unimportant when applying for such consent. The paper presents statistical data for the Malopolska Province showing how this instrument is applied in KOWR activities.

MATERIALS AND METHODS

Linguistic and logical analysis of legal texts was the method used for the presented research. The method aims at creating a legal norm covering all cases of agricultural real estate acquisition requiring KOWR consent. The materials examined were legal texts, particularly Polish laws, subject literature and case law. Subject literature from other scientific disciplines was also used, as well as statistical data for the period 01.01.2018 to 12.07.2018 obtained from the Cracow Branch Unit of KOWR. Narrowing statistical data only down to the Malopolska Province was justified by the fact that the Authors of the research are employees of scientific units based in this province and their research focuses on this region. This paper is the first stage of research on the functioning of consent issuance for property acquisition. Ultimately, this requirement will cover the entire country. Due to the importance of the issue, the Authors have already taken steps to obtain statistical data from other Regional Branches of KOWR.

RESULTS

Analysis of the current legal status in Poland shows that the legislator defined appropriate legal structures that enabled the protection of agricultural land. As it is often the case in such situations, the question arises whether these structures have proved effective in retrospect.

One of the instruments applied is the obligation to obtain consent of the Center of Agricultural Support (KOWR) for agricultural real estate acquisition by a foreigner (Art. 2a par. 4 of the Act on shaping the agricultural system – UKUR) and KOWR's legitimate right of pre-emption of shares or stocks of a commercial law company being the owner of the land or holding perpetual usufruct of the agricultural land in question (Art. 3a and Art. 2c of UKUR).

When considering the acquisition of shares or stocks in commercial law companies, another instrument comes into the equation, i.e. the obligation of notaries to inform the Minister of Internal Affairs about any agreements of share or stock purchase in a commercial law company being the owner or holder of perpetual usufruct of a property situated within the Republic of Poland (Art. 99, par. 3-3 Act on notarial services – UPN and Art. 8a of UNNC).

With reference to this instrument, it is worth mentioning that a notary has neither the obligation nor appropriate instruments to establish whether the company whose stocks or shares are being acquired is either the owner or holder of perpetual usufruct of the agricultural real estate [Czubik 2017]. The current legal status determining the notification obligation of notaries is incoherent with the regulation of Art. 3 of UKUR, which grants KOWR the right of pre-emption. However, it is also important for exercising the pre-emption right of shares or stocks of a commercial law company being the owner or holding permanent usufruct of agricultural property. Therefore, to effectively exercise this pre-emption right by KOWR, it is required that notification, on the basis of Art. 99, par. 3-4 of UPN and Art. 8A of UNNC, applied to each share or stock subscription agreement concluded by a foreigner [Czubik 2017].

CONSENT TO PROPERTY PURCHASE

In accordance with Art. 2a par. 4 of the Act on shaping the agricultural system (UKUR), the consent of the National Center of Agricultural Support (KOWR) is required for agricultural property acquisition by entities other than farmers or persons covered in Art. 2a par. 3 pt 1 of UKUR or in cases other than those mentioned in par. 3 pts 2-4 of UKUR.

In compliance with Art. 2a of UKUR, agricultural land purchasers must be farmers, i.e. persons who manage farms individually (of a minimum farm area covering 1ha – Art. 2 pt 2 in connection with Art. 6 of UKUR) and already have the legal right to agricultural property (a minimum of one conversion hectare of agricultural land), provided their area including the newly acquired land does not exceed 300ha. The area size was arbitrarily included in the Act of 2003. This regulation may be bypassed, among others, by concluding prenuptial agreements. In compliance with UKUR, the purchaser of agricultural land must possess so-called agricultural qualifications acquired through agricultural education or by proving farming experience.

Another requirement set down by KOWR is the obligation of a minimum 5-year residence in the area of the district where at least one of the parcels constituting the farm is situated. According to the Civil Code (KC), the residence is understood as staying in a given locality with intent of permanent dwelling [Art. 25 KC, NSA I OW63/1]. Registration of residence in a given district is irrelevant for satisfying the conditions of living there [I OSK 2105/15, P-1.4132.223.2016.AB]. Art. 6 par. 1 of UKUR does not require uninterrupted stay in the district. This fact has two important consequences. Firstly, even a long actual absence in the district (e.g. due to studies, being posted elsewhere or imprisonment) does not influence the loss of place of residence [IV CR 242/78, OSN 1979, no. 6, it. 120]. Secondly, it is enough that a physical person has at any time lived in the district for a total of 5 years. Therefore, despite the fact that in compliance with Polish law one can only have one place of residence, the condition of residence in accordance with Art. 6 par. 1 of UKUR may be met in several districts. Considering the issue of residence, it should be underlined that there are no legal requirements preventing agricultural land acquisition by a person who has not yet run a farm and only intends to do so. Thus, such a person cannot prove a required period of stay.

With reference to the required 5-year period of residence, it is necessary to underline that the requirement raises constitutional doubts, since it is difficult to connect it with the notion of the family farm, as defined in Art. 23 of the Constitution of the Republic of Poland [JL 1997, no. 78, it. 483]. At the same time, it results from the above mentioned NSA regulation, that law cannot contain resolutions which even indirectly limit or weaken family farms [NSA II OSK 2695/15]. It seems that the requirement of a 5-year residence aims at protecting against land acquisition by foreigners, but actually it also limits land acquisition by Polish citizens (e.g. by a son returning to the country from the city and intending to take over a farm from extended family). Moreover, the requirement in question limits the freedom of choice of place of residence, guaranteed by Art. 52 of the Polish Constitution [see: Opinion of the Legislative Council 2016, RL-0303-5/16]. These cases allow to conclude the unconstitutionality of this requirement [Bieluk 2016]. Simultaneously, the legislator decided that the insurance in the Agricultural Social Insurance Fund is irrelevant to farmer status.

PROCEDURAL ASPECTS OF ISSUING A DECISION BY THE DIRECTOR OF THE NATIONAL CENTER FOR AGRICULTURAL SUPPORT (KOWR)

From a formal aspect, the consent in question is an administrative decision (Art. 2a par. 4 of UKUR, Art. 104 of The Administrative Procedure Code – KPA) issued according to administrative procedure. Therefore, general rules regulating the procedure apply to its issuance.

In accordance with Art. 2a of UKUR in connection with Art. 61 of KPA, the proceedings for consent may only be initiated at the request of the person concerned, i.e. the seller of the disposed property (Art. 2a par. 4 point 1 of UKUR) or a physical person possessing agricultural qualifications, who intends to establish a family farm (Art. 2a, par. 2 pt 2 of UKUR). In the context of Art. 61 of KPA, it should be emphasized that the legal authority,

i.e. the Director General is not allowed to start the proceedings in question on his own initiative, e.g. in public interest. At the same time, it is not unlikely that the application may be submitted simultaneously by different authorized entities, i.e. the owner and purchaser. Legal proceedings ongoing at the request of the owner also allows a purchaser to submit an application, because in both cases the premises for granting consent are different. However, due to Art. 62 of KPA, it seems proper to conduct single proceedings for both entities, due to the fact that their rights result from the same actual situation and legal basis, although the result of the proceedings may differ for each interested party. Only in the case of consent refusal for the seller's property application is KOWR obliged to acquire the property at market prices – upon the request of the owner (Art. 2a par. 6 of UKUR – in case of doubt the price is determined by court – Art. 2a par. 8 of UKUR).

Formally, refusal to initiate "second" proceedings should take the form of a decision, against which the applicant may lodge a complaint (Art. 61a of KPA) within a period of 7 days from the announcement or notification of the decision, see Art. 141 of KPA). The deadline may be met by posting the decision at a Polish Post unit. If the deadline for lodging the complaint is exceeded, the authority may reinstate the deadline upon application of the interested party, provided the latter proves that failure to meet the deadline resulted from involuntary causes (Art. 58 of KPA). However, lodging a complaint does not suspend the first proceedings, unless the authority considers it justified (Art. 142 of KPA).

The form in which the application in question should be submitted results from Art. 63 of KPA. It may be done in writing, by telegraph or fax, or by other forms of technological communication of a public administration body established in compliance with the Act of 17 February 2005 on computerization of activities of entities realizing public tasks. The application may also be filled orally. In this case the administrative body is obliged to protocol the activity.

The content of the application stems from general rules of administrative proceedings and Art. 2a of UKUR. Therefore, it should contain: the name of the applicant, address and request content, i.e. issuing consent for property purchase or a request for the consent refusal and the applicant's signature (Art. 63 par. 2 of KPA). Moreover, according to Art. 2a par. 4 pt 1 or 2 of UKUR, the applicant should present all possible evidence to prove the facts referred to in the provision, e.g. agricultural qualifications or impossibility to purchase the land by relatives. The Director General should settle the case immediately or no later than within one month (Art. 35 of KPA).

The settlement body issues its consent or refuses it. Lack of response from the body means a lack of resolve and in result may denote the body's idleness, which entitles the party to send a reminder (Art. 37 KPA). The applicant is entitled to send a reminder if the body exceeds the statutory period of the case settlement or the proceedings take longer than necessary for case settlement (so called prolixity – Art. 37 par. 1 pt 1 and 2 of KPA). The reminders are made to a higher body (the term was defined in art. 17 of KPA). However, the body appropriate for the issuing of consents is the minister responsible for rural development, i.e. currently the Minister of Agriculture. The reminder is sent via the National Director.

Both parties to the agreement are entitled to lodge an appeal against the decision or refusal to the Minister of Agriculture within 1 month of announcement or notification of a decision (Art. 127 KPA). The previous rules of reinstating the deadline are applicable.

ANALYSIS OF STATISTICAL DATA

On the basis of obtained statistical data concerning the number of consents for agricultural property acquisition by persons who did not meet conditions stated in Art. 2a par. 1 of UKUR issued by the Cracow Branch of the National Support Center for Agriculture (KOWR), it can be stated that the instrument has been increasingly frequently used by this body. The number of consents, still low in 2016, increased almost ten-fold in 2017. The causes of such disproportion may be the fact that the change of law occurred on 30.04.2016, whereas each consent is granted as a result of administrative proceedings, pending according to the calendar determined by KPA. The data from 2018 only cover the period of the first six months.

Therefore, it may be supposed that the number of consents issued throughout 2018 will be higher than in 2017. At this moment in time, it is impossible to determine the total area of concerned real estate.

Presented data prove the statement that the instrument implemented by Polish law, i.e. consents for agricultural real estate acquisition, issued by KOWR, has been used.

Table 1. The number of consents for the purchase of agricultural real estate granted in accordance with Art. 2a of UKUR by Cracow Branch of The National Support Centre for Agriculture (KOWR) in the Małopolska Province

Period	Number of consents	Area [ha]
2016	40	78.97
2017	393	909.16
01.01.2018 – 12.07.2018	375	438.68

Source: own study based on Data of the Cracow Regional Branch of The National Support Centre for Agriculture (KOWR)

CONCLUSIONS

The authors objective of the presented paper constitutes a contribution to the discussion on how the obligation to obtain KOWR consent for agricultural real estate purchase influences the demand for agricultural land in Poland. Following the change of law in 2016, this particular area has not been the subject of deep economic or legal reflection.

The paper contains an analysis of proceedings aimed at issuing consent to purchase agricultural real estate by the Director of The National Support Centre for Agriculture (KOWR). There are several conditions determining how such consent may be obtained and by whom. Some have been most explicitly described in law (e.g. agricultural qualifications), whereas others must be analyzed not only on the basis of UKU, but basing on case law and achievements of doctrine. The proceedings per se are routine administrative proceedings which aim at issuing a decision basing on documents presented by the applicant interested in receiving consent to acquire agricultural land.

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ZGODA KRAJOWEGO OŚRODKA WSPARCIA ROLNICTWA NA NABYCIE NIERUCHOMOŚCI ROLNEJ JAKO NOWY INSTRUMENT W OBROCIE ZIEMIĄ

Słowa kluczowe: rolnik indywidualny, rynek ziemi rolnej, zgoda na nabycie ziemi rolnej

ABSTRAKT

W 2016 roku uległy zmianie reguły obrotu ziemią rolną w Polsce. Celem reformy prawa było zamknięcie dostępu do rynku polskiej ziemi rolnej dla cudzoziemców z Unii Europejskiej. W przededniu wejścia nowych przepisów w życie spekulowano na temat tego, czy zmiana doprowadzi do „zamrożenia” rynku ziemi rolnej, m.in. w związku z uprawnieniami, jakie przyznano Agencji Nieruchomości Rolnych, której obowiązki przejął Krajowy Ośrodek Wsparcia Rolnictwa (KOWR). Do analizy posłużono się literaturą przedmiotu oraz danymi KOWR. Badany problem to formalno-prawne aspekty wydawania przez KOWR zgody na nabycie ziemi rolnej położonej na terenie RP oraz faktyczne wykorzystanie przedmiotowego instrumentu przez KOWR Oddział Terenowy w Krakowie. Regulację mającą na celu zamknięcie dostępu do polskiej ziemi cudzoziemcom z UE skonstruowano w taki sposób, że dostęp do rynku ziemi rolnej utrudniono albo uniemożliwiono nie tylko podmiotom zagranicznym, ale także niektórym obywatelom polskim. Zgodnie z art. 2a ust. 4 ustawy o kształtowaniu ustroju rolnego (UKUR), zgoda taka wymagana jest w przypadku nabycia ziemi rolnej przez podmioty inne niż wymienione w art. 2a ust. 3 UKUR. Jak wskazują uzyskane od KOWR i zaprezentowane dane, w Małopolsce instrument ten jest wykorzystywany w praktyce.

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