

## **Acquisition of real estate by foreigners**

### **INTRODUCTION**

Trading of real estate is already quite a complicated process, requiring the assistance of skilled lawyers (auditors and other advisors) who can manoeuvre between various administrative, tax and civil law regulations posing numerous requirements and obligations on the parties to the transaction. In some cases this process must involve an additional step – acquiring an administrative permit for acquisition of real estate if the purchaser qualifies as a foreigner under the Act of 24 March 1920 on Acquisition of Real Estate by Foreigners (hereinafter: "AREF").

### **WHO IS CONSIDERED TO BE A "FOREIGNER"?**

The notion of a "foreigner" is explained under article 1(2) AREF and it encompasses the following categories of entities:

1. a natural person who is a non-Polish national;
2. a legal person whose registered office is located abroad;
3. a partnership of the persons referred to in subpara. 1 or 2, not vested with legal personality, whose registered office is located abroad, established in accordance with the legislation of a foreign country;
4. a legal person and a partnership whose registered office is located in the territory of the Republic of Poland, directly or indirectly controlled by the persons or partnerships referred to in subpara. 1, 2, and 3.

The category established in para. 2 includes all types of legal persons, as long as their domestic law grants them a legal personality.

Not all companies (in the broad sense of this term) are, however, established as legal persons – in some cases they operate only as organizational entities (partnerships) with legal capacity recognized by their domestic law. They fall within the category established in para. 3 with the proviso that they must be established by either non-Polish nationals (para. 1) or legal persons (para. 2).

In that context it is worth noting that para 3. only speaks of "partnerships" – not extending its reach over other organizational entities with legal capacity that are not considered to be companies under their respective domestic laws (certain funds or trusts). However, it is often said that para. 3 should be applied to these entities by way of analogy.

When it comes to entities mentioned in para. 4 which are "controlled" by a foreigner – article 1(3) AREF provides a partial definition of "control", narrowed down to "commercial companies or partnerships". It stipulates that a controlled entity means "a company or partnership in which a foreigner or foreigners hold more than 50 per cent of votes at the meeting of partners or the general meeting, also as a pledgee or user, or pursuant to agreements with other persons, or are in a dominant position" (in the meaning provided by the Polish Company Code). This definition is applied by way of analogy to other legal persons.

### **WHAT CONSTITUTES "REAL ESTATE ACQUISITION"?**

On the grounds of AREF the term "real estate" is defined relatively broad. According to article 1(4) AREF, "acquisition of real estate" means acquisition of ownership of real estate or perpetual usufruct of real estate following any legal event. Such "legal event" includes both contracts, administrative decisions, court rulings and events taking effect ex lege, such as usucaption.

However, this does not exhaust the scope of AREF. The statute also regulates "indirect" acquisition of land – by (generally speaking) acquiring shares or stocks in commercial companies based in the territory of Poland which are owners or perpetual usufructors of real estate located in Poland. The "indirectness" of the acquisition, however, is not analyzed on a multi-tiered level. Therefore, if a foreigner is acquiring shares or stock in a company that does not itself own or perpetually usufruct the land, but is a share- or stock-holder in a company that does, such transaction does not fall under AREF.

It is worth noting that in its literal sense this regulation does not concern acquisition of "rights and duties of a partner" in a Polish partnership (i.e. registered partnerships, professional partnerships, limited partnerships and limited joint-stock partnerships – which are not legal persons, but are vested with legal capacity), but only "shares or stocks" in Polish commercial companies (i.e. limited liability companies, simple joint-stock companies and joint-stock companies). However, by way of a systemic approach, the trading of these „rights and duties" is also influenced by AREF requirements.

Secondly, not all transactions relating to shares and stocks are covered by AREF. Pursuant to article 3e(1) and (2) it is only:

1. the acquisition or taking up by a foreigner of shares or stocks, as well as any other legal transaction concerning shares or stocks (mainly establishing pledges), if as a result the company being an owner or perpetual user of real estate in the territory of the Republic of Poland becomes a controlled company (in the sense described above) and
2. the acquisition or taking up by a foreigner of shares or stocks if this company is a controlled company and shares or stocks are acquired or taken up by a foreigner not being a shareholder or stockholder of the company.

As further stated by article 3e(3) AREF, it does not apply i.a. to shares that are admitted to trading on a regulated market or when a company owns (or perpetually usufructs) an independent residential unit (apartment) not located in a border area.

## **ADMINISTRATIVE PROCEDURE FOR OBTAINING A PERMIT**

As a rule, according to article 1(1) AREF, in order for a foreigner to acquire real estate a special permit is required. Such permit is issued in a form of an administrative decision by the minister in charge of internal affairs. Typically, the permit must be issued beforehand and it is valid for the period of 2 years. To obtain it, a foreigner must file a formal request.

Prerequisites for obtaining a permit are laid down by article 1a(1) AREF and they need to be cumulatively fulfilled:

1. acquisition of real estate by the foreigner does not pose a threat to the defence and security of the state or to public order, and it is not contrary to the interests of social policy and social health;
2. the foreigner demonstrates circumstances that confirm their ties with the Republic of Poland.

Fulfillment of the prerequisite of "safety" must be considered in relation to a specific real estate (its properties and its use intended by the foreigner). This is examined first and foremost in the proceedings conducted by the Minister of National Defence, who has the right to object to the acquisition of this real estate in a situation where it could endanger the defence or security of the state (see article 1(1) AREF). This assessment affects especially real estate located in the border area and in the vicinity of military units and in the recent few years – transactions involving Russian entities.

Assessment of compliance with public order and state policies is, in turn, by the minister in charge of internal affairs. This assessment focuses mainly on risk relating to money laundering. Needless to say, the terms "social policy" and "social health" are broad and need to be carefully considered.

As far as agricultural real estate is concerned, a minister in charge of rural affairs could also object to a particular case of acquisition (see article 1(1) AREF). Basis for the objection are not ascertained by AREF, yet they most likely revolve around the issue of maintaining agricultural character and use of the land.

When it comes to demonstrating foreigner's "ties" with Poland, AREF explicitly indicates in article 1a(2) that in case of a commercial company or a partnership these ties can be confirmed in particular through performing economic or agricultural activities in Poland. However, as article 1a(5) AREF further stipulates, the area of real estate acquired by the foreigner for the purposes of business or agricultural activity should be justified by (adequate to) the actual needs resulting from the nature of the activity.

Necessary documents that need to accompany the foreigner's request are listed in a separate regulation of the Minister of the Internal Affairs of 20 June 2012 on detailed information and documents to be presented by a foreigner applying for a permit to purchase real estate (for acquisition of real estate – see para. 3-5 and for acquisition of shares or stocks – see para. 7). They include, i.a., in case of a request for acquisition of real estate:

1. documents describing the real estate dated no longer than 6 months before the request is submitted (such as certificate on the purpose of the real estate in the local spatial development plan currently in force or extract from the land register together with an excerpt from the register map),
2. valid statement of the transferor (in any written form) expressing the will to transfer the real estate to a foreigner, containing detailed information on the real estate in question,
3. in case of foreigners being legal persons - documents dated no longer than 3 months before the request is submitted indicating the possession of funds for the purchase of real estate and the possibility of financing its economic activity – i.e. certificates from relevant tax office, social security service and bank keeping the base account for the applicant or their shareholder.

The request must also be accompanied by a proof of payment of the due stamp duty made to the capital city of Warsaw – in the amount of PLN 1,570.

Pursuant to article 3d AREF it is also possible for a foreigner to acquire a "promise of a permit" (Polish: "promesa"). Such promise also takes a form of an administrative decision. It is valid for a period of one year from the day of its issuance - during this period the minister cannot refuse to grant the permit, unless there was a significant change of circumstances. Common situations when foreigners seek to obtain a promise is when they intent to acquire real estate through auction or when the real estate does not yet have its legal status settled (e.g. inheritance proceedings are pending).

## **WHAT ARE THE EXEMPTIONS?**

In general, there are two types of exemptions established by AREF itself: 1) full exemption from the application of AREF and 2) exemption from the requirement to obtain an administrative permit.

In terms of companies, according to article 7(1) AREF transformation of a commercial company or partnership (in the meaning provided by the Polish Company Code) is fully exempted from the regime of AREF. This does not ring true, however, for divisions and mergers. The rationale behind this regulation lies in the fact that in case of "transformation" there is only a transformation in an organizational sense with no transfer of assets. Additionally, on the basis of article 7(5) AREF, closed-end investment funds

and specialised open-end investment funds applying investment principles and restrictions laid down for a closed-end investment fund within the meaning of the provisions of the Act of 27 May 2004 on Investment Funds and Management of Alternative Investment Funds are also excluded from the application of AREF.

As far as the second category of exemptions is concerned, the most important one is stipulated by article 8(2) AREF. According to that provision, foreigners (citizens and entrepreneurs) from countries of the European Economic Area and Switzerland do not have to obtain any administrative permits.

In this context it is worth noting that article 126(1) of the EEA Agreement stipulates that it shall apply to the territories in which the Treaty establishing the European Community (now: TFEU) is applied and under the conditions laid down in that Treaty, as well as to the territories of Iceland, Liechtenstein and Norway. The territorial scope of TFEU (and TEU) is in turn defined in article 355 TFEU – and it effectively extends beyond the European continent. For example – article 355(1) TFEU states that its provisions apply to countries such as French Guiana, Martinique or the Canary Islands. In other words - entities with headquarters in these regions also fall under the scope of article 8(2) AREF and are consequently exempted from the obligation to obtain the administrative permit.

Other important exemptions regarding the obligation to obtain an administrative permit include:

1. acquisition by an entity referred to in article 1(2) subpara. 4 AREF, for its statutory purposes, of undeveloped real estate, the total area of which in the whole country does not exceed 0.4 ha in urban areas;
2. acquisition of real estate by a foreigner who is a bank and at the same time a mortgage creditor, by way of taking possession of real estate as a result of an ineffective auction in enforcement proceedings;
3. the acquisition or taking up by a bank which is a legal person as defined in article 1(2) subpara. 4 AREF of shares in a company referred to in article 3e AREF, in connection with the enforcement by that bank of claims arising from banking activities performed.
4. The exemptions from the obligation to obtain the aforementioned permit do not, however, apply to real estate located in the border area and agricultural land of the area exceeding 1 ha (see article 8(3) AREF).

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