

## **Rules for acquisition of agricultural real estate**

### **INTRODUCTION**

Real estate market is one of the most secure and stable avenues for capital. However, not all types of land are readily available for purchase and investment. It is especially true for the land of strategic significance – such as agricultural real estate.

### **WHAT IS AN "AGRICULTURAL REAL ESTATE"?**

When defining an "agricultural real estate", article 2 (1) of the Law on Formation of the Agricultural System of 11 April 2003 ("FAS") essentially refers to the meaning assigned to this term by the Civil Code, which reads as follows: "land which is or may be used for carrying out agricultural production activity within the scope of plant and animal production, not excluding gardening, horticulture and fishery production". FAS, however, excludes from that definition parcels of land located in areas designated in zoning plans for non-agricultural purposes.

What's important, having such relatively broad definition of an agricultural real estate, at the same time FAS excludes from the scope of its own application certain categories of such land, for example:

- 1) agricultural real estate which farmland area is less than 0,3 hectares (the "farmland", defined precisely in article 2 (5) FAS, includes, among others, arable land, orchards and pastures);
- 2) agricultural real estate constituting interior roads.

As far as agricultural real estate located within administrative borders of a city is concerned, FAS provides only a fragmentary regulation.

### **WHAT IS CONSIDERED TO BE AGRICULTURAL REAL ESTATE "ACQUISITION"?**

FAS provides a very broad definition of "agricultural real estate acquisition". According to that statute, the notion of "acquisition" encompasses a transfer of ownership not only by the way of a legal act (such as concluding a contract or drafting up a will), but also by the way of an administrative decision, a court ruling or "another legal event" (such as the lapse of time – that can lead to acquisition of property by the way of usucaption).

According to article 2c FAS, the rules laid down for the transfer of ownership apply to the transfer of perpetual usufruct of the agricultural real estate as well.

What is worth noting, in the light of the above, the term "acquisition" does not refer to acquiring other rights to land, such as land servitudes.

### **CAN ONLY A FARMER ACQUIRE AN AGRICULTURAL REAL ESTATE?**

The general rule set out in article 2a (1) FAS stipulates that the agricultural real estate can be acquired only by an "individual farmer", unless FAS states otherwise. FAS, in fact, provides numerous important exceptions to this rule.

The term "individual farmer" is separately defined in article 6 (1) FAS and requires meeting several various criteria. The core element of that definition provides that an "individual farmer" is a natural person who is the owner, perpetual usufructuary, autonomous possessor or tenant of an agricultural real estate. Secondly, the farmland area of the said agricultural real estate shall not exceed 300 hectares.

What is more, to be considered an "individual farmer", one must have personally operated an agricultural farm for at least 5 years and have lived for at least 5 years in a municipality in the area of which an agricultural real estate included in that farm is located. For the purposes of FAS – an "agricultural farm" has essentially the same meaning as assigned to it in the Civil Code (that is – it is composed of agricultural real estate together with forest land, buildings and their parts, installations and livestock, if they constitute or may constitute an organized economic unit along with the rights bound with conducting an agricultural farm), but it shall not exceed 1 hectare.

Additionally, an individual farmer is required to have "agricultural qualifications" – for example, have at least 5 years of work experience in agriculture or have received agricultural education (regulated by separate legal provisions).

If the agricultural estate is to be acquired by several people, each of them shall have the status of an individual farmer. However, if such real estate is or is to become part of the marital estate, it is sufficient if the requirements listed above are met by just one of the spouses.

In this basic scenario, legal persons (such as commercial companies) are excluded from the possibility to acquire agricultural real estate, since they can never meet the criteria of an "individual farmer". However, FAS provides for a closed catalogue of exceptions to this general rule in article 2a (3). The most crucial ones are the following:

- 1) acquisition of an agricultural real estate of an area less than 1 hectare (so called "bagatelle real estate");
- 2) acquisition in the course of enforcement or bankruptcy proceedings;
- 3) acquisition in the course of restructuring – remedial proceedings;
- 4) acquisition as a result of merger or division of commercial companies (carried out on the basis of both Polish and foreign regulations).

If the acquisition of an agricultural real estate is based on a legal act concluded in a form of a notary deed, the occurrence of one of these exceptions must be proved or appropriate statements must be made. Otherwise, the notary should refuse to draw up a notarial deed.

Furthermore, according to article 2a (4) FAS, entities other than "individual farmers", including commercial companies, can also acquire agricultural real estate, even if they don't fall within article 2a (3) exceptions catalogue. In this case, such entity needs to obtain a special prior approval (consent) - an administrative decision issued by the General Director of the National Support Centre for Agriculture ("NSCA"), a governmental agency supervised by the Minister of Agriculture and Rural Development. Such approval is valid only for a period of one year, counting from the moment the decision became final and binding.

FAS stipulates that the said decision can only be issued upon request of either the purchaser (in one of the four given instances) or the seller (only in one instance). For example, a request can be placed by a purchaser if they meet (collectively) the following prerequisites:

- 1) the agricultural real estate in question is located in the area of distribution of a public purpose investment or within the boundaries of the demarcation lines of the area of location of such an investment established in a final administrative decision;
- 2) the purchaser will undertake to begin the execution of such investment within 12 months from the date of acquisition of the agricultural real estate;
- 3) the purchaser will determine the completion date of such investment.

In this context it is worth noting that FAS does not prohibit concluding conditional agreements – based on a condition precedent, such as obtaining the status of an individual farmer or obtaining the approval of the General Director of the NSCA.

According to article 4b (1) FAS, the agricultural real estate can also be acquired by the NSCA on behalf of the State Treasury, but only for the purposes of "improving the area structure of the farms". Such goal can be achieved by, for example, acquiring the land in order to later lease it to individual farmers to expand their small family farms.

Last but not least, when considering conditions for acquisition of an agricultural real estate one must bear in mind additional restrictions laid down by separate statutes, such as the Law on Acquisition of Real Estate by Foreigners of 24 March 1920.

## **WHAT ARE THE CONSTRAINTS IN REGARDS TO AGRICULTURAL REAL ESTATE ACQUISITION?**

An entity interested in acquiring an agricultural real estate, once it qualifies under FAS to do so, must take into account further relevant statutory regulations limiting the trading of such real estate.

First of all, in article 3 FAS grants special preemption rights:

- 1) to the lessee of the agricultural real estate – if the lease agreement was concluded in writing with a certified date, it has been executed for at least three years counting from that date and if the real estate in question is included in the lessee's family farm (that is, as defined by article 5 FAS, a farm run by an individual farmer and which farmland area does not exceed 300 hectares);
- 2) to the NSCA (acting on behalf of the State Treasury) – if there are no other entities vested with preemption rights or if these entities have not exercised their rights.

Once again, certain exceptions have been provided - the most important one being that the lessee's and the NSCA's preemptive rights are excluded by obtaining the approval of the General Director of NSCA for acquisition of the agricultural real estate under article 2a (4) FAS.

Moreover, a special right of acquisition was conferred upon the NSCA (acting on behalf of the State Treasury) on the basis of article 4 (1) FAS. It can be regarded as a form of an expropriation that serves as one of the tools for the NSCA to carry out its statutory mission. The NSCA can execute it by issuing an appropriate statement and by paying the price for the land. Therefore, whenever there has been an acquisition of an agricultural real estate on any legal basis (other than a contract of sale), it is necessary to notify the NSCA about that fact, so that it can decide to exercise the said right. Depending on the mode of acquisition, the notification duty burdens different entities – for example, the notary in case of an unilateral legal act.

Needless to say, the NSCA's right is excluded by the approval of the General Director of NSCA for acquisition of the agricultural real estate obtained under article 2a (4) FAS. Some other exceptions include acquisition of an agricultural real estate by usucaption or acquisition by a member of a farming cooperative.

Once the agricultural real estate is finally acquired, article 2b (1) and (2) FAS prescribe that, as a rule, for the period of at least 5 years its new owner/perpetual usufructuary is obliged to run an agricultural farm and they can't sell or transfer the possession of the land to any third party. By way of exception, the General Director of the NSCA can consent to the purchase or to the transfer of possession before the expiry of the said period, if they can be justified by an important interest of a purchaser of an agricultural real estate or by a particular public interest. This rule, once again, has some important exceptions – for example, it does not apply to:

- 1) the agricultural real estate acquired by usucaption;
- 2) the agricultural real estate that has been covered by zoning plans adopted after the date of its acquisition and that has become designated for non-agricultural purposes;

3) the agricultural real estate acquired in the course of enforcement or bankruptcy proceedings.

Acting in contravention of FAS rules for acquisition of an agricultural real estate leads to grave consequences in the form of the "ex tunc" invalidity of the legal act. This invalidity is only declared, not imperatively ruled by the court – which means that it is assumed that the legal act in question was invalid from the very beginning (from the date of its conclusion). What's important, is that this strict rule does not apply to acquisition on other basis, such as by means of a court ruling or an administrative decision.

### **WHY REGULATE AGRICULTURAL REAL ESTATE ACQUISITION IN SUCH DETAIL?**

FAS is one of a very few statutes that has a distinctive preamble. Such preamble works as an invaluable tool for interpretation of a given act in a broader, systemic context. The preamble to FAS mentions, among other things, the goal of "ensuring the food security of citizens" and "promotion of sustainable agriculture conducted in accordance with the requirements of environmental protection". These considerations are in line with the "Farm to Fork Strategy" introduced by the European Commission as a part of the "European Green Deal" in 2020 (however, it is worth noting that the preamble was added to FAS back in 2016).

Limitations in the trading of agricultural real estate certainly serve the purpose of ensuring food security. First and foremost, the statute provides that the agricultural real estate can be acquired only by entities that do intend to use that real estate for agricultural purposes and not only as a form of capital investment. It is all the more important, since the land suitable to conduct agricultural activity is not an endless resource. In fact, due to the climate change and constantly advancing urbanization, it is becoming more and more scarce. Therefore, the agricultural real estate trading has become a consideration of strategic significance.

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