

ACQUISITION OF AGRICULTURAL REAL PROPERTY ONLY FOR THE DETERMINED

Since 30 April 2016¹, the possibility of selling agricultural land without restriction has been cut short, due to amendment of the Act on the Agricultural System of 11 April 2003 (the "Act"). The cases in which transactions involving agricultural land can take place, exemptions and exceptions to those cases, bring the application of the Act complicated and give rise to many doubts. The paralysis that hit the agricultural properties market has induced the government to reflect on its position and slightly moderate its policy in this regard.

92.3% positive decisions consenting to asset deals in 2018

If agricultural real property is to be sold to an entity other than an individual farmer (satisfying the statutory criteria), it is necessary to obtain consent from the NASO². In 2018³, 17,152 positive decisions consenting to the acquisition of agricultural real property were issued, which account for 92.3% of all the decisions issued in this regard. Refusals were given in only 293 cases. It is worth noting that of the positive decisions, 491 permitted legal persons to acquire real property.

In the cases specified in the Act, NASO also has powers under the right of first refusal and the right to acquire an agricultural real property. As the report shows, NASO exercised its right of first refusal in 2018 in only 28 cases of a total of 1,279 agreements for the sale of agricultural real property concluded on condition NASO did not exercise its right of first refusal, while NASO did not exercise its right to acquire agricultural real property at all, despite receiving 221 notifications.

NASO may also take over control of an agricultural real property if there is a change of partner in or a new partner joins a partnership that has legal title to agricultural real property (the situations concerning capital companies are described below). In such a case, by exercising its right NASO may take over the real property (without becoming a partner in the partnership). In 2018,

Key issues

- 92.3% positive decisions consenting to asset deals in 2018
- 32% decisions resulting in NASO's acceding to a company in 2018
- Real properties of interest to NASO
- Acquisition of shares for PLN 19 million
- Amendments introducing a minimum agricultural area of 5 hectares
- NASO's current practice

¹ The Act on Suspension of Sales of Real Properties of the Agricultural Resources of the State Treasury and on Amendments to Certain Acts, which inter alia amended the Act on the Agricultural System of 11 April 2003, came into force on 30 April 2016.

² National Agricultural Support Office

³ Report on the activity of the National Agricultural Support Office in 2018.

NASO received 14 notifications of such cases, but did not exercise its right at all.

32% decisions resulting in NASO's acceding to a company in 2018

The restrictions on selling agricultural land introduced in 2016 have an enormous effect not only on simple sales of agricultural real property but are often a thorn in the side of institutional investors and entrepreneurs whose fixed assets include agricultural land. In many cases, their portfolios of agricultural real properties are not used at all for their business purposes and agricultural land is of minor importance to the entities' activities. Nevertheless, in the case of corporate restructurings, e.g. mergers, transformations, de-mergers or even in the case of an ordinary increase in the share capital, such entities must count on the risk of NASO's exercising its right of first refusal or right of acquisition. In such a case, NASO will join the company as a new shareholder. The transaction is also burdened with the risk of the share price agreed on by the parties being challenged.

In 2018, NASO exercised its right of first refusal in 926 cases out of 2,837 notifications of its right of first refusal to shares in companies. However, it never exercised its right of acquisition, despite receiving 81 notifications in 2018.

Real properties of interest to NASO

When deciding whether to exercise or waive the right of first refusal or acquisition, directors of individual regional branches of NASO look to the guidelines issued by the General Director of NASO. Under those guidelines, a waiver of the right of first refusal is justified where it is found that the real property is of little use for rational productive farming, where acquiring it would involve high costs of reinstating the land for agricultural use or where there is a significant encumbrance over the property in the form of a mortgage (or a relatively high level of indebtedness secured by that mortgage or there are other encumbrances over the property).

An analysis of the cases in which NASO made a statement on the exercise of its right of first refusal to shares shows that in 2018 this right was exercised primarily in relation to shares in Krajowa Spółka Cukrowa (a sugar company). An interesting case from the end of 2017 / beginning of 2018 was NASO's exercise of its right to acquire 2,000 newly created shares in C. Olsen Agri sp. z o.o., with a total value of PLN 2,000,000, in connection with an increase in the company's share capital. The company, which breeds purebred Arabian horses, held the title to more than 418 hectares of agricultural real property, and the shares in relation to which NASO exercised its right of acquisition were originally acquired by one of its shareholders, C. Olsen Farm Investments Limited with its registered office in Cyprus.

Acquisition of shares for PLN 19 million

This year NASO exercised its right of first refusal, as an example, with regard to 41 shares in a company growing potatoes in Trzemeszno, paying a total of PLN 7,790 for the shares. In May 2019, it made a statement on the exercise of its right of first refusal to, inter alia, 10 shares in the share capital of Wielkopolskie Centrum Hodowli i Rozrodu Zwierząt w Poznaniu sp. z o.o. for a total of PLN 900. Worthy of note, however, is the statement NASO made on 29 April 2019, which concerned NASO's exercise of its right to acquire shares

in "Agroman" sp. z o.o., which were transferred by a German citizen to a German law cooperative, Agrargemeinschaft Lubstorf eG with its registered office in Lubstorf (the agreement was performed as part of the performance of an obligation under a custody agreement of 1999). NASO exercised its right to acquire the shares, paying PLN 19,499,854 for them.

Amendments introducing a minimum agricultural area of 5 hectares

On 26 June 2019, amendments came into force that slightly limit the cases in which the State Treasury may interfere in transactions on the agricultural property market.

Although the basic rule that agricultural real property may be acquired without restriction only by an individual farmer has not changed, sales of agricultural real properties of up to 1 hectare are now exempt from this rule.

However, where M&A transactions are concerned, shares in a company holding legal title to agricultural real properties may be freely sold only if the area of the properties does not exceed five hectares. The general exception that the right of first refusal does not apply to transfers of shares in companies admitted to an organized trading system that have agricultural real properties in their portfolios has been upheld. However, every joint-stock company that applies to have its shares admitted to trading on a regulated market and that has legal title to agricultural real property with an area of five hectares or more must notify NASO, which may exercise its right to acquire the real property.

The requirement of a minimum area of agricultural land (five hectares) triggering NASO's right also applies when there is a change of partner in a partnership or a new partner joins a partnership, and also in the case of a share capital increase in a company.

Other changes introduced by the 2019 amendments primarily concern changes to the procedure by which NASO exercises its rights. They include the following: (i) the period in which NASO may make a statement on the exercise of its right of first refusal to or right to acquire shares in capital companies has been extended from one month to two months; (ii) the members of the management board of companies are required to make statements concerning the value of contingent liabilities and attach them to notifications of NASO's right of acquisition or first refusal.

The Act does not apply to agricultural real properties situated within the administrative borders of towns and cities (e.g. agricultural properties that are not covered by the local master plan, where they would be designated for purposes other than agricultural), provided the properties are not situated on land for which special resolutions concerning the location of residential investments (or so-called investments accompanying residential investments) have been adopted. Nevertheless, even in such cases the notary must send NASO the notarial deed of the transfer instrument and NASO may exercise its right to acquire the real property if, for example, the investor has not obtained a building permit within two years, or has not implemented and obtained an occupancy permit for at least 50% of the investment within five years of obtaining the building permit (in the case of investments involving more than one building).

NASO's current practice

Although the changes made under the amendment are unlikely to revolutionize sales of agricultural land, bearing in mind the cases in which NASO has to date exercised its rights, investors whose portfolios include agricultural properties of minor importance to farming can now approach planned restructurings with greater confidence.

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