

Litigation and ADR

The latest amendment to the Act on the Management of State Treasury Property – a declaration of war for foreigners managing multi-hectare farms in Poland?

The Act on the Management of State Treasury Property, which came into force on 3 December 2011, includes, i.a., the promotion of small- and medium-size farms. At this point the question arises whether it will work to the disadvantage of large agricultural producers, who have been more and more active in the Polish countryside recently.

So far a number of the largest farms, in whole or in a significant part, are located on land leased from the Agricultural Property Agency of Poland (APA). A significant number of these farms are run by foreigners (mostly people from Germany and the Netherlands but also from Great Britain, Belgium and other, usually European countries) who, in their home countries, did not have a chance to obtain such vast areas of land for such a small price. Thus, those people made the decision to move to Poland permanently. The lease of land from the APA was, and is, their only option due to the transitional period, provided by the Accession Treaty, which postpones the full opening of the market for agricultural land until 2016. Until 2016, the purchase of land from the APA by inhabitants of European Union countries depends on the consent of the Ministry of Internal Affairs and Administration of Poland (MIAA).

Once The Act on the Management of State Treasury Property came into force, the situation of foreign farmers changed dramatically. It turned out that they had to give back to the APA a large part of any leased land so that this land could be sold to small- and medium-size farms, usually owned by Polish farmers. According to the amendment, the Agency should have submitted by 3 June 2012 a proposal to all large-scale farmers to reduce by 30% the area of their leased land. Within three months of the receipt of such a letter (i.e. no later than on 3 September 2012) farmers had the chance to accept the proposed conditions. If they agreed, they acquired in return the right to purchase the remainder of the leased land regardless of the duration of the lease contract (in existing legislation the priority right was acquired after a three-year contract). If they did not agree to the proposed conditions, they lost their rights to priority even if the three-year period had passed.

Thus, it appears that the legislators used the “carrot and stick” approach. However, the proverbial “carrot” is not always as attractive as it may seem. First, for some land there would be no other takers than the land’s previous tenants. Second, foreign farmers (as opposed to Polish farmers) still have restrictions, introduced at the accession of Poland to the EU, on the purchasing of agricultural

land. Therefore, at least some of the foreign farmers would have to obtain the approval of the MIAA in order to begin to tender.

For those farmers who have given a part of their land to the Agency, the case is not yet lost. Everything depends on the decision of the Constitutional Tribunal which has already received the appropriate complaint. If the Constitutional Tribunal decides that the amendment violates the Polish Constitution, it also may decide upon the possibility of claiming compensation for those who, as a result of unconstitutional provisions, suffered damage. If this happens, it will be possible to claim compensation in the Polish common courts. However, these will not be easy procedures. The main burden of proof will be borne by the farmers who will be obliged to show the link between the repealed provisions and any damage suffered. Also, they will be obliged to indicate the amount of damage.

Regardless of the result of these proceedings before the Constitutional Tribunal, farmers who are not citizens of Poland may claim their rights before international arbitration on the basis of bilateral agreements on the reciprocal promotion and protection of investments. These are the so called "BITs" (Bilateral Investment Treaties) on the basis of which Poland is bound to protect foreign investments in Poland, including, i.a., guaranteeing non-discriminatory, fair and equitable treatment of investments and foreign investors, refraining from arbitrary action, and, in some BITs (e.g. in the Polish-Dutch BIT) for fulfilling contracts that have already been signed with investors. The result of such claims may be compensation corresponding to the full amount of damage suffered as a result of state policy, including the APA, by an investor (here a farmer). In addition, the new provisions may lead to the expropriation from investors (farmers) of their rights to property lease, which may also raise a compensation obligation on the side of the state.

Although the amendment to the Act on the Management of State Treasury Property binds both Polish and foreign farmers, it has to be pointed out that the former own small- and medium-size farms, whilst the latter specialize in the management of multi-hectare land areas. On this basis, German, Dutch and citizens of other countries, who have leased farmland from the Agency for a limited period of time, and then invested in building farms, hiring people, taking loans and other obligations, paying ground rent, taxes and other official charges, are suddenly forced to return some parts of those lands despite the fact that the lease period has not yet passed. At least some of those farmers may face the problem of how to keep their new smaller farms, especially how to pay off loans for equipment and cover other costs adjusted previously to farms of the original much larger size.

It could be stated that those farmers may always purchase additional land. Here, however, the problem of MIAA approval arises. This approval is required for purchasing land either from the APA or a private person. It is true that this obligation expires in 2016, however, it is probable that by this time most of the Agency's land will have already been sold. The amendment was written in such a

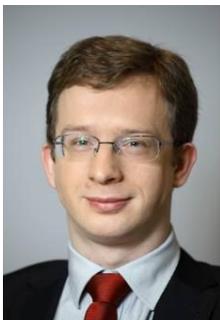
way as if the sale of land (not lease of land) for the benefit of small- and medium-size farms (in place of large farms) was the main goal of the Agency in the near future. Is it possible that the Agency's other goal was the rapid sale of land to Polish citizens so as to reduce the possibility of the land's purchase by foreign farmers after 2016?

All these facts indicate that Poland has failed to fulfill the above-mentioned obligations resulting from BITs and has not ensured adequate protection for investments of foreign farmers in our country. Thus, as in other cases, such as with Eureko or with the American agri-food manufacturer Cargill, Inc., the Treasury needs to take into account any possible claims asserted at the international level, as well as the obligation to pay compensation if those claims are found justified.

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