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**SALE AND LEASE OF AN ENTERPRISE INCLUDING  
AGRICULTURAL PROPERTY. CIVIL LAW AND TAX  
PROBLEMS****Introduction**

The enterprise may include agricultural real estate or the right of perpetual usufruct of agricultural land. This implies the question to what extent the provisions of the Act of 11 April 2003 on the shaping of the agricultural system<sup>1</sup> should be applied to trade in an enterprise which includes agricultural real estate, shares or stocks not admitted to organized trading within the meaning of the Act on Trading in Financial Instruments in a capital company being the owner or perpetual usufructuary of agricultural real estate with an area of at least 5 ha, or agricultural property with a total area of at least 5 ha; i.e. restrictions on the acquisition of agricultural property, shares, stocks of companies that own agricultural property with an area of at least 5 ha. The seller and buyer of the enterprise are usually interested in transferring the ownership of the entire enterprise, preferably under one agreement. The assumption that ASAS is a special provision referred to in Article 55<sup>2</sup> of the Civil Code<sup>2</sup> *in fine* would mean that the turnover of an enterprise which includes agricultural real estate, stocks or shares in the capital companies owning agricultural real estate with an area of at least 5 ha, would be subject to restrictions resulting from the act on shaping the agricultural system (ASAS).

The study concerns the issue of how much the provisions of the ASAS should be applied to the contracts for the sale or lease of an enterprise which includes agricultural property and how this may affect the taxation of contracts for the sale of the enterprise.

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<sup>1</sup> Unit text of Dz.U. 2020, Item 1655 (henceforth cited as: ASAS).

<sup>2</sup> Act of 23 April 1964, the Civil Code, Dz.U. 2019, Item 1145 (henceforth cited as: CC).

## The Scope of the Activities with the Enterprise as the Subject

The definition of an enterprise is included in Article 55<sup>1</sup> of the CC. The components of the enterprise mentioned in this provision, such as the ownership of real estate or movable property, including equipment, materials, goods, products, rights to use real estate or movable property, receivables, rights from securities, etc., are examples and not all should be part of it.

An enterprise is a set of components dominated by the intangible element, which is the essence of the enterprise. The decisive factor is having recipients of the goods and services offered and a reputation that attracts buyers<sup>3</sup>. An enterprise is when, to conduct business activity, it is sufficient to organize a specific set of intangible and tangible assets indicated in Article 55<sup>1</sup> of the CC<sup>4</sup>.

An organized part of an enterprise should be distinguished from an enterprise, which is an organizationally and financially separated group of tangible and intangible assets in the existing enterprise, which includes liabilities, intended for the implementation of specific economic tasks, and which could also constitute an independent enterprise independently carrying out these tasks, as defined in Article 5a point 4 of the Act of 26 July 1991 on personal income tax<sup>5</sup>, Article 4a point 4 of the Act of 15 February 1992 on corporate income tax<sup>6</sup>, and Article 2 point 27e) of the Act of 11 March 2004 on tax on added value<sup>7</sup>. The organized part of an enterprise differs from an enterprise, e.g. by the fact that it includes obligations that are not part of the enterprise<sup>8</sup>. The division of an enterprise into several organizationally and financially separate parts and their sale differs from the sale of the entire enterprise, because in the first case, liabilities are also disposed of, and in the second one, only assets are<sup>9</sup>. An enterprise divided into several organizationally and financially separable parts is not a simple sum, because an enterprise includes an organizational and management element related to the merging of individual parts into a single whole.

The provision of Article 55<sup>2</sup> of the Civil Code provides that the entire enterprise can be sold in one operation, i.e. make an in-kind contribution to a capital

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<sup>3</sup> W.J. Katner [in:] *System Prawa Prywatnego. Prawo cywilne – część ogólna*, vol. I, ed. M. Safjan, Warszawa 2007, p. 1229.

<sup>4</sup> *Ibidem*.

<sup>5</sup> Unit text of Dz.U. 2020, Item 1426.

<sup>6</sup> Unit text of Dz.U. 2020, Item 1406.

<sup>7</sup> Unit text of Dz.U. 2020, Item 106 (henceforth cited as: AVTA).

<sup>8</sup> P. Pinior [in:] *Wkłady niepieniężne w spółkach handlowych*, ed. W. Popiołek, Warszawa 2014, p. 127.

<sup>9</sup> An example of an organized part of an enterprise is a warehouse in glass factory with means of transport, employees of the enterprise producing, for example, glass articles. Another example of an organized part of an enterprise is e.g. apparatus, devices, technology, qualified employees, and patents for the production of a specific drug in a pharmaceutical plant constituting a separate department or section.

company, conclude an agreement for its donation, exchange, sale, dissolution of joint ownership, partial inheritance division, lease, rent, etc. The situation becomes more complicated when the enterprise includes non-transferable rights, such as use, contractual pre-emptive, redemption or the purchase of a specific component requires a decision of the minister of internal affairs: e.g. the purchase of a land property by a foreigner from outside the European Union (Article 1 of the Act of 24 March 1920 on the acquisition of real estate by foreigners<sup>10</sup> in the absence of the grounds for exemption listed in Article 8 sec. 1, points 2–7 AAREF). In the resolution of the Supreme Court of 25 June 2008<sup>11</sup>, it was established that when concluding the contract of sale of the enterprise within the meaning of Article 55<sup>1</sup> of the CC the limitations or exclusions of the admissibility of transferring individual components of this enterprise remain valid resulting from the provisions of the Act, contractual reservation or the nature of the obligation. The same ruling indicated that the sale of an enterprise is a series of singular successions which means the necessity to conduct a separate legal assessment of each of them that is indirectly indicated in Article 75 § 4 of the CC. This leads to a separate assessment of the admissibility of each transfer of ownership of things and rights included in the enterprise, and thus, the sale of the enterprise does not consume individual requirements for its specific components. The following cannot be the subject of sale: the easement of the necessary road established for the vendor of the enterprise as an independent owner of the real estate (Article 146 of the CC in conjunction with Article 300 of the CC), copyrights (Article 16 of the Act of 4 February 1994 on copyright and related rights<sup>12</sup>)<sup>13</sup>.

Agreements covered by Article 55<sup>2</sup> of the CC, are not contracts of general title<sup>14</sup>. The provision of Article 55<sup>2</sup> of the CC:

- does not release the legal successor of the entrepreneur from fulfilling the additional conditions necessary for the transfer of rights included in the enterprise<sup>15</sup>,
- deals with the relationship between the seller of the enterprise and the acquirer of the enterprise and does not regulate either the manner of transfer or the effects of the sale of the enterprise<sup>16</sup>.

The contract for the sale of the fullest right to the enterprise is a double-effect agreement, i.e. binding and disposing, on the basis of which the obligation and the right to the enterprise are created<sup>17</sup>. The contract of sale of the right to the enterprise

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<sup>10</sup> Unit text of Dz.U. 2017, Item 2278 (henceforth cited as: AAREF).

<sup>11</sup> III CZP 45/08, Lex no. 393765.

<sup>12</sup> Dz.U. 2019, Item 1231 as amended.

<sup>13</sup> W. Pawlak [in:] *Kodeks cywilny. Komentarz*, vol. I, ed. J. Gudowski, Warszawa 2021, p. 1044.

<sup>14</sup> M. Kępiński [in:] *Kodeks cywilny*, vol. I, ed. M. Gutowski, Warszawa 2018, p. 479.

<sup>15</sup> Decision of the Supreme Court of 25 June 2008, III CZP 45/08, Lex no. 393765.

<sup>16</sup> M. Habdas [in:] *Kodeks cywilny. Komentarz*, vol. I, eds. M. Habdas, M. Fras, Warszawa 2018, p. 432.

<sup>17</sup> *Ibidem*, p. 433.

has an impact on the sale of its components<sup>18</sup>. The double binding and disposing effect will apply to the elements, the sale of which does not require the fulfilment of special conditions or obligations<sup>19</sup>, e.g. the sale of a pharmacy does not transfer to the buyer the rights resulting from the authorization to run a pharmacy issued to the seller<sup>20</sup>. The general principle of non-transferability in public law of rights resulting from concessions, permits and licenses is not undermined by the provision of Article 55<sup>2</sup> of the CC, which introduces the principle according to which a legal transaction concerning an enterprise covers everything that is part of the enterprise and provides that it does not apply if the content of a legal act or specific provisions leads to different results<sup>21</sup>. The sale of a business does not lead to universal succession, and specific conditions may be required to the successful transfer of certain components of the business<sup>22</sup>. This view is dominant in the literature on the subject<sup>23</sup>.

The provision of Article 55<sup>2</sup> of the CC is dispositive in the sense that the parties can exclude certain elements of the enterprise from the scope of the disposition activities concerning it.<sup>24</sup> An enterprise may be acquired as a result of several contracts<sup>25</sup>. When the circumstances of concluding two agreements regarding the sale of an enterprise allow it to be assumed that one of them concerned the acquisition of liabilities and the other of the assets of this enterprise, such agreements may be jointly treated as the sale of the enterprise<sup>26</sup>.

Qualifying whether a given activity is the sale of the enterprise or its components has tax consequences. The sale of the enterprise or its organized part is not subject to tax on goods and services (Article 6 point 1 of the AVTA), therefore their disposal for payment is subject to tax on civil law transactions, and the free disposal may be subject to tax on inheritance and donations if the buyer is a natural person. The sale of individual components of the enterprise is a supply of goods and is subject to tax on goods and services, unless a specific supply is exempt from this tax pursuant to Article 43 point 10 et seq. of the AVTA; in such case the sale for payment is subject to tax on civil law transactions and the free sale may be subject to inheritance and donation tax if the buyer is a natural person. Under certain

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<sup>18</sup> *Ibidem*.

<sup>19</sup> *Ibidem*.

<sup>20</sup> Decision of the Supreme Administrative Court of 20 February 2007, II OSK 350/06, Lex no. 344615.

<sup>21</sup> *Ibidem*.

<sup>22</sup> M. Habdas [in:] *Kodeks cywilny. Komentarz*, vol. I, eds. M. Habdas, M. Fras, Warszawa 2018, p. 433.

<sup>23</sup> M. Kępiński [in:] *Kodeks cywilny*, vol. I, ed. M. Gutowski, Warszawa 2018, p. 479; E. Gniewek [in:] *Kodeks cywilny*, vol. I, ed. E. Gniewek, Warszawa 2004, p. 188; E. Skowrońska-Bocian [in:] *Kodeks cywilny*, vol. I, ed. K. Pietrzykowski, Warszawa 2011, p. 283–284; R. Morek [in:] *Kodeks cywilny*, vol. I, ed. K. Osajda, Warszawa 2013, p. 614. A different point of view is presented by J. Widło, *Rozporządzenie przedsiębiorstwem*, Kraków 2002, p. 170 and seq.

<sup>24</sup> M. Kępiński [in:] *Kodeks cywilny*, vol. I, ed. M. Gutowski, Warszawa 2018, p. 477.

<sup>25</sup> Decision of the Supreme Court of 6 July 2005, III CK 705/04, Lex no. 150645.

<sup>26</sup> Decision of the Supreme Court of 24 June 1998, I CKN 780/97, Lex no. 34441.

circumstances, some transactions, which can be carried out separately, and which, on their own, may lead to taxation or exemption, should be considered as a unitary transaction if they are not independent of each other; for example, the fact of making an in-kind contribution of an enterprise to a capital company in several stages does not change the nature of the activity which should be regarded as a uniform transaction of the enterprise's in-kind contribution<sup>27</sup>. When a transaction consists of a set of elements and activities, all the circumstances in which it is made should be taken into account to determine whether it concerns a single transaction or two or more separate transactions<sup>28</sup>.

The parties to the contract relating to the enterprise may decide themselves which components to exclude from the scope of the contract in question. However, they do not have full freedom in this regard. The scope of the exclusions cannot negate the essence of the enterprise within the meaning of Article 55<sup>1</sup> of the CC, therefore the sale of the enterprise should include at least those components that determine the functions performed by the enterprise<sup>29</sup>. The sale of the enterprise takes place when the components necessary for the performance of its economic tasks are transferred<sup>30</sup>. The sale of individual components of the enterprise, even if they represent a significant value compared to the value of the enterprise as a whole, does not constitute grounds for considering that it has been sold<sup>31</sup>. What components of the enterprise must be included in the content of the performed activity in order to be considered as the object of an enterprise, must be determined in a specific factual state<sup>32</sup>. The subject of the activity must be the minimum resources necessary to run the enterprise<sup>33</sup>.

## **Issues Related to the Sale of an Enterprise Which Includes Agricultural Real Estate**

An enterprise may be engaged in different activities, for example:

- production of medicines, and it may include agricultural property with an area of 2.3 hectares, which is used by this enterprise as a temporary landfill for storing waste, which is then removed from its territory,

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<sup>27</sup> Decision of the Supreme Administrative Court of 7 December 2012, I FSK 89/12, Lex no. 1366327.

<sup>28</sup> *Ibidem*.

<sup>29</sup> Decision of the Supreme Court of 17 October 2000, I CKN 850/98, Lex no. 50895.

<sup>30</sup> Decision of the Supreme Court of 10 January, 1972, I CR 359/71, Lex no. 1385; decision of the Supreme Court of 30 January 1997, III CKN 28/96, Lex no. 29109; decision of the Supreme Administrative Court (until 31 December 2003) in Gdańsk of 6 October 1995, SA/Gd 1959/94, Lex no. 24237.

<sup>31</sup> Decision of the Supreme Administrative Court (until 31 December 2003) in Gdańsk of 6 October 1995, SA/Gd 1959/94, Lex no. 24237.

<sup>32</sup> E. Skowrońska-Bocian [in:] *Kodeks cywilny*, vol. I, ed. K. Pietrzykowski, Warszawa 2011, p. 284.

<sup>33</sup> *Ibidem*.

- production of ecological goods, and it may include agricultural real estate with an area of several dozen or several hundred hectares, where plants are grown that are used in the further process of producing organic products from them, e.g. cosmetics, food, by the same enterprise, and only a small part of plants intended for the production of organic products is purchased from other agricultural producers,
- providing medical services (e.g. a private medical clinic), and it may include several agricultural properties with a total area of 3.1 ha, constituting class V land, not used in any way for commercial activities (not cultivated agricultural land),
- trading: shares in limited liability companies, shares of companies not admitted to organized trading within the meaning of the Act of 29 July 2005 on trading in financial instruments<sup>34</sup>; such an enterprise may include shares in a limited liability company that owns agricultural real estate with a total area of more than 5 ha and shares in a joint-stock company not admitted to organized trading pursuant to the provisions of the Act on Trading in Financial Instruments with a total area of more than 5 ha; the size of shares and stocks of capital companies that own agricultural real estate in the entire portfolio is small,
- trading: shares in limited liability companies, shares of companies not admitted to organized trading within the meaning of the Act on Trading in Financial Instruments; such an enterprise may include shares in a limited liability company that owns agricultural real estate with a total area of more than 5 ha and shares in a joint-stock company not admitted to organized trading pursuant to the provisions of the Act on Trading in Financial Instruments with a total area of more than 5 ha; the size of shares and stocks of the capital companies owning agricultural real estate in the entire portfolio is dominant.

Seemingly, only the first, third and fourth situations seem to be the easiest to draw up a business sale agreement. In the situation described in point 3, for the buyer of a private medical clinic a low-class agricultural real estate may be important as in the future he intends to allocate it for the development and increasing the scope of medical activities, e.g. by building a rehabilitation clinic, pharmacy, etc. In the fourth case, the buyer may want to acquire the entire enterprise which includes shares and stocks in the companies owning agricultural real estate with an area of more than 5 hectares only because of these shares and stocks, whereas the remaining shares and stocks are purchased by him separately.

The provision of Article 55<sup>2</sup> of the Civil Code allows the parties to a future sale agreement, in the cases described above, to separate from its composition:

- (in the first case) an agricultural property with an area of 2.3 ha, serving as a temporary storage site for waste,
- (in the third case) an uncultivated agricultural property with an area of 3.1 ha,
- (in the fourth case) shares in a limited liability company owning agricultural real estate with a total area of more than 5 ha and shares in a joint-stock company not

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<sup>34</sup> Unit text of Dz.U. 2020, Item 89, 284, 288 and 568.

admitted to organized trading pursuant to the provisions of the Act on Trading in Financial Instruments with a total area of more than 5 ha.

The provision of art. 55<sup>2</sup> of the Civil Code also allows to verify contracts for the sale of agricultural real estate, shares and stocks to the ASAS concerning the following aspects: whether the buyer is an individual farmer who can only be a natural person (Article 2a sec.1 of the ASAS); pre-emption right to agricultural real estate (Article 3 sec. 1, point 4 of the ASAS); the right of pre-emption of shares and stocks (Article 3a sec. 1 of the ASAS); and in the case of contracts other than sale, the right to acquire agricultural real estate by the NASC<sup>35</sup> (Article 4 sec. 1 of the ASAS); and the right to acquire shares and stocks by the NASC (Article 4 sec. 6 of the ASAS).

In the cases of 1, 3, 4, agricultural real estate, shares and stocks in the capital companies owning agricultural real estate with an area of more than 5 ha are elements that are not necessary for the implementation of economic tasks, i.e. a pharmaceutical enterprise may operate without an agricultural real estate with an area of 2.1 ha; the medical clinic will provide services to patients without disruptions after the sale of the agricultural property with an area of 3.1 ha; an entrepreneur who has a large number of shares and stocks in various capital companies may operate without shares, stocks of capital companies owning agricultural real estate with an area of more than 5 ha. The exclusion of the above said elements from the structure of the enterprise described in paragraphs 1, 3 and 4 means that the remaining components will be sold or disposed free of charge as an enterprise, because agricultural real estate, shares not admitted to organized trade, and shares in capital companies owning agricultural real estate with an area of more 5 hectares were elements that did not determine the function performed by the enterprise.

In the case described in point 2, agricultural real estate is an element influencing the scope of activities carried out by the enterprise. Without them, it can be difficult to ensure the right amount of plants for the production of organic cosmetics and food. It can be difficult or not feasible to buy plants of the right quality and grown under ecological conditions, instead of plants grown on the company's real estate. The sale of agricultural property where organic farming is carried out will be the sale of the enterprise, as it affects the economic activity carried out by the enterprise. In this case, it is easier to replace machines, devices, technologies for the production of organic cosmetics and food than the means for the production of substrates, i.e. properly maintained agricultural properties where agricultural crops are grown. The contract for the sale of the enterprise described in point 2 can be divided into 2 contracts: the sale of the agricultural real estate to which the provisions of the ASAS should apply and the sale of other elements.

If the enterprise includes agricultural real estate and the provisions on the pre-emptive right to purchase (Article 3 of the ASAS) applies to the contract of purchase and sale of such property, it is necessary to draw up the following:

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<sup>35</sup> National Agricultural Support Centre.

- an agreement obliging the sale of agricultural real estate, provided that the NAS acting in the interests of the State Treasury does not exercise the pre-emptive right to purchase,
- an agreement obliging the sale of the remaining components of the enterprise, provided that an agreement is concluded transferring the ownership of agricultural property in the event that the NASC does not use the right of pre-emptive purchase of agricultural property.

These contracts may be covered by one title deed, and instead of the second contract, a preliminary contract for the sale of the remaining components of the enterprise may be concluded. Similar contracts may be drawn up in the case of sale of the company described in point 5.

The division of the contract of sale or another disposing of the enterprise which includes agricultural real estate into two concerning agricultural real estate and other components of the enterprise does not guarantee the achievement of the parties' goal, i.e. transfer of ownership of the entire enterprise, when the NASC exercises its pre-emption right to agricultural real estate. The sale of an enterprise which includes agricultural real estate, by a contract other than sale, may take place by title deed transferring the ownership, e.g. donation, but in this case the NASC has the right to acquire the agricultural real estate pursuant to Article 4 of the ASAS. The right to purchase is granted to the NASC, acting in the interests of the State Treasury, also in the case of the conclusion of contracts other than the sale of an enterprise that includes shares of limited liability companies, shares of companies not admitted to organized trading within the meaning of the Law on Trading in Financial Instruments, and those of companies owning agricultural real estate with a total area of more than 5 hectares (Article 4 sec. 6 of the ASAS). A different interpretation of Article 55<sup>2</sup> of the CC, indicating that when selling an enterprise or entering into another agreement on its transfer, the provisions of the UKUR do not apply, would lead to a situation where the transfer to the enterprise of agricultural real estate, shares, stocks in capital companies owning agricultural real estate with an area of more than 5 ha, could lead to the possibility of easily circumventing ASAS provisions. The provision of Article 55<sup>2</sup> of the CC indicates that activity involving an enterprise may not cover everything that is part of it, when specific regulations so provide; and such is the ASAS, which defines the acquisition of agricultural property very broadly, indicating that the acquisition of agricultural property may take place as a result of a legal transaction (e.g. having an enterprise as its object) and that the acquisition of agricultural real estate may occur as a result of any legal event (Article 2 point 7 of the ASAS). When transferring the ownership of an enterprise which includes any real estate, including agricultural, the notary making the contract is required to submit an application for the entry in the land and mortgage register via the ICT system that supports the court proceedings (Article 92 § 4 of the Act of 14 February 1991, Law on Notaries<sup>36</sup>).

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<sup>36</sup> Dz.U. 2020, Item 1192.



For the turnover of a company which includes the right to use agricultural land or a farm, the provisions of the ASAS should also be applied, which results from Article 4a of the ASAS and Article 2c point 1) of the ASAS. All cases where the provisions of the ASAS do not apply to trading in agricultural real estate, shares not admitted to organized trading within the meaning of the Act on Trading in Financial Instruments, shares in the capital companies that own agricultural real estate (e.g. pursuant to Article 1a, 1b, 1c; Article 3 sec. 5; Article 3a sec. 2; Article 4 sec. 4 of the ASAS), apply to the sale of an enterprise which includes agricultural real estate, shares and stocks described above.

### **Sale by the Syndic of the Bankruptcy Estate of the Enterprise Which Includes Agricultural Real Estate**

The provision of art. 316 paragraph. 1 of the Bankruptcy Law Act of 28 February 2003<sup>37</sup> stipulates that the enterprise should be sold in bankruptcy proceedings as a whole, and if this is not possible, the organized part of the enterprise should be sold (Article 318 sec. 1 of the BL). The creditors' council may permit to withdraw from the sale of the enterprise as a whole (Article 206 sec. 1, point 2 of the BL). When the creditors "council has not been established, or when the creditors" council has not adopted a resolution to withdraw from the sale of the enterprise as a whole within the time limit indicated by the judge commissioner, the decision in this regard is made by the judge commissioner (Article 213 of the BL). The enterprise may be disposed of by the syndic within 30 days from the validation of the court decision authorizing the sale of the enterprise pursuant to the provisions of Part VII of the Preparation of the Liquidation of the BL, in particular pursuant to Article 56e of the BL.

The provisions of the ASAS do not apply to the agricultural real estate acquired in bankruptcy proceedings (Article 2a sec. 3, point 9 of the ASAS) and in the course of restructuring proceedings as a part of sanation proceedings (Article 2a sec. 3, point 4 of the ASAS). Agricultural property sold in bankruptcy and sanation proceedings may be purchased by anyone, but the NASC acting for the benefit of the State Treasury has a pre-emption right. The NASC acting for the benefit of the State Treasury also has the pre-emption right when an enterprise that includes agricultural real estate, the right to use agricultural land, a farm, shares not admitted to organized trading within the meaning of the Act on Trading in Financial Instruments or shares in capital companies owning agricultural real estate with an area of more than 5 ha is being sold in bankruptcy or sanation proceedings. The creditors' council or the judge commissioner must agree to withdraw from the sale of the enterprise as a whole, when the enterprise includes agricultural real estate,

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<sup>37</sup> Act of 28 February 2003, Bankruptcy Law, Dz.U. 2003, Item 1228 (henceforth cited as: BL).

the right to use agricultural land, a farm, shares not admitted to organized trading within the meaning of the Act on Trading in Financial Instruments or shares in capital companies owning agricultural real estate with an area of more than 5 ha, because the NASC acting for the benefit of the State Treasury may exercise the pre-emption right as a result of concluding an agreement obliging the sale of the agricultural real estate belonging to the enterprise, and the buyer will be able to purchase the rest of the components of the enterprise.

## **The Apport of an Enterprise Which Includes Agricultural Real Estate**

The subject of a non-monetary contribution to capital companies may be the enterprise or its organized part<sup>38</sup>. Article 55<sup>2</sup> applies to the contribution of an enterprise as an input to a commercial company, which means that when the enterprise is contributed in the form of an input, it may be transferred to the company in its entirety; it is possible to indicate specific assets transferred to the company or to indicate the enterprise as the subject of the contribution, with the exception of some components, e.g. agricultural real estate included in the enterprise<sup>39</sup>. The transfer of the right of an enterprise to a capital company consists in the transfer to it of all the rights that the vendor (shareholder) has in relation to the object of apport, and which have not been excluded in a manner permissible pursuant to Article 55<sup>2</sup> of the CC<sup>40</sup> in the company agreement or resolution confirming the increase of the share capital. When contributing an enterprise as an apport to a limited liability company, it is neither necessary nor decisive to state in the in-kind act that the object of the apport exhausts all the components of the enterprise within the meaning of Article 55<sup>1</sup> of the CC. In the case of an enterprise, the definition of the subject of contribution may consist in a general statement that the subject of the apport is the enterprise, or in the calculation of the contributed components directly or by referring to other documents, such as the balance sheet or specification of the apport<sup>41</sup>.

The contribution of an enterprise to a capital company which includes agricultural real estate or the right of perpetual usufruct of agricultural land is the acquisition of agricultural real estate within the meaning of Article 2 point 7 of the ASAS. After its contribution to a capital company, the NASC, acting for the benefit of the State Treasury, may submit a declaration on the acquisition of the agricultural property in question, on the right of perpetual usufruct of agricultural land against the payment of the price of the property, or on the right of perpetual usufruct of agricultural land (Article 4 sec. 1 of the ASAS *in fine*), unless this right would not be due to the

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<sup>38</sup> P. Pinior [in:] *Wkłady niepieniężne w spółkach handlowych*, ed. W. Popiołek, Warszawa 2014, p. 122, 126 and the referenced literature.

<sup>39</sup> *Ibidem*, p. 124 and the referenced literature.

<sup>40</sup> Decision of 6 December 2002, IV CKN 1601/00, Lex no. 1165529.

<sup>41</sup> Decision of the Supreme Court of 8 April 2003, IV CKN 51/01, Lex no. 78892.

exclusions under Article 4 sec. 4 of the ASAS. The NASC, acting for the benefit of the State Treasury, has the same right in the case of an apportionment of a capital company of an enterprise which includes shares, shares not admitted to organized trading within the meaning of the Act of 29 July 2005 on Trading in Financial Instruments, of an enterprise which is the owner or perpetual usufructuary of real estate agricultural property with an area of at least 5 ha, or of agricultural property with a total area of at least 5 ha. This means the NASC may submit a declaration on the purchase of shares against payment of their price (Article 4 sec. 6 of the ASAS). The right to acquire shares and stocks included in the enterprise, referred to in Article 4 sec. 6 of the ASAS, is not entitled to the NASC acting for the State Treasury in the cases specified in Article 4 sec. 4 of the ASAS.

Bringing to a capital company an enterprise which includes agricultural real estate, shares, stocks in a commercial company that is the owner or the perpetual usufructuary of agricultural real estate with an area of at least 5 ha, or agricultural real estate with a total area of at least 5 ha, takes place in one operation<sup>42</sup>. When making a contribution to a capital company, it is possible to conclude an agreement with a binding effect and a second agreement with a disposable effect. Whereby, the NASC, acting for the benefit of the State Treasury, has the right to acquire agricultural real estate, shares, stocks in a commercial law company that is the owner or perpetual usufructuary of agricultural real estate with an area of at least 5 ha and included in the enterprise contributed in apportionment, and may acquire it after the conclusion of an agreement with disposable effect. In the event of contribution of an enterprise consisting of stocks and shares in a commercial company that is the owner or the perpetual usufructuary of an agricultural property with an area of at least 5 ha, or agricultural property with a total area of at least 5 ha, the NASC may purchase the stocks and shares after the registration of the share capital increase in the register of entrepreneurs of the National Court Register (Article 4 sec. 6 of the UKUR *in fine*).

Execution by the NASC, acting for the benefit of the State Treasury, of the right to acquire real estate, the right of perpetual usufruct of agricultural land, shares, stocks in a commercial law company that is the owner or perpetual usufructuary of an agricultural property with an area of at least 5 ha, or agricultural property with a total area of at least 5 ha included in an enterprise contributed in apportionment to a capital company means that the capital company will acquire the incomplete enterprise. When the apportionment is made due to the agricultural real estate or shares in question, shares in a commercial company that is the owner or perpetual usufructuary of agricultural real estate with an area of at least 5 ha, or agricultural real estate with a total area of at least 5 ha, the intended economic goal will not be achieved.

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<sup>42</sup> G. Gorczyński [in:] *Wkłady niepieniężne w spółkach handlowych*, ed. W. Popiołek, Warszawa 2014, p. 296, 301.

## **Lease of an Enterprise Which Includes Agricultural Real Estate**

For agricultural properties acquired after 30 April 2016 the provisions of Article 2b sec. 1 and 2 of the ASAS are applied, ordering running a farm for a period of 5 years<sup>43</sup> during which the acquired real estate cannot be transferred to other entities. Agricultural property that was purchased after 30 April 2016 and became part of an agricultural holding cannot be the subject of a lease or lending agreement for a period of 5 years from the date of its purchase. This provision does not apply when the purchaser does not run an agricultural holding, i.e. the total area of agricultural real estate, including the acquired agricultural real estate, does not exceed 1 ha. An agricultural holding may become part of an enterprise. If the agricultural property, which was included in the enterprise or was incorporated into it, was acquired after 30 April 2016; and if the total area of the buyer's agricultural property exceeds 1 ha, this new agricultural property may not be leased. The entire enterprise cannot be leased either, i.e. together with the acquired new agricultural property, when the total area of the agricultural property included in the enterprise exceeds 1 ha. The subject of the lease may be an organized part of the enterprise which does not include agricultural property acquired after 30 April 2016; moreover, all other components of the enterprise may be leased without the newly acquired agricultural property.

### **Conclusion**

In terms of what will ultimately be purchased, the application of the NASC provisions is uncertain for the sale of an enterprise consisting of agricultural real estate, shares or stocks not admitted to organized trading within the meaning of the Act on Trading in Financial Instruments in a capital company that is the owner or perpetual usufruct user of agricultural real estate with an area of at least 5 ha, or agricultural real estate with a total area of at least 5 ha. The NASC, operating for the State Treasury, may exercise the right consisting in the acquisition of agricultural real estate in the event of:

- contracts of sale of the enterprise through the pre-emption right to agricultural real estates included in it,
- a contract other than the sale of an enterprise, through the right to acquire agricultural real estate that is part of it.

The NASC has the same rights in terms of the shares or stocks in question in the event of the sale of an enterprise consisting of shares or stocks not admitted to organized trading within the meaning of the Act on Trading in Financial Instruments in a capital company that is the owner or perpetual usufructuary of an agricultural

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<sup>43</sup> After the amendment to Art. 2b of the ASAS by Art. 1 point 6 (a) of the Act of 26 April 2019 (Dz.U. 2019, Item 1080) amending min. the ASAS as of 26 June 2019.

property with an area of at least 5 ha or agricultural property with a total area of at least 5 ha.

When the NASC, acting for the benefit of the State Treasury, exercises the pre-emptive right to the agricultural property, it may lead to the destruction of the contract of sale of the enterprise: the seller will be deprived of a part of the enterprise, while the potential buyer may not be interested in purchasing the rest of the enterprise, without the agricultural real estate. The binding legal regulations do not provide for the possibility of obtaining a declaration of non-execution of the pre-emption right for agricultural real estates included in the enterprise from the entity entitled to exercise the pre-emption right before the conclusion of the binding agreement, which could have increased the certainty of business transactions. This would additionally require establishing the relation of such a declaration to the pre-emption right, i.e. introducing a regulation stipulating that obtaining a declaration of non-exercise of the pre-emption right from the right holder in relation to a specific real estate, prior to the conclusion of an agreement obliging the sale of the enterprise, would exclude the pre-emption right.

The division into several contracts of the sale of an enterprise, which includes agricultural real estate, shares or stocks not admitted to organized trading within the meaning of the Act on Trading in Financial Instruments in a capital company being the owner or perpetual usufructuary of agricultural real estate with an area of at least 5 ha or agricultural real estate with a total area of at least 5 ha, raises doubts as to whether these contracts can be treated as a single transaction in terms of taxation and not be subject to tax on goods and services. To be sure in this respect, one should apply for an individual interpretation pursuant to Article 14b et seq. of the Act of 29 August 1997, of the Tax Ordinance<sup>44</sup>, which extends the entire process of selling the enterprise.

To facilitate the turnover of an enterprise that includes agricultural real estate, rules should be introduced that apply to the sale of businesses under bankruptcy proceedings, i.e.: anyone can purchase an enterprise which includes agricultural real estate, shares or stocks in a capital company being the owner or perpetual usufructuary of agricultural real estate with an area of at least 5 ha, with the possible retention of other rights of the NASC, i.e. pre-emption rights and purchase rights. The simplest situation would be if the provisions of the ASAS would not apply to the sale of the enterprise or an organized part of the enterprise which includes agricultural real estate.

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<sup>44</sup> Dz.U. 2020, Item 1325.

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## Summary

The article concerns the issue of the sale of an enterprise which includes agricultural real estate. It was found that the provisions of the Act on shaping the agricultural system should be applied when transferring ownership of an enterprise, which includes agricultural real estate or shares of companies that own real estate with an area of more than 5 ha. This means, the sale of the enterprise must be divided into two binding contracts, and when the State Treasury does not exercise its pre-emption right – an ownership transfer contract must be made. Alternatively, the sale of an enterprise may be split into several contracts for agricultural property and other components, but this leads to difficulties in the tax classification of the entire transaction, i.e. whether it should be taxed with civil law transactions tax or each contract for the sale of a part of the enterprise with the tax on goods and services.

*Keywords:* enterprise, agricultural real estate, sale, share, value added tax

## **ZBYCIE I DZIERŻAWA PRZEDSIĘBIORSTWA W SKŁAD KTÓREGO WCHODZĄ NIERUCHOMOŚCI ROLNE. PROBLEMATYKA CYWILNOPRAWNA I PODATKOWA**

### Streszczenie

Artykuł dotyczy problematyki zbycia przedsiębiorstwa, w skład którego wchodzi nieruchomości rolne. Stwierdzono, że przy przeniesieniu własności przedsiębiorstwa, w skład którego wchodzi nieruchomości rolne lub akcje spółek, które są właścicielami nieruchomości o powierzchni więcej niż 5 ha, należy stosować przepisy ustawy o kształtowaniu ustroju rolnego, co powoduje, że sprzedaż przedsiębiorstwa trzeba dzielić na dwie umowy: zobowiązującą, a gdy Skarb Państwa nie skorzysta z prawa pierwokupu, umowę przeniesienia własności. Można ewentualnie rozdzielić zbycie przedsiębiorstwa na kilka umów dotyczących nieruchomości rolnych i pozostałych składników, lecz prowadzi to do trudności w zakwalifikowaniu pod względem podatkowym całej transakcji, tzn. czy należy ją opodatkować podatkiem od czynności cywilnoprawnych, czy też każdą umowę zbycia części przedsiębiorstwa podatkiem od towarów i usług.

*Słowa kluczowe:* przedsiębiorstwo, nieruchomość rolna, sprzedaż, akcja, podatek od towarów i usług