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I. ARTYKUŁY

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An optimal model of agricultural real estate transactions in the light of Professor Aleksander Lichorowicz's research*

Un modello ottimale di transazioni immobiliari agricole alla luce delle ricerche del Professor Aleksander Lichorowicz

The events celebrating the scholarly output of Professor Aleksander Lichorowicz provide a unique opportunity to recall the Jubilarian's views on the issue of the proper shaping of the principles of the trade in agricultural real estate in Poland. The aim of the article is, on the one hand, to present the most important postulates formulated by Professor Lichorowicz concerning the optimal model of agricultural real estate trade and, on the other hand, to determine the basic directions of legal changes which would make the current Polish model of agricultural real estate trade more rational, consistent with Professor Lichorowicz's postulates. The article analyses the most important instruments serving the proper shaping of the agricultural system, i.e. instruments protecting agricultural holdings against irrational divisions, instruments preventing excessive concentration of agricultural real estate, the requirement of agricultural qualifications, the pre-emption right to agricultural real estate, instruments related to agricultural lease and inheritance of agricultural holdings. In conclusion, the author expresses an opinion that the Polish legislator, while working on the necessary modification of the principles of agricultural real estate turnover, should extensively draw on the achievements and results of the research conducted by Professor Aleksander Lichorowicz.

Keywords: agricultural law, agricultural real estate, shaping of agricultural system, individual farmer

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Le celebrazioni in onore alla carriera scientifica del Professor Aleksander Lichorowicz sono un'occasione unica per ricordare le Sue opinioni relative al problema di come tracciare le regole adeguate per le transazioni immobiliari agricole in Polonia. Per cui, da un lato, l'articolo si propone di presentare i postulati più importanti del Professor Lichorowicz riguardo a un modello ottimale di transazioni immobiliari agricole, dall'altro, invece, di determinare i principali orientamenti per le modifiche giuridiche in grado di rendere l'attuale modello polacco di dette transizioni più razionale e coerente con i postulati formulati dal Professore. Nello studio sono stati analizzati gli strumenti più importanti volti a garantire una corretta definizione dell'ordinamento agricolo, ovvero gli strumenti di tutela delle aziende agricole contro le divisioni irrazionali, gli strumenti che impediscono una concentrazione troppo elevata di immobili agricoli, il requisito di possedere competenze agricole, il diritto di prelazione sugli immobili agricoli, gli strumenti in materia di locazione agraria e successione all'interno delle aziende agricole. Nella parte conclusiva, l'Autore formula un postulato secondo il quale il legislatore polacco, al momento di svolgere un lavoro di apportare modifiche alle regole per le transazioni immobiliari agricole, dovrebbe fare ampio uso delle pubblicazioni e dei risultati della ricerca del Professore.

Parole chiave: diritto agrario, immobili agricoli, definizione dell'ordinamento agricolo, singoli agricoltori

1. Preliminary remarks

The year 2024 is dedicated to honouring Professor Aleksander Lichorowicz, the long-standing Head of the Chair of Agricultural Law at the Faculty of Law and Administration of the Jagiellonian University, and his scientific output. Among the many scientific interests of the Distinguished Jubilarian, an important place take the rules of agricultural real estate transactions in Poland, to which Professor Lichorowicz devoted numerous and excellent publications.[1]

[1] Without pretending to make an exhaustive list of the articles written by Professor Aleksander Lichorowicz on the issue of agricultural real estate transactions, it is necessary to mention such fundamental works as the monographs: *Dzierżawa gruntów rolnych w ustawodawstwie krajów Europy Zachodniej*, Kraków 1986; *Szczególne zasady dziedziczenia gospodarstw rolnych w ustawodawstwie krajów zachodnioeuropejskich*, Kraków 1992; *Status prawny gospodarstw rodzinnych w ustawodawstwie krajów Europy Zachodniej*, Białystok 2000; dissertations: *Podstawowe rozwiązania w zakresie obrotu gruntami rolnymi w ustawodawstwie krajów Europy Zachodniej*, "Studia Prawnicze" 1991, no. 3; *Kodyfikacja zasad obrotu gruntami rolnymi w nowym szwajcarskim prawie gruntowym*, "Kwartalnik Prawa Prywatnego" 1994, no. 1; *Instrumenty oddziaływania na strukturę gruntową Polski w ustawie z 11 kwietnia 2003r. o kształtowaniu ustroju rolnego*, "Kwartalnik Prawa Prywatnego" 2004, no. 2; articles: *O nową regulację obrotu nieruchomościami rolnymi*, "Kwartalnik

Since the publication of the aforementioned publications, the legal status in force in Poland with regard to the public-legal control of the transactions concerning agricultural real estate has undergone far-reaching modifications. The amendment to the Act of 11 April 2003 on the shaping of the agricultural system,[2] which came into force on 30 April 2016, was of extreme importance. It introduced into the Polish legal system new instruments of control of the agricultural real estate transactions, including, in particular, the principle that an agricultural real estate in Poland may be purchased only upon prior approval of the Director General of the National Agricultural Support Centre (with significant exceptions, however, concerning especially individual farmers and persons close to the seller), as well as a five-year obligation imposed on the purchaser to continue the agricultural activity on the purchased real estate, and an accompanying prohibition to dispose of the real estate or transfer it to third parties. The construction of the pre-emption right and so-called "right to purchase" of the agricultural real estate was also substantially modified, and so was the control of share deals in companies owning agricultural real estate. The main justification for the changes introduced was the aim to "prevent speculative transactions concerning agricultural real estate and to realise the principle resulting from Article 23 of the Constitution of the Republic of Poland (family farm as the basis of the agricultural system of the Republic of Poland)."[3] The restrictive character of the above-mentioned regulations, as well as their evidently low legislative level, became the subject of justified criticism in the Polish legal science.[4] A positive effect of this criticism has

Prawno-Ekonomiczny" 1996, no. 1; *O nowy kształt zasad obrotu nieruchomościami rolnymi w kodeksie cywilnym*, "Rejent" 1997, no. 6; *W kwestii modelu prawnego ustawowego prawa pierwokupu*, "Studia Iuridica Agraria" 2002, vol. III; *Regulacja obrotu gruntami rolnymi według ustawy z 11 kwietnia 2003r. o kształtowaniu ustroju rolnego na tle ustawodawstwa agrarnego Europy Zachodniej*, "Przegląd Legislacyjny" 2004, no. 3; *Problem rodzinnego prawa pierwokupu w ustawodawstwie szwajcarskim i polskim*, in: R. Budzinowski (ed.), *Problemy prawa rolnego i ochrony środowiska. Profesorowi Wiktorowi Pawlakowi w dziewięćdziesiątą rocznicę urodzin 14 grudnia 2004 roku*, Poznań 2004.

[2] Journal of Laws 2022, item 461 as amended; hereinafter: ASAS.

[3] Explanatory Memorandum to the Government's Bill on Suspension of the Sale of Real Property of the Agricultural Property Stock of the State Treasury and Amendments to Certain Acts, 8th Kadence Parliamentary Print No. 293.

[4] Among many cf. e.g.: J. Pisuliński, O *niektórych osobliwościach obrotu nieruchomościami rolnymi*, "Rejent" 2016, no. 5, pp. 45–47, J. Biernat, *Nabywanie nieruchomości rolnych w drodze zasiedzenia. Wybrane zagadnienia konstrukcyjne*, "Studia Prawnicze. Rozprawy i Materiały" 2018, no. 1, pp. 147–155; A. Bieranowski, *Dekompozycja konstrukcji zasiedzenia w nowym reżimie ograniczeń nabycia własności nieruchomości rolnej – zagadnienia węzłowe i uwagi de lege ferenda*, "Rejent" 2016, no. 5, pp. 80–90; J. Grykiel, *Ograniczenia*

been the postulate to formulate anew the rational principles of agricultural real estate transactions in Poland, which – free from obvious defects of the present regulation – would realise the essential goals specified in Article 1 of the ASAS., i.e., in particular, improvement of the area structure of agricultural farms, counteracting excessive concentration of agricultural real estate and ensuring that agricultural activity on agricultural farms is carried out by persons with appropriate qualifications. These regulations should furthermore correspond to the needs of the contemporary economic situation, and help to safeguard it against a potential paralysis of agricultural real estate transactions, as well as adhere to the standards developed in the case-law of the European Court of Justice with regard to permissible restrictions on the free movement of capital and entrepreneurship.

Proper implementation of the above postulate requires referring to many sources. One of them can undoubtedly be the reference to the output of the most eminent representatives of the doctrine of agricultural law in Poland, the exceptional value of which manifests itself primarily in the fact that the ideas arising from it have a timeless character. In this respect, the thought of Professor Aleksander Lichorowicz is of fundamental importance, all the more so because the solutions he has developed are to a large extent based on comparative studies, of which Professor Lichorowicz was an unrivalled master – not only in the area of the doctrine of agricultural law in Poland.

This paper will point out the key elements of a properly formed model of agricultural real estate transactions, resulting from the scientific research which Professor Lichorowicz has conducted, and will juxtapose them with the binding regulations defining the current form of public law regulation of agricultural real estate transactions in Poland. Consequently, the main aim of the work is to determine the basic directions of legal changes that when

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obrotu nieruchomościami rolnymi oraz prawami udziałowymi w spółkach po nowelizacji ustawy o kształtowaniu ustroju rolnego, "Monitor Prawniczy" 2016, no. 12, pp. 628–629; Sz. Byczko, *Ustawowe prawo pierwokupu udziałów i akcji spółek będących właścicielami nieruchomości rolnych*, in: P. Księżak, J. Mikołajczyk (eds.), *Nieruchomości rolne w praktyce notarialnej*, Warszawa 2017, pp. 236–246; J. Bieluk, *Zastaw na udziałach i akcjach w spółkach będących właścicielami lub użytkownikami wieczystymi nieruchomości rolnych – paradoks art. 3a ust. 3a ustawy o kształtowaniu ustroju rolnego*, "Przegląd Prawa Rolnego" 2021, no. 1, pp. 59–68; idem, *Przekształcenia spółek kapitałowych a ustawa o kształtowaniu ustroju rolnego*, "Przegląd Prawa Rolnego" 2019, no. 2, pp. 113–124; P. A. Blajer, *Z prawnej problematyki obowiązków nabywcy nieruchomości rolnej wynikających z art. 2b ustawy o kształtowaniu ustroju rolnego*, "Przegląd Prawa Rolnego" 2021, no. 1, p. 33; M. Bidziński, M. Chmaj, B. Ulijasz, *Ustawa o wstrzymaniu sprzedaży nieruchomości Zasobu Własności Rolnej Skarbu Państwa – aspekt konstytucyjnoprawny*, Toruń 2017.

made accordance with Professor Lichorowicz's guidelines would make the Polish model of agricultural real estate transactions more rational.

2. Legal instruments for the rational shaping of the agricultural real estate transaction model

In his numerous works, Professor Lichorowicz formulated a catalogue of legal instruments which, if applied correctly, enable rational shaping of public control of transactions concerning agricultural real estate. To a large extent, this catalogue was the result of comparative studies conducted by Professor Lichorowicz. This circumstance deserves special attention, as the instruments included in it are not an abstract creation that could not be applied in practice. On the contrary, they are tools effectively used in other legal systems, thus they should constitute a point of reference for the discussion on the rationalisation of the Polish model of transactions concerning agricultural real estate. Therefore, what needs to be determined is to what extent these tools are relevant and applicable to Polish regulations currently in force, and particularly those contained in the ASAS.

2.1. Instruments to protect farms from irrational subdivisions, and consequently serving to improve the structure of agricultural farms

One of the most frequently repeated criticism of the Polish agricultural legislation after the social and economic changes at the turn of the 1980s and 1990s expressed by Professor Lichorowicz was the lack of effective instruments preventing irrational divisions of agricultural farms.[5] In this respect, Professor Lichorowicz pointed to the solutions adopted in the legislations of both the Roman and Germanic families of law. The former were based on specific, measurable, area-based criteria, creating the institution of a minimum cultivated unit, below which the division of a farm is in principle not permissible. This type of solution is characteristic, for example, of France, where the *Code rural* introduced the concept of SMI, while stipulating that the reduction or liquidation of a farm that has reached SMI level 2 always requires the consent of the agricultural administration. Similar minimum area standards have also been applied in Portuguese legislation (*unidada de*

[5] Cf. A. Lichorowicz, *Regulacja obrotu gruntami rolnymi według ustawy z 11 kwietnia 2003 r. o kształtowaniu ustroju rolnego na tle ustawodawstwa agrarnego Europy Zachodniej*, "Studia Iuridica Agraria" 2005, vol. V, p. 76; idem, *O nowy kształt zasad...*, p. 41.

cultura), Italian legislation, (*minima unita colturale*) or Spanish legislation (*minima unidad de cultivo*). On the other hand, the regulations adopted within the Germanic family of law, in force, for example, in Germany, Austria, Switzerland, Denmark, Norway, Sweden, the Netherlands, Ireland and Finland, reject rigid area criteria, relying instead on the general category of a farm capable of commodity production and capable of providing a livelihood for an average farming family. Under these solutions, the assessment of whether the division intended by the parties will not deprive the seller's farm of its self-sufficiency and family character has been entrusted to public administrations or courts of law.[6]

Juxtaposing the above-mentioned comparative observations with the regulations of the ASAS adopted in its original text of 2003, Professor Lichorowicz regretfully emphasised the lack of legal instruments that would limit an irrational division of agricultural farms.[7] *Prima facie*, it might seem that the above situation would change after the almost revolutionary modifications to the existing legal status, made by the amendment to the ASAS in 2016. At that time, a mechanism of administrative control over the transactions concerning agricultural real estate, exercised by the Director General of the NASC, was introduced. That control envisaged a general obligation imposed on a potential purchaser to obtain the consent for the acquisition of an agricultural real estate (Article 2a (4) of the ASAS, subject to exceptions listed in Article 2a (1) and (3)). However, specifying in great detail the prerequisites for issuing the abovementioned consent, the legislator made no reference to structural issues aimed at preventing irrational divisions of agricultural farms, while essentially, these prerequisites concern the purchaser of agricultural real estate and *inter alia*, impose on the purchaser a commitment to carry out agricultural activities on the acquired real estate.

Also, what is missing in the administrative procedure for granting consent to the disposal of agricultural real estate before the expiry of the 5-year period following its acquisition, under which, in principle, a disposal or transfer of agricultural land into the possession of a third party is not allowed (Article 2b (3) of the ASAS), is adequate assurance of a certain control of the process of division of agricultural farms. This is because the premise for the granting of consent is exclusively "the important interest of the purchaser of

[6] A. Lichorowicz, *Zagadnienia dopuszczalności podziału gospodarstwa rolnego (ze szczególnym uwzględnieniem roli notariusza*, in: *Księga pamiątkowa. I Kongres Notariuszy Rzeczypospolitej Polskiej*, Poznań 1993, p. 120.

[7] A. Lichorowicz, *Regulacja obrotu gruntami rolnymi...*, p. 77.

the agricultural real estate or the public interest." Thus, once again, strictly subjective considerations, related to the subjective needs of the purchaser are given absolute priority over structural issues to ensure protection of an agricultural farm, otherwise possibly exposed to irrational division. We are right therefore to conclude that despite the passage of years and numerous amendments to the ASAS, under Polish legislation, prevention of the division of agricultural farms, as already long ago emphasised by Professor Lichorowicz,[8] continues to be neglected.

Incidentally, it is worth noting that the Polish agricultural legislation still lacks other instruments of control of agricultural real estate transactions, the introduction of which was postulated by Professor Lichorowicz, based on his comparative research. First of all, it is necessary to mention here the support of neighbourly trade,[9] the protection of the proper land structure created as a result of land consolidation actions carried out in the area of a given locality, as well as the control of the adequacy of the price specified in the contract to the real value of the land, thus preventing speculative transactions.[10]

2.2. Instruments to counteract excessive concentration of agricultural real estate

In his numerous articles and studies, Professor Lichorowicz has repeatedly drawn attention to the necessity of introducing into the Polish legislation effective tools for counteracting excessive concentration of agricultural land.[11] In this respect, Professor Lichorowicz pointed to potential inspirations coming from foreign legal solutions. On the one hand, at the level of some regulations, digitally defined area norms are introduced, and where exceeded, automatically subject a given transaction to control and to the obligation to obtain consent of a competent administrative body. The French agricultural legislation provides an example of such an approach. On the other hand, some solutions (in particular German or Austrian) apply

[8] Among the numerous publications cf. A. Lichorowicz, *Instrumenty oddziaływania...*, p. 429.

[9] Indeed, the attempt to introduce the so-called neighbourhood pre-emption right into the Polish legal system ended in failure. For more on this topic, see P. Blajer, *Sąsiedzkie prawo pierwokupu a struktura gruntowa polskich gospodarstw rolnych – panaceum czy pandemonium?*, "Przegląd Prawa Rolnego" 2015, no. 2, pp. 45–65.

[10] A. Lichorowicz, *Regulacja obrotu gruntami rolnymi...*, p. 78.

[11] Among many, cf. A. Lichorowicz, *O nowy kształt zasad...*, pp. 44–45; idem, *Regulacja obrotu gruntami rolnymi...*, pp. 79–80.

criteria of a structural nature, treating an excessive concentration of land in the hands of one owner as leading to an unfavourable division of agricultural land, hence allowing the administrative authority to refuse consent to a given transaction. Referring to these sources of inspiration, Professor Lichorowicz suggested the introduction of a statutory definition of a top limit on the size of a farm, the exceeding of which would make it obligatory to obtain the consent of the agricultural administration body for further acquisition transactions leading to the enlargement of a farm.[12] Professor Lichorowicz was also concerned about the 300 ha area standard envisaged for a family farm in the original version of the ASAS, emphasising the ineffectiveness of this regulation and its contradiction with the current trends of the EU structural policy in agriculture.[13]

Undoubtedly, the significance of the area criterion has increased after the amendment to ASAS made in 2016. This is reflected, in particular, by the content of Article 2a (2) of the ASAS, which generally prohibits an individual farmer, as a particularly privileged person within the framework of the regulation of transactions concerning agricultural real estate, from acquiring an agricultural real estate if its area, together with the area of agricultural real estate forming part of his or her farm, exceeds 300 ha. Any acquisition of an agricultural real estate in the above-mentioned conditions is sanctioned by the absolute invalidity of the legal act leading to such acquisition. Moreover, within the framework of administrative proceedings for granting consent to purchase agricultural real estate, in cases where such purchase is sought by an entity other than an individual farmer, the Director General of the NASC should, in principle, make its issuance conditional on the applicant proving that as a result of the purchase no excessive concentration of agricultural land will take place (cf. Article 2a (4) point 1 and 3 of the ASAS). These regulations remain in connection with solutions adopted in the Act of 19 October 1991 on the management of agricultural real property of the State Treasury,[14] which establishes the principles of sale of state-owned agricultural real estate. Pursuant to those principles the NASC may sell agricultural real property only if as a result of such sale the total area of agricultural land: 1) owned by the purchaser does not exceed 300 ha and 2) of the land ever acquired from NASC by the purchaser does not exceed 300 ha.

[12] A. Lichorowicz, *O nowy kształt zasad...*, p. 44.

[13] A. Lichorowicz, *Instrumenty oddziaływania...*, p. 431.

[14] Act of 19 October 1991 on the management of agricultural real property of the State Treasury (Journal of Laws of 2024, item 589).

Therefore, it can be concluded that the current Polish agricultural legislation meets to a much greater extent the postulates of Professor Lichorowicz regarding the introduction of instruments to counteract an excessive concentration of agricultural land. However, one cannot overlook the weaknesses of these solutions. The way in which the legislator defines the 300 ha area standard is, on the one hand, too strict, and on the other hand, imprecise. In particular, the absolute ban on purchasing agricultural real estate by an individual farmer in excess of the indicated area standard of 300 ha of agricultural land – even in cases justified by economic reasons and the good of the agricultural farm – may raise doubts. It is worth emphasising, moreover, that in the light of the regulations in force, exceeding the indicated area standard may also take place through no "fault" of the individual farmer, e.g. in the case of inheriting agricultural land, as a result of which the farm exceeds the area of 300 ha.[15] On the other hand, the effect of this event will be the loss of the status of an individual farmer, and the farm run by him – the status of a family farm, which entails the loss of significant privileges within the framework of transactions concerning agricultural real estate. The very way in which Article 2a (2) of the ASAS is drafted also raises significant reservations. It is not clear whether the ban on purchasing agricultural real estate exceeding the 300 ha standard refers only to real estate which is to be included in a family farm or to all agricultural real estate, also acquired without a functional connection with a family farm. It can be assumed, as some doctrine representatives do, that an agricultural real estate owned by a farmer, which is not part of a family farm, should not count when determining the area of agricultural land for the purpose of acquiring further real estate by this farmer.[16] In this situation, the postulates of Professor Lichorowicz, aiming at shaping the instruments of counteracting excessive concentration of agricultural land in a flexible way and corresponding to the current economic needs, still remain valid.

2.3. The requirement of agricultural qualifications as a premise for the validity of the acquisition of ownership of agricultural real estate

One of the main postulates voiced by Professor Lichorowicz was to strengthen the importance of agricultural qualifications within the framework

[15] P.A. Blajer, W. Gonet, *Ustawa o kształtowaniu ustroju rolnego. Komentarz*, Warszawa 2020, p. 88.

[16] T. Czech, *Kształtowanie ustroju rolnego. Komentarz*, Warszawa 2024, p. 179.

of real estate transactions, including even making them a prerequisite for the validity of the acquisition of an agricultural real estate.[17] Arguments in this regard were provided primarily by comparative studies conducted by the Professor. He drew attention to the importance of practical qualifications, which are strongly emphasised in the agricultural legislation of Western European countries. In this regard, Professor Lichorowicz emphasised that the practical qualifications of a candidate for a purchaser of agricultural real estate are determined primarily by the fact of permanent employment in agriculture (e.g. France, Austrian *Länder*, the Netherlands, Denmark, Norway, Spain), and sometimes also by obtaining the primary source of income from agricultural work (Denmark, France, Spain, Norway). Evidence of the secondary importance of theoretical qualifications (agricultural education) would also be found in the Swiss solutions which impose an obligation on the administrative authority to check the actual qualifications of the purchaser of the real estate for its proper management even in cases where he or she has a certificate from an agricultural school. In the light of these ideas, the requirement for agricultural qualifications should also be formulated for legal persons and organisational units acquiring agricultural real estate, i.e. for natural persons responsible for their operation (e.g. board members).[18]

Ensuring that an agricultural activity on agricultural farms is carried out by persons with appropriate qualifications is also one of the declared objectives of the currently binding ASAS (Article 1 (3)). This aim is realised first of all by the introduction of the criterion of agricultural qualifications as an element of the definition of an individual farmer running a family farm, i.e. a particularly privileged person within the framework of transactions concerning agricultural real estate (Article 6 (1) of the ASAS). Moreover, the legislator devotes a great deal of attention to the drafting of this criterion, defining it in Article 6 (2) of the ASAS and then detailing it in the executive regulation to this Act, i.e. the Regulation of the Minister of Agriculture and Rural Development of 17 January 2012 on agricultural qualifications held by persons performing agricultural activity.[19]

[17] Cf. A. Lichorowicz, *O nowy kształt zasad...*, p. 46.

[18] For a broader discussion, see: A. Lichorowicz, *Regulacja obrotu gruntami rolnymi...*, p. 80.

[19] Regulation of the Minister of Agriculture and Rural Development of 17 January 2012 on agricultural qualifications held by persons performing agricultural activity (Journal of Laws of 2012, item 109).

Agricultural qualifications in Poland are traditionally divided into theoretical qualifications and practical qualifications (Article 6 (2) of the ASAS), however, in order to obtain the status of an individual farmer it is sufficient for a natural person to possess one type of these qualifications. This implementing regulation, in turn, enumerates the documents which make it possible to demonstrate the fact of having the relevant type of qualification. And it is precisely in the manner in which these documents are defined that the greatest weakness of the Polish solutions regarding agricultural qualifications lies. It turns out that in order to prove practical qualifications, defined by the ASAS as "length of service in agriculture," it is enough to submit only a private document including a declaration of an interested person that he/she has been involved in agricultural activity in an agricultural farm with an area of at least 1 ha which is his/her property, object of perpetual usufruct, object of self-ownership or lease – for the period specified in the Act, i.e. 3 or 5 years (cf. § 7 point 2 of the executive Regulation). This declaration is not subject to any official verification, nor is it made under pain of criminal liability – it is merely an annex to the notarial act (deed) documenting the transaction leading to the acquisition of the ownership of an agricultural real estate. It is further noteworthy that, although this document is only one of the means of proof to demonstrate practical qualifications by an individual farmer, in practice it is the most common means of demonstrating such qualifications. In this way, the extensive legal regulation of agricultural qualifications at the level of the ASAS and the executive Regulation takes on a purely facade character, and the criterion of agricultural qualifications itself has little practical significance.

This conclusion is also confirmed by the fact that at the level of the norms concerning the prerequisites for the issuance of consent for the acquisition of agricultural real estate by the Director General of the NASC, in the case where the prospective purchaser does not have the status of an individual farmer – the criterion of agricultural qualifications has not been taken into account at all (cf. Article 2a (4) item 1 of the ASAS). This criterion has been replaced by the requirement that the purchaser undertakes to carry out agricultural activities on the acquired agricultural real estate.

Taking the above into account, it is difficult to resist the impression that the criterion of agricultural qualifications, despite formal declarations and extensive legal regulation, has not gained the significance within the Polish model of agricultural real estate trasnactions that Professor Lichorowicz postulated in his publications.

2.4. Pre-emption right of agricultural real estate

In the scientific work of Professor Lichorowicz, an important place was occupied by the research on the right of pre-emption of agricultural real estates, first of all in comparative perspective.[20] In his publications, Professor Lichorowicz emphasised the importance that this institution has in the agricultural legislation of Western European countries, pointing in particular to the numerous forms of this right provided for in it, which enable rational shaping of the agrarian structure. In this context, he stressed the importance of the institution of neighbourhood pre-emption right, known e.g. in France, Italy, Spain or Switzerland, or the family pre-emption right, available to the farmer's family members, occurring e.g. in Italy, Switzerland, Spain and Norway.[21] He also drew attention to the fact that in many Western European countries the statutory right of pre-emption of agricultural real estate was entrusted to private law entities (e.g. French *SAFER*, Italian *enti di sviluppo*) and not to a public law entity, as it is the case in Poland. And the very use of the real estate acquired as a result of exercising the statutory right of pre-emption has been subject to strict control in Western Europe, unlike in Poland, where an entitled person exercising the right of pre-emption has full freedom to dispose of the acquired land or to keep it for himself.[22] The Professor also noticed weaknesses in the shape of the Polish pre-emption right, particularly concerning the unsatisfactory definition of sanctions in the event that this right is not taken into account, which in some cases is too lenient (the sanction of damages in the case of infringement of the contractual right of pre-emption) and in others too severe (as a rule, the sanction of absolute nullity of a legal transaction in the case of infringement of the statutory right of pre-emption).[23]

It should be emphasised that, in fact all the above-mentioned observations and postulates remain fully valid to this day. *De lege lata*, the statutory right of pre-emption of agricultural real estate vested in NASC (Article 3 of the ASAS) and the so-called right to purchase (Article 4 of the ASAS) which complements it, retain their fundamental meaning as an instrument of public law control of transactions concerning agricultural real estate with an area of less than 1 ha, and a supplementary meaning in relation to essentially

[20] Cf. A. Lichorowicz, *W kwestii modelu prawnego...*, p. 270 ff. and the literature indicated therein.

[21] A. Lichorowicz, *Regulacja obrotu gruntami rolnymi...*, p. 81.

[22] Ibidem, p. 82.

[23] A. Lichorowicz, *W kwestii modelu prawnego...*, p. 281.

administrative forms of control – in relation to agricultural real estate with an area of at least 1 ha. They also have an important control significance in the case of share deals in companies owning agricultural real estate – with a total area of at least 5 ha (Articles 3a and 4 (6) of the ASAS).[24] These rights, in contrast to the solutions adopted in Western European legislation, can be exercised by the NASC which is a legal person of public law, in a completely arbitrary manner, free from the obligation to justify the need for their exercise. The use of agricultural real estate acquired as a result of the exercise of the pre-emption right by the NASC is not subject to any control, either. In particular, the NASC is not obliged to use them agriculturally or to allocate them for sale or lease to farmers. On the other hand, the sanction of absolute invalidity of an agreement leading to the purchase of an agricultural real estate drawn up in breach of the pre-emption right (or the right to purchase) vested in the NASC is very serious – in fact, it even undermines the security of trade by giving the NASC overly far-reaching powers with regard to the cancellation of the transfer of the agricultural real estate.[25]

Another weakness of the Polish regulation of the right of pre-emption of agricultural real estate is also the relatively modest range of forms of this right. In the currently binding legal state, apart from the NASC, which in fact exercises the right of pre-emption only for control purposes, these rights are vested only in the lessee (Article 3 (1) of the ASAS) and the co-owner (Article 166 of the Civil Code) of agricultural real estate. Thus, only in the latter two cases does the statutory right of pre-emption actually serve to improve the structure of Polish agricultural farms. However, due to the irrational combination of the regulation of both these forms of pre-emption right with the general principles of purchasing real estate in Poland resulting from the ASAS, the practical significance of the pre-emption right of a lessee and co-owner of agricultural real estate is *de lege lata* more than modest.[26]

[24] P.A. Blajer, *Public control of share deals in companies owning agricultural real estate in a comparative perspective*, "Przegląd Prawa Rolnego" 2022, no. 2, p. 45 ff.

[25] A. Lichorowicz, *Instrumenty oddziaływania...*, p. 433. It is appropriate to share the view expressed by Professor Lichorowicz, that the sanction of absolute nullity of an act concluded in breach of the pre-emption right should be abandoned. Instead, the holder of the pre-emption right – whose rights have been infringed as a result of the conclusion by the obliged person with a third party of a contract infringing the pre-emption right – should be provided with the right to assume – as a result of the assumption of a unilateral declaration of will – the rights of a third party and thus acquire the real estate which is the subject of the contract. Cf. A. Lichorowicz, *W kwestii modelu prawnego...*, p. 281.

[26] For a detailed discussion on this topic, see P.A. Blajer, *Z rozważań nad aktualnym kształtem pierwokupu dzierżawcy nieruchomości rolnej w świetle ustawy o kształtowaniu ustroju rolnego*, "Przegląd Prawa Rolnego" 2019, no. 2, p. 125 ff.

Despite the legislative attempts signalled above, neither the neighbourhood pre-emption right nor the family pre-emption right has been introduced into the Polish system of agricultural law, despite the fact that the practical usefulness and the need to apply these instruments for the improvement of the agrarian structure of Poland seems unquestionable.

2.5. Lease of agricultural real estate

The issue to which Professor Lichorowicz devoted particular attention was the question of agricultural lease. It is difficult to exhaustively enumerate the numerous criticisms that Professor Lichorowicz formulated towards the legal regulation of agricultural lease in Poland, or to be more precise, towards its almost complete lack, as well as the postulates that he made to change this unsatisfactory state of affairs.[27] In order to put the problem as succinctly as possible, it can be said that the basic proposal of Professor Lichorowicz, which had its roots in his comparative legal research, was the introduction in Poland of rational regulations in the field of legal control of lease transactions, whose instruments would refer to the control of ownership transactions (professional qualifications of the tenant, structural effects of concluding a tenancy agreement), and, moreover, would ensure adequate durability of the tenancy relationship and protection of the rightful rights of the tenant, as an entity actually using the agricultural real estate for agricultural production purposes.[28]

Therefore, it should be noted with regret that this rational postulate has not as yet been implemented by the Polish legislator. In Poland, there is no legal regulation that would implement the assumptions of a rational model of agricultural lease, in the shape of solutions adopted in Western European countries. The legal norms in force in this respect are rudimentary. To a slightly broader extent, the legislator regulates only the lease of state-owned agricultural real estate – pursuant to the provisions of Articles 38–40 of the aforementioned Act on management of agricultural real property of the State Treasury. [29]

The lease agreement also formally remains outside the scope of interest of the legislator who regulates only the ownership transactions concerning agricultural real estate in the ASAS. However, it should be emphasised that its

[27] In this respect, reference should be made first of all to the monograph: A. Lichorowicz, *Dzierżawa gruntów rolnych w ustawodawstwie krajów Europy Zachodniej*, Kraków 1986.

[28] A. Lichorowicz, *Regulacja obrotu gruntami rolnymi...*, p. 85.

[29] More extensively: A. Suchoń, *Prawna ochrona trwałości gospodarowania na dzierżawionych gruntach rolnych*, Poznań 2006.

regulations affect the situation of tenants of agricultural real estate in Poland, significantly weakening their position.[30] Moreover, a certain paradox is the circumstance that, in fact, the regulations of the ASAS contain a surrogate of public-legal control of the agricultural real estate lease, in the form of the obligation imposed on the purchaser of agricultural real estate to run the agricultural farm which the acquired real estate is a part of for the period of 5 years following the acquisition, and the prohibition to sell and give into possession to third parties (and thus also to lease) this real estate during the 5-year period referred to above (Article 2b (1)–(2) of the ASAS).

These obligations may, as a rule, be waived only by way of a consent to sell or give possession of the real estate, issued by the Director General of the NASC (Article 2b (3) of the ASAS). Thus, in this way, the NASC retains control over cases where the purchaser leases the real estate for a period of 5 years following the purchase. Moreover, due to the interpretation of the obligation of personal management of an agricultural farm (Article 2b (1) of the ASAS), adopted in the practice of trade, which is extremely unfavourable for tenants, assuming that the leased real estate is, as a rule, non-transferable due to the fact that its purchaser cannot fulfil this obligation, the attractiveness of leases from the point of view of owners of agricultural real estate has been further weakened.

Taking into account in this pessimistic picture of agricultural lease in Poland, the above-described insignificance of the tenant's right of pre-emption (Article 3 (1) of the ASAS) it is not difficult to draw the conclusion that the need to create a rational model of agricultural lease in Poland, which would regulate in particular the legal situation of tenants, enabling them to carry out their agricultural activity in peace, is, in the current legal and economic situation, even urgent.

2.6. Inheritance of agricultural farms

In the light of Professor Lichorowicz's conception, an element of a correctly formed model of agricultural real estate transactions is also rational regulations concerning inheritance of agricultural farms.[31] In this respect, Professor Lichorowicz repeatedly criticised the Polish regulations concern-

[30] More extensively: A. Suchoń, *Wpływ ustawy o kształtowaniu ustroju rolnego na dzierżawę gruntów rolnych*, "Przegląd Prawa Rolnego" 2022, no. 2, p. 269 ff.; P.A. Blajer, *Z prawnej problematyki obowiązków nabywcy nieruchomości rolnej wynikających z art. 2b ustawy o kształtowaniu ustroju rolnego*, "Przegląd Prawa Rolnego" 2021, no. 1, p. 33 ff.

[31] A. Lichorowicz, *O nowy kształt zasad...*, pp. 47 ff.

ing this problem, in force in the years 1963–2001, which were eventually declared inconsistent with the Constitution of the Republic of Poland by the well-known judgment of the Constitutional Tribunal of 31 January 2001.[32] In their place, he proposed the introduction into the Civil Code of a different model of farm inheritance, based on Swiss and French solutions. This model would consist in abandoning the special prerequisites of agricultural inheritance, allowing all heirs appointed on general principles to inherit a farm, while transferring the entire control of the inheritance process, protection of the existence of the inherited farm to the stage of inheritance division.[33] That solution should be accompanied by a substantial modification of the rules on inheritance division, in particular by reinforcing, during division, the position of heirs who, prior to the opening of the succession, had worked on the farm. These heirs should also be given preference as regards the rules on repayments due from the inherited farm (e.g. by being exempted from part of the repayments charged to them) and should be given access to favourable bank loans in order to make the repayments due to the other co-heirs as painless as possible.[34]

Similarly as it is in the case of other instruments mentioned in this work for the rational shaping of the transactions concerning agricultural real estate, also the postulates of Professor Lichorowicz in the field of *mortis causa* transactions are still waiting for their realisation. *De lege lata* the provisions of the ASAS introduce a certain regime of control of inheritance of agricultural farms, but it has on the one hand a purely controlling character, not serving the improvement of agrarian structures, and on the other hand – it is highly imperfect. As a rule, in the case where an agricultural real estate (or an agricultural farm) is inherited by virtue of a will by a person who is not a close relative of the testator and does not have the status of an individual farmer, the NASC may intervene by exercising its right to purchase an agricultural real estate or an agricultural farm (Article 4 (1)–(2) of the ASAS).[35] However, this regulation remains dead in practice due to the lack of any sanction in the event of failure to notify the NASC of its right to purchase

[32] Ref. act P. 4/99; A. Lichorowicz, *Szczególny porządek dziedziczenia gospodarstw rolnych w Polsce po orzeczeniu Trybunału Konstytucyjnego z dnia 31 I 2001 r.*, "Rejent" 2001, no. 9, p. 89.

[33] A. Lichorowicz*, O nowy kształt zasad...*, p. 48.

[34] Ibidem, pp. 51–52.

[35] K. Marciniuk, *Dziedziczenie gospodarstw rolnych a zmiany w ustawie o kształtowaniu ustroju rolnego dokonane w kwietniu 2016 r.*, "Białostockie Studia Prawnicze" 2017, no. 4, p. 95 ff.

and – consequently – a widespread failure to comply with the obligation to notify. The right to purchase an agricultural real estate is also vested in the NASC at the stage of inheritance division, however, in this case its practical significance is again limited due to the exclusion of this right in a situation where the inheritance division takes place between close relatives or after statutory inheritance (Article 4(4) of the ASAS).

Apart from the abovementioned residual regulations concerning public law control of the *mortis causa* transactions, the provisions of the ASAS do not introduce any structural solutions aimed at a real protection of an inherited farm. Neither have such solutions been brought about by numerous modifications of the general inheritance law in recent years, consisting in the introduction into the Polish legal system of a number of interesting institutions, such as, in particular, specific bequest, succession administration and family foundation. Their significance for generational changes in agriculture and the protection of agrarian structures in the course of these changes, however, still remains negligible.[36]

3. Conclusions

The considerations carried out in this paper clearly show how little the Polish legislator uses the achievements of the most eminent representatives of the agricultural law science to create a rational model of agricultural real estate transactions. In spite of the introduction in recent years of a number of restrictive instruments of public law control, the tools discussed in this work that serve to improve the agrarian structure, remain to a significant extent not taken into account, or their legal regulation leaves much to be desired.

Instead of formulating at this point an extensive catalogue of *de lege ferenda* conclusions, we should therefore postulate that the Polish legislator, while working on the necessary modification of the principles of agricultural real estate transactions in Poland, should make extensive use of the achievements and results of the research of Professor Aleksander Lichorowicz, in which guidelines for the adoption of rational legal solutions will be found. It should be emphasised that the solutions postulated by Professor Lichorowicz have not lost their topicality and still constitute the starting point for the discussion on the future shape of the principles of agricultural real estate transactions in Poland.

[36] A. Makowiec, *Zapis windykacyjny gospodarstwa rolnego*, Warszawa 2020; J. Bieluk, *Możliwość zastosowania instytucji fundacji rodzinnej w rolnictwie*, "Przegląd Prawa Rolnego" 2023, no. 1, p. 81 ff.

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