

## **STATUTORY RIGHT OF PRE-EMPTION OF AGRICULTURAL REAL ESTATE\***

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**Abstract.** The article presents the problem of the right of pre-emption of agricultural real property and attempt to answer the question whether it was justified for the legislator to introduce a right which limits an attribute of an owner, such as the right of asset disposal. The statutory right of pre-emption of agricultural property has been regulated in different legal acts and entitle to the lessee, the Agricultural Property Agency and the co-owner. The article also discusses issues concerning the exercise of the right of pre-emption and problems concerning the concurrence of the right of pre-emption from the Act on the establishment of the agrarian system with other cases of the statutory right of pre-emption. In Authors opinion the fact that the right of pre-emption of agricultural property to the lessee and co-owner has to be considered as positive, but some conditions should be change. It is also necessary to change the provisions of the Act of 11 April 2003 on the establishment of the agrarian system concerning the right of pre-emption of the Agricultural Property Agency The objective scope of the application of the right of pre-emption (redemption) is too wide.

**Key words:** agricultural real estate, the right of pre-emption, sale, Agricultural Property Agency

### **INTRODUCTION**

The right of pre-emption consists in the reservation for the sake of one party the priority right of purchase of a designated object in case the other party would sell the object to a third party. It is realized only when the obliged party concludes a contract of

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sale, and not another type of contract, e.g. a contract of exchange or donation. In accordance with the contents of article 596 of the Civil Code [Kodeks... 1964] the right of pre-emption may be reserved either in the essence of a legal transaction or in an act. The statutory right of pre-emption is to make possible the purchase of a specific object to those parties, which in accordance with the socio-economic assumptions are most predisposed to do so [Radomska 1972]. The legislator frequently uses the institution of the statutory right of pre-emption in agrarian relations, treating it as an instrument used to realize specific socio-economic goals.

The statutory right of pre-emption of agricultural property has been regulated in different legal acts, i.e.: the Act of 11 April 2003 on the establishment of the agrarian system [Ustawa... 2003], the Act of 23 April 1964, the Civil Code [Kodeks... 1964] and the Act of 19 October 1991 on the management of real property of the State Treasury [Ustawa... 2007]<sup>1</sup>.

The aim of this paper was to present the problem of the right of pre-emption of agricultural real property and attempt to answer the question whether it was justified for the legislator to introduce a right which limits an attribute of an owner, such as the right of asset disposal.

The character of this study at the same time forces us to limit our considerations only to selected issues. The adopted layout of this article assumes the following problems will be discussed in this order: the subjective and objective scope of the right of pre-emption vested in the lessee, the Agricultural Property Agency and the co-owner. The article also discusses issues concerning the exercise of the right of pre-emption and problems concerning the concurrence of the right of pre-emption from the Act on the establishment of the agrarian system with other cases of the statutory right of pre-emption. A discussion of another institution similar to pre-emption and provided for by the regulations of the Act on the establishment of the agrarian system, sometimes called in the doctrine the right of redemption, remains outside the scope of this article (rights conferred in article 4 of the Act) [Ustawa... 2003].

## **THE RIGHT OF PRE-EMPTION OF THE LESSEE AND THE AGENCY OF AGRICULTURAL PROPERTY**

The Act of 11 April 2003 on the establishment of the agrarian system [Ustawa... 2003] treats the statutory right of pre-emption as the basic instrument modifying the agrarian system of the state. According to article 1 of the Act this effect is to improve the area structure of farms, counteract excessive consolidation of agricultural property and ensure agricultural activity in farms is run by adequately qualified individuals.

The subject of the right of pre-emption reserved by the regulations of the Act is an agricultural property, and, despite explicit regulation, its integral part in the form of a share in co-ownership. For the purpose of the Act, according to the contents of article 2 [Ustawa... 2003], agricultural property refers to agricultural property for the purpose of

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<sup>1</sup> The right of pre-emption from article 29 of the Act on the management of agricultural property of the State Treasury refers to all properties, not only agricultural. Non-agricultural land constitute a very small part of the Agricultural Property Stock of the State Treasury.

the Civil Code, except for these properties which are released in the physical development plans for purposes other than agricultural.

In the light of article 461 of the Civil Code [Kodeks... 1964] agricultural property (agricultural land) refers to properties which are or may be used to run production activity in agriculture in plant and animal production, including also horticultural, orchard and fishery activity. From among such defined properties we need to exclude these, which in physical management plans are released to purposes other than agricultural.

Among those entitled to the right of pre-emption the legislator included two subjects, explicitly defining the order in which they are entitled to the right of pre-emption. The subject entitled to the right of pre-emption in the first place is the lessee of the sold agricultural property. Next the right of pre-emption is vested in the Agency of Agricultural Property, acting in the exercise of this right for the benefit of the State Treasury.

For the lessee of agricultural properties as the entitled party, the legislator imposed two additional requirements, on the satisfaction of which the exercise of the statutory right of pre-emption is dependent.

The first requirement concerns the form of the lease contract. This contract should be in accordance with article 3 item 1 point 1 of the Act [Ustawa... 2003] concluded in the written form with a certified date and at the same time it should be executed for at least three years since that date. It needs to be stressed that the right of pre-emption will be vested in the lessee only when the lease has been executed for at least three years since the moment in which the contract was given a certified date and not since the moment it was concluded. It is possible that parties will conclude a contract in the simple written form and during the lease the contract receives a certified date, for example as a result the performance of this legal transaction is declared in an official document.

The other requirement stipulates that the purchased property should be a part of the family farm of the lessee or the lessee should be an agricultural producers' cooperative. In accordance with the contents of article 5 of the Act [Ustawa... 2003], a family farm is an agricultural farm meeting two conditions jointly. Firstly, it has to be run by an individually farming peasant and secondly, the total area of agriculturally utilized area in that farm may not exceed 300 ha.

An individually farming peasant in the light of article 6 item 1 of the Act [Ustawa... 2003] is a physical person, being an owner or a lessee of agricultural properties with a total agriculturally utilized area up to 300 ha, running a farm in person, having adequate farming qualifications and living in the commune in which one of the properties, constituting a part of the farm, is located.

In case there are no lessees entitled to the right of pre-emption or they do not exercise their right, the right of pre-emption is vested by the Act in the Agency of Agricultural Property, acting for the benefit of the State Treasury. However, we need to stress that the right of pre-emption is not vested in the Agency of Agricultural Property if as a result of the purchase of a property by the buyer the family farm is increased in size, on condition the area does not exceed 300 ha and the purchased agricultural property is located in the commune being the place of residence of the buyer or is situated in the neighbouring commune.

Moreover, the right of pre-emption vested in the lessee and the Agency of Agricultural Property does not apply when the buyer of an agricultural property is:

- 1) an agricultural producers' cooperative – in case its member sells an agricultural property constituting the contribution in land to the cooperative,

- 2) a close relative of the alienator in the understanding of regulations concerning real property management, i.e. for example a descendant (e.g. a son, a grandson), an ascendant (e.g. the father, a grandfather), siblings, children of a sibling, a spouse who does not have joint property with the seller of a given property, and a person who cohabits with the seller.

From the moment the Act on the establishment of the agrarian system came into force [Ustawa... 2003] (16 July 2003) until the end of 2007 a total of 408 thousand contracts were filed at the Agency, transferring the ownership of agricultural properties, in relation to which the Agency was entitled, in the opinion of notaries, to the right of pre-emption or redemption. A definite majority of contracts (approx. 80%) concerned properties of less than 1 ha, having not significant effect for the enlargement of family farms. Until the end of 2007 the Agency filed 484 notarial documents on the purchase of property with an area of approx. 12.2 thousand ha for the amount of approx. 106 mil zlotys, of which in the year 2007 there were 162 declarations concerning approx. 5369 ha worth 72.4 mil zlotys (data jointly for the right of pre-emption and redemption). Purchased properties are offered by the Agency mainly for sale in the form of bidding by tender open only to selected persons – farmers enlarging their family farms. The superior condition for the Agency to exercise its rights vested on the basis of the Act on the establishment of the agrarian system is demand for agricultural land in a given area on the part of individually farming peasants. An opinion on the expediency of the use of pre-emption is given by chambers of agriculture or communes<sup>2</sup>.

An important issue for lessees and the Agency is to determine legal consequences of an infringement of the right of pre-emption. According to article 9 of the Act [Ustawa... 2003], a legal transaction executed contrary to the provisions of the above mentioned legal act or without a proper notification of the person entitled to the right of pre-emption is invalid. However, the content of this regulation is problematic. It is relatively clear that a lack of a notification of the lessee, as a person entitled to pre-emption, results in the contract being invalid. Similarly, the conclusion of an unconditional contract, although a conditional contract should be concluded, results in it being invalid. However, a question arises what other infringements result in the invalidity of a contract. For example, it seems that this may refer to the cases when pre-emption is executed on the basis of forged documents, the declaration on the execution of pre-emption filed past due date, etc. It seems that the invalidity of a contract should not be caused e.g. by a failure to attach evidence confirming the exclusion of the right of pre-emption, or a lack of information on the existence of the close relationship between the parties. It is enough for such a condition to exist at the moment the sales contract was concluded [Truskiewicz 2003].

As far as the Agency of Agricultural Property is concerned also the Act of 19 October 1991 on the management of agricultural property of the State Treasury [Ustawa... 2007] vests the right of pre-emption in this institution. One of the management forms for property from the Agricultural Property Stock of the State Treasury is sale. In recent years increased interest in the purchase of land property may be observed among farmers. Article 29 item 4 of the above mentioned Act [Ustawa... 2007] vests in this state legal person the right of pre-emption for the benefit of the State Treasury in case of a resale of a property by the buyer within 5 years since ownership of this property was

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<sup>2</sup> See: [www.anr.gov.pl](http://www.anr.gov.pl).

transferred from the Agricultural Property Stock of the State Treasury. It needs to be observed that the subjective scope of this right is very wide. It refers not only to agricultural properties, but to all land. However, agricultural land constitutes a vast majority of the Agricultural Property Stock of the State Treasury. Apart from that, the Agricultural Property Agency theoretically may use the right of pre-emption in any situation land is resold, even in case of a transaction between individually farming peasants. Also the sale for the benefit of close relatives is covered by the right of pre-emption, as restrictions of this right imposed by the Act on property management do not apply in this respect. The fact of building development of this property is of no importance here [Górecki 2002].

### **THE RIGHT OF PRE-EMPTION OF A CO-OWNER**

In accordance with article 166 of the Civil Code [Kodeks... 1964] in case of sale by the co-owner of an agricultural property concerning the share in the jointly owned property or a part of this share the other co-owners are entitled to the right of pre-emption, if they run a farm on the jointly owned land. However, this does not apply to the case when a co-owner running a farm sells his share in the co-owned property together with the farm or when the buyer is another co-owner or a person who would inherit the farm after the seller. The right of pre-emption stipulated in article 166 § 1 of the Civil Code [Kodeks... 1964] may also apply to perpetual usufructuaries of an agricultural property (argumentation from article 237 of the Civil Code).

The introduction of the right of pre-emption is justified by the protection of existing farms and is to prevent their divisions. As it may easily be observed, the scope of the statutory right of pre-emption is limited. The right of pre-emption as stipulated in article 166 § 1 of the Civil Code [Kodeks... 1964] does not apply to such agricultural properties, which are not parts of a farm. Thus a question arises whether it is not the case when co-owners run a joint farm on land covered by co-ownership or whether it also applies to a situation when co-owners run individual (separate) farms. The Civil Code explicitly stipulates running one farm and not a bigger number of farms. Using the literal interpretation it must be stated that the legislator imposes on “co-owners” the condition of running a joint farm (and not “farms”) and that these co-owners are vested with the right of pre-emption [Gniewek 2001]. In the resolution of 30th June 1992 the Supreme Court<sup>3</sup> stated that heirs of an agricultural property are not entitled to the right of pre-emption, mentioned in article 166 § 1 in relation to article 1035 of the Civil Code [Kodeks... 1964], if one of them disposes of their share in the inherited property in a situation when within this share on a plot of land actually portioned out from this property he/she runs a separate farm.

It should be remembered that the conclusion of an unconditional sales contract for the share in a co-owned agricultural property with an infringement of the right of pre-emption vested in the co-owners results in an absolute invalidity of this legal transaction (article 599 § 2 of the Code) [Kodeks... 1964].

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<sup>3</sup> III CZP 75/92, OSNC 1993/1-2/12.

## EXERCISE OF THE RIGHT OF PRE-EMPTION

The right of pre-emption may be exercised only in case of the sale of an agricultural property. If the owner intends to sell to a third party the objective property, a sales contract with this person in the form of a notarial deed may be concluded only on condition that the party entitled to the right of pre-emption (a lessee, a co-owner, the Agricultural Property Agency) do not exercise this right. The alienator should promptly notify the parties entitled to pre-emption on the contents of the above mentioned sales contract with a third party. Next within a month from the receipt of the above mentioned notice the entitled party should file a declaration of will in the form of a notarial deed on the exercise of the vested right. Obviously the exercise of the right of pre-emption is a right and not an obligation. From the moment the party vested with the right of pre-emption files an effective declaration of will, i.e. in a timely fashion and in the form of a notarial deed, on the exercise of the vested right, a sales contract between the seller and the entitled party takes effect.

## CONCURRENCE OF RIGHTS RESULTING FROM THE RIGHT OF PRE-EMPTION

The legislator did not regulate in the provisions the problem of priority in case of concurrence of the right of pre-emption from the Act on the establishment of the agrarian system with the cases of the statutory right of pre-emption reserved in other Acts. Three cases of such concurrence of rights are of most significance. The first is the concurrence of the right of pre-emption from the Act on the establishment of the agrarian system with the right of pre-emption reserved in article 166 of the Civil Code [Kodeks... 1964]. The second case pertains to the concurrence with the right of pre-emption of an agricultural producers' cooperative, vested on it based on article 147 § 2 of the cooperative law [Ustawa... 2003], in case of a transfer of ownership for value of the contribution in land by a member of the cooperative. The third case refers to the concurrence of the right of pre-emption of a lessee with the right of pre-emption of the Agency, resulting from article 29 item 4 of the Act on the management of agricultural property of the State Treasury [Ustawa... 2007].

First we need to analyze a situation when a property being leased is an object of co-ownership. In case of sale a concurrence may occur of the right of pre-emption of a lessee of an agricultural property reserved in article 3 item 1 of the Act of 11 April 2003 [Ustawa... 2003], with the right of pre-emption of a co-owner of this property resulting from article 166 of the Civil Code [Kodeks... 1964]. Different opinions on the subject are presented in the doctrine. It seems that the right of pre-emption should be vested first of all in the lessee. Such an opinion was proposed by some representatives of the doctrine on the ground of previously binding regulations concerning the right of pre-emption [Stempka-Jażwińska 1981]. It needs to be pointed out that *ratio legis* of article 3 item 1 of the Act of 11 April 2003 [Ustawa... 2003] consists in the protection of an integral production unit, such as a family farm undoubtedly is, by facilitating a combination of the actual use of a property with its ownership. In turn, the aim of article 166 of the Civil Code [Kodeks... 1964] is to create conditions making it possible for

individual co-owners of an agricultural property to increase their share in the property, and as a consequence to accelerate the process of land consolidation in agriculture. Social and economic considerations covered by protection stipulated in article 3 item 1 of the Act of 11 April 2003 [Ustawa... 2003] are undoubtedly of bigger practical importance than respective reasons underlying article 166 of the Civil Code [Kodeks... 1964]. As a consequence, the protection of interest of the lessee should find precedence over the protection of interests of co-owners of an agricultural property. It should be added here that the problem of concurrence of the right of pre-emption of a lessee and a co-owner is of limited practical importance. In literature we may also find opinions that the incidence of concurrence of the right of pre-emption of a lessee and a co-owner is practically impossible [Lichorowicz 2004].

In turn, when investigating the concurrence of the right of the co-owner with the right of the Agency we need to state that since in the light of the Act the right of pre-emption is vested in the Agency only as the second in rank, it is an argument suggesting we should give priority to the right of a co-owner over the right of the Agency.

In case of concurrence of the right of pre-emption from the Act on the management of the agrarian system with the right of pre-emption of an agricultural producers' cooperative, the priority of the right of the cooperative may be inferred from the teleological interpretation of the provision of article 3 point 5 of the Act [Ustawa... 2003], stipulating the above mentioned exclusion of pre-emption of the lessee and the Agency in case of sale by a member of an agricultural producers' cooperative constituting the contribution in land. This regulation suggests that the legislator values more the purchase of a property constituting the contribution in land by the cooperative than its purchase by a lessee or the Agency. Thus, if based on the principle of rationality we ascribe a cohesive system of values to the legislator, then we should infer that in case of the concurrence of the right of pre-emption from article 147 § 2 of the cooperative law with the right of pre-emption of a lessee and the Agency from the Act on the establishment of the agrarian system [Ustawa... 2003], the right of the cooperative is given priority, the cooperative in that case being the object more preferred by the legislator.

We also need to consider the concurrence of the right of pre-emption vested in the lessee based on article 3 of the Act of 11 April 2003 [Ustawa... 2003] with the right of pre-emption of the Agency. It seems justified to give priority to the right of pre-emption of a lessee as the current user of the agricultural property. First of all, this is justified by the requirement to preserve the stability of farming and support for the development of family farms. One of the tasks for the Agency is to create and improve the area structure of family farms (article 6 of the Act of 19 October 1991) [Ustawa... 2007]. According to article 3 item 1 of the Act of 11 April 2003 [Ustawa... 2003], the right of pre-emption is vested first of all in the lessee of farmland – an individually farming peasant or a member of the agricultural producers' cooperative and only then to the Agency. It seems that the same principle should be binding in case of the concurrence of the right of pre-emption of the lessee from article 3 item 1 of the Act of 11 April 2003 [Ustawa... 2003] with the right of pre-emption from article 29 item 4 of the Act of 19 October 1991 [Ustawa... 2007], especially as the scope of the application of the right of pre-emption of the lessee was considerably limited. It does not seem justified for the Agency to use the right of pre-emption in relation to the leased property constituting a part of the family farm, and next – after the conveyance of the property to the Agricultural Property Stock of the State Treasury – to allocate it to be used for the development of family

farms. Also in practice it is assumed that only after lessee does not exercise its right, the right of pre-emption of the Agency based on article 29 item 4 of the Act of 19 October 1991 applies [Ustawa... 2007].

## CONCLUDING REMARKS

Considerations concerning the right of pre-emption of agricultural property suggest several concluding remarks.

First of all we must consider the fact that the right of pre-emption of agricultural property to the lessee and co-owner has to be considered as positive.

As far as lessees are concerned it seems that this right should be vested not only in individual farmers, but also commercial companies if their main activity is running agricultural activity, the partners are qualified farmers and the area of the farm does not exceed 300 ha. We also need to support the notion of strengthening the position of a lessee in case of sale of farmland leased to a third party, passing over the lessee. It would be an advisable solution to introduce a construction that in case of sale of leased farmland with the statutory right of pre-emption being passed over, the lessee could demand from the court to be granted the right to take the place of the buyer in the sales contract and purchase the leased property under terms and conditions arranged with the third party.

Referring to the right of pre-emption of the Agricultural Property Agency it seems that it is necessary to change the provisions of the Act of 11 April 2003 [Ustawa... 2003] on the establishment of the agrarian system. It is justified to state that the objective scope of the application of the right of pre-emption (redemption) is too wide. Rights of the Agency should refer only to agricultural properties exceeding a specified area, e.g. 3 ha, utilized agriculturally and which are essential from the point of view of the realization of the goals of the Act.

## REFERENCES

- Gniewek E., 2001. Kodeks cywilny. Księga druga. Własność i inne prawa rzeczowe. Komentarz. Wyd. C.H. Beck, Warszawa.
- Górecki J., 2002. Prawo pierwokupu. Komentarz do artykułu 596-602 k.c. i innych przepisów regulujących prawo pierwokupu. Zakamycze, Kraków.
- Kodeks cywilny z 23 kwietnia 1964 r. 1964. Dz. U. PRL 16, item 93, with later amendment.
- Lichorowicz A., 2004. Dzierżawa. In: System Prawa Prywatnego. Prawo zobowiązań – część szczegółowa. T. 8. Ed. J. Panowicz-Lipska. Wyd. C.H. Beck, Warszawa.
- Radomska E., 1972. Ustawowe prawo pierwokupu nieruchomości. Wyd. UMK, Toruń.
- Stempka-Jaźwińska C., 1981. Umowa dzierżawy nieruchomości. Wyd. UMK, Toruń.
- Truskiewicz Z., 2003. Przeniesienie własności nieruchomości rolnej w świetle ustawy o kształtowaniu ustroju rolnego (część II). Rejent 11.
- Ustawa z dnia 11 kwietnia 2003 r. o kształtowaniu ustroju rolnego. 2003. Dz. U. RP 64, item 592 with later amendments.
- Ustawa z dnia 16 września 1982 r. Prawo spółdzielcze. 2003. Dz. U. RP 188, item 1848, with later amendments.



Ustawa z dnia 19 października 1991 r. o gospodarowaniu nieruchomościami rolnymi Skarbu Państwa. 2007. Dz. U. RP 231, item 1700, with later amendments.

## **USTAWOWE PRAWO PIERWOKUPU NIERUCHOMOŚCI ROLNYCH**

**Streszczenie.** W artykule przedstawiono problematykę prawa pierwokupu nieruchomości rolnych oraz podjęto próbę odpowiedzi na pytanie, czy słuszne było wprowadzenie przez ustawodawcę prawa, które ogranicza atrybut właściciela, jakim jest uprawnienie do swobodnego rozporządzania rzeczą. Prawo pierwokupu nieruchomości rolnych jest uregulowane w różnych ustawach i przysługuje dzierżawcy, Agencji Nieruchomości Rolnych oraz współwłaścicielowi. Artykuł porusza także kwestie dotyczące wykonania prawa pierwokupu oraz problematykę zbiegu prawa pierwokupu z ustawy o kształtowaniu ustroju rolnego z innymi przypadkami ustawowego prawa pierwokupu. Zdaniem Autorów, należy pozytywnie ocenić przyznanie prawa pierwokupu nieruchomości rolnych dzierżawcy oraz współwłaścicielowi. Jeżeli chodzi o prawo pierwokupu Agencji Nieruchomości Rolnych, to wydaje się konieczna zmiana przepisów ustawy z dnia 11 kwietnia 2003 roku o kształtowaniu ustroju rolnego [Ustawa... 2003]. Zakres przedmiotowy zastosowania prawa pierwokupu (wykupu) jest zbyt szeroki.

**Słowa kluczowe:** nieruchomość rolna, prawo pierwokupu, sprzedaż, Agencja Nieruchomości Rolnych

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