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Title: Acquisition of real estate by foreigners in Poland : principles and procedure

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ACQUISITION OF REAL ESTATE BY FOREIGNERS IN POLAND. PRINCIPLES AND PROCEDURE

Acquisition of real estate by foreigners in Poland is governed by Act of 24th March 1920. This Act, owing to the fact that Poland joined the European Community, and thereby was obliged to adjust the Polish legislation to European standards of legal regulations, was fundamentally amended, so its present form can be found in Journal of Laws from 2004, no 167, item 1758 (further called the Act).

The real estate in Poland comprise ground estate (including agricultural), buildings permanently related to ground or parts of such buildings, if special regulations state that they constitute separate from the ground subject of the right of ownership (Article 46 and later of the Civil Code, Journal of Laws from 23rd April 1964, no 16, item 93 with further amendments). The ground estate is a part of the Earth surface constituting separate subject of ownership, whereas the agricultural estate is the estate which is or may be used for purposes of production activity in agriculture in the field of plant and animal production (including gardening, orcharding, fishing).

For acquisition of real estate in Poland, regardless whether it is acquired by a Pole or a foreigner, it is always necessary to do it in the form of a notarial act, otherwise the legal activity of acquisition of real estate will be void. In practice it means that any such acquisition must be concluded before a notary in order to be valid. According to the Act, the acquisition of real estate is any legal event from which results in acquisition of the right of ownership or perpetual usufruct, because these two rights are legally similar. Considering the archaism of legal construction of perpetual usufruct, the Polish legislation is slowly moving away from it replacing it with the right of ownership, which is fuller.

In the meaning of the Act the foreigners are:

- 1) a natural person not possessing Polish citizenship,
- 2) legal persons having their seat abroad,
- 3) companies not being a legal person, of persons provided for in items 1 or 2, having their seat abroad, established in compliance with the legislation of foreign states,
- 4) legal persons and commercial partnerships not being a legal person, having their seat on the territory of the Republic of Poland, controlled directly or indirectly by persons or companies provided for in items 1, 2 and 3. The controlled commercial partnership is the partnership in which a foreigner or foreigners directly or indirectly possess over 50% of votes at the partners assembly or a general assembly, also as gagee, user or upon the basis of agreements with other persons, or having dominating status in the meaning of the Act from 15th September 2000 – Code of Commercial Partnerships (Code of Commercial Partnerships, Journal of Laws no 94, item 1037 with further amendments).

According to Article 4 §1 item 4 a dominant partnership is the partnership which:

- 1) possesses directly or indirectly the majority of votes at the partners assembly or general assembly also as gagee or user, or in the management of other capital partnership (dependent partnership), also on the basis of agreements with other persons, or
- 2) is entitled to appoint or dismiss the majority of members of board of another capital partnership (dependent partnership) or cooperative (dependent cooperative), also on the basis of agreements with other persons, or
- 3) is entitled to appoint or dismiss the majority of members of board of supervisors of another capital partnership (dependent partnership) or cooperative (dependent cooperative), also on the basis of agreements with other persons, or
- 4) members of its board or board of supervisors constitute more than a half of members of board of capital partnership (dependent partnership) or cooperative (dependent cooperative), or
- 5) it possesses directly or indirectly the majority of votes in personal dependent partnership or in the general assembly of a dependent cooperative, also based on agreements with other persons, or
- 6) has a significant influence on the activity of a capital dependent partnership or a dependent cooperative, particularly based on agreements constituting holding constructions.

Acquisition of real estate by a foreigner in Poland requires permit, which is issued by the Minister of Internal Affairs and Administration. Without this permit, as a rule, a foreigner may not successfully legally acquire real estate in Poland – such acquisition is void. In order to obtain an adequate permit, a foreigner should file a motion in the ministry. Filing a motion for issuance of the permit initiates the administrative procedure. The motion should contain the determination of foreigner (his/her name, surname, company, address of residence or seat) and his legal status, the determination of the real estate which is to be acquired, the determination of the seller, description of a legal form of acquisition of the real estate and also the information concerning the purpose and ability of acquiring the real estate. A foreigner should also enclose to the motion documents confirming the data included in the motion (in case of natural persons – a copy of pages of the valid passport or identity card, legal persons or organizational units not being a legal person – a copy from the adequate register, in which the foreigner is registered), and also other documents which may confirm his bonds with the Republic of Poland (for example possessing Polish nationality or Polish origin, solemnizing marriage to a Polish citizen, performing business or agricultural activities in Poland in compliance with the provisions of Polish legislation. Presenting to the minister other documents, which may be helpful in establishing the correctness of acquisition of real estate by a foreigner (for example extract from chain of title, extract from the register of grounds together with a sketch of the map from files, statement from the commune concerning the destiny of the real estate according to the spatial development plan for the area) will definitely accelerate the procedure of acquiring the real estate by him. The Minister of Internal Affairs and Administration prior to issuance of permit may demand to present evidence and information necessary for considering the motion and may check that the acquisition of real estate by a foreigner will not pose threat to the defensiveness, national security or public order and whether it is in accordance with the state's interest. In this field he may also consult other public administration organs or professional organizations, in order to establish whether a foreigner fulfils the legal conditions. However, the opinion or information obtained this

way are not binding for the minister. They only help him make the decision taking into account all significant circumstances of the case.

Administrative matters in Poland should be taken care of without delay. It particularly concerns the matters which may be considered on the basis of evidence provided by a party together with the demand to initiate the procedure, or on the basis of facts and evidence commonly known to the administrative organ. If the explanation of the matter requires conducting administrative trial, such a matter should be handled within a month, and in particularly complicated cases – two months. These time limits are of instructive character, which means that they may be both shortened as well as prolonged by the organ handling a specific matter. In the latter case, the organ is, however, obliged to state the reason of such prolongation of the procedure and determine the expected time of handling the matter to the party. Relating to permit for acquisition of real estate by a foreigner, the legislator assumes that the procedure should be complete within two months. In practice this procedure takes longer, depending on how complicated the case is (concerns mainly the cases when a foreigner applying for the permit is not a natural person). Only in case when a foreigner wants to acquire real estate located on the territory of a Special Economic Zone, the procedure should take a little shorter. The Act requires the decision to be taken within no longer than one month, however, even this time limit may be prolonged. The permit is issued in the form of an administrative decision. However, prior to its issuance, the Minister of Internal Affairs and Administration addresses the Minister of Defense, and if the acquisition concerns agricultural estate, also to the minister competent in the country development, with the enquiry in order to make sure that they do not have any reservations as for acquisition of the specific real estate by a foreigner applying for an adequate permit. If they have any reservations in this aspect, they may raise an objection within 14 days from the date of enquiry by the Minister of Internal Affairs (in justified cases the time limit for raising an objection may be prolonged to 2 months to enquire the minister mentioned above). Addressing the above mentioned ministers is a standard procedure and does not determine the content of the future decision. However, if the Minister of Internal Affairs and Administration intends to issue the refusal, he may act independently, i.e. he does not have to address the motion to mentioned ministers.

The permit to acquire real estate by a foreigner is issued when the acquisition of real estate by a foreigner does not pose threat to the defensiveness, national security or public order, and is not in opposition with social policy and public health considerations, and moreover, he proves that there arise circumstances confirming his bonds with Poland. The permit determines, first of all, the person of a buyer and seller, the real estate to be acquired, factual and legal justification and the so-called special conditions. Special conditions may concern only the buyer (foreigner) and they most often refer to the ability to enter into agreement by a foreigner, and not to its content. However, they play an important role, since if they were determined, and the foreigner is not able to present an official confirmation that they were fulfilled, the foreigner may not legally successfully acquire real estate in Poland. Considering the state's security, the Minister of Internal Affairs and Administration may not justify his decision concerning the permit. The permit is valid for the period of two years from the date of its issuance.

The foreigner who intends to acquire real estate in Poland, but is not yet sure if he will finally decide to perform this legal activity may take advantage of the promise. The prom-

ise of the permit is particularly useful for foreigners who are legal persons or other organizational units (founders) having a seat abroad or in Poland, but controlled by them (so, in the meaning of Polish legislation, also foreigners) at the stage of their creation. In such a case, already at the stage of creation of the given subject, they can be certain that they will obtain a permit to acquire a given real estate in the future. The procedure to obtain a promise is the same as in case of applying for the permit itself, because the result of obtaining a promise is a legal status where the foreigner is certain that if he applies for a permit within the period of time of validity of the promise (i.e. one year from the date of obtaining a promise), he will obtain it unless during this time the actual state relevant to the decision concerning the case, i.e. obtaining the permit, changes.

In case of refusal, concerning both the promise and the permit, a foreigner may file a motion to reconsider the case to the Minister of Internal Affairs and Administration. Then, the minister is obliged to reconsider the motion and he may, but does not have to, change his mind and issue a positive decision.

Initiation of administrative procedure to obtain a permit for acquisition of real estate by a foreigner does not mean that the foreigner may not change his mind about acquiring the real estate till the end of the procedure. If he or the seller state that he does not intend to buy (and in case of the seller – sell) the given real estate, the Minister of Internal Affairs and Administration discontinues the procedure.

Considering the peculiarity of commercial companies, the acquisition and taking shares and stocks (or performing other legal activities concerning them) in commercial companies which have a seat in Poland, by foreigners, also requires obtaining the permit from the Minister of Internal Affairs and Administration, if in the result of such activities, the company which is an owner or perpetual usufruct of the real estate located in Poland becomes a controlled company. Moreover, the acquisition, or taking shares or stocks in such a company by a foreigner, also requires the permit by a minister competent in the internal affairs, if such a company is a controlled company, and if shares and stocks are acquired or taken by a foreigner who is not a shareholder of the company. The procedure is conducted according to the same rules as in case of applying for the permit by a foreigner who is a natural person but the motion for obtaining the permit (taking or performing other legal activity concerning shares or stocks) should, apart from the above mentioned data, also include:

- 1) determination of the company whose shares (stocks) are acquired, taken or are subject to other legal activity;
- 2) determination of the company which will become a controlled company in the result of acquiring, taking shares (stocks) or other legal activity concerning shares (stocks) of other commercial company;
- 3) determination of real estate which is owned or in perpetual usufructuary of a company which is to become a controlled company or whose shares (stocks) are acquired or taken by foreigners;
- 4) determination of the way of acquiring or taking shares (stocks) or other legal activity concerning shares (stocks) in a company in the result of which the company who is an owner or a perpetual usufruct of real estate on the territory of the Republic of Poland will become a controlled company.

If shares of the above mentioned companies have been admitted to public trading, or the company is the owner or perpetual usufructuary of the real estate, the acquisi-

tion of which does not require the permit, the foreigner does not have to apply for the permit to acquire, take or perform other legal activity concerning it.

The permit is also not required in case of transforming a commercial company and acquiring a real estate by inheriting by persons entitled to statutory succession (in the meaning of native law of the deceased person leaving inheritance, and in case there is no such regulation in the law of the deceased person, the Polish law is applied – it means that entitled to statutory succession in the first order are children and a spouse of the deceased person, and in the second order also his parents and brothers and sisters – see art. 931 and 932 of the Civil Code). However, if a foreigner is to acquire the right of ownership or perpetual usufructuary of real estate located in Poland by testamentary inheritance, he should file a motion to the Minister of Internal Affairs and Administration for an adequate permit within two years from the death of the person leaving inheritance. In this course he is obliged to obtain the permit. However, if he does not obtain the permit, the right of ownership to this real estate or the right for perpetual usufructuary is acquired by persons who would be entitled to statutory succession. The same applies to the situation when a foreigner acquires shares or stocks of a commercial company which is the owner or perpetual user of real estates in the territory of the Republic of Poland which are part of the inheritance. Then, if the foreigner is to inherit the above mentioned shares or stocks in the course of statutory succession, the permit is not necessary.

The Act concerning acquisition of real estate in Poland by foreigners also determines lots of other circumstances, which do not require a foreigner to obtain the permit. They are the following:

- 1) acquisition of separate living accommodation,
- 2) acquisition of separate business premises destined for garages or share in such premises, if it relates to providing for the living needs of the purchaser or owner of the real estate or separate living accommodation,
- 3) acquisition of real estate by a foreigner residing in the Republic of Poland for at least 5 years following the granting of a permit to settle thereto,
- 4) acquisition by a foreigner, being the spouse of a Polish citizen and residing in the Republic of Poland for at least 2 years following the granting of a permit to settle thereto, of real estate that as a result of acquisition shall constitute marital estate of the spouses,
- 5) acquisition of real estate by a foreigner, if on the day of acquisition they are entitled to statutory succession from real estate transferor, and the real estate transferor has been the owner or perpetual usufructuary thereof for at least 5 years,
- 6) acquisition by a legal person or commercial partnership having its seat in Poland and controlled directly or indirectly by foreigners for its statutory purposes, of undeveloped real estate that the total area whereof in the whole of the country does not exceed 0,4 ha within cities,
- 7) acquisition of real estate by a foreigner, being a bank and simultaneously mortgagee, through the seizure of real estate for ownership due to unsuccessful auction in execution proceedings,
- 8) acquisition or seizure by a bank directly or indirectly controlled by foreigners, shares or stocks in the company which will in the result of such acquisition become controlled by foreigners, due to the bank's claims resulting from performed banking actions.

These exemptions do not apply to real estate located in border area and agricultural real estate of area exceeding 1ha. The foreigner wanting to acquire real estate in the border area or agricultural real estate exceeding the area of 1ha will have to obtain the permit regardless of the exemptions defined by the Act.

Since it is necessary to adjust Polish legislation to legal standards of Member States of the European Union, i.e. to enable free flow of people, capital, goods and services, the Polish Act on acquisition of real estate by foreigners does not require obtaining the permit to acquire the real estate by foreigners who are citizens or entrepreneurs of the Member States of the European Economic Area. This rule does not apply to acquisition of agricultural and forest real estate and the so-called second house. By acquisition of the second house they mean acquisition by a foreigner of the real estate designed for building accommodation or for recreational purposes, which will not constitute the permanent place of residence of the foreigner (it does not apply to acquisition of a separate living accommodation).

Acquisition of agricultural and forest real estates by foreigners will require obtaining the permit for the period of 12 years since joining the European Union by Poland and the acquisition of the second house for the period of 5 years. However, these so-called protective periods as regards agricultural real estate (It means that no foreigner shall be able to acquire forest real estate in Poland for the period of 12 years from the date when Poland joined European Union), do not concern the foreigners who for over 7 (on agricultural real estate located in the following voivodeships: the dolnośląskie, kujawsko-pomorskie, lubuskie, opolskie, pomorskie, warmińsko-mazurskie, wielkopolskie, zachodniopomorskie) and 3 (on agricultural real estate located in the following voivodeships: the lubelskie, łódzkie, małopolskie, mazowieckie, podkarpackie, podlaskie, śląskie, świętokrzyskie) years since the date of concluding an agreement of lease with stated date have been performing agricultural activity on this real estate in person and have been legally dwelling on the territory of the Republic of Poland. Citizens of Member States of the European Economic Area who were, on the day when Poland became a member of the European Union, shareholders of commercial companies with seats on the territory of the Republic of Poland, may include in the period of lease the period of lease of the agricultural real estate by the company if during this period, being shareholders of the company, they performed in person agricultural activity on this real estate and legally dwelled on the territory of the Republic of Poland. As regards the acquisition of the second house, despite the protective period, a foreigner may acquire a real estate without the permit if he has been residing legally and continuously for at least 4 years on the territory of the Republic of Poland, or he wants to acquire it in order to perform business activity consisting in tourist services.

The Act on acquisition of real estate by foreigners in Poland also introduces a general rule that the surface of the real estate acquired by a foreigner in order to satisfy his living needs can not exceed 0,5ha, and in case of acquiring real estate for performing business or agricultural activity, its surface should be justified by real needs resulting from the kind of activity performed.