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Commission I

**National Report – Rapport national – Landesbericht
Poland**

**Legal incentives and legal obstacles to diversification for farmers –
Incitations et obstacles juridiques de la diversification de
l'agriculture – Rechtliche Fördermittel und Hindernisse für die
bäuerliche Diversifikation**

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National Report for Poland

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I. Introduction

The issue of diversification of farms (agricultural holdings) which consequently leads to the diversification of farmers (agricultural producers) is very complicated in the Polish legal system. The basic problem in this area is the lack of statutory definition in the state regulations. Due to the lack of this definition it is not possible to define clearly the purposes and directions of diversification. Another obstacle in the Polish legal system is the issue of defining the scope for the farm (agricultural holding) as an object of support. It seems that the Polish legislator insufficiently perceives the need for such a statutory definition of the agricultural holding. Definitions of the farm (agricultural holding), which are found in the Polish legal system, are of different character and depend on the purpose of the regulations. Alike in the majority of EU legislations the Polish Civil Code (article 55³ Civil Code) provides an object-functional definition of the agricultural holding as an object of turnover. Despite the fact that in the Polish doctrine this definition has aroused a number of controversies, it seems that there is no doubt that the agricultural holding specified in this regulation

as a functionally connected set of components such as, among others, agricultural land including forest land, as well as buildings, parts of buildings, equipment and livestock can be, like an enterprise, the object of sale in one legal action provided they are or can constitute an organised business entity. In addition, the farm (agricultural holding) defined in this way also comprises the rights connected with its running. There is also a legal definition of the farm (agricultural holding) in the act on agricultural income tax. The purpose of this definition is to define the agricultural holding as an object of taxation. Moreover the functional approach to the agricultural holding is found in the provisions of the insurance act. In the act on farmers' social insurance the agricultural holding is defined as: each farm which serves the purposes of conducting agricultural activities. This enables to distinguish farmers being subject to insurance by virtue of law. It should be noted that according to article 1 section 2 of the Act of 20th December 1990 on farmers' social insurance¹ in the Polish legal system farmers' social insurance is divided into accident, illness and maternity insurance and pension-disability insurance. In spite of this diversity both groups of farmers are subject to obligatory insurance. This applies to farmers whose holding area is more than one comparative fiscal hectare or special unit of agricultural production. The issue of diversification of agricultural holdings and farmers (agricultural producers) will be discussed in more detail later on in this Report where economic incentives of diversification will be considered.

A special approach to agricultural holding in the Polish legislation is found in the Act of 11th April 2003 on creating an agricultural system² In this act on the basis of civil-law category of farm (agricultural holding) as an object of turnover a legal category of family farm was distinguished. According to article 5 of the act in question a family farm is defined as an agricultural holding run by an individual farmer with total area of arable land not bigger than 300 hectares. Thus classifying an agricultural holding as a family farm requires two conditions to be fulfilled, namely: subjective condition related to a person running an agricultural holding (quality of an individual farmer) and

¹ Journal of Laws 2008, No. 50, item 291 as amended.

² Journal of Laws 2003, No. 64, item 592 as amended.

objective one related to the maximum area of arable land which is a part of a particular holding.

It is emphasised in the Polish doctrine that this definition was formulated for the needs of limiting and control over agricultural property turnover, which was done in connection with the Polish accession to the European Union rather than with defining a type of agricultural holding which is subjected to system protection³ and can be supported with both the EU and the state funding⁴.

For the sake of clarity of these considerations, it should be added that the definition of a farm (agricultural holding) is also found in the Act of 18th December 2003 on the state register system for producers, register of farms (agricultural holdings) and the record of applications for granting financial support⁵. According to article 3 section 1 of this act an agricultural holding is defined as all agricultural property being in the possession of the same subject or a farm in accordance with article 2 subsection b. of the Council Regulation (EC) No. 1782/2003 of 29th September 2003 specifying common terms and conditions for direct support schemes for common agricultural policy and establishing particular support schemes for farmers as well as changing the following Regulations: (EEC) No. 20119/93, (EC) No. 1452/2001, (EC) No. 1453/2001, (EC) No. 1454/2001, (EC) No. 1868/94, (EC) No. 1251/1999, (EC) No. 1254/1999, (EC) No 1673/2000, (EEC) No. 2358/71 and (EC) No. 2529/2001⁶.

In conclusion of this part of the Country Report it should be noted that the problem of the Polish legislation is not only the lack of definition of farm (agricultural holding) diversification, and as a result diversification of farmers (agricultural producers), but also the lack of definition of farm (agricultural holding) formulated for the purposes of support schemes for the Union and state (domestic) funding. It

³ cf A.Lichorowicz, *Instrumenty oddziaływania na strukturę gruntów Polski w ustawie z dnia 11 kwietnia 2003 o kształtowaniu ustroju rolnego*, „Kwartalnik Prawa Prywatnego”, 2004, vol.2.

⁴ cf D._obos-Kotowska, *Prawne instrumenty wsparcia gospodarstw ywotnych ekonomicznie* In *Studia Iuridica Agraria*, vol. VI, edited by S.Prutis and K.Stefa_ska, p.56 and subsequent ones.

⁵ Journal of Laws 2004, No. 10, item 76 as amended.

⁶ Journal of Laws of the EU L 270 of 21st October 2003, p.1 as amended; Journal of Laws of the EU, Polish special edition, chapter 3, vol.40, p.269 as amended. It is worth mentioning that Article 2 of the Regulation was repealed.

seems, however, that the Polish legislator has a legal basis enabling to formulate such a definition. In article no. 23 of the Constitution of the Republic of Poland of 2nd April 1997 it was directly specified that a family farm is a base for the agricultural system. The regulation in question is a very important system postulate and is an authorisation for an ordinary legislator to formulate principles not only for the intended land area structure of farms (agricultural holdings) and defining the system model of the farm (agricultural holding), including the 'family' element, but also for taking into account in this model criteria for a holding which is protected and capable of obtaining support. The construction of such a model should be a starting point for potential formulation in the domestic legislation of the notion of diversification as well as for establishing purposes and criteria for diversification.

II. Notion of diversification in *de lege lata* and *de lege ferenda* economic and legal approach.

The indicated lack of statutory definition of diversification of agricultural holdings requires the search for the scope of this notion not only in a juridical approach but also in an economic one. It seems that the attempt to classify diversification in terms of economic categories should be a starting point in answering a question about understanding the meaning of this notion also in terms of legal categories.

On the whole, from the point of view of economic sciences, diversification of farms (agricultural holdings) means diversification in the structure of agricultural production as well as exploiting ground resources, capital and labour in farms for activities other than agricultural activity⁷. The purpose of diversification, as seen in this approach, is to make the use of agricultural holding resources more effective not only in an agricultural activity but also in non-agricultural activity. Thus diversification ventures also express entrepreneurial development, activation of inhabitants in rural areas, limiting unemployment and increasing incomes of inhabitants in rural areas. Diversification of agricultural holdings is in accordance with the purposes of the policy of multifunctional development of rural areas. It should also be added that the scale of

production and incomes received from agricultural activity are determined by the condition of land resources in Polish farms (agricultural holdings), and above all, by fragmented land structure. What principally matters in the conditions of increasing competition are directions of diversification which enable flexible adaptation of production activity of agricultural holdings to market requirements. The direction which is gaining more and more significance is the use of agricultural holdings' resources in non-agricultural activity. Another significant economic purpose of diversification is also diversification in the sources of income received within the agricultural holding run by a farmer. The basic unit of economic value of agricultural holdings is the sum of standard direct surpluses from all kinds of activities done in a particular holding. The economic value is expressed in ESU (i.e. European Size Unit).

From the point of view of practicality of the Country Report it is important to relate the considerations to the basic statistical parameters. In Poland out of 2.391 agricultural holdings running agricultural activity in 2007, the majority accounted for the economic class of 0 - 2 ESU (67.9%, only by 0.7% less than in 2005). The economic value of more than 4 ESU was achieved by only 19.5% of agricultural holdings (0.7% more than in 2005). The average economic value of an agricultural holding in Poland increased by 0.3% ESU since 2005 and amounted to 3.6 ESU (the average for the European Union in 2005 was 10.5 ESU). These data illustrate the slow increase in agricultural holdings in Poland and their difficult competitive position on the market.

Bearing in mind the statistical data above, it should be noted that the issue of diversification of agricultural holdings in Poland seems to be particularly significant.

Therefore there is no doubt that the Polish legislator should search for legal criteria for diversification which would also include the above mentioned economic parameters. For this purpose the Council Regulation of 8th December 2008 establishing community typology of farms⁸ should be used as a legal basis. In article 1 section 2 of this regulation it is directly specified that the aim of this typology is a homogenous classification of business farms according to their economic size

⁷ cf. I.Paluszek, *Dyweryfikacja wykorzystania zasobów ziemi w gospodarstwach rolnych w Polsce*. Scientific Annuals of the Association of Economists for Agriculture and Agrobusiness, vol. X.

⁸ Journal of Laws of the EU L 2008.335.3.

and type of farming as well as the importance of other gainful activities directly related to the holding. Adopting this regulation as a starting point for legal considerations it seems that the conflict between the EU and Polish legal systems does not pose a problem for the Polish legislator. The problem of potential legal diversification lies only in diversified economic parameters. However, it should be signalled that due to the lack of legal definition of diversification in the Polish legislation this notion is to be understood more widely than just diversifying an activity in respect of other gainful activities. In the Polish systemic and economic conditions, the emphasis should be placed on determining the intended size of the farm measured by size or income class. The final purpose of such diversification should be the capacity to absorb the union support.

III. Specific legal solutions related to diversification

1. The main challenge for the Polish legislator is undoubtedly search for more effective solutions aiming at modernisation of area structure of agricultural holdings. Too fragmented farms, due to their economic weakness, do not facilitate the diversification of agricultural production or more effective use of land, capital or labour in these holdings. What is more, running non-agricultural activity will more often be possible outside these farms rather than within these holdings, which seems to contradict the sense of diversification seen as running a non-agricultural activity by a farm with the use of its resources (as a complementary activity).

As far as the land structure is concerned, the Polish legislator focuses mainly on the control over agricultural property turnover. It should be noted that the control system existing before the system transformation in Poland in 1989-1990 was not fully adjusted to the conditions of the market economy. During the first stage of system changes the agricultural property turnover was excessively liberalised through the elimination from the Polish Civil Code all the limitations of this turnover except for statutory inheritance of farms. Moreover, even sustained regulations related to the statutory inheritance of agricultural holdings were questioned by the Polish

Constitutional Court⁹ which decided that the existing regulations guaranteed neither the integrity and indivisibility of the agricultural holding nor that it will be taken over by a person (persons) with appropriate professional skills and qualifications. According to the Court this purpose should be achieved through an appropriate formulation of regulations specifying the division of inheritance part of which is an agricultural holding.

Only did the Act of 11th April 2003 on creating the agricultural system which became effective on 16th July 2003 partially restore limitations on agricultural property turnover. These limitations, however, are related only to *inter vivos* turnover whereas inheritance of agricultural holdings is still based on general regulations. In practice the limitations in *inter vivos* turnover prove insufficient. In the case of selling agricultural property the limitation means introduction of pre-emption right to which first of all the tenant of agricultural property is entitled - under strictly defined conditions - and then, if there is no entitled tenant or if the tenant did not use his right, the pre-emption right is transferred to the state Agricultural Property Agency. These limitations, however, do not concern the most common type of turnover i.e. so called family turnover. According to the regulations of this act only the Agricultural Property Agency has the right of redemption which can be used if the transfer of agricultural property rights is made through agreements other than sales agreement (e.g. donation).

The Polish legislator also made an attempt at complex restructuring of state agricultural property. Legal regulations related to these issues are included in the Act of 19th October 1991 on management of State Treasury agricultural properties¹⁰. Although the influence of this act on the diversification of agricultural holdings is limited, in the long run their restructuring combined with privatisation should have a beneficial influence on land structure.

The presented legal instruments in the area of property turnover show that they are not fully effective in terms of their influence on the complex creation of land structure. Assuming that the existing structure of agricultural holdings in Poland is still

⁹ cf the sentence of the Polish Constitutional Court of 31st January 2001, reference symbol P4/99 (Journal of Laws No. 11, item 91).

¹⁰ Journal of Laws No. 231 of 2007, item 1700 as amended.

a starting point, support instruments for low-outcome holdings should still play an important role. It seems that only the increase of economic size of these holdings can provide a basis for their diversification which would also include running non-agricultural activities in these holdings.

2. Assuming that, in accordance with article 4 of the Council Regulation (EU) No. 1698/2005 of 20th September 2005 on support development of rural areas by the European Agricultural Fund for Rural Development¹¹, the main purpose of diversification activities is the improvement in quality of life in rural areas and supporting activities aiming at diversification, including non-agricultural activity. These activities are approached through social axis and leader axis. Economic and environmental axes must also be taken into consideration as well as support planned in financial schemes and structural funds. These issues are common knowledge, therefore it does not seem necessary to present specific legal prerequisites. It can be added, however, that due to the provisions of the Regulation it is the member states' responsibility to establish strategies for development and performing tasks in this field at a territorial level - country or region level. This can be done in accordance with internal institutional solutions. At the Community level Strategic Directives on rural policy in 2007-2013 which are of directional character¹². On the basis of these directives the State Strategic Plan was made (article 11 of Regulation No. 1698/2005). It was implemented using the Programme for Rural Areas Development (PROW) for years 2007 - 2013 which is a homogenous operational programme for the whole country. Poland benefited from the possibility of choosing from activities included in the indicated axes, which was reflected in the national scheme for rural areas development. The selection of support instruments referred to in article 5 of the Act on supporting rural areas development was already made in PROW for years 2007-2013. It enabled to formulate Poland's own rural policy on the basis of chosen legal instruments which were regarded as essential for permanent and balanced development. Within the current period of programming

¹¹ Journal of Laws EU 2005 L 277/1.

¹² Decision No. 144/2006 on the Community strategic directives on the development of rural areas. Journal of Laws No. EU 2006, L 55/20.

(2007-2013) legal instruments supporting rural areas development are specified in one programme document i.e. Programme for Rural Area Development for 2007 - 2013. Programme changes of consolidating character, however, are not accompanied by unifying procedures for gaining financial means by beneficiaries. In this area the Polish legislator sustained the regulations obliging in granting support which were applied in the previous period of programming in 2004 - 2006, which cannot be assessed positively. In the Act on support for rural development two courses of action were adopted in relation to application for granting support from the European Agricultural Fund for Rural Development (one is based on administrative law, the other on civil law). The diversification of courses of action in the matters of similar legal character may lead to procedural barriers. It should be noted that beneficiaries of support means are frequently farmers who are not capable of bearing costs of professional legal service. These barriers become more noticeable in the process of diversification.

An example of diversification activities, where the source of obligation is based on the civil law relationship, can be an activity consisting in the establishment and development of micro-enterprise or rendering basic services for economy and rural inhabitants (article no. 5 section 1, item 18 and 19 of Act on support for rural development). It is a typical diversification activity aiming at non-agricultural activity. According to article no. 22 section 1 of Act on support for rural development the support included in these activities is granted on the basis of written agreement in order to be valid. It is a truism to say that diversity of undertakings possible to implement in this course of action requires the adaptation of provisions of a particular agreement to a specific activity. The practice shows, however, that the purpose of agreement is not always achieved. Furthermore, legal disputes over agreements constructed this way are very complicated. It should be noted that the majority of agreements concluded in this course of action are of unnamed character. Complexity of these problems is indicated by case-law of the Polish Supreme Court¹³. While presenting the civil law instruments for implementing diversification activities on the

¹³cf the sentence of the Supreme Court of 28th April 2004, reference symbol V CK 379/03, published in "Monitor Prawniczy" of 2004, no.11/486.

basis of the Act on support for rural development it is necessary to stress the fact that their sources are diversified. It also relates to the course of agreement conclusion. An example of such diversification are activities specified in article 5 section 1, item 22 and 23 of Act on support for rural development concerning the implementation of cooperation projects and functioning of local support team. On the basis of article 13 subsection 1, financial support is granted at the request of a local activity group chosen in competition for the realisation of development strategy worked out by this group. According to article 14 the selection of such a local group in the competition run by the region's self-government is the basis for the conclusion of agreement on conditions and implementation method of local development strategy. However, it can only be signalled that the legal character of this competition was not specified. Consequently a problem arises as to the validity of agreement concluded on the basis of such a competition in the case when this competition is revoked. Therefore it seems that the application of solutions used in tenders are largely insufficient.

3. Another issue that requires presentation is the issue of the state system of direct payments as an instrument of diversification. The legal basis of this system is the Act of 26th January 2007 on payments within direct support scheme¹⁴. It can already be claimed now that the direct payment scheme as a whole is not an active instrument of diversification. This scheme is mostly of social character and its main purpose is to grant support to farmers maintaining agricultural land in accordance with norms. The sole possibility of supporting specific agricultural production and adjusting the amount of payment to the production profile preferred by Poland does not seem to be a satisfactory solution. It can only be signalled that the potential diversification is observed not within single area payment but in payments for energy plants or temporary payments for soft fruit. What is more, the Polish legislator also planned, among others, separate sugar payment, separate fruit and vegetable payment and support for oil-seed rape and perennial plantations, to mention but a few. For the purposes of these considerations it should be emphasised that the Polish legislator pointed to the land possessor (farmer) a subject that is entitled to single area

¹⁴ Journal of Laws No. 35, item 217 as amended.

payment. The legislator used the notion of possession used in the civil law and distinguished independent possession and dependent possession. In the case when the land is the subject of self-contained and dependent ownership (e.g. subject of tenancy) it is just the dependent possessor (the farmer) who is entitled to the payment, that is the subject actually involved in the cultivation of registered agricultural lands which qualify for the payment and who is also responsible for their maintenance in accordance with norms. Any disputes arising from the applicant's right to land are subject to the civil law and should be settled by common courts. This solution should be accepted.

4. However, it must be emphasised that, on the whole, the tenant's (farmer's) legal situation in relation to the land owner is not particularly advantageous considering the possibility of undertaking diversification activities by the tenant farmer. In this area the Polish legislator insufficiently uses legal instruments enabling diversification of rights, the property right in particular. This issue has been raised a number of times in the Polish doctrine which has indicated the possibility of functional diversification of the property right in terms of its subject of protection. On this basis, among others, the category of agricultural property has been distinguished enabling a wider than only civil-law approach to guarantee sufficient protection for the agricultural producer¹⁵. This producer can also be a dependent possessor, including a tenant farmer. Unfortunately, the provisions of the Polish Civil Code define tenancy of agricultural land in social rather than production categories. They do not provide a sufficient distinction between short-term and long-term tenancies. As a result, the tenant is obliged to run his activities in accordance with principles of proper agricultural economy, but at the same time any changes in the purpose of the subject of tenancy require landlord's consent. Bearing in mind the fact that the Polish Civil Code stipulates that regulations on lease will be applicable in matters which are not subject to the tenancy regulations, the scope of acceptable changes is very limited. It does not facilitate a broader diversification of agricultural holdings. It should be noted that in the Polish legislation there is a lack of complex legal regulation concerning so called farm tenancies. Apart from the Civil Code partial legal solutions are found in

¹⁵ cf. T. Kurowska, *Upowszechnienie prawa w_ asno_ ci nieruchomo_ ci*, Katowice 1994.

specific provisions (among others in the previously mentioned Act on management of State Treasury agricultural properties or in the Act on farmers' social insurance). These solutions, however, do not allow the tenant farmer to make significant changes to the subject of tenancy without landlord's consent. Due to the above mentioned legal conditions of tenancy with dominating social functions, the scope of contract freedom in negotiations between a farmer and the land owner is not particularly wide. It must be noted here that the source of these limitations are not legal regulations themselves, since the majority of regulations are relatively binding, but above all the long-lasting (i.e. for decades) practice of concluding such agreements. These agreements are usually concluded either in an oral form or if such an agreement is even made in a written form, it is still too general. In such situations the existing legal regulations do not allow to complement sufficiently contractual provisions. Therefore these regulations do not facilitate diversification of agricultural holdings created on the leased grounds.

5. It seems that effective diversification should be supported not only by specific legal regulations whose sources are found in community and state regulations but also by legal instruments constituting a system. In the Polish legislation system-related solutions are not sufficient incentives for diversification.

First of all, it should be emphasised that in the Polish legal system, as a rule, agricultural activity is not included in business activity¹⁶. Consequently, public administration has a limited ability to influence forms and methods of conducting agricultural activity. In fact, there is no possibility of authoritarian intervention into the diversification of farms (agricultural holdings). Even if it is assumed that authoritarian intervention in this area should not play the main role, the total resignation from this kind of influence cannot be positively assessed.

The system of farmers social insurance regulated by the state law of 20th December 1990¹⁷ is not a satisfactory instrument of diversification, either. Although this system does not pose legal barriers, it, unfortunately, it does not provide

¹⁶ cf article no. 3 of Act of 2nd July 2004 on freedom of economic activity (Journal of Laws of 2007 No. 155, item 1095 as amended).

¹⁷ Journal of Laws of 2008 No. 50, item 291 as amended

satisfactory stimuli in this area. Establishing 'stiff' amount of insurance premium for pension, accident, illness and maternity insurance without taking into account the kind and scope of conducted agricultural activity, does not favour the diversification.

The same comments can be made in relation to tax solutions. The main form of agricultural taxation in Poland is the agricultural tax regulated by the act of 15th November 1984 on agricultural tax¹⁸. As it is emphasised in the Polish doctrine this tax is of property character and its construction lacks the element of personalisation or any reference to personal situation of the taxpayer. Consequently the imposed agricultural tax is not related to the income earned by the farm because this tax is not related to running an agricultural activity. In addition, the taxation system has a hindering effect on undertaking non-agricultural activity since conducting other than agricultural activity on arable lands causes an increase in fiscal charges through imposing property tax. Agricultural tax diversification according to the taxpayer's paying capacity is still a postulate. Furthermore, it must be added that only so called special units of agricultural production are subject to legal entity or natural persons income tax. Thus taxation system does not provide satisfactory incentives facilitating diversification of agricultural holdings and consequently diversification of agricultural producers.

On the basis of the presented examples of public and legal burdens it can be concluded that the system of these burdens does not stimulate diversification of agricultural holdings evolving towards agricultural enterprises. It seems that this system petrifies the existing structure in which, as it was previously indicated, low output farms are in the majority.

IV. Conclusions

These considerations lead to formulating general conclusions.

Firstly, in the Polish economic reality, the necessity of supporting low output farms remains the main problem. This support should be based not only on the state

¹⁸ Journal of Laws of 2006 No. 136, item 969 as amended

funding but also union funding. This is a key issue for gradual change in area structure of farms (agricultural holdings). It is because only farms of particular economic potential can become a subject of diversification also directed towards non-agricultural activity directly connected with the holding.

Secondly, on the state level it should be noted that in the Polish administrative system both in self-government administration and the government administration, agriculture administration has virtually disappeared. The role of this administration is particularly significant in the period when agricultural activity is becoming more and more specialised. Without efficient agriculture administration it is not possible to meet new challenges and conditions such as, for example, lack of food, renewable energy sources (bio-fuels, wind power etc.). Unfortunately in the Polish legal system the role of this administration has been taken over by the Agricultural Property Agency in the area of land turnover as well as by the Agency for Restructuring and Modernisation of Agriculture. Both these legal structures are centralised and their regional branches act according to homogenous pragmatics created at the central level. So even if within the Agency for Restructuring and Modernisation of Agriculture there are district offices, their activity is homogenous countrywide. This construction of 'implementing administration' is certainly not adjusted to regionally varied requirements of diversification and seems highly unsatisfactory.

Thirdly, the Polish legal system in a broad area of agriculture is of static character and is too weak to stimulate diversification of agricultural holdings. Meeting new challenges will be possible only when diversified economic instruments are reflected in both stable and simultaneously flexible legal system. The key role in this area is to be played by the previously discussed possibility of using instruments for the diversification of rights, including property rights.

Furthermore, it seems essential to undertake complex activities aiming at the creation of full programme of changes in agriculture. With regard to diversification activities it is necessary to make an attempt to establish a function and purposes for

which diversification is to be used. In this respect the scope of expanding the areas of non-agricultural activity in rural areas is the key issue.

Finally, 'rural' policy of particular union states accepting legal instruments of diversification as a starting point should lead to lasting and balanced development of rural areas.