

AGRICULTURAL LAND AND POLAND'S MEMBERSHIP IN THE EUROPEAN UNION – AN ATTEMPT TO ANALYZE BASED ON THE LEGISLATION OF THE REPUBLIC OF POLAND

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Abstract

Due to a multifunctional character of land, including agricultural land, the European Union member states introduce to their internal legislation provisions hindering or preventing foreigners from purchasing it. On her accession to the European Union in 2004, Poland negotiated a very long, covering 12 years, period of ban on agricultural land sales to foreigners. However, some cases of granting permission to purchase property to foreigners were noted during this period. Owing to experiences of other countries and because of the danger of strengthening speculative practises on the market, new regulations governing the agricultural land turnover entered into force in 2016. As has been presented by statistical data, the provisions efficiently cut of the access to Poland's land for foreigners, but also for some Polish citizens. The paper presents an analysis of new regulations and an attempt at finding the answer to the question whether the legislator's decision was fully compliant with the primary legislation of the European Union.

Keywords: *land ownership, law reform, civil law*

JEL classification: *K11, K12, K15, Q15*

1 Introduction

Land is treated all over the world as particular wealth. It also applies to agricultural land, i.e. the land intended for agricultural production. Because of the land, its value in itself, resources and potential it hides, as well as human needs it allows to realize, wars have been and are waged or long time litigations have been conducted.

Poland has been the European Union member state since 2004. The European Union is an international formation, whose priority is economic cooperation of its member states. Agriculture is one of important sectors of economy. Art. 38, par. 1 of the Treaty on the Functioning of the European Union (further: TFEU) states that the EU determines and realizes common agricultural and fisheries policy. Art. 39 TFEU determines the goals of common agricultural policy. These include, among others, productivity of agriculture, optimal utilisation of agronomic inputs (including agricultural land), ensuring decent life for rural dwellers and reasonable prices for goods delivered to consumers. Concerning the agricultural land, the EU focuses on sustainable agriculture which guarantees the economy, which will not lead to environmental losses. On the other hand, Art. 40 of TFEU regulates common organization of agricultural markets, where common rules of competition apply allowing to exclude the instances of discrimination among producers or consumes. In compliance with Art. 42 of TFEU, the Council upon request of the Commission may allow to grant assistance for protection of farms in disadvantaged position due to structural or natural conditions.

Upon Poland's accession to the EU in 2004 the principles of property turnover in general and agricultural land in particular changed fundamentally. The determinants of these changes in the first place result from the freedoms guaranteed by the primary Union law and from the requirements of the EU legislation concerning sustainable agriculture. Not without importance is also the issue of maintaining the competitiveness of Polish farms towards the farmers from so called "old Union". The latter reason became crucial in the light of area structure of Polish farms. From this point of view it became necessary to ensure the possibility of land consolidation and maintaining land in the hands of Polish farmers, as well as to protect Polish agricultural land market against speculative behaviours.

Poland's accession to the EU caused a real concern of Polish authorities against the uncontrolled buying of Polish land by richer countries of the "old" European Union. The fear felt by Polish authorities resulted from the experiences of other member states and comparing the prices of agricultural land in various countries, as shown in Figure 1.

Therefore, in order to maintain public order and safety, some measures were undertaken to prevent this process. However, the applied legal regulations (12-year period of ban on land sales to foreigners negotiated in the EU Accession Treaty, a system of permissions for land acquisitions and a change of land use) must be compliant with the European law. Solid jurisprudence of the Court of Justice states unanimously that all restrictions imposed on property acquisitions constitute a restriction on the fundamental freedoms stated in the Treaty on the Functioning of the European Union (Art. 45 TFEU, Art. 49 TFEU), capital flow (Art.63 of TFEU) and is an infringement of the prohibition of discrimination on grounds of nationality (Art.18 of TFEU, Art. 21 KPP). The restriction takes place irrespective of the fact whether land purchase is done for speculation or investment reasons or for the own needs (C-423/98, Lange, 2004). The statements above are the reference for the national regulations. On the other hand, the provisions governing agricultural land acquisitions are of crucial importance for the possibility of rational and sustainable agricultural activities. In this context, the rules in question are in dilemma between the two values: protection of freedoms guaranteed by the treaty and requirements of sustainable agriculture development.

From a legal point of view, the land is a thing, and more specifically a property (Art. 46 of Civil Code Act: further KC) (Ustawa Kodeks cywilny, Dz.U. 1964 nr 16 poz. 93). The term should be obviously connected with impossibility of moving it to a different place. Over the years the law defined the kinds of legal relationships which may bind a thing with a person in whose power the thing remains and differentiated the ownership and possession. Whereas the ownership is law, from the legal point of view the possession means only some factual situation (art. 336 KC). The property owner may be indicated by a land and mortgage register kept for the property, obviously if it was established for this property, whereas the possessor is always a person who at a given moment is entitled to actual control over the thing. Therefore, the possessor does not have to be the owner, the same as the owner does not necessarily have to exercise control over his thing, i.e. be its possessor (art. 222 KC). This in turn may be either independent or dependant possession (art. 336 KC). The difference between them lies in the fact, that only dependant possession is formed on the basis of legal relationship which joins the possessor with the owner. An example of dependant possession is a lease agreement (art. 693 KC). During the contract period the leaseholder remains the property owner, whereas the lessee is a dependant possessor. On the other hand, independent possession means actual power exercised over a thing corresponding to the content of property law. Only independent possession leads to prescription, i.e. a take-over of the ownership of a thing after a certain period of time. For the needs of presented paper, the terms of possession and possessor will denote each

person actually exercising control over a property (i.e. possessor, owner, perpetual usufructuary, leaseholder, etc.) According to the basic definition (art. 46¹ KC), the agricultural property (or agricultural land) is a property which is or may be used for productive activities in agriculture in the area of crop and livestock production, not excluding horticultural, fruit and fish production.

From the economic point of view, land beside labour and capital is a factor of production. In literature it is determined as multifunctional good (Wilkin 2014). It refers to various branches of economy, but particularly to agriculture. For agriculture the land, especially agricultural land is the factor enabling agricultural production, i.e. animal breeding and husbandry, crop cultivation and other farming activities (keeping gardens, orchards or fish ponds). The great value of agricultural land for the economy is best evidenced by the fact, that each case of land exclusion from agricultural use requires, in compliance with the legislator's will, conducting a special administrative procedure, according to Art.11 of the Law on protection of agricultural and forest lands (Ustawa o ochronie gruntów rolnych i leśnych, Dz.U. 1995 nr 16 poz. 78). Depending on the acreage which is to be excluded from agricultural production or on the purpose of exclusion, the procedure may be free of charge or involve really high costs, as shown in Table 1.

Table 1 Rates for permanent exclusion of agricultural land from agricultural production

Mineral and organic soil	The rate for permanent exclusion of land from agricultural production for [ha] in PLN
class I	437.175,00
class II	378.885,00
class IIIa	320.595,00
class IIIb	262.305,00

Source: <https://www.biznes.gov.pl/opisy-procedur/-/proc/283-wylaczenie-gruntow-z-produkcji-rolniczej>.

The amount which should be paid for exclusion of land from agricultural use constitutes a rate of the area and rate for permanent exclusion of land from agricultural production. Calculation of total costs of exclusion from agricultural production should also include other organizational costs and the time. Assessing the regulations one may afford to state, that the high costs are to act preventively and counteract the depletion of agricultural acreage, among others, because of food safety. Since the 90-ties of the 20th century a decrease in the number of farms has

been observed in Poland and hence the area of farmlands (Dzun, 2014). At the same a declining share of agriculture in gross national product has been noted. In the years 1989, 2007 and 2016 it was, respectively 13%, 3.7% and 2.6%.

Presented paper aims to analyse and assess selected issues concerning agricultural land connected with Poland's membership in the European Union.

The issue of the access to agricultural land, in another words the problem of agricultural land, comes to the forefront, opening Poland's agricultural land market for foreigners (both foreign physical persons and organizations). Poland negotiated, that her agricultural land market would be closed for 12 years after the accession to the European Union, which took place on 01.05.2004. Therefore, the law changed in 2016 with the objective of closing the access to Poland's agricultural land for foreigners, but paradoxically the results were felt also by some Poles.

As a background for the outlined problems the Authors used the considerations, which for the needs of the paper they entitled "dependencies between the fact of agricultural land possession and farmer behaviours connected with Poland's membership in the European Union".

2 Data and Methods

The research material of this study are the texts of legal acts of the European Union and Polish legislation dedicated to the issues of real estate trade, in particular agricultural real estate, literature on the subject, case law of the Court of Justice of the European Union and the Supreme Court of the Republic of Poland and statistical data. The results of the research were presented in a descriptive, tabular and graphic form.

3 Results

3.1 Agricultural land versus farmer behaviours

Agriculture is the sector of economy burdened with a considerable risk, such as various types of threats, i.e. environmental factors (atmospheric and climatic factors, leading to crop overproduction disaster or yield disaster), economic factors (price instability of agronomic inputs or crops), the outcomes of political decisions (e.g. introducing embargo), diseases epidemics and losses caused by pests or lack of competence among agricultural producers (leading e.g. to degrading of the natural environment).

The negative results of risk in agriculture may be reduced. One of the ways to do it is state aid called public aid, allocated as financial support for farmers.

The other ways to prevent risk include benefiting from biological and biotechnological progress, diversified directions of production and sources of income for farmer families, as well as support for acquisition of agricultural knowledge. In this context, the rules of granting State aid for farmers are of crucial importance. The EU is a homogenous market guaranteeing free flow of commodities, services, capital and people. (For the sake of presented article, free flow of capital is important, which according to the rule may be invested in any way in the area of each member state. One of the ways of investing capital may be property acquisition). Because the above-mentioned State aid might cause disturbances of the equilibrium on the common market, it must be done under control of the European Union, particularly European Commission. Except for *de minimis* aid, each case of public aid has to be reported to the European Commission, i.e. must pass the notification procedure. In case of agriculture, all instruments of public aid are contained in the Rural Development Programme (RDP). Currently implemented RDP comprising the years 2014-2020. RDP overlaps multiannual financial framework. From a legal point of view RDP is a contract determining the strategy for utilisation financial means coming partly from the EU budget and partly from the national budget allowing for the realization of the EU goals and Poland's needs. Currently various types of direct payments are realized in Poland, including area payments, the payments for agricultural practices beneficial for the climate and the environment, called the payments for greening, or the payments for young farmers. The details were stated in the Law on payments in the framework of direct support schemes (Ustawa o płatnościach w ramach systemów wsparcia bezpośredniego, Dz.U. 2015 poz. 308). The beneficiaries of the aid may be only farmers (starting or continuing farming activities) who are the possessors of agricultural lands. From this perspective possession of agricultural lands is a key premise for obtaining public aid.

3.2 Restrictions on the access to agricultural land for foreigners

The issue of property acquisitions by foreigners is not a new problem for Polish law. Currently it is regulated by the Act on property acquisitions by foreigners of 1920 (Ustawa o nabywaniu nieruchomości przez cudzoziemców, Dz.U. 1920 nr 31 poz. 178). At the same time it should be noticed that the possibility of purchasing agricultural property is a particular case of property acquisition because it concerns a particular kind of real estate (Złoto-Małolepszy, 2013). The literature of the subject indicates a catalogue of causes of limiting agricultural property turnover, including particularly the issues of national safety, food safety, protection of national heritage, limiting or control over behaviours of speculative character

concerning foreign entities and limitations and control over the scale of foreign investments (Karaszewski, Jaworek & Siemińska, 2016).

At the beginning of the discussion it should be pointed out that currently agricultural land remains in possession of private physical persons and organizational units having or not legal personality (companies, cooperatives), public organizational units with or without the legal personality and the State Treasury (ST). On behalf of ST agricultural land is under care of the National Agency for Agricultural Support. The institution was established on 01.09.2017 from the merger of the Agricultural Market Agency (AMRA) and the Agricultural Property Agency (APA). The Agricultural Property Agency was created on 15.07.2003 replacing the Agricultural Property Agency of the State Treasury and was operating based on the act on the management of agricultural properties of the State Treasury (Ustawa o gospodarowaniu nieruchomościami rolnymi Skarbu Państwa, Dz.U. 1991 nr 107 poz. 464).

As has been mentioned before, the transitory period in Poland's agricultural land turnover was planned for 12 years from the moment of her accession to the EU and finish on 30.04.2016 (Brożyna, 2006). Like other Central and East European countries, Poland did not decide for the liberalization of the regulations concerning possibilities of agricultural land purchases by foreigners (Marks-Bilska, Kisiel & Lizińska, 2017). The draft law limiting access to Poland's agricultural land for foreigners was developed several years before the end of the above mentioned transitory period and from the very beginning raised interest of farmers and other persons interested in the legal status. Polish farmers postulated continuation of the previous model, i.e. protection of Poland's agricultural land against access by foreigners, in the first place for fear of increased prices for agricultural land, which might happen after opening the land market to the foreign subjects. Analysis of agricultural land prices in the countries of the old and new European Union allows to assume, that foreign subjects would be ready to pay any price, whereas financial capacities of Polish farmers compared unfavourably with foreign farmers. The issue of agricultural land turnover in Poland is regulated by the Act on shaping the agricultural system of 2003 (further: ASAS) (Ustawa o kształtowaniu ustroju rolnego, Dz.U. 2003 nr 64 poz. 592). The act limiting access to agricultural land for foreigners was passed by Polish Parliament (Sejm) in 2015. It was a completely new version of ASAS. It was to enter into force on 01.05.2016. Finally, Polish legislator decided on a different solution and on 14.04.2016 passed and Act on suspended sale of property from the Property Stock of the State Treasury (Ustawa o wstrzymaniu sprzedaży nieruchomości Zasobu Własności Rolnej Skarbu Państwa, Dz.U. 2016 poz. 585). The act was not a new one, only the law changing the regulations already in force, among others the Civil Code, Act on

land and mortgage register, Act on management of agricultural property of State treasury and the above mentioned ASAS. At this point it should be mentioned , that the changing act was amended several months after entering into force. The cause of amendment were problems with the application of the new legislation which appeared after its entering into force, specifically legal collisions with other regulations at the moment of its entering into force.

In compliance with Art 2a ASAS, a purchaser of agricultural land may be exclusively a private farmer, who manages the farm himself and already has legal title to agricultural property (a minimum of one conversion hectare of farmlands) and its area including newly purchased land will not exceed 300ha. The area was arbitrarily included in the act of 2003. This regulation is circumvented in the first place by concluding matrimonial property agreements (prenuptial agreements). In compliance with ASAS, agricultural land purchaser must possess so called agricultural qualifications. The qualifications may be acquired through agricultural education (secondary, tertiary or postgraduate). A person who is able to prove his/her agricultural experience is also able to get these qualifications. Another requirement of ASAS is the obligation to live for at least 5 years in the commune where one of the parcels composing the agricultural holding is situated. Concerning the premise of habitation, it should be noticed, that there is nothing to prevent agricultural land purchase by a person, who so far has not managed a farm but would like to start it, therefore he/she cannot prove the required length of residence. At the same time the legislator decided that an individual farmer has no social security obligations in Agricultural Social Insurance Fund. Therefore it may be a person who pays social security contributions to Social Insurance Institution.

At this point it should be explained what the legislator understands under the term of acquisition. Acquisition may denote both unilateral legal action, such as inheritance or bequest, or bilateral, such as agreements of sale, donation, exchange and annuity contracts, or division of joint ownership, e.g. in case of division of joint property of spouses or liquidation of a company.

A novelty introduced by the act is the situation regulated by Art.2B, par.2 ASAS, which states that property purchasers cannot sell it or pass it to other entities for 10 years from the day of purchase. Simultaneously the purchaser is obliged to manage the farm into which the acquired property was included. Earlier sale is possible only due to unforeseen circumstances (independent on the purchaser, e.g. unforeseen loss of ability for the farm running) following the consent of the ordinary court of law. Although the above mentioned regulations have not been in force for long, decisions of the court on these matters have already appeared. A case quite recently analysed by the court concerned the situation where the land purchasers were the plaintiff's parents. Shortly after the property acquisition the

state of health of one of the parents got worse, so the other parent had to take care of the sick person. In this situation the parents decided to give the farm to their son, who was ready to abandon his current occupation and move to the country. The notary refused to record the agreement due to the above mentioned statutory ban on the property sale for 10 years after the purchase date. The Supreme court which analysed the case regarded the notary's decision as wrong and stated that the court's decision about an earlier disposal of the property was completely unnecessary because the property would remain in the family hands. The Supreme Court also referred to the preamble to ASAS. In the light of this regulation it should be assumed that the agreement should concern the case when the land would be purchased by a person outside the immediate heirs group (III CZP 24/17).

Previously mentioned ASAS provides in Art.2a par.3, that a transferor may without any obstacles transfer the ownership of agricultural property on local government units, State Treasury, legal persons operating on the basis of regulations on Catholic church – State relationships in the Republic of Poland, on the State relationships with other churches and religious associations and guaranteeing freedom of faith and conscience and family and friends including spouse, descendants, ascendants, siblings and their children, adopters and the adopted persons. The catalogue of these subjects is a closed one. In reference to the latter, it should be presumed that they do not need to have the status of individual farmer. The other exception is acquisition in result of inheritance and specific bequest or in the course of restructuring proceedings.

If a person other than the ones mentioned above (e.g. individual farmer or a relative) were to be the purchaser, or the purchase referred to the cases other than mentioned before, according to Art.2a item 4 of ASAS acquisition of agricultural property would be possible exclusively with the consent of the National Agency for Agricultural Support (NAAS). The act provides that during the five years from the act entering into force transfer of agricultural properties, which at present are the property of the State Treasury will be suspended. However, the lands, which are the property of NAAS will be leased.

The act contains also regulations referring to the tenant of transferred property. In compliance with Art.3 of ASAS, the tenant is entitled to pre-emption right of the transferred property, unless it is a local government unit, State Treasury or the person indicated above, counted among the transferee relatives. However, in Art.3 item 1 of ASAS the legislator decided that pre-emption would be possible only in case of written lease contract with certified date and the lease was realized for at least 3 years from this date and the acquired property is a part of the tenant's family farm.

These regulations raise constitutional doubts and doubts concerning their compliance with the European Union legislation. It seems that the 10-year grace period concerning property sale is a too far-reaching restriction on the property law (Art. 64 of the constitution) and conducting the economic activity Art. 22 of the constitution). Legislative Council working on Polish act stated unanimously that the above mentioned period was too long and categoric and not necessary for the protection of constitutional values (protection of agricultural system) which legitimize restriction of citizen's rights and freedoms (Bieluk, 2016). Moreover, the member states may shape the way of agricultural property acquisition by foreigners, yet the rules are assessed through cardinal principles of the EU law, i.e. European freedoms, including free capital and people flow, as well as non-discrimination principle (*Fearon v. Irish Land Commission*, C-182/83). At the same time the requirement of personal management of farm over such a long period of time is not essentially contradictory to the EU law, still in compliance with the jurisprudence of the Court of Justice (*Ospelt v. Weissenberg*, C-452/01) cannot be the absolute requirement and the domestic law must anticipate derogations from it, statutory exceptions or exemptions with the consent of the court. Otherwise, the regulation may be regarded contradictory to the EU legislation (see: *Konle v. Austria*, C-302/97). It seems that in this context, the exception provided in Art.2b item 3 of ASAS has been too rigidly formulated and in result may be regarded as contradictory to the EU legislation.

Finally, it should be mentioned that the provisions of the act shall not apply among others, to the sale of a land parcel of less than 0.3 ha, the properties included in Agricultural Property Stock of the State Treasury, or built-up lands with area to 0.5ha if on the day of the act entering into force they were occupied by residential buildings or buildings, constructions of appliances not used for agricultural production together with the adjoining parcels, enabling their appropriate utilisation and occupied for house garden.

The data concerning property and agricultural land acquisitions by foreigners in Poland were illustrated by Table 2 covering the years 2002-2016. Analysis of data allows to conclude that foreigners' interest in agricultural land increased after Poland' accession to the European Union. Although in 2016, i.e. in the year when the law was changed 251 decisions were issued allowing Poland's land acquisition by foreigners, including 51 documents referring to agricultural land, still the acreage which was passed into foreign hands was the smallest in history. Because of the lack of current data from the Ministry for 2017, it is still impossible to conclude whether the land turnover was effectively stopped.

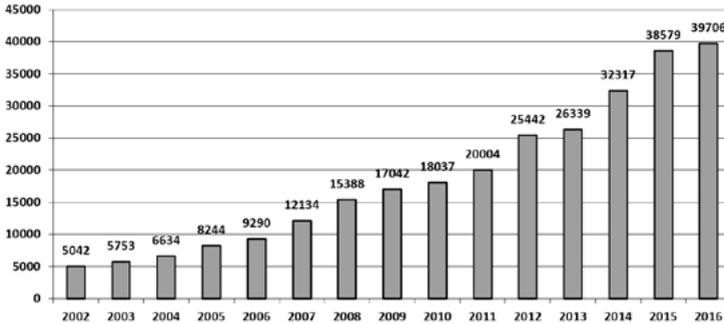
Table 2 Number of permits and purchase of real estate (including agricultural land) in [ha] by foreigners in Poland in 2002-2016

Year	Number of permits		Area in [ha]	
	all land	agricultural land	all land	agricultural land
2002	1595	109	4884	412
2003	1580	129	4718	398
2004	1065	279	2691	761
2005	592	373	1786	1759
2006	532	274	575	532
2007	525	266	436	394
2008	514	307	1285	1253
2009	311	195	1758	1613
2010	262	180	808	800
2011	308	217	1008	1001
2012	313	218	1032	1021
2013	252	161	697	661
2014	271	166	1036	1030
2015	335	162	460	446
2016	251	51	80	65
Total	8706	3087	23254	12146

Source: Own study based on the Reports of Minister of the Interior due to the Act on the acquisition of real estate by foreigners.

Changes of agricultural land prices in private turnover in national currency in Poland in 2002-2016 have been presented in Figure 1. As results from the presented data, the price for 1 ha of agricultural land has been increasing constantly.

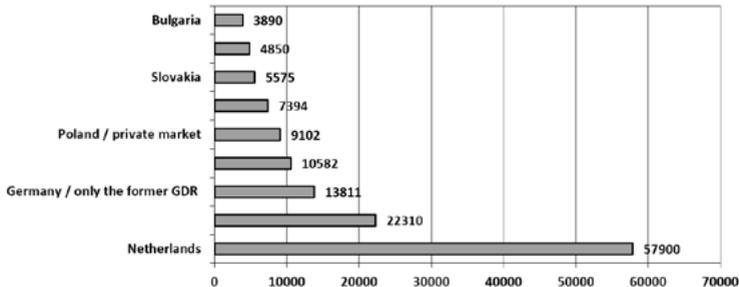
Figure 1 Prices of agricultural land in private trading in Poland in 2002-2016 in PLN/ha



Source: Rynek Ziemi Rolniczej, 2017.

Average prices for agricultural land in selected European Union countries in 2016 in EUR/ha were shown in Figure 2. The data for Poland indicate, that the price of 1ha of agricultural land in Poland was the highest in the region, but lower than in the so called old Union countries.

Figure 2 Average price of agricultural land in selected EU countries in 2016 in PLN/ha



Source: Rynek Ziemi Rolniczej, 2017.

4 Conclusion

In terms of Poland's accession to the EU the obvious objective of Polish authorities became protection of Polish farms against buying up by foreign capital. The fears are justified by historical experiences of other countries, but also by the fact that for the whole period of Poland's EU membership the prices for land properties

were not equalized. Therefore, the structure of agricultural property market contains a considerable speculative potential. No unanimous answer can be given to the question whether the legal instruments discussed in the article are efficient means for achieving the above mentioned goal.

Presented statistical data allow to state that after Poland's accession to the EU, the interest of foreign capital in agricultural land purchases in Poland grew. The demand structure in this respect indicates participation of increasingly more serious players on the market, because the acreage of land transferred to foreigners increased at a decreased total number of permissions issued. Until 2016, the transitory regulations assuming a 12- year grace period in land property acquisitions by foreigners provided a guarantee against uncontrolled agricultural land acquisitions by foreigners. Such long transitory period was incompatible with the idea of European integration (Brożyna, 2006) and actually unprecedented in the EU history. The exception was Denmark's objection concerning the regulations limiting living property acquisitions irrespective of the provisions of Treaties (Protocol on the acquisition of property in Denmark). The protocol is unlimited in time, so it is valid until now (Lange, 2004). Currently, the main protection instruments are regulations concerning exclusion of agricultural land from agricultural production.

Obviously, the legal regulations presented above allow to achieve the goal which the legislator set up, i.e. efficient restriction of access to Poland's land for foreigners. Still, another result of externalisation of social costs appeared, i.e. restricted access to agricultural land for Polish citizens. Moreover, the doubt remains whether the discussed regulations are compliant with the Constitution of Poland and the EU legislation, i.e. free flow of capital and people.

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