23/3/A/2010

JUDGMENT
of 18 March 2010
Ref. No. K 8/08*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Zbigniew Cieślak – Presiding Judge
Stanisław Biernat
Maria Gintowt-Jankowicz
Mirosław Granat – Judge Rapporteur
Mirosław Wyrzykowski,

Krzysztof Zalecki – Recording Clerk,

having considered, at the hearings on 25 February and 18 March 2010, in the presence of the applicant, the Sejm and the Public Prosecutor-General, an application by the Polish Ombudsman (hereinafter: the Ombudsman) to determine the conformity of:

1) Article 4 of the Act of 11 April 2003 on shaping the agricultural system (Journal of Laws - Dz. U. No. 64, item 592) to Article 2, Article 21(1), as well as Article 64(1) and (2) in conjunction with Article 31(3) of the Constitution of the Republic of Poland,
2) Article 29(5) of the Act of 19 October 1991 on the management of agricultural property of the State Treasury (Journal of Laws - Dz. U. of 2007 No. 231, item 1700) to Article 2, Article 21(1), as well as Article 64 in conjunction with Article 31(3) of the Constitution,

adjudicates as follows:

1. Article 4 of the Act of 11 April 2003 on shaping the agricultural system (Journal of Laws - Dz. U. No. 64, item 592 and of 2008 No. 180, item 1112) **is consistent with Article 2, Article 21(1) as well as Article 64(1) and (2) in conjunction with Article 31(3) of the Constitution of the Republic of Poland.**

2. Article 29(5) of the Act of 19 October 1991 on the management of agricultural property of the State Treasury (Journal of Laws - Dz. U. of 2007 No. 231, item 1700, of 2008 No. 227, item 1505 as well as of 2009 No. 19, item 100, No. 42, item 340 and No. 98, item 817) **is inconsistent with Article 2, Article 21(1) as well as Article 64 in conjunction with Article 31(3) of the Constitution.**

STATEMENT OF REASONS

[…]

III

* The operative part of the judgment was published on 29 March 2010 in the Journal of Laws – Dz. U. No. 48, item 287.

The Constitutional Tribunal has considered as follows:

I. The constitutional issue.

The Ombudsman challenges the adopted manner of regulating two civil law rights of the Agricultural Property Agency which interfere with private law transactions involving agricultural property in Poland. The first group of allegations refers to the legislator's infringement of the principle of appropriate legislation and the principle of specificity (clarity) of legal provisions (Article 2 of the Constitution). In the opinion of the applicant, provisions which regulate the right of acquisition (Article 4 of the Act of 11 April 2003 on shaping the agricultural system; Journal of Laws - Dz. U. No. 64, item 592, as amended; hereinafter: the Act on shaping the agricultural system) and the statutory right of repurchase by the Agricultural Property Agency (Article 29(5) of the Act of 19 October 1991 on the management of agricultural property of the State Treasury; Journal of Laws - Dz. U. of 2007 No. 231, item 1700, as amended; hereinafter: the Act on the management of agricultural property of the State Treasury) have been formulated in an imprecise and defective way.

Without challenging the mechanism of exercising the right vested in the Agricultural Property Agency, the Ombudsman argues that the non-conformity of Article 4 of the Act on shaping the agricultural system to the Constitution arises from such accumulation of irregularities in the challenged legislative provision that there has been an infringement of the formal principle of specificity of statutory restrictions on constitutionally protected rights (Article 31(3) of the Constitution), and in particular the right of ownership (Article 21(1) as well as Article 64(1) and (2) of the Constitution). The way of regulating the Agency's right of acquisition does not allow to determine, in particular, the group of individuals and entities that are subject to the right, the scope ratione materiae of agreements to which the right applies as well as the consequences of the exercise of the right by the Agency. The vagueness of Article 4 of the Act on shaping the agricultural system is so considerable that it infringes the principle of protection of the constitutionally guaranteed right of ownership (Article 21(1) and Article 64(1) of the Constitution) in conjunction with the principle of proportionality expressed in Article 31(3) of the Constitution. In the case of the exercise of the right of acquisition, there is no way of protecting the individual's right of ownership, which constitutes an infringement of Article 64(2) of the Constitution.

In the applicant's opinion, in the case of the statutory right of repurchase by the Agricultural Property Agency, the mere introduction of a mechanism for restricting private transactions involving agricultural property and the structure of the mechanism constitute disproportionate interference with the constitutional principle of protection of ownership (Article 21(1) as well as Article 64(1) and (2) in conjunction with Article 31(3) of the Constitution). The applicant's allegation is, to a lesser extent, aimed at the legislative aspect of the regulation. In the Ombudsman's opinion, the provision constitutes an excessive and disproportionate infringement of the essence of the right of ownership. The allegations of non-conformity to the principles of a state ruled by law, and in particular to the principle of appropriate legislation and the principle of protection of citizens' trust in the state and its laws (Article 2 of the Constitution), arise from the carte blanche nature of the rights held by the Agency and from the lack of statutory regulation concerning the premisses of exercising the right of repurchase, which results in citizens' uncertainty as to the scope of their own rights.

Therefore, in the view of the Ombudsman, the two challenged provisions constitute disproportionate interference with the constitutionally protected right of ownership; the applicant substantiates the degree (significance) of interference and its source in a different way. Moreover, in his application as well as at the hearing, the applicant stressed that he did not request a review of constitutionality of the challenged provisions in the light of Article 21(2) of the Constitution, which regulates the premisses of admissibility of expropriating the granted right of ownership.

II. Issues concerning the right of acquisition of agricultural property (Article 4 of the Act on shaping the agricultural system).

1. The right of acquisition as a new institution of property law.

The right of acquisition of agricultural property vested in the Agricultural Property Agency was introduced into the Polish legal system in 2003, at the time of entry into force of the Act on shaping the agricultural system. The said right was regulated in Article 4(1)-(5) of the Act on shaping the agricultural system. In accordance with that provision, the Agricultural Property Agency, which acts on behalf of the State Teasury, may submit a declaration of acquisition of agricultural property upon payment of a monetary equivalent, if parties to a civil law transaction transfer the ownership of the agricultural property as a result of concluding an agreement other than a contract of sale (Article 4(1) of the Act on shaping the agricultural system); unless the result of the acquisition is the enlargement of a family agricultural holding within statutory limits, the acquirer is a close relative of the transferor, the agricultural property is transferred as a land contribution by a member of an agricultural production cooperative or the agreement transferring the ownership of the property is an agreement concluded with a successor in accordance with the provisions of the Act of 20 December 1990 on social insurance for farmers; Journal of Laws - Dz. U. of 1998 No. 7, item 25, as amended (Article 4(4)(1)-(3) of the Act on shaping the agricultural system).

The Ombudsman regards the institution of the right of acquisition of agricultural property by the Agricultural Property Agency as a new and unique instrument among the existing mechanisms for the oversight of civil law transactions which, for that very reason, requires the detailed statutory regulation of basic features of civil law constructs. With reference to such formulation of the argument, the Constitutional Tribunal points out that there are a number of unilateral rights in the Polish legal system which modify private law transactions involving agricultural property; each of them displays certain diverse and unique features. What may be indicated, within that scope, is primarily the following: the right of pre-emption exercised with regard to a party to a conditional agreement; the right of precedence concerning acquisition, exercised before an agreement which transfers ownership is concluded with an entitled person or entity; the right of purchase exercised by concluding an agreement between an entitled person or entity and the owner of property; the right to demand that an immovable property be purchased by a relevant commune (Pol. *gmina*), which is granted by statute to the owner or a perpetual usufructuary on the basis of Article 36(3) of the Act of 27 March 2003 on spatial planning and development (Journal of Laws - Dz. U. No. 80, item 717, as amended), the owner’s right to demand that an immovable property be purchased in the case of restriction on the right to use it on the basis of Article 132 of the Act of 27 April 2001 - the Environmental Protection Law (Journal of Laws - Dz. U. of 2008 No. 25, item 150, as amended) or the right to demand that an immovable property be purchased in the case where the property is situated in an area protected on the basis of Article 26(5) of the Act of 27 July 2001 on the

implementation of the Environmental Protection Law, the Act on waste as well as amendments to certain acts (Journal of Laws - Dz. U. No. 100, item 1085, as amended). Each of the above-mentioned instruments modifies property transactions in a particular way and interferes with property ownership; however, it may not be indicated that the right of acquisition constitutes, among them, a significant exception.

The argument about a unique character of the right of acquisition weakens the structural and functional similarity to the right of purchase which is regulated in Article 35 of the Act of 14 July 1961 on the management of urban and residential areas (Journal of Laws - Dz. U. of 1969 No. 22, item 159); the Act is no longer in force, as it was repealed in 1985. The said right was a complementary right to the right of pre-emption which had been granted, on the basis of that Act, to the Presidium of the National Council in the event of the sale of immovable property by individuals. The provisions regulating the exercise of the right of pre-emption were applicable, according to the legislator's will, to the right of purchase. The scope ratione materiae of the right of purchase was specified in a narrower way than the scope of the right of acquisition vested in the Agricultural Property Agency, as it was granted to the state in the specific cases of concluding a contract of donation, exchange of property or dissolution of co-ownership of immovable property which was co-owned by the state. The appropriate application of provisions on pre-emption in the context of the said Act meant that the owner of immovable property could donate it to a third party or replace it (and the co-owners could contractually revoke the shared aspect of the right) only under the condition that the organ of public authority which had the right of purchase did not exercise that right (Article 30 of the said Act). Taking the above into consideration, the Constitutional Tribunal holds the view that it is impossible to determine that the right of acquisition is a unique means of acquiring the ownership of immovable property by a public entity in the Polish legal system. The right alludes, in its structure and content, to some already existing solutions, and thus it is not a completely new instrument in the Polish system.

2. The scope ratione materiae of the application of Article 4 of the Act on shaping the agricultural system

The applicant’s doubts are primarily raised by the wording of Article 4(1) of the Act on shaping the agricultural system, for it causes interpretative difficulties as regards determining the scope ratione materiae of that provision and the catalogue of “agreements transferring ownership which are other than contracts of sale”. In the view of the Ombudsman, at least some of the potential addressees of Article 4(1) of the Act on shaping the agricultural system may have problems with determining whether the provision actually applies to them. Moreover, the applicant alleges that the Act does not specify whether - in the case of the right of acquisition – “an agreement transferring ownership which is other than a contract of sale” should immediately be concluded as a conditional agreement which only imposes the obligation of the transfer of ownership as in the case of pre-emption, or whether the said right is subject to exercise only after the conclusion of an unconditional agreement which effectively transfers the ownership of immovable property. In the Ombudsman’s opinion, the requirement that the provisions of the Polish Civil Code which concern the right of pre-emption be appropriately applied to the exercise of the entitlement of the Agricultural Property Agency (Article 4(5) of the Act on shaping the agricultural system) would rather suggest the first solution and the conclusion that, by “an greement other than a contract of sale”, the legislator meant only the agreements which imposed an obligation to transfer the ownership of agricultural property which would be concluded provided that the Agency did not exercise its right of acquisition.

The Constitutional Tribunal wishes to indicate that, within the span of a few years of applying the challenged provision, it was clarified in the jurisprudence of courts, and in particular in the jurisprudence of the Supreme Court, that Article 4(1) of the Act on shaping the agricultural system had very broad application and encompassed all agreements transferring ownership, regardless of their type and unique legal character. Although the organs of public authority which are responsible for applying the law did not formulate an exhaustive catalogue of those agreements, it definitely includes agreements stipulating obligations and transferring the ownership of agricultural property, i.e. contracts of donation (see the decision of the Supreme Court of 10 November 2005, Ref. No. V CK 249/05, Lex No. 186719), exchange, or annuity, and the articles of association which regulate the question of providing agricultural land as an in-kind contribution, as well as agreements which only have property consequences, which are concluded in order to carry out an already existing obligation, i.e. the transfer of ownership of immovable property, e.g. in order to ease the burden of debt arising from a loan agreement (see the decision of the Supreme Court of 27 October 2004, Ref. No. IV CK 121/04, OSNC No. 11/2005, item 191), or agreements transferring ownership which are concluded to exercise the statutory obligation specified in Article 231 of the Civil Code or the claim on the basis of Article 151 of the Civil Code. The scope of Article 4(1) of the Act on shaping the agricultural system also encompasses agreements to divide joint property between divorcees, which are frequent in notarial practice, where the object of such an agreement is an agricultural property, and also the cases of the (contractual) transfer of a share in inheritance including an agricultural holding (Article 1070^1 of the Civil Code, introduced by the Act of 2003, stipulates that, in such cases, Article 4 of the Act on shaping the agricultural system shall apply accordingly). Likewise, it may be indicated that the scope of the above-mentioned provision does not comprise the transfer of agricultural property in the case of other legal events, such as: inheritance, including inheritance by will, prescription, the renunciation of ownership of agricultural property (see G. Bieniek, "Zrzeczenie się własności i innych praw rzeczowych", *Rejent* of 2004, No. 3-4, p. 27), as well as the acquisition of ownership on the basis of a court ruling or an administrative decision, or as a result of enforcement proceedings.

It also follows from the previous jurisprudence of the Supreme Court that a significant element and feature of acts in law falling within the scope of agreements, on the basis of Article 4 of the Act on shaping the agricultural system, is an unconditional transfer of ownership. In the decision of 27 October 2004 (Ref. No. IV CK 121/04, OSNC No. 11/2005, item 191), relying on a linguistic and functional interpretation of Article 4 of the said Act, the Supreme Court concluded that the Agency was entitled to the right of acquisition in the case of the transfer of ownership of immovable property, and thus only in the case of agreements which have property consequences; therefore, it applies in the event of concluding either an agreement stipulating obligations and transferring ownership (the so-called agreement with a double effect from Article 155 of the Civil Code) or an agreement only transferring ownership, which is concluded in order to carry out the previously existing obligation to transfer the ownership of immovable property (arising from an agreement, legacy, unjustified enrichment or from other circumstances). As a consequence, the right is not granted in the case of concluding an agreement other than a contract of sale which only stipulates an obligation to transfer the ownership. The Supreme Court repeated the view presented in the decision of 27 October 2004 in its decision of 10 November 2005 (Ref. No. V CK 249/05, Lex No. 186719), in which it additionally clarified that Article 4(1) of the Act on shaping the agricultural system was applicable to agreements transferring the ownership of immovable property which were concluded after

the entry into force of the Act, regardless of the fact whether and when an agreement setting out an obligation to transfer the ownership of immovable property was concluded.

To sum up, the Constitutional Tribunal states that, on the basis of the jurisprudence of courts, it is possible to determine the scope of application of Article 4 of the Act on shaping the agricultural system. It comprises all agreements transferring ownership which are other than contracts of sale of immovable property, regardless of their type and unique legal character, in particular: a contract of donation, exchange, or annuity; the articles of association which regulate providing agricultural land as an in-kind contribution, an agreement to divide joint property between divorcees, a contractual transfer of a share in inheritance including an agricultural holding, as well as agreements which only have property consequences by transferring the ownership of immovable property.

3. Reference to provisions on the exercise of the contractual right of pre-emption.

The legislator has not decided to regulate the institution of the right of acquisition in the Act on shaping the agricultural system in an exhaustive way. Article 4 of the said Act merely indicates situations where the Agricultural Property Agency acquires the said right and the ways of calculating the monetary equivalent for the acquired ("taken over") agricultural property by the Agency. The manner and consequences of the exercise of the right of acquisition have not been regulated in the said Act, which merely contains reference to the appropriate application of provisions on pre-emption to the exercise of the right of acquisition by the Agricultural Property Agency (Article 4(5) of the said Act).

The Constitutional Tribunal shares the applicant's allegation as to a certain imperfection of statutory reference to the appropriate application of relevant provisions of the Civil Code. As every "agreement transferring ownership which is other than a contract of sale" should unconditionally transfer the ownership of agricultural property to the acquirer, who becomes the owner thereof, this rules out, for instance, applying Article 597(1) of the Civil Code to the right of acquisition accordingly. Applied accordingly, the said provision would impose an obligation to conclude not an unconditional but rather a conditional agreement transferring ownership, in the case where the Agricultural Property Agency has the right to acquire agricultural property. In the event of direct application of general principles of pre-emption, an agreement which transfers the ownership of agricultural property and which is other than a contract of sale should be an agreement concluded under the condition that the Agency does not exercise its right of acquisition.

The Constitutional Tribunal points out that, in the light of general principles of civil law, the requirement that provisions regulating the functioning of another legal institution should be applied accordingly may mean that some of the provisions which a given regulation refers to will be applied directly, with considerable modifications, or will not be applied at all. Reference to the appropriate application of provisions on the exercise of the right of pre-emption is not an effective solution. However, taking into account the established line of jurisprudence of the Supreme Court, it may not be stated that the scope of appropriate application of the Civil Code provisions on the right of pre-emption to the exercise of the right of acquisition (Article 4(5) of the Act on shaping the agricultural system) is vague and misleads parties to transactions in a way that they are unable to determine which provisions of the Civil Code will be applicable to them and which will not. The Supreme Court has ruled out, *inter alia*, the possibility of direct application of Article 597(1) of the Civil Code - which concerns the obligation that a conditional agreement is to be concluded in the case of a contractual right of pre-emption – since it is incompatible with the unconditional character of an agreement transferring the ownership

of immovable property pursuant to Article 4(1) of the Act on shaping the agricultural system.

Likewise, the Supreme Court has also already presented its view on the second fundamental issue, i.e. the question about the possibility of applying Article 599(2) of the Civil Code to the exercise of the right of acquisition; in accordance with the said Article an agreement concluded unconditionally between parties shall be null and void if the right of pre-emption is vested in the State Treasury by statute. However, not only the said provision is ruled out (the appropriate application thereof, in fact, consists in the lack of a possibility of application), but the Act of 2003 on shaping the agricultural system separately and exhaustively regulates civil law sanctions in the event of concluding an agreement which transfers the ownership of agricultural property and which is other than a contract of sale. Article 9 of the Act on shaping the agricultural system specifies sanctions for breaching the right of pre-emption and the right of acquisition, vested in the Agency, in a different way than this is stipulated in Article 599(2) of the Civil Code, which refers to the right of pre-emption. An act in law which is carried out in violation of the provisions of the said Act or without notifying the Agency about the possibility of filing a declaration of acquisition of agricultural property, as a result of concluding an agreement other than a contract of sale, is legally null and void, and anyone who has a legal interest, as well as the Agency itself, may file a petition in court to determine the existence of a legal arrangement or lack thereof, on the basis of Article 189 of the Code of Civil Procedure.

Sharing the applicant's allegation as to a certain imperfection of statutory reference to the appropriate application of provisions on pre-emption to the exercise of the right of acquisition of immovable property by the Agency, the Constitutional Tribunal has not found such a degree of defectiveness and legislative irregularities which would weigh in favour of declaring the unconstitutionality of the challenged provision.

4. The mechanism of notifying the Agricultural Property Agency about concluding a notary deed and exercising the right of acquisition by the Agency.

What also raises the Ombudsman's doubts as regards the issue of constitutionality is the legal character and consequences of the declaration of intent submitted by the Agricultural Property Agency and the way of exercising its power by the Agency, when notified about conclusion of a relevant agreement. Likewise, it has been pointed out that the pleadings of the participants in the proceedings before the Constitutional Tribunal, as well as in legal literature on the subject that there are interpretative difficulties as regards Article 4 of the Act on shaping the agricultural system in that regard. The applicant argues that the unfortunate and vague wording of Article 4 of the said Act precludes unambiguous determination of a legal construct adopted in that provision. This poses a risk to the participants of transactions and results of their uncertainty as to their rights and obligations imposed by statute in civil law transactions.

The Constitutional Tribunal wishes to note that neither Article 4 of the Act on shaping the agricultural system nor any other provision of that Act specifies the procedure for exercising the right of acquisition by the Agricultural Property Agency. In such a case, reference should again be made to the appropriate application of provisions of the Civil Code concerning the right of pre-emption; and, in particular, to Article 600 of the Civil Code, which regulates the exercise of that right. So far the Supreme Court has not presented its views as to other – than those related to Article 597 and Article 599 of the Civil Code – issues concerning the "appropriate" application of the regulation of the right of pre-emption to Article 4 of the Act on shaping the agricultural system; in particular, no rulings can be indicated where common courts and the Supreme Court would explain who

is obliged to notify the Agricultural Property Agency that an agreement transferring ownership has been concluded. However, that issue does not raise serious doubts in the practice of carrying out transactions, which is confirmed by the stance of the President of the National Notary Council.

The scope of appropriate application of other provisions on pre-emption must take into account a basic assumption about an unconditional character, rather than a conditional one, of an agreement concluded by private entities. Due to the unconditional character of an agreement between parties to transactions involving agricultural property, the scope of application of Article 600 of the Civil Code is limited to an obligation to notify the Agricultural Property Agency about the possibility of exercising its right within a month from the moment of being notified about the conclusion of the agreement. According to notarial practice, there is no doubt that the requirement to apply provisions on the right of pre-emption accordingly entails that a person obliged to notify the Agricultural Property Agency is the transferor of agricultural property, since what has been introduced is not a mechanism of concluding a conditional agreement but an unconditional transfer of ownership. Therefore, there will be no application for Article 598(1) of the Civil Code, pursuant to which – in the case of the right of pre-emption – it is the acquirer who should forthwith notify the Agency about the conclusion and content of an agreement, serving the Agency with a copy of that agreement. Such a solution may only raise doubts, voiced by the representative of the Public Prosecutor-General during the proceedings, that the default of notification will affect not the transferor but the acquirer of agricultural property, i.e. its current owner.

The applicant also argues that the provisions of the Act do not indicate to whom the Agency should submit a declaration of acquisition of immovable property within a month from being notified about the conclusion of an agreement transferring ownership, under the restriction that it will lose its right due to the expiry of the right after the lapse of the indicated period. In the literature on the subject, there is a view that, due to submitting the declaration of intent, the ownership of agricultural property is transferred from the acquirer to the Agency by way of a unilateral act in law carried out by the Agricultural Property Agency (see J. Górecki, "Nowe ograniczenia w obrocie nieruchomościami rolnymi", *Państwo i Prawo* Issue No. 10/2003, p. 16). In the legal doctrine, a further-reaching view is taken (see R. Sztyk, "Podstawowe zasady kształtowania ustroju rolnego", *Rejent* No. 5/2003, p. 30), in accordance with which, after submitting a unilateral declaration of intent by the Agricultural Property Agency, and thus the change of the owner of agricultural property, additionally the agreement between the Agency and the transferor of the agricultural property is concluded which has the same content as the one concluded with the acquirer of the property.

However, the Ombudsman's doubts concern not the character of the declaration of the Agency's intent to exercise the statutory right of acquisition, but the question to whom such a declaration should be submitted. In the case of the right of pre-emption, the declaration of the intent to exercise the right is submitted to the seller who, after concluding a conditional contract of sale, still remains the owner of the object of ownership. In the case of the right of acquisition, the declaration may not be effectively submitted to the transferor, as – after the conclusion of an unconditional agreement transferring the ownership of immovable property – the acquirer is already the owner of agricultural property. In the event of the mechanism of unconditional transfer of the right to the acquirer, s/he is the only person the declaration may be submitted to. The President of the National Notary Council has informed that it is assumed in notarial practice that the ownership of property is transferred to the State Treasury at the moment the declaration of the Agricultural Property Agency is submitted to the acquirer of agricultural property.

Therefore, the Constitutional Tribunal has concluded that the imprecision of Article 4 of the Act on shaping the agricultural system in that regard, as alleged by the applicant, has been eliminated and, in the practice of transactions, this issue does not raise the doubts as regards interpretation which were pointed out in the literature on the subject and in notarial practice at the time shortly after the Act had entered into force (see e.g. L. Błądek, "Niektóre rozważania na temat ustawy z dnia 11 kwietnia 2003 r. o kształtowaniu ustroju rolnego", *Rejent* No. 9/2003, p. 142). Thus, the lack of explicit regulation of the way of exercising the right by the Agricultural Property Agency in the Act on shaping the agricultural system does not constitute an excessive restriction on civil law transactions, as it was suggested by the applicant.

5. The situation of persons who are entitled due to the contract of annuity.

The applicant indicates that the Act does not regulate the legal effects of the exercise of the right of acquisition by the Agricultural Property Agency in the context of agreements which not only grant rights but also impose obligations with regard to the transferor, including personal obligations. In particular, what has not been sufficiently specified is whether - in the case of the contract of annuity which entails transferring the ownership of an immovable property in exchange for the acquirer's commitment to provide care and personal services for the annuitant, as well as to permit him/her to continue to live in the immovable property after it has been transferred – by virtue of the law, the Agency assumes any obligations arising from such a contract with regard to the entitled person (Article 908 of the Civil Code). Also, it should be noted that a similar issue arises in the context of taking over inherited debts, since Article 4 of the Act on shaping the agricultural system is applicable here on the basis of Article 1070^1 of the Civil Code.

None provision prohibits the Agency from exercising its right in that situation, and Article 600(2) of the Civil Code applied accordingly allows the Agency to free itself from personal obligations upon payment of the value of the said services. This is confirmed by the stance of the President of the National Notary Council; it follows from his letter that the Agency could effectively free itself from the obligations imposed on it with regard to the annuitant in return for a life-time annuity. By contrast, it follows from the letter of the President of Agricultural Property Agency that, in practice, the Agency has never exercised its right with regard to the contracts of annuity, and even that the Agency refrains from interference in the case of agreements which give rise to personal obligations with regard to a given annuitant, due to the incapability of fulfilling such an obligation in practice. Therefore, there has been no jurisprudence concerning the admissibility and effectiveness of the Agency's request to change its personal obligations with regard to an annuitant, on the basis of Article 600(2) of the Civil Code.

6. The assessment of the Ombudsman's allegations, from the point of view of the principle of specificity of legal provisions and the principle of appropriate legislation (Article 2 of the Constitution).

The Constitutional Tribunal will review the previous findings as regards the essence of the legal institution of the right of acquisition of agricultural property by the Agricultural Property Agency and the way of formulating Article 4 of the Act on shaping the agricultural system in the light of the higher-level norm for constitutional review indicated by the applicant, i.e. Article 2 of the Constitution, and in particular the principle of appropriate legislation and the principle of specificity of legal provisions, which are expressed therein.

6.1. The test of specificity of legal provisions in the jurisprudence of the Constitutional Tribunal.

The requirement of appropriate legislation, indicated by the applicant as a higher-level norm for constitutional review, manifests one of the aspects of the principle of a state ruled by law, expressed in Article 2 of the Constitution. This aspect is functionally related to the principles of: reliability of law, legal security as well as the protection of citizens' trust in the state and its laws. These principles stipulate that legal provisions should be formulated in a precise and clear way and the enactment of law should take place in a logical and consistent way, with due respect for general systemic principles and relevant axiological standards. It follows from the previous jurisprudence of the Constitutional Tribunal that the usefulness and potential legitimacy of the entry into force of given legal regulations may not constitute justification for drafting law in a chaotic, arbitrary or defective way.

One of the requirements of appropriate legislation is the principle of specificity of law. The specificity of law also constitutes an element of the principle of protection of citizens' trust in the state and its laws, which arises from Article 2 of the Constitution. It is also functionally related to the principles of legal certainty and legal security. Therefore, the requirement of specificity of legal regulation is based on the constitutional principles of a democratic state ruled by law. It refers to all regulations which (directly or indirectly) affect the legal situation of the citizen (see e.g. the judgments of: 15 September 1999, Ref. No. K 11/99, OTK ZU No. 6/1999, item 116; 11 January 2000, Ref. No. K 7/99, OTK ZU No. 1/2000, item 2; 21 March 2001, Ref. No. K 24/00, OTK ZU No. 3/2001, item 51; 30 October 2001, Ref. No. K 33/00, OTK ZU No. 7/2001, item 217; 22 May 2002, Ref. No. K 6/02, OTK ZU No. 3/A/2002, item 33; 20 November 2002, Ref. No. K 41/02, OTK ZU No. 6/A/2002, item 83; 3 December 2002, Ref. No. P 13/02, OTK ZU No. 7/A/2002, item 90; 29 October 2003, Ref. No. K 53/02, OTK ZU No. 8/A/2003, item 83; 9 October 2007, Ref. No. SK 70/06, OTK ZU No. 9/A/2007, item 103).

In the jurisprudence of the Constitutional Tribunal, "specificity of law" is used in a broad sense which includes both the precise wording of a provision as well as the clarity of law, which is to be comprehensible and communicative for as large a number of individuals and entities as possible (see T. Spyra, "Zasada określoności regulacji prawnej na tle orzecznictwa Trybunału Konstytucyjnego i niemieckiego Sądu Konstytucyjnego", *Transformacje Prawa Prywatnego* Issue No. 3/2003, p. 59; T. Zalasiński, *Zasada prawidłowej legislacji w poglądach Trybunału Konstytucyjnego*, Warszawa 2008, pp. 183-185).The requirement of specificity of a legal regulation has a character of a general systemic directive, imposing an obligation on the legislator to optimise it in the legislative process. The legislator should aim at fulfilling - to a maximum extent - the requirements which make up that principle. For the above reasons, it is the legislator's obligation to create provisions of law which are as specific as it is possible in a given case, both in respect of their content as well as their form. Hence, the degree of specificity of particular regulations is relative with regard to the actual and legal circumstances that accompany each regulation. This relativity naturally results from the imprecision of language, in which legal texts are written, and from the variety of matters which are subject to regulation.

The Constitutional Tribunal has, a number of times, indicated in its jurisprudence that, for the assessment of the conformity of the wording of a given provision to the requirements of appropriate legislation, three assumptions are vital:

– every provision which imposes restrictions on constitutional rights or freedoms should be formulated in such a way which allows to unambiguously determine who and, in what situation, is subject to restrictions,

– the wording of a given provision should be adequately precise so that it would ensure the consistent interpretation and application of the provision,

– a given provision should be formulated in such a way that the scope of its application would encompass only those situations where the legislator, acting rationally, intended to introduce regulations which would impose restrictions on the exercise of constitutional rights and freedoms.

What should be construed as the precision of legal regulation is the possibility of decoding unambiguous legal norms (as well as its consequences), by means of the methods of interpretation adopted in a given legal culture. In other words, the principle of specificity of legal provisions should be understood as a requirement to formulate provisions in such a way that they would guarantee a sufficient degree of precision for determining their meaning and legal consequences (see, in particular, the rulings of the Constitutional Tribunal of: 19 June 1992, Ref. No. U 6/92, OTK of 1992, Part I, item 13; 1 March 1994, Ref. No. U 7/93, OTK of 1994, Part I, item 5; 26 April 1995, Ref. No. K 11/94, OTK of 1995, Part I, item 12; the decision of 24 February 2003, Ref. No. K 28/02, OTK ZU No. 2/A/2003, item 18 as well as the judgments of 17 October 2000, Ref. No. SK 5/99, OTK ZU No. 7/2000, item 254 and 28 June 2005, Ref. No. SK 56/04, OTK ZU No. 6/A/2005, item 67). The precision of the wording of a given provision is manifested in the specificity of the regulation of rights and obligations, so that their content was obvious and would allow to enforce them.

The clarity of a provision is to guarantee that it would be communicative to its addressees, but what is meant here is the comprehensibility of a provision in the context of general language. The vagueness of a provision, in practice, entails that the legal situation of the addressee of a given norm is uncertain and that the norm will be shaped by the organs of public authority which are responsible for applying the law (cf. the judgments in the cases K 24/00 and K 41/02 as well as the judgment of 27 November 2007, Ref. No. SK 39/06, OTK ZU No. 10/A/2007, item 127). In accordance with the established line of jurisprudence of the Constitutional Tribunal, enacting vague and ambiguous provisions which do not allow the citizen to predict the legal consequences of his/her actions constitutes an infringement of the Constitution (cf. the judgments in the cases K 6/02 and K 41/02).

In the present case, the Constitutional Tribunal maintains the above-indicated assumptions. At the same time, the Tribunal holds the view that declaring a given provision to be no longer legally binding - due to the fact that its wording is vague or imprecise - should be regarded as a last resort, used when other methods of eliminating doubts as regards the content of the provision, in particular by way of its interpretation, will prove insufficient. Consequently, the imprecise wording or vague content of a given provision does not, in every case, justify the elimination of the provision from the legal system. In the opinion of the Constitutional Tribunal, the vagueness or imprecision of the provision may justify declaring it unconstitutional as long as that vagueness or imprecision is so considerable that the ensuing discrepancies cannot be overcome by means of ordinary measures aimed at eliminating inconsistencies in the application of law (see the decision of the Constitutional Tribunal of 27 April 2004, Ref. No. P 16/03, OTK ZU No. 4/A/2004, item 36, as well as the judgments of: 16 December 2003, Ref. No. SK 34/03, OTK ZU No. 9/A/2003, item 102; 28 June 2005, Ref. No. SK 56/04; 15 January 2009, Ref. No. K 45/07, OTK ZU No. 1/A/2009, item 3).

6.2. The result of the test of specificity of law with regard to Article 4 of the Act on shaping the agricultural system.

The Constitutional Tribunal has confronted the specified content of the higher-level norm for constitutional review, i.e. the principle of appropriate legislation arising from Article 2 of the Constitution, and the principle of specificity of legal provisions, which constitutes an element of the aforementioned principle, with the allegations put forward by the Ombudsman as regards the conformity of Article 4 of the Act on shaping the agricultural system to the Constitution. In the view of the Constitutional Tribunal, one may not speak of such accumulation of vagueness as regards the regulation of the mechanism of exercising the right of acquisition, which would excessively hinder the exercise of the right of ownership of agricultural property by citizens entitled thereto. Consequently, the Constitutional Tribunal has regarded Article 4 of the Act on shaping the agricultural system as a regulation which is sufficiently specific, with regard to which there has been no infringement of the principle of appropriate legislation, arising from Article 2 of the Constitution.

It follows from the analysis carried out so far by the Constitutional Tribunal that the doubts raised by the Ombudsman as regards interpretation have been dispelled in the jurisprudence of courts by applying the available methods for interpreting civil law. The Constitutional Tribunal maintains its view, repeatedly presented in its previous jurisprudence, that not every provision which is imprecise, or even defectively formulated, should be regarded as unconstitutional. Declaring a given provision to be no longer legally binding due to its vagueness or imprecision is a last resort, applied only when other methods for eliminating doubts concerning interpretation will prove insufficient. Only confirmed essential dysfunctionality of a legal provision and the fact that the legislator has gone beyond a certain essential level of vagueness may constitute an independent premiss of declaring the non-conformity of the provision to Article 2 of the Constitution (cf. the judgment of 30 October 2001, Ref. No. K 33/00, OTK ZU No. 7/2001, item 217). By contrast, in the present case, the Constitutional Tribunal does not observe such great vagueness of Article 4 of the Act on shaping the agricultural system, neither as regards the scope ratione materiae of the provision nor as to the assumed construct of the exercise of the right of acquisition, which would justify regarding the provision as unconstitutional.

Despite the Ombudsman's allegations, most disputable issues have been clarified in the process of applying the law both by the organs of the judiciary as well as by notaries public. Despite a small number of rulings by the Supreme Court concerning the Act on shaping the agricultural system, one may speak of judicial interpretation which, to a large extent, dispels concerns as to the inconsistent application of the challenged provision. In the view of the Constitutional Tribunal, the interpretation of Article 4 of the Act on shaping the agricultural system has been specified sufficiently enough for the participants in transactions not to wait insecurely for precedent rulings and the shaping of consistent jurisprudence, as the applicant suggests.

At the same time, the Constitutional Tribunal notes that there are still a number of situations which raise justified doubts as to whether, in their case, the Agricultural Property Agency is entitled to the right of acquisition on the basis of Article 4 of the Act on shaping the agricultural system. An example of such a situation is an act in law involving the dissolution of the co-ownership of agricultural property, due to the disputable categorisation of such an act in law at all as an act in law transferring ownership. Likewise, although for reasons of usefulness, a judicial interpretation as to determining the inclusion within the scope of Article 4(1) of the Act on shaping the agricultural system will be needed for acts in law transferring ownership, carried out between individuals and legal

entities representing the property of the state or local self-government. An example of such an act in law is an agreement of exchange of immovable properties, where one of them is an agricultural property, between an individual and the authorities of a given commune, on the basis of the Act of 21 August 1997 on the management of immovable property as well as the problem of entitlement to the right of acquisition (as well as the right of pre-emption) by the Agricultural Property Agency, in the event of the sale of agricultural property by an individual to the State Treasury. Adopted in the jurisprudence of courts, the doctrine of a broad interpretation of the scope ratione materiae of Article 4 of the Act on shaping the agricultural system definitely does not enable ones to answer the above questions. Moreover, according to the information received by the Constitutional Tribunal, the Agricultural Property Agency has not so far exercised its right in the case of concluded agreements other than contracts of donation, agreements which involve providing agricultural land as in-kind contributions to companies as well as loan agreements which require as collateral the assignment of agricultural property to creditors. As a consequence, potential disputes have not been examined in court proceedings and thus there have been no reliable jurisprudence of courts in that regard.

In the view of the Constitutional Tribunal, the said circumstance does not constitute an argument for the unconstitutionality of the challenged provision of Article 4 of the Act on shaping the agricultural system, due to its non-conformity to the principle of appropriate legislation and the principle of specificity of law, which arise from Article 2 of the Constitution. A majority of previously disputable issues have been specified more precisely in the jurisprudence of courts, and the remaining doubts as regards interpretation do not concern significant issues and do not go beyond an acceptable level. It should be pointed out that, when adjudicating, the Tribunal takes into account the state of affairs at the moment of closing a hearing (Article 316(1) of the Code of Civil Procedure in conjuction with Article 20 of the Constitutional Tribunal Act) and, therefore, the Tribunal itself assesses – in default of consistent jurisprudence within a given scope – the occurrence of interpretative ambiguities and their scale.

Moreover, the Constitutional Tribunal assumes in its jurisprudence that the legislator enjoys considerable freedom when it comes to shaping legal institutions within the scope of civil law which regulate relations between private entities, and also as regards those regulations which grant special rights to one of the participants in civil law transactions. The shape of those regulations is modelled and specified more precisely in the practice of transactions, and disputable issues are resolved in the course of activity carried out by the organs of public authority which are responsible for applying the law. The Constitutional Tribunal once again wishes to emphasise that it has no jurisdiction as regards determining the binding interpretation of statutes, which falls within the scope of competence of other organs of public authority, including common courts and the Supreme Court. The remaining doubts as regards interpretation and the problem of consequences resulting from the exercise of the right of acquisition for annuitants, which has been pointed out by the applicant, will certainly be the subject of the jurisprudence of courts.

Therefore, the Constitutional Tribunal has found no grounds for questioning the conformity of the challenged provision of Article 4 of the Act on shaping the agricultural system to the normative content arising from the principle of specificity of legal provisions and the principle of appropriate legislation, and has stated that Article 4 of the said Act is consistent with Article 2 of the Constitution. The vagueness or imprecision of a provision may justify declaring it unconstitutional only where the vagueness or imprecision is so considerable that the resulting discrepancies cannot be resolved by means of ordinary measures aimed at eliminating inconsistencies in the application of law. However, as

regards Article 4 of the Act on shaping the agricultural system, such a situation is not the case.

7. The assessment of conformity of Article 4 of the Act on shaping the agricultural system to Article 21(1), as well as Article 64(1) and (2) in conjunction with Article 31(3) of the Constitution.

7.1. The scope of allegations.

The Ombudsman has requested the Tribunal to review the conformity of Article 4 of the Act on shaping the agricultural system to Article 21(1), as well as Article 64(1) and (2) in conjunction with Article 31(3) of the Constitution. The said provisions refer to a higher-level norm for constitutional review which concerns the protection of ownership. However, it follows from the analysis of the applicant's letter, its substantiation and the stance presented at the hearing by the representative of the applicant, that the Ombudsman's allegations pertaining to the indicated provisions do not refer to the very introduction of a mechanism of exercising the right of acquisition by the legislator and its substantive defectiveness as an instrument which disproportionately interferes with the constitutionally protected right of ownership of agricultural property vested in individuals. By contrast, the Ombudsman indicates that Article 4 of the Act on shaping the agricultural system constitutes disproportionate interference with the right of ownership, due to the excessive imprecision of the wording of the provision regulating the right of acquisition. The vagueness of the provision results in the inadmissible uncertainty of the addressees of the Act as regards the rights of the Agricultural Property Agency and the related obligations of participants in civil law transactions. In the opinion of the Ombudsman, the inconsistency in the application of the challenged provision by the organs of the state and state entities, and in particular the Agricultural Property Agency, makes it difficult for citizens to exercise their rights, results in the uncertainty of their legal situation and forces citizens to wait for the shaping of consistent jurisprudence.

Bound by the boundaries of the Ombudsman's application, the Constitutional Tribunal has no jurisdiction to carry out constitutional assessment as to whether the right of acquisition, in its essence, constitutes excessive interference with the constitutionally protected right of ownership, or whether the very choice of the mechanism of exercising the right of acquisition by the Agricultural Property Agency, in the event of concluding any agreements which transfer the ownership of agricultural property and which are other than contracts of sale, is consistent with the Constitution, or whether the introduction of the mechanism ensures the effective implementation of statutory tasks assigned to the Agency which aim at shaping the agricultural system in Poland. Hence, the Constitutional Tribunal has not examined, as requested in the Ombudsman's application, whether the mechanism of exercising the right of acquisition, in fact, constitutes a covert form of expropriation without the requirement to indicate vital public interests underlying such interference (Article 21(2) of the Constitution). The Tribunal has merely assessed whether the legal institution of the right of acquisition, formulated in the Act in a way specified by legislation, fulfils the premisses required by the principle of proportionate interference with constitutionally protected rights (Article 21(1), as well as Article 64(1) and (2) of the Constitution) in conjunction with a formal requirement that any restriction on the right of ownership should be regulated by a sufficiently specific statute (Article 31(3) of the Constitution).

7.2. The assessment of the applicant's allegations.

Embarking on the substantive assessment of the applicant's allegations, the Constitutional Tribunal points out that, pursuant to Article 31(3) of the Constitution, any restrictions on constitutional rights and freedoms (and in accordance with Article 64(3) of the Constitution – also as regards the exercise of the right of ownership) may be imposed "only by statute" and must meet the requirement of sufficient specificity. The statutory basis needs to render an issue in an adequately extensive way so that it could meet the requirement of sufficient "specificity" (see the judgment of 21 March 2001, K 24/00, OTK ZU No. 3/2001, item 51). The test of ultimate specificity on the basis of Article 31(3) of the Constitution makes obvious reference to the requirement of specificity of legal provisions, which constitutes a fundamental requirement of the principles of appropriate legislation (Article 2 of the Constitution). For that reason, the Tribunal refers to the above-mentioned view as regards the scope ratione materiae of the higher-level norm for constitutional review, which arises from Article 2 of the Constitution.

The Constitutional Tribunal has confronted the higher-level norm for review, specified in that way, with the provisions, challenged by the Ombudsman, which impose restrictions on agricultural property transactions. The Constitutional Tribunal notes that the right of acquisition, which functions in transactions as a complementary legal institution to the right of pre-emption by the Agricultural Property Agency, constitutes an instrument of interference with the constitutionally protected right of ownership. In the case of the exercise of the right, in accordance with the previously established mechanism, an acquirer whose acquisition of the ownership of an agricultural property is legally effective is deprived of the property, on the basis of an agreement, shortly after the transfer of the ownership of the property. In the view of the Constitutional Tribunal, it is however indispensable to take into account the circumstance, which has frequently been stressed by the Tribunal, that it has no jurisdiction to review the usefulness and aptness of the solutions adopted by the legislator. The starting point for the rulings of the Constitutional Tribunal, in the case of indicating Article 31(3) of the Constitution as a higher-level norm for constitutional review, is always to assume that the legislator's actions were rational and to presume conformity to the Constitution (see, *inter alia*, the ruling of 26 April 1995, Ref. No. K 11/94, OTK in 1995, Part I, item 12, the judgment of 7 November 2006, Ref. No. SK 42/05, OTK ZU No. 10/A/2006, item 148, the judgment of 19 September 2006, Ref. No. K 7/05, OTK ZU No. 8/A/2006, item 107). In the judgment of 21 March 2005 (Ref. No. P 5/04, OTK ZU No. 3/A/2005, item 26), the Tribunal stated that enacting the law, and thus the choice of the most appropriate legislative variants, was the role of the Parliament, whereas the task of the Constitutional Tribunal was merely to assess whether the solutions adopted by the legislator do not infringe constitutional norms, principles and values. In the present case, the Tribunal fully maintains that view.

In the context of such a higher-level norm for review, the Constitutional Tribunal does not share the applicant's allegation that the wording of Article 4 of the Act on shaping the agricultural system is so vague and imprecise that it is impossible to precisely determine the content of the regulation. Since the Tribunal has not found any infringements of the principles of appropriate legislative activity arising from Article 2 of the Constitution, and has not shared the applicant's view that the mechanism of interference with the right of ownership of agricultural property exceeds the admissible level of vagueness, the Tribunal finds no grounds to regard Article 4 of the Act on shaping the agricultural system as a regulation interfering, in a disproportionate way, with the constitutionally protected right of ownership (Article 21(1) as well as Article 64(1) and (2) in conjunction with Article 31(3) of the Constitution). In the light of the principle of specificity which arises from Article 31(3) of the Constitution, the Constitutional Tribunal

has found no grounds to adopt different assessment than the one assumed on the basis of Article 2 of the Constitution. Thus, it has not found sufficient arguments to declare Article 4 of the Act on shaping the agricultural system to be inconsistent with Article 21(1), as well as Article 64(1) and (2) in conjunction with Article 31(3) of the Constitution.

III. The assessment of constitutionality of Article 29(5) of the Act on the management of agricultural property of the State Treasury.

1. The statutory right of repurchase by the Agricultural Property Agency.

Pursuant to Article 29(5) of the Act on the management of agricultural property of the State Treasury, the Agricultural Property Agency has the right of repurchase of immovable property on behalf of the State Treasury, within the period of 5 years from the date of acquisition of the property from the Agency, with the exception of immovable property situated within the boundaries of special economic zones; the right of repurchase should be entered in the land register which is kept for a given immovable property. Thus, the scope of application of that provision encompasses all immovable properties sold previously by the Agency, with the exception of those situated within the boundaries of special economic zones. The legal construct of the statutory right of repurchase does not pose any major interpretation problems. Despite the lack of further guidelines in the Act, in cases which are not regulated, the provisions of the Civil Code are directly applicable to that right, pursuant to general reference made in Article 54 of the Act on the management of agricultural property of the State Treasury. These are, in particular, provisions on the contractual right of repurchase reserved by the parties to a contract of sale (Articles 593-595 of the Civil Code), which has been known in civil law for years.

The Constitutional Tribunal wishes to draw attention to the fact that the Civil Code provides merely for a contractual right of repurchase. Thus, it regulates a situation where the acquirer submits a declaration of intent which expresses consent to reserve the right of repurchase to the transferor. Apart from the above-mentioned significant difference, the remaining elements of the statutory right of repurchase by the Agricultural Property Agency do not modify the *essentialia negotii* of the said right. The unique character of the contractual right of repurchase consists in the fact that, by the seller's declaration submitted to the purchaser within a specified period, the purchaser is obliged to transfer the ownership of the thing which s/he has acquired back to the seller, in exchange for the return of the price and the cost of sale and the return of outlays incurred (the return of the outlays which were not necessary shall be payable to the purchaser only within the limits of the increase of the value of the thing). A repurchase price may be specified in advance in a given contract; then, however, it may be reduced, upon request of the seller, to the value of the thing at the time when the right of repurchase is exercised. The violation of the contractual right of repurchase results in the purchaser's liability in damages. The contractual right of repurchase, being a personal claim, may also be entered in a relevant land register (Article 16 of the Act on land registers and mortgages), and then it applies in the context of each acquirer of a given immovable property. The violation of the right of repurchase entered in the land register results in liability which is attached to a given immovable property regardless of its current owner (pursuant to the concept of the so-called extended effectiveness of obligations).

The statutory right of repurchase is characterised by a more restrictive way of shaping all elements than the contractual right of repurchase. The Agricultural Property Agency acquires the statutory right of repurchase at the time of conclusion of any contract

of sale concerning land which belongs to the State Treasury's Reserve of Agricultural Property. The said right becomes an element of the content of such a contract without consent of the parties and without the possibility of excluding such a right on the basis the parties' unanimous declarations of intent. The period of reserving the right of repurchase is the longest possible period provided for the contractual right of repurchase, whereas the repurchase price has been specified in the lowest amount admissible by the Civil Code. When the transferor exercises the statutory right of repurchase, s/he is obliged to return only the price and costs of sale and the outlays incurred, but the return of those outlays which were not necessary shall be due to the purchaser (acquirer) only within the limits of the increase of the value of the thing. Additionally, in each case, the right of repurchase shall be entered in a relevant land register and is effective not only in relation to a party to the contract of sale of agricultural property from the Agency, but also with regard to any subsequent owner of the property. The consequences of the exercise of the statutory right of repurchase do not raise any doubts concerning interpretation. In such a case, what is applied here is the established construct of a claim for the transfer of ownership of a given immovable property back to the transferor.

2. Specifying a higher-level norm for the constitutional review.

Putting forward an allegation of disproportionate interference with the constitutionally protected right of ownership, in the *petitum* of the application, the Ombudsman has indicated the following as higher-level norms for review: Article 2 and Article 21(1) as well as Article 64(1)-(3) in conjunction with Article 31(3) of the Constitution. Due to the indication of such a higher-level norm for review, the Constitutional Tribunal will begin with pointing out basic relations between Article 64 and Article 21(1), which determine the constitutional higher-level norm as regards the protection of the right of ownership.

It follows from the previous jurisprudence of the Tribunal that the right of ownership and its guarantees, indicated in Article 64 of the Constitution, should be construed in the context of general systemic principles of the Republic of Poland, and in particular in the context of Articles 20 and 21 of the Constitution, which include private ownership among the basic systemic principles of the state. However, Article 21(1) of the Constitution does not only expresses a systemic principle of the Republic of Poland, but it also imposes certain obligations on public authorities. It should be noted that, above all, the said provision rules out the possibility of evolution of ownership relations towards the restoration of a dominant role of the state or other public entities (see the judgment of 12 January 1999, Ref. No. P 2/98, OTK ZU No. 1/1999, item 2).

In its previous jurisprudence, the Tribunal has held the view that the relation between Article 64 (supplemented with the guarantees of the right of ownership in respect of the level of protection of other property rights) and Article 21(1) of the Constitution does not consist in replacing one provision with another, but the relation is based on the provisions being complementary to each other (see E. Łętowska, "Własność i jej ochrona jako wzorzec kontroli konstytucyjności. Wybrane problemy. Referat na XII Konferencję Sędziów Trybunału Konstytucyjnego i Sądu Konstytucyjnego Republiki Litewskiej, Warszawa 24 czerwca 2009 r.", pp. 7-9). The basic content of Article 64 of the Constitution is the stipulation about everyone's right of ownership, and in that regard the provision repeats and specifies the general principle and guarantee of protection of ownership, as expressed in Article 21(1) of the Constitution (see the judgment of 13 April 1999, Ref. No. K 36/98, OTK ZU No. 3/1999, item 40, the judgment of 12 January 1999, Ref. No. P 2/98, OTK ZU No. 1/1999, item 2; the judgment of

21 May 2001, Ref. No. SK 15/00, OTK ZU No. 4/2001, item 85). Not only does Article 64 repeat the principle, but it also develops and supplements it. For that reason, the Constitutional Tribunal has recognised both higher-level norms for the constitutional review, indicated by the applicant.

Article 64(1) of the Constitution (unlike Article 21(1) of the Constitution, which contains a declaration of a systemic guarantee of the protection of ownership) primarily expresses the individual's subjective right to protection of the right of ownership, which the individual is entitled to, and which constitutes the basis of the public subjective right comprising the freedom to acquire property, to maintain it and to dispose of it (see the judgment of 31 January 2001, Ref. No. P 4/99, OTK ZU No. 1/2001, item 5). Article 64 regards the protection of ownership as an element of the legal order, which implies the obligation of organs of public authority to set out appropriate rules of the functioning of property relations (see B. Banaszkiewicz, "Konstytucyjne prawo do własności" [in:] *Konstytucyjne podstawy systemu prawa*, M. Wyrzykowski (ed.), Warszawa 2001, pp. 32-37).

The Constitutional Tribunal holds the view that Article 21(1) of the Constitution constitutes a value which determines the direction of interpretation of Article 64 of the Constitution (see the judgment of 12 January 2000, Ref. No. P 11/98, OTK ZU No. 1/2000, item 3; cf. L. Garlicki, Commentary to Article 64 of the Constitution Konstytucji [in:] *Konstytucja Rzeczypospolitej Polskiej*, Warszawa 2002, pp. 5-6). In that respect, Article 64 of the Constitution should also be understood as a reflection of a general systemic principle such as regarding private property as one of the basic institutions of the economic order of the Republic of Poland, and one of the basic values of social order. The guarantee of the protection of ownership should primarily be implemented by legislative activities which shape basic legal institutions that specify the content of ownership as well as set out the protective measure of the right (see the judgment of 12 January 1999, Ref. No. P 2/98, OTK ZU No. 1/1999, item 2). With that scope, the legal content of Article 64(1) of the Constitution overlaps with the legal content of Article 21(1) of the Constitution. In the light of its findings, the Constitutional Tribunal has considered the applicant's allegations in the context of the constitutional higher-level norm concerning the protection of ownership, derived from the two provisions of the Constitution (Article 21(1) and Article 64(1) of the Constitution).

2.1. The higher-level norm arising from Article 64(2) of the Constitution.

The applicant alleges that the challenged provisions are also inconsistent with Article 64(2) of the Constitution. The said provision establishes the principle that "everyone, on an equal basis" shall receive legal protection regarding ownership, in comparison with the scope of regulation of other property rights. It follows from the previous jurisprudence of the Constitutional Tribunal that it primarily means the prohibition against category-related differentiation in the level of protection with regard to other property rights (see the judgments of: 2 June 1999, Ref. No. K 34/98, OTK ZU No. 5/1999, item 94, 29 June 1999, Ref. No. K 23/00, OTK ZU No. 5/2001, item 124), since the protection of ownership may not *sensu stricto* be weaker than the level of protection of other property rights (see the judgment 30 October 2001, Ref. No. K 33/00, OTK ZU No. 7/2001, item 217). The differentiation in the character of particular property [rights] may determine the differentiation in the scope of the protection thereof (see the judgment of 25 February 1999, Ref. No. K 23/98, OTK ZU No. 2/1999, item 25), especially that the requirement of the protection of property rights of the same category is not absolute and allows for justified exceptions. If it can be proven that the differentiation

is justified by the arguments of relevance, proportionality and connection with other constitutional principles, then such differentiation is admissible (see the judgment of 31 January 2001, Ref. No. P 4/99, OTK ZU No. 1/2001, item 5).

Therefore, it follows from the previous jurisprudence of the Constitutional Tribunal that although Article 64(2) of the Constitution amounts to a prohibition against category-related differentiation in the level of protection of the right of ownership, in comparison with other property rights, it is not however tantamount to a prohibition against differentiation ratione personae in the substantive and qualitative level of protection of particular property rights (see E. Łętowska, *op.cit.*, p. 16).

2.2. The higher-level norm arising from Article 64(3) of the Constitution.

In accordance with Article 64(3) of the Constitution, "the right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right". It follows from the previous jurisprudence of the Constitutional Tribunal that the indicated provision fulfils a double role (see the judgments of: 12 January 1999, Ref. No. P 2/98, OTK ZU No. 1/1999, item 2; 11 May 1999, Ref. No. K 13/98, OTK ZU No. 4/1999, item 74; 25 May 1999, Ref. No. SK 9/98, OTK ZU No. 4/1999, item 78). Firstly, the provision constitutes an unambiguous and explicit constitutional basis for introducing restrictions on the right of ownership. Secondly, the premisses of admissibility of restrictions on ownership contained therein may definitely constitute – both formally and substantively – a criterion for review of restrictions introduced by the legislator, without being all constitutional stipulations which narrow down the legislator's freedom in that regard.

The Constitutional Tribunal wishes to underline that separate regulation as regards the issue of imposing restrictions on ownership, by indicating – in Article 64(3) of the Constitution - premisses allowing such measures, does not mean ruling out the application of a general principle of proportionality expressed in Article 31(3) of the Constitution to that right. This is determined by the role of the last provision, which is determined by its place in the systematics of Chapter II of the Constitution ("General Principles"), as well as a function which this provision fulfils, as regards the regulation of rights and freedoms of the individual. In the view of the Constitutional Tribunal, the said role amounts to specifying certain impassable boundaries of the legislator's interference. At the same time, specifying the premisses of restricting the right of ownership does not contain the indication of values and goods the protection of which weighs in favour of interference with the rights of the owner. This specification is limited only to the indication of a formal premiss (a statutory requirement) as well as the delineation of the boundary of maximum interference (prohibition against violating the essence of the right of ownership). Treating Article 64(3) merely as a special provision which rules out a general principle stipulated in Article 31(3) of the Constitution, the consequence of which would be overlooking the criteria indicated in that Article, when specifying the premisses of the legislator's interference with the right of ownership, would lead to far-reaching consequences, such as relativising legal protection guaranteed in the context of the right of ownership by the Constitution. The analysis of the content of both clauses which specify the premisses of restricting rights (*inter alia* the right of ownership) has led the Constitutional Tribunal to conclude that, in the case of the right of ownership, it is Article 31(3) of the Constitution that should fulfil a basic role, whereas Article 64(3) of the Constitution should be regarded solely as constitutional confirmation of admissibility of the introduction of restrictions on the said right (see the judgments of: 12 January 1999, Ref. No. P 2/98, OTK ZU No. 1/1999, item 2; 25 February 1999, Ref. No. K 23/98, OTK ZU No. 2/1999, item 25;

29 May 2001, Ref. No. K 5/01, OTK ZU No. 4/2001, item 87; 23 April 2002, Ref. No. K 2/01, OTK ZU No. 3/A/2002, item 27). The repetition of merely some of the premisses of the principle of proportionality in that provision constitutes a form of additional emphasis of the primary position of the right in relation to the other property rights which have been overlooked in Article 64(3) of the Constitution. In the view of the Constitutional Tribunal, the assessment of constitutional admissibility of statutory restrictions on the right of ownership (and other property rights) must both take into account the requirements provided for in Article 64(3) and confront a given regulation with premisses which construct a general principle expressed in Article 31(3) of the Constitution.

3. The statutory right of repurchase as disproportionate interference with the right of ownership.

Moving on to the assessment of the statutory right of repurchase by the Agricultural Property Agency, the Constitutional Tribunal maintains the view established in its jurisprudence that the possibility of deciding about (disposing of) the object of ownership is one of the most important and fundamental elements of that right. A classical concept of ownership, which derives from Roman law, assumes that the owner may freely transfer his/her right to another person, and do this not only *inter vivos*, but also *mortis causa*. The right of disposal (*ius disponendi*) also means the possibility of maintaining ownership of a given thing by its owner, as long as such is the owner's will (see the judgment of 30 October 2001, Ref. No. K 33/00, OTK ZU No. 7/2001, item 217).

In the view of the Constitutional Tribunal, the right of repurchase is a substantially far-reaching restriction on ownership. However, the Constitutional Tribunal does not share the view of the Ombudsman as regards the fact that the very introduction of the statutory right of repurchase constitutes the infringement of the Constitution. Undoubtedly, the statutory right of repurchase by the Agricultural Property Agency constitutes an instrument which limits private transactions involving agricultural property. However, the Constitutional Tribunal does not agree with the statement that the very essence of the right constitutes disproportionate interference with the constitutional principle of the protection of ownership (Article 21(1) as well as Article 64(1) and (2) in conjunction with Article 31(3) of the Constitution).

By contrast, the Constitutional Tribunal shares the applicant's allegations that the disproportionate interference with the essence of the right of ownership stems from the fact that the statutory right of repurchase by the Agricultural Property Agency has been shaped in Article 29(5) of the Act on the management of agricultural property in a way which infringes the principles of a state ruled by law, and in particular the principle of appropriate legislation and the principle of protection of citizens' trust in the state and its laws (Article 2 of the Constitution), due to the carte blanche powers of the Agricultural Property Agency and the lack of regulation of the right of repurchase in a statute.

In the event of contractual repurchase, the stringent character of the said legal institution is mitigated when both parties to a legal relationship adhere to mutually agreed provisions of a given agreement and the rules for exercising the right of repurchase. By contrast, in the case of the statutory right of repurchase which has been shaped by statute without any possibility of modification, the provisions of the Act do not specify the conditions on the basis of which immovable properties sold by the Agricultural Property Agency are to be repurchased by the Agency. Neither Article 29 of the Act on the management of agricultural property of the State Treasury nor any other provision of that Act, as well as of the Act on shaping the agricultural system, mentions any premisses which the Agency (acting on behalf of the state) must fulfil in order to exercise the right it

has been granted. Not only does this breach the constitutional standards of Article 31(3) of the Constitution, but also this enables the court to conduct a substantive review of admissibility of such interference. The legislator placed the goal and reasons for such considerable interference within the remit of the Agency and he does not specify them by statute. Indeed, from the point of view of the constitutional standard, it is hard to regard the derivation of relevant premisses as sufficient when it is done from the general wording of Article 1 of the Act on shaping the agricultural system (defining the shaping of the agricultural system as activity aimed at improving the land structure of agricultural holdings, preventing excessive concentration of agricultural property and ensuring that agricultural households are run by persons who have relevant qualifications in the field of agriculture) or from the content of an internal regulation of the President of the Agency, which does not bind the other party to an agreement, and where the lack of adherence to the regulation by the employees of the Agency does not give rise to a possibility of laying any claims in that regard. Moreover, the Constitutional Tribunal indicates that the lack of specified premisses of exercising the right of repurchase additionally creates a situation where it is impossible to undermine the exercise of the right of repurchase if the Agency exercises its power in a way falling outside the scope of the aim of the Act on shaping the agricultural system, i.e. where the Agency exercises its power in a way that does not fall even within the general aims of the said Act.

Also, the Constitutional Tribunal wishes to indicate that the Act lacks relevant regulation of the system of settlements after the exercise of the right of repurchase, between the Agency and the acquirer, which adheres to the principles of market economy. The statutory reservation of the right of repurchase is beneficial for the transferor (the Agency), as it may – by means of a unilateral declaration of intent submitted to the purchaser within a set time-limit – lead to the re-transfer of the sold property to the Agency, and thus to the return of the agricultural property to the State Treasury's Reserve of Agricultural Property. The present reference to the relevant provisions of the Civil Code creates an unfavourable situation for the acquirer who will receive the return of the price and the costs of sale as well as the return of the relevant outlays. The repurchase is carried out at the price the property was sold to the acquirer in the past, settling the necessary outlays that have been incurred and the outlays that have increased the value of the property. The settlement is not carried out in accordance with the rules adopted in the Act of 1997 on the management of agricultural property (the market price of the property), which is applicable to the situation where an individual is expropriated by an organ of public administration for the sake of public interest. This way the price at which the statutory right of repurchase is exercised may considerably differ from the price of that immovable property quoted on the market at the moment of the exercise of the right of repurchase by the Agricultural Property Agency.

The statutory reservation of the right of repurchase with regard to agricultural property is also disadvantageous for the purchaser, who must take into consideration the fact that the seller may exercise the said right. The uncertainty of the legal situation does not serve the interests of the acquirer, in particular reservation for a long period and without indicating the reasons which would justify the exercise of the right. In the event of the necessity to resell land, this imposes an additional limitation due to the need to find another acquirer during the period reserved for repurchase. What has only been left to the discretion of the parties (in practice, to the discretion of the purchaser of agricultural property from the State Treasury's Reserve of Agricultural Property) is a decision whether – given the fulfilment of the above requirements - to at all participate in a tender organised by the Agricultural Property Agency or in an auction of such property. In addition, the obligation of entering the right of repurchase in the land register decreases the value of

agricultural property, as the potential acquirer acquires a restricted right of ownership and must take into account the possibility of exercising the right of repurchase by the Agency. It is worth noting that the statutory "obligation" to sell immovable property with the right of repurchase may limit the Agency's opportunities to dispose of the property, due to a smaller number of potential purchasers, daunted by the perspective of concluding an agreement with such a far-reaching restriction. This undoubtedly, impacts the effectiveness of carrying out basic tasks of the Agency which are related to the management of agricultural property.

The Constitutional Tribunal is aware of the reasons for adding paragraph 5 to valid Article 29 of the Act on the management of agricultural property of the State Treasury in 2003 by the legislator. Since the right of pre-emption solely concerns the transactions of sale of agricultural property, this might have triggered intentions to circumvent provisions which restrict sale conducted by the Agency (up to 500 ha) or provisions on pre-emption in the case where agricultural property was acquired by "a dummy acquirer" which would next transfer the property, for instance, to a "target" acquirer. The statutory right of repurchase, granted for 5 years and always entered in the land register, applies to every subsequent owner of given immovable property and may be effectively exercised with regard to him/her, thus resulting in the transfer of ownership of the property back to the Agricultural Property Agency. In the course of legislative work, it was emphasised that the aim of Article 29(5) of the Act on the management of agricultural property of the State Treasury – in accordance with the intention of the applicant – was to prevent, in a broad sense, the acquisition and resale of the Agency's land by an individual or entity which at a given moment owns more than 500 ha" (the amendment No. 44, Bulletin No. 1708/IV of 8 April 2003); Article 28a of the Act on the management of agricultural property of the State Treasury, added by the Act of 11 of April 2003 on shaping the agricultural system, rules out the possibility of selling agricultural property by the Agency, if – as a result of that sale – the total area of agricultural land of a given acquirer exceeds 500 ha.

The Constitutional Tribunal wishes to note that this aim may be achieved by the Agency with a milder measure which is the Agency's statutory right of pre-emption, provided for in the same statute (Article 29(4) of the Act on the management of agricultural property of the State Treasury), where immovable property acquired from the State Treasury's Reserve of Agricultural Property is resold to an individual or entity within 5 years from the date of acquisition from the Agency. Unlike the right of pre-emption vested in the Agency in the case of private law transactions involving agricultural property which has not previously been acquired from the State Treasury's Reserve of Agricultural Property (Article 3 of the Act on shaping the agricultural system), that type of pre-emption does not provide for any exceptions within the scope ratione personae and has been introduced also in order to prevent any malpractice related to transactions involving land.

4. The conclusion.

In the light of the established constitutional standard of protection of the right of ownership, the Constitutional Tribunal has concluded that the way of formulating certain premisses of the statutory right of repurchase of immovable property granted to the Agricultural Property Agency (Article 29(5) of Act on the management of agricultural property of the State Treasury) constitutes disproportionate interference with the constitutional principle of protection of ownership. Therefore, the introduction of restriction on the right of ownership in that provision may not be regarded as necessary for the achievement of constitutionally legitimate objectives. As a consequence, the Constitutional Tribunal has concluded that, due to the presence of constitutional defects,

the challenged regulation – in a disproportionate way interferes with – the constitutional principle of the protection of ownership (Article 21(1) and Article 64 in conjunction with Article 31(3) of the Constitution) as well as the principle of protection of citizens' trust in the state and its laws (Article 2 of the Constitution). Apart from declaring the non-conformity of Article 29(5) of Act on the management of agricultural property of the State Treasury to the higher-level norm concerning the protection of ownership, expressed in Article 21(1) and Article 64 of the Constitution in conjunction with Article 31(3) of the Constitution, the Tribunal has also concluded that the Article 29(5) of the said Act infringes the principle of protection of citizens' trust in the state and its laws, expressed in Article 2 of the Constitution.

For the above reasons, the Constitutional Tribunal has adjudicated as in the operative part of the judgment.