

Consequences of the judgement of the Constitutional Tribunal dated 10 March 2015 (file no. K 29/13) on transformation of perpetual usufruct right into ownership title

In March 2013 we prepared a briefing on the issue of transformation of perpetual usufruct right into ownership title in connection with the amendment¹ to the Act on Transformation of Perpetual Usufruct Right into Ownership Title to Property dated 29 July 2005 (the "Act"). As of the date the Amendment became effective, i.e. 28 July 2011, the group of perpetual usufructuaries who became entitled to apply to the owner, i.e. the State Treasury or a local authority, for the transformation of their perpetual usufruct right into ownership title through administrative proceedings, was extended. As a result legal entities such as companies were included among the persons entitled to demand transformation of the perpetual usufruct right into ownership title. Moreover, the deadline for submitting the demand for transformation, i.e. 31 December 2012, was abolished, and the limitation as to the type of real property that could be the subject of an application for transformation was also abolished.

¹ The Act to Amend the Property Management Act and Certain Other Acts (Journal of Laws No. 187, item 1110) hereinafter the "**Amendment**"

Applications to the Constitutional Tribunal for review of the Amendment for compliance with the Constitution

However, the Amendment to the Act was not well received by local authorities, which applied for it to be reviewed with regard to its constitutional compliance, alleging that some of the provisions were unconstitutional. The justification for this was that the Amendment interfered excessively in the rights of local authorities as owners, and decreased their budgets, which derive funds, among other things, from perpetual usufruct fees.

Constitutional Tribunal Judgement

In its judgment of 10 March 2015, the Constitutional Tribunal acknowledged that local authorities were correct to question the compliance of some provisions in the Act with the Constitution, and stated that the provisions in the Amendment to the Act which give natural persons (individuals) and legal (corporate) entities the right to transform perpetual usufruct right into ownership title, was not compliant with the Constitution.

As of 17 March 2015, i.e. from the date of publication of the judgement of the Constitutional Tribunal in the Journal of Laws (Journal of Laws 2015, item 373), Article 1 section 1 of the Act ceased to apply. This article provided that natural and legal persons which on 13 October 2005 were perpetual usufructuaries of real property could apply for transformation of the perpetual usufruct right to these properties into ownership title. Similarly, article 1 section 3 of the Act ceased to apply. This article provided that an application requesting transformation could also be submitted by natural persons (individuals) and legal (corporate) entities who were legal successors of the persons referred to in section 1 art. 1 of the Act.

Consequences of the judgement of the Constitutional Tribunal

Current range of eligible entities

A practical implication of the judgment of the Constitutional Tribunal is that legal persons (other than housing co-operatives) cannot apply for transformation of their perpetual usufruct right into ownership title on the basis of the Act.

Currently only the following may submit such a demand:

- a natural person who, on 13 October 2005, was a perpetual usufructuary of developed property designated for housing purposes or on which there is a garage, or property designated for this type of development, and a natural person who on that day was a perpetual usufructuary of agricultural property;
- a natural person who on 13 October 2005 was a perpetual usufructuary of property regardless of its designation, if the perpetual usufruct right was obtained:
 - in exchange for the expropriation or take-over of land in favour of the State Treasury on the basis of another basis, before 5 December 1990; or
 - on the basis of Art. 7 of the Decree on the Ownership and Usufruct of Land in the City of Warsaw dated 26 October 1945 (Journal of Laws No. 50, item 279);
- owners of premises (natural and legal persons) whose share in common property comprises the perpetual usufruct right, provided that their perpetual usufruct right fulfils the conditions specified in the first point above;
- housing cooperatives which are the owners of residential buildings or garages, provided that their perpetual usufruct right fulfils the conditions set out in the first point above; and
- natural persons which are legal successors of the persons specified above and legal persons which are legal successors of the legal persons referred to in two preceding points.

Unwinding of finalised proceedings

As a result of the Constitutional Tribunal's judgement legal grounds arose to re-open administrative proceedings and to unwind transformation of the perpetual usufruct right into ownership title. Under 145a of the Code of Administrative Procedure a party to administrative proceedings can demand that the proceedings, which ended with a final administrative decision, are re-open within one month from 17 March 2015, i.e. from the day the Constitutional Tribunal judgement was published.

In such a situation a party to the proceedings could demand the legal effect of the transformation is unwound and the original situation restored in which a natural person or legal (corporate) person would continue to hold the perpetual usufruct right, and the local authority or the State Treasury would continue to be the owner of the property. If such a situation occurred the State Treasury or the local authority would have to return the fee, which must have been paid by the applicant (perpetual usufruct holder) requesting transformation of its perpetual usufruct right into ownership title. What is interesting the State Treasury or the local authority could not re-open the proceedings ex officio, as they are not considered to be the parties to the proceedings. However, a motion to re-open the proceedings and request the unwinding of the transformation could be made by the state prosecutor.

The one-month time limit described above is a procedural time limit, which means that when taking action to resume the proceedings at the request of the local authority or State Treasury the prosecutor can ask for the time limit to be waived. Under article 58 § 1 of the Code of Administrative Procedure "if a time limit is not met the time limit can be waived at the request of the interested party if the interested party can produce credible evidence that the time limit was missed for reasons beyond its control."

It seems, however, as time passes from the moment the Constitutional Tribunal judgement was issued, that a review of decisions transforming perpetual usufruct into ownership title will be less and less feasible due to the difficulty of demonstrating that a party was not at fault for not submitting a complaint in time.

There is no doubt that due to the Constitutional Tribunal's judgement the administrative procedure for transformation of perpetual usufruct right into ownership title under the Act will be of decreasing importance in market practice. Legal entities that still wish to transform the title will be able to do so based on the Act on Real Estate Management. However, such transformation depends on the discretionary consent of the local relevant authority or the State Treasury, as a result making use of these regulations of limited practical importance.

Commentary

The Amendment was well received among private investors who are players on the real estate market. The wording of the Amendment before the Constitutional Tribunal gave its judgement allowed certain problems with legal title to real estate to be solved. For example, by consolidating title to land and it also allowed perpetual usufructuaries to acquire ownership title which is a stronger right in rem.

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