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## **RESTRUCTURING FARM-RUNNING ENTITIES – LEGAL ASPECTS**

Key words: restructuring, farms, state aid, debt

**ABSTRACT.** The Act of 9 November 2018 on debt restructuring for farm-running entities introduced, into Polish law, certain instruments aimed at improving the financial liquidity of agricultural enterprises, which are insolvent or threatened with insolvency, and ultimately, enhancing their competitiveness in the EU market. These instruments consist of providing state aid in the form of subsidies to the interest of restructuring loans or loans for financing the repayment of debt arising in connection with conducting agricultural activity, as well as providing by the National Support Centre for Agriculture (KOWR) state aid in the form of guarantees securing the repayment of the restructuring loan, and taking over by KOWR a farm-running entity's debt arising in connection with conducting agricultural activity in exchange for the transfer of ownership of their property to the State Treasury. The solutions enacted function in parallel to the possibility of making an arrangement with creditors and effecting remedial actions based on the provisions of Restructuring Law. The aim of the article is to evaluate the enacted regulations from the point of view of their consistency with the provisions of Restructuring Law, their compliance with the principles and objectives presented in the justification of the bill, and the expected results. Interpretation of intent and systemic interpretation of legal acts was used, with the application of historical and logical methods. Following the analysis carried out, it was concluded that with the regulations currently in force, the objectives of the act assumed by the legislator and the anticipated results will not be achieved in full.

### **INTRODUCTION**

Running a farm in Poland is particularly regulated in Polish law. It should be noted, for instance, that while manufacturing activity in agriculture in the realm of crop farming and animal husbandry, horticulture, market gardening, forestry and inland-water fisheries, may fulfil the criteria of economic activity, the provisions of Entrepreneurs' Law – an act governing the rules for the undertaking, pursuit and termination of economic activity on the territory of the Republic of Poland, including the rights and duties of entrepreneurs as well as the tasks of public authorities in this respect – do not apply to it. Moreover, a natural person, a legal person or an organisational unit which is not a legal person, yet is given legal capacity by the act, running a farm, is an entrepreneur [Budzinowski 2002], but the status of these entities in light of Bankruptcy Law varies [Majchrzak, Czyżewski 2016]. In light of the Civil Code, in turn, one may say that a farm is a special type of enterprise.

The legislator also provided a different status to farm-running entities in terms of the rights related to the possibility of their restructuring, which is the result of passing the Act of 9 November 2018 on debt restructuring for farm-running entities, which applies in parallel to the provisions of the Act of 15 May 2015 – Restructuring Law, addressed to all entrepreneurs. In accordance with the justification of the bill, the new regulations were intended to provide agricultural producers that run farms constituting small, medium-sized or large enterprises with additional debt restructuring possibilities by enabling the immediate payment of “old” debt, partially restructured in the previous restructuring procedure and connected with conducting agricultural activity. It is also indicated that about 2,000 farm-running agricultural producers who have problems with servicing bank loans are to be the beneficiaries of implemented instruments [The Polish Sejm 2018].

The aim of this study is to evaluate the regulations enacted in 2018 from the perspective of their consistency with the provisions of Restructuring Law, their compliance with the principles and objectives presented in the justification of the bill [The Polish Sejm 2018], and the expected results. For this purpose, the interpretation of intent and systemic interpretation of legal acts was used, with the application of historical and logical methods.

#### DEBT RESTRUCTURING IN LIGHT OF RESTRUCTURING LAW

The restructuring procedure provided for in the Act on Restructuring Law is addressed to insolvent entrepreneurs or those threatened with insolvency<sup>1</sup>, including farm-running entities. The purpose of such procedure is to avoid declaration of bankruptcy of a debtor through enabling him to undergo restructuring by making an arrangement with creditors in the proceedings for the approval of an arrangement, accelerated arrangement proceedings or arrangement proceedings, and in the case of remedial proceedings – also through conducting remedial actions, while securing legitimate rights of creditors [Lubicz-Posochowska 2015]. Remedial actions are, in turn, acts in law and factual acts which lead to an improvement in the economic situation of the debtor and are aimed at restoring the debtor’s capability to discharge obligations, while ensuring protection against execution. Entering into an arrangement with creditors involves restructuring the debtor’s liabilities consisting of: the deferment of the date of satisfaction; spreading repayment into instalments; reducing the amount of the obligation; converting receivable debts into shares; or amending, exchanging or repealing the right which secures the specific receivable debt<sup>2</sup>. One exception is liabilities resulting from social insurance premiums in part financed by the debtor as the employer, resulting from premiums to the Labour Fund, the Employees’ Guaranteed Benefits Fund, the Bridge Retirement Pensions Fund, premiums to the debtor’s own social insurance and health insurance and the debtor’s other liabilities to the Social

<sup>1</sup> Insolvency is the financial situation of a debtor in which they have lost the capability to perform their monetary obligations due. An entrepreneur is at risk of insolvency if based on reasonable assessment, it is evident that they will soon become insolvent [Gurgul 2018, Zimmerman 2019].

<sup>2</sup> Thus, the statement contained in the justification of the bill, as well as in the impact assessment of the regulations – of the Bill on debt restructuring for farm-running entities– which reads: “the provisions of the Act of 15 May 2015 – Restructuring Law [Journal of Laws, 2017.1508, as amended] provide the opportunity for partial debt reduction only” should be considered incorrect [The Polish Sejm 2018].

Insurance Establishment (ZUS), as well as their liabilities in respect of the Employees' Guaranteed Benefits Fund, the restructuring of which may only include spreading the payment into instalments or deferment of the payment time limit.

In order to effectively conduct arrangement and remedial proceedings, the debtor needs to have the capability to cover, on an ongoing basis, the costs of the proceedings, the liabilities arisen after the day of proceedings opening, and the obligations which cannot be covered by the arrangement unconditionally [Zimmerman 2019]. The latter include 1) maintenance and alimony receivable debts and pensions constituting compensation for causing diseases, incapacity to work, disability or death and resulting from conversion of the rights covered by the substance of the right to annuity into pension for life; 2) claims for release of the assets and abstention from infringement of rights; 3) receivable debts for which the debtor is liable in connection with acquisition of inheritance after the day of opening of restructuring proceedings, after the inheritance was included in the arrangement estate or remedial estate; 4) receivable debts resulting from social insurance premiums in part financed by the insured, the remitter of which is the debtor<sup>3</sup>. The expenses of the proceedings include, among others, the remuneration of the restructuring counsellor performing the function of arrangement supervisor, court supervisor or receiver. While the remuneration of the arrangement supervisor is determined based on an agreement concluded with the debtor, in the remaining cases, the amount of the remuneration is the result of objective and discretionary determinants and in 2019, it remained within the range from just under PLN 10,000 to more than PLN 1 million, and payments may be made in the form of quarterly down payments.

#### DEBT RESTRUCTURING BASED ON THE PROVISIONS OF THE ACT OF 9 NOVEMBER 2018

With the Act of 9 November 2018 on debt restructuring for farm-running entities, the legislator introduced new instruments enabling the restructuring of debts of a financial nature arising in connection with conducting agricultural activity. The regulations enacted provide for the possibility of debt restructuring by means of the following instruments:

- 1) state aid provided by the Agency for the Restructuring and Modernisation of Agriculture (ARiMR) in the form of:
  - subsidies to the interest of a loan granted by the bank in order to finance the payment of debt arising in connection with conducting agricultural activity – restructuring loan,
  - loans for financing the repayment of debt arising in connection with conducting agricultural activity,
- 2) state aid provided by the National Support Centre for Agriculture (KOWR) in the form of guarantees securing the repayment of the restructuring loan,
- 3) The National Support Centre for Agriculture (KOWR) taking over a farm-running entity's debt arising in connection with conducting agricultural activity in exchange for the transfer of ownership of their property to the State Treasury.

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<sup>3</sup> In compliance with Art. 154 of the Act of 15 May 2015 – Restructuring Law, in the case of debts due to the Agricultural Social Insurance Fund (KRUS), regulations concerning debts due to Social Insurance Institutions shall apply accordingly.

They are addressed to farm owners<sup>4</sup>, with the subjective criterion involving the requirement of meeting the condition of conducting agricultural activity for at least three years and being insolvent or threatened by insolvency. Additionally, debtors are required to present security for the repayment of the credit or loan, whereas granting a guarantee or taking over the debts is possible with entities holding legal title to the agricultural property on which a mortgage will be established. The instruments listed above may not, however, be used by farm-running entities in liquidation or bankruptcy or those subject to a restructuring procedure based on the provisions of the Act of 15 May 2015 – Restructuring Law. Thus, they are addressed to debtors that were not subject to proceedings for the approval of an arrangement, accelerated arrangement proceedings, arrangement proceedings or remedial proceedings, and those in whose case such proceedings were validly concluded. The provision of support in the form of state aid is conditional upon, among others, the debtor preparing a restructuring plan including: 1) a description of the farm's situation before receiving the requested state aid and a description of the expected situation of the farm after obtaining it; 2) an analysis and assessment of the debtor's economic and financial situation; 3) a description of activities which will be undertaken in order to restore the capability to cover the costs of the agricultural activity conducted and repay the financial obligations; 4) a list of the sources of financing of the above-mentioned activities and a forecast of the economic and financial effects of their implementation, along with a schedule of implementation and the final date of implementation of the restructuring plan; 5) determination of the restructuring period in which the capability to cover the costs of the agricultural activity conducted and repay the financial obligations will be restored. Such a plan needs to be approved by the head of the regional agricultural advisory centre.

When evaluating the regulations introduced, it should be noted that their interpretation raises a number of doubts. Some of them concern the type of obligations to which the above-mentioned instruments may apply. Firstly, it appears from the justification of the bill that the aid in question includes civil law obligations, whereas this limitation cannot be inferred directly from the legal act. This is particularly important in situations in which part of the insolvent debtor's obligations also include public law obligations. Secondly, in accordance with the position of the Bureau of Research of the Chancellery of the Sejm, the aim of the regulation is to “make it possible for farm-running entities to pay off their debt which was partially restructured as part of the previously conducted restructuring procedures” [Bureau of Research... 2018, Zych 2019]. This interpretation, though consistent with the justification of the bill, is not confirmed by the provisions of the act itself. Moreover, the above premise would mean that the previously conducted restructuring procedure was not economically effective, as it did not sufficiently contribute to restoring the debtor's capability to perform obligations. It should be emphasised here that the application of the instruments provided for in the Act of 9 November 2018 to the obligations which were subject to restructuring as part of procedures regulated by Restructuring Law is not justified. Restructuring obligations by making an arrangement results in the debtor having to perform the arrangement approved by a legally valid court decision. Changing the terms of the arrangement is possible only at the request of an authorised entity in a situation in which after the arrangement is approved, a permanent

<sup>4</sup> Within the meaning of the Act of 15 November 1984 on agricultural tax.

increase or reduction of income from the debtor's enterprise occurs. It also requires proceedings for amending the arrangement to be carried out, including the need to summon a meeting of creditors in order to vote on the new arrangement proposals. A farm-running entity obtaining support provided for in the Act of 9 November 2018, cannot be equated with a permanent increase or reduction of farm income, thus changes to the arrangement may be impossible. Assuming a different situation, it should also be noted that it might so happen that creditors do not agree to any changes to the previously approved arrangement. Additionally, it needs to be stressed that the adoption of the arrangement by creditors is not tantamount to complete restructuring of obligations. While in the course of performing the arrangement, the proposal of spreading the repayment into instalments may be executed, the potential reduction (and thus cancellation of part of the obligation) actually occurs only upon completion of the performance of the arrangement, and so in a situation in which the obligations subject to the arrangement are paid off on the terms provided for in the arrangement. As a result, with reference to the entities, whose debt was already restructured as part of the restructuring procedures carried out previously, the regulations discussed herein may only be applied to obligations arising after the restructuring procedure (within the meaning of Restructuring Law), and so not "partially restructured". What is more, it should be recognised that this concerns obligations arising already after the performance of the potential arrangement. Otherwise, the situation in which the debtor does not perform – during the period of performance of the arrangement – the obligations arising after the arrangement was approved constitutes a basis for setting aside the arrangement in compliance with Art. 176 of Restructuring Law. The consequence is the right of current creditors to pursue their claims in the original amount, which means that also in this case, one cannot talk about "partially restructured" obligations.

Further doubts concern the effects which are to be achieved thanks to the regulations enacted. In accordance with the justification of the bill of 9 November 2018, "the possibility of obtaining aid for the repayment of civil law liabilities" was to contribute to "the improvement of the financial liquidity of farms, and thus ultimately enhance their competitiveness in the EU market". However, it is not the possibility of obtaining aid, but actually obtaining it that may potentially impact the condition of the given entity. Moreover, in the impact assessment of analysed regulations, it was said that "the entry of the drafted act into force will make it possible for farm-running entities to maintain financial liquidity", which is inconsistent with the requirement of meeting the condition of insolvency or threatened by insolvency in order to be able to request support as part of one of the instruments implemented. It is not about maintaining financial liquidity, but creating the possibility of restoring it to an extent ensuring the farm's long-term capability to compete in the agricultural market. It may, therefore, be assumed, in compliance with the position of the Bureau of Research of the Chancellery of the Sejm, that the solutions discussed herein will facilitate the repayment of debts connected with conducting agricultural activity and enable the supported farms to improve their financial liquidity, but the amounts of debt to be paid off will not be reduced.

Finally, it should be noted that the act contains information about the maximum limits of expenses from the state budget constituting the financial result of the act, which are as follows: in 2018 – PLN 140,000,000, in 2019 – PLN 329,100,000, in 2020

– PLN 129,600,000, in 2021 – PLN 28,800,000, in 2022 – PLN 2,700,000, in 2023 – PLN 1,600,000, in 2024 – PLN 600,000, in 2025-2027 – PLN 0. Due to the fact that three out of the four proposed support programmes constitute state aid, in order to execute them, it is necessary to first obtain approval of the European Commission following notification, deeming them compliant with the Commission’s Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty<sup>5</sup>. Taking account of the fact that as of the day of submitting this study to the Editors, the regulations enacted have not been approved by the European Commission, their implementation is not possible. Assuming that they will be approved in 2020, no more than 26% of planned resources will be able to be allotted to the implementation of the instruments provided for in the act in the years 2020-2027, which may be additionally limited due to the fact that the bill anticipated that the aid programme would be notified to the European Commission for the period until the end of 2020 on account of the validity period of the guidelines for state aid in agriculture in the years 2014-2020. This additionally makes the possibility of implementing the enacted instruments at a later time dubious. It may be necessary to repeat the notification after 2020. However, due to the non-compliance of the provisions of the act with the Communication from the Commission on the revision of the method for setting reference and discount rates, it is doubtful whether the European Commission will approve the regulations enacted [Bureau of Research... 2018]. As a result, until the date of entry into effect of the Act of 9 November 2018, only the instrument of the National Support Centre for Agriculture (KOWR) taking over a farm-running entity’s debt may be implemented [KOWR 2019].

## CONCLUSIONS

Since 1 January 2016, farm-running entities have been able to take advantage of the forms of restructuring addressed to all entrepreneurs, regulated by the Act of 15 May 2015 – Restructuring Law, which allow the debtor to avoid declaring bankruptcy primarily as a result of entering into an arrangement with creditors for restructuring the existing debt. The instruments introduced by the Act of 9 November 2018 may be considered as new forms of support responding to the need of insolvent farmers or those threatened by insolvency (and so usually with no credit worthiness) to obtain capital which will be allotted to the repayment of debt arising in connection with conducting agricultural activity. Yet the group of beneficiaries able to take advantage of such a solution is limited to entities meeting statutory criteria, which makes the group of regulation addressees much narrower than in the case of restructuring procedures. The legislator anticipated that the instruments introduced would contribute to the improvement of the economic stability of agricultural producers, their financial liquidity, and competitiveness in the EU market, and that they would make it possible to increase the sense of security in conducting agricultural activity, thanks to which they would also serve to prevent the collapse of indebted farms. However, due to the European Commission’s lack of approval of notification of the support

<sup>5</sup> In accordance with the bill’s covering letter, the bill was notified to the European Commission under number SA.51315(2018/N) and the two-month period for assessment started on 12 June 2018.

programme, the actual implementation of three out of four means of debt restructuring for farm-running entities enacted in 2018 is not possible. In practice, farm-running entities, meeting certain specific conditions, may only submit a request to the National Support Centre for Agriculture (KOWR) for taking over their debt arising in connection with conducting agricultural activity in exchange for the transfer of ownership of their property to the State Treasury. It should be noted, however, that handing over property does not have a positive influence on the security of conducting agricultural activity. Considering the above, it will not be possible to achieve the anticipated effects of the regulations enacted in 2018 within the expected scope. This circumstance is additionally enhanced on account of the inconsistencies pointed out between the provisions of the act and the justification of the bill, as well as the statutorily limited financial results of the introduced regulations.

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## RESTRUKTURYZACJA PODMIOTÓW PROWADZĄCYCH GOSPODARSTWA ROLNE

Słowa kluczowe: restrukturyzacja, gospodarstwa rolne, pomoc publiczna, zadłużenie

### ABSTRAKT

Ustawą z dnia 9 listopada 2018 roku o restrukturyzacji zadłużenia podmiotów prowadzących gospodarstwa rolne wprowadzono do polskiego systemu prawnego instrumenty, które w założeniu mają służyć poprawie płynności finansowej niewypłacalnych bądź zagrożonych niewypłacalnością przedsiębiorstw rolnych, a docelowo wzrostowi ich konkurencyjności na rynku Unii Europejskiej. Instrumenty te polegają na udzielaniu pomocy publicznej w formie dopłat do oprocentowania kredytu restrukturyzacyjnego lub pożyczki na sfinansowanie spłaty zadłużenia powstałego w związku z prowadzeniem działalności rolniczej, a także na udzielaniu przez Krajowy Ośrodek Wsparcia Rolnictwa (KOWR) pomocy publicznej w formie gwarancji zabezpieczającej spłatę kredytu restrukturyzacyjnego, oraz przejęciu przez KOWR długu podmiotu prowadzącego gospodarstwo rolne, powstałego w związku z prowadzeniem działalności rolniczej, w zamian za przeniesienie własności nieruchomości na rzecz Skarbu Państwa. Uchwalone rozwiązania funkcjonują równoległe z możliwością zawarcia układu z wierzycielami oraz przeprowadzenia działań sanacyjnych na podstawie przepisów Prawa restrukturyzacyjnego. Celem artykułu jest ocena uchwalonych przepisów z punktu widzenia ich spójności z przepisami prawa restrukturyzacyjnego i zgodności z założeniami wskazanymi w uzasadnieniu projektu ustawy oraz oczekiwanych skutków. Zastosowano celowościową i systemową wykładnię aktów prawnych, z uwzględnieniem metody historycznej oraz logicznej. W wyniku przeprowadzonej analizy stwierdzono, że zakładane przez ustawodawcę cele ustawy, jak również oczekiwane skutki przy obecnym kształcie przepisów nie zostaną w pełni osiągnięte.

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