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## Federal Supreme Court decision on rural land rights

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Pursuant to the Federal Act on Rural Land Rights,<sup>(1)</sup> certain restrictions and approval requirements apply to agricultural businesses and agricultural land. In particular, the sale of such businesses or land requires approval. Also, if the concerned business or land is under leasehold, the leaseholder has a pre-emptive right. The purpose of the act is to promote agricultural land ownership, strengthen the rights of owners and leaseholders who cultivate agricultural land and prevent excessive prices for agricultural land.

### Background

Pursuant to Article 61 of the act, the acquisition of an agricultural business or agricultural land requires approval from the competent cantonal authority. If a legal entity owns an agricultural business or agricultural land, and if the shares in the legal entity are acquired, the question of the approval requirement becomes relevant.

According to doctrine<sup>(2)</sup> and previous case law,<sup>(3)</sup> approval is required if the majority of shares in a legal entity are acquired and the agricultural land is the main asset of the legal entity. In contrast, the acquisition of any amount of shares is possible without approval if the agricultural land is not the main asset of the entity.<sup>(4)</sup>

In a previous decision the Federal Supreme Court held that the term 'main assets' indicates that the relevant assets are closer to 100% than to 50% of the entire assets.<sup>(5)</sup> Accordingly, in the case of share sales, cantonal authorities have thus far followed this rule and have not applied the permit requirement if an agricultural business or agricultural land was only a minor part of the concerned legal entity's total assets.

The main asset test also applies<sup>(6)</sup> to the pre-emptive right of the leaseholder. Hence, the transfer of the majority of shares in a legal entity is a pre-emption event that leads to a right of first refusal only if the main assets of the legal entity consist of an agricultural business or agricultural land. If so, the leaseholder's pre-emption right relates to the shares that are the object of the transaction.<sup>(7)</sup>

According to practice, legal entities may acquire an agricultural business or agricultural land, but must fulfil certain requirements. In particular, the majority shareholder must personally operate the agricultural business or the majority of shareholders must personally work in that business.<sup>(8)</sup>

### Decision

The Federal Supreme Court<sup>(9)</sup> has recently confirmed much of the above. With regard to share deals and the pre-emptive right of leaseholders, the court held that a leaseholder's pre-emptive right is subject to the main asset test and requires that a majority of the shares be transferred. The court also confirmed that if a pre-emption event occurs, the pre-emptive right relates to the shares that are the object of the transaction. The court made a clear distinction between the civil law part (ie, the pre-emptive right) and the public law part (ie, the approval requirement).<sup>(10)</sup>

With regard to the purchase of an agricultural business or agricultural land by a legal entity, the court confirmed that the majority shareholder must personally operate the agricultural business that is the main asset of the legal entity or the majority of shareholders must personally work in that business. The court further pointed out the importance of control mechanisms to monitor compliance. It held that:

- a legal entity owning an agricultural business may issue only registered shares (ie, no bearer shares);
- shares must be held by individuals; and

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- as a consequence, holding structures are excluded if a legal entity owns or acquires an agricultural business.<sup>(11)</sup>

The decision deviates from previous decisions and doctrine regarding the approval requirement. In particular, the court held that an approval requirement will also apply to transfers of shares in legal entities that own an agricultural business which is not the main asset. The court pointed out that any transfer of shares in a legal entity that owns an agricultural business results economically in a partial transfer of ownership and is, in any case, subject to approval.<sup>(12)</sup>

### Comment

The decision raises no particular questions about the pre-emptive right of leaseholders or the purchase of an agricultural business or agricultural land by a legal entity.

In contrast, with regard to the approval requirement, the court has substantially deviated from its previous practice. It no longer applies the main asset test. It also no longer limits the approval requirement to transfers of a majority of the shares in legal entities that own an agricultural business or agricultural land. Consequently, according to the court, an approval is required for any transfer of shares, including if a minority of the shares in the legal entity are transferred and regardless of whether the agricultural asset is the main asset of the legal entity.

As a result, the decision broadens the approval requirement considerably. The question arises as to whether the court deliberately introduced a fundamental change of practice or whether the approach taken will remain limited to the particular case.

For various reasons, it is questionable whether a broad approval requirement should apply generally:

- A historical interpretation of the law reveals that the legislature's intention was to limit the approval requirement. The purpose of the relevant provisions (Articles 4(2) and 61(3) of the act) was to prevent circumventions of the law, but not to apply the approval requirement to companies that own a small land reserve outside of the building zone.<sup>(13)</sup>
- The recent Federal Supreme Court decision focuses on a special case, in which a possible abuse of rights was relevant. Different treatment is appropriate for cases where an abuse of rights is out of the question.
- The decision does not go into the previous Supreme Court practice; neither does it deal with relevant doctrine. Likewise, it does not announce explicitly a change of practice.
- Applying the approval requirement generally would be unfeasible for shareholder changes of publicly listed companies. In contrast to the Federal Act on the Acquisition of Real Estate by Non-Swiss Residents,<sup>(14)</sup> the Rural Land Rights Act contains no exceptions for such companies.<sup>(15)</sup> Given the lack of a legal basis, it is not legally possible to treat public and private companies differently. Therefore, any application of the law must be appropriate for public and private companies and an application that is unsuitable for a certain type of company is generally excluded for all companies.
- The strict consequence of nullity (Article 70 of the act) would be inappropriate for shareholder changes of large companies owning a few plots of agricultural land which form an exceptionally small percentage of their total assets.

In particular cases, especially in those involving a potential abuse of rights, it might be desirable to have a broad approval requirement that also applies if a minority of the shares are transferred and regardless of the main asset test. Nevertheless, in view of the above arguments, it seems questionable whether applying such a broad approval requirement to all cases would be justified or even required by law.

As long as the scope of application of the recent Supreme Court decision remains unclear, any ownership change with regard to legal entities owning an agricultural business or agricultural land requires particular attention. Depending on the case, it is advisable to approach the competent authorities.

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### Endnotes

(1) Federal Act on Rural Land Rights, SR 211.412.11.

(2) Beat Stalder in: *Kommentar zum BGBB*, 2011, Article 61 Number 21; Eduard Hofer/Benno Studer, *Erwerb landwirtschaftlicher Gewerbe durch juristische Personen, Blätter für Agrarrecht*, 2012, page 48.

(3) Federal Supreme Court, 5A.34/2006, April 3 2007.

(4) Beat Stalder, Article 61, Number 21; Eduard Hofer/Benno Studer, page 48.

(5) Federal Supreme Court, 5A.34/2006, April 3 2007, consid. 6.1.

(6) Eduard Hofer/Benno Studer, pages 44 and following.

(7) Christina Schmid-Tschirren/Christoph Brandli, in: *Kommentar zum BGBB*, 2011, Article 4 Number

7; Eduard Hofer/Benno Studer, page 56.

(8) Franz A Wolf, *Landwirtschaftliches Grundeigentum bei der Einbringung in juristische Personen und beim Erwerb von Anteilsrechten an Kapitalgesellschaften*, in *Jusletter*, October 13 2014, Numbers 8 and following.

(9) BGE 140 II 233.

(10) BGE 140 II 233 consid. 3.4.

(11) BGE 140 II 233 consid. 3.2.2, 3.2.3 and 5.6.2.

(12) BGE 140 II 233 consid. 5.6.1.

(13) Eduard Hofer/Benno Studer, pages 45 and following.

(14) Federal Act on the Acquisition of Real Estate by Non-Swiss Residents (*Lex Koller*), SR 211.412.41.

(15) Franz A Wolf, Number 27.

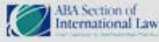
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