

# NEW LEGISLATION ON THE LEASE OF AGRICULTURAL LAND BY THE MUNICIPALITY

## NOVÁ LEGISLATÍVA O PRENÁJME POĽNOHOSPODÁRSKEJ PÔDY OBCOU

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### 1 Legislation and its Application

The lease relationship, the subject of which is the lease of land for agricultural purposes, has a specific character. The legal framework of this legal relationship is therefore primarily constituted by the special Act No. 504/2003 Coll. on the Lease of Agricultural Land, Agricultural Holdings and Forest Land and on Amendments to Certain Acts, as amended (hereinafter referred to as the "NPP Act"). Pursuant to § 1 para. 1 of the NPP Act: "The lease agreement on the lease of land for agricultural purposes shall be governed by the provisions of the Civil Code on the lease agreement, unless otherwise provided for in this Act; the same shall apply to the sublease of land for agricultural purposes."<sup>(1)</sup>

1 § 1 para. 2 of the NPP Act.

The provision in question determines the legal regulation that will govern the lease relationship in a specific case or on specific issues and expresses the legal principle "lex specialis derogat legi generali" (a special law abrogates a general law or legal regulation). Thus, it is valid that if the Act on NPP contains a different legal regulation than Act No. 40/1964 Coll. Civil Code, as amended (hereinafter referred to as the "Civil Code") in its provisions governing the lease agreement (§ 663 to § 684), the provisions of the NPP Act take precedence over the provisions of the Civil Code. The lease of land for agricultural purposes is governed by the provisions of the Civil Code only in the absence of legal provisions in the NPP Act. It follows from the above that the application of the Civil Code is excluded to the special legal relations arising from the use of agricultural and forest land

#### Abstract (EN)

On May 1, 2021, Act No. 151/2021 Coll., amending Act No. 504/2003 Coll. on the lease of agricultural land, agricultural business and forest land and on the amendment of certain laws as amended by later regulations, which amend Act of the Slovak National Council No. 330/1991 Coll. on land adjustments, arrangement of land ownership, land offices, land fund and on land communities as amended (hereinafter referred to as "Amendment No. 151/2021 Coll.") entered into force. Amendment No. 151/2021 Coll. fundamentally changes the rules and obligations of the municipality as the owner of agricultural land when leasing agricultural land to other persons. The paper clearly explains the most important institutes related to the lease of agricultural land by the municipality and points out the new legal regime of the lease of municipal agricultural land effective from 1 May 2021.

#### Keywords (EN)

agricultural land, municipality, tenant of agricultural land, agricultural purposes, right of first refusal

#### Abstrakt (SK)

Dňa 1. mája 2021 nadobudol účinnosť zákon č. 151/2021 Z. z., ktorým sa mení a dopĺňa zákon č. 504/2003 Z. z. o nájme poľnohospodárskych pozemkov, poľnohospodárskeho podniku a lesných pozemkov a o zmene niektorých zákonov v znení neskorších predpisov, ktorým sa mení zákon Slovenskej národnej rady č. 330/1991 Zb. o pozemkových úpravách, usporiadaní pozemkového vlastníctva, pozemkových úradoch, pozemkovom fonde a o pozemkových spoločenstvách v znení neskorších predpisov (ďalej len „novela č. 151/2021 Z. z.“). Novela č. 151/2021 Z. z. zásadným spôsobom mení pravidlá a povinnosti obce ako vlastníka poľnohospodárskej pôdy pri prenájme poľnohospodárskej pôdy iným osobám. Príspevok prehľadne vysvetľuje najdôležitejšie inštitúty súvisiace s prenájomom poľnohospodárskej pôdy obcou a poukazuje na nový právny režim nájmu obecnych poľnohospodárskych pozemkov účinný od 1. mája 2021.

#### Kľúčové slová (SK)

poľnohospodárska pôda, obec, nájomca poľnohospodárskej pôdy, poľnohospodárske účely, predkupné právo

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for agricultural purposes, which are regulated in the NPP Act.

In addition, when letting land and buildings owned by the municipality for agricultural purposes, it is necessary to take into account the general legal regulation regulating the letting of municipal property – Act No. 138/1991 Coll. on Municipal Property (hereinafter referred to as the “Municipal Property Act”). In relation to the Municipal Property Act, the NPP Act also has the character of a special regulation which takes precedence over the provisions of the Municipal Property Act in matters expressly regulated by the NPP Act. In matters not regulated by the NPP Act, the municipality is governed by the General Municipal Property Act.<sup>(2)</sup> The special regime for letting property for agricultural purposes in the NPP Act is justified by the very nature of the subject of the lease and the purpose of its use. There is a public interest in the valorisation and management of agricultural land, the fulfilment of which is at the same time the duty of its owner.

The need for transparency in the lease of municipal property to third parties is, in turn, legislatively reflected in the public law requirements contained in the Municipal Property Act, which cannot be omitted even in the case of the specific object and purpose of the lease.

## 2 Tenant of Agricultural Land

The municipality may conclude a “Contract on the lease of land for agricultural purposes in the operation of a business” in the case of the lease of agricultural land, if the lessee is a natural person or a legal person who is an entrepreneur operating a business.<sup>(3)</sup> Entrepreneur operating the enterprise are: natural persons operating as independent peasants according to Act No. 105/1990 Coll. on private business of citizens in the n. n. p., or legal persons – commercial companies or cooperatives established and existing in accordance with the relevant provisions of Act No. 513/1991 Coll. Commercial Code, as amended (hereinafter referred to as the “Commercial Code”). These persons have in their object of activity as the object of business listed, for example, “agriculture, including the sale of unprocessed agricultural products for the purpose of processing or resale.”

The municipality may also lease agricultural land to other persons. However, there are significant differences for other persons compared to tenants who are agricultural entrepreneurs. In particular, they are not covered by the provisions of § 7 et seq. of the NPP Act concerning, for example, the amount of rent, the minimum notice period in the case of a lease agreement concluded for an indefinite period of time, the provisions on the minimum duration of an agreement concluded for a definite period of time, the right of first refusal for the conclusion of a new lease agreement, etc.

## 3 Extinction of the Institute of the Right of First Refusal of the Existing Tenant

The most important change as of 01 May 2021 is that with the effect of Amendment No. 151/2021 Coll., the institute of the preferential right of the existing lessee to conclude a new lease agreement, which was contained in Section 13(1) of the NPP Act until 30 April 2021, has been deleted from the NPP Act without compensation. 2 of the NPA Act. Until 30 April 2021, if the lessee duly and timely fulfilled its obligations under the lease agreement for the agricultural property of the municipality and there were no lockouts on the part of the lessor, the lessee had the right to a priority conclusion of a new lease agreement for the land which the lessee had been using until then, at a rent at the usual rate. The violation of the right of first refusal of the existing tenant resulted in the absolute nullity of the lease agreement concluded by the municipality with another person.<sup>(4)</sup> Until 30 April 2021, such a statutory restriction significantly limited the freedom of the municipality as a landlord to freely and transparently choose the most suitable tenant for its agricultural property in accordance with the Municipal Property Act. By the institution of the tenant’s right of first refusal, the legislator significantly interfered with the landlord’s rights to dispose of agricultural land by way of lease.

The new legislation removes the unbalanced legal position between the lessor of agricultural land and its lessee as of 1 May 2021. The new regulation respects the need for a necessary degree of administrative flexibility, but it marks a shift towards increased protection of the municipality’s property rights.

2 Tekeli (2018).

3 Vargaestok (2018).

4 Lazíková (2010).

The right of property is one of the fundamental rights and freedoms, which is also afforded special protection by Act No. 460/1992 Coll. Constitution of the Slovak Republic (hereinafter referred to as the "Constitution of the Slovak Republic"). It is expressed as the right of everyone to own property, with the property right of all owners having the same legal content and protection. The right of property is generally referred to as the most important substantive right in Slovak and foreign civil law, which results in its systematic inclusion in the first title of the second part of the Civil Code regulating substantive rights.

The content of the fundamental right to own property guaranteed by the Constitution of the Slovak Republic is regulated in more detail in the Civil Code as the basic code of Slovak private law. In § 123 of the Civil Code, the content of the property right is regulated as the right to hold (*ius possidendi*), use (*ius utendi*), enjoy its fruits and benefits (*ius frutendi*) and dispose of (*ius disponendi*) the object of one's ownership within the limits of the law, while the latter component of this set of rights (*ius disponendi*) expresses the owner's right to decide exclusively on the further legal fate of the thing.<sup>(5)</sup> By its nature, the dispositive power to lease property includes the choice of who the owner wishes to lease his property to. The dispositional authorization to lease the property is mirrored by the authorization not to lease the property.

To address the transition period, the legislature has provided an intertemporal provision in § 24g of the NPS Act to the modifications effective May 1, 2021: "If a lease which is concluded during the term of a lease agreed for a fixed period of time and the subject matter of which is the use of the same land does not come into force by 1 May 2022, it shall cease to have effect."<sup>(6)</sup>

#### **4 Use of Agricultural Land Without a Written Lease Agreement**

In the application practice, it is possible to encounter cases of violation of the law when entities use municipal agricultural land without concluding a written lease agreement, which is in violation of the Municipal Property Act.

In order to meet the public interest in the proper management of agricultural land, the NPP Act seeks

to overcome this illegality. To this end, the legislator in Art. 4 of the NPP Act establishes in a new way the legal prerequisite for the establishment of a lease relationship for an indefinite period of time in the case of use without a written lease agreement as follows: "If the authorized user, who uses the land according to a special regulation, 12aa) has demonstrably proposed to the owner the conclusion of a lease contract and the owner has not refused the conclusion of the lease contract within two months from the date of delivery of the proposal or has not invited the user of the land to return and take it over or has not concluded a lease contract with another person, than the authorized user of the land, it shall be presumed that on the expiry of two months from the date of delivery of the draft lease agreement, a lease relationship of indefinite duration has been established between them, which may be terminated on 1. November with a notice period of one year. The proposal to conclude a lease agreement pursuant to the first sentence may be rejected in whole or in part. The user is obliged, when proposing the conclusion of a lease agreement under the first sentence, to instruct the owner on the form and manner of refusal of the proposal and to warn him that if he does not refuse the proposal or does not invite the user of the land to return and take it over, the lease relationship under the first sentence will arise, otherwise this lease relationship will not arise. If the owner, before the expiry of two months from the date of delivery of the proposal for the conclusion of a lease contract, has concluded a lease contract with a person other than the user of the land as referred to in the first sentence, he shall notify the user of this fact within six months from the date of delivery of the proposal."<sup>(7)</sup>

In order to fulfil the statutory assumption of the establishment of a lease relationship for an indefinite period of time in the absence of a written lease agreement, the cumulative fulfilment of the following conditions is required: the use of land without a lease agreement; the use by an authorized user pursuant to Section 22 par. 229/1991 Coll. on the regulation of ownership relations to land and other agricultural property, as amended; the proposal for the conclusion of a lease agreement by the user; the expiry of the two-month period from the receipt of the proposal (the municipality did not reject the proposal or call for the return and takeover of the land, as well as

5 Števček (2017).

6 § 24g of the NPA Act.

7 § 12 para. 4 of the NPA Act.

did not conclude a lease agreement with another person); warning the user of the legal consequences of the municipality's failure to act; observance of the statutory deadlines. If the user does not warn the municipality of the legal consequences of its failure to act in the letter accompanying the lease agreement, or if the municipality is not instructed by the user of these consequences in another demonstrable form, the conditions of the legal prerequisite for the establishment of a lease relationship for an indefinite period of time will not be fulfilled.

## **5 Lease of Agricultural Land and the Municipal Property Act**

The public law requirements for the validity of the conclusion of the lease agreement consist in the obligation to proceed with the lease of municipal property in accordance with § 9a para. 9 of the Municipal Property Act. In the case of lease of municipal property, if there is no special legal regulation according to a special act on the NPP, the municipality is obliged to proceed with one of the following forms when leasing land: commercial public tender, public auction, direct lease at least for a rent in the amount determined by an expert opinion according to a special regulation, by applying the exception of lease of municipal property for a reason of special consideration according to § 9a par. 9 (c) of the Municipal Property Act.<sup>(8)</sup>

The definition of a reason worthy of special consideration must not be arbitrary (arbitrary) by the municipal authorities. If a specially qualified majority of three-fifths of the members of the municipal council resolves on a reason that respects the basic principles of the disposal of municipal property pursuant to Art. 1 of the Municipal Property Act, pursues a legitimate objective, while there is a logical continuity between the identified reason and the defined objective and the chosen method of disposal of the property is potentially able to achieve the objective, so the condition (hypothesis) for the procedure for a reason of special consideration under § 9a para. 9 (c) of the Municipal Property Act.

Disposal of municipal property in the form of lease of land and buildings for agricultural purposes primarily for the benefit of a particular subject of law may be a reason worthy of special consideration under § 9a para. 9(c) of the Municipal

Property Act, if the municipal council legitimately evaluates and explicitly describes in the municipal council resolution all the above-mentioned criteria precluding arbitrariness in decision-making. Assuming that the subject of the lease has so far been properly used and managed by the proponent of the lease agreement, thereby increasing the creditworthiness of the agricultural land, and the proponent of the lease agreement has duly fulfilled its legal obligations as a user of the subject of the lease (e.g. proper and timely payment of rent, payment of property tax, ensuring the quality control of the land, etc.).

It is a legitimate expectation of the proposer of the lease agreement and at the same time may be a reason worthy of special consideration in the conditions of the municipality to proceed to the conclusion of the lease agreement. Although the user is not legally entitled to conclude a lease agreement (he does not have a priority right to conclude it), the proper use of the subject of the lease is in the interest of both the user and the municipality as the owner of the agricultural land. The status of landowner implies obligations to protect its features and functions to ensure sustainable management, but also to maintain the ecological and genetic potential of living organisms.<sup>(9)</sup> In order to determine the most appropriate way of letting the agricultural land of the municipality, it is necessary to assess the complex factual situation with regard to the current use of the subject of the lease, its improvement and the possible interest of other entities to conclude a lease contract for the subject of the lease.

## **6 Duration of the Lease Agreement**

The municipality may conclude a lease agreement for agricultural land for a fixed or indefinite period of time. Section 8 of the NPP Act stipulates the minimum and maximum duration of a lease under a fixed-term contract. According to § 8 para. 1 of the NPA Act: "Land is leased to a tenant for agricultural purposes in the course of running a business for at least five years. Where the contract for the lease of land for agricultural purposes in the course of running a business is concluded for a fixed period, the lease period shall be for a maximum of 15 years."<sup>(10)</sup> (Longer

8 Sotolař (2019).

9 Buday (2013).

10 § 8 para. 1 of the NPA Act.



periods are for certain types of primary agricultural production pursuant to Art. 2 of the NPP Act, e.g. for orchards.)

A lease agreement concluded for an indefinite period of time may be terminated by giving five years' written notice. According to § 13 par. 2 of the NPA Act: "If the tenant has, at the earliest one year and at the latest two months before the expiry of the period for which the lease is agreed, demonstrably delivered to the landlord a proposal for a new lease agreement and the landlord has not rejected this proposal by the expiry of the period for which the lease was agreed or has not notified the tenant that he has concluded a lease agreement with another person, it shall be presumed that, by the expiry of the period for which the lease was agreed, a lease relationship of indefinite duration has been established between them, which can be terminated as of the 1. 1. 2009. November with a notice period of one year; Art. 4, the second to fourth sentences shall apply *mutatis mutandis*."<sup>(11)</sup>

The legislator in the above-mentioned provision of the NPP Act regulates in a new way the overcoming of illegal inactivity of the municipality towards the existing tenant who uses the agricultural land of the municipality on the basis of a contract concluded for a definite period of time. The provision of § 13 para. 2 of the NPS Act is not a "legalization of municipal inaction," but an effort by the legislature to fulfill the public interest in the proper management of agricultural land. Within the meaning of § 13 para. 2 in fine in conjunction with § 12 para. 4 of the NPA Act, the municipality may reject the proposal to conclude a lease agreement in whole or in part. The lessee is obliged to instruct the municipality on the form and manner of refusal of the proposal when proposing the conclusion of the lease agreement and to warn the municipality that if it does not refuse the proposal or does not invite the lessee to return and take over the land, the lease relationship will arise, otherwise the lease relationship will not arise. If the municipality, before the expiry of two months from the date of delivery of the proposal for the conclusion of the lease agreement, has concluded a lease agreement with a person other than the lessee of the land, it shall notify the lessee of this fact within six months from the date of delivery of the proposal.<sup>(12)</sup>

11 § 13 para. 2 of the NPA Act.

12 Explanatory report to the amendment to Act No. 151/2021 Coll., Parliamentary Print No. 393 of 08.01.2021.

## **7 Reasonable Extension of the Lease Term or Right to Reasonable Compensation**

According to § 13 par. 1 of the NPA Act: "If the lessee has incurred necessary expenses in maintaining the land in a condition fit for proper agricultural use, unless they are normal expenses in the use of the leased land, or if he has incurred reasonable expenses in reproducing or increasing the value of the benefits of the leased land in the ordinary course of farming, or to increase the performance of the land with the consent of the lessor, or in the framework of measures approved by the competent governmental authority, and the agreed lease term or the termination of a lease agreed for a specific period of time expires before the time for recovering the expenses incurred for such purpose has expired (Art. 2) and the tenant is therefore unable to make use of them, he shall be entitled to a reasonable extension of the lease term or to reasonable compensation."<sup>(13)</sup> In the present case, it is the incurring of non-normal costs to maintain the agricultural land, the term 'normal costs' being understood to mean costs associated with the tenant's agricultural business, that is, for example, the costs of sowing, ploughing and harvesting. 'Necessary costs of maintaining the land in a condition fit for proper agricultural use' means the costs associated with maintaining the land in such a condition as to comply, for example, with legislation on the protection of agricultural land.<sup>(14)</sup>

In the case of a purposeful expenditure to reproduce or enhance the value of the benefits of the leased land in the ordinary course of management or to enhance the performance of the land with the consent of the lessor, it is the incurring of a purposeful expenditure with the consent of the lessor resulting in the reproduction or enhancement of the value of the benefits of the leased land in the ordinary course of management. In all § 13 par. 1 of the NPS Act, the condition for entitlement to a reasonable extension of the lease term or to reasonable compensation is that the lease expires before the time for recovering the expenditure incurred for such purpose has expired, the lessee is therefore unable to make use of it, and by surrendering and returning the land, the lessee would suffer a loss.

13 § 13 para. 1 of the NPA Act.

14 Lacko-Bartošová (2021).

## **8 No Option to Lease Municipal Agricultural Land (Prohibition of Automatic Renewal of Lease Contracts)**

The duration of the lease agreement is subject to the lease term and the expiry of the agreed time. In the case of a lease of agricultural land of a municipality, the contracting parties may not negotiate in the contract the possibility of automatic renewal of the contract, even on the basis of the principle of contractual freedom. An agreed automatic renewal of the lease, whereby the lease expires on expiry of time only if the lessor fails to call upon the other party to return and take possession of the leased property at the end of the lease within a fixed contractually agreed period before the expiry of the time for which the lease was agreed, would be void. The NPP Act regulated this method of automatic renewal of a lease agreement concluded for a certain period of time before its amendment by Act No. 291/2017 Coll. Although the NPP Act does not currently provide for this method of termination of a lease agreement, it is excluded by the general civil law regulation on the conclusion of compulsorily published contracts in the Civil Code with effect from 1 January 2011.

Pursuant to § 490 par. 2 of the Civil Code: "Unless the law provides otherwise, a provision of a contract under section 47a, under which a contract concluded for a fixed period continues after the expiry of that period, is void."<sup>(15)</sup> A contractual arrangement under which, at the will of the parties, the validity of a contract is extended for a fixed period of time under certain conditions is, in principle, an expression of the contractual freedom of the parties, but the contractual freedom of the parties is limited in certain cases. In particular, these are legal relations with a public law element, whether this public law element relates to the object or subject of the legal relationship, where it is in the interest of society as a whole to protect, as a rule, public funds or public property against their misuse or wasteful disposal by limiting or tightening the conditions for the establishment, change or termination of such a legal relationship.<sup>(16)</sup> The above-mentioned intention of the privileged position and protection of public property is also pursued by the legislator by the provision of § 490 par. 2 of act no. 40/1964

Coll. Civil Code, as amended (hereinafter referred to as the "Civil Code"), according to which "Unless otherwise provided by law, the provision of a contract under Section 47a, according to which a contract concluded for a fixed period of time continues after the expiration of that period of time, shall be null and void."<sup>(17)</sup>

The provision of § 490 par. 2 of act no. 40/1964 Coll. The Civil Code has introduced a stricter contractual regime, which is related to the specific nature of compulsorily published contracts relating to the management of public funds or public property. The regime of compulsorily published contracts was introduced by Act No. 546/2010 Coll. with effect from 1 January 2011, its enactment being related to the amendment of Act No. 211/2000 Coll. on Free Access to Information and on Amendments and Additions to Certain Acts (Act on Freedom of Information), as amended, and to the establishment of the institute of compulsorily published contracts (Section 47a of the Civil Code).<sup>(18)</sup>

A compulsorily published contract is a contract within the meaning of Art. 1 of the Freedom of Information Act, a compulsorily disclosed contract is "a written contract concluded by an obliged person and containing information which has been obtained with funds managed by legal entities of the public administration, including non-state special-purpose funds, or relating to the use of such funds, the management of the property of the State, the property of a municipality, the property of a higher territorial unit or the property of legal entities established by or under the law, or the management of funds of the European Union."<sup>(19)</sup> Pursuant to Article 2(2)(a) of the Treaty on European Union. 1 of the Freedom of Information Act: The persons obliged under this Act to disclose information (hereinafter referred to as "obliged persons") are state authorities, municipalities, higher territorial units as well as those legal persons and natural persons to whom the law confers the power to decide on the rights and obligations of natural persons or legal persons in the field of public administration, and only within the scope of their decision-making activities."<sup>(20)</sup> The municipality is an obliged person under the Freedom of Information Act and, in this sense, the obligation to publish contracts

<sup>15</sup> § 490 para. 2 of the Civil Code.  
<sup>16</sup> Hambáleková (2020).

<sup>17</sup> § 490 para. 2 of the Civil Code.

<sup>18</sup> Tekeli et al. (2021).

<sup>19</sup> § 5a para. 1 of the Freedom of Information Act.

<sup>20</sup> § 2 para. 1 of the Freedom of Information Act.

under Article 5a of the Freedom of Information Act in conjunction with Article 47a of the Civil Code also applies to the municipality.

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