

Common lands within the meaning of the common lands act of 29 June 1963 – selected civil law issues

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Abstract

The article will discuss the general issues related to common land - the term applied in the Common Lands Act of 29 June 1963 and its legal nature. In addition, an attempt will be made to answer the question about an entity that should be disclosed in the second section of the land and mortgage register in the case of real property being a part of the common land. Currently, land and mortgage registers may be established for common land. The question is whether it should be the common land itself or natural and legal persons entitled to hold shares therein, or maybe a company established to manage and develop such a common land. It seems that the legislator itself has been unable to deal with this issue. There are no legal acts where it would indicate directly or indirectly an entity that should be disclosed in the second section of the land and mortgage register as an owner (co-owner).

Key words: common land, co-ownership, commonality, agricultural land and woodland, company to manage and develop the common land

1. Introduction

Distinguishment of common lands (commonly known also as easement or land-easement communities) has resulted from transformations in the social and economic structures that took place mainly in the 19th century and at the beginning of the 20th century.² This institution originates directly from the past forms of the land possession by villagers, – initially based on relations arising from the servile relationship, and then based on collective legal titles that appeared in the course of enfranchisement of peasants, within the framework of which, – apart from sole land ownership, – the joint ownership of pastures and forestland³ was bestowed upon peasants. However, there

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² See: K. Marciniuk, *Kilka uwag do założeń do projektu ustawy o zmianie ustawy o zagospodarowaniu wspólnot gruntowych* [Several Comments on the Assumptions to the Draft Act on Amending the Common Lands Act], „Studia Iuridica Agraria” 2012, issue 10, p. 535–536, J. Ignatowicz, *Komentarz do art. 196 k.c.* [Commentary on Article 196 of the Civil Code], [in:] *Kodeks cywilny. Komentarz*, vol. 3, Z. Resich et al. (ed.), Warszawa 1972, p. 502.

³ See e.g. K. Marciniuk, *op. cit.*, p. 535, J. Ignatowicz, K. Stefaniuk, *Praworzeczowe* [Property Law], Warszawa 2006, p. 123.

are only few legal institutions that have been preserved in an unamended form for several hundred years like the common lands⁴. It has been kept in the Common Lands Act dated 29 June 1963⁵. The solutions adopted therein were adjusted to the agricultural policy pursued in 1960s. In the era of command-and-quota system, common lands were treated as a part of the socialisation of agriculture. For that reason, they could have not be divided into the entities entitled, the administrative control mechanism for land transactions concerning such lands was introduced, or finally they were banned from keeping land and mortgage registers, while those existing registers had already become ineffective and invalid. Therefore, after the 1989 political transformation in Poland it was necessary to adjust some provisions of the Act to the contemporary social and economic realities⁶. There were even some questions whether common lands have remained valid in the current economic conditions⁷. Surely, the Act of 10 July 2015 on Amending the Common Lands Act⁸ provided a much-needed “update” of the juridical matter applicable within this scope without any amendments for several decades. The solutions adopted therein are also of use to order legal statuses of common lands in Poland⁹. Obviously, narrow framework of this paper does not allow for the discussion of all changes in the legal status within this scope.

According to the status valid before the adoption of the amending act of 10 July 2015, which became effective as of 1 January 2016, approx. 5,100 common lands with a total area of ca. 107 thousand ha were in Poland. About 3,500 of them had their legal status not regulated, as there was no administrative decision establishing: properties being a part of the common land, list of entities entitled to share in common land and a list of areas of farms they have, plus value of their shares in the common land¹⁰. It was not done although Article

⁴ G. Jędrejek, *Zarząd wspólnotą gruntową* [Administration of the Common Land], „Zeszyty Prawnicze” 2008, issue 8/1, p. 151.

⁵ Uniform text Journal of Laws of 2016, item 703 (further: “Common Lands Act”/“Act”/“CLA”). It was preceded by the Act of 4 May 1938 on the Ordering of Common Lands (Journal of Laws, item 290). Within the scope referring to the organisation of common lands – see: Order of the Ministers of Agriculture and of Forestry and Wood Industry of 29 April 1964 on the establishment of model articles of associations for a company to develop the common land (M.P. of 1964, issue 33, item 145).

⁶ Form no. 3193: Governmental draft Act on Amending the Common Lands Act (available on the Polish Parliament website).

⁷ See e.g. R. Szarek, *Wspólnoty gruntowe – czy mają jeszcze rację bytu* [Common Lands - Do They Still Remain Valid], „Finanse Komunalne” 2008, issue 10, p. 34–47.

⁸ The Act of 10 July 2015 on Amending the Common Lands Act (Journal of Laws of 2015, item 1276; hereinafter: “amending act”).

⁹ See also K. Marciniuk, *op. cit.*, p. 545.

¹⁰ See: note no. 4.

8 section 5 of the Common Lands Act had imposed an obligation of performing those activities on the competent body within one year from the date of its entry into force, i.e. by 5 July 1964. Such arrangements were to concern the actual and legal status as of 5 July 1963, i.e. the Act's date of entry into force, which is now practically impossible. Due to the above, after more than 50 years from the Act's date of entry into force, there were some difficulties with establishment of the origin of lands in common use, thus with their classification into common lands or commune properties, while the determination of a circle of persons entitled to a share in common lands became hampered, sometimes even impossible. That implied many problems and nuisances¹¹. Moreover, sharers of only 1080 common lands have established companies to manage those lands, including only 1073 companies with competent authorities being appointed, which makes it impossible for them to actually operate in the conduct of legal transactions¹².

Despite these "drawbacks", amendment of the Common Lands Act does not assume the annulment of existing common lands, established pursuant to the provisions thereof, that is lands for which values of shares of all entitled entities are known and where land management is carried out under the company established by the authorised entities. They will be able to function in a previous organisational form and manage on the so far adopted basis, if the entitled entities are willing to do so. The Act provides an option of converting the common land into common co-ownership (in fractional parts), which must be agreed on by all interested entities (sharers of the common land). Such a solution should be assessed positively, since the above legal institution has had a long tradition in Poland and constitutes a firmly established element of rural relations. Moreover, it does not constitute an anachronism on a European or global scale. Solutions similar to the Polish common lands are also present in other legal orders (e.g. British *commons* or Swiss *Allmende*)¹³. K. Marciniuk has even stated that in some dimension the Polish common lands are a part of the joint heritage of European legal tradition and a proof of the common history¹⁴. In turn, I. Lipińska states that common use of agricultural and forest lands falls into the tradition of the Polish country¹⁵.

11 Both for sharers of these common lands and for third parties (see: note no. 1).

12 See: note no. 1.

13 See: I. Lipińska, *Z prawnej problematyki wspólnot gruntowych* [From the Legal Issues of Common Lands], „*Studia Iuridica Agraria*” 2011, issue 9, p. 202–216; K. Marciniuk, *op. cit.*, p. 547.

14 See: K. Marciniuk, *op. cit.*, p. 547.

15 See: I. Lipińska, *op. cit.*, p. 215.

Until 1 January 2016, Article 11 of the Common Lands Act was in force, stating that for real properties being a part of the common land no land and mortgage registers were kept, while previous land registers became ineffective and closed¹⁶. It was abolished, as the legislator correctly recognised that there was no reasonable justification for the maintenance of an exclusion, pursuant to which for some real property categories (here: land being the common land) no land and mortgage registers might be kept. That is why currently land and mortgage registers may be established and kept also for real properties being a part of common lands. Undoubtedly, this provision has been abolished in order to restore the possibility of applying to these real properties the principles of right transparency, public credibility of land and mortgage registers or the possibility of real property mortgaging, which was defeated by the Common Lands Act in the wording from before the amendment¹⁷. In that way, land register was rightly no longer the only official register to disclose the legal status of grounds constituting common lands¹⁸.

This article discusses in general terms the issues of common lands in the current legal situation, their legal nature, as well as attempts to answer who should be disclosed in the second section of the land and mortgage register in the case of real property being a part of the common land. The matter is whether it should be the common land itself or natural and legal persons, possibly also so-called legal entities without corporate status (Article 33¹ of the Civil Code)¹⁹ entitled to a share in it, or maybe the company appointed to develop such common lands, referred to in the provisions of section 2 of the Common Lands Act of 29 June 1963. It seems that even the legislative body

¹⁶ Such a regulation resulted from the lack of possibility of introducing in all cases a clear "legal lineage" of the ownership of lands treated - as intended by a legislative body - as common lands. In addition, it resulted from legal and economic conditions valid in the formation period of the provisions of the Act (see: E. Stawicka, *Wspólnoty gruntowe – aspekty cywilistyczne i administracyjnoprawne* [Common Lands. Civil, Administrative and Legal Aspects], „Palestra” 2008, issue 1–2, p. 77; K. Rudol, *Problematyka prawna ujawniania nieruchomości wspólnot gruntowych w księgach wieczystych* [Legal Issues Concerning the Disclosure of Common Lands' Properties in Land and Mortgage Register], „Palestra” 2019, issue 4, p. 76).

¹⁷ See: E. Stawicka, *op. cit.*, p. 74.

¹⁸ See: P. Parzych, E. Rymarczyk, A. Szabat-Pręcikowska, *Problematyka wspólnot gruntowych w aspekcie ewidencyjnoprawnym* [The Issues of Common Lands in the Record and Legal Aspect], „Infrastruktura i Ekologia Terenów Wiejskich”, issue 2/III/2013, p. 35–46.

¹⁹ Admittedly, the Act states that sharers of common lands may include natural and legal persons. However, it does not seem that this would constitute the basis for the conclusion that the so-called legal entities without corporate status (Article 33¹ of the Civil Code) may not be them. Equally the provision of Article 1 of the Civil Code states that it governs the civil law relations between natural and legal persons. However, it does not mean that it does not govern the relations based on the principle of freedom of will and equal ranking of entities with a share in organisational units, to whom the special provisions grant legal capacity.

has been unable to deal with that issue. Although there can be no doubt about making relevant entries in land and mortgage registers – based on an administrative decision of the Voivode, –in the case of acquisition of common lands by the commune or the Treasury pursuant to Article 8j and 8l of the Act, just like in the case of Article 30a section 1 of the CLA, i.e. after converting the common land into co-ownership, it is quite the contrary in the case of determination of persons entitled to a share in the common land pursuant to Article 8a and 8c of the CLA (it is about the so-called “old” and “new” group of entities entitled to a share in the common land; it will be discussed later on). The legislator does not indicate directly or indirectly who should be entered in such a case in the second section of the land and mortgage register as an owner (co-owner) from the subjective side. Pursuant to the applicable provisions of the Act, this issue cannot be settled unambiguously. Recently it has been the subject of a legal question presented to the Supreme Court for settlement pursuant to Article 390 of the Civil Procedure Code by the Regional Court in Z. By its decision dated 24 January 2020,²⁰ the Supreme Court refused to adopt a resolution under that mode. By no means does it render the discussed legal issue obsolete, as its meaning is not purely theoretical, when a number of common lands in Poland is to be considered. Currently, in Poland there are approx. 107 thousand ha of grounds designated in the land and building register as common lands. Moreover, these grounds constitute goods significant for the state and subjects of civil law relations.

2. Basis for the case of the Supreme Court (file reference III CZP 54/19)

In the case in which the Supreme Court refused to adopt a resolution (III CZP 54/19), the Regional Court in H. dismissed the motion of the Company for Development of the “M.” Common Land in H. to establish the land and mortgage register for the land property in H. and to enter the “M.” Common Land in H. as its owner. It pointed out that in the current legal situation it is generally possible to establish the land and mortgage register for real properties being a part of common lands, but in the situations specifically provided for in the provisions of law. Currently, only Article 8j, 8l and 30a section 1 of the Common Lands Act constitute such provisions. These provisions state, respectively, that final decisions on the free-of-charge acquisition by a commune of the ownership of real properties referred to in Article 8g section 1 and

²⁰12 File reference III CZP 54/19, unpubl.

Article 8l of the CLA, the final decision on the acquisition by the Treasury of the ownership of a real property referred to in Article 8 of the CLA and the resolution on converting the common land into co-ownership in fractional parts or a valid decision of the court in the case referred to in Article 30a section 2 of the CLA constitute the basis for an entry in the land and mortgage register. It decided that none of the cases indicated in those provisions did not occur in the case and therefore it dismissed the entry claim. In the appeal against that decision, the appellant claimed that the provisions referred to by the regional court constituted the basis for disclosure of the ownership right to real property for the benefit of the Treasury, commune or members of the common land as co-owners in fractional parts, not for the benefit of the common land.

The district court expressed its uncertainty whether such an opinion was correct. It pointed out that after derogation of Article 11 of the Common Lands Act of 29 June 1963 it has been rather assumed that there is no obstacle to keep land and mortgage registers for real properties being a part of the common land. That change was not accompanied by an appropriate amendment of the Act of 6 July 1982 on Land and Mortgage Registers and Mortgage²¹, nor by provisions of the Regulation of the Minister of Justice of 17 September 2001 on keeping land and mortgage registers and document sets²². Consequently, there are no provisions related to establishing and keeping land and mortgage registers for real properties being a part of the common land. The court has emphasised gaps present in the Regulation of the Minister of Justice of 15 February 2016 on establishing and keeping land and mortgage registers in an ICT system²³. It points out that in the doctrine there are presented various contradictory concepts as to who is an owner of real properties being a part of the common land, while the definition of the common land as a special type of co-ownership should, in this context, be treated as a description of common land through its comparison with an institution that has some common features, instead of a suggested equivalence of these two institutions, or even a suggestion that the co-ownership-related provisions may be applied to common lands. In the case of equivalence of common land and co-ownership specified in the Civil Code, it would be aimless to place Article 30a governing the procedure of converting common land into co-ownership in the Common Lands Act. That being so, it considered uncertain, to say the least, whether sharers of the common land might be deemed co-owners of a real property being a part of the common

²¹ Uniform text Journal of Laws of 2019, item 2204.

²² Journal of Laws of 2001, No. 102, item 1122.

²³ Journal of Laws of 2016, item 312.

land, therefore whether they could be disclosed in the second section of the land and mortgage register. As the court assesses, the indication of the common land as a property owner itself is doubtful. No provision grants legal personality or at least legal capacity to the common land.

3. Concept of the common land, persons entitled to their share in it, share in the common land

There is no legal definition of the common land in the Act. Pursuant to Article 1 section 1 of the CLA, common lands being subject to development on the terms and in the manner specified in the Act constitute agricultural, forest properties and water areas:

1. granted as a result of enfranchisement of peasants and townsmen-farmers as joint ownership, in co-possession or for common use to the community, some group or some residents of one village or more;
2. assigned as remuneration for dissolved easements, resulting from land provision for peasants and townsmen-farmers, as joint ownership, co-possession or common use to the commune, town or all entities authorised to use easement;
3. resulting from the distribution of lands granted at the enfranchisement of peasants and townsmen-farmers among residents of several villages as joint ownership, co-possession or for common use;
4. in common use by residents of former environs and small farms and belonging to urbaria communities and hut partnerships;
5. received by a group of residents of one or several villages as joint ownership and for common use by way of privileges and donations or acquired for this purpose;
6. entered in land and mortgage (land) registers as a commune ownership, if these registers include an entry on a right of specific groups of commune residents to perpetual usufruct and to derive benefits from these properties;
7. constituting the commune domain shared on the territory of Rzeszow, Krakow Voivodeships and Cieszyn powiat in the Katowice Voivodeship.

Article 2a of the Common Lands Act added as a result of amendment stipulates that the Act provisions shall not apply to lands covered by public waters within the meaning of the Water Law of 18 July 2001²⁴. This provision aims

²⁴that Act was repealed by the –Water Law of 20 July 2017 (i.e. Journal of Laws of 2020, item 310, as amended).

at the elimination of doubts arising as to the relation of the Common Lands Act with the–Water Law. Pursuant to Article 3 of the Act, common lands do not include real properties or their parts specified in Article 1 section 1 of the CLA, if:

1. until 31 December 1962 and in the case of forests and woodlands– until 30 September 1960 they were divided into individual plots of land among co-proprietors or were subject to prescription;
2. before 1 January 2011 they were legally or actually transferred for public or social purposes.

Inclusion of real properties as parts of common lands occurred by operation of law from the entry into force of the Act, while a decision of the starost (before 1990 *presidia* of *poviat* national councils competent for agricultural and forest affairs constituted an entity authorised within²⁵that scope) was declaratory in that regard. In decisions of the Supreme Court, it is stated that the determination of real properties which are a part of the common land is the sole responsibility of the starost, therefore it is unacceptable to forejudge about this and to verify administrative arrangements by common courts²⁶. While establishing the ground affiliation to the common land, the starost was also deciding whether (and what) changes in the ownership status resulted from various legal events, e.g. due to prescription. Establishment of the common land's composition by the starost forejudged, in the way binding for the court, that grounds were not acquired through prescription by third parties or by some members of the common land. In the eviction-related case, that precluded the effectiveness of the charge of prescription²⁷. Determination of one's affiliation to the common land should occur

²⁵See: Article 1 of the Act of 17 May 1990 on the division of tasks and competences specified in special acts between commune bodies and governmental authorities and on the amendment of some acts (Journal of Laws no. 34, item 198).

²⁶See: resolution of the Supreme Court of 14 April 1965, file reference III CO 39/65, OSNCP 1966, no. 11, item 181 (with a thesis: "Determination whether real property constitutes the common land falls exclusively within the jurisdiction of national council *presidia*' authorities referred to in the Common Lands Act of 29 June 1963"; in accurate opinion of J. Ignatowicz, this thesis is going too far towards the limitation of judicial proceedings – see: *idem* in: *Code...*, *op. cit.*, p. 503); resolution of the Supreme Court of 20 May 1966, file reference III CZP 16/66, OSNCP 1967, no. 1, item 4 (with a thesis: "Determination pursuant to Article 8 of the Common Lands Act of 29 June 1963 (Journal of Laws no. 28, item 169) by an agricultural and forestry authority of the national council *presidium* the grounds that are a part of the common land excludes in the vindication-related case the effectiveness of the charge of prescription also when this case has been initiated before the entry into force of the mentioned Act"); resolution of the Supreme Court of 16 February 1968, file reference III CZP 78/66, OSNCP 1968, no. 10, item 161 (with a thesis: "Determination whether the agricultural and forest real property belongs to a hut partnership, by administrative means pursuant to the provisions of Article 1, 3 and 8 of the Common Lands Act of 29 June 1963 (Journal of Laws no. 28, item 169) is not subject to verification in judicial proceedings").

²⁷See: resolution of the Supreme Court of 20 May 1966, file reference III CZP 16/66, OSNCP 1967, no. 1, item 4.

within one year from the entry into force of the Act. However, it was an indicative time limit, not the strict one²⁸, so such a determination could be done also after its expiry. That did not exclude judicial proceedings in any cases concerning the ownership of properties being a part in the common land caused by events occurred after the entry into force of the Common Lands Act. That is why in its decision of 7 March 2002²⁹ the Supreme Court stated that the issuance of a decision establishing that the property is a part of the common land did not preclude the prescription of that property. Also the decision of the Supreme Court of 28 November 2001³⁰ assumed that “members of the common land do not have the capacity to acquire by prescription a physical part of the property being the commune’s joint ownership. Entitlement to a claim from Article 4 of the Common Lands Act does not exclude the claim from Article 231 of the Civil Code nor the capacity to acquire real property by prescription (Article 172 of the Civil Code)”. In the literature it is observed, often rightly, that in many cases, due to the lapse of time, there are generally no common lands, just individual lands of their members who managed to prescribe them within years³¹.

Article 6 section 1 of the Common Lands Act states that entities entitled to a share in the common land include natural or legal persons having farms, if they were actually using that common land within the last year before the entry into force of the Act (i.e. before 5 July 1963 – author’s comment). Therefore, a farmer not using grounds of the common land had no rights to have a share therein, just like a person using the common lands but not being a farmer³². Any rights in the common land and shares therein of particular farmers are specified *ex lege*, regardless of the fact if those persons were previously entitled to rights in rem to common lands³³.

If the common land is composed of forests, woodland or uncultivated land to be afforested, such a land can be shared by natural persons having a place of residence or legal persons having their seat in the village where lands being a part of the common land are located, or persons having their place of residen-

²⁸ See: decision of the Supreme Court of 16 February 1968, file reference III CZP 78/66, OSNCP 1968, no. 10, item 61, and decision of the Supreme Court of 7 March 2002, file reference II CKN 619/99, OSNC 2002, no. 3, item 30.

²⁹ File reference II CKN 619/99, OSNC 2003, no. 2, item 30

³⁰ IV CKN 1004/00, LEX no. 52768.

³¹ E.g. M. Ptaszyk, *Istota i charakter wspólnoty gruntowej* [The Essence and Nature of the Common Land], „Krakowskie Studia Prawnicze” 1986, no. 19, p. 161, and I. Lipińska, *op. cit.*, p. 205.

³² Accurately by I. Lipińska, *op. cit.*, p. 204.

³³ See: J. Szachutowicz, *Zniesienie współwłasności i podział wspólnot gruntowych w postępowaniu scaleniowym* [Dissolution of Co-Ownership and Division of Common Lands in the Consolidation Proceedings], „Palestra” 1984, no. 9, p. 27.

ce in another village who run a farm, unless those persons did not actually use the common land (section 2) within five years before the entry into force of the Act. Failure to use the common land within a period mentioned in section 1 or in section 2 does not result in the loss of rights, if it is caused by a natural disaster, chance occurrence or other special reasons (section 3). It is the so-called “old” group of entities entitled to a share in the common land, operating based on the principles applicable pursuant to the original wording of the Act. Thereby, the amendment has kept the previous method of adjusting legal situations of common lands as the priority.

In Article 6a, the amending act stipulates that if it is impossible to determine the entities entitled to a share in the common land, referred to in Article 6 section 1 or 2 of the Act, the entities entitled to a share in this land include:

- natural or legal persons who have farms and were actually using the common land uninterruptedly from 1 January 2006 to 31 December 2015;
- natural persons having a place of residence in the village where lands being a part of the common land are located, or who run their farm in this village – if the common land is constituted by forests, woodland or uncultivated land to be afforested, unless these persons did not actually use the common land from 1 January 2006 to 31 December 2015.

Failure to use the common land within a period mentioned in section 1 item 1 does not result in the loss of rights, if it is caused by a natural disaster, chance occurrence or other special reasons. It is the so-called “new” group of entities entitled to a share in the common land (the amending act specifies a catalogue of entities entitled).

Shares of particular entities entitled in the common land are specified in perfect (fractional) parts. A value of shares of entities entitled to use the common land is established in such a way that a half of the common land is divided among the entities entitled (Article 6 section 1, Article 6a item 1 of the Act) in equal parts, while the second half – is divided in proportion to the area of lands owned by each entity entitled and located on the area of the same or adjacent commune (Article 9 of the Act). In this context, it should be noted that one of foundations on which the Common Lands Act was based is the integrity of the common land specified in Article 5 (“Common lands may not be divided among entities entitled to a share in these lands (section 1). Common land shall be divided only if its grounds are subject to consolidation, with the consent

of an absolute majority of persons entitled to a share in this land (section 2)”) and in accordance with the principle of indivisibility of the common land share expressed in its Article 27 stating that the common land share may be disposed of only in whole and only to a person who has already had a share in this land and to persons having farms in the same village or in villages adjacent to the common land. Disposal of shares in the common land occurs in the form of notarial deed (Article 27 of the Act). The only exception from this principle – elaborated in Article 28 – is established by Article 29. It governs the situation when, as a result of annulment of co-ownership of real property or division of the estate (also division of matrimonial property after the cessation of statutory conjugal community), the farm with which a share in the common land is connected is divided. Then, the share in the common land is divided in proportion to the area of these parts. Pursuant to Article 28 of the CLA, if all farm lands are disposed of by an entity entitled to a share in the common land, share in this common land shall devolve upon the acquirer of this farm. If a part of lands specified in section 1 of the CLA is disposed of, share in the common land is maintained by its previous owner, unless it refrains from its rights to the acquirer under an agreement. However, if the transferor keeps an area of agricultural land not exceeding 0.1 ha, share in the common land is transferred to the acquirer (Article 28 of the Act).

If a real property being a part of the common land is sold, the commune has the right of pre-emption (Article 26 section 2 of the Act).

As a result of the amendment (Article 8a section 1 of the Act), it is assumed that the determination of properties being a part of the common land, determination of a list of entities entitled to a share in the common land and a list of areas of farms owned by them and value of their shares in the land occurs at a request made not later than by 31 December 2016 by an entity entitled to a share in the common land referred to in Article 6 section 1 or 2 or by its legal successor. Provisions of Article 8a section 2 and 3 specify the motion’s elements and evidence that should be enclosed by a proposer to its motion. In the case of common lands, as a rule, individual documents confirming particular shares in the common land are not accepted - only documents concerning the entire common land in the form of data included in the land register and in so-called bestowing tables containing information on all sharers. Hence, there is rather no risk that only a part of entities entitled to a share in the common land is to be established. The starost issues a decision on the determination which real properties from among those referred to in Article 1 section 1 con-

stitute the common land and on the determination of a list of entities entitled to a share in the common land and a list of areas of farms they have, plus value of their shares in the common land. Farm areas of persons entitled to a share in the common land are specified according to the data included in the land and building register (Article 8a section 4–6 of the Act). If it is impossible to determine the entities entitled to a share in the common land referred to in Article 6 section 1 or 2, the starost issues its decision on the non-determination of a list of entities entitled to a share in the common land pursuant to Article 6 section 1 or 2 (Article 8a section 7 of the Act). When such a decision becomes final, the determination of real properties being a part of the common land and of a list of entities entitled to a share in the common land and of a list of farm areas owned by them and value of their shares in the land occurs at a request of an entity entitled to a share in the common land referred to in Article 6a (Article 8c section 1 of the Act). In Article 8c section 2–6, the procedure on that subject is governed in detail. The starost issues a decision on the determination of a list of entities entitled to a share in the common land referred to in Article 6a and a list of farm areas they own, plus value of their shares in the common land (Article 8d of the Act). When the determination of a list of entities entitled to a share in the common land is impossible also in this manner, the starost issues a decision on the non-determination of a list of entities entitled to a share in the common land (Article 8e of the Act).

In such a case (so when both procedures – from Article 8a and 8c of the Act failed), the amended Act indicates entities entitled to a free-of-charge acquisition of ownership of real properties designated in the land and building register as the common land. Namely, they constitute competent communes due to the location of real properties designated in the land and building register as the common land. A commune as the acquirer may allocate these real properties only for the purposes referred to in Article 24 section 2 of the Property Management Act of 21 August 1997, connected with the performance of the commune's own tasks. Acquisition of these properties by the commune occurs at its request (Article 8g–8i). If the commune does not make a request or receives a final decision refusing the commune to acquire the ownership of real properties referred to in Article 8g, pursuant to Article 8k the ownership of these properties shall be transferred to the Treasury. Acquisition of real properties constituting common lands by the commune or the Treasury occurs by way of administrative decision. Any decision in this matter is issued by the Voivode, while the competent minister in charge of

rural development constitutes the body of higher instance for the Voivode deciding on these matters. Final decisions of the Voivode on this subject constitute the basis to make entries in the land and mortgage register (Article 8j, 8l).

4. Company for the common land management and administration

Persons entitled to have a share in the common land should establish a company to manage the land and to well develop grounds being a part of this land. The company is established by way of resolution adopted with a majority of votes authorised to have a share in the common land, when at least a half of them is present. The company members are persons entitled to have a share in the common land (Article 16 section 1 and 2 of the Act). In addition, owners of lands adjacent to the common land may be the company members under the terms specified in the articles. Such a company is a legal person and it operates based on the articles (Article 15 section 1 of the Act). The articles of association should specify:

1. name and registered office of the company, as well as the subject of its activity;
2. rights and obligations of the company members;
3. governing bodies of the company, manner of their appointment and scope of activities;
 - a. types of legal actions performed by the company, the appointment of which requires a resolution of the members' meeting³⁴;
 - b. conditions for the company representation and the commitment of proprietary obligations;
4. conditions for the admission of owners of lands adjacent to the common land to the company;
5. conditions for the admission of non-members of the company to the use of the company's lands and devices;
6. distribution of profits and losses;
7. manner of dissolution and liquidation of the company (Article 17 of the Act).

³⁴ Pursuant to § 9 of the Order of the Ministers of Agriculture and of Forestry and Wood Industry of 29 April 1964 on the establishment of model articles of association for a company to develop the common land, the company's governing bodies include: 1) general meeting of its members; 2) management board; 3) board of control. Pursuant to § 10 section 1 thereof, the general meeting of the company's members is its highest authority. Regulation of the issues related to the common land management in the Order raises reservations in the context of a catalogue of sources of law designated in Article 87 of the Constitution of Poland (see also: G. Jędrejek, *op. cit.*, p. 155)

The articles of association and changes thereto are approved by a decision of the starost. The company shall acquire legal personality as of the day when the decision on approval of its articles of association becomes final. The company's name, composition of its management board and area of the common land, as well as lists of entities authorised to use this land are ex officio subject to an entry in the land register. Any further changes in the common land's area and in the list of persons entitled, as well as any amendment to the articles of association and change in the management board's list of persons are reported by the company's management board to the register (Article 18 section 1 and 2 of the Act). The company is liable for debts and obligations with all its assets without limitation (Article 20 section 1 of the Act). In turn, the company members are liable for the company's debts and obligations only up to the value of their shares in this common land, however in the case of debts and liabilities of the company established to develop grounds specified in Article 1 section 2 of the Act – accordingly to the value of their share in profits earned on these grounds (Article 20 section 2 of the Act).

Pursuant to Article 19 of the Common Lands Act, while adopting resolutions on meetings of the company's members, each member is entitled only to one vote regardless of a value of its share in this common land (Article 9 of the Act)

³⁵. If the resolution:

1. was adopted with breach of rights or the articles of association;
2. violates the principles of proper management of grounds included in the common land;
3. violates interests of particular members of the company

it is possible to institute an action to derogate the company's resolution within 30 days from the date of receipt of information on the resolution, however not later than within six months from its adoption (Article 19a section 1 of the Act). The following entities shall have the right to institute the action:

1. management board, board of control and their individual members;
2. member of the company who voted against the resolution and after its adoption requested its objection to be recorded in the minutes;

³⁵ Such a solution should be assessed critically. G. Jędrejek also thought that – In his opinion, the above principle is justified for corporate entities, such as associations, which do not include the company appointed to manage common lands. Due to the applicability of the above principle, a co-owner of the common land whose share comes to ¼ will be outvoted by at least two other co-owners. According to Jędrejek, it is hard to decide that such a solution is compliant with special protection of the ownership right guaranteed by the Constitution of Poland – Article 21, 64 (see: *idem, op. cit.*, p. 156).

3. member of the company unreasonably unadmitted to participate in a general meeting of members;
4. member of the company who was not present on a general meeting of members, only if the general meeting of members was convened in a defective manner or if the resolution was adopted in the case not included in the agenda.

In addition, the competent commune head (mayor) shall have the right to institute an action, subject to the case when the resolution violates interests of particular members of the company (Article 19a section 2 and 3 of the Act)³⁶.

The company is entitled to erect and maintain devices needed to achieve the company's purposes on the common land (Article 22 of the Act). The competent commune head (mayor) exercises supervision over the company's activities (Article 23 of the Act). In its judgement of 9 November 1971³⁷ the Supreme Court rightly claims that when it is about the common land, it is represented by the company whose members include persons entitled to have a share in the common land, while the company is a legal entity (Article 15 of the Act) represented by its statutory bodies. Therefore, there is no way the commonality of villagers may represent the common land. In the decision dated 18 April 1997³⁸, it states that the company may be appointed to manage grounds creating the common land and to represent it. Therefore, the company is actively legitimated to apply for the ascertainment of the acquisition of ownership by way of prescription. In the resolution of 25 October 1995³⁹, it was also concluded that in the case of prescription of ownership of a real property being a part of the common land, the company - not the common land's members - was the party to the proceedings. If the company is not appointed to manage a real property being a part of the common land, the applicant must fill this gap. In such event, the court where the case is pending should use its right provided in Article 177 § 1 and 2 of the Civil Procedure Code. Finally, in the resolution of the Supreme Court dated 23 August 1968⁴⁰ it was stated that as the Act had transferred the common land management to special companies, only the company had an active card to institute a vindication-related action as to the plot of land being a part of the common land, not individual co-owners. In the resolution dated 7 March 2008

³⁶ Prior to the amendment of the Common Lands Act, it did not include any form of judicial review of bodies of companies to develop common lands.

³⁷ File reference III CRN 310/71, LEX no. 7013.

³⁸ File reference II CKU 28/97, LEX no. 30381.

³⁹ File reference III CZP 149/95, LEX no. 30381.

⁴⁰ File reference III CZP 73/68, OSNC 1998, no. 3, item 39.

⁴¹ the Supreme Court stated, in turn, that a guardian appointed by the court for a company established to manage the common land should immediately convene a meeting of its members in order to appoint the company's management board. Such a guardian cannot appoint the company's management board on its own⁴².

The company appointed for the common land management and development is a special legal person and has nothing in common, apart from its name, with a commercial law company. The Code of Commercial Companies shall not apply thereto⁴³. However, the possibility of using it *per analogiam* in any matters not regulated in the Common Lands Act, e.g. concerning liquidation of a company appointed to manage the common land, should not be excluded *a priori*⁴⁴. It may be classified at most as a so-called administrative law company⁴⁵, which means an association of persons appointed to supervise joint undertakings. The most common examples of this company type include water companies or companies appointed to administer common lands. Supervision over and control of the water company's activities are exercised by the competent starost (Article 462 of the Water Law Act). In turn, supervision over activities of the company appointed to manage the common land is exercised by the competent commune head (mayor) (Article 23 of the CLA).

Pursuant to Article 25 section 1 of the discussed Act, if entities entitled to a share in the common land do not present the articles of association for approval by the competent commune head (mayor)⁴⁶ within three months from the date of determination of a list of authorised entities, this body establishes

⁴¹ File reference III CZP 8/08, OSNC 2009, no. 4, item 50.

⁴² See more about this: G. Jędrejek, *op. cit.*, p. 157–161.

⁴³ In its judgement dated 8 December 2011, file reference IV CSK 188/11, LEX no. 1168550 (based on the previous legal condition), the Supreme Court was of the opinion that data included in the land register constituted the basis for the determination of persons entitled to a share in the common land, being subject to notification of a general meeting of the company members to manage the common land and to develop grounds belonging to the common land in a proper way. In the context of an action to determine, pursuant to Article 189 of the Civil Procedure Code, it is possible to annul a resolution of the general meeting of members of the company to develop the common land due to its conflict with the Act. Resolutions from meetings of members of the company to develop the common land oriented towards the production of legal effects in the area of civil law relationships are subject to Article 58 § 1 of the Civil Code – as legal actions, in reference to which, contrary to the case of resolutions of a general meeting of shareholders or resolutions of partners to a limited liability company, no special provisions excluding such a possibility were provided for (Article 252 § 1 and Article 425 § 1 of the Code of Commercial Companies).

⁴⁴ See: G. Jędrejek, *op. cit.*, p. 161.

⁴⁵ See: e.g. judgement of the Voivodeship Administrative Code dated 17 June 2008, file reference II SA/Ke 251/08, LEX no. 511548, J. Szachutowicz, *Spółki prawa administracyjnego* [Administrative Law Companies], „Przegląd Sądowy” 2004, issue 2, p. 4.

⁴⁶ This is not an indicative time limit, but the strict one.

a compulsory company, grants it with articles of association and appoints its governing bodies from among persons entitled to a share in the common land. If persons chosen or appointed to the company bodies refuse to participate in these bodies or if activities of these bodies do not accomplish a purpose for which the company has been established, and in particular in the case of improper development of grounds belonging to the common land, the competent commune head (mayor) may appoint the company bodies from among persons who are not members of the company (section 2 of the Act). Non-members of the company appointed to the company bodies are provided with a relevant remuneration burdening the company (section 3 of the Act) determined by the competent commune head (mayor).

The literature is full of voices not finding any justification for the existence of companies in order to manage common lands. The legislator's concept saying about the common land management by the company, which is not an owner of grounds belonging to the common land despite the possession of legal personality, has been treated as superficial⁴⁷. Obligatory establishment of such companies have been treated sometimes as economically ineffective and as maladjusted to the specificity of rural communities. Therefore, application of the Civil Code provisions on co-ownership in fractional parts thereto was advocated⁴⁸. However, it seems that these charges are exaggerated, particularly based on the current legal situation. In the author's opinion, maintenance of an institution of the company to manage the common land in the amending act does not constitute the legislator's mistake. It seems that the application of the Civil Code provisions concerning the common estate management (Article 199 and the following of the Civil Code) would not work for common lands.

A significant *novum* brought by the amendment is the standard in Article 30a of the CLA, according to which entities entitled to a share in the common land may adopt a resolution on the conversion of the common land into co-ownership in fractional parts. This resolution is adopted unanimously by all entities entitled to a share in the common land. If there is a lack of consensus, Article 199 section 2 of the Civil Code shall apply. Such a resolution should determine co-owners of a real property and value of their shares in co-ownership. A value of the co-owner's share is equal to the value of its share in the common land. The resolution referred to must be adopted in the form of a notarial deed. Open-

47 See: e.g. G. Jędrejek, *op. cit.*, p. 151.

48 *Ibidem*, p. 165-166.

ing of the company's liquidation (Article 30b of the Act)⁴⁹ occurs as of the date of such a resolution.

5. Opinions of the doctrine and the judicature on a legal nature of common lands

In the literature there are basically three views about a legal nature of common lands.

The first, isolated, opinion on this issue is presented by J. Szachułowicz⁵⁰. As he assesses, grounds constituting common lands were the Treasury's ownership, while as a result of municipalisation they became the commune's ownership. In turn, burdens in the form of shareholders' rights constitute limited rights in rem. He perceives the rights of the common land's members established on a real property as the limited rights in rem, assuming that entities entitled to shares in the common land shall have the unnamed limited rights in rem to common lands. That opinion has been rightly criticised e.g. by S. Rudnicki⁵¹ who concludes that it is contrary to the *numerus clausus* principle of rights in rem valid in the Polish legal system, according to which this catalogue is closed and if it is about the limited rights in rem (*iura in re aliena*), it covers the use, easement, pledge, cooperative member's ownership right to premises, and mortgage. Moreover, the fact that common lands (specifically – grounds belonging to them) do not belong to the Treasury results clearly from provisions of Article 7, 10, 26 section 3⁵² and Article 30 of the Act.

In the literature and in the judicature, a different opinion is clearly prevailing, according to which the common land constitutes a special variant of co-ownership in fractional parts, with some features of compulsory co-ownership. It is emphasised that co-ownership in fractional parts is basically consolidated, but it includes some variants resulting from the peculiarity

⁴⁹ Such a solution was supported in science (see: P. Parzych, E. Rymarczyk, A. Szabat-Pręcikowska, *op. cit.*, p. 45). However, in the literature both its advantages and disadvantages are perceived (see more: K. Marciniuk, *op. cit.*, p. 540–544).

⁵⁰ See: J. Szachułowicz, *Status prawny wspólnot gruntowych* [The Legal Status of Common Lands], „Przegląd Sądowy” 2002, issue 9, p. 70.

⁵¹ See: S. Rudnicki [in:] G. Bieniek, S. Rudnicki, *Nieruchomości. Problematyka prawna* [Real Properties. Legal Issues], Warszawa 2009, p. 814; S. Rudnicki, *Własność nieruchomości* [The Ownership of Real Properties], Warszawa 2007, p. 29. See also: R. Szarek, *Komunalizacja mienia gromadzkiego* [Municipalisation of the Commune Property], „Radca Prawny” 1997, issue 6, p. 53.

⁵² The amending act has abolished it. It stipulates that consent of the competent body of a poviats national council presidium in charge of agriculture and forest affairs is not required in the case of disposal of the common land for the State, as well as in the case of exchange of grounds being a part of the common land for state lands.

of specific economic relations. It refers in particular to compulsory co-ownership, habitat co-ownership, bequethal co-ownership, and co-ownership of common lands⁵³.

J. Ignatowicz opposed mainly the suggestion made in the literature that common lands constituted the property of a relevant company as the legal person. He claimed that although those companies were legal persons, but they were responsible only for the management of lands, the shares in which belonged to the corporate assets. In addition, he did not agree with an idea that it was a joint co-ownership, as that co-ownership lacked the basic feature of joint co-ownership. Namely it was not based on the personal relation connecting some persons, thus it did not perform an auxiliary role towards such a relation. Consequently, he claimed that common land was co-ownership *sui generis*, not having its equivalent in the Polish law. However, due to the principle that common land should be divided only into two basic forms, he classified the common land as the specific variant of co-ownership in fractional parts, with which, in his opinion, it had the most in common (existence of shares). He admitted that it was partially similar also to compulsory co-ownership (prohibition to demand division), but largely diverged from it (although limited, but existing possibility of share disposal)⁵⁴. In other place, it concluded that although special companies being legal persons were appointed to manage common lands, subjects of that form of ownership were constituted by farmers, company members. In that regard, their ownership constituted a special form of co-ownership in fractional parts⁵⁵.

S. Rudnicki believes that the institution of common lands is a special type of commonality with its own laws, regulated in the Common Lands Act, which subject is constituted by real properties specified therein. Provisions of this Act are specific and exclude the Civil Code provisions concerning co-ownership that do not apply to common lands. Without clear determination of a subjective nature of the common land, the Act provided it with a special legal structure separate from the civil law provisions concerning co-ownership⁵⁶. In other place, however, Rudnicki claims that this institution is a special type of co-ownership

⁵³ See e.g. J. Ignatowicz, K. Stefaniuk, *op. cit.*, p. 122. See also: K. Dadańska, *Prawo rzeczowe* [Property Law], Warszawa 2017, p. 152-155.

⁵⁴ See: J. Ignatowicz, *op. cit.* See also: J. Ignatowicz, K. Stefaniuk, *op. cit.*, p. 123-124.

⁵⁵ See: J. Ignatowicz, *Rozdział V. Wykonywanie własności ze względu na jej formę* [Section V. Exercise of Ownership Due to Its Form] [in:] *System prawa cywilnego. Prawo własności i inne prawa rzeczowe*, *idem* (ed.), Wrocław 1976, p. 183-184.

⁵⁶ See: S. Rudnicki, *op. cit.*, p. 29.

with its own laws. He adds that provisions of the Common Lands Act are specific in relation to the Civil Code provisions concerning co-ownership, which are applied to common lands only *mutatis mutandis*, i.e. within the scope not regulated therein and if it is not contrary to a legal nature of the common land. Without clear determination of a subjective nature of the common land, the Act provided it with a special legal structure separate from the civil law provisions concerning co-ownership⁵⁷.

In opinion of K. Dadańska⁵⁸, the Common Lands Act which provisions constitute *lex specialis* towards the Civil Code provisions does not expressly determine a subjective nature of the common land. According to the author, it should be assumed that common land is a legal structure separate from the Civil Code provisions, a special type of co-ownership, as shown by the provisions of Article 7, 10, 26 section 3 and Article 30 thereof.

P. Parzych, E. Rymarczyk and A. Szabat-Pręcikowska think that the common land is not an association or incorporation, but real property. They admit that having regard to Article 46 of the Civil Code this cannot be accepted altogether. However, while assuming the common land as a real property, in their opinion it constitutes the subject of co-ownership with some specific features, which was created in the quite distant past and in a different economic system. Common land is not a subject but a real property or a set of properties constituting the subject of co-ownership with some special features, hard to be defined⁵⁹.

The third view presented by M. Ptaszyk⁶⁰ and approved by G. Jędrejek⁶¹ and K. Marciniuk⁶² must be necessarily noted. According to it, in the case of common land there is no co-ownership, as common lands include not only objects, – therefore agricultural areas, woodland and water areas –, but also the right to use joint lands and their ownership. That is why it would be more correct to refer not to “co-ownership”, but to “commonality of lands”. On this ground, Ptaszyk defines the common land as a set of rights in rem (ownership or use) on land properties:

- a. derived from statutorily specified sources (Article 1 section 1 of the Common Lands Act);

⁵⁷ See: S. Rudnicki [in:] G. Bieniek, S. Rudnicki, *op. cit.*, p. 813

⁵⁸ K. Dadańska, *op. cit.*, p. 153.

⁵⁹ P. Parzych, E. Rymarczyk, A. Szabat-Pręcikowska, *op. cit.*, p. 38.

⁶⁰ M. Ptaszyk, *op. cit.*, p. 156.

⁶¹ K. Marciniuk, *op. cit.*, p. 537.

⁶² G. Jędrejek, *op. cit.*, p. 153.

- b. shared by a contractually or administratively specified group of villagers having their place of residence or farm in a given village;
- c. used as mandatory within the framework of a legal person appointed specially for this purpose⁶³.

In turn, K. Rudol thinks that common land constitutes a special institution of agricultural law, structurally similar to co-ownership in fractional parts. Its content is constituted by the right of collective management of grounds being a part of common land by entities residing or having their farm in a village where the common land is located. Management and administration of the common land properties are entrusted to a company intentionally appointed for this purpose, associating persons entitled to have a share in a given common land. This company has been equipped with the capacity to represent the common land in legal and administrative proceedings⁶⁴. If it is about the decision of the Regional Court in H. indicated in the introduction, in his opinion it results from purposive misinterpretation of Article 1 of the Act of 6 July 1982 on Land and Mortgage Registers and Mortgage in conjunction with abolished Article 11 of the Act, due to an improper assumption that the Common Lands Act allows to establish a land and mortgage register for real properties belonging to the common land only if the prerequisites of Article 8j, 8l and Article 30a section 1 of the Act are proved. In his opinion, the court assumes incorrectly that despite the above-mentioned prerequisites, the common land relation persists, although in reality the above events result in the common land's liquidation and its respective conversion into the right of ownership or co-ownership in fractional parts. Such a conversion obviously hampers the disclosure of these rights in the land and mortgage register, while not as the common land, but as ownership or co-ownership⁶⁵.

While explaining the essence of the common land, the Supreme Court defines it as the co-ownership *sui generis*. It points out that although common land is similar to co-ownership, it constitutes co-ownership with special features, non-distributable, with its own distinct principles and provisions. Its essence is the right to a share in the common land in the form of use of grounds being its part, according to their purpose, assigned to natural or legal persons owning farms⁶⁶. In the Court's opinion, the common land sharer is not entitled to rights

⁶³ M. Ptaczyk, *op. cit.*, p. 166.

⁶⁴ K. Rudol, *op. cit.*, p. 74 and 78.

⁶⁵ *Idem*, p. 78.

⁶⁶ See: resolution of the Supreme Court of 23 August 1968, file reference III CZP 73/68, OSNCP 1969, no. 5,

resulting from the Civil Code provisions concerning co-ownership to such an extent to which it would be contrary to the principle resulting from the Common Lands Act and from the articles of association of a company appointed to manage the common land and to properly administer grounds included therein.

In its judgement dated 4 July 1997⁶⁷, formulated somehow in this “spirit”, the Supreme Court argues that within the framework of an action to distribute inheritance covering a farm, with the possession of which a share in common land is connected, it is acceptable to grant this share in whole to the heir who does not receive a bequeathed farm in whole or in part, if it has already had share in this common land or has a farm in the same village or in villages adjacent to the common land (Article 27 and 29 of the Act). The view expressed in this judgement is too extreme –as it refers to the aspect included in the Act of 23 August 1968⁶⁸ and specified in the resolution dated 9 December 1969⁶⁹ that the Civil Code provisions concerning co-ownership generally do not apply to common lands (also by analogy). In the literature, it is quite amicably and correctly claimed that provisions of the Common Lands Act constitute *lex specialis* towards the Civil Code provisions concerning co-ownership, which are applied to common lands only *mutatis mutandis*, i.e. within the scope not regulated therein and if it is not contrary to a legal nature of common land⁷⁰. Therefore, the application *per analogiam legis* of the Civil Code provisions concerning co-ownership is justified in any matters not regulated in the Common Lands Act (*ubi eadem legis ratio ibi eadem legis dispositio*), and certainly such a possibility may not be excluded in advance (*a priori*).

In the judgement of the Voivodeship Administrative Court in Białystok dated 17 August 2011⁷¹, it was established that common land was not a subject, but a real property (set of properties) being a subject to co-ownership with some special features. The essence of this co-ownership is the right to a share in the common land in the form of use of grounds being its part, according to their purpose, assigned to natural or legal persons owning farms. Management of this property (properties) is exercised by a company intentionally appointed

item 90; resolution of the Supreme Court of 9 December 1969, file reference III CZP 89/69, OSNCP 1070, no. 10, item 173.

⁶⁷ File reference II CKN 227/97. See: resolution of the Supreme Court of 9 December 1969, III CZP 89/69, OSNC 1970, no. 10, item 173.

⁶⁸ File reference III CZP 73/68, OSNCP 1969, sent.5, item 90.

⁶⁹ File reference III CZP 89/69, OSNCP 1970, sent. 10, item 173.

⁷⁰ Accurately e.g. S. Rudnicki [in:] G. Bieniek, S. Rudnicki, *Wspólnoty gruntowe* [Common Lands] [in:] *Nieruchomości...*, *op. cit.*, p. 813.

⁷¹ File reference II SA/Bk 809/10, LEX no. 898080.

for this purpose by persons entitled to a share. However, there is no legal analogy between a company appointed to manage the common lands and a commercial company. However, the company appointed to manage the common land has legal personality, but it does not own these lands. Upon its appointment, the company does not become the common land's owner, but just performs managerial functions. These grounds still constitute an object of property of persons entitled to a share in the common land.

In the author's opinion and in the light of the wording of provisions of Article 1–3 of the Act, it is justified to claim that common land is a specific legal personality (legal structure) defined from the objective, not the subjective side⁷². It is a specific set of rights to agricultural lands, woodland and water areas. After all, it is composed, by operation of law, of lands defined in this way, not of their owners. Moreover, the common land members may have diverse legal titles to manage these lands. It does not have to be the right of ownership assigned to them indivisibly – it may also be the use or ownership assigned indivisibly to the common land members. In its judgement, the Supreme Court⁷³ fairly concluded that from a diverse nature of titles to real properties being a part of common lands resulted from Article 1 section 1 and 2 of the Act. A referral in the Act, on the one hand, to such prerequisites as granting, receipt, definition of agricultural properties, woodland and water areas in co-ownership, while on the other hand to real properties constituting the commune's ownership, excludes finding a universal legal regime towards each entity exercising the above rights. If some specific real property belongs e.g. to the commune and these lands are only used by the common land members, such a situation cannot be compared with the common land composed of a real property transferred to these persons for their own. So determination of a current entity and legal title to real properties included in the common land depends on the explanation of a title and manner of establishment of a specific common land, while now it is possible to update the list of entities entitled to a share in the common land and of value of their shares in a variety of ways.

In the Civil Code, the Polish legislator regulated only the commonality of the right of ownership, i.e. co-ownership. The latter does not constitute an autonomous right in rem, but only a variant of the right of ownership⁷⁴.

⁷² The term "common land" is close to housing community, constituting the so-called legal entity without corporate status (Article 33¹ of the Civil Code in conjunction with Article 6 of the Act of 24 June 1994 on the Ownership of Premises). However, it does not allow to formulate the thesis that common land is a subject of civil law.

⁷³ File reference III CZP 54/19.

⁷⁴ See: e.g. E. Gniewek, *Rozdział VIII. Współwłasność* [Section VIII. Co-Ownership] [in:] *System prawa prywatnego. Vol. 3.*

The ownership-related provisions apply directly to co-ownership. The lack of regulation of the commonality of rights other than ownership is synonymous with the occurrence of so-called thetic gaps that require filling by analogy. In this case, the co-ownership provisions shall apply *per analogiam legis*. E. Gniewek claims that the issue whether the co-ownership provisions should be applied to the commonality of other rights by analogy or only *mutatis mutandis* is raised faultily, stating that in the case of legal gap, we apply “appropriate” legal provisions by *analogiae legis* (more seldom *ex analogiae iuris*)⁷⁵. Therefore, the co-ownership provisions have a wider meaning and application than it results from their basic scope apprehended in the book II of the Civil Code (Article 195 and the following).

The common land constitutes a special form of ownership regulated in the Common Lands Act (*lex specialis*) and not having any equivalent in the Polish civil law, which legal nature is the closest to co-ownership in fractional parts. However, it does not constitute an example of such a co-ownership: if two or more entities are entitled indivisibly to a different right than ownership, it merely demonstrates the commonality of this right, not the co-ownership. An entirely different issue is the fact that in the trading practice, juridical “short-cuts” are taken and the terms “co-ownership” and commonality” are equated. In this context, it should not be missed that the common land members may be provided with specific grounds only for joint use or ownership. Meanwhile, the latter is not a subjective right (*in rem*) at all. Only if grounds are granted to the common land members as indivisible property, co-ownership in fractional parts *sui generis* may be assumed. This peculiarity is expressed in the limited disposal of shares in the common land and in the limited demand to divide the common land. However, within the scope not regulated in the Act it is possible to apply the Civil Code provisions concerning co-ownership in fractional parts by *analogiae legis* to this commonality, unless it is contrary to a legal nature of the common land. Naming the common land the special institution of the agricultural law seems not to proclaim anything specific, especially that the agricultural law is not a branch of the legal system. In addition,

Prawo rzeczowe, *idem* (ed.), Warszawa 2013, p. 672–675; J. Ignatowicz, *Rozdział V. Współwłasność* [Section V. Co-Ownership] [in:] J. Ignatowicz, K. Stefaniuk, *Prawo rzeczowe*, Warszawa 2012, p. 126; T.A. Filipiak [in:] T.A. Filipiak, J. Mojak, M. Nazar, E. Niezbecka, *Zarys prawa cywilnego* [Summary of the Civil Law], Lublin 2006, p. 204. In turn, Z.K. Nowakowski believes that co-ownership in fractional parts is an autonomous legal relation constituting the right *in rem* (*idem*, *Rozdział X. Współwłasność* [Section X. Co-Ownership] [in:] *System prawa cywilnego. Vol. II. Prawo własności i inne prawa rzeczowe*, *idem* (ed.), Wrocław 1976, p. 384.

⁷⁵ See: E. Gniewek [in:] *System prawa prywatnego...*, *op. cit.*, p. 663.

it is wrong to define the common land as the way of management of agricultural lands, woodland and water areas⁷⁶. These agricultural lands, woodland and water areas actually constitute the common land, not their management.

6. Real property being a part of the common land and entry into the second section of the land and mortgage register

As is known, the second section of the land and mortgage register covers entries of ownership and perpetual usufruct⁷⁷(Article 24 of the Act of 6 July 1982 on Land and Mortgage Registers and Mortgage⁷⁸). In § 32 section 1 of the Regulation of the Minister of Justice of 21 November 2013 on establishing and keeping land and mortgage registers in an ICT system, it is stipulated that the second section of the land and mortgage register shall include information on a real property owner (“Section II. Ownership” is divided into the following rubrics: (2.2) – owner, (2.3) – owner of defined premises, (2.4) – perpetual user, (2.5) – authorised entity). If the right of ownership is granted to several persons, all of them are indicated, with designation of their shares or a type of joint communality (e.g. conjugal community) (§ 33–35 of this Regulation).

Land and mortgage register courts have various approaches to an entry in the second section of the land and mortgage register, in the case of real properties constituting common lands. Various possibilities are indicated in the doctrine to this extent.

1. Firstly, it is deemed possible to enter the Treasury as the common land owner, while rights of use by specific entities established on a real property should be treated as the limited right in rem.
2. Secondly, it is deemed possible to enter co-ownership in fractional parts by persons entitled in relation to shares they own.
3. Thirdly, it is deemed possible to enter the right of ownership for the benefit of a common land company.
4. Fourthly, an entry of the right of ownership in the land and mortgage register would be made for the benefit of the common land with possible indication that a specific common land company is appointed to manage and develop it.

⁷⁶See: I. Lipińska, *op. cit.*, p. 202.

⁷⁷The right of perpetual usufruct is omitted here.

⁷⁸Uniform text Journal of Laws of 2019, item 2204.

As assessed by K. Rudol⁷⁹, none of the above solutions corresponds with an actual legal situation of real property as it is impossible to recognise the common land structurally in the land and mortgage register.

Undoubtedly, the Common Lands Act does not allow to draw an unambiguous and clear conclusion as to an entity or entities that should be disclosed in the second section of the land and mortgage register referring to the real property creating the common land. Such a state of affairs should be assessed negatively, for this reason alone that provisions of this Act have already been amended and it is impossible not to deem the issues of a property's ownership status relevant for the legislator. Therefore, it should be postulated that the provisions of the Common Lands Act or the Act on Land and Mortgage Register and Mortgage, as well as executive provisions to the latter (regulation of the Minister of Justice of 17 September 2001 on keeping land and mortgage registers and document sets and regulation of the Minister of Justice of 15 February 2016 on establishing and keeping land and mortgage registers in an ICT system) indicate the requested wording of an entry in the second section of the land and mortgage register concerning properties being a part of the common land. The civil law does not recognise ownerless real properties. Therefore, an entry of the right of ownership must be made in the second section of the land and mortgage register.

Prima facie, if the legal nature of common lands resembles co-ownership in fractional parts, it seems to be justified to state that the second section of the land and mortgage register related to the common land property should include, with designation of a value of granted shares, natural and legal persons entitled to have a share in the common land. Such a solution would correspond with the standard from Article 18 section 1 of the Act providing that the company's name, composition of its management board and area of the common land, as well as lists of entities authorised to use this land are ex officio subject to an entry in the land register. However, there are some opinions in the literature that making an entry of co-ownership in fractional parts for persons entitled to a share in the common land would not be compliant with the legal nature of that land. Although the common land's structure is similar to co-ownership in fractional parts, but such a common land constitutes a different, special (*sui generis*) institution of the agricultural law, which content is constituted by the right to collective management of grounds being a part of the common

⁷⁹ See: K. Rudol, *op. cit.*, p. 76-77.

land according to the entities distinguished in the Act⁸⁰. Entering the common land members in the second section of the land and mortgage register would be synonymous with equating the terms “common land” and “co-ownership”. The fact that common lands are treated as examples of *sui generis* co-ownership in fractional parts does not mean that such an ownership type occurs in this case. Here we actually have a special type of commonality. The author ignores the fact that some elements of compulsory co-ownership occur also in the case of common land, which was rightly mentioned by J. Ignatowicz. Moreover, if the common land members were to be treated as co-owners in fractional parts, how would we explain the sense of the standard from Article 30a of the Act allowing for the conversion of the common land into the co-ownership in fractional parts?

De lege lata, real properties included in common lands cannot also be deemed the subject of ownership of the Treasury or the commune (as a result of municipalisation). In the context of disclosing the Treasury as an owner of such properties, the literature rightly indicates that the rights of ownership to the properties included in common lands are usually granted to private persons, which means that such an entry would result in depriving these entities of their property rights. On the other hand, it is noticed that the assignment of rights to use properties being a part of common lands is basically equal with *quasi*-expropriation of persons who have had the right of ownership to these lands. Although these persons still have the right of ownership to real properties included in the common land, *de facto* they are entirely deprived of their permissions constituting the content of this right, despite of its further existence⁸¹. In addition, provisions of Article 7, 10 and Article 30 of the Act⁸² confirm that it is not the Treasury who owns the common lands. Moreover, it is noticed that the legislator has never intended to develop state lands based on the common land, and only in justified cases the Treasury could acquire these grounds or become their sharer⁸³.

⁸⁰ *Ibidem*, p. 78.

⁸¹ See: K. Rudol, *op. cit.*, p. 77.

⁸² Article 7: “Limitations specified in Article 5 and 6 do not apply to the State”; Article 10: “If it is needed to define the State share in the common land, this share is defined with consideration of a value of the common land; this value is specified on the terms and in the manner stipulated in the provisions concerning sales of state agricultural properties”; Article 30: “Entities entitled to a share in the common land constituting in part or in whole forests, woodland or uncultivated land to be afforested may give up their rights to a share in the common land to the extent covering these forests, woodland and uncultivated land for the benefit of the State. Resignation from one’s share occurs pursuant to Article 27 section 2”.

⁸³ See: I. Lipińska, *op. cit.*, p. 216.

The ownership of properties being a part of the common land is not granted also to a company appointed to manage and develop real properties included in the common land⁸⁴. Within the scope of the above assessment, it does not matter that it has a legal personality and may acquire some rights, as it is a civil law entity. No provision stipulates, as it may not stipulate, that grounds included in the common land constitute the company's ownership. Moreover, the Civil Code does not recognise the divided ownership. In the decision of the Supreme Court dated 23 February 2017⁸⁵, it was therefore stipulated imprecisely that "A certified copy of the entry in the land and mortgage register claiming that the company exercising management of the common land is an owner of a plot of land included in this common land (Article 1 section 1 of the Common Lands Act) constitutes an official document using the presumption of conformity of its content with the factual state, which constitutes –due to the lack of the land and mortgage register – evidence of the company's right to manage this property". The fact that the company is entitled to manage real properties included in the common land does not mean that it is an owner of such properties.

Mainly for practical reasons, it would be the best to disclose in the second section of the land and mortgage register of the common land or the common land with an indication that a specific company (tagged with name) is appointed to manage and develop its grounds⁸⁶. As it has already been mentioned, the Common Lands Act has imposed on persons entitled to a share in the common land an obligation of establishing a company to manage the land and to administer its grounds, as well as to represent it in judicial and administrative proceedings, and moreover to properly develop its grounds. Thereby, the legislator has decided that the company establishment constitutes a *sine qua non* condition for the management and development of the common land, thus it has clinched the impossibility of appointing any other entity to perform these functions⁸⁷. K. Rudol is of similar opinion, as he points out: "It seems that for practical reasons, it would be the best to disclose in the second section of the land and mortgage register as the property owner the common land company or the common land itself, with a possible indication that a specific company is appointed to manage and develop it". It should be immediately added

⁸⁴ See also: G. Jędrejek, *op. cit.*, p. 151; I. Lipińska, *op. cit.*, p. 209; B. Jeżyńska, *Organizacja gospodarstwa rolnego jako spółki* [Organisation of the Farm as the Company] [in:] A. Oleszko (ed.), *Prawo rolne*, Warszawa 2009, p. 183.

⁸⁵ File reference V CSK 309/16, LEX no. 2291677.

⁸⁶ See: K. Rudol, *op. cit.*, p. 78.

⁸⁷ See: Z. Truskiewicz, *Orzecznictwo Sądu Najwyższego w sprawach dotyczących stosunków rolnych* [Jurisprudence of the Supreme Court in Matters Related to Agricultural Relations], „Przegląd Prawa Rolnego” 2010, issue 1, p. 242.

that entering the common land in the second section of the land and mortgage register would not mean that it is an owner of properties included in it. The statutory provisions do not equip it with legal personality or legal capacity. Although equipment with legal capacity does not have to be performed by the legislator directly or indirectly with use of phrases resembling those included in the Code of Commercial Companies (Article 8 § 1 of the Code of Commercial Companies: – “partnership may acquire rights in its own name, including the ownership of property and other rights in rem, make commitments, sue and be sued”). It may have a descriptive form, as in the case of employee’s loan and benefit funds⁸⁸, although such a form cannot be found in the Common Lands Act. Thereby, common land may not be deemed an organisational unit having legal capacity within the meaning of Article 33¹ of the Civil Code, therefore the subject of civil law relations. Therefore, entering the common land as an “owner” in the second section of the land and mortgage register would constitute a specific juridical brachylogy. No subjective right, therefore ownership, may belong to “no-subject” of the civil law. Such an entry would mean that this property belongs in respective shares to the common land members on the terms similar to co-ownership and specified in detail in the Act. The common land has legal personality defined from the objective - instead of subjective - side, which means that it is established by grounds, not by their owners. The right of the common land members to real properties included therein has a similar legal nature to the co-ownership in fractional parts.

Finally, it is not true⁸⁹ that only if common lands constituted co-ownership (which would entail the necessity of their conversion), it would be possible

⁸⁸ In the decision of the Supreme Court of 25 January 2017, file reference IV CSK 149/16, OSNC 2017, no. 9, item 105, it was assumed that an employee’s loan and benefit fund might be a party to legal proceedings. The court found that both Article 33¹ § 1 of the Civil Code and Article 64 § 1¹ of the Civil Procedure Code provide for organisational units to which the Act assigns legal capacity, not limiting the determination of a possible way, indication or form of providing it by the Act with legal capacity only to an unambiguous verbal formulation of such an act of will of the legislator. Article 8 § 1 of the Code of Commercial Companies constitutes an example of a statutory provision indirectly granting legal capacity to organisational units other than legal entities. Admittedly, it constitutes the statutory source of providing partnerships with legal capacity, although it does not determine it *expressis verbis*, but only indirectly through the statement that these companies may e.g. acquire rights and make commitments in their own name. The direct source deciding that employee’s loan and benefit funds may be a party to legal proceedings is constituted by Article 64 § 1¹ of the Civil Procedure Code, as these funds satisfy all the prerequisites defined in this provision, not excluding their provision with legal capacity by the Act. We cannot imagine the situation when the fund, granting loans to its members, becomes a party to the civil law relation established in this way with the legislator’s consent, or when the fund concludes an agreement with a work establishment and it is deprived of legal capacity, as the existence of obligation relationship is possible only among entities having legal capacity. If the legislator granted legal capacity to the funds, although with use of a descriptive method, pursuant to Article 64 § 1¹ of the Civil Procedure Code these funds may also be a party to legal proceedings.

⁸⁹ Different opinion of P. Parzych, E. Rymarczyk, A. Szabat-Pręcikowska, *op. cit.*, p. 45.

to establish and keep land and mortgage registers for grounds being their part, which would help regulate the legal status of these lands. Land and mortgage registers are kept to establish the real property's legal status. They are established and kept for real properties (Article 1 section 1 and 2 of the Act on Land and Mortgage Registers and Mortgage). After the annulment of Article 11 of the CLA, that should also concern real properties being a part of common land.

7. CONCLUSIONS

The amendment to the provision of the Common Lands Act should generally be assessed positively. The adopted solutions are a step in the right direction. The same assessment regards the fact⁹⁰ that the legislator did not listen to any opinion advocating for a “top-down” liquidation of all common lands in Poland as “non-congruent with the modern social and economic conditions, relict of feudal ownership relations”. After the annulment of Article 11 of the CLA, land and mortgage registers may be established and kept for grounds being a part of common lands. It seems that the most appropriate and the most practical solution would be to disclose in the second section of the land and mortgage register the common land, or possibly the common land with indication that a specific company is appointed to manage and develop the common land grounds. This section is for entries of ownership and perpetual usufruct. Ignoring the issue of lands held in perpetual usufruct, in practice owners or co-owners in fractional parts are entered there. Although common lands are not subjects of the civil law, their entry in the second section would constitute an entry related to the right of ownership – sending a clear message that real property belongs indivisibly to many persons on the terms close to co-ownership in fractional parts and that a company, being a legal entity, appointed by the common land sharers is managing this land, thus it is authorised to dispose of it. The concept of common lands (easements) is well-known in rural relations, and probably not only there, so such an entry in the land and mortgage register would not bear the stamp of ambiguity and illegibility in the aspect of ownership relations.

⁹⁰ The same opinion is expressed by K. Marciniuk, *op. cit.*,..., p. 547.