
June 2015

Proposals for new rules concerning agricultural land leasing

The Swedish Association of Landowners has called for a modernisation of the rules concerning agricultural land leasing. As a result, the work to renew the legislation, which is over forty years old, is now underway. Above all, two issues have come into focus: the lateral leaseholder's security of tenure and the possibility of a "results-based rent".

Historically, the contractual parties in the land lease relationship have most often consisted of large agricultural estates, the land of which is leased out to small farmers. The landowner was regarded as the stronger party in the contractual relationship and the rules concerning agricultural land lease were designed to provide the conscientious tenant farmer a more secure existence. Today it is not unusual that the property owner is a person who himself lives on his farm but leases out the farm's total land of 20–30 hectares. The tenant can be a large-scale farmer who owns several hundred hectares and also leases additional land from a number of small farmers. Thus, the relationship of relative strength may now be reversed.

About 40 percent of Sweden's agricultural land is leased out, which makes leasing a very important institution in Swedish agriculture. The starting point for the development of the new rules has been that the land lease should be an attractive form of tenure for both landowners and tenants. By increasing, for example, the predictability for the holdings of the tenancy relationship in the lateral lease and the parties' ability to adapt the lease rent according to the particular agricultural land's or farm's circumstances, the supply of farmland for lease is expected to increase.

Proposals for new rules concerning agricultural land leases

Security of tenure for the lateral tenants

An agricultural land lease means that the land is made available for use. With an agricultural land lease, one distinguishes between agreements that include housing for the tenant farmer (referred to as farm leases) and agreements that do not include housing (referred to as lateral leases).

Under current law, lateral leases with a term longer than one year are covered by security of tenure.¹ This means that when the term of the lease agreement concludes, the tenant farmer has — as a general rule — the right to have the lease extended. Security of tenure can be broken only if certain prerequisites specified in the law are fulfilled, as is the case, for instance,

1 Chap. 9, section 7, paragraph 8, Swedish Land Code.

June 2015
Proposals
for new rules
concerning
agricultural
land leasing

if the landowner can reasonably prove that he will cultivate the land himself and it is not unreasonable with regard to the tenant farmer that the land lease tenancy ends (referred to as owner occupancy of the land). For the lateral leases that extend for no more than one year, the tenant farmer lacks security of tenure and therefore has no right to renewal of the lease. The lack of security of tenure for this type of leasehold has resulted in a situation where it has become increasingly common to see one-year lateral leases and that the same land area is repeatedly leased to the same tenant for a term not exceeding one year. There are also additional types of agreements other than leases (e.g., maintenance contracts) which are used in order to avoid the emergence of a security of tenure.

The uncertainty regarding the duration of the tenancy under the agreement has led to a situation where many tenants of lateral leaseholds found themselves having poorer prospects in terms of being able to make long-term investments. Costly and more long-term measures, such as liming, fertilisation and weed control of the land, are not justified for a tenant farmer whose only security in his contractual situation is for one year at a time. For obvious reasons, it is also in the landowner's self-interest that the land is maintained in a sustainable way.

In the wording of the new rules, the lateral leaseholder's interests in being able to plan his activities has been weighed against the landowner's interest of having a reasonable control over his land. The new rules mean that security of tenure is introduced also for lateral leases that are only up to one year. This removes the landowner's possibility to limit the term of the agreement in order to circumvent the security of tenure. At the same time, in order to maintain the balance between the tenants' interests and the property owners' interests, some relaxation of the security of tenure for lateral leaseholds which are for five years or less was proposed.² The change means that the prospects for the landlord to break the security of tenure are less stringent than they have been up to now. This applies with owner occupancy of the land, structural rationalisation and use "for other purposes". A new feature is that it also becomes possible to terminate the security of tenure as the ownership and right of usage of the leased property will be transferred via purchase, exchange, or land reparcelling on market terms and conditions. The evaluation of whether the extending of the lease agreement can be refused shall relate solely to the issue of whether the landowner has reasonably proven that grounds exist for the termination of the asserted security of tenure. It is no longer necessary in such situations to give further consideration to whether it is unfair with regard to the lessee that the land lease tenancy terminates (referred to as an unreasonableness testing).

In order to ensure that the tenant farmer gets time to phase out his operations and in order to prevent unfounded terminations, it was proposed that the tenant shall have the right to remain on the leased property until shortly after the sale is complete. If the planned sale does not materialise within two years from the end of last lease term, the last lease agreement will return to being valid. The same shall apply if the leased property is sold but the terms and conditions of the sale are not market terms. A tenant who is denied an extension of the lease agreement due to a sale of the property, the owner taking up occupancy of the land,

2

For a lateral lease with a term of longer than five years and for a farm lease, security of tenure is unchanged.

June 2015
Proposals for new rules concerning agricultural land leasing

or other usage of the leased property, shall also be entitled to a pre-determined amount of compensation if the sale does not take place within two years. The compensation shall be equal to three times the last applicable annual lease rent. No compensation will however be payable if the tenant farmer exercises the option to re-lease, or if, due to unforeseen circumstances beyond the landowner's control, it has not been possible for the landowner to take the proposed action/measures.

A commonly occurring example of where the new rules could have an impact is as follows. A landowner decides, in conjunction with his reaching an age for retirement, to wind up his own agricultural activities in order to lease out the farmland. Meanwhile, he continues to live on the farm. When he passes on later, his wife continues to lease out the land until her passing. The surviving children have no interest in either farming or retaining the land, but rather wish to divest themselves of it in connection with the division of property. A sale of the land without the associated continuous agricultural lease can often bring in a higher sales price than if the leasehold right remains after the sale. With the support of the new rules, such a type of sale is feasible provided that it is conducted on market terms and conditions.

The legislative proposal opens up the possibility for the serious landowner who wishes to take up occupancy of the land himself, to be given the possibility to do so. As one of the parties who was consulted in the process pointed out however, it is not self-evident that the same principle should apply in cases where the landowner is a municipality, a church, a corporation, etc.³ For these parties, the same social and emotional reasons to cultivate their own land do not exist; rather, there are only financial considerations. With a balancing of interests, the tenant's interest of a lasting contractual relationship should therefore be given greater weight and prevail, and the right of the owner to take up occupancy of the land himself without a reasonableness test should only apply to property owners who are natural persons.

The period of notice of termination for one-year leases

The Swedish Government Commission of Inquiry proposes that period of notice of termination for leases entered into for a period longer than one year should be one year, and for leases of one year or less should be three months. As mentioned above, it commonly occurs that the lease agreement is repeatedly entered into for one year at a time. Running a farm, however, is a capital-intensive activity that often involves large investments in means of production. The Swedish Federation of Rural Economy and Agricultural Societies has, in its consultative response, therefore given its very strong recommendation that current notice of termination period of eight months be retained for one-year leases as it is of significant importance for the tenant farmer to know, when approaching the autumn sowing, if he is going to work the land during the following year. As it is common that the agricultural land lease term runs from 14 March, the notice of termination would occur no later than 14 July. In connection with the harvest, the tenant may already know by then if he will cultivate the land himself in the coming year and thereby can assess whether it is worthwhile for him to invest in the autumn, sowing in late summer. The possibility of having winter crops in the crop rotation

³ The opinion of the Swedish Federation of Rural Economy and Agricultural Societies: Agricultural Land Leases and Residential Leases – some questions about the lease rent and security of tenure (SOU 2014:32).

June 2015
Proposals for new rules concerning agricultural land leasing

is important for the tenant farmer, since these crops often provide much greater financial return than spring-sown crops. If the period of notice for termination — as the Government Commission of Inquiry suggests — would be shortened to three months, the tenant farmer's lease could terminate in mid-December. The tenant farmer would then risk having already invested significant sums in the crop, for which the landowner would have no obligation to provide compensation. For the tenant farmer, it would not be an option simply not to sow in the autumn, as his income would then decline and thus his ability to pay the rent.

The possibility of a variable rent for the tenancy

The recommendation for the amendment opens up the possibility of a flexible model where the contracting parties are given greater (but not total) freedom to determine the amount of the rent and variations in how it is determined. The parties should be able to agree on a "variable" land rent for the tenancy, partly via indexing, and partly by the rent being linked to the price movements of products that the tenant farmer produces or is dependent upon his agricultural operations.

That the rent could be linked to the tenant farmer's reported profits would be inappropriate, as it would then be dependent upon the individual tenant farmer's skills and ability rather than the earning capacity of the land being leased. This would work to the detriment of both the landowner and the tenant farmer. It is often the case that the tenant farmer uses both his own land as well as leased land, possibly related to multiple lease agreements, and it is therefore not possible to differentiate which profits are derived from which particular leased land.

Outlook

The proposal for the amendment to the Agricultural Tenancies Act (Arrendelagen) was submitted in June 2014 and at the time of writing, is being reviewed by the Swedish Council on Legislation.⁴ At the present time, there is no indication of when the bill can be expected to be submitted to parliament.

⁴ SOU 2014:32 *Agricultural and Residential Tenancies – some questions about the lease rent and security of tenure.*



Anna Moll,
Senior Associate / Advokat