Romanian procedural and administrative particularities of the sale of lands to foreign persons

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Abstract

This study aims to examine the particularities of the procedures and legal instruments through which foreign persons, in the broadest sense of this term,[3] *may acquire, especially through sale-purchase contracts, agricultural lands situated outside of the built-up area, after Romania joined the European Union (1st of January, 2007). Likewise, this paper analyses specific international private law problems that may arise in relation with the application of the Romanian law regarding the legal transfer of agricultural and non-agricultural lands.*

Keywords: *sale, land outside of the built-up area, foreigners, residents, member States, third States, pre-emption right.*

JEL Classification: K11, K33

1. Introductory and methodological considerations

1.1 It is already an understatement that the attractiveness and the coagulating force of the European Union reside primarily in the four great freedoms: free movement of people, goods, services and capital. These freedoms are, as well, instruments of elimination of any form of discrimination between the citizens of the member states of the European Union.

Therefore, the possibility that citizens of a member state will acquire land on the territory of any other member state – in this case, Romania – arises issues that are not only of regional or national interest, but as well of European interest, and not only geographically. The adequate regulation and resolution of legal relationships involving extraneous elements, regarding the acquisition of agricultural land situated outside of the built-up areas presents maximum

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[3] For an analysis of the notion of *foreign person* and of its legal regime, please see, e.g.: I. Filipescu, *Drept internațional privat*, Actami, Bucharest, 1999, p. 214 and A. Fuerea, *Drept internațional privat*, 2nd edition revised and enlarged, Universul Juridic, Bucharest 2005, pp. 81-151. For the same issue, see: T. Prescure, S. Codruț, *Drept internațional privat*, Lumina Lex, Bucharestm 2005, pp. 114-128.

importance both for the Romanian national interests and the securing of the freedom of movement principle.

Any enactment in this regard needs to conform to the European Union principles while aiming to protect, at the same time, the legitimate interests of Romanian citizens, especially of the farmers that are so intensely engulfed in the local traditions of land ownership.

1.2 The legal regime of the transfer of the lands has been regulated, besides the common norms of the Civil Code, through various special laws, as Law no. 54/1998 regarding the legal regime of the transfer of the lands as well as the Law no. 247/2005 regarding the reform in the field of property and justice, as well as some adjacent measures[4].

These laws did not include provisions regarding the conditions and the procedure according to which foreign persons could acquire land in Romania. Consequently, the necessity of an enactment regulating the issues considered in this study was imperious and requested a swift resolution, especially in the eve of Romania admission to European Union.

The enactment that established the legal regime of the acquisition of agricultural land – placed within built-up areas or outside of built-up areas – by foreign persons, with any title, except through legal inheritance, is Law no. 312/2005 regarding the acquiring of the property right upon land by foreign citizens and stateless persons as well as by foreign legal persons, including the subsequent amendments and additions.[5]

Considering the object and the content of its provisions, one may say that Law no. 312/2005 is a very important enactment for the configuration of the legal status of the foreigners[6] – natural and legal persons – in Romania, in terms of their legal capacity, with a special view to non-ancillary rights in rem over land of various types.

1.3 Recently, the same issues of land circulation have been addressed by another enactment, which, actually, constitutes the main object of this research; it is Law no. 17/2014 regarding certain measures to regulate the sale-purchase of agricultural land situated outside of the built-up areas and of amendment of Law no. 268/2001 regarding the privatisation of commercial companies that hold in administration land pertaining to the public and private State property, with agricultural destination and for the establishment of the Agency for the State Domains.[7]

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[4] Title X of this Law was regulating the regime of the lands' transfer; this Law has abrogated the provisions of Law no. 58/1998.

[5] Law no. 312/2005 regarding the acquiring of the property right upon land by foreign citizens and stateless persons as well as by foreign legal persons has been published in Monitorul Oficial, First Part, no. 1008 of 12 November 2005 and came into force on 1-st January 2007, the date of admission of Romania into the European Union.

[6] „The legal status of a foreigner" is a notion that encompasses the entirety of rights and obligations that a foreigner has in a certain State (see I. Macovei, *Drept internațional privat*, C.H. Beck, Bucharest, 2011, p. 113).

[7] Law no. 17/2014 has been published in Monitorul Oficial, First Part, no. 178 of 12 March 2014.

In order to establish the adequate measures for the implementation of this law the Ministry of Regional Development and Public Administration has issued Order no. 740 of 13 May 2014 regarding the approval of Methodological Norms for Application of First Title of Law 17/2014.[8]

1.4 As was already mentioned, in Romania, the main enactment that created a general applicable regulation regarding the legal regime of the acquisition by foreign persons (foreign citizens, stateless persons and foreign legal persons) of lands situated within the built-up areas or outside of the built-up areas was Law no. 312/2005. This law was nor repelled by Law no. 17/2014, so that, currently, these two enactments are complementing each other, as long as there is no contradiction between their provisions; thus, these two laws configure „the general legal regime of circulation of land situated within and outside of the built-up areas", a regime that is, of course, complemented by the provisions of the Civil Code, regarding the acquiring of land, through various modes, by natural and legal persons.

2. A comparative review of the provisions of Laws no. 312/2005 and no. 17/2014

2.1 Common issues

2.1.1 The legal norms contained by laws no. 312/2005 and no. 17/2004, regulating legal relationships with extraneous regarding the acquiring of land by foreign persons, are norms with a great degree of imperiousness that protect a public interest; consequently, they qualify as International Private Law material norms or immediate application norms, excluding, by assumption, any conflict of law, directly governing the legal relationships that are within their scope of regulation. [9]

Since these two laws target the legal regime of circulation of immovable property, resulting in legal relationships including one or more extraneous (foreign law) elements, the applicable law will always be *lex rei sitae* (the law of the place where the property is situated), as it is provided for by Article 2613 of the Civil Code.[10]

2.1.2 From the perspective of the Romanian International Private Law the structure of the legal relationships concerning the circulation of lands situated in Romania may present various foreign law (extraneous) elements[11], such as: the

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[8] MDRAP Order no. 740/2014 has been published in Monitorul Oficial, First Part, no. 401 of 30 May 2014.

[9] According to Article 2.566, first paragraph, of the Civil Code, "The imperative dispositions provided by the Romanian law for the regulation of a legal relationship including a foreign law element will be applicable with priority." For an analysis of the "immediate application" norms, see D. Alexandru Sitaru, *Drept international privat. Partea generala. Partea speciala*, C.H. Beck, Bucharest, 2013, pp. 20-25.

[10] According to this article: "Possession, property right and the other non-ancillary rights in rem over goods, including the security interests on property are governed by the law of the place where these are situated, unless special law provisions provide otherwise."

[11] In a classical definition, accepted by most of scholars, the foreign law element (the extraneous element) is a factual element found in a close connection with the civil, civil procedure, commercial,

place where the land is situated, the citizenship, the domicile or the residency of the acquiring natural persons or the nationality of the acquiring legal persons, etc. These extraneous elements will be construed as connecting factors with various law systems that may have incidence in such legal relationships. Of course, as long as the land is situated on Romanian territory, the conflict of law rule that has to be applied and from which the parties may not derogate through their agreement, unless a legal provision pertaining to the Romanian legal system provides otherwise, is *lex rei sitae*.[12]

2.1.3 The dispositions of Article 3 of Law 312/2005 as well as those of Article 2, second paragraph, last thesis of Law 17/2014, institute a common principle according to which: "The citizen of a Member State, the stateless person with domicile in a Member State or in Romania as well as the legal person incorporated in accordance with the legislation of a Member State, may acquire the right to property over the land in the same conditions with those provided by the law for the Romanian citizens and for the Romanian legal persons"; in other words, affiliation to the European legal order conferred the foreigners of the Member States the national legal regime**.**

This regulation is an expression of the freedom of movement of persons' principle that consists in elimination, between the Member States, of any discrimination based on citizenship or nationality.

2.1.4 Through the provisions of Article 6 of Law 312/2005 as well as through those of Article 2, third paragraph of Law 17/2014, the Romanian lawmakers introduced a rule with a principle value, regarding the conditions under which foreigners, other than those belonging to the Member States, may acquire land in Romania.

In this respect, according to Article 6, first paragraph, of Law 312/2005,"The foreign citizen, the stateless person and the legal person belonging to third states may acquire the property right over land under the conditions provided for in international treaties, on a reciprocal basis".[13] In addition to these provisions, the second paragraph of the same article states that the persons mentioned in the first paragraph may not benefit another regime, more favourable than that applicable to foreign persons that are citizens or residents of Member

labor or other private law relationships whose presence grants to that relationship the vocation to be governed by the legal rules of several law systems, that may be incident in that cause.

[12] For developments regarding the modern sense of the *Lex Rei Sitae* rule, see B. Akkermans, E. Ramaekers, *Lex Rei Sitae in Perspective: National Developments of a Common Rule?,* Maastricht European Private Law Institute, Working Paper No. 2012/14, electronic copy available at: ttp://ssrn.com/abstract=2063494.

[13] According to International Private Law doctrine, reciprocity is that situation when, on the territory of a specific state, certain rights are granted to foreign citizens, only in the situations and to the extent the foreign state grants an identical regime to the citizens of the first state, found in the state wherefrom the foreign citizens originate. Reciprocity may be: legislative, diplomatic and factual (see, in this sense: T. Prescure și S. Codrut, *op. cit.*, p. 118). According to the provisions of Article 2.561 of Civil Code, "The application of the foreign law is independent of the reciprocity condition. The special provisions requesting the reciprocity condition in specific matters remain applicable. The fulfilment of the factual reciprocity condition is presumed until contrary proof that is established by the Ministry of Justice, through consultation with the Ministry of Foreign Affairs".

States. In other words, the quoted law interdicts the application of *most favoured nation clause* to foreigners of third states (hereinafter, referred to as Third States),[14] regarding the acquiring of land in Romania.[15]

2.2 Elements of distinction

2.2.1 First, in respect of the regulation object, Law 312/2005 has a more obvious general character; thus, if Law 312/2005 regulates the conditions of the acquisition (with any title, except through legal inheritance) of the right to private property over land, notwithstanding that such land is within or outside of built-up areas, Law 17/20014, instead, considers only the sale-purchase of agricultural land outside of the built-up areas.[16]

On the other hand, while Law 312/2005 applies only to foreign citizens, stateless persons and foreign legal persons, Law 17/2004 is more complex, in relation to the subjects of regulation. The latter is applicable to the participants in these sale relationships of land situated outside of the built-up areas, independently of their citizenship, domicile, residence or nationality of persons.

In other words, Law 17/2014 regulates both hypothesis: when the buyers are Romanian citizens, citizens of a member state of European Union (hereinafter Member State), stateless persons with domicile in Romania or in a Member State; but it also applies to situations when the same position is held by citizens or stateless persons with domicile in the European Economic Area Agreement (EEAA) member states or in the Helvetic Confederation member states, including legal persons that have the nationality of the EEAA or the Helvetic Confederation member states.

2.2.2 As it is revealed by the structure of Law 312/2005, the acquisition of non-ancillary rights in rem over the land situated in Romania by foreign natural or legal persons, is not subject to special procedural requirements. On the other hand, Law 17/2004 establishes specific requirements in regard of both the foreign persons and the Romanian citizens or legal persons, requirements which affect the validity of the land sale-purchase deeds; these may include the observance of a pre-emption right granted to some categories of subjects, or the obligation to obtain specific approvals from certain authorities.

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[14] See, in this regard, e.g., O. Ungureanu și C. Jugastru, *Manual de drept internațional privat*, ALL Beck, Bucharest, 1999, p.87.

[15] "Third States", according to the provisions of Article 2, letter b) of Law 312/2005, means those states that are not members of the European Union.

[16] According to the provisions of Article 2 of Law 17/2004, the agricultural lands situated within the built-up areas are not placed under the incidence of the Law; consequently, the legal regime of the sale to foreigners of these lands will be that provided by the Civil Code and, eventually, by Law 312/2005.

3. Specific provisions of Law no. 312/2005

3.1 Regulation of special legal incapacities

Articles 4 and 5 of Law 312/2005 contain two restrictions regarding the legal capacity to acquire land in Romania, applicable to the foreign citizens or stateless persons residing in a Member State or to the legal persons established in a Member State.

The first restriction is that regulated by Article 4 and targets the legal capacity of these persons – that are non-resident of Romania – to acquire land for secondary residences, respectively for secondary offices, before the expiry of a 5 year duration, starting with the date of Romania's admission to the EU, namely before 1st of January 2012. This lack of legal capacity of the above mentioned foreigners to buy land in Romania is special and temporary.

The second restriction is established by Article 5 and regards the same category of foreigners (nor-residents in Romania) that are affected by another special and temporary lack of legal competence: they do not have the right to acquire agricultural land, forests and forestry lands before the completion of a 7 year period form the date of Romania's admission to the UE, i.e. starting with 1st of January 2014.

This interdiction does not apply to farmers that carry on independent activities and are citizens of a Member State or stateless persons with domicile in a Member State who establish their residence in Romania. Stateless persons that are residing in Romania are also included in this category of persons. Consequently, the persons included in these categories, exempted from the interdiction provided by Article 5, could acquire agricultural land, forests and forestry lands even as of 1st of January, 2007, date of admission of Romania in EU, the acquiring conditions being the same imposed by the law in respect of the Romanian citizens. Conversely, as a restriction of the right to dispose of their property, in accordance with the provisions of Article 5 fifth paragraph of Law 312/2005, farmers that acquired that type of land were not allowed to change the destination of land, for a period of 7 years from the admission of Romania to EU.

3.2 The Treatment Granted to Companies

A special analysis and emphasis are required to assess the meaning and the effects of the provisions of Article 7 of Law 312/2005, text that amended Article 6 of Emergency Government Ordinance 92/1997 regarding the stimulation of direct investment. Following this amendment, the current text of said Article 6 reads as follows: "A commercial company, a resident or non-resident legal person may acquire any non-ancillary rights in rem over immovable property, to the extent required for the running of its activity, according to its social object, with the observance of the legal dispositions regarding the acquiring of the rights to private property over land by foreign citizens, stateless persons as well as by the foreign legal persons".

The quoted legal norm, in our opinion, grants/recognizes to legal persons of foreign nationality [17] that have at least a secondary office on Romanian territory – as well as to those that are non-residents in Romania – the right to acquire non-ancillary rights in rem over land or buildings required for the conduct of their statutory activity. Inclusion of this right within the legal capacity of the foreign legal persons is subject to strict observance of the corresponding provisions of law that regulate the acquisition of land by foreign citizens and stateless persons, as well as by foreign legal persons.

Out of these legal provisions, the following conclusions may be extracted:

- the company, constituted in conformity with the legislation of a Member State, which is resident in Romania, may acquire a right to property over land under the same conditions as those imposed by law for the commercial companies of Romanian nationality[18];

- the company that has the nationality of a Member State but it is not a resident of Romania may gain the right to property over land required for establishment of secondary offices after expiry of a 5 year term as form admission of Romania to EU (Article 4) and will not have the right to buy agricultural land, forests and forestry lands until the expiry of a 7 years term starting from the same date (Article 5); and

- the company belonging to Third States may acquire the right to property over land, irrespective of their type or destination, only with observance of the conditions regulated through international treaties and on a reciprocal basis, in accordance with the applicable international private law norms and without benefiting, by reference to the commercial companies originating from Member States, of the most favourite nation clause.

4. Particular features and special conditions regarding the sale of the land situated outside of the built-up areas, under the rule of Law no. 17/2014

4.1 Particular Features

4.1.1 There is a first conclusion to be extracted out of the examination of provisions of Title I of the above mentioned law (hereinafter, the Law): the regulations contained in this Title concern the transfer of right to property only over the land situated outside of the built-up areas, transfer to be made through

[17] According to provisions of Article 2.571 of Civil Code, a legal person has the nationality of the state on whose territory it has established, through its constitutive act, its legal office. If there are legal offices established in several states, the real office will be determinant to identify the nationality of the legal person.

[18] In this last category are also included the subsidiaries of foreign nationality companies, established on Romanian territory, which, according to Article 42 of Law 31/1990 regarding the companies, have the nationality of the state on whose territory have established their legal office (real).

voluntary sale[19] and not through other property transfer acts as exchange of land, donation, life-income agreements, transactions, etc.

4.1.2 The provisions of Article 2 of Law are applicable to Romanian citizens and legal persons as well as to foreigners, including the foreign legal persons that belong to the Member States. The foreigners belonging to Third States are subject, as also provided by Law 312/2005, to the restriction imposed by Article 2, third paragraph of Law, i.e. the purchase of land will be made in accordance with international treaties and on a reciprocal basis.

Likewise, one may remark the provisions of Article 20, second paragraph, of Law, according to which there are some exemptions to the application of the Law, concerning the transfer of property between co-owners, husbands, relatives and in-laws, up to and including the third degree. We may observe that, presumably, the lawmaker decided that, through this exemption, there will be no adverse effects for the purpose of the Law,[20] taking into consideration the special legal relationships – patrimonial or non-patrimonial – established between the said subjects.

4.1.3 Granting maximum efficiency to the pre-contracts and put or call options authenticated prior to the coming into force of the Law (that is before 12 April 2014), the lawmaker has exempted all these acts from the special requirements of the Law.[21] This exemption, obviously, concerns the contracts to be concluded, under the conditions provided by the Civil Code, based on voluntary implementation of the valid concluded pre-contracts or based on court judgments that will have the legal value of a sale-purchase contract, according to Article 5, first paragraph, o the Law.[22]

4.2 Pre-emption right. Common issues

4.2.1 Another basic rule introduced by Law 17/2014 is provided by Article 4, first paragraph, of the Law, stating that ”Alienation, through sale, of agricultural

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[19] According to Article 20, third paragraph, of Law 17/2014 „The dispositions of this law do not apply to enforcement procedures and to the sale contracts concluded further to public tender formalities, as is the case of sales made during the insolvency prevention procedures and insolvency procedures or to sale of immovable property pertaining to the private domain of local or regional interest of the territorial administrative units.”

[20] These purposes are: providing alimentary security, protection of national interests and exploitation of natural resources in agreement with the national interest, establishment of specific measures regarding the regulation of the sale – purchase of lands situated outside the built-up areas; merging of agricultural land with a view to the increase of the agricultural farms dimensions and creation of economic viable exploitations.

[21] See the provisions of Article 20, first paragraph, of the Law, which is an application of the international private law rule known as “tempus regit actum”.

[22] According to Article 5, first paragraph: ”Whenever the rendering of a court judgment is required to keep lieu of a sale purchase contract, the request is admissible only if the pre-contract is concluded according to the provisions of Law 287/ 2009, republished, with subsequent amendments and of the relevant legislation, as well as if the conditions provided at Articles 3, 4 and 9 of this Law are met and the immovable property that is object of the pre-contract is registered in the fiscal log and in the land book.”

lands situated outside of the built-up areas is made with the observance of the material and formal conditions provided by Law 287/2009 regarding the Civil Code, republished, with subsequent amendments and of the pre-emption right of the co-owners, landholders, neighbouring owners as well as of the Romanian State, through the Agency of State Domains, in this order, at equal price and conditions".

Therefore, the sale of this category of immovable property to Romanian citizens or foreigners must observe, besides the material and formal conditions provided by the common law, a new requirement that is not found in Law 312/2005 i.e. the obligation to observe a legal pre-emption right[23] regarding the sale of lands outside of built-up areas, granted to a specific category of persons (the co-owners, landholders, neighbouring owners as well as of the Romanian State, through the Agency of State Domains). This pre-emption right will be exercised in the legal order of preference established by the Law and at a price equal to that offered by the presumptive third buyer that is interested in acquiring a specific land outside of the built-up areas. Moreover, the selling conditions have to be similar to those offered by such buyer in terms of, for example, credit instalments or distribution between the parties of the selling costs.

4.2.2 As an exception from the rule established through Article 4, first paragraph, of the Law, the second paragraph of the same article, in respect of the alienation of land situated outside the built-up areas hosting categorised archaeological sites, establishes a special pre-emption right in favour of the Romanian State, through the Ministry of Culture and Cults, local departments of the ministry and territorial administrative units, as the case may be, under sanction of absolute nullity of the alienation deeds.[24]

A literal construction of the above mentioned provision may give credit to the opinion that the Romanian lawmaker excluded the pursuit of subsequent pre-emption right regulated by Article 4, first paragraph of Law 17/2014, in case that no one of the pre-emptors indicated at Article 4, fourth paragraph of Law 422/2001 has exercised its pre-emption right. Nevertheless, taking into account the nature of the considered goods as well as the purposes of the Law, the construction of the provisions of Article 4, first paragraph, of the Law has to be an extensive one, meaning that, after depletion of the preference order established by Law 422/2001, the provisions of Article 4, first paragraph of Law17/2014 will become applicable.

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[23] For an monographic analysis, see, e.g.: I. Negru, *Teoria generală a dreptului de preempțiune*, Universul Juridic, Bucharest, 2010; A. Foltiș, *Dreptul de preempțiune*, Hamangiu, Bucharest, 2011; I. Ionescu, *Antecontractul de vânzare-cumpărare*, Hamangiu, Bucharest, 2012. For an analysis of the specificity of the pre-emption right under the rule of the new Civil Code, see T. Prescure, *Curs de contracte civile*, Hamangiu, Bucharest, 2012, p. 53-56.

[24] According to Article 4, fourth paragraph, of Law 422/2001 "the historical monuments owned by private law natural or legal persons may be sold only under the conditions precedent of the exercise of the pre-emption right by the Romanian State, through the Ministry of the Culture and Cults, for the historical monuments classified in Group A, or through the de-concentrated departments of the Ministry of the Culture and Cults, for the historical monuments classified in Group B or through the administrative territorial units, as the case may be, according to law, under the sanction of absolute nullity of the sale."

4.2.3 In respect of the conditions provided for the exercise of the pre-emption right, Article 4, third paragraph of the Law confers special evidentiary value to the land book certificate that constitutes the formal basis for conclusions of property alienation deeds, regarding the immovable assets and non-ancillary in rem rights. The content and the use of this certificate constitutes proof of good faith of the contracting parties and of the public notary (the instrumental professional – as it is named by the Law) in respect of the seller's ownership of the sold immovable property, as it is described in the land book.

Article 11 of the Law contains a disposition that, apparently, is superfluous but which, nevertheless, expresses an essential requirement relative to the landholder – natural or legal person: this must be a part of a farming/lease contract, validly concluded, as per the provisions of the extinct Law 16/1994 of farming and/or in accordance with the Civil Code norms (Articles 1836 -1850) and which is validly registered in the special register kept by the secretary of the territorial administrative unit. Consequently, the exercise of the pre-emption right granted to a landholder is subject to two cumulative conditions: the valid conclusion of the farming/lease contract and the valid registration of this contract in the special register that grants the farming contract the effect of opposability toward third persons.

4.3 Pre-emption right. Procedural issues

4.3.1 As previously mentioned, in accordance with the previsions of Article 20, third paragraph of the Law, the provisions of this law do not apply to enforcement procedures and to the sale contracts concluded through public tender or to sales made during the pre-insolvency or insolvency procedures, nor to sale of immovable property pertaining to the private domain of local or regional interest of the territorial administrative units.

Consequently, if a land is subject to enforcement procedures or to a forced sale authorized by the bankruptcy judge, the pre-emption right is exercised under the conditions provided by the Civil Procedure Code (Article 1738 of the Civil Code).

4.3.2 According to the economy of the Law (Article 6 and the following), the pre-emption right has to be exercised before the conclusion of the contract with the offering third party and the will of the pre-emptors has to be displayed within the terms imposed by the Law. For example, the pre-emptor has to exercise his pre-emption right within 30 days from the posting of the sale offer at the mayor's office – or on the webpage of the mayor's office – that has jurisdiction over the property in question.

4.3.3 The free sale of the property that is subject to the pre-emption right may be achieved, according to the Law, only if, during the 30 days period established by the Law, there is no holder of the pre-emption right willing to buy the property (Article 7, seventh paragraph) or if there is no valid buying offer

issued by one of the holders of the pre-emption right that has accepted the offer in due time (Article 10, fourth paragraph).

4.3.4 If no pre-emptor expressed the will to buy the property within the legal period, there is no more need for the final notice (*in Romanian language: "aviz"*) of the central or territorial structures of the Ministry of Agriculture and Rural Development[25] and the free sale may be accomplished based on the certificate issued by the mayor's office (Article10, first paragraph).

4.4 The pre-emption right. Distinctions, as compared with the common law regulations

4.4.1 In respect to the procedural conditions of the exercise of the pre-emption right consecrated by Article 4, first paragraph of the Law, one may say that the procedural regime established by Article 6 and the following of the Law, is derogatory and distinctive compared with the general regime regulated by Article 1730-1740 of the Civil Code, regarding the general pre-emption right applicable to the sale of property.

The exercise of the pre-emption right by the entitled pre-emptors, under the terms of the Civil Code, may be done only after the conclusion of the contract with the third party and only upon the notice addressed by the seller or by the third party. In such situations, the sale contract is concluded under the condition precedent that the pre-emptor will not exercise his pre-emption right within 10 days (in case of sale of movable property) or within 30 days (in case of sale of immovable property), as the case may be.

If the pre-emption right will be properly exercised, the concluded contract will be retroactively rescinded and the sale to the pre-emptor will be achieved according to his will, expressed in this respect, backed by allocation of the entire price at the disposal of the seller.[26]

Although the Law regulates the distinctive exercise of the pre-emption right, Article 8 of the Law provides, in this respect, that: "the dispositions of this Chapter regarding the exercise of the pre-emption right are complemented with the common law provisions".[27]

4.4.2 Although no comprehensive examination is required, more aspects of distinctiveness may be emphasised:

- The Civil Code does not provide for the express absolute or relative nullity as a sanction of infringement of the pre-emption right, as is provided by Article 7, seventh paragraph and by Article 16 of the Law.

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[25] See the provisions of Article 6, third paragraph of the Law that define the notions of central structure and territorial structure.

[26] For an analysis of the legal mechanism of the exercise of the legal pre-emption right in case of sale of movable and immovable property, see, e.g.: T. Prescure, *Curs de contracte civile*, Hamangiu, Bucharest, 2012, pp. 53-56.

[27] That means the provisions of Articles 1730-1740 of the Civil Code.

- The Civil Code does not institute any exceptions regarding the exercise of the pre-emption right for particular situations or categories of persons, but such exceptions are provided by Article 20, second paragraph, of the Law.
- Failure to observe the provisions of the Civil Code in respect of the pre-emption right does not entice contravention liability, as is possible under the *imperium* of the Law.
- Under the *imperium* of the Civil Code, the exercise of the pre-emption right implies a preponderant conventional procedure placed upon the control of the sellers, of the third parties buying under condition precedent and of the pre-emptors of various degrees. However, the procedure of exercise of the pre-emption right, as provided for by the Law, has a marked administrative character: the mayor's offices that have jurisdiction over the lands that are the object of pre-emption rights, as well as the central and territorial structures of the Ministry of the Agriculture and Rural Development, have important responsibilities and powers in the process of exercise of these rights.

4.5 Administrative particularities. Notices

4.5.1 Particular categories of lands situated outside of the built-up areas, as those situated within a distance of 30 km of the state border and the Black Sea shore, as well as those situated within a distance of 2.400 meters of special compounds (Article 3, first paragraph of Law) may only be legally alienated based upon specific notice (which, in our opinion, is, in respect of its legal nature, a mandatory conforming notice – in Romanian language "*aviz conform*")[28] of the Ministry of National Defence. Such a notice is issued after consultation of the state organisms that have attributions in the field of national security. Such a specific notice is not required when the buyer is a pre-emptor, respectively a holder of the pre-emption right (Article 3 second paragraph of the Law).

4.5.2 The requirement of obtaining such specific notice (conforming notice) is also requested in case of selling lands situated outside of the built-up areas that contain archaeological sites with identified archaeological patrimony or areas where potential archaeological patrimony has been incidentally identified.
In such situations, a specific notice will be issued by the Ministry of Culture and Cults or, as the case may be, by the de-concentrated departments of the Ministry, within 20 days from the registration of the buyer's petition. Lack of any answer in the said fixed period will have the value of a tacit favourable notice (Article 3, first paragraph of the Law).

[28] According to the administrative law doctrine, the notices („*avizele*" in Romanian language) are part of the procedural forms preceding the issue of an administrative act. These may be consultative notices (which are not mandatory to be requested and to be followed), mandatory notices (which are mandatory to be requested but are not mandatory to be followed) and conforming notices (which are mandatory to be requested and followed, in respect of the content or of the imposed behaviour).

4.5.3 Consecutively to the obtaining of the above mentioned specific notices, Article 9 of the Law requests a final notice for the conclusion of the sale-purchase contract, in authentic form, or, as the case may be, for the granting of a court judgment that will stand in lieu of a sale purchase contract (when a sale pre-contract is not voluntary executed by one of the parties and the other party is using this pre-contract to obtain such a judgment). The prerogative to issue such notice is established based upon the area of the land. If the land is larger than 30 hectares, the prerogative belongs to the central structure of the Ministry of Agriculture and Rural Development and if the land is smaller than 30 hectares the prerogative belongs to the territorial structure of the Ministry.

4.6 Administrative punishments

The punishments established by the Law for infringement of the provisions of this law have a diverse legal nature, especially contraventional and civil.

4.6.1 In respect of the regulated contraventions, for example, according to Article 14, letter d) of the Law, the non-observance of the pre-emption right, as provided for by Article 4, constitutes contravention that is punished with a fine between 50.000 lei and 100.000 lei. There are also other categories of acts and facts of lesser importance that are qualified as contraventions, in accordance with the provisions of said Article 14 of the Law.

4.6.2 In respect of the civil liability, as per the provisions of Article 7, seventh paragraph of the Law, "the free sale"[29], at a price smaller than the price requested through the sale offer mentioned at Article 6, first paragraph of the Law or under terms more favourable than those therein provided, will be sanctioned with absolute nullity (imprescriptible and non-remediable) of the sale.

4.6.3 Based upon Article 16 of the Law, the alienation through sale of the lands situated outside of the built-up areas, without observing the pre-emption right of the entitled persons or without obtaining the notices requested by the provisions of Articles 3 and 9 of the Law is interdicted under the sanction of relative nullity (nullity that is legally time barred and is remediable, under the terms of law).

Therefore, we may appreciate that the legal norms that institute the pre-emption right for the sale of the lands situated outside of the built-up areas are of private policy and that, consequently, the pre-emption right regulated by Article 4,

[29] The notion of "free sale" must be understood by reference to the provisions of Article 7 of the Law that states: "If, within the period of 30 days established by Article 6, second paragraph, none of the holders of the pre-emption right manifests the intention to buy the land, the sale of the land is free, with observance of provisions of the law and of the methodological norms, following which the seller will give written notice about this sale to the mayor's office". To qualify a sale as a free sale one must also observe the provisions of Article 10, fourth paragraph of the Law, according to which: "If there is no buying offer from the holders of the pre-emption right that have accepted the offer in legal due time, the sale is free and Article 7, seventh paragraph of the Law will be accordingly applied".

first paragraph of the Law belongs to the private policy whilst the right established by Article 4, first paragraph of Law 422/2001 belongs to the public policy.

5. Conclusions

In conclusion, in consideration of the above analysis, one may affirm that, actually, under the imperium of the provisions of the Civil Code, of Law 312/2005 as well as of Law 17/2014, the legal regime of the sale of lands situated within the built-up areas or outside of the built-up areas by Romanian citizens, stateless persons, legal persons of foreign nationality as well as by natural and legal foreign persons residing in the Member States or in Third States is fully regulated. The jurisprudence of the courts will confirm or infirm the functionality and efficiency of this regime, in respect to the major national interests of the Romanian State, regarding one of the most important natural resources: the lands situated within the built-up areas or outside of the built-up areas.

De lege ferenda, it is our opinion that the Romanian lawmaker needs to further address this issues and to merge the provisions of Law 312/2005 and Law 17/2014 into a single enactment, avoiding, by that, any useless repetition or contradiction that may arise in the application of the existing legislation.

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