

NEW RESTRICTIONS THAT MAY IMPACT THE DEVELOPMENT OF THE RENEWABLE ENERGY PROJECTS

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Abstract

*It is notorious that the new subventions from which will benefit also Romania (PNNR)² triggered a significant interest for the investor who intend to invest in this renewable energy field. One of the important milestones of such project is securing the land. In the previous periods during which similar investments have been done, the acquisition of such land was a feasible economic business model for the investors. This meanly due the low price of the agricultural land located outside the buildable areas in Romania. Meanwhile, this business model seems to be quite difficult to be replicated again due to some new legislative amendments enacted by Romania. On one side, these make such acquisition of such land very complicated and, on the other side, the procedure takes very long time and it does not give any guarantee at its end, mainly due to the risk of competing with the other legal preemptors. An alternative solution would be to find other legal means to secure the target land. The present article presents the details of the preemption procedure provided under Law 17/2014 on the regulations regarding the sale and purchase of agricultural land outside buildable areas and for the amendment of Law No. 268/2001 on the privatisation of companies administering the State's publicly and privately owned agricultural land and for the creation of the Agency for the State's Domain ("**Law 17**").*

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1. Background

The Law 17 introduced among others a preemption procedure that should be conducted before selling an agricultural land located outside buildable areas. This preemption procedure has been several times amended and currently it became a very lengthy and complicated process though which the interested buyers should take it into account.

Further we shall briefly introduce the story of Law 17. This law has undergone several changes (5 changes) since its enactment in 2014³. Law 17 was last amended and completed by Law 175/2020 ("**Law 175**"), published in the Official Gazette no. 741 from 14 August 2020, and applies from 13 October 2020. The Romanian legislation on the sale of farmland has been significantly amended by Law 175. The new provisions were enacted with the declared aim of consolidating the Romanian agricultural real estate market and increasing the use of farmland for agriculture instead of speculative investment.

However, we are of the opinion that the new regulation mainly leads to more restrictions on the access of foreigners (mainly investors) to Romanian agricultural real estate, which also raises concerns about its compatibility with EU legislation.

With the enactment of Law 175, investors, mainly in the field of renewable energy sector, had to amend their business model in respect of securing of the target land. After Law 17 and its successive amendments, the access to Romanian agricultural real estate market was significantly restricted. It is undoubtful that most of the wind/solar farms were/are built on agricultural land plots.

These new barriers and restrictions lead to an *apparent* deadlock.

The main changes introduced by Law 175 consist in the increase in the number of pre-emptors and in imposing restrictive measures for some pre-emptors. Moreover, there is a temporary and indirect interdiction to sell farmland.

The current context of deadlock of the legal circulation of agricultural land plots located outside the built-up area is confirmed indirectly by the adoption by the Romanian Senate of another

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² https://energy.ec.europa.eu/index_en, consulted on 1.10.2022.

³ Law 17/2014 published in the Official Gazette no. 178 dated 12 March 2014 and entered into force since 11 April 2014.

draft law which introduces a number of other amendments to Law 17, which mainly provide the elimination of some of the restrictions adopted by Law 175. This draft law was adopted on 22.06.2021 and registered under no. 292/2021 at the Romanian Senate and is currently under the approval of the Committee on Public Administration and Urbanism Planning, the Committee on Culture, Arts and Mass Media and the Committee on Defense, Public Order and National Security.

However, once the investors make their own economic feasibility study and become aware of the new paradigm on the real estate market on agricultural land, it may be more advantageous to diminish the length of securing the target land by other legal and valid instruments than acquisition of such target lands.

2. Analysis

2.1. Amendments on farmland legislation implemented by Law 175

The most important amendments introduced by Law 175 are the following:

a. Increase in the number of pre-emptors and restrictive measures for some pre-emptors.

The catalogue of pre-emptors has been extended. Where the previous form of Law 17 (art. 4 of Law 17) provided only four categories of pre-emptors (co-owners, tenants, neighbors, the Agency for the State's Domain, in this order, at equal price and conditions), Law 175 extends the number of pre-emptors, setting forth no less than seven categories (also art. 4 of the new version of Law 17): (i) co-owners, first degree relatives, spouses, relatives and in-laws up to the third degree (first category of pre-emptors); (ii) owners of agricultural investments over agricultural land and tenants (second category of pre-emptors), (iii) owners of the neighboring farmland or tenants of neighboring lands (third category of pre-emptors); (iv) young farmers (fourth category of pre-emptors), (v) research and development units in the field of agriculture, the forestry and food industry, agricultural educational institutions (fifth category of pre-emptors), (vi) individuals domiciled or residing where the land is located or in neighboring localities and (vii) the Romanian State.

Law 175 also imposes tighter conditions to be met by certain pre-emptors. For example, according to art. 4 para. (2) of Law 17, amended by Law 175, tenants will qualify as pre-emptors only if their lease agreements were registered with the competent town halls at least one year prior to the display of the sale offer. Also, according to art. 4 para. (2) of Law the amended version of Law 17, tenants must prove the fulfilment of additional conditions regarding the domicile/residence/registered office on the Romanian territory, for a period of five years prior to the registration of the sale offer. These criteria must also be met by natural persons, shareholders of the tenants. The legislator also extended this condition to legal person shareholders of the tenants, requesting that the shareholders controlling the tenant prove the registered office/secondary headquarters on the Romanian territory for a period of five years prior to the registration of the sale offer (art. 4 para. (2) letter c) of Law 17).

Law 175 also establishes an order of priority for the purchase of agricultural land among pre-emptors of the same rank. For example, as per art. 4 para. (5) of Law 17, amended by Law 175, in the case of owners of neighboring agricultural land with the same rank, the priority between them is established according to the largest side of the land with which the agricultural land is adjacent.

b. Restrictions for natural/legal persons who do not qualify as pre-emptors.

One of the most important changes concerns the restrictive conditions imposed on natural and legal persons who are not holders of the pre-emption right and who wish to purchase farmland. Thus, although the previous form of Law 17 (art. 7 para. 7 of Law 17) provided for the free sale of agricultural land if no pre-emptor exercises its right of pre-emption, the new provisions establish, as per art. 4¹ of Law 17, amended by Law 175, a series of conditions to be met by natural/legal persons who do not qualify as pre-emptors, conditions related to (i) domicile/residence/registered office/secondary office in Romania for at least five years prior to the registration of the sale offer (for legal persons such conditions also apply to their shareholders, whether natural or legal persons), (ii) performing agricultural activities in Romania for a period of at least five years prior to the registration of the sale offer, (iii) for natural persons, fiscal registration in Romania for a period of at least five years/for legal

persons, obtaining at least 75 % of the annual income of the last five fiscal years from agricultural business, etc.

In fact, persons who meet the above conditions represent **an eighth category of pre-emptors** who may exercise their right within 30 days from the expiry of the term for completing the pre-emption procedure.

Only if they do not express their intention to acquire the farmland afterwards may be freely alienated to any natural/legal person, in all cases in compliance with the price and conditions of sale comprised in the sale offer.

c. Temporary and indirect interdiction to sell farmland. Law 175 imposes on owners who want to sell farmland before the eighth anniversary of their acquisition an 80% tax on the difference between the sale price and the purchase price, based on the grid of notaries applicable to that period, as per Art. 4² para. (1) of the recent version of Law 17.

According to Art. 4 para. (2) of the recent version of Law 17, this tax also applies to direct or indirect alienation, before the eighth anniversary of the purchase of lands, of the controlling stock in companies that hold agricultural land representing at least 25% of their assets. In this case, the seller will pay a tax of 80% of the difference of the value of the lands calculated based on the notaries' grid between the acquisition of farmland and the alienation of the shares. To avoid double taxation, the profit tax is applied to a diminished base considering the percentage of the lands in the company's fixed assets.

There is no legal framework to regulate the method of payment of this tax, which makes this obligation hard to apply, but breach of these obligations is sanctioned with the absolute nullity of the transaction.

Moreover, once purchased, the farmland must continue to be used exclusively for agricultural purposes.

d. Procedural amendments. Law 175 introduces a number of changes to the procedure for exercising the right of pre-emption, mainly related to significant prolongations of the procedural deadlines and additional obligations imposed on municipalities, such as their obligation to notify pre-emptors about the sale offer registered by the owner. For example, as per Art. 6 para. (6) of the new version of Law 17, *within 10 working days from the date of registration of the sale offer, the city hall has the obligation to notify the pre-emptors, at their domicile, residence or, as the case may be, their headquarters, about the registration of the sale offer*, obligation which was not provided in the previous version of Law 17. Moreover, (i) according to Art. 6 para. (2) of the new Law 17, the actual pre-emption period was extended from 30 calendar days to 45 business days and (ii) the eighth category of pre-emptors have an extra 30 business days following the pre-emption period to exercise their right to buy the farmland (Art. 4¹ para. 3 of the amended version of Law 17);

In addition, Law 175 regulated the possibility for sellers and pre-emptors to withdraw their offer/acceptance of the offer by the completion date of the sale procedure (Art. 7¹ of the new version of Law 17). This derogation from the traditional rules provided under the Romanian Civil Code.⁴ cannot be justifiable because it makes easily room for abusive exercise of such right. According to art. 1191 of the Romanian Civil Code, the offer is irrevocable and according to art 1199, its withdrawal is valid only its beneficiary receives it before/simultaneously with the receipt of the offer. This article cannot be applied since the offer is being made public through the local authority. Hence, it seems impossible to send first the withdrawal and afterwards the offer. Without further detailing the rationale behind the above-mentioned derogation, it clearly results that the procedural changes are likely to further bureaucratize the sale procedure. The entire pre-emption procedure takes significantly (up to 4 months or more).

3. Solutions for investors to acquire the farmland

One of the solutions for the investors to secure the agricultural land plots for their investments

⁴ Law 287/2009 published in the Official Gazette of Romania no. 505/15 July 2011.

is for them to conclude with the owners of the farmland both (i) a superficies agreement for a period of 99 years over the farmland and (ii) a call option agreement over the farmland⁵. Practically a conventional pre-emption right is established in favor of the investor, in accordance with Art. 1.730 of the Civil Code, which will be applicable after the termination of the pre-emption procedure⁶.

It will be necessary for the investors to register the superficies right and the call option right with the land books of the agricultural land plots, so that these rights become opposable to the legal pre-emptors and to other third parties.

Once the superficies and call option agreement are concluded, the owner of the farmland shall commence the pre-emption procedure provided by Law 17 and if, at the end of this procedure, none of legal pre-emptors of the eight categories of pre-emptors proceeds with the acquisition of the farmland, then the investor will be able to freely buy the farmland. In this manner, during the whole period of the pre-emption procedure, the investors will have secured the land plots necessary for their investments in compliance with its standards of protection⁷.

Obviously, the investors, who will have concluded a call option agreement with the owner of the farmland until the termination of the pre-emption procedure, will be able to buy the farmland with priority over other investors and by merely exercising their option.

Moreover, if one of the pre-emptors decides to acquire the farmland, he/she will acquire an ownership right which is encumbered by the superficies right of the investor.

4. Conclusion

Even if more restrictions have been introduced by Law 175 on the sale of agricultural land and even if apparently there is a deadlock, there are solutions for investors to secure their land so that they can make their investments.

However, in order to unblock the access to the real estate transactions on the farmland located outside the buildable area and to eliminate some of the harsh restrictions, we consider that a new amendment of Law 17 is necessary. *De lege ferenda*, such amendment should exclude the procedure for strategic sectors (i.e. energy sector) in order to develop such projects easier and faster.

Finally, given the numerous legislative amendments brought in time to Law 17, we appreciate that a stability and predictability on this particularly important area, which has an impact on the movement of farmland, would be a progress.

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⁵ "The call option agreement is also called the preferential agreement and can be defined, in a generic way, as the promise that one of the parties assumes that, in case it decides to conclude the contract envisaged by the other party, to give preference to the latter (the beneficiary) in order to conclude the sale agreement at an equal price". - *Pactul de opțiune este denumit și pactul de preferință și poate fi definit, cu titlu generic, ca fiind promisiunea pe care și-o asumă una dintre părți ca, în cazul în care se va decide să încheie contractul avut în vedere de cealaltă parte, să acorde preferință acesteia din urmă (beneficiarului) la contractare la preț egal* (Gabriel Boroi, Liviu Stănciulescu, *Instituții de drept civil*, Ed. Hamangiu, Bucharest, 2012, p. 341).

⁶ "In case two or more person have preemption rights over one and the same property, the problem of solving the competition between them arises. In this regard, the rules to be considered are the following: (i) legal pre-emption rights have priority over conventional pre-emption rights [Art. 1.734 para. (1) lit. a) of the Civil Code]. Therefore, if there is a legal pre-emption right over one property, for example, in case of selling a farmland located outside the buildable area, and the land plot is co-owned by the owner and another person, the co-owner is the beneficiary of a legal pre-emption right established by the provisions of Art. 4 para. (1) of Law no. 17/2014 and will be preferred to a third party who would be the beneficiary of a conventional pre-emption right based on a call option agreement concluded with the seller", (ii) in the case of legal pre-emption rights, a certain order of priority will be established by law, as is the case of the legal pre-emption rights established by art. 4 para. (1) of Law no. 17/2014 in favor of the co-owners, tenants, neighboring owners, as well as of the Romanian state, which are ranked by the text of the law mentioned in this order (Dan Chiriță, *Dreptul de preempțiune în Noul Cod Civil*, „Revista Română de Drept Privat” no. 4, 2015, p. 40).

⁷ Cristina Elena Popa (Tache), *Compliance with the legal treatment standards of international investments during the global economic crises. Between yes and no*, in Dalvinder Singh, Cristina Elena Popa Tache, Cătălin-Silviu Sărau (editors), *Looking for New Paths in Comparative and International Law (Contributions to the Conference on Comparative and International Law June 25, 2021, Bucharest - International Conference)*, Adjuris – International Academic Publisher, 2021, pp. 165.

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