RESTRICTIONS ON THE SALE OF AGRICULTURAL LAND. CONTROVERSIES NATIONAL LAW - UNION LAW

PhD. student **Gabriela TEODORU**[1]

Abstract

Each nation has developed its own system of regulation on the ownership, use and movement of agricultural land to ensure the most beneficial use of land. However, Member States must ensure that national regulations do not conflict with European law. Restrictive measures for the acquisition of agricultural land were taken by some Member States at the end of the transitional period during which the Accession Treaties allowed EU investors to be restricted from buying agricultural land in these countries. It is mandatory to analyze to what extent some of these regulations violate fundamental EU principles, such as the free movement of capital and non-discrimination on grounds of nationality, in order not to distort the business environment and to ensure equal treatment before the law for all EU citizens. The assessment of the proportionality and non-discriminatory nature of these regulations requires a good knowledge of the practical effects that these normative acts will have. For this reason, it is appropriate that in the next period legal professionals notice all the difficulties that will appear in the process of applying these regulations as well as the practical manner in which their application is likely to lead to the achievement of the objectives assumed by the legislator. Certainly, sooner or later the CJEU will be called upon to rule on the compatibility of these regulations with Union law and the research undertaken during this period will be used for the correct assessment of the impact of these new laws.

Keywords: *legal conditions for acquiring agricultural land, right of preemption, legal preemptors, free movement of capital, the principle of proportionality, discriminatory regulation, case law of the European Union Court of Justice.*

***JEL Classification**:* K11, K12, K15

1. Introduction

A country's agricultural law is often a reflection of the problems that farmers and agriculture in general face in that country. The countries of the world regulate the legal circulation of land differently, but the principles or reasonings considered can be easily systematized. Among other things, the surface and quality of agricultural land, together with national interests, help shape the law. A wide variety of different laws, regulations and policies affect the legal movement of agricultural land. The right to own agricultural land, the freedom to use, according to its purpose, agricultural land, and the freedom to sell agricultural land are privileges granted and protected by law. In some countries, these rights may be exercised with minimal restrictions; in others, potential owners or users of agricultural land face significant limitations.

The approach of states, related to this issue, may be more restrictive for special political, social or geographical reasons characteristic of those states.

Significant issues of agricultural land law include physical planning; land consolidation; limitations on sale/purchase, division or unification of land; compulsory use of agricultural land; provisions on governmental (or quasi-governmental) pre-emption or expropriation of agricultural land; access to privately owned land by members of the general public; and regulating the lease of agricultural lands.

Each nation has developed its own system of regulation on the ownership, use and movement of agricultural land to ensure the most beneficial use of land. Member States, especially those in Central and Eastern Europe, are taking protectionist measures with regard to the legal movement of land, which, in most cases, without a proper argumentation, may conflict with European regulations on the free movement of capital. Such an approach is mainly due to the differences in financial resources between European citizens, which apparently create a competitive advantage for the citizens of Western European states.

Our study presents the European Commission's view of protectionist measures that could violate Union law, relevant CJEU case law, legislative measures adopted in some Member States,

[1] Gabriela Teodoru - Doctoral Law School, Bucharest University of Economic Studies, Romania, avocat_dimofte@yahoo.com.

including Romania, and the extent to which these new regulations could be in breach of EU law.

2. Legal circulation of agricultural lands - regulations in union law and interpretative jurisprudence

Agricultural land is a valuable asset in all countries, including EU Member States, and its acquisition is often subject to various conditions and restrictions. National land laws governing the acquisition of land serve various purposes, such as maintaining land for agricultural use or monitoring and, possibly, reducing land concentration. Sometimes they strengthen the position of the local farmers, as opposed to foreign investments[2].

The acquisition of agricultural land also falls within the scope of EU law, which recognizes the distinctive character of agricultural land. EU treaties allow restrictions on foreign investment in agricultural land, if they are proportionate to the protection of legitimate public interests, including, for example, the preservation of agricultural communities, the development and maintenance of sustainable agriculture or the prevention of land speculation. The jurisprudence of the Court of Justice of the European Union (CJEU) also legitimizes this course of action. However, drawing a line between proportionate and disproportionate protection of public interests may not always be clear and remains a challenge for many Member States[3].

The contribution to the debate on foreign investments in agricultural land was the aim of a Commission Interpretative Communication, C350-5, of 17.10.2017[4], regarding the benefits and challenges of foreign investments in agricultural land. The communication not only responded to the European Parliament's request to publish guidelines on how to regulate agricultural land markets in accordance with EU law, but also aimed at informing the debate on foreign investments in agricultural land, assisting Member States in the process to adjust their legislation or those Member States which may wish to do so at a later stage, as well as to help promote a wider dissemination of best practices in this complex area. As such, the Communication provides a valuable regulatory framework for Member States and provides guidance for the interpretation of certain restrictions from a European law perspective.

From a legislative point of view, the Commission finds that there is no secondary legislation at European level on the acquisition of agricultural land. Member States have the competence and discretion to regulate their land markets, but they must respect the basic principles of the Treaties, in particular regarding *fundamental freedoms and non-discrimination on grounds of citizenship or nationality.*

Regarding the *fundamental freedoms*, these are: the free movement of capital and the freedom of establishment. The right to acquire, use or dispose of agricultural land shall be subject to the principles of *free movement of capital* provided for in Articles 63 et seq. of the Treaty on the Functioning of the European Union (TFEU)[5].

As a general rule, all restrictions on the movement of capital between Member States but also between Member States and third countries are prohibited. The CJEU interpreted the notion of restriction as meaning all measures that limit investments or that are likely to hinder, discourage or make them less attractive.[6]

When investments in agricultural land are entrepreneurial agricultural activities, they may also be covered by the provisions on *freedom of establishment:* Article 49 TFEU prohibits any restriction

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[2] Cristina Elena Popa Tache, *International investment protection in front of the states role in crisis times to managing disputes*, „Juridical Tribune - Tribuna Juridică", volume 10, issue 3, December 2020, pp. 455-465.

[3] See Cristina Elena Popa Tache, *Ranking of Treatment Standards in International Investments*, „International Investment Law Journal", Volume 1, Issue 1, February 2021, pp. 79-87.

[4] Commission Interpretative Communication on the Acquisition of Farmland and European Union Law, (2017/C 350/05). Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:C:2017:350:TOC

[5] This has been confirmed in several CJEU decisions; see, for example, Case C-370/05 Festersen, paragraphs 21 to 23, Case C-452/01, Ospelt, paragraph 24.

[6] As regards the definition of restrictions on the movement of capital: CJEU, Case C-112/05, Volkswagen, paragraph 19; CJEU, Joined Cases C-197/11 and 203/11, Libert, paragraph 44; CJEU, Case C-315/02, Lenz, paragraph 21.

on the establishment of nationals (physical or legal persons) of one Member State in the territory of another Member State for the exercise of independent economic activity, such as agriculture.

An essential element inherent in all fundamental freedoms is the principle of non-discrimination on grounds of citizenship or nationality. It prohibits both direct and indirect discrimination (disguised forms of discrimination). The latter refers to national provisions on the exercise of fundamental freedoms which do not explicitly discriminate on grounds of nationality but which in fact lead to an equivalent result.

On the other hand, Article 345 TFEU provides that "the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership". National rules governing the acquisition or exploitation of agricultural land concern property rights, but Article 345 TFEU does not preclude the application of fundamental freedoms or other basic principles of the Treaty.

Therefore, under Article 345 TFEU, Member States have the power to take decisions on the real-estate regulations, subject to compliance with the requirements of EU law.

The Commission also identifies the types of restrictions on fundamental freedoms and possible justifications that Member States may invoke in national land sales regulations.

The conditions which national measures likely to impede the exercise of fundamental freedoms must fulfil in such a way as not to infringe Union law are: 1. not to be discriminatory, 2. to be justified by a major public interest, 3. to be appropriate to achieve the objective pursued, 4. not to exceed what is necessary to achieve that objective, and 5. cannot be replaced by alternatives less restrictive (principle of proportionality).

While the first condition can be easily analyzed in the light of the criteria applicable to the nationals of the issuing Member States, as regards the major public interest, a CJEU jurisprudence was needed to guide Member States in drawing up national regulations in accordance with Union law and to avoid equivocal interpretations of the notion of major public interest.

The CJEU has recognized a number of public policy objectives that may, in principle, justify restrictions on investments in agricultural land, such as:

- increasing the area of agricultural plots so that they can be exploited profitably, preventing land speculation[7];

- preserving agricultural communities, maintaining a distribution of land ownership to enable the development of viable agricultural holdings and managing green spaces and rural areas, encouraging the reasonable use of available land, prevent natural disasters and support the development of viable agriculture on basis of social and spatial planning considerations (which means maintaining the destination of agricultural land and continuing to use it in appropriate conditions)[8];

- maintaining a traditional form of cultivation of agricultural land, by exploiting it directly and ensuring that it is occupied and exploited predominantly by their owners, maintaining a permanent population in rural areas and encouraging the reasonable use of available land to avoid land pressure[9];

- for the purpose of urban and rural or regional planning and in the general interest, the maintenance, in certain regions, of a permanent population and an economic activity independent of the tourism sector[10];

- the preservation of national territory in areas established as being of military importance and the protection of military interests against real, specific and serious risks[11].

The CJEU has repeatedly emphasized that these objectives are consistent with the objectives of the Common Agricultural Policy (CAP) set out in Article 39 TFEU.

On the other hand, it is important to note that the CJEU decided in each case, always taking into account the context of the specific circumstances of each case.

In accordance with settled jurisprudence, derogations from fundamental freedoms must be interpreted restrictively. In any case, derogations from fundamental freedoms cannot be justified by

[7] Case C-182/83, Fearon, paragraph 3.
[8] Case C-452/01 Ospelt, paragraphs 39 and 43.
[9] Case C-370/05 Festersen, paragraphs 27 and 28.
[10] Case C-302/97 Konle, paragraph 40, related cases C-519/99-C-524/99 and C-526/99-C-540/99 Reisch, paragraph 34.
[11] Case C-423/98, Albore, paragraphs 18 and 22.

purely economic purposes.

The Court also evaluated to what extent the restrictive conditions are appropriate to lead to the realization of the major public interest claimed in the national regulation under analysis.

The CJEU has exercised in-depth scrutiny of the proportionality of national measures restricting fundamental freedoms. When assessing the proportionality of a measure, all the factual and legal circumstances of the case should be taken into account, both in terms of the exercise of fundamental freedoms by potential sellers and buyers, but also in relation to the public interest pursued.

The principle of proportionality provides that restrictive provisions: 1.must be appropriate for achieving the objective pursued, including pursuing the legitimate objective of public interest in a coherent and systematic manner[12]; 2.it must not go beyond what is necessary to serve the public interest; 3.there is no alternative measure which could pursue that public interest in a less restrictive way for the free movement of capital or the freedom of establishment[13].

It is for the national authorities to demonstrate that the legislation they adopt complies with the principle of proportionality. This means that the legislation must be appropriate and necessary to achieve the stated objective and that this objective could not be achieved through less extensive prohibitions or restrictions or less disruptive to trade within the European Union[14]. In that regard, the reasons which may be put forward by a Member State as justification must be supported by appropriate evidence or an analysis of the appropriateness and proportionality of the restrictive measures[15].

Systematizing the relevant jurisprudence of the CJEU, one can identify a series of restrictive measures and conditions adopted by Member States regarding the sale of agricultural land as well as the position, interpretation and guidance offered by the European court in relation to these national regulations:

1. Prior authorization. The imposition of a prior administrative authorization in the case of a transfer of agricultural land restricts the free movement of capital, but may nevertheless be justified under Union law in certain situations. Such a system of prior authorization cannot, as the CJEU stated, "legitimize discretionary conduct on the part of national authorities, which could deprive EU law of its useful effect". For such a regime to be compatible with EU law, it "must be based on objective, non-discriminatory and well-known criteria, which ensure that such a regime can sufficiently circumscribe the exercise of national authorities right of assessment"[16]. The criteria must be precise[17]. In addition, all affected persons must have access to an appeal.[18]

2. Preemption rights (right of first refusal) in favor of farmers. The jurisprudence of the CJEU indicates that pre-emption rights in favor of certain categories of buyers (e.g. tenants) may be justified, in certain circumstances, by the objectives of agricultural policy.

In the Ospelt case[19], the CJEU examined a system of prior authorization for the purchase of agricultural land. The CJEU examined the proportionality of measures prohibiting the acquisition of land by non-farmers in order to maintain a viable agricultural community and to maintain land for agricultural use. The Court also examined whether there were less restrictive measures for the free movement of capital than a ban on the purchase of non-farmers.

In this context, the CJEU concluded that mechanisms could be put in place to give tenants a right of pre-emption. If the latter do not acquire the land, non-farmers may be allowed to buy agricultural land with the condition that they maintain this use. Consequently, if the aim is to promote the acquisition of land by farmers, pre-emption rights in favor of tenants or farmers in general could be considered as a restriction on the free movement of capital, so far as they are more less restrictive than prohibiting the purchase by non-farmers.

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[12] See CJEU, Case C-243/01, Gambelli, paragraph 67, Case C-169/07, Hartlauer, paragraph 55, and the case-law cited in that judgment.
[13] As regards the principle of proportionality, see, in particular: CJEU, Case C-543/08, Commission v Portugal, paragraph 83.
[14] CJEU, Case C-333/14, Scotch Whiskey, paragraph 53.
[15] CJEU, Case C-333/14, Scotch Whiskey, paragraph 54.
[16] See, for example, Case C-567/07 Woningstichting Sint Servatius, paragraph 35.
[17] Case C-201/15, AGET Iraklis, paragraphs 99-101.
[18] See CJEU, Case C-54/99, Eglise de Scientologie, paragraph 17.
[19] Case C-452/01 Ospelt, paragraph 52.

3. Price control State interventions to prevent agricultural land prices from reaching an excessive level may, in certain circumstances, be justified under EU law. This applies, in particular, to rules allowing national authorities to prohibit the sale of land where the price can be considered, on the basis of objective criteria, highly speculative.

4. The obligation to exploit the land directly. Although the CJEU recognized as a legitimate public objective[20] the need to predominantly ensure the direct exploitation of arable land, the existing jurisprudence considered that a general requirement in this regard imposed on the acquisition of agricultural land is not a proportionate measure. The objective pursued could be achieved by less restrictive measures, namely by making the purchase conditional on the acquirer's obligation to keep the land for agricultural use[21].

5. Vocational training in agriculture. The conditioning of the purchase of agricultural land by the vocational training in agriculture is a restriction which raises doubts as to its proportionality. The requirement for specific vocational training for land acquisition must be specifically justified in any national law, otherwise it appears to be an unjustified and disproportionate restriction on the free movement of capital. In order to reach a different conclusion, Member States should demonstrate why certain vocational training is required for the acquisition of land, while the pursuit of agricultural activities is generally allowed without any formal attestation of competence.

6. Prohibition to sell to legal persons. A national rule prohibiting the sale of agricultural land to legal persons constitutes a restriction on the free movement of capital and, where appropriate, the freedom of establishment. Such a condition was justified by the Member State which adopted it as necessary to achieve the objective of maintaining agricultural land for agricultural use. However, when the object of a legal person's activity is agriculture, the prohibition on selling to legal persons is an obstacle to transactions which do not affect the agricultural destination of the land[22]. It can be concluded from the considerations of the CJEU that such a ban is not justified because it is not necessary to achieve that objective.

7. Procurement limits. Till now, the Commission has taken note of two types of procurement capping measures in national legislation. Some Member States require a regulatory body to issue a specific permit for the acquisition of land that exceeds a certain area. Other Member States have introduced or confirmed absolute limits that already exist. Whether the national procurement limits are justified by a legitimate public interest reason (such as the objective of a more balanced ownership structure) and respect fundamental EU rights and general principles of EU law, such as non-discrimination and proportionality, they could be considered compatible with Union law. The assessment of the fulfillment of these conditions will also largely depend on the existence of objective and well-defined criteria on which to base national rules and remedies that can be exercised by those interested.

8. Privileges granted to local acquirers. Preemption rights and other privileges granted to local buyers require careful attention and verification. Granting privileges to locals could mean favoring their own nationals of a Member State, possibly constituting disguised discrimination on grounds of citizenship or nationality, prohibited by Article 63 as well as Article 49 TFEU, as it benefits, even if not formally, but through their practical effects, their own nationals. It is difficult to deny that the vast majority of local buyers are nationals of the Member State concerned and that foreigners are therefore much less likely to enjoy the privilege granted[23]. In addition, even if these measures were considered to be applicable without distinction, the free movement of capital and, where appropriate, the freedom of establishment would nevertheless be restricted, as these measures make it difficult or less attractive to invest in non-local agricultural land.

In order to be compatible with the principles of free movement of capital, privileges for local

[20] Case C-370/05 Festersen, paragraphs 27 and 28.
[21] Case C-452/01 Ospelt, paragraphs 49 to 53.
[22] Case C-452/01 Ospelt, paragraph 51.
[23] See, to that effect: CJEU, Cases C-279/93, Finanzamt Köln-Altstadt v Schumacker, paragraph 28; C-513/03, van Hilten-van der Heijden, paragraph 44; C-370/05, Festersen, paragraph 25; C-11/07, Eckelkamp, paragraph 46 (higher tax on non-residents). For the issue of foreign investment treatment standards and application, see (a comprehensive monograph) Cristina Elena Popa Tache, *Legal treatment standards for international investments. Heuristic aspects*, Ed. Adjuris International Academic Publisher, 2021.

acquirers, as well as other restrictions, must pursue, in the same proportion, legitimate public interest objectives. It cannot be excluded that Member States may invoke public objectives which the CJEU has recognized as legitimate, such as increasing the area of agricultural parcels for the development of viable agricultural holdings in local communities or maintaining a permanent population in rural areas. At this level, the condition is that the privileges reflect the socio-economic aspects of the objectives pursued. This could be the case if pre-emption rights are granted to local farmers to remedy fragmentation of land ownership, for example, or if other special rights are granted to locals to address concerns arising from their geographical location (eg regions less developed). Privileges for locals that are not necessary to achieve the goal are obviously not justified[24].

This results, in particular, from the jurisprudence of the CJEU Libert case. In this case, the CJEU examined the proportionality of a national regulation under which, in a given locality, land could only be acquired under the following conditions: the person to whom the land would be transferred must have lived uninterruptedly for at least six years before the transfer in that particular commune or in a neighboring commune; secondly, the potential buyer or tenant must have carried out activities in the commune in question on the date of the transfer, with the condition that these activities cover on average at least half of the duration of a working week; thirdly, the potential buyer or tenant has established a professional, family, social or economic relationship in the commune due to an important and long-term circumstance.

The CJEU considered that this national rule was disproportionate, explaining that *none of these conditions* directly reflected the socio-economic aspects corresponding to the objective of exclusive protection of the less affluent indigenous population on the real estate market, invoked by the Member State. The conditions of the law can be met not only by this less affluent local population, but also by other people who have sufficient means and who, consequently, do not have a specific need for social protection on the real estate market. Therefore, these measures go beyond what is necessary to achieve the objective pursued. In addition, it should be pointed out that less restrictive measures than those provided for in the national rule in question should have been taken into account[25].

9. The condition of reciprocity. Member States may not make the purchase of agricultural land by nationals of another EU Member State conditional on the authorization of their own nationals to purchase agricultural land in that EU Member State. The requirement of reciprocity was rejected by the CJEU as incompatible with the principles of EU law. The obligation to respect EU law does not depend on it being respected by other Member States[26]. In the event of a breach of EU law by a Member State, any other Member State has the right to refer this infringement to the CJEU (Article 259 TFEU). In addition, the Commission, as guardian of the Treaties, monitors compliance with EU law by Member States, has the power to initiate infringement proceedings and, if necessary, to notify the CJEU of infringements.

3. Legal circulation of agricultural lands - regulations in the law of some Member States

The report "Agricultural land market regulations in EU Member States"[27] of 27.04.2021 prepared at the request of the European Commission, reveals reliable and up-to-date data and information on agricultural land market regulations in 22 different Member States of the European Union. The information and data collected in this report are based on the most recent legislation adopted by the analyzed Member States, as well as on the views expressed by experts in the

[24] For example, the CJEU rejected the establishment of special rights for acquirers with a "sufficient connection with the commune", in the sense of a "professional, family, social or economic link", which were granted to protect the less affluent local population in the real estate market. The CJEU explained this by stressing that such conditions can be met not only by the less affluent population but also by other people who have sufficient means and do not have a specific need for social protection in the real estate market (related cases C-197/11 and C-203/11, Eric Libert, paragraphs 54-56).

[25] Joined Cases C-197/11 and C-203/11, Eric Libert, paragraphs 54-56.

[26] Cases C-118/07, Commission v Finland, paragraph 48; C-266/03, Commission v Luxembourg, paragraph 35:'a Member State […] may not invoke the principle of reciprocity and rely on a possible breach of the Treaty by another Member State in order to justify its own failure to fulfill its obligations. obligations.

[27] https://www.europeanlandowners.org/images/AGRI__LAND_MARKET_REGULATIONS_IN_THE_EU_/Agri-Land_EU_-_D3_-_MAIN_REPORT_final-3, consulted on 1.10.2021.

agricultural land market from these Member States.

Analyzing the regulations of the Member States, it can be seen that the states that have adopted the most restrictive measures on the legal movement of agricultural land are Hungary, Croatia, Poland and Romania. At the opposite pole, with the most permissive legislation, are Sweden, Finland, Slovakia and the Netherlands. Considering the position of Romania on the 4th place in this ranking of the states with the most restrictive conditions on the sale of agricultural lands, we will make a brief review of the restrictions imposed by the legislation of the first three states in this ranking.

Hungary. Starting with 1994, legal entities cannot purchase agricultural land. Today, about 140 thousand hectares of agricultural land are owned by agricultural companies. This land was acquired in property before 1994. Although, agricultural companies can rent agricultural land from individual owners.

All EU and Hungarian citizens can buy one hectare of land without restrictions. Only registered farmers can acquire more than one hectare. The rules for application of the law on the sale of land define the farmer as a Hungarian or EU citizen who has a professional training in agriculture or forestry or who has carried out agricultural or forestry activities on the territory of Hungary for at least three years in five consecutive years, or who holds at least 25% of an agricultural producer organization registered by the competent authorities. Farmers can own 300 hectares of land in property and can use a maximum of 1,200 hectares for agricultural exploitation, including leased land.

A wide range of potential buyers have preemption rights. When the land is sold, the right of pre-emption belongs primarily to the state. It is followed by the co-owners, the lessee who has been exploiting the land for at least three years or a resident neighbor. A resident neighbor is 1. a person who lives within the locality where the land is sold and the land he owns is adjacent to the land that is the subject of the contract of sale, or 2. a person who has lived for at least 3 years in a neighboring locality/adjacent to the locality where the land that is the object of the sale is located and the land that he owns in the neighboring locality is adjacent to the land that is the object of the sale.

When acquiring land, the law gives priority to the exercise of the right of pre-emption for family farmers, young farmers and beginner farmers. This classification is important in determining who has priority if there are more farmers who express their willing of buying.

For land sales, a maximum sale price is established according to certain criteria, respectively: a) for agricultural lands, depending on the profitability index for a production period of 20 years, b) for forests, depending on the index of profitability for a production period of 50 years. In addition, the average selling price in the region or locality in which the land subject to sale is located, is taken into account.

The main objectives of the Hungarian Land Law are the equitable distribution of agricultural land, limiting speculation on land sales, maintaining a rural population and encouraging village living, in order to support agricultural practices aiming environmental conservation and create viable farms to ensure a stable supply of food at affordable prices.

There are many voices criticizing these restrictive conditions for the acquisition of agricultural land, arguing that these regulations conflicts with fundamental economic freedoms. For example, the prohibition on the acquisition of land by legal entities conflicts the provisions of the principle of free movement of capital. However, some argue that the absence of a ban would lead (and has led in the past) to an uncontrollable use of land or a change of its use.

Currently, the Hungarian Land Law is being examined by the European Commission and there are several complaints about the violation of Community law pending before the EU Court of Justice.

Croatia. Land ownership is very fragmented. For this reason, land transactions are very difficult, especially due to the costs of selling and buying.

It is not clear how much state-owned agricultural land is available in the country because a systematization of agricultural land in registers is not completed.

According to the current Law (OG 20/118), state-owned agricultural land can be sold by public auction. One buyer can buy state-owned agricultural land up to a maximum of 50 ha for the continental area and up to a maximum of 5 ha for the coastal area. A cadastral plot cannot be larger

than 10 ha. Whoever buys agricultural land is obliged to cultivate it for ten years (to keep its destination for agriculture), and if he ever decides to sell it, he must sell it back to the state. When selling agricultural land, the state property also applies the rule of domicile: the land is sold with priority to farmers who have their domicile in the area where the land subject to sale is located, thus encouraging them to stay in those areas.

The pre-emption right to the sale of state lands is granted to legal or private persons in the following order: 1) small family farms in the livestock sector that do not own enough agricultural land (criterion applicable only in case of lease), 2) farmers who already use the land on the basis of previously concluded lease or concession contracts (in case of sale), 3) young farmers, 4) other family farms, 5) private or legal persons having residence or headquarters in the region where the land subject to sale is located 6) agricultural cooperatives, 7) other private or legal persons who carry out activities in agriculture or intend to start activities in agriculture.

Land policy in Croatia is largely about state-owned agricultural land management regulations. Transactions with private-owned agricultural land are subject to the general regulations governing the selling of real estate. According to them, private owners can still sell their agricultural land freely to other Croatian citizens, individuals and legal entities, without applying any right of pre-emption.

Poland. Land use is very fragmented and small family farms are widespread. There are specific regulations both in terms of transactions with private-owned agricultural land and in terms of state-owned agricultural land. In both cases, a priority is recognized for the acquisition for family farms.

Non-farmers can only buy land of less than 1 ha. Individual farmers who run a family farm can buy plots larger than 1 ha. An individual farmer is defined as a natural person who is the owner or lessee of the agricultural property, with a total area not exceeding 300 ha. The individual farmer must have agricultural qualifications, be a resident of a certain municipality, where at least one of his agricultural plots is located, and personally manage the farm for at least 5 years. The potential buyer of plots larger than 1 ha is obliged to run the farm, which includes the plots of land to be purchased, for at least 5 years. During this time, the purchased land may not be sold or transferred in any other form to other persons.

The sale of state lands can take place only if, as a result of this sale, the total surface of the lands owned by the buyer does not exceed 300 ha. However, only state-owned land smaller than 2 ha can be sold, while state-owned land larger than 2 ha can only be rented. Generally, the land owned by the state is sold through a state agency, the National Support Center for Agriculture.

There are several limitations for legal entities to buy agricultural land. In fact, legal entities can purchase agricultural land only with the consent of the director general of the National Support Center for Agriculture.

Preemption rights are guaranteed to tenants who are individual farmers who manage farms whose total area does not exceed 300 ha as well as to the state agency.

The right of pre-emption does not apply if the land is sold to a relative or family member (e.g. descendants, ascendants, siblings, husband, adopted child or stepchild). It should be noted that the rotation of land between family members represents a significant percentage of transactions in Poland. The pre-emption right does not apply if the sale of agricultural property takes place between units belonging to the same church or religious association. Also, the right of pre-emption does not apply when the sale of agricultural land takes place between members belonging to the same agricultural production cooperative.

The purpose of the regulations introduced in 2003 and 2016 was to prevent speculative trade and excessive concentration of agricultural land. In principle, the regulations favor family farms that exploit the land they own and include some restrictions on the purchase of agricultural land by legal entities. In fact, it is almost impossible for legal entities to buy land and especially larger plots.

Also, some farms run by individuals who want to expand their farms perceive the regulations as unfavorable. Large farms run by individuals are sometimes divided between family members into smaller farms to bypass the 300 ha threshold.

There are opinions that the regulations on the right of pre-emption of tenants and the National Support Center for Agriculture were introduced primarily to create barriers to the purchase of

agricultural real estate by foreigners, and not to protect the country's agricultural system, as presented in the preamble of the Law of April 11, 2003.

Even if, there are countries, that the Report[28] claims, have more flexible regulations regarding the legal acquisition of land, it can be seen that many Member States are taking legal measures to protect and/or control the transfer of agricultural land.

For example, in **France**, any land sale transaction must be approved by SAFER (*Sociétés d'Aménagement Foncier et d'Etablissement Rural*). SAFER's role is to regulate the transfer of ownership of agricultural land, in order to avoid speculation, favoring the maintaining of agricultural land in the property of farmers, especially young farmers, supporting land consolidation and promoting environmental protection. SAFER can intervene and block a transaction before it is completed. Although there is no maximum selling price established by law, SAFER can intervene and block the sale if it considers that the price requested by the seller is too high depending on the region, type of land. SAFER can also block a transaction when the sale of the land involves the dismantling of a farm.

German law requires that every sale of land be registered and approved by the local authorities. Approval of a sale can be refused only if: the acquisition would lead to an "unhealthy distribution of land", the transaction leads to uneconomic fragmentation of plots, or there is an imbalance between the sale price and the value of the land. Except for the requirement that a plot of land not become less than 1 ha, the reasons for not approving a sale of agricultural land are quite vague. For example, an unhealthy distribution of land is defined by the situation in which the sale of land would contradict measures to improve the agricultural structure.

The German Constitutional Court has interpreted that there is such a situation when the land is bought by a non-farmer, while a farmer in need of land would be willing to purchase that land and use a right of pre-emption.

There are pre-emption rights for farmers, but the procedure is quite complex, as farmers do not have direct pre-emption rights, but have to exercise their right of pre-emption through public organizations. If a farmer is willing and authorized to use a right of pre-emption, a regional land management organization must first purchase and register the land. The farmer can buy the land from that regional land management organization at a price that also includes registration fees and land sales tax paid by the organization which is usually about 5%. Thus, the use of a right of pre-emption means that farmers are willing to pay twice the sales tax of the land and registration fees in addition to the initial price.

Summarizing the protectionist measures adopted by the Member States, we can see:

- regulations on the maximum selling price or a maximum traded area,
- transactions must be approved by local authorities (for example, in Germany and Austria). Lack of approval may exist for sales to non-farmers, if the price is unreasonably high, if the sale promotes the formation or expansion of large estates, if the land is not used for the intended purposes or to avoid fragmentation.
- preemption rights that are granted to farmers, neighbors, family members, co-owners. The right of pre-emption in favor of farmers is considered a proportionate restriction on the free movement of capital and less restrictive than a ban on sales to non-farmers.

4. Legal circulation of agricultural lands - regulation in Romanian law

By Law no. 17/2014 regarding some measures to regulate the sale of agricultural lands located outside the built-up area and amending Law no. 268/2001 on the privatization of companies holding public and private land owned by the state for agricultural purposes and the establishment of the State Domains Agency, measures were taken to regulate the sale of agricultural arable land so that the established rights and procedure lead to: ensuring food security, protecting national interests and exploiting natural resources, in line with the national interest, ensuring measures to regulate the sale

[28] "Agricultural land market regulations in EU Member States" of 27.04.2021 drawn up at the request of the European Commission.

of agricultural land outside the built-up area, merging excessively derelict agricultural land in order to increase the size of agricultural farms and establishing economically viable farms.

If the provisions of Law no. 17/2014 did not create controversies in the business environment or among legal professionals, the amendments brought by Law no. 175/2020 created disputes, regarding the issue of the constitutionality of the newly introduced legal texts, of their compatibility with the EU regulations, respectively, of the application of the new provisions.

The law establishes the procedure of selling the lands respecting the legal and formal conditions provided by Law no. 287/2009 of the Civil Code, republished, with subsequent amendments, and the right of preemption, at a price and under equal conditions, in order of rank.

With regard to the exercise of the right of preemption, the categories of preemptors have been widened and the conditions to be met for them have been tightened, as follows:

• rank I: co-owners, first degree relatives, spouses, relatives and relatives up to and including the third degree;

• rank II: owners of agricultural investments for the cultivation of trees, vines, hops, exclusively private irrigation and/or tenants. If on the lands subject to sale there are agricultural investments for the cultivation of trees, vines, hops and for irrigation, the owners of these investments have priority in the purchase of these lands;

• rank III: the owners and/or lessees of the agricultural lands adjacent to the land subject to sale;

• rank IV: young farmers;

• rank V: research and development units in the fields of agriculture, forestry and food industry, as well as agricultural educational institutions

• rank VI: natural persons with domicile/residence located in the administrative-territorial units where the land is located or in the neighboring administrative-territorial units;

• rank VII: the Romanian state, through the State Domains Agency.

The lessee who wishes to buy the leased agricultural land located outside the built-up area must have this quality under a valid lease contract concluded and registered according to the legal provisions at least one year before the date of posting the sale offer at the town hall and meet the following conditions: a) in the case of lessees natural persons, to prove that the domicile/residence is located on the national territory for a period of 5 years prior to the registration of the offer for sale of agricultural lands located outside the built-up area; b) in the case of lessees legal entities, also the shareholders, natural persons, to prove that the domicile/residence is located on the national territory for a period of 5 years prior to the registration of the offer for sale of agricultural lands located outside the built-up area; c) in the case of lessees legal entities, with shareholders another legal entity, the shareholders holding control of the company to prove that the registered office/secondary is located on the national territory for a period of 5 years prior to the registration of the offer for sale of agricultural lands located outside the city.

In case of exercising the right of preemption by young farmers, the priority for the purchase of land subject to sale, has the young farmer who carries out activities in the livestock sector, respecting the condition of domicile/residence established in the national territory for a period of at least one year before registering the offer for the sale of agricultural land located outside the built-up area.

Also, the law establishes a right of preference for acquisition of agricultural land located outside the built-up area, in favor of specialized buyers, natural and legal persons who cumulatively meet certain conditions.

Conditions for **natural persons** interested in acquiring agricultural land:

If the holders of the preemption right do not express their intention to buy the land within 45 working days from the publication of the offer, the alienation by sale of the agricultural lands located outside the built-up area can be done to the natural persons observing the following cumulative conditions:

• to have the domicile/residence located on the national territory for a period of at least 5 years prior to the registration of the sale offer;

• to carry out agricultural activities on the national territory for a period of at least 5 years, prior to the registration of this offer;

• to be registered by the Romanian tax authorities at least 5 years prior to the registration of the offer for sale of agricultural lands located outside the built-up area.

Conditions for **legal entities** interested in acquiring agricultural land:

If the holders of the preemption right do not express their intention to buy the land within 45 working days from the publication of the offer, the alienation by sale of the agricultural lands located outside the built-up area can be done to the legal persons observing the following cumulative conditions:

• to have the registered office and/or the secondary office located on the national territory for a period of at least 5 years prior to the registration of the sale offer;

• to carry out agricultural activities on the national territory for a period of at least 5 years prior to the registration of the offer for sale of agricultural lands located outside the built-up area;

• to present the documents showing that, from the total income of the last 5 fiscal years, at least 75% represents income from agricultural activities, as provided by Law no. 227/2015 on the Fiscal Code, with subsequent amendments and completions, classified according to the CANE (Classification of Activities in the National Economy) code by order of the Minister of Agriculture and Rural Development;

• the associate/shareholder who has control of the company must have the domicile located on the national territory for a period of at least 5 years prior to the registration of the offer for sale of agricultural lands located outside the built-up area;

• if in the structure of legal entities, the associates/shareholders who control the company are other legal entities, the associates/shareholders who control the company must prove that the domicile is located on the national territory for a period of at least 5 years prior to the registration of the sale offer of agricultural lands located outside the built-up area.

In fact, the persons who meet the above conditions represent an eighth category of preemptors, who have the possibility to exercise their right within 30 days from the expiration of the term for completing the preemption procedure.

If none of the potential buyers meets the conditions to be able to buy the agricultural land located outside the built-up area or does not submit to the town hall where the land subject to sale is located a purchase request and documents proving the fulfillment of these conditions, its alienation by sale can be made to any natural or legal person, under the conditions of Law no. 17/2014.

Failure to comply with the conditions provided above will result in the absolute nullity of the contract thus concluded, being provided very high fines, ranging from approximately 20,000 to 40,000 euros.

Beyond the restrictions imposed on the selection of the buyer, the normative act also provides a "penalty" for reselling the land less than eight years after the purchase, respectively a tax of 80% on profit (the difference between the sale price and the initial purchase price). The same tax rate applies in the case of direct or indirect alienation, before the age of eight years from the purchase, of the control package of companies that own agricultural land located outside the built-up area and which represent more than 25% of their assets. The law also stipulates that the profit tax due as a result of the sale be adjusted in such a way as not to lead to a double taxation of the gain.

In the period preceding the law enactment but also after that, there were numerous controversies regarding the compliance of the new regulations with the UE law.

The mere examination of the conditions which the lessee must meet in order to be able to exercise his right of pre-emption or the conditions which natural or legal persons, other than preemptors, must satisfy in order to benefit from a priority right to purchase, reflects a severe restriction of the access of potential buyers to the acquisition of agricultural land.

From this perspective, an analysis of the compatibility of these regulations with EU legislation is required. As stated above, the conditions which national measures likely to impede the exercise of fundamental freedoms, must satisfy so as not to infringe Union law are: 1. not be discriminatory, 2. be justified by an overriding public interest, 3. be appropriate to achieve the objective pursued, 4. not go beyond what is necessary to achieve that objective, and 5. cannot be replaced by alternatives less restrictive (principle of proportionality).

Following the legislative process prior to Law no. 175/2020 enactment we can give certain answers regarding the compliance of these provisions with the UE law.

Thus, the Explanatory Memorandum[29] of the draft law mentions the objectives pursued by the initiators of the law, respectively: stimulating young farmers, providing support to the agricultural producer, who has agricultural land in exploitation, purchasing agricultural land in order to expand agricultural land exploited for the purpose of establishing, expanding and making profitable farms, consolidating agricultural holdings by ensuring real chances for farmers to have access to the purchase of land proposed for sale, on equal terms, ensuring a sustainable development of agriculture in general. All these objectives seem to justify more the establishment of the categories and ranks of preemptors and less the conditions imposed to the other natural or legal persons interested in the acquisition of agricultural lands out of town.

The objectives pursued by the initiators of the law do not show how they would contribute to achieving these objectives, conditions such as:

- *the rule of domicile/headquarters*: the condition that the natural persons, associates/ shareholders of the legal persons have a domicile on the national territory and the legal persons have a social or secondary headquarters on the national territory. The domicile rule is more restrictive in the conditions in which it presupposes the possession of the domicile/headquarters for a period of at least 5 years prior to the registration of the sale offer.

- *the obligation to exploit the land directly*: the condition for potential buyers to carry out agricultural activities on the national territory for a period of at least 5 years, prior to the registration of this offer

- *the obligation to pay taxes to the Romanian state* for at least 5 years before the registration of the sale offer

- *the obligation to carry out a predominantly agricultural activity*: from the total income of the last 5 fiscal years, at least 75% to represent income from agricultural activities.

In reality, the analysis of these criteria reflects two main conclusions: 1. they are deeply discriminatory, both for the citizens of other EU states and for the Romanian citizens who reside in other EU states; 2. they do not lead to the fulfillment of the objectives invoked by the national legislator.

Regarding the discriminatory nature of these conditions, it can be observed from several perspectives. It should be emphasized that these conditions, the requirement of residence in Romania as well as the obligation of direct land exploitation or fiscal registration, are NOT applicable to pre-emptors, but only to potential buyers who would buy agricultural land if no preemptor has exercised the right to purchase.

Also, the rule of domicile/residence/headquarters on the national territory seems likely to privilege the nationals and would lead, consequently, to violations of the commitments of the Romanian state towards the Union and, therefore, of art. 148 of the Constitution, which regulates the implications of Romania's entry into the European Union, as a result of accession.

Article 49 of the Treaty on the Functioning of the European Union provides that "… restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited". Freedom of establishment cannot be interpreted as a condition to benefit of other rights and freedoms due to European citizens. The conditioning of the acquisition of agricultural land by the establishment of the domicile in the country represents in fact a restriction of the freedom to establish the domicile for economic reasons.

The CJEU has repeatedly noted that national regulations providing differences based on residence criteria, which deny non-residents certain benefits, which are granted to people living in the country, are discriminatory. However, in this case, discrimination may also exist in relation to Romanian citizens who have established their domicile in another state of the European Union. A Romanian citizen residing in another EU state who would like to return to the country and purchase agricultural land would not be included in this category of preference.

[29] http://www.cdep.ro/proiecte/2018/300/30/6/em430.pdf, consulted on 1.10.2021.

Regarding the obligation of direct land exploitation, this would be justified only from the perspective of a specialization in the agricultural field of the potential buyer, specialization necessary for a future exploitation of the agricultural land according to its destination. However, there is no justification for the condition that this specialization in the agricultural field be carried out *on the national territory*.

Why, for example, a Romanian citizen with the domicile in Romania for more than 5 years, working in agriculture in another Member State and wishing to return to the country and develop a business in agriculture cannot benefit the right of preference for land acquisition in Romania? Why a citizen from another Member State residing in Romania for more than 5 years, working in agriculture in another Member State, can't benefit the right of preference to purchase land in Romania? Obviously, the regulation is discriminatory from this perspective as well.

Regarding the condition of the 5 years prior to the registration offer, whether we are talking about establishing the domicile or the period of carrying out agricultural activities or fiscal registration, discrimination occurs between those who met these conditions on the date of entry into force of the law and those who didn't meet them then, and for at least 5 years they will not be able to meet them.

In other words, for all agricultural land transactions for the next 5 years, priority will be given to those who cumulatively met the conditions on the date of entry into force of the law or those who met all conditions, except the 5-year condition, and this condition will be met during this period.

However, for those who decide to purchase agricultural land after the entry into force of the law and who do not meet the cumulative conditions, they need at least 5 years to be able to benefit from the right of pre-emption.

However, it seems incomprehensible to adopt such regulations when the CJEU has previously ruled differently on similar cases. Thus, in Case C-370/05 Festersen[30], the CJEU ruled unequivocally that restrictions based on residence criteria could not be considered, in any way, justified and proportionate in order to restrict the free movement of agricultural land. The main objective invoked by the Danish and Norwegian Governments for imposing the residence criterion was to maintain the use of agricultural land under direct exploitation and for agricultural areas to be inhabited and exploited mainly by their owners. Other objectives indicated by the government were to maintain, for the purpose of land planning, a permanent population in rural areas and to promote the rational use of available land to avoid land pressure.

The CJEU's response in this case was unequivocal: *29. With regard to the condition of proportionality, it is necessary to verify whether the obligation of the acquirer to establish permanent residence on the acquired agricultural land constitutes an appropriate and necessary measure to attain the objectives set out in paragraph 27 of this law, as stated by the Danish and Norwegian Governments. .....*

40.Even assuming that that obligation is recognized as a necessary measure to achieve the objective pursued, on the ground that it would in itself produce positive effects on the land market (given the constraints that any change of residence imply, which have the consequence of discouraging speculative operations in the land field), it should be emphasized that, by associating this obligation with a condition relating to the maintenance of residence for a period of at least eight years, such an additional condition clearly goes beyond what might be considered necessary, especially as it implies a lasting suspension of the exercise of the fundamental freedom to choose one's residence.

It should be noted, however, that by Decision no. 586/2020, the Constitutional Court of Romania, resolving the objection of unconstitutionality of the Law for amending and supplementing Law no. 17/2014, analyzed these criticisms also from the perspective of European law.

The majority of constitutional judges considered that the debated texts of the law "do not regulate any restriction or exclusion of natural or legal persons from the Member States from the purchase of agricultural land, but impose certain conditions for achieving the purpose of the law,

[30] https://curia.europa.eu/juris/liste.jsf?language=en&num=C-370/05, consulted on 1.10.2021.

namely the development of land ownership. All these conditions are common to natural and legal persons in the Member States of the European Union, and there is no difference in legal treatment between them as regards the right to purchase agricultural land outside the city. The criticized texts do not forbid or exclude the right of natural or legal persons from outside the national territory to buy such lands, with the fulfillment of the conditions provided by law, equally valid conditions regarding the Romanian natural or legal persons. Therefore, the above demonstrates that the legislator did not operate with the criterion of citizenship, but with a set of objective criteria aiming the buyer's ability to maintain the category of use of agricultural land outside the city and to exploit it effectively."

It is true that the legislator did not operate on the basis of citizenship/nationality, but operated on the basis of domicile/residence/headquarters. How is this an objective criterion aiming for buyer's ability to maintain the category of use of extra-urban agricultural land and to work it effectively?

For example, a multinational company with activities in the field of agriculture for decades, which has economic, financial, technological, agricultural research capabilities does not benefit from this priority right to purchase because the partner/shareholder in control of the company is not domiciled on the national territory for a period of at least 5 years prior to the registration of the offer for sale of agricultural lands located outside the built-up area.

It is also worth noting the separate opinion of the other three constitutional judges who motivate as the rule of domicile/residence/headquarters, even if it applies to all EU citizens, regardless of nationality, in reality, this rule favors nationals. Moreover, the law stipulates that, in case of non-exercise of the right of pre-emption, if none of the potential buyers, within the legal term, meets the conditions to be able to buy agricultural land located outside the built-up area, its alienation by sale can be made to any natural or legal person. The separate opinion states that "Thus, natural or legal persons who do not meet the conditions of domicile/residence in the national territory and who, in principle, are foreign, including those from the Member States of the European Union, will be able to buy agricultural land only in the end, which indicates the existence of two categories of persons who can potentially, but in a certain order, buy such land and which are differentiated exclusively by the connection with the national territory. Thus, one can notice that, from the perspective of the free movement of capital between Member States, the criticized text is contrary to the Accession Treaty, which is a violation of Article 148 paragraphs (2) and (4) of the Constitution."

Even if the Decision of the Constitutional Court ruled on these regulations, in our opinion the constitutional judge did not make a true analysis of the proportionality of these restrictions, to what extent these restrictions lead to the achievement of the claimed objectives, and if there are no alternative measures that could pursue that public interest in a less restrictive way for the free movement of capital or the freedom of establishment

It is obvious that the national legislator tries through such regulations to protect the national territory and its own citizens, especially since the financial resources held by potential foreign buyers are clearly superior to those held by its own citizens. It is natural for politicians to take such legislative steps.

5. Conclusions

Evaluating the recently introduced legislative measures, we believe that the national legislator did not sufficiently motivate the need to impose such conditions, some of which are not appropriate to achieve the objectives pursued, are excessive and could be replaced by less restrictive alternatives. It should be noted that European countries, with restrictions on the acquisition of agricultural land much less or not at all, managed to achieve all the objectives that the Romanian legislator also claimed.

The above-mentioned measures have been included in recent amendments to legislation in Hungary, Slovakia, Latvia, Lithuania, Bulgaria and Romania and coincided with the end of the transitional periods during which the Accession Treaties allowed EU investors to be restricted from buying agricultural land in these countries.

In this context, the Commission has expressed concern that some of the provisions of the new

laws violate fundamental EU principles, such as the free movement of capital and non-discrimination on grounds of nationality. In the Commission's view, the new laws discriminate, through their practical effects, citizens of other EU countries or impose other disproportionate restrictions that could adversely affect investment.

Concrete disputes will certainly arise and interested persons will ask the CJEU to rule on the extent to which such regulations violate EU principles and, consequently, to remove them from application, if it is concluded that they are contrary to union law.

The assessment of the proportionality and non-discriminatory nature of these regulations requires a good knowledge of the practical effects that these normative acts will have. For this reason, it is appropriate that in the next period legal professionals take notice of all the difficulties that will appear in the process of applying the law as well as the practical manner in which its application is likely to lead to the achievement of the objectives assumed by the legislator. Certainly, sooner or later the CJEU will be called upon to rule on the compatibility of these regulations with Union law and the research undertaken during this period will be used for the correct assessment of the impact of these new laws.

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