Acquisition of Agricultural Lands

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Acquisition of Agricultural Lands

Cross-border Issues from a Central European Perspective

Edited by
János Ede SZILÁGYI

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Introduction to Land Regulation in Central European Countries

János Ede SZILÁGYI

This book examines the rules of acquirement of agricultural and/or forest lands in the Central European region of the Czech Republic,[1] Hungary,[2] Poland,[3] and Slovakia[4] (together the Visegrád Countries or V4 countries[5]), and Croatia,[6] Romania,[7] Serbia,[8] and Slovenia,[9] with a special focus on their cross-border aspects. In addition to each country's national rules, this book also covers some of the specificities of *investment law*[10] in the EU countries of the region,[11] some of the *human rights* issues specific to the region,[12] and the *European Union's* legislation and jurisprudence concerning land acquirement.[13] It is important to note that at the end of the period covered by this book (i.e., February 2022), Serbia was not yet a member of the European Union, and Croatia was still subject to certain transitional rules and exceptions to the main rules of EU

1 On current issues of Czech legislation, see, in particular, Vomáčka and Tkáčiková, 2022, pp. 157–171.
2 On current issues of Hungarian legislation, see, in particular, Hornyák, 2021, pp. 86–99.; Csák, 2018, pp. 5–32.; Hornyák, 2018, pp. 107–131.; Olajos, 2018, pp. 157–189.; Olajos and Juhász, 2018, pp. 164–193.; Udvarhelyi, 2018, pp. 294–320.; Olajos, 2017, pp. 91–103.
3 On current issues of Polish legislation, see, in particular, Blajer, 2022a, pp. 7–26.; Blajer, 2022b, pp. 9–39.; Zombory, 2021, pp. 174–190.; Kubaj, 2020, pp. 118–132.; Wojciechowski, 2020, pp. 25–51.
4 On current issues of Slovak legislation, see, in particular, Szinek Csütörtöki, 2022, pp. 126–143.; Szinek Csütörtöki, 2021, pp. 160–177.
5 See more on these in Csirszki, Szinek Csütörtöki and Zombory, 2021, pp. 29–52.
6 On current issues of Croatian legislation, see, in particular, Staničić, 2022, pp. 112–125.; Josipović, 2021, pp. 100–122.
7 On current issues of Romanian legislation, see, in particular, Sztranyiczki, 2022, pp. 144–156.; Veress, 2021, pp. 155–173.
8 On current issues of Serbian legislation, see, in particular, Dudás, 2021, pp. 59–73.
9 On current issues of Slovenian legislation, see, in particular, Avsec, 2021, pp. 24–39.; Avsec, 2020, pp. 9–36.
10 On the specificities of investment law, see Szilágyi and Andréka, 2020, pp. 92–105.; Szilágyi, 2018b, pp. 194–222.
11 For some of the region's land transfer features, see Hartvigsen and Gorgan, 2020, pp. 85–103.
12 On the human rights aspects, see Marinkás, 2018, pp. 99–134.
13 On the EU law aspects, see Korom, 2021, pp. 101–125.; Szilágyi, 2017b, pp. 148–164.

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law in relation to land acquirements. Two of the countries analyzed in this book were in the process of introducing new national land laws, and the authors of the chapter on these two countries (namely Slovenia and Hungary) have therefore sought to include a chapter on the new legislation that will enter into force after February 2022.

In addition to agricultural land, the book also touches on—but does not go into detail about—the rules for *forest land*. In some respects, it also covers—albeit not exhaustively—the special acquirement rules for *state-owned* agricultural or forest land. In addition to the rules on land, the book also deals with the rules on the acquisition of agricultural holdings, where these exist—a group of assets (such as land, buildings, farm equipment, and rights) operated for the same agricultural purpose and regulated or treated as a single legal category. In the book, the category of *acquirement* has been dealt with in a rather broad way.[14]

The concept of acquirement includes (a) the different ways of acquisition of ownership, (b) the acquisition of limited rights *in rem* (e.g., usufruct), (c) the acquisition of the use of land (e.g., based on a lease), (d) indirect acquirement (i.e., the acquisition of shares in legal entities which already own land or may acquire land), (e) intestate succession and testamentary disposition, and (f) other cases of farm-transfers *inter vivos* or in the event of death.

A significant number of Central European countries attach great importance to their agricultural and (in many cases) forestry land acquirement rules, including cross-border land acquirement rules. The sensitivity of these countries, in this respect, is well illustrated by the fact that when they were negotiating the conditions for EU membership with the European Union (or its predecessor institutions), the rules on the acquisition of agricultural land were a major topic of negotiation and conclusion of the agreements. In other words, we hold the view that the subject of our book reflects a real Central European specificity—a characteristic of the legislative policy and legal culture of the countries of this region. All this is true even if there are significant differences between the national land laws of the various countries, and we can find examples of both more liberal and more restrictive legislation. That is, it seems that in a significant number of these countries, there exists a kind of sovereignty or food sovereignty[15] approach (i.e., to strengthen their freedom of self-determination over and through their land). We see this approach as having been reinforced both by the financial crisis of 2008 and the resulting economic crisis, by the uncertainties arising from the supply chains that broke down during the COVID-19 epidemic, and by the war in Ukraine, which is still ongoing at the time of writing, and the food shortages that it threatens. Below we highlight some of the aspects that could provide an important starting point for national land laws.

14 See also Szilágyi, 2017a, pp. 229–235.

15 On the definition of food sovereignty, see Szilágyi, Hojnyák and Jakab, 2021, 75–79.; Szilágyi, Raisz and Kocsis, 2017, p. 160. See also Raisz, 2022, m.a.; Csirszki, 2022.

(a) In order to underline the importance of the topic of our book, we believe that it is worth mentioning, in the introduction, certain non-binding soft law[16] documents related to land acquirement that are linked to the United Nations or certain institutions of the European Union. It is stressed that these do not impose any regulatory obligations on individual countries but may nevertheless be of interest—for example, because these institutions have not previously considered it necessary to speak on the subject in this way. In the regulatory field of agricultural land transfer, several legal documents have been issued in quick succession by EU institutions, including an opinion by the European Economic and Social Committee (EESC),[17] a resolution by the European Parliament (EP),[18] and an interpretative communication by the European Commission (EU Commission).[19] These EU legal documents also include soft law documents of certain international organizations, among which a voluntary guideline of the Food and Agriculture Organization of the United Nations (FAO) entitled "Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security" (hereinafter: VGGT) has been given particular attention.[20] Among these documents,[21] the interpretative communication of the European Commission is of great importance as it has provided an important starting point for the comparative perspective of national land laws in this book. We believe that all these documents underline the relevance and importance of this topic.

(b) In our opinion, national land laws in certain countries of the Central European region are significantly influenced by the way agricultural land prices are developed. Considering the land prices in some EU member states, it can be observed that such prices in the member states of Central Europe that joined in 2004 and afterward (hereinafter: the new member states) are significantly lower compared to the land prices in the countries that joined earlier (see Table 1 for the evolution of agricultural land prices in certain EU countries). This may make the land market in the new member states a good investment target for perfectly understandable reasons as producers in the EU member states are otherwise competing under similar conditions in many respects, such as the volume of EU agricultural subsidies and the homogeneity of the EU agricultural market. Of course, many other factors (such as the existing land tenure structure in a given country) can also influence agricultural land prices.

16 For the interpretation of soft law documents in the context of national land laws, see Szilágyi, 2018a, pp. 189–211.
17 European Economic and Social Committee, 2015
18 European Parliament, 2017
19 European Commission, 2017. One of the initiatives of this interpretative communication was the proposal to amend Directive 2015/849/EU.
20 Food and Agriculture Organization of the United Nations, 2012 (hereinafter: VGGT).
21 For an analysis of these, see Szilágyi, 2018a.

Table 1 Land prices in certain member states EU27, 2011–2020 (e = estimated), €/ha; source: Eurostat, 21.12.2021. https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=apri_lprc&lang=en

	State	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
New MSs in or since 2004	Bulgaria	2 112	2 843	3 175	3 620	3 891	4 131	4 622	5 011	5 382	5 328
	Czechia	1 836	3 264	3 662	4 282	4 775	5 463	6 448	7 600	8 561	9 477
	Estonia	1 062	1 265	1 865	2 426	2 567	2 735	2 890	3 174	3 461	3 772
	Croatia	:	:	:	:	2 726	2 835	3 005	3 282	3 395	3 440
	Latvia	2 336	4 475	4 980	2 552	2 654	2 917	2 975	3 856	3 922	4 182
	Lithuania	1 212	1 527	2 009	2 330	3 089	3 516	3 571	3 890	3 959	4 127
	Hungary	2 089	2 380	2 709	3 042	3 356	4 182	4 368	4 662	4 862	4 893
	Poland	4 855	6 080	6 275	7 723	9 220	9 083	9 699	10 414	10 991	10 711
	Romania	1 366	1 666	1 653	2 423	2 039	1 958	2 085	4 914	5 339	7 163
	Slovenia	:	:	15 545	16 009	16 071	17 136	16 876	18 460	18 752	21 451
	Slovakia	11 375	9 650	5 575	11 442	24 175	28 217	3 009	3 432	3 789	3 984
Old MSs before 2004	Belgium			36,591(e)	38,496(e)						
	Denmark	17 476	17 562	15 708	17 209	18 752	17 584	17 328	17 724	17 580	17 491
	Ireland	:	:	26 366	23 449	23 594	18 141	19 903	27 457	28 068	25 724
	Greece	15 393	14 968	13 907	13 276	12 633	12 272	12 264	12 387	12 604	12 599
	Spain	:	12 005	11 910	12 192	12 574	12 522	12 827	13 023	12 926	12 901
	France	5 390	5 440	5 770	5 940	6 000	6 070	6 030	6 020	6 000	6 080
	Italy	34 257	39 342	32 532	39 247	40 153	33 193	31 731	30 569	34 156	:
	Luxembourg	23 648	24 230	26 621	27 438	27 738	26 030	35 590	35 110	37 300	46 500
	Netherlands	50 801	52 716	54 134	56 944	61 400	62 972	68 197	70 320	69 632	:
	Finland	8 210	8 047	8 461	8 090	8 138	8 326	8 718	8 380	8 686	8 524
	Sweden	6 811	7 043	6 797	7 408	7 751	7 921	8 708	8 842	9 056	10 100
	United Kingdom	18 885	21 905	23 283	26 634	30 292	25 730	23 450	23 412		

Another important aspect to consider when assessing the land market situation is that demand for agricultural land has increased significantly worldwide. The main driving force behind this is the dynamic growth in the human population and the corresponding increase in demand for products in which land is used as a means of production (such as food, fodder, and energy). Moreover, the global financial and economic crisis of 2008 has contributed to investors having come to regard land markets in countries such as the EU member states as a "safe haven."[22] The increase in demand, driven by population growth in our globalizing world, has significantly contributed to the acceleration in cross-border land acquirements.[23] One manifestation of this process, to the detriment of the countries of investment destination, is the phenomenon known in the literature as "*land grabbing*,"[24] whereby crops are produced on the land of the destination country using the ecosystem services, land, or water available there and are often not consumed by the population of the destination country but by that of a distant location. In other words, the natural resources of some of the world's peoples are used by people elsewhere in the world, sometimes causing serious and irreversible environmental problems in the country of investment.[25]

(c) In our view, the increase in environmental problems may also justify the special attention given by the countries of the region to their national land laws. Agriculture is a major user of natural resources and environmental services. In the context of agricultural and forest land, we would like to draw attention to the quality, decline, and degradation of this land. At the EU level, including in the countries of the Central European region, the quantitative and qualitative situation of land is rather depressing as "unsustainable land use is consuming [a] fertile soils and [b] soil degradation continues."[26]

In addition, "the degradation, fragmentation and unsustainable use of land in the Union is jeopardising the provision of several key ecosystem services… Every year more than 1 000 km^2 of land are taken."[27] In this context, the EU has set an important objective for the quantitative protection of land "to making progress towards the objective of 'no net land take', by 2050."[28] On soil degradation, it is worth noting that "in Europe, the soil is being lost 17 times faster than it is being renewed… On average, each year 1.6 tons of soil is formed and 8 tons of soil is lost per hectare."[29] We believe it

22 Petetin and Taylor, 2015, p. 13.
23 On the definition and the world and EU aspects of cross-border land acquisitions, see Szilágyi, 2017a, pp. 229–250.
24 See Häberli and Smith, 2014, pp. 189–222.; de Schutter, 2011, pp. 503–559.; Gorman, 2014, pp. 199–235.; Cotula et al., 2009; Deininger et al., 2011; Zagema, 2011; Hall and Lobina, 2012.
25 In essence, this will make it possible for some countries to consume beyond their available biological potential; for an easy way to see the so-called environmental footprint of this process, see (10.12.2016.): http://www.footprintnetwork.org/ecological_footprint_nations/ecological_per_capita.html.
26 European Commission, 2013, point 6.
27 European Commission, 2013, point 23.
28 European Commission, 2013, point 23.
29 National Society of Conservationists, 2012, p. 20.

is important to add that it takes an average of 500 years for 2 cm of humus to form[30] and that land use and land protection issues not only affect agricultural productivity but are closely linked to other elements, processes, and problems in the environment.[31]

In light of the above situation and trends, it can be stated that while the demand for agricultural and forest land and its productive potential is growing worldwide, this demand must be met from increasingly scarce and diminishing natural resources. In other words, land scarcity and soil degradation further justify a legislative approach to regulating the transfer of agricultural and forest land that is cautious and protective of both quantity and quality.

Beyond this introduction, our book is essentially divided into two major sections. The first part deals with the European Union's investment agreements, including land acquisitions, and the position and approach of the individual member states in the Central European region. In the same section, human rights issues related to land acquisitions are addressed, with a special focus on the Council of Europe's system of legal protection and its regional characteristics. This section also covers the implications of European Union law for national land law. The second part of the book analyses the national land laws of eight countries, including their constitutional background and the specificities of the European Union.

30 European Commission, 2010, p. 2.

31 We would like to highlight three issues: (a) *Living environment*: one hectare of land can sustainably support an average of 5 tons of animals. (b) *Water*: in addition to its free contribution to the purification of our water (and air, for that matter), healthy soil plays a critical role in storing water (on average, 3,750 tons of water are stored per hectare of well-functioning soil); this is an important capability in light of the fact that one of the environmental problems of our time is the serious difficulties and damage (e.g. in the form of flash floods) caused by the increasingly accelerating hydrological cycle of human activity. In other words, if the soil is degraded, more water is released into the atmosphere, and the hydrological cycle accelerates even more. (c) *Climate change*: soils store 20% of human-related carbon dioxide emissions. This huge capacity is illustrated by the fact that if just 0.1% of the carbon dioxide stored in European soils were released into the atmosphere, the environmental impact would be the same as if the current European car fleet doubled (i.e., 100 million more cars on the roads). Of course, not all land uses are equally efficient at storing carbon dioxide: Europe's grasslands and forests absorb 100 million tons of carbon per year, while arable land emits between 10 and 40 million tons per year, which is why it is so important to maintain and increase the level of the former. European Commission, 2010, p. 2–3.

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PART I

| Chapter 1 |

Human Rights Aspects of the Acquisition of Agricultural Lands With Special Regard to the ECtHR Practice Concerning the So-Called "Visegrád Countries", Romania, Slovenia, Croatia, and Serbia

György MARINKÁS

ABSTRACT

The aim of the current study is to examine how the national legal rules and judicial practice regarding the acquisition and holding of agricultural land are, in the case law of the European Court of Human Rights, linked to the right to property and the right to fair trial, as granted by Article 1 of the First Protocol to the European Convention on Human Rights and Article 6 (1) of the Convention. The study is focused on the land-related issues of the so-called "Visegrád Countries"—Czech Republic, Hungary, Poland and Slovakia—and some other selected neighboring countries, namely Romania, Slovenia, Croatia, and Serbia, all of which are member states of the Council of Europe. The author identified two main categories of legal issues, which are relevant in the selected countries or constitute a distinctive feature of these countries. The category of compensation-related cases can be divided into three main subcategories: cases where the compensation system established by the state after the change of regime displayed systematic shortcomings; cases where the earlier proprietors' or their heirs' interests clashed with those of third parties who acquired the property in good faith; and the so-called Slovakian "Gardener cases," as the author named them, which display similarities with the second subcategory. The other main category is the issue of agricultural land acquisition by foreign natural or legal persons. However, the ECtHR's case law is not that elaborated in this question as the case law of the Court of Justice of the European Union, since, contrary to EU law—which as a rule obliges member states to provide the free disposal of agriculture land—Article 1 of Protocol No. 1 does not create a right to acquire property. However, a national legislation that, alone among the CoE member states, implemented land reform programs with some blanket restrictions on the sale of agricultural land is incompatible with the provisions of Article 1 of Protocol No. 1.

KEYWORDS

agricultural land, right to property, compensation, legal entity, foreigners

Marinkás, Gy. (2022) 'Human Rights Aspects of the Acquisition of Agricultural Lands With Special Regard to the ECtHR Practice Concerning the So-Called "Visegrád Countries", Romania, Slovenia, Croatia, and Serbia' in Szilágyi, J. E. (ed.) *Acquisition of Agricultural Lands: Cross-border Issues from a Central European Perspective.* Miskolc–Budapest: Central European Academic Publishing. pp. 25–53. https://doi.org/10.54171/2022.jesz.aoalcbicec_2

Introduction

The aim of the current study is to examine how the national legal rules and judicial practice regarding the acquisition and holding of agricultural land are, in the case law of the European Court of Human Rights (hereinafter: ECtHR), linked to two human rights, namely the *right to property* and the *right to fair trial,* as granted by Article 1 of the *First Protocol* (hereinafter: Article 1 of Protocol No. 1) to the European Convention on Human Rights (hereinafter: ECHR) and Article 6 (1) of the ECHR. The study is focused on the land-related issues of the so-called "Visegrád Countries"—Czech Republic, Hungary, Poland, and Slovakia—and some other selected neighboring countries, namely Romania, Slovenia, Croatia, and Serbia (hereinafter: the selected states), all of which are member states of the Council of Europe (hereinafter: CoE).

Studying this topic in relation to the selected states can be relevant for certain reasons. For example, up to this date, selected states have already implemented a thorough revision of their land regimes twice: first, after the change of regime, they implemented a market-oriented land model based on private property; second, some 10–15 years later, they had to legislate again to ensure the conformity of their agricultural land-related rules with the law of the European Union (hereinafter: EU). The latter reform process is still in progress in some of the selected countries.[1] Another reason that renders the topic worth studying is that institutions and bodies of the EU, as well as scholars and international institutions, are involved in a—to say the least—vivid debate about the sustainability of the current market-oriented regulation of the EU. Some argue that it would be better if the member states had larger space to maneuver, so that they can decide on the conditions of trading in their arable lands.[2] The author of the current study believes that an analysis focused on the ECtHR case law may contribute to this debate, even though the debate is rather an EU-level one.

After studying the agricultural land-related case law of the ECtHR regarding the selected countries, the author identified two main categories of legal issues that are relevant in the selected countries or that constitute a distinctive feature of these countries. The first main category comprised compensation-related cases that constitute the vast majority of agricultural land-related cases in the selected countries. This is attributable to the common historic heritage[3] of such countries, namely that after World War II they all became part of what became known as the Eastern Bloc under communist control, imposed on them by the Soviet Union. Sooner or later private agricultural lands were nationalized in each of these countries either by *de jure* confiscation of the

1 Papik, 2017, pp. 146–159.

2 ECOSOC, NAT/632, Brussels, 21 January 2015.; Directorate-General for Internal Policies of the Union: Extent of Farmland Grabbing in the EU, 2015.; EP: Report on the state of play of farmland concentration in the EU: how to facilitate the access to land for farmers; Szilágyi, 2015, pp. 96–102.; European Commission Interpretative Communication on the Acquisition of Farmland and European Union Law (2017/C 350/05).

3 See, among others, Raisz, 2014.

ownership title or by *de facto* deprivation. The latter meant that while the owners were allowed to retain their title as owners, in practice, they were deprived of the possibility to dispose of their lands. The category of compensation-related cases can be divided into three main subcategories: (i) cases where the compensation system established by the state after the change of regime displayed systematic shortcomings and, in some instances, triggered the so-called "pilot judgment procedure," as in the *Maria Atanasiu and Others v. Romania* and the *Manushaqe Puto and Others v. Albania cases*; (ii) cases where the earlier proprietors' or their heirs' interests clashed with the interests of third parties who acquired the property in good faith, as in the *Pincová and Pinc* case; and (iii) the so-called Slovakian "Gardener cases," as the author named them, which display similarities with the second subcategory. The *Urbárska obec Trenčianske Biskupice v. Slovakia* case marked the emergence of several cases with almost identical statement of facts, including the *Šefčíková v. Slovakia*, the *Salus v. Slovakia*, the *Silášová and Others v. Slovakia*, and the *Jenisová v. Slovakia* cases.

The other main category is the issue of agricultural land acquisition by foreign natural or legal persons. However, the ECtHR's case law is not that elaborated in this question as the case law of the *Court of Justice of the European Union* (hereinafter: CJEU). This is attributable to the fact that while the right to acquire, use, or dispose of agricultural land falls under the free movement of capital principles set out in Article 63 of the *Treaty on the Functioning of the European Union* (hereinafter: TFEU), thus EU law, as a rule, obliges member states to provide the free disposal of agriculture land, and Article 1 of Protocol No. 1 (as it is elaborated on in detail below) does not create a right to acquire property. Thus, as a rule, a possible application claiming that a violation of Article 1 of Protocol No. 1 occurred due to a certain legal entity not being allowed to acquire agricultural land under national law would be inadmissible under the established case law of the ECtHR. However, in the *Zelenchuk and Tsytsyura v. Ukraine* case, the ECtHR stated that a national legislation that—alone among the CoE member states—implemented land reform programs with some blanket restrictions on the sale of agricultural land is incompatible with the provisions of Article 1 of Protocol No. 1. Although this ban has already been lifted by a novel legislation,[4] the author found the case interesting enough to make an exception and introduce it, even though, originally, Ukraine was not selected in the scope of countries covered by the research.

1. Brief Introduction to the regulations of the Visegrád Countries, Romania, Slovenia, Croatia, and Serbia

In its recent *Zelenchuk and Tsytsyura v. Ukraine* case, the ECtHR provided a valuable comparative law analysis on the regulation of 32 CoE member states' agricultural land-related regulation, which served as a starting point for the author to introduce the legislation of the selected member states. To comply with the scope and purpose

4 On the novel legislation, see Buletsa, Oliynyk and Sabovchyk, 2019, pp. 89–93.

of the current chapter, the author dispenses with the introduction of the regulation of countries other than Hungary, Slovakia, Czech Republic, Poland, Romania, Slovenia, Croatia, and Serbia, that is to say, the selected countries. The findings of the ECtHR's analysis are supplemented by sources from the scientific literature. As a result of the research, the author concluded that none of the selected member states—even those that had undergone a thorough land reform program since 1990[5]—introduced a general ban on the trade in agricultural land. Slovenia is currently undergoing a reform.[6]

Restrictions and conditions may apply in the selected member states, however.

By enacting the *Act on Transactions in Agricultural and Forestry Land*,[7] the Hungarian legislator imposed several limitations on the acquisition of agricultural land.[8] These restrictions, which were accepted by the European Commission as being in conformity with EU law, include (i) the procedural role of the local land committee, (ii) the cap on the size of acquisition of lands and for the ownership of property, (iii) the system of the right of preemption to buy and lease, or (iv) the statutory minimum and maximum duration of leasehold. On the other hand, the CJEU—first in a preliminary decision procedure,[9] then in an infringement procedure[10]—held that depriving persons of their right of usufruct if they do not have a close family tie with the owner of agricultural land in Hungary is contrary to EU law.[11] In the ongoing infringement procedure, the European Commission continues to dispute the conformity of certain Hungarian legal institutions with EU law,[12] such as (i) the inability of legal persons to acquire ownership of agricultural land (with a few exceptions) and the prohibition of their transformation; this may be considered as one of the basic pillars of the current Hungarian land regime, as pointed out by some authors.[13] Furthermore, the Commission disputes the EU law conformity of (ii) the skills requirements of farmers, (iii) the non-recognition of experience acquired abroad, and (iv) the personal obligation to cultivate. Lastly, the European Commission doubts (v) the objectivity of the provisions on the prior consent required in the cases of sale and purchase contracts.[14] As some

5 Including Croatia, the Czech Republic, Estonia, Hungary, Poland, Romania, and the Slovak Republic.

6 Avsec, 2021, pp. 24–39.

7 Act CXXII of 2013 on Transactions in Agricultural and Forestry Land

8 For an analysis of the law, see Csák, 2017, pp. 1125–1136.; Hornyák, 2021, pp. 86–99.; Hornyák, 2017, pp. 124–136.; Szinay and Andréka, 2019, pp. 28–39.

9 CJEU, 'SEGRO' Kft. v. Vas Megyei Kormányhivatal Sárvári Járási Földhivatala and Günther Horváth v Vas Megyei Kormányhivatal, para. 129.

10 CJEU, European Commission v. Hungary

11 The author forecasted the result already in a 2018 article; see Marinkás, 2018, pp. 99–116.

12 For the details please see: Commission's Interpretative Communication on the Acquisition of Farmland and European Union Law; see, furthermore, Raisz, 2017, pp. 434–443.; Szilágyi, 2018, pp. 193–194.; Szilágyi, 2017a, pp. 107–124.

13 Andréka and Olajos, 2017, pp. 410–424.

14 For an analysis on the presumed discrimination between "old" and "new" member states in the practice of the European Commission, see Szilágyi, 2017b, pp. 1055–1072.

authors noted, "Hungary can be considered a 'bad cop' who acts against the principle of the free movement of capital."[15]

It is not only the Hungarian legislator that imposed restrictions on the acquisition of agricultural land, however. Most of the selected states make a distinction between citizens of the European Union and third-country nationals when it comes to the acquisition of agricultural land. While—as a rule—those who belong to the former category are eligible to acquire agricultural land provided that they comply with certain criteria (and in some cases, provided that a certain time-limited transitional period has passed), those belonging to the latter category must comply with more severe restrictions to acquire agricultural lands. In some instances, they are even prohibited from acquiring agricultural land, except for a few statutory exemptions. As an example, as a rule, agricultural land cannot be sold to foreign persons in Croatia as the law requires reciprocity with the buyer's state and also the approval of the Croatian Minister of Justice.[16]

Similar rules are in force in other countries of the region: the Serbian regulation, in practice, renders it impossible for legal entities registered outside the EU to purchase agricultural land in Serbia; it requires reciprocity with the buyer's state, and the buyer must prove that the real estate is necessary for the activity it conducts in Serbia.[17] The latter criterion is to be determined by the Ministry of Commerce. In Poland, only private persons are entitled to acquire agricultural land, and legal entities must fulfill additional conditions, such as obtaining a permission from the authorities.[18] In Romania, the Constitutional Court *(Curtea Constituțională a României)* held with a majority decision[19] that *Law. No. 175/2020* on the modification of certain agricultural land-related rules is constitutional.[20] As the majority of the Constitutional Court stated: "[...]

> the criticised texts do not forbid or exclude the right of natural or legal persons from outside the national territory to buy such lands [...] the legislator did not operate with the criterion of citizenship/nationality, but with a set of objective criteria aimed at the buyer's ability to maintain the category of use of extra-urban agricultural land and to work it effectively."

Contrary to this, one of the two separate opinions emphasized that, in practice, the national legislation does have an effect of a quasi-criterion of citizenship/nationality.[21]

15 Csirszki, Szinek Csütörtöki and Zombory, p. 49.
16 Josipović, 2021, pp. 107-108.
17 Dudás, 2021, p. 68.
18 For a detailed analysis of the Polish regulation, see Blajer, 2022, pp. 9–39.; Tschopp, 2018, pp. 51–63.; Suchoń, 2021, pp. 34–46.
19 Romanian Constitutional Court (RCC), No. 586/2020.
20 Veress, 2021, pp. 155–173.
21 Separate Opinion of Mona-Maria Pivniceru.

The other separate opinion[22] emphasized that, Law. No. 175/2020 does not comply with EU law and especially with the *Treaty of Accession of Romania*. The problem is well illustrated by the fact that some 40% of arable land in Romania belongs to foreigners, as a scholar argues in this regard: possession of arable land in such large proportion by foreign nationals may exclude the prevalence of state's sovereignty.[23] It is not all about sovereignty; arable land is also a valuable resource that provides food security for the state, and thus, several member states grant its protection on constitutional level.[24] As an example Article 'P' (1) of the Fundamental Law of Hungary states that "natural resources, in particular arable land, [...] shall form the common heritage of the nation, it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations."

Several member states require qualifications or prior experience from the potential buyers (e.g., Hungary, Poland, the Slovak Republic, and Slovenia). However, the Polish,[25] Slovakian,[26] and Slovenian regulations require preliminary authorisation, except for buyers who are already engaged in farming or their family members. An EU national who would like to acquire ownership of agricultural land in Serbia is required by the law (i) to reside in the territory of the same municipality in which the agricultural land is located, (ii) to cultivate that same land for at least 3 years, (iii) to prove that they have had a registered family farm in Serbia without interruption for at least 10 years, and (iv) to prove that they own the necessary agricultural machines and equipment.[27]

The Czech Republic, Hungary, Poland, Romania,[28] Serbia, the Slovak Republic, and Slovenia have preemption laws, securing a right of first refusal mostly to neighboring or other farmers, tenants, close family members, agricultural enterprises, or municipalities—and in some cases, the state.

In certain cases, restrictions exist on the maximum amount of land that the same person may own; for example, the Hungarian legislator set a 300 hectares cap in Hungary. Some states also limit the minimum size of land parcels, seeking to prevent the excessive subdivision of land below a certain size. Last but not least, special restrictions also exist in certain sensitive areas such as border areas and areas adjacent to military installations, such as Serbia.[29]

However, these issues, namely the foreign natural and legal persons' right to acquire agricultural land, emerge mainly in the EU context and not in the CoE context.

22 Separate Opinion of Livia Doina Stanciu and Elena-Simina Tinisescu.
23 Anghel, 2017, pp. 77–104.
24 For a comparative analysis, see Hojnyák, 2019, pp. 58–76.; See furthermore: Orosz, 2018, pp. 178–191.
25 For a detailed analysis on the Polish regulation see: Zombory, 2020, pp. 282–305.
26 For a detailed analysis on the Slovakian regulation see: Szinek Csütörtöki, 2021, pp. 160–177.; Szinek Csütörtöki, 2022, pp. 126–143.
27 Dudás, 2021, p. 68.
28 The question of interpretation of the new Romanian regulation, please see: Veress, 2021, pp. 159–163.
29 Dudás, 2021, p. 68.

First, the established case law of the ECtHR on Article 1 of Protocol No. 1 does not grant the right to acquire property. The violation of the said right only comes into question when a CoE member state treats persons in a comparable situation differently without an objective reason. In some cases, such as the *Luczak v. Poland* case of the ECtHR, the Court had to decide on a national legislation that practically made it impossible for foreign citizens to buy and use agricultural land in a way such a land is regularly used. While the complainant of the case was allowed to buy a farm, they were prevented from engaging in agricultural activity due to the state imposed restrictive rules based solely on nationality. As it is clear from this short statement of facts, this case was not a "straightforward" acquisition case. As mentioned in the introductory part, mainly compensation-related cases emerged before the ECtHR in relation to the selected countries due to their shared historic similarities, which may be regarded as one of their distinctive features.

2. The case law of the ECtHR and the ECHR

2.1. A brief introduction of the ECtHR's Article 1 of Protocol No. 1 and Article 6 of the ECHR's related case law

2.1.1. Article 1 of Protocol No. 1-related ECtHR case law

First, as a starting point, it must be emphasized that Article 1 of Protocol No. 1 does not guarantee the right to acquire property, as stated in *Kopecký v. Slovakia*[30] in accordance with the established case law of the ECtHR,[31] and neither is it possible to consider the hope of recognition of a property right for which it has been impossible to effectively exercise "possession" within the meaning of Article 1 of Protocol No. 1. Nationalized agricultural land may fall within this category, that is to say, while expecting restitution of long-lost family lands is an understandable wish of a human being, based on the ECtHR's case law, a difference exists between mere hope of restitution and legitimate expectation. The latter must be of a nature more concrete than mere hope and be based on a legal provision or on a judicial decision.[32] The temporal scope of the ECHR and its protocols cannot be interpreted as imposing any general obligation on the contracting states for past, instantaneous act. Deprivation of ownership or of another right *in rem* is an instantaneous act in the light of the ECtHR's case law[33] and does not produce a continuing situation of

30 ECtHR, Kopecký v. Slovakia, para. 35.
31 ECtHR, Van der Mussele v. Belgium, para. 48.; ECtHR, Slivenko v. Latvia, para. 121.; ECtHR, Kopecký v. Slovakia, para. 35.
32 ECtHR, Gratzinger and Gratzingerova v. the Czech Republic, para. 73.; ECtHR, Von Maltzan and Others v. Germany, para.112.
33 ECtHR, Kopecký v. Slovakia, para. 35.; ECtHR, Preußische Treuhand GmbH & Co. KG a.A. v. Poland, para. 57.; see, furthermore, ECtHR Guide, para. 395.

"deprivation of a right."[34] As a conclusion, Article 1 of Protocol No. 1 in the ECtHR's case law[35] cannot be interpreted as imposing any general obligation on the contracting states to return property that had been transferred to them before they ratified the Convention.[36] However, once the state has gone beyond its obligations under Articles of the ECHR—a possibility under Article 53 of the Convention—it cannot apply that right contrary to the Convention.[37] That is to say, in case the state grants a right to restitution, (i) it must obey the established case law of the ECtHR on Article 1 of Protocol No. 1 and of the ECHR Article 6 (1); furthermore (ii) as the ECtHR noted in the *Pincová and Pinc v. the Czech Republic* case, the state must ensure that "the attenuation of those old injuries does not create disproportionate new wrongs."[38] As another consequence of Article 1 of Protocol No. 1, having ratified the ECHR (including Protocol No. 1), the related case law of the ECtHR, once a contracting state, enacts legislation providing for the full or partial restoration of property confiscated under a previous regime, and such legislation may be regarded as generating a new property right protected by Article 1 of Protocol No. 1 for persons satisfying the requirements for entitlement. The same may apply in respect of arrangements for restitution or compensation established under pre-ratification legislation, if such legislation remained in force after the contracting state's ratification of Protocol No. 1.[39] However, the legislator still retains a high degree of freedom to determine the scope of property restitution and to choose the conditions under which they agree to restore property rights of former owners.[40] In particular, the exclusion of certain categories of former owners from such entitlement falls within the state's margin of appreciation. Claims excluded from the scope of restitution in this way do not create a "legitimate expectation" eligible for the protection under Article 1 of Protocol No. 1.[41]

Second, it is worth introducing the three elements of the right to property under the ECHR's case law[42] as Article 1 of Protocol No. 1 comprises three distinct rules.[43]

34 Marinkás, 2015, pp. 191–196.
35 ECtHR, Jantner v. Slovakia, para. 34.; ECtHR, Van der Mussele v. Belgium, para. 48.
36 The same statement can be made regarding EU law: as Ágoston Korom writes that the goals of the CAP do not affect the member states' margin of appreciation on the restitution, that is to say, member states are free to impose restitution measures concerning the properties confiscated before the accession. See Korom, 2021, p. 102.
37 ECtHR, ECHR v. Belgium (Case relating to certain aspects of the laws on the use of languages in education in Belgium'); see, furthermore, ECtHR, E.B. v. France, para. 49.
38 ECtHR, Pincová and Pinc v. the Czech Republic, para. 58.
39 ECtHR, von Maltzan and Others v. Germany, para. 74.; ECtHR, Kopecký v. Slovakia, para. 35.; ECtHR, Broniowski v. Poland, para. 125.; see, furthermore, ECtHR Guide, para. 398.
40 ECtHR, Maria Atanasiu and Others v. Romania, para. 136.
41 ECtHR, Gratzinger and Gratzingerova v. the Czech Republic, para. 70–74.; ECtHR, Kopecký v. Slovakia, para. 35.; ECtHR, Smiljanić v. Slovenia, para. 29.; see, furthermore, ECtHR Guide, para. 396.
42 ECtHR, Zvolský and Zvolská v. the Czech Republic, para. 63.
43 In this regard, see also ECtHR, Szkórits v. Hungary, para. 34.

The first sentence of the first paragraph[44]—as the first rule—outlines the principle of peaceful enjoyment of property with a general nature. The second sentence of the same paragraph contains the second rule, which regulates the deprivation of property and subjects it to certain conditions.[45] The third rule is contained by the very same sentence and recognizes that the contracting states are entitled, among other things, to control the use of property in accordance with the public interest. When it comes to judging a possible infringement, the Court first must ensure that the last two rules are applicable before determining whether the first one has been complied with. The three rules are not, however, unconnected (or in other words, "distinct"): the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property. Thus, they must be interpreted "through the optics" of the general principle established in the first rule.[46]

Third, it must be mentioned that states not only have a negative duty, that is to say, a duty to abstain from interfering with the right of peaceful enjoyment of property, but Article 1 of Protocol No. 1 may entail positive obligations[47] inherent in ensuring the effective exercise of the rights guaranteed by the Convention. In the context of Article 1 of Protocol No. 1 and with regard to Article 1 of the Convention, each contracting party "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention," which may require the state to take the measures necessary to protect the right of property.[48] However, the boundaries between the state's positive and negative obligations cannot be demarcated under Article 1 of Protocol No. 1 with "surgical precision."[49] The author considers that this fact is worthy of comparison with the Article 8-related case law of the ECtHR.

Fourth, as it was stated by the ECtHR in the *Karaivanova and Mileva v. Bulgaria* case, a domestic law that prescribes that issues arising from the very same factual starting point should be resolved in separate procedures places individuals in a state of lengthy uncertainty,[50] which amounts to a violation of Article 1 of Protocol No. 1. While states should enjoy a wide margin of appreciation in regulating important social and economic reforms, such as the ones introduced in Bulgaria after the fall of communism, states are nevertheless required to organize their judicial and administrative systems in such a way so as to guarantee the rights provided for under the Convention.[51] As it was in the *Karaivanova and Mileva v. Bulgaria* case, by requiring a restitution procedure and then launching a "*rei vindicatio*" judicial proceeding aimed at specifying the

44 Article 1 of Protocol No. 1.: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions."
45 Article 1 of Protocol No. 1.: "No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."
46 ECtHR, Iatridis v. Greece, para. 55.; ECtHR, Elia S.r.l. v. Italy, para. 51.
47 ECtHR, Szkórits v. Hungary, para. 36.
48 ECtHR Sovtransavto Holding v. Ukraine, para. 96.
49 ECtHR Broniowski v. Poland, para. 144.
50 ECtHR, Sivova and Koleva, paras. 115–16.; ECtHR, Nedelcheva and Others, paras. 78–82.
51 ECtHR, Sivova and Koleva, cited above, para. 116.

rights recognied in the restitution procedure, the authorities unjustifiably delayed the effective exercise of the applicants' restitution rights.[52] Interestingly enough, this was elaborated from Article 1 of Protocol No. 1. by the ECtHR and not from Article 6 (1).

Fifth, it must be stated that several cases in the field of the restitution of property concerned the domestic authorities' failure to enforce the final judicial (or administrative) decisions. This issue, as elaborated on in details below, is often scrutinized "through the optics" of Article 6 of the ECHR as well. Once a final judgment that is not subject to any ordinary appeal is delivered, the applicant is entitled with an enforceable claim that constitutes a "possession" within the meaning of Article 1 of Protocol No. 1[53]; therefore, the concept of "legitimate expectation" can come into play.[54] Non-enforcement of final decisions, either in individual cases or because of systematic shortcomings in the system of restitution of property, gave rise to a violation of Article 1 of Protocol No. 1. and may trigger a "pilot judgment procedure" as it happened in the *Maria Atanasiu and Others v. Romania* and the *Manushaqe Puto and Others v. Albania* cases.[55]

Sixth, as the ECtHR noted in the *Pincová and Pinc v. the Czech Republic* case, the state must ensure that "the attenuation of [...] old injuries does not create disproportionate new wrongs." To avoid such scenarios, the ECtHR, in its case law, emphasized that legislation should make it possible to take into account the particular circumstances of each case, so that persons who acquired their "possessions" in good faith were not made to bear the burden of responsibility for the wrongdoings of their states.[56] In accordance with this, in the *Katz v. Romania* case,[57] the ECtHR held that a violation of Article 1 of Protocol No. 1 had occurred due to the legislation's fault in the restitution of nationalized buildings which, in the meantime, had been sold by the state to third parties who had purchased them in good faith. Similar decision was made by the ECtHR in the *Zvolský and Zvolská v. the Czech Republic*[58] and the *Velikovi and Others v. Bulgaria* cases.[59] The latter dealt with the proportionality of measures which, with the aim to compensate persons from whom property had been arbitrarily taken under the communist regime, had deprived other individuals of property they had purchased from the state in good faith.[60]

52 ECtHR, Karaivanova and Mileva v. Bulgaria, para. 81.
53 ECtHR, Jasiūniene v. Lithuania, para. 44.
54 ECtHR, Driza v. Albania, para. 102.
55 In *Beshiri and Others v. Albania*, the Court reviewed the new domestic scheme/remedy introduced in Albania in response to that pilot judgment. Noting the state's wide margin of appreciation as regards the choice of forms of redress for breaches of property rights, the Court found the new remedy to be effective having regard to the following considerations: (a) appropriateness of the form of redress, (b) adequacy of the compensation, and (c) accessibility and efficiency of the remedy. See Beshiri and Others v. Albania, paras. 188, 189–203, 204–214.
56 ECtHR, Pincová and Pinc v. the Czech Republic, para. 58.
57 ECtHR, Katz v. Romania, paras. 30–36.
58 ECtHR, Zvolský and Zvolská v. the Czech Republic, paras. 72–74.
59 ECtHR, Velikovi and Others v. Bulgaria, paras. 181, 190.
60 See, furthermore, ECtHR, Guide, paras. 410–411.

Seventh, as to the adequacy of the compensation in general, Article 1 of Protocol No. 1 requires that compensation in return for property taken by the state should be "reasonably related" to its value.[61] A compensation amounts to 10% of the current value of the original property could be considered reasonable in the specific context of the case[62]; in this regard, the ECtHR is prone to accept the aim of serving public interest until the awarded compensation appears to be unreasonably low.[63] It is worth mentioning that the cases related to compensation were examined thoroughly by *Anikó Raisz*, who made valuable statements regarding the awkwardness of the ECtHR's compensation-related case law in certain aspects.[64] Namely, the ECtHR applies a double standard based on the "Western–Eastern" division when it comes to awarding compensation for the loss of ownership of agricultural lands: the Court awards multiple times higher compensation prices for a "Western" plot of land, and the disproportion in value is not justified by the market price of land.[65]

2.1.2. Article 6-related ECtHR case law

First, as mentioned in the above section related to the Article 1 of Protocol No. 1 case law of the ECtHR, the authorities' failure to execute a final and binding judgment is contrary either to the right to property—as guaranteed by Article 1 of Protocol No. 1—and to the right to access to court as guaranteed by Article 6 (1), since the right to the execution of a court decision is one of the aspects of the latter right as stated by the ECtHR in the *Popescu v. Romania*[66] case. In certain agricultural land-related cases, the ECtHR held that administrative bodies have no discretion to "override" a final court judgment because they consider it erroneous or otherwise contrary to law, that is to say, administrative bodies as a rule cannot refuse to enforce a final judgment on these grounds,[67] save for reasons of a substantial and compelling character.[68]

Secondly, certain types of extraordinary appeal procedures may be tantamount to a violation of Article 6 (1) of the Convention as they are eligible to infringe the principle of legal certainty. The right to a fair hearing under Article 6 § 1 of the Convention—interpreted in the light of the principles of the rule of law and legal certainty—encompasses the requirement that, where the courts have finally determined a dispute between given parties, their ruling should not be called into question.[69] As an example, in a land-related case, namely the *Urbanovici v. Romania*, the ECtHR held that Article 6 § (1) had been violated; the Supreme Court of Justice had examined the extraordinary appeal of the Procurator General and set at naught an entire judicial

61 ECtHR, Broniowski v. Poland, para. 186.
62 ECtHR, Guide, para. 402.
63 ECtHR, Serbian Orthodox Church v. Croatia, paras. 62, 65–68.
64 Raisz, 2014.
65 Raisz, 2010, pp. 245–246.
66 ECtHR, Popescu v. Romania, para. 66.; ECtHR, Hornsby v. Greece, para. 40.
67 ECtHR, Mutishev and Others v. Bulgaria, para. 129.; ECtHR, Mancheva v. Bulgaria, para. 59.
68 ECtHR, Brumărescu v. Romania, para. 61.; ECtHR, Ryabykh v. Russia, para. 52.
69 ECtHR, Brumărescu v. Romania, para. 61.

process, which had ended in a judicial decision that was res judicata and which had, moreover, been executed. The ECtHR paid particular attention to the fact that this extraordinary appeal procedure was opened only to the prosecutor general and not for the parties.[70] The aim and scope of these extraordinary procedures is of paramount importance when it comes to the scrutiny of the ECtHR. The diverging views on the subject shall not serve as a ground for reexamination; in other words, no party should be entitled to seek review of a final and binding judgment merely for the purpose of obtaining a rehearing and fresh determination of the case. Otherwise, the extraordinary appeal procedures may infringe the principle of legal certainty and respect for the res judicata effect of final judgments.[71] As for the scope, higher courts' power should only cover the correction of judicial errors and miscarriages of justice and should not involve a novel factual investigation, that is to say, the extraordinary review cannot be a disguised appeal procedure. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character.[72]

Third, as established in the Court's case law—e.g., in the *Csepyová v. Slovakia case*[73]—when it comes to the assessment of the reasonableness of the length of proceedings, particular attention must be paid to the following factors: (i) complexity of the case, (ii) the conduct of the applicant and of the relevant authorities, and (iii) what was at stake for the applicant in the dispute.

2.2. Cases related to compensation

The current section deals with concerns related to compensation grouped into three categories: (i) the systematic shortcomings of the regulation and the practice of state authorities related to compensation, (ii) the infringement of the rights of those who acquired their property in good faith—that is to say, where the state created new wrongs, when tried to remedy old ones—and last but not least, (iii) cases related to the prevailing public interest against the rights of those eligible for compensation (i.e., the Slovakian "gardener cases.")[74]

2.2.1. The systematic shortcomings of a compensation case

The ECtHR's two pilot judgments, the *Maria Atanasiu and Others v. Romania* and the *Manushaqe Puto and Others v. Albania* cases, dealt with the shortcomings of the compensation systems by Romania and Albania, respectively.

As explained by the ECtHR in the *Maria Atanasiu and Others v. Romania*,[75] the primary aim of the "pilot judgment procedure" is to assist the CoE member states

70 ECtHR, Urbanovici v. Romania, para 28.
71 ECtHR, Ryabykh v. Russia, para. 52.; ECtHR, Sivova and Koleva, para. 66.; ECtHR, Karaivanova and Mileva v. Bulgaria, para. 44.
72 ECtHR, Ryabykh v. Russia, para. 52.
73 See furthermore: ECtHR, Frydlender v. France, para. 43.
74 Denomination made by the author.
75 ECtHR, Maria Atanasiu and Others v. Romania, paras. 212–214.

in the resolution of a dysfunction that detrimentally effects the protection of the Convention right in question in the national legal order.[76] Several repetitive cases may indicate a structural or systemic problem and trigger the designation of a pilot case to help rectify problems at the national level, thus (i) securing the rights and freedoms as required by the Convention, (ii) offering a more rapid redress for those concerned, and, lastly, (iii) easing the burden on the Court.[77] Because of the structural or systemic nature of the issue, a "pilot" case necessarily extends beyond the individual applicant's interests. Consequently, the Court needs to identify both (i) the roots of the structural or systemic problem and (ii) the general measures that need to be taken in the interest of other potentially affected persons.[78] In the *Maria Atanasiu and Others v. Romania* case—contrary to the *Broniowski and Hutten-Czapska* cases, which highlighted the shortcomings of the domestic legal system for the first time—the ECtHR considered the activation of the "pilot judgment procedure" after it delivered several judgments,[79] holding the shortcomings of the Romanian legal framework on compensation tantamount to a violation of Article 6 (1) of ECHR and Article 1 of Protocol No. 1.

The ECtHR, after reiterating its established case law on similar cases,[80] identified six problems that may have led to the structural and systematic shortcomings in the Romanian system.[81] First, throughout the years, the Romanian legislator gradually extended the scope of the reparation laws to all nationalized immovable property, while, except for a short period,[82] dispensing with placing a cap on compensation. Secondly, the legislative provisions grew complex—or rather, chaotic—due to the several modifications, which resulted in an inconsistent judicial practice regarding the interpretation of the core concepts in relation to the rights of former owners, the state, and third parties that acquired nationalized properties and in a general lack of legal certainty.[83] Thirdly, as an answer to the second problem, the domestic authorities, although they were already faced with the complexity of the issue, responded by enacting Law no. 247/2005, which established a single administrative procedure for claiming compensation that was applicable to all the properties concerned, be it an agricultural land or a flat. Fourthly, the state clearly lacked sufficient human

76 For some theoretical issues regarding the legal base of the "pilot judgment procedure," please read the partly concurring and partly dissenting opinion of Judge *Zupančič* and the partly dissenting opinion of Judge *Zagrebelsky*!

77 ECtHR, Broniowski v. Poland, para. 35.; ECtHR, Hutten-Czapska v. Poland, pp. 231–234.

78 ECtHR, Wolkenberg and Others v. Poland, para. 35.; ECtHR, Olaru and Others, para. 54.

79 ECtHR, Brumărescu v. Romania, paras. 34–35; ECtHR, Străin and Others v. Romania, para. 19; ECtHR, Păduraru v. Romania, paras. 23–53; ECtHR, Viaşu v. Romania, paras. 30–49; ECtHR, Faimblat v. Romania, para. 16–17; ECtHR, Katz v. Romania, para. 11; ECtHR, Tudor Tudor v. Romania, para. 21; ECtHR, Matieş v. Romania, paras. 13–17.

80 ECtHR, Maria Atanasiu and Others v. Romania, paras. 134–141.

81 ECtHR, Maria Atanasiu and Others v. Romania, paras. 219–227.

82 Although law no. 112/1995 introduced a cap on compensation, this was abolished by Law no. 10/2001. See para. 10.

83 ECtHR, Păduraru v. Romania, para. 94.

and material resources to satisfy every claim. This shortage was manifested in the Central Board's practice, which, after facing with a substantial workload from the outset, dealt with files in random order. By May 2010, the Central Board managed to decide on only one third of all the registered cases being awarded a "compensation certificate." [84] Fifthly, the lack of a time limit for the processing of claims by the Central Board was identified as another weak point of the domestic compensation mechanism. This was stated by the ECtHR in the *Faimblat v. Romania* case and acknowledged by the *High Court of Cassation and Justice of Romania (Înalta Curte de Casație și Justiție)*.[85] The ECtHR considered the lack of a time limit as a factor that renders the right of access to a court theoretical and illusory. Sixthly, the Court noted that the legislation on nationalized property represented a considerable burden on the state budget from the outset.

Similarly to the *Maria Atanasiu and Others v. Romania* case, in the pilot judgment *Manushaqe Puto and Others v. Albania*, the Court held that Article 1 of Protocol No. 1 of the Convention had been violated on account of the non-enforcement of a final decision that had awarded the applicants compensation in lieu of restitution of their property.[86] In the "follow-up" case, the *Beshiri and Others v. Albania*, the Court reviewed the new domestic remedy vehicle introduced in Albania in response to the pilot judgment. Taking into consideration the state's wide margin of appreciation as regards the choice of forms of redress for breaches of property rights, the Court took the view that the new remedy was effective having regard to the following considerations: (i) appropriateness of the form of redress, (ii) adequacy of the compensation, and (iii) accessibility and efficiency of the remedy.[87]

However, in the *Vrabec and Others v. Slovakia* case, the Court found a violation of Article 6 (1) of the ECHR due to the deficiencies in the compensation system, and the case did not attract a "pilot judgment procedure." In 1951, the state authorities nationalized three hectares of land from a relative of the applicants without paying compensation to the late owner. The applicants claimed restitution of the land under Law no. 503/2003 without success. In a 2006 judgment, the Supreme Court (*Najvyšší súd Slovenskej republiky*) held that the legal interpretation of lower levels of jurisdiction was right, namely that those lands that had been formally transferred to the state pursuant to Ordinance 15/1959 did not fall under the scope of Law no. 503/2003, and thus, the applicants were not entitled to compensation. Based on Law no. 403/1990, they would have been eligible for compensation, but they had never applied for it.[88] While the government admitted that the domestic courts' practice was not uniform regarding certain issues, it was not the case with the interpretation Law no. 503/2003.

84 Only some 21,260 out of a total of 68,355 cases were dealt with and the total payments that were carried out did not reach 4000 total. – ECtHR, Maria Atanasiu and Others v. Romania, para. 224.

85 ECtHR, Maria Atanasiu and Others v. Romania, paras. 76.

86 ECtHR, Manushaqe Puto and Others v. Albania, paras. 110–118.

87 ECtHR, Beshiri and Others v. Albania, paras. 188, 189–203, 204–214.

88 ECtHR, Vrabec and Others v. Slovakia, paras. 5–7, 9.

Namely, the government alleged that, based on their practice, Law no. 503/2003 did not cover land expropriated under Ordinance no. 15/1959, and it stated that the two judgments, in which the courts took an opposite view and on which the applicants relied, were exceptional at that time. The ECtHR reiterated that under its established case law,[89] it is not its task (i) to call into question the national courts for their interpretation of domestic law or (ii) to compare different decisions of national courts, even if the proceedings are apparently similar. The ECtHR must respect the independence of the national courts. However, acute and persistent variations in the practice of the highest domestic court may in itself be contrary to the principle of legal certainty. This principle is implied in the ECHR and constitutes one of the basic elements of the rule of law.[90] In the case at hand, taking each and every circumstance of the case into consideration, the ECtHR was not convinced that the domestic courts' practice was coherent enough to be in conformity with the ECHR. Accordingly, Article 6 § 1 of the Convention had been violated.[91]

Contrary to the above cases, the ECtHR did not find a systemic error in the *Čadek and Others v. the Czech Republic* case as the country's *Land Ownership Act* of 1991 entitled the restitution claimants to ask either (i) a "restitutio in integrum" of land that had been confiscated from them before 1990, or—if it was not possible for reasons indicated in the law—(ii) to a compensatory land of equivalent value ("restitution claim"). Some original restitution claimants transferred their claims to other persons, which was a practice allowed by the then valid law. The restitution claims had a nominal value, which was based on the 1991 price of the confiscated land. As a result of a 2003 amendment to the Land Ownership Act, if the Land Fund (*pozemkový fond*) did not succeed in providing a substitute land by December 31, 2005—or within 2 years if the claim had been purchased after entry into force of the Amendment Act—the claim would be extinguished. The restitution claimant then would be entitled only to a financial compensation equivalent to claim's nominal value determined in 1991 based on its then value. The Court observed that most of the applicants bought the restitution claims after the Amendment Act had been enacted; therefore, they were aware that their claims to substitute plots of land were precarious and would expire by the end of 2005. Thus, the ECtHR concluded that they would have accepted the element of risk that is inherent in business activities, such as dealing in property. In this regard, the ECtHR considered that, for farmers, the negative consequences of the Amendment Act were mitigated by the decision of the Supreme Court (*Nejvyšší soud České republiky*), which exempted farmers (those cultivating land for a living under the law) from the scope of the act, even if they were not original restitution claimants.[92] Accordingly, the ECtHR held that Article 1 of Protocol No. 1 had not been violated.

89 ECtHR, Nejdet Şahin and Perihan Şahin v. Turkey, paras. 49–50.
90 ECtHR, Beian v. Romania (no. 1), paras. 37–39.
91 ECtHR, Vrabec and Others v. Slovakia, paras. 24, 25, 27, 29, 35.
92 ECtHR, Čadek and Others v. the Czech Republic, paras. 5, 6, 43, 55, 70.

2.2.2. The acquisition of the land in good faith either as a buyer or as someone eligible for compensation

In the *Pincová and Pinc* case, the heir of the former proprietary of a confiscated house launched successful proceedings against the applicants in 1992.[93] The applicants alleged the infringement of their property rights; since they concluded the contract in good faith, the national court did not grant them compensation proportionate to the value of the lost property.[94] In the case at hand, the ECtHR found that the interference with the right to property amounted to "deprivation of possessions" within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1. The Court reiterated its earlier case law and stated that the deprivation of property should be based on law, should pursue a legitimate aim, and should be proportionate, that is to say, it must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. In the present case, none of the parties disputed that the state's acts were based on laws.[95] Regarding the legitimate aim, the ECtHR reiterated its earlier findings in the James case: "Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest [...] unless that judgment is manifestly without reasonable foundation."[96] Arising from this, the notion of "public interest" is necessarily extensive.[97] The Court examined whether the law succeeded in striking a fair balance between the general interest of the community and the requirements of the protection of the individual's fundamental rights. In this regard, the Court examined the amount of the compensation, which must be reasonably related to the market value of the lost property. On the other hand, legitimate objectives of "public interest" may call for less than the reimbursement of the full market value. Having regarded the fact that in the case at hand, compensation received by the applicants amounted to one-fifth of the current market value of the house, the state failed to strike the abovementioned fair balance; thus, property rights were infringed.[98]

In the *Szkórits v. Hungary* case, the applicant had a joint title to a plot of land in the value of 4.59 "golden crowns" (*aranykorona*), which became the possession of socialist "collective farms" during the communist regime. Following the change of regime, based on Act no. II of 1993 on Land Settlement and Land Distribution Committees, the Pest County Land Registry adopted a plan on the division of such properties. The applicant was granted a plot of land in 2000; however, he could not take possession of it because the plot that had been granted was apparently occupied and being used by the owners of the neighboring plots due to severe insufficiencies in the land register. It was only in 2006 that the authorities took steps to remedy the situation by

93 ECtHR, Pincová and Pinc, paras. 9–32.
94 ECtHR, Pincová and Pinc, paras. 42.
95 ECtHR, Pincová and Pinc, paras. 47–51.
96 ECtHR, James and other v. the United Kingdom, para. 46.
97 ECtHR, James and other v. the United Kingdom, para. 46.
98 ECtHR, Pincová and Pinc, paras. 52–64.

designating a new plot for him. During the 6-year period, the applicant was unable to use, or dispose of, his property.[99]

In the course of examining the merits,[100] the ECtHR noted a disagreement between the parties whether the applicant's claim is a property interest eligible for protection under Article 1 of Protocol No. 1. Accordingly, the Court first had to determine the legal position of the applicant.[101] As the ECtHR reiterated, Article 1 of Protocol No. 1 protects "possessions" that can be either "existing possessions" or a "legitimate expectation" of obtaining the effective enjoyment of a property right. Article 1 of Protocol No. 1 does not, however, guarantee the right to acquire property.[102] Applying these principles of the established case law on the case at hand, the issue that needed to be examined was whether the decision of the authority to confer a plot of land to the applicant constituted a substantive interest protected by Article 1 of Protocol No. 1 in case (i) the applicant did not enter into possession, and (ii) his trespass claim was dismissed on the ground that he had never been in possession of the property, since it did not actually exist due to a malfunction of the property register (i.e., the plot of land had been incorporated by the neighbouring lands). Having regarded these facts, in the Court's view, the applicant had a proprietary interest protected by Article 1 of Protocol No. 1. As the ECtHR noted, the applicant had a legitimate expectation of taking possession of the plot of land and thus had an interest constituting a "possession" for the purposes of Article 1 of Protocol No. 1. The Court reiterated that, as mentioned earlier in the chapter, Article 1 of Protocol No. 1 comprises three distinct rules and that its essential objective is to protect a person against unjustified interference by the state with the peaceful enjoyment of possession. The ECtHR also reiterated that Article 1 of Protocol No. 1 entails not only such a negative duty but also positive obligations to ensure the effective exercise of the rights guaranteed by the Convention, that is to say, to take the measures necessary to protect the right of property.[103] Since the boundaries between the state's positive and negative obligations under Article 1 of Protocol No. 1 do not lend themselves to a precise definition,[104] the key question regarding both is whether the authorities succeeded in striking a fair balance between the competing interests of the individual and of the community as a whole. An overall examination of the various interests at stake is necessary to assess proportionality, and one must bear in mind that the Convention is intended to safeguard rights that are "practical and effective." Regarding the proportionality, the Court, contrary to the government, saw no reason to query the applicant's good faith in considering themselves as the rightful owner; furthermore, nothing in the statement of facts suggests that he must have known that the land register system suffered from malfunctions, which would render his claims invalid. The Court also observed that years had passed between

99 ECtHR, Szkórits v. Hungary, paras. 6–9, 37.
100 ECtHR, Szkórits v. Hungary, paras. 26, 27, 28, 31, 32, 33, 34, 45, 36, 38, 40, 41–46.
101 ECtHR, Beyeler v. Italy, para. 98.
102 ECtHR, Kopecký v. Slovakia, para. 35.
103 ECtHR, Sovtransavto Holding v. Ukraine, para. 96.; ECtHR, Öneryıldız v. Turkey, para. 134.
104 ECtHR, Broniowski v. Poland, para. 144.

the authority's decision and the first time that the applicant was able to exercise any property rights, and 10 years had elapsed before he was eventually able to take possession of the newly designated, substitute land, which was not of the same value as that originally designated to him. In the Court's evaluation, the applicant suffered serious frustration for his property rights, which was attributable to the mistakes of a state authority. Based on the ECtHR's case law, the state is not allowed to remedy its own mistakes at the expense of the individual concerned,[105] that is to say, the oversight of the land register system should not have resulted in the long-lasting, *de facto* denial of the applicant's property rights; therefore, the Court concluded that the authorities made the applicant bear a disproportionate and excessive burden, and accordingly, Article 1 of Protocol No. 1 of the Convention had been violated.

2.2.3. Land lease, or the Slovakia Gardener Cases

A peculiar category of compensation cases is that of the Slovakian "Gardener cases," as the author named them. The *Urbárska obec Trenčianske Biskupice v. Slovakia* case, though not officially designated as a "pilot judgment," marked the emergence of several cases with almost identical statement of facts: *Šefčíková v. Slovakia*, *Salus v. Slovakia*, *Silášová and Others v. Slovakia*, and *Jenisová v. Slovakia*.

The "cumulated statement of facts" that one may derive from the above cases is the following: under the former communist regime of the then Czechoslovakia, owners of lands were either *de jure* confiscated of their property or obliged to put their land at the disposal of state-owned or cooperative farms, which amounted to a *de facto* deprivation of property. In the latter case, while they formally remained owners of the land, in practice, they were deprived of the peaceful enjoyment of property. Some of the land affected by the nationalization was not cultivated by the farms. The state promoted the use of such land for gardening, which resulted in the establishment of allotment gardens (*záhradkové osady*) mainly in the vicinity of urban agglomerations, and individual plots of lands were granted to persons belonging to the national gardeners' association (*Slovenský zväz záhradkárov*), who were allowed to cultivate the land as a leisure activity. Following the fall of the communist regime, the then Czechoslovakian[106] Parliament adopted the Land Ownership Act of 1991, which sought to mitigate certain past wrongdoings. In case of those who were *de jure* deprived of their possessions, the legislator gave precedence to legal certainty, that is to say, the users' existing rights prevailed over the rights of the former owners. The legislator considered this to be of greater public interest than restoring the land *in natura* to its original owners. In the second category of cases, that is, where the original owners namely maintained their ownership rights (*nuda proprietas*), the act established the conditions enabling the owners to enjoy their property rights to a greater extent, including the possibility to retrieve the original plot of land from

105 ECtHR, Lelas v. Croatia, para. 74.

106 Czechoslovakia only split into the two sovereign states of the Czech Republic and Slovakia on 1 January 1993.

the tenants. However, Act 64/1997 limited the possibility of terminating the lease; in other words, this was allowed only if the tenant failed to comply with legal obligations (e.g., failed to pay the lease fee). Furthermore, the tenants were entitled to apply for acquiring ownership of the land they used for gardening. If the request was granted, the owners were offered the right to obtain either a different plot of land or pecuniary compensation.[107]

As regard the alleged violation of Article 1 of Protocol No. 1 by mandatory transfer of ownership of the land, the ECtHR stated that the applicant was deprived of its possessions within the meaning of the second sentence of Article 1 of Protocol No. 1, which has not been disputed between the parties. The ECtHR accepted the government's argument that having regarded the wide margin of appreciation that the contracting states enjoyed in similar matters, protecting the interest of the gardeners was in the public interest within the meaning of the second sentence of Article 1 of Protocol No. 1. However, when it came to scrutiny of proportionality, the Court noted that the value of land was established based on a regulation that disregarded the actual value of the land at the latter time. The land's value—some SKK 6.1–6.9 per square meter—was calculated based on its 1982 market value, when the tenancy was established, without taking into account that the value of real property increased significantly in Slovakia following the change of regime and the establishment of a market-oriented economy. The documents available indicate that the market value of the applicant's land transferred to the gardeners was between SKK 295 and 300 per square meter in 2002, when the transfer took place, that is to say, the 1982 market value corresponds to less than 3% of the market value of the property in 2002. In the ECtHR's view, the state failed to raise any argument that would serve as a valid reason for this disproportionation: it was not proven that the aim of consolidation—which only effected some 0.22% of the agricultural land in Slovakia—or the socially weak or particularly vulnerable situation of the gardeners would require it. Thus, the Court was not persuaded that the declared public interest was sufficiently broad and compelling to justify the substantial difference between the real value of the applicant's land and that of the land obtained in compensation. In the Court's view, the state failed to strike a fair balance between the interests at stake and made the applicant association bear a disproportionate burden contrary to its right to peaceful enjoyment of possessions. Accordingly, Article 1 of Protocol No. 1 had been violated on account of the deprivation of the applicant association's property.[108]

Regarding the alleged violation of Article 1 of Protocol No. 1 by the compulsory letting of land, the ECtHR noted that it is not disputed between the parties and that the compulsory letting of the applicant's land amounted to a control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1. The restriction had a statutory basis, namely Act 64/1997. The interference undoubtedly contributed to the legal certainty of the persons concerned, and the Court saw

107 ECtHR, Urbárska obec Trenčianske Biskupice v. Slovakia, paras. 7–13.
108 ECtHR, Urbárska obec Trenčianske Biskupice v. Slovakia, paras. 116, 120, 123–124, 131–133.

no reason to doubt that the interference pursued a "legitimate aim" in the "general interest." On the other hand, the ECtHR was off the view that the general interest was not sufficiently strong to justify such a low level of rent, bearing no relation to the actual value of the land. Accordingly, Article 1 of Protocol No. 1 had been violated on account of the deprivation of the applicant association's property.[109]

2.3. Cases related to the acquisition of agricultural lands by legal persons and by foreign nationals

2.3.1. General rules

The applicant of the ECtHR's *Luczak v. Poland* case was a French national of Polish origin who had moved to Poland in the 1980s and whose wife was a Polish citizen. As a result of his employment in Poland, he was affiliated with the general social security scheme as the relevant law governing the scheme did not exclude the participation of foreign nationals. In 1997, the applicant and his wife jointly bought a farm; subsequently, the applicant terminated his employment to concentrate on the farm, which he expected to provide them with a living. The applicant and his wife requested the "Częstochowa branch of the Farmers' Social Security Fund" (*Kasa Rolniczego Ubezpieczenia Społecznego*) to admit them to the farmers' social security scheme. While his wife's application was granted, the fund refused the applicant's request on the ground that the Farmers' Social Security Act of 20 December 1990 (*ustawa o ubezpieczeniu społecznym rolników*) required Polish nationality for admission to the scheme. As a result, the applicant did not have the right to social security cover and to pay contributions toward his old-age pension.[110]

Before examining the case in detail, the ECtHR reiterated[111] that, as a general rule, "very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention." On the other hand, when it comes to general measures of economic or social strategy, the case law[112] grants a wide margin of appreciation to the CoE member states. The ECtHR further stated that it is not its role to substitute itself for the legislator. Due to fact that national authorities have direct and better knowledge of their society and its needs, they are, in principle, better placed than the international judge to appreciate what is in the public interest on social or economic grounds. As a result, the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation."[113]

Regarding the applicability of the findings in the above paragraph to the case at hand, the ECtHR noted that in respect of admission to the farmers' scheme, the 1990

109 ECtHR, Urbárska obec Trenčianske Biskupice v. Slovakia, paras. 140, 144, 145.
110 ECtHR, Luczak v. Poland, paras. 8–13.
111 ECtHR, Gaygusuz v. Austria, para. 42; ECtHR, Koua Poirrez v. France, para. 46.
112 ECtHR, James and Others v. the United Kingdom, para. 46.; ECtHR, National and Provincial Building Society and Others v. the United Kingdom, para. 80.
113 ECtHR, Luczak v. Poland, para. 48.

Act established a difference in treatment based on nationality. The ECtHR considered that the applicant was in a similar position to other persons who, as Polish nationals, applied for admission to the farmers' scheme, since he was (i) a permanent resident in Poland, (ii) affiliated to the general social security scheme, and (iii) contributed as a taxpayer to the funding of the farmers' scheme. The respondent government claimed that the particular rules governing the agricultural sector are aimed to protect Polish farmers, who are a vulnerable group. While the ECtHR considered that that state's regulation could be regarded as pursuing an economic or social strategy falling within the state's margin of appreciation, the Court reiterated that legislation regulating access to such a scheme must be compatible with Article 14 of the Convention. It noted that in the instant case, the applicant's admission to the farmers' scheme was refused solely on the ground of his nationality, whereas for all practical purposes, he was in a comparable position to Polish nationals who applied for admission having previously been affiliated with the general social security scheme. It underlines that the applicant, as other Polish employees, supported the farmers' scheme by paying taxes when he was employed. In this connection, the Court observes that the 1982 Act—the predecessor of the 1990 Act—did not establish a nationality condition in respect of social security cover for farmers. The Court also noted that, while the government argued that social and economic policies pursued prior to 2004 justified the difference in treatment, after Poland's EU accession, their public policy goals governing farmers' scheme suddenly changed. In the ECtHR's view, the government failed to provide any convincing arguments in this regard, namely the causes of the sudden change. Furthermore, the Court noted that based on an estimation made by the government, amendments to the 1990 Act aimed at providing the EU citizens with the possibility that the admission to the farmer's scheme would not generate additional budget expenditure. Therefore, the ECtHR found that the government failed to provide any reasonable and objective justification for the distinction such as to meet the requirements of Article 14 of the Convention, even having regarded the margin of appreciation granted for member states in the area of social security. Accordingly, Article 1 had been violated.[114]

The applicant of the *Stephen Ogden v. Croatia* case was a British national with British permanent residence. In 2005, the applicant bought an old stone house and the surrounding land plot on the Pelješac peninsula and requested the consent of the minister of justice for the acquisition of ownership of the real property in question, in accordance with the then valid rules on the acquisition of real property by foreigners. The minister dismissed the applicant's request on the ground that the property in question was located in a "protected significant natural landscape" area where, unless otherwise provided for by an international agreement, foreigners —either natural persons or legal entities—could not acquire ownership of real property. The applicant's attempts to require permission through judicial proceedings were unsuccessful. It was only Croatia's accession to the European Union in 2013 that brought a

114 ECtHR, Luczak v. Poland, paras. 49, 51, 55–60.

change in the applicant's situation. The new EU conformity law lifted the ban on the acquisition of ownership of real property in the protected areas of nature for foreign nationals or legal entities. In 2014, the applicant successfully lodged an application with the Land Registry Division of the Korčula Municipal Court (Općinski sud u Korčuli) seeking to be recorded in the land register as the owner of the real property in question on the basis of the sale and purchase agreement from 2005, in which the court granted and recorded the applicant's ownership of that property.[115] In his claim for just satisfaction, the applicant specified that the denial of entering his ownership into the registry had deprived him of the possibility of spending summer holidays in the house he bought and that had he had to pay for private accommodation, which had cost him 3,000 euros. The Court reiterated that under Article 37 § 1 (b) of the Convention, it may "[...] at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that [...] the matter has been resolved [...]." In this regard, the Court noted that, in 2014, the applicant's ownership of the property at issue became registered, and thereby, he became its legally recognized owner. The Court further noted that even if he had not been formally recognized as the owner of the property in question for some 8 years, he could have used the property as he wished, namely spending his free time there. To the Court, it was evident from the applicant's submissions that his intention had never been to rent or sell the property; it if had, it would have led to another conclusion. Having regarded these considerations, the Court was not persuaded that the applicant had suffered any disadvantage as a result of the alleged violation(s).[116]

2.3.2. The Ukrainian case

The factual and legal background of the case can be summarized as follows: under the laws of the former Ukrainian Soviet Socialist Republic, individuals and non-state entities could not own land as this was owned by the state. The enactment of the Land Code of December 18, 1990 (hereinafter: 'the Land Code') authorised local councils to transfer land to individuals and non-state entities. At the same time, the Land Code introduced a 6 year-long moratorium on selling or otherwise disposing of the land, except that (i) the owners were allowed to transfer the property back to their local council and that (ii) courts were authorised to shorten this period in case a valid reason existed for such a decision. When the Land Code entered into force, the majority of the country's agricultural land was held by the former Soviet collective and state-owned farms. A statutory Act of 1992 renamed them "collective agricultural enterprises" (hereinafter: CAEs). Three years later, a presidential decree implemented a gradual reform of the CAEs by issuing shares of land to their current and former members and to some workers employed in the social sector. In this context, "share" meant a number expressed in hectares but without defining a specific physical location or defined boundaries. Even though the decree allowed

115 ECtHR, Stephen Ogden v. Croatia, paras. 1, 4–7, 10–13.
116 ECtHR, Stephen Ogden v. Croatia, paras. 29–32.

members of the CAEs to withdraw from their associations with their shares, it was not until 1999 that the large-scale dissolution of the CAEs started. A presidential decree of 1999 accelerated the land reform by requiring the dissolution of all CAEs and the conversion of shares into physical plots of land until April 2000. Based on a summary approved by the Parliament, some 6.87 million Ukrainians obtained shares of land, and 3.17 million had converted their shares into plots of land. Some 107,000 shares were sold or otherwise disposed of by their new owners, contrary to the statutory ban on disposing the land reinforced by the Transitional Provisions of the new Land Code, which provided that until January 1, 2005, individuals and non-state entities could not sell or otherwise transfer title to (i) plots zoned for individual farming enterprises or for other commercial agricultural production and (ii) shares of land. Only swap transactions, inheritance cases, and expropriation for public needs were exempted. The ban was subsequently extended and modified and commonly referred to in Ukraine as the "the land moratorium." Based on the legislator's initial intentions, the moratorium was introduced only as a temporary measure until a land market with "adequate" prices evolved. The *travaux préparatoires*[117] of the New Land Code show that the legislator was afraid of the possibility that dispensing with the moratorium would lead to a scenario where a few large landowners could acquire the majority of agricultural land and cheap agricultural labour force from the rest of the population.[118]

Despite the legislator's good intentions, the law failed to achieve their aim. An advisory corporation, EasyBusiness, acting as an intervener, submitted that two-thirds of Ukraine's agricultural land was transferred into private ownership and 94% of the rural population converted their shares of land into land plots from 1996 to 2009; thus, legally, the land was fragmented into small parcels. However, in practice, the land market became fairly monopolized with the 100 biggest players renting 6.5 million hectares, which created a non-transparent land market, where the control over land concentrated in the hands of agricultural holding companies. The latter ones, as the most common tenants, had disproportionate power over small landowners, who had no choice but to accept abnormally low rents. As EasyBusiness pointed out, international experience shows that—contrary to what was feared by the legislator—in most countries, the creation of a free land market had induced an increase in the value of land. This trend renders it less likely that financial resources of international financial entities would suffice to buy up the land in quantities that would threaten a state's sovereignty or food security. High land fragmentation is also a mitigating factor in this regard. Lastly, EasyBusiness argued that lifting the moratorium would strengthen the farmer's bargaining position. However, the ECtHR noted that the applicants did not submit any evidence that would support the allegations of EasyBusiness regarding the abuse of market power by tenants in their particular cases.[119]

117 Preparatory works.
118 ECtHR, Zelenchuk and Tsytsyura v. Ukraine paras. 6–20.
119 ECtHR, Zelenchuk and Tsytsyura v. Ukraine, paras. 93–96, 141.

When addressing the case, the ECtHR noted that while the moratorium and its extensions clearly had their basis, which had never been declared unconstitutional, in domestic law, the uncertainty created by the repeated extensions of the moratorium and the repeated failure of Parliament and the government to respect self-imposed deadlines for the creation of a sales market in agricultural land rendered the relevant legislation unforeseeable. As the ECtHR noted, these omissions led to a situation where the moratorium was treated as indefinite. Regarding the ban on the transfer of agricultural land, the ECtHR noted that it is not its role to substitute itself for the legislator and decide whether a state that has decided to transfer land back into private hands should or should not then allow the new owners to sell it and under what conditions.[120] Under the Court's well-established case law, its task is to determine whether the manner in which it was applied to—or affected—the applicants gave rise to a violation of the Convention.[121]

In the proceedings before the Court, the government argued that the moratorium was needed to avoid certain key risks, namely (i) the impoverishment of the rural population, (ii) the excessive concentration of land in the hands of wealthy individuals or hostile powers, and (iii) the withdrawal of agricultural lands from cultivation. Regarding the first argument, the ECtHR made two observations. First, not every applicant lived in rural areas and did farming for a living, meaning that this argument did not concern those applicants—not few in number—who lived in cities. Second, as to the risk of impoverishing the rural population generally, the ECtHR noted how the legislator also acknowledged that the absolute prohibition on sales was not needed but was only for a definite time period, which would enable the development of a stable land market. As for the second and third argument, the Court ECtHR observed that Ukrainian law already contained certain provisions aimed at and seemingly eligible to achieve the same result. These measures among others included the taxation regime, which would penalize the agricultural land's withdrawal from cultivation; the restrictions on the categories of those able to own land; and the caps on the maximum amount of land owned. Lastly, the ECtHR found it relevant that no other Council of Europe member state had implemented land reform programs with some blanket restrictions on the sale of agricultural land. Again, the ECtHR reiterated that it was not for the Court to determine whether the legislation chose the best solution, having regarded the margin of appreciation granted for the legislator by the Convention.[122] Still, the legislator is required to provide a reasoning for the choice of a more restrictive solution—over less restrictive solutions—and how it strokes a "fair balance" between the interests of the parties. This is the core element of scrutinising proportionality. When it comes to assessing the severity of the burden imposed on the applicants, the ECtHR found the following factors to be relevant: (i) the length of time the restrictions remained in place (17 years overall), (ii) the broad scope of

120 ECtHR, Zelenchuk and Tsytsyura v. Ukraine, paras. 105, 106, 110, 117 118.
121 ECtHR, Garib v. the Netherlands, para. 136.
122 ECtHR, Bečvář and Bečvářová v. the Czech Republic, para. 66.

restrictions, namely that they practically prevented the applicants from alienating their lands and using them for any other purpose than agriculture, and (iii) the blanket and inflexible nature of the restrictions, which are not subject to any individual review or exception. As a result of these, the applicants' ownership rights were rendered, in practical terms, precarious and defeasible. In this regard, the ECtHR reiterated that ECHR should be interpreted and applied in a manner that renders its guarantees practical and effective rather than theoretical and illusory.[123] Finally, the Court concluded that the state made the applicants bear the burden of the authorities' failure to meet their self-imposed goals and deadlines. In view of all the relevant factors of the case, the Court considered that the burden imposed on the applicants was excessive and the respondent state overstepped its wide margin of appreciation in this area and failed to strike a fair balance between the general interest of the community and the property rights of the applicants. Thus, accordingly, Article 1 of Protocol No. 1 had been violated.[124]

Summary

The author identified two main categories of agricultural land-related legal issues that show up often in the ECtHR's case law related to the selected countries, that is to say, which constitute a distinctive feature of the selected countries in this respect. The first main category comprised compensation-related cases, which constitute the vast majority of agricultural land-related ECtHR cases in the selected countries. The author reiterates the shared historic characteristics of the selected countries and their decisions to provide compensation—either fully or partially—for the properties confiscated during the communist era either *de jure* or *de facto*. In doing so, these states have gone beyond their obligations under articles of the ECHR and its protocols, since Article 1 of Protocol No. 1 cannot be interpreted as imposing any general obligation on the contracting states to return property, which was transferred to them before they ratified the ECHR. However, once a CoE member state has granted the right to compensation, it is obliged to grant this right through a national law that obeys the established case law of the ECtHR on both Article 1 of Protocol No. 1 and ECHR Article 6 (1). The common problem of the selected countries' agricultural land-related legislation and judicial practice arose from the non-compliance with the abovementioned ECtHR case law. A national regulation that suffers from systemic deficiencies (e.g., because the state tried to remedy a complex situation with one-size-fits-all regulation and at the same time failed to provide sufficient resources for the authorities vested with the task) is clearly not in conformity with ECtHR case law, as identified in the *Maria Atanasiu and Others v. Romania* and the *Manushaqe Puto and Others v. Albania* cases. Similarly, legislators of the selected countries often failed to strike a

123 ECtHR, Paposhvili v. Belgium, para. 182.
124 ECtHR, Zelenchuk and Tsytsyura v. Ukraine, paras. 124–129, 144, 147–149.

fair balance between the interests of those who were made eligible for compensation and those who acquired the ownership or the tenancy rights of the once nationalized property from the state in good faith. That is to say, the strive to remedy old injuries created disproportionate new wrongs, as stated by the ECtHR in the *Pincová and Pinc v. the Czech Republic* case, where those who acquired agricultural land in good faith suffered disproportionate burden, and in the Slovakian "Gardener cases," where those entitled to compensation were obliged to bear the prevalence of the rights of tenants, who—if they wished so—may become the new owners of land. In these cases, the ECtHR paid special regard to the fact that either the statutory land purchase prices or the lease prices were well below the actual market prices.

The other main category is related to the issue of acquisition of agricultural lands by foreign natural or legal persons. However, as mentioned above, the ECtHR's case law is not as "rich" in this issue because Article 1 of Protocol No. 1 does not create a right to acquire property. Thus, under the established case law of the ECtHR, a possible claim submitted by a legal entity on the ground that it was not allowed to acquire agricultural land would be declared inadmissible by the ECtHR with a high probability. In the *Zelenchuk and Tsytsyura v. Ukraine* case, however, the ECtHR took the view that a national legislation that prescribes some blanket restrictions on the sale of agricultural land is incompatible with the provisions of Article 1 of Protocol No. 1. In this regard, the Court paid particular attention to the fact that that (i) the state made the applicants bear the burden of the authorities' failure to meet their self-imposed goals and deadlines, thus creating a situation where the moratorium was deemed indefinite; and (ii) the regulation excluded the possibility of any individual review or exception. It must be mentioned that an intervener, EasyBusiness, submitted evidence that the moratorium was rather counterproductive, that is, big agricultural holders succeeded in renting neighboring lands and creating "quasi-*latifundia*" and at the same time reached extra profit due to the absurdly low renting prices to the detriment of the owners. Although the ECtHR practically disregarded these findings, the author firmly believes that legislators of the selected countries should at least read them before deciding to impose wide-ranging restrictions on disposing and acquiring agricultural land, even if restrictions on acquiring agricultural land may be deemed a tool for protecting national sovereignty.

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| Chapter 2 |

Acquirement of Land Rights by Foreign Investors: An International Investment Law Perspective[1]

János Ede SZILÁGYI – Bálint KOVÁCS

ABSTRACT

This chapter provides an insight into the world of international investment law and its intersection with cross-border acquirement/acquisition of land. Cross-border acquirements, in this context, can be viewed as foreign investments that may fall under the protection of one (or more) of the approximately 3,000 existing international investment agreements. International investment law, as a complex and autonomous system, provides protection to investors via substantive provisions and investment treaty arbitration. The unique situation of Central Europe within this particular international law framework is something which merits attention, which is why this chapter provides an introductory part for the reader to gain a general knowledge of the field and then dives into some of the regional specificities, in tune with the rest of the book.

KEYWORDS

international investment law, arbitration, land acquisition, land grabbing

1. Short introduction to international investment law

The international investment law (IIL) regime is an atomized system—as opposed to the multilateral trading system, with the World Trade Organization as its biggest component—mostly made up of bilateral investment treaties (BITs) and treaties with investment provisions (TIPs), collectively referred to as international investment agreements (or IIAs). IIAs are instruments for the facilitation and protection of foreign direct investment (FDI) and have been widely regarded as an important factor in attracting FDI. When two states conclude a bilateral investment treaty, they essentially grant the protections formulated therein to investments made on their territories by investors from the other contracting state. The country where the

1 Our paper draws upon the conclusions of a previous study by Szilágyi, 2018.

Szilágyi, J. E., Kovács, B. (2022) 'Acquirement of Land Rights by Foreign Investors: An International Investment Law Perspective' in Szilágyi, J. E. (ed.) *Acquisition of Agricultural Lands: Cross-border Issues from a Central European Perspective.* Miskolc–Budapest: Central European Academic Publishing. pp. 55–75. https://doi.org/10.54171/2022.jesz.aoalcbicec_3

investment is made is called a *host country*, while the country of origin of the investor is called a *home country*.

As more and more IIAs have been reached, the use of the dispute resolution mechanism attached to these agreements—called investor-state dispute settlement (ISDS)—started seeing activity. Like any system, due to its imperfections, it has received criticism from some and has also been praised by others. Some of the more important questions related to this topic will be presented briefly in this paper, with a focus on the general characteristics of the system as well as the specific case of the acquirement of land rights in selected Central European countries.[2]

The social, political, and economic implications of IIAs have often been overlooked by developing countries in their quest to maximize FDI inflows.[3] Widely recognized as essential for their development, the inflow of FDI was also encouraged by IIAs typically entered into by developing countries (investment importers) with developed countries (investment exporters). When it comes to development, oftentimes, states that are strapped for investment will focus on the narrower macroeconomic effects of FDI. Nevertheless, the social and political implications of FDI—protected by IIAs—are not to be disregarded. IIAs accord foreign investors protection against *expropriation*,[4] other substantive protection in the form of standards of treatment, as well as procedural remedies for their effective enforcement in the form of ISDS. Consequently, terms such as *fair and equitable treatment*,[5] the protection of *legitimate expectations*, the prohibition of discrimination, and other substantive provisions have become ubiquitous within IIAs. Recourse to investment treaty arbitration (ITA) as a means for ISDS has also grown ever more popular.[6] While FDI produces mixed results, with local communities sometimes negatively affected by the inflow of foreign capital, the development contribution of FDI has a front and center position with decision-makers in developing countries. International organizations such as the United Nations Conference on Trade and Development (UNCTAD) or the World Bank have encouraged granting increased protection to foreign investors as a way to ensure increased inflows of capital[7]; however, it has been noted that the protection of investments dominates these treaties, while the promotion aspect is often overlooked in them. This made IIAs—and investor access to investment arbitration—important components for attracting capital. Ultimately, the importance of these mechanisms stems from the fact that they insulate foreign investments, granting foreign investors

2 The selected Central European countries—as per the topic of this book—are the following: Croatia, Czechia, Hungary, Poland, Romania, Serbia, Slovakia, and Slovenia.

3 For a review of the main points on this topic, see Nagy, 2020, pp. 899–900.; also, Pohl, 2018.

4 Víg, 2019.

5 Paparinskis, 2014.

6 See the statistics of the United Nations Conference on Trade and Development (UNCTAD) on the number of ISDS cases: https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf (Accessed: July 12, 2022)

7 See, for UNCTAD, https://unctad.org/system/files/official-document/iteiit20077_en.pdf and for the World Bank, https://documents1.worldbank.org/curated/en/666341500008847215/pdf/117475-PUBLIC-WP-13-7-2017-12-8-30-SPIRAToolKitGuide.pdf (Accessed: July 12, 2022)

the right to take their grievances in front of international arbitral tribunals, thus circumventing domestic courts.

Traditionally, the field of international investment protection has its origins in the principles of state responsibility to aliens.[8] With its evolution over time, at one point, it was argued that IIAs and ITA are needed to protect foreign investment from political risk in the host states while also avoiding the need for the home states of investors to engage in diplomatic efforts (or even in the use of force) to protect the interests of their citizens abroad.[9] With the help of such a dispute settlement mechanism, investors can engage host states directly and hold them accountable for actions that violate their rights in accordance with the applicable IIA. In disputes arising from FDI, several overlapping legal regimes may be applicable. This is where IIAs will stand out; in cases where there is such a treaty between the investor's host state and home state, if the investor so chooses, ITA may be the way to resolve a dispute that has arisen between them. In cases where an arbitration is lodged, this effectively impedes the state from giving diplomatic protection or bringing an international claim on the same dispute, unless the host state will not comply with the arbitral tribunal's award. This system effectively establishes the capacity of private individuals and corporations to engage in proceedings directly against a state in an international forum, essentially recognizing the individual as a subject of international law.[10]

The protections granted by IIAs extend to all investments coming from and established in the countries party to them. What is more, the commitments made by host states by entering into investment contracts with foreign investors may also be covered by the protections granted by a BIT, in case it includes a so-called *umbrella clause*. Umbrella clauses included in many IIAs extend the treaty protections, transforming the obligations assumed by states in investment contracts agreed with investors into international obligations. The effects of these treaties are numerous, and combining these with investment contracts, foreign investors will benefit from a highly effective regime of protection that domestic investors do not enjoy. An example of such a protection is that of stabilization clauses, which are usually included into investment contracts and have the effect of essentially "freezing" the law applicable at the time the contract was entered into. Basically, this insulates the investment from any subsequent regulation which might affect it, effectively shielding investors from political risk and regulatory change in the host state.[11]

Due to the high costs involved in ISDS proceedings, they have anecdotally been linked to a phenomenon called *regulatory chill*,[12] whereby a state will avoid adopting regulation—which in many cases might be necessary to correct past regulatory

8 Miles, 2013, p. 47; Lim, Ho and Paparinskis, 2018, Chapter 1 on the origins of investment protection and the field of international investment law.

9 For a perspective on the evolution of the international law on foreign investment, see Sornarajah, 2015, starting with p. 31.

10 Broches, 1972, p. 349.

11 Schreuer et al., 2009, p. 588.

12 Víg and Hajdu, 2018, pp. 44–54.

mistakes and to protect human rights or the environment—fearing costly arbitral proceedings and potential awards for compensation against them.[13] This forms the basis for the critique that IIAs curb states' regulatory powers, an argument which has formed the basis of much debate. Arbitral practice, in principle, does recognize the state's regulatory authority, as stated in the case *Electrabel v Hungary*, framing it in the context of FDI protection.

While the investor is promised protection against unfair changes, it is well established that the host state is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest. Consequently, the requirement of fairness must not be understood as the immutability of the legal framework but as implying that subsequent changes should be made fairly, consistently, and predictably, taking into account the investment's circumstances.[14]

One might also consider the question of IIAs from the angle of government commitments and the fact that an IIA entered into at a particular moment in time, by the government in power at that time, having had a particular vision regarding development and foreign investment, will outlast said government and may be considered a burden by a new one. Changes to existing IIAs are not at all common, which suggests that a different government elected on a different platform might see its hands tied by the treaty policies of previous governments. It is also plain to see why an uncertain, everchanging regulatory environment, exposure to political risk, and issues of rule of law may represent a deterrent for foreign investors. Many developing countries have little to offer in the eyes of investors other than natural resources and a cheap labor force. To attract foreign investors, countries may engage in a regulatory *race to the bottom*,[15] whereby they will cut red tape for the benefit of foreign investors without considering factors such as environmental protection and human rights. The consequences of these political decisions are not fully considered as the lack of economic advancement is tied to the lack of foreign investments, which results in the prioritization of capital inflow above all.

It is thanks to this view of being the backbone of development that FDI has received the extra protection briefly outlined above. The granting of such specific protection is continually encouraged, together with other means of promoting investments. An important part of this system is investment arbitration, which appears to be an efficient method of dispute resolution due in part to the enforcement regime backing it up. Two international conventions stand out in this system: the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention (1958) and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, referred to as the ICSID Convention, which established the International Centre for Settlement of Investment

13 Miles, 2013, p. 178.

14 Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Award, para. 7.77.

15 An expression that refers to the efforts made by states to appear more competitive in front of investors, easing doing business and gaining their advantages by reducing regulatory standards on the protection of the environment, human rights, workers' rights, etc.

Disputes (ICSID), the principal institution for ISDS. These conventions contain provisions on enforcement that make them highly efficient and thus highly attractive to foreign investors.

The above brief introduction is necessary to understand the interplay between IIL and national regulation. While it is important to encourage investments, one of the most important incentives for investors will be the guarantee of safety from political risk and drastic measures, be they administrative, judicial, or legislative. As an *ultima ratio* alternative, investment arbitration gives foreign investors the possibility of obtaining compensation whenever their investment has been imperiled.

2. Sovereignty, regulation, and IIAs

International law is built upon the concept of the state. States are the primary subjects of international law and exist on the basis of the principle of sovereignty. Sovereignty as a concept has two main aspects: internal sovereignty, which is an expression of supreme authority within one's territory, and external sovereignty, which implies that in exercising its supreme authority, no outside legal power can force the state to take a certain position or act in a certain way. This essentially signifies independence,[16] also expressed through the maxim *par in parem non habet imperium*.[17] States thus enjoy an exclusive right to regulate within their own territory,[18] which necessarily and evidently extends to regulation on matters of ownership of real estate.

The United Nations General Assembly Resolution 2625 (XXV.) of 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, in accordance with the Charter of the United Nations, spells out some of the abovementioned principles. The Resolution provides that the principle of sovereign equality of states also includes the element that "[e]ach State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States."

In exercising their sovereignty, states may enter into international agreements, which they must then honor, as expressed through the well-known maxim of *pacta sunt servanda*. International law also requires that it gain primacy over national law, this hierarchy being of existential importance to international law.[19] Such a hierarchy is also needed so that states' participation in building international relations is credible and trustworthy. Exercising their sovereign rights to enter into international agreements does not preclude states from adopting different regulations; however, adopting regulation that goes counter to international commitments will have consequences

16 Island of Palmas Case, The Netherlands v. USA, 1928, http://legal.un.org/riaa/ cases/vol_II/829-871.pdf (last visited 06.30.2022).

17 Mádl and Vékás, 2018, pp. 223–227. The latin maxim also appears as *par in parem non habet iurisdictionem*, see Nagy, 2017a, p. 263.

18 Shaw, 2003, p. 409.

19 Fábián, 2018, pp. 9–10.

that will manifest themselves pursuant to the concrete mechanisms to which the state has adhered. As provided in the Vienna Convention on the Law of Treaties (1969), according to art. 27, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Some international agreements have a coercive mechanism attached to it, while others are toothless, which is why a distinction is made between *hard law* and *soft law*. In the case of IIAs, as shown above, states essentially enter into an agreement granting supplementary protection to foreign investors of another state, which is ensured by a dispute settlement procedure removed from the host state's judiciary, usually in the form of investment arbitration.

Adopting regulation pertaining to land investments may trigger the protective mechanisms contained in IIAs, as with any other investment. Investors will thus have the right to ask an international tribunal to decide whether a particular measure of the state is consistent with the standards of protection applicable under the IIA. These tribunals will also respect the power of the government to take private property—the *eminent domain* rule—and will only order monetary compensation, the granting of restitution in kind being excluded from their jurisdiction. In essence, IIAs ensure that any regulatory, administrative, or judicial measure of the host state, which adversely affects in an unjustifiable way a foreign investment falling under its protection, will not remain without consequence. Some view this as an excessively strong system threatening the sovereignty of states, which is why it has come under heavy criticism and is now in the midst of a legitimacy crisis.[20] It must be noted that the debate around international conventions and sovereignty has been addressed a century ago by the Permanent Court of International Justice, which noted the following in the now famous *Wimbledon case*:

> "The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty."[21]

It is the case, nevertheless, that regulatory efforts by host states might interfere with the investments made on its territory. The cost of interfering with a foreign investor's rights protected by the substantive provisions in IIAs might be one that is hard to afford by a developing country. The arbitral proceedings themselves are particularly costly; however, in case of the claimant's success, the compensation payable pursuant to the award will also be large.

The costs of investment arbitration are not to be ignored. A highly noteworthy empirical study of the matter puts it into figures, and they are objectively astronomical.

20 Emmert and Esenkulova, 2018, p. 14.

21 Case of the S.S. "Wimbledon"—United Kingdom, France, Italy & Japan v. Germany, Judgment, para. 35.

The mean costs for the parties taking part in such proceedings, which includes tribunal costs (the arbitration venue, institution, arbitrators, secretariat, etc.) and legal costs (mainly lawyers' fees), incurred by respondent states are around US$4.7 million, with the median figure at US$2.6 million, while for investors, the mean figure is US$6.4 million, and the median figure is US$3.8 million. This worsened by the fact that respondent states prevailing in arbitration will be less likely to benefit from cost shifting in their favor; basically, even if the states win, they end up with large costs for which they will most likely not be reimbursed. In addition, as previously noted, the compensation payable also tends to be massive.[22] By the standard established in customary international law as well as in many of the IIAs for the amount of compensation owed in case of expropriation and nationalization, what is thus regularly claimed as compensation is the *fair market value* of the investment, and it encompasses both *lucrum cessans* and *damnum emergens*. The measure of the compensation payable had been one of the major topics of debate stretching into the second half of the twentieth century; today, arbitral tribunals apply the standard of *fair market value*.

At the start of decolonization after the Second World War, concessions and other land rights gained in the colonial era experienced a massive backlash. In the post-war international legal system of the United Nations (UN), developing countries voiced their concerns and pushed what was dubbed as the New International Economic Order (NIEO), using the United Nations General Assembly (UNGA) as a platform to make their voices heard. This push for eliminating what was essentially the legacy of colonialism and imperialism through the pursuit of economic justice resulted in the adoption of a number of UNGA resolutions, such as the 1803 (XVII) UNGA Resolution of 1962 on permanent sovereignty over natural resources, 3281 (XXIX) UNGA Resolution of 1974 – the Charter on the Economic Rights and Duties of States, and the 1974 Declaration on the Establishment of a New International Economic Order.[23] The debates at that time all related to the topic of acquirement of land rights by foreign investors. As these resolutions had no teeth, they remained principles that were later adapted and used in different contexts, but they were never accepted by arbitral tribunals as customary international law. With the spread of IIAs overriding their content, the principles thusly established can now be found in national legal instruments, such as constitutions and statutes, as well as international codes and institutions.

The era of proliferation of IIAs started in the 1990s, with the fall of communism in Central Europe bringing more countries into the neoliberal paradigm.[24] The specificity of the Central European context will be addressed in the next chapter as recent developments regarding intra-EU investment arbitration[25] are rooted in this period.

22 For a detailed analysis on costs, see Hodgson, Kryvoi and Hrcka, 2021.

23 On this matter, see Lim, Ho and Paparinskis, 2018, starting with p. 10.

24 As shown by the statistics of UNCTAD, between 1990 and 2007, a number of 2663 new IIAs entered into force. For details, see World Investment Report 2015: Reforming International Investment Governance, Ch. IV, p. 121, Figure IV.1. – Evolution of the IIA regime.

25 Intra-EU investment arbitration refers to investment arbitration lodged based on a BIT entered into by two EU member states.

3. The particular case of Central Europe and IIAs

Central Europe (CE) experienced a massive increase in the number of IIAs, especially after the fall of communism,[26] which was prompted by these countries entering the global economic race for attracting capital in the form of FDI. CE countries account for many IIAs entered into in this "era of proliferation" of such international treaties, which later led to a large number of cases coming out of the same region.

Seeking integration into the political, economic, and military organizations of the West, such as the Council of Europe, the European Communities (European Union), the World Trade Organization, and the North Atlantic Treaty Organization, CE countries introduced a number of reforms after the regime change. This period was marked by constitutional and legal reform, transitioning to a market economy through the privatization of state-owned enterprises, commitments to guaranteeing the free flow of capital, and adherence to the values of democracy and rule of law. One part of these commitments came in the form of IIAs, which classically have a double purpose, namely that of promoting and of protecting foreign investment. CE countries, on the one hand, accepted the reality of the prevailing ideology at the end of the Cold War, having to implement the "Washington Consensus"; on the other hand, they faced the harsh reality of having to compete for FDI, in lieu of other sources to finance their economic growth, in their attempts of catching up to the West.[27] In this regard, it has been noted that state power within CE countries was reduced to a minimum, with IIAs impeding the much needed continual readjustment of the role of government.[28]

Most of the ISDS cases in the CE region concern matters regarding either public service regulation or regulatory decisions on dismantling state ownership.[29] As per the caseload statistics[30] of the most important dispute resolution institution in this field—the ICSID—Eastern Europe and Central Asia (a region that also includes the countries subjected to analysis herein) accounts for 26% of all cases registered under the ICSID Convention and Additional Facility Rules.[31] In addition, the non-ICSID cases, conducted as ad hoc arbitration under the UNCITRAL Rules, or at the Stockholm Chamber of Commerce, and other prominent institutions, as well as cases that are not known to the public show that this region accounts for a large number of cases. This comes as no surprise as many countries in this region underwent massive changes in the 1990s, requiring regulatory solutions that paved the ground for implementing

26 For a more nuanced analysis of the regional experience, see Nagy, 2016.
27 Sándor, 2019, pp. 470–471.
28 Sándor, 2019, p. 472.
29 Nagy, 2016; Sándor, 2019, p. 483.
30 For details and other figures, see The ICSID Caseload – Statistics (Issue 2022-1) https://icsid.worldbank.org/sites/default/files/documents/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf (Accessed: July 12, 2022)
31 The large number of cases is not matched by the arbitrators appointed to cases at ICSID. This region only accounts for around 3% of appointments.

democratic reform and adapting to the conditions of the market economy. In their quests to adhere to Western institutions, governments introduced regulatory measures, some of which ended up costing them in arbitration.

Membership in the European Union was a principal goal for all countries in the region, which constituted a catalyst for legislative progress and reform. CE countries had been encouraged to enter into BITs with EU member states prior to accession, which evidently resulted in these IIAs becoming intra-EU treaties after these countries' accession to the EU.[32] As has been noted in the legal literature, intra-EU BITs were not a problem specifically related to Central European member states; however, it was their accession that brought the issues to light as approximately two-thirds of the cases in the region have been intra-EU ones. After the European Economic Community was established, member states refrained from entering into BITs, and those that had previously (pre-accession) been concluded did not find application.[33] After accession some of the BITs had to be brought in line with EU regulation, effectively maintaining these treaties among EU member states.[34] The irony is that some of the cases lodged against new member states had as their root cause legislative reform implemented in the pre-accession phase. Such was the *Micula case*, where the European Commission intervened and forbade Romania to pay out the award, relying on EU state aid rules.[35] Soon after, the Commission made requests to member states to terminate all intra-EU BITs; however, it was the Court of Justice of the European Union (CJEU) that ultimately cleaned up the mess via three important judgments, causing much consternation in the professional community.[36] Pursuant to these developments, member states also entered into an agreement to terminate all intra-EU BITs.[37] While this did not end all intra-EU investment arbitration cases, and arbitration under the Energy Charter Treaty (ECT) continued, a shift can now be observed, with intra-EU ITA approaching its end.[38]

Important developments have also been made with regard to IIAs entered into by EU member states with third countries. Pursuant to the extension of exclusive EU competence to the field of FDI via the Treaty of Lisbon, existing BITs entered into by

32 Korom, 2020, pp. 56–59.

33 Nagy, 2019, p. 2.

34 As also shown by the following cases: CJ Case C-118/07 (Commission v Finland) [2009] ECR I-1301, I-1335 and I-10889; ECJ Case C-205/06 (Commission v Austria) [2009] ECR I-1301; ECJ Case C-249/06 (Commission v Sweden) [2009] ECR I-1335.

35 Commission Decision (EU) 2015/1470 of March 30, 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award Micula v Romania of December 11, 2013.

36 Judgment of the Court (Grand Chamber) of March 6, 2018 (request for a preliminary ruling from the Bundesgerichtsh of — Germany) — Slowakische Republik v Achmea BV, Case C-284/16; Judgment in Case C-109/20, Republiken Polen v PL Holdings Sàrl; Judgment of the Court (Grand Chamber) of September 2, 2021. Republic of Moldova v Komstroy LLC – C-741/19.

37 Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union – SN/4656/2019/INIT.

38 Most recently, we have witnessed the first investment treaty arbitration case where the tribunal admitted the intra-EU objection of the host state. See Green Power Partners K/S SCE Solar Don Benito APS v. The Kingdom of Spain. SCC Arbitration V (2016/135), Award (June 16, 2022).

EU member states with third countries will gradually be replaced by treaties negotiated by the EU with those states. As long as there is no treaty between such third states and the EU, member states' treaties will remain in force.[39]

To conclude, it must be noted that investments coming from EU member states will now be subjected to the law of the host state and also EU law, while investments coming from third countries will be subjected to the IIAs in force.

4. Land investments and IIAs

As any other foreign investment, land investments may also come under the protection of IIAs, and they have seen an uptick in the last couple of decades. Due to the economic and geopolitical turmoil, interest in acquiring farmland has been growing. Without entering deep into the recent history of land acquirements, we must mention a few key moments that have prompted massive investments into this sector.[40]

In the aftermath of the sub-prime mortgage crisis, which resulted in the global financial crisis—the Great Recession—there was a massive uptick in investments in farmland.[41] Around this period, two major food crises occurred: the 2007–2008 world food price crisis[42] and the 2010–2012 world food price crisis.[43] The SARS-CoV-2 pandemic has shown the fragility of value chains, and consequently, food insecurity has become a major concern. With a new crisis on our hands, resulting from the Russian military aggression against Ukraine, the matter of food insecurity is once again front and center,[44] and it was also a focus at the most recent World Trade Organization Ministerial Conference, where a Declaration was adopted on the matter[45] and the

39 See Regulation (EU) No 1219/2012 of the European Parliament and of the Council of December 12, 2012 establishing transitional arrangements for bilateral investment agreements between member states and third countries -- https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32012R1219 (Accessed: July 12, 2022)

40 See also The Economist: Buying Farmland Abroad: Outsourcing's Third Wave. May 21, 2009.

41 HighQuest Partners, United States (2010-08-10), "Private Financial Sector Investment in Farmland and Agricultural Infrastructure", OECD Food, Agriculture and Fisheries Papers, No. 33, OECD Publishing, Paris. http://dx.doi.org/10.1787/5km7nzpjlr8v-e (Accessed: July 12, 2022)

42 For more details, see 2007–2008 world food price crisis, Wikipedia: https://en.wikipedia.org/wiki/2007%E2%80%932008_world_food_price_crisis (accessed July 12, 2022)

43 For more details, see 2012 world food price crisis, Wikipedia: https://en.wikipedia.org/wiki/2010%E2%80%932012_world_food_price_crisis (accessed July 12, 2022) and also GRAIN – The Global Farmland Grab 2016; GRAIN – Seized: The 2008 Landgrab for Good and Financial Security.

44 For more details, see 2022 food crises, Wikipedia:
https://en.wikipedia.org/wiki/2022_food_crises (Accessed: July 12, 2022)

45 See Ministerial Declaration on the Emergency Response to Food Insecurity, Ministerial Conference, Twelfth Session, Geneva 12—15 June 2022.
https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/28.pdf&Open=True (accessed July 12, 2022)

NATO Strategic Concept for 2022 was mentioned.[46] The growing inflation experienced in 2022 as a result of these crises has also contributed to making farmland a focus for investment.[47]

The cross-border acquirement of land rights has consequently seen a sensible increase in both the number and the volume of transactions since the beginning of the new millennium. This increase has happened mainly because well-capitalized, developed countries have become more interested in increasing their food security, which also prompted more activity from the part of transnational corporations (TNCs) in this direction. TNCs have been paying more attention to avoiding commercial issues related to agricultural products, shifting their focus toward maintaining appropriate capacities to ensure their customers with the provision of agricultural products in the long run. This means fortifying their means of production with adequate agricultural fields and the connected water resources.[48]

One of the main critiques against IIAs—especially BITs—is that they often contain the same provisions and follow the same template.[49] The IIAs entered into will resemble US or European models, which have been deemed as highly investor-protective.[50] Of course, these treaties are entered into with the purpose of promoting a trustworthy, investor-friendly environment. It is also the case that there is a lack of expertise in many developing countries, as well as a lack of negotiating power[51]; thus, the provisions contained in these templates are now ubiquitous. The lack of innovation in this field means that the cross-border acquirement of land rights will have the same regime as any other investment, the same standards of protection, and the same exceptions applying to land investments as well.

The IIL regime, underpinned by the multitude of IIAs, has also been faulted for raising the price tag on land reform and on policies concerning the redistribution of land.[52] The acquirement of land rights by foreign investors carries multiple effects, depending, of course, on the way the land is utilized. In addition to issues around land redistribution, such investments may affect local values, in many cases affecting the rights of local residents as well as those of indigenous peoples, who might have competing rights over the land.[53]

The renewed interest of investors in acquiring farmland appears as a natural reaction to the challenges faced by the agricultural sector and in the supply of food, in light of the above. Governments, foreign governments, sovereign wealth funds, and international investment funds have all shown a massive interest in acquiring land for the purposes of food production, but also that of biofuel. In this context, IIAs

46 Which can be found here: https://www.nato.int/strategic-concept/ (Accessed: July 12, 2022).
47 Rastello, 2021.
48 De Schutter, 2011, pp. 511–513; Cotula et. al., 2009, pp. 4–5.; Dooly, 2014, pp. 306–307.
49 See Sándor, 2017, p. 473.
50 Alvarez, 2009, p. 50.
51 As argued by Sándor, 2017, pp. 473–474.
52 Cotula, 2015. p. 43.
53 Cotula and Schröder, 2017, p. 1.

will grant extra protection to investors seeking to acquire land. IIAs have been faulted by critics for contributing to the maintenance of bad deals and the phenomenon of *land grabbing*—a term that has been used by critics to describe the phenomenon of large-scale land deals in low and middle-income countries.[54]

Where a land-related dispute arises and is taken to arbitration, states' carveouts in IIAs regarding the right to regulate might constitute important provisions for avoiding supplementary responsibility. IIAs contain security exceptions and emergency provisions that could be linked to regulatory moves that might infringe upon investors' rights. Thus, regulation of land in the public interest might not in all cases result in the host state having to pay massive damages pursuant to arbitration. Such provisions are also contained in the US Model BIT, which has been used extensively as a model throughout the world. According to Annex B on expropriation, in para. 4(b), it is provided that "except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."

Treaty policy becomes an important factor, as provisions in IIAs may assist countries with their regulatory priorities. Security exceptions may be used to limit investors' access to arbitration, examples of which are contained in the US Model BIT, the Canadian Model BIT, and the ASEAN Regional Investment Treaty. Some have also excluded particular industry sectors, reserving the jurisdiction of domestic courts. Such is the example of article 9(4) of the Turkey Model BIT (2009) in relation to disputes concerning real estate:

> "The disputes, related to the property and real rights upon the real estates are totally under the jurisdiction of the Turkish courts and therefore shall not be submitted to jurisdiction of the International Center for Settlement of Investment Disputes (ICSID) or any other international dispute settlement mechanism."

While the issues faced in Africa, Southeast Asia, and South America are different that those of Central European countries, large-scale land deals have been made in this region as well. In this international context, where the acquirement of rights upon land—be it in the form of property, long-, and short-term leases, concessions, or other rights—to establish investments is growing, the number of related disputes is also expected to increase. At this point, we consider it important to make a few observations regarding the scope of IIAs, what these treaties cover, and how they can be activated.

54 Cotula, 2015, pp. 1–2.

5. What constitutes an investment?

As their name suggests, IIAs have to do with the protection of foreign investment. The question arises if whether or not only FDI or also foreign portfolio investments (FPI) are covered. In this context, the difference between these two types of foreign investment has to do mainly with

> "control of the assets or company: establishing a manufacturing plant or acquiring a firm abroad are two examples of direct investment; purchasing shares bringing little control over the firm's decisions is an example of portfolio investment."[55]

Most IIAs cover both types of investment; however, it is in the interest of countries to focus more on attracting FDI as these bring a more substantial contribution to the economy, while FPI less so. Jurisdiction pursuant to an IIA will only be recognized in case the dispute is related to an investment as defined by the applicable treaty.[56]

The requirement that a dispute arise directly out of an investment is also included in the ICSID Convention at Article 25(1). The term "investment" is not defined within the Convention, and the omission was intentional, with a majority of the drafters agreeing that a definition might cause jurisdictional issues.[57] Attempts were also made by arbitral tribunals to define what investment means for the purposes of Article 25(1) of the ICSID Convention. One of the more widely cited attempts to circumscribe the conditions a business activity needs to be recognized as an investment was done in the case Salini v Morocco and is popularly called the Salini test.[58] On this basis, a four-prong test has been developed, whereby an investment needs to have the following characteristics: it should consist of a material contribution; it must have a certain duration of performance; there must be a participation in the risks of the transaction; and it must make a contribution to the economic development of the investment's host state. The last condition, referred to as the development prong, has sparked somewhat of a controversy in legal literature, which will not be addressed in detail herein. However, we must note that the contribution to development can be a highly subjective issue and might constitute a condition for the jurisdiction of

55 European Parliament Briefing: EU International Investment Policy: Looking Ahead. European Parliamentary Research Service, 2022, p. 3. Available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729276/EPRS_BRI(2022)729276_EN.pdf (Accessed: July 12, 2022)
56 See, for example, The Netherlands Model BIT (2019), the US Model BIT (2012), or the South African Development Community's (SADC) Model BIT (2012) (the last one also expressly excludes portfolio investments).
57 Schreuer et. al., 2009, pp. 114–115.
58 Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I], ICSID Case No. ARB/00/4, Decision on Jurisdiction, para. 52.

arbitral tribunals, which smaller investors might not be able to fulfill.[59] It would also be difficult to recognize that the acquisition of land with the purpose of speculation on the real estate market genuinely contributes to the economic development of the host state.

It must also be noted that IIAs, in many cases, use broad definitions that usually include "every asset" in the term "investment" and have been interpreted as including not only contractual rights but also the different incentives that states might have granted for the investment to be established as well as the licenses and permits that the investment might require. The aforementioned umbrella clauses widen the jurisdiction of investment arbitration tribunals to also include contractual matters that would normally be dealt with in the framework of commercial arbitration.[60] Investments may also be structured in such a way as to gain access to and benefit from the protection of a particular IIA.[61] In addition, in some cases, the *most favored nation clause* extended jurisdiction.[62] This being the situation, investors are right in feeling confident that their investment will fall under the protection of an IIA.

6. Land acquirement and related issues

In the last two decades, economic actors have been showing a massive interest in investment in agricultural lands, as previously shown.[63] It must also be noted that many investments outside the agricultural sector will also include the acquirement of land-related rights, and legal issues may also arise from such arrangements. For the purposes of this study, we will not be excluding either of these.

What in the critical professional literature has been called *land grabbing* is a phenomenon found all around the world, in both developed and developing countries.[64] Extensive legal and other professional literature has focused on the matter of land grabbing, especially pertaining to Africa, Southeast Asia, and South America. These regions have experienced the acquirement of land in bulk—either as property, in the form of long-term leases, or as other contractual arrangements affecting the lives of local communities and of indigenous peoples by violating their human rights and the

59 Such a condition is also contained in art. 2 of the SADC Model BIT. For details on the matter, see Kovács, 2019, pp. 86–100.

60 Dolzer and Schreuer, 2008, p. 155.

61 Chaisse, 2015, pp. 225–305.

62 Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction.

63 For an in-depth look at the phenomenon also see: Szilágyi and Andréka, 2020.

64 European Coordination Via Campesina defined land grabbing as "the control – whether through ownership, lease, concession, contracts, quotas, or general power – of larger than locally-typical amounts of land by any persons or entities – public or private, foreign or domestic – via any means – 'legal' or 'illegal' – for purposes of speculation, extraction, resource control or commodification at the expense of peasant farmers, agroecology, land stewardship, food sovereignty and human rights."

environment. UNCTAD has observed a link between massive agricultural investments and issues related to food security, environmental destruction, forced evictions of existing users of land, conflicts over land rights, forced labor, child labor, and illegal expropriation of national resources.[65] Several other international organizations have dealt with this question and provided tools to assist both governments in developing countries and investors to make better, more responsible investments.[66] It must also be mentioned that well-thought-out investments which take into consideration the specific local needs are also quite advantageous and have such positive effects as job creation, contribution to rural, industrial and infrastructural development, technology transfer, contribution to food and energy security, and many other positive contributions to development.

It is evident that the challenges faced by some of these countries are different from those faced by CE countries; however, the framework of our study does not permit an in-depth look at these issues, which is why the next section will focus on matters specific to the Central European region in the context of IIL.[67]

According to the previous section, land-related cases can undoubtedly fall under the jurisdiction of an arbitral tribunal via an IIA. In many of the investment arbitration cases, investors rely on many provisions that have been quite popular, such as non-discrimination, fair and equitable treatment, or protection against expropriation. Fair and equitable treatment (FET) is one of the main treatment standards upon which investors rely when lodging arbitral proceedings against a host state. This standard of treatment ensures that a state will not be able to unilaterally adopt regulation in violation of the rights that the investor enjoys or can legitimately expect to enjoy. In case such rights are violated, the investor may trigger arbitration. Depending on the applicable IIA, clauses containing FET may be broader or narrower.[68] A broader application

65 UNCTAD, World Investment Report 2009: Transnational Corporations, Agricultural Production and Development, p. 94.

66 In this context, we must mention the World Bank Report titled The Practice of Responsible Investment Principles in Larger-scale Agricultural Investments – Implications for Corporate Performance and Impact on Local Communities, 2014; Investment Contract for Agriculture: Maximizing Gains and Minimizing Risks, World Bank, 2015; UNCTAD, FAO, IFAD, World Bank: Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources, 2010; Committee on World Food Security: 2014 Principles for Responsible Investment in Agriculture and Food Systems; UN Declaration on the Rights of Peasants, 2018; The IISD Guide to Negotiating Investment Contracts for Farmland and Water; Legal Guide on Contract Farming. UNIDROIT, FAO, IFAD, Rome, 2015; Legal Guide on Agricultural Land Investment Contracts, UNIDROIT, IFAO, Rome, 2021; Bali Declaration on Human Rights and Agribusiness in Southeast Asia (2011); Your Land, My Land, Our Land: Grassroots Strategies to Preserve Farmland and Access to land for Peasant Farming and Agroecology. Nyéléni – Europe & Central Asia, April 2020.

67 Several civil society initiatives have appeared in European countries shedding a light on issues related to land grabbing and land-use rights; see the members of the *Access to Land* organization: https://www.accesstoland.eu/-Members- (Accessed: July 12, 2022); see also a map of large-scale land acquisitions in several regions of the world created by *Land Matrix*: https://landmatrix.org/map/ (Accessed: July 12, 2022)

68 There are several ways in which FET clauses have been formulated, with many states attempting to narrow its applicability. See The Netherlands Model BIT, art. 9.

will result in more protection granted to the investor, with an adverse effect on the side of the state and its regulatory mobility. What is noteworthy about the legitimate expectations of the investor is that these do not stem from specific laws or contractual rights but from relations between the investor and the host state. These expectations stem from the reasonable reliance of the investor in its decision making on representations and inducements made by the host state.[69] The requirement to accord fair, prompt, and adequate compensation in case of expropriation is also important to mention in this context, both for cases of direct and indirect expropriation.

Without attempting to exhaust the treatment standards included in IIAs in the context of this paper, the above have been highlighted due to their importance in the cases concerning land rights acquirements in CE. In the case of agricultural land, it is usually the state schemes of privatization and redistribution in violation of the rights of early investors that have prompted investors to seek compensation. Not all such cases ended up in investment arbitration as this is a highly complex procedure that is realistically less accessible to smaller investors. Some of the cases that ended up in arbitration are presented in the section below.

In the Central European region, the intensity of the inflow of foreign investment was related to the privatization of state assets beginning in the 1990s. Investment came mainly from Western countries as markets opened up, and the process of privatization was not without its hiccups.[70] The communist regimes were replaced by democratic governments that committed themselves to building up market economies and implemented, in this transitional period, several reform measures. The reform packages usually included measures such as the liberalization of the markets, the privatization of state enterprises, and the removal of trade and investment restrictions. Property rights were reformed, and a new legal framework was established for business entities, as well as a business-friendly regulatory environment sustained by an institutional network aspiring to guarantee it.

69 As deduced from the case International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Award of January 26, 2006, para. 147. Similarly in Merrill and Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1, Award of March 31, 2010, para. 150. For more on the FET and what it includes, see Dolzer and Schreuer, 2008, pp. 119–149.

70 Examples of privatization-related investment arbitration cases can be found all throughout the larger CEE region: Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24; EVN AG v. Republic of Bulgaria, ICSID Case No. ARB/13/17; MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia, ICSID Case No. ARB/13/32; Saluka Investments B.V. v. The Czech Republic, UNCITRAL; Rail World Estonia LLC, Railroad Development Corporation and EEIF Rail BV v. Republic of Estonia, ICSID Case No. ARB/06/6; ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16; Luigiterzo Bosca v. Lithuania, UNCITRAL; EVN AG v. The Former Yugoslav Republic of Macedonia, ICSID Case No. ARB/09/10; Eureko B.V. v. Republic of Poland; Nordzucker v. Poland, UNCITRAL; Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11; Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1; UAB ARVI ir ko and UAB SANITEX v. Republic of Serbia, ICSID Case No. ARB0921; MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8; Československá Obchodní Banka a.s. v. the Slovak Republic, ICSID Case No. ARB/97/4. Short analysis of these cases and more can be found in Nagy, 2019.

Following the fall of communism, many CE countries saw complications regarding ownership rights, which added to a relatively cheap price for acquiring rights over agricultural land. Some of the restorative efforts of these new democratic governments had brought about massive fragmentation of lands to the point that profitable farming was not sustainable, with many people engaging only in subsistence farming. Such lands were than easily acquired by investors. Despite the efforts made by countries in the region, with an eye on accession to international organizations established by the West, acquiring a clear title over land in CE countries proved to be difficult. The efforts for re-privatization and the restitution of property were not as smooth as one might have expected. Communal ownership, the fragmentation of lands, and the expectation that the population would be able to navigate the new legal environment had proven to be too much. Political risk and corruption had also discouraged investors, and some of those who had stuck around subsequently had disputes with the state.

IIAs had been entered into by these states to encourage the inflow of capital, despite the existing issues. Investors, it may be argued, were rightly reluctant to commit investments to these states lacking insurance, fearing that they would not receive the treatment they were promised or that they deserved. IIAs constituted one of the tools that sought to win investors' trust, and it also ended up being one of the more efficient tools in recovering the losses from investments that became *collateral victims* of the transitional period. Focusing exclusively on cases where the acquirement of land rights constituted one of the major factors, it must be noted that despite the similarities, each case is quite different and has its own complexities.

In the tumultuous transitional period in Croatia, the complex case of Gavrilović v. Croatia unfolded.[71] The issue was that of a private company that had been nationalized by the communist regime and then partially reacquired during privatization by the former owner and heirs. It was a case where the murky proceedings of privatization mixed with bankruptcy in a war-torn area of the country. The Croatian State alleged corrupt schemes in the proceedings for the company's privatization, essentially stripping the Gavrilović family from part of its investment, which consisted of a meat processing factory and agricultural and grazing land. In this highly complex case, the issue of expropriation and that of the legitimate expectations of the claimants were the main substantive matters analyzed during the proceedings. The Tribunal ultimately found that Croatia had breached its obligations under the applicable Croatia–Austria BIT as regards direct expropriation. The Tribunal also noted that the legitimate expectation under the FET standard could not be recognized with respect to real estate to which the claimants had neither property nor any other contractual rights.[72]

In Hungary, in the case of Magyar Farming v. Hungary, the investors had their lease contract cancelled by the state in a scheme for the redistribution of agricultural

71 Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39.
72 For a summary of the case, see Hough, 2018.

land to local farmers. The investor entered into a lease contract gaining usufructuary rights, making its investment in reliance of a prelease right provided by the law which was subsequently modified. The arbitral tribunal found that due to the lack of compensation from the state to the investors for the expropriation of their statutory prelease right, the expropriation was unlawful.[73]

In another case, arbitration was lodged against the Hungarian state, the claimant investor accusing the respondent of not acting in good faith while terminating a concession contract. A land swap deal done in dubious circumstances by the investor concerning state-owned land ultimately led to the withdrawal of a concession granted by the Hungarian government. The arbitral tribunal did not find any abuse of rights by the respondent state and established that there had been no expropriation in the case.[74]

Foreign investors in Poland also brought their dispute to investment arbitration in a case concerning the termination of the lease agreement for a farmland in North-Western Poland.[75] The investors argued that the decision of the lessor was unlawful and politically motivated, while Poland asserted that the termination was conducted in an ordinary fashion, pursuant to the terms and conditions of the lease, due to repeated and material breaches of the contract by the lessee. The investment's deterioration and subsequent governmental notice to remedy the situation finally prompted the government to terminate the lease. The claimants asserted that the grounds for the termination of the lease agreement were nonexistent or immaterial and that the real purpose for the termination was the intent to lease the farm to Polish farmers. The arbitral tribunal found that the lease agreement had been legally terminated and did not find bad faith in the conduct of the host state.

In Romania, complications arising from the privatization of previously nationalized agricultural land also resulted in a case.[76] The Romanian Constitutional Court's Decision striking down as unconstitutional a law on privatization that guaranteed the claimant's investment was ultimately found by the arbitral tribunal to be the cause of failure to honor the lease in the case, prompting the payment of compensation.

While the above cases have not been presented in detail, they are sufficient to illustrate how land-related cases are treated in the context of IIAs and international investment arbitration. The standards of international customary law and principles of international law underpinning the system will, in some cases, produce results that are different from those of domestic courts. It must also be noted that success is not guaranteed for investors in all cases, which is why both investors and states must seek out further ways to ensure that investments remain balanced.

73 Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary, ICSID Case No. ARB/17/27. See also, *supra* Chapter 1, footnote 63, as well as Szilágyi, 2018.

74 Vigotop Limited v. Hungary, ICSID Case No. ARB/11/22. For a more detailed summary of this and other cases concerning Hungary, see also Nagy, 2017b.

75 Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland, PCA Case No 2015-13. As presented in Treder and Sadowski, 2019, pp. 345—348.

76 Mr. Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania, ICSID Case No. ARB/10/13.

7. Beyond IIAs – Concluding remarks

While IIAs have become quite popular, and their provision of a dispute resolution mechanism in the form of investment arbitration is seen as an important tool for the protection of FDI, many investments are still made on a contractual basis between the investor and the host state. These contracts represent a critical instrument where both the investor and the host state can include their expectations. Making sure that both parties are on the same page is important to avoid disputes.

A well-prepared contract may include provisions for the protection of the investor while also providing requirements regarding a contribution to development, the protection of the environment and that of human rights, and any other question a state might consider important. Moreover, host states may include more precise provisions as to their right to regulate in the public interest, while also guaranteeing the investor's rights. A well-drafted contract can go a long way in avoiding costly arbitration. In this sense, the instruments presented herein, elaborated with the purpose of ensuring more equitable and balanced land investments, must be reiterated.[77] For investors, it is also important that they engage in proper due diligence before establishing an investment. Making an effort in this regard will most certainly help them avoid blocking assets in risky investments.[78]

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77 See footnote 57.

78 See Investment Contracts for Agriculture: Maximizing Gains and Minimizing Risk. Agriculture Global Practice Discussion Paper 03. World Bank, 2015. p. 25. https://www.iisd.org/system/files/publications/world-bank-agri-investment-contracts-web.pdf (Accessed: July 12, 2022)

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| Chapter 3 |

The European Union's Legal Framework on the Member State's Margin of Appreciation in Land Policy – The CJEU's Case Law After the "KOB" SIA Case

Ágoston KOROM

ABSTRACT

Several studies and scientific workshops have considered the member states' rules—within the framework of EU law—on the ownership and use of agricultural and forest property, taking into account that this area is significant not only for the member states that acceded after 2004, such as Hungary, but also for the founding members. These examinations have focused on the public interests acknowledged by the Court of Justice of the European Union (CJEU), such as the preservation of the rural population; the promotion of small and middle-sized, livable properties; and the easing of the speculative pressure on the land market, which should be achieved in practice without compromising EU law—especially its fundamental freedoms. This characteristic of the CJEU's relevant case law primarily led to the application of the free movement of capital; nevertheless, the CJEU's judgment in the "KOB" SIA case resulted in a significant change in this area, which is the main subject of the current examination.

KEYWORDS

Member state's margin of appreciation in land policy, free movement of capital, targets of the CAP in the land policy, legal development in the KOB SIA case, freedom of establishment, Services Directive

1. Introduction

Several studies and scientific workshops have considered the member states' rules—within the framework of EU law—on the ownership and use of agricultural and forest property, taking into account that this area is not only significant for the member states that acceded after 2004, such as Hungary, but also for the founding members.

Korom, Á. (2022) 'The European Union's Legal Framework on the Member State's Margin of Appreciation in Land Policy – The CJEU's Case Law After the "KOB" SIA Case' in Szilágyi, J. E. (ed.) *Acquisition of Agricultural Lands: Cross-border Issues from a Central European Perspective.* Miskolc–Budapest: Central European Academic Publishing. pp. 77–90. https://doi.org/10.54171/2022.jesz.aoalcbicec_4

These examinations have focused on the public interests acknowledged by the Court of Justice of the European Union (CJEU),[1] such as the preservation of the rural population; the promotion of small and middle-sized, livable properties; and the easing of the speculative pressure on the land market, which should be achieved in practice without compromising EU law—especially its fundamental freedoms. This primarily meant the application of the free movement of capital; nevertheless, the CJEU's judgment in the "KOB" SIA case resulted in a significant change in this area, which is the main subject of the current examination.

The member states' margin of appreciation[2] refers to how they can regulate ownership rights and the use of agricultural property and how EU law limits this. Today, according to the development of EU law, we cannot talk about an "EU land policy" because, similarly to the Common Agricultural Policy (CAP),[3] common EU regulations do not exist. The member states are those who have the power of regulation in this field. However, this does not indicate that the area is free from EU control.

It should be stressed that all the member states' measures, which can affect and be a possible barrier to the operation of the internal market, fall within the scope of EU control. In this context, the CJEU developed a practice by which all the member states' measures that can prevent the free movement of production factors—such as capital, workforce, and goods—are subject to EU control. Within this type of control, the CJEU did not assume that the measures introduced by the member states were not intended to compromise the rules of the internal market; therefore, it created a consistent case law that prevents the regulations aiming to violate the internal market's rules. Denys Simon's considerations about the negative and positive relationship of integration forms should be considered. The most significant element of the integration kept together by the law is the negative integration that maintains the internal market. Without the positive integration, the negative form cannot be maintained; therefore, the internal market helps to balance the disparities caused by the internal market. Agriculture, which has been aided in all the developed countries for at least 100 years, should be mentioned. The expenditure of the CAP is equal to at least 40% of the EU's budget. It should be added that the least developed member states' aiding systems were also developed from the CAP.[4]

1 On this subject, see Kurucz, 2012, pp. 118–130.; Kurucz, 2015; Korom and Gyeney, 2015, pp. 289–306.; Szilágyi, 2021.

2 János Ede Szilágyi explains that EU law and the CJEU's case law create a powerful framework for agricultural and forestry and emphasizes that rules on land use and land ownership should be distinguished. Szilágyi highlights the European Agreement of 1994 during Hungary's accession phase, which—contrary to the acquisition of ownership—required the principle of national treatment. Linked to this matter, the Act of Accession provided exemption until 2014 in the case of agricultural lands' ownership. The issue is detailed in Szilágyi, 2017, p. 165.; Korom, 2013, pp. 11–25.; Szilágyi, 2013, pp. 109–121.

3 See more in Bianchi, 2012.

4 Simon, 1997, p. 92.

It should be mentioned that all provisions that are barriers to fundamental freedoms are generally against EU law, although these rules can be justified. Therefore, the CJEU primarily examines whether the rule contains directly discriminative provisions on citizenship. Next comes the further analysis of the rule. The principle of national treatment means that the member state guarantees its citizens the same rights as those of other member states' citizens. According to case law, a rule that meets the principle of national treatment's requirements can lead to indirect discrimination if it primarily affects the citizens of other member states negatively.

Afterward, the examination decides whether the introduced restriction serves public interests in light of EU law and the introduced measure can be justified. It is a permanent rule related to the internal market that entirely economic reasons cannot serve a legitimate interest in its operation. In land policy, this is less determining compared to other fields because of the positive integration component explained below. Social goals can be accepted as limits to fundamental freedoms. Next, the different control standards are examined, such as whether the rule is suitable and necessary for implementing its goals. According to the principle of proportionality, the measures cannot exceed the extent necessary to reach the targets. The principle of consistency requires the member states' measures to be implemented consistently to address it as a public interest. Thus, the restriction of gambling can be justified by social or other reasons, but if the member state also manages gambling facilities, restricting gambling cannot be regarded as a legitimate public interest in that member state.

The TFEU's Article 345 (ownership autonomy) and the fundamental freedoms remain the same if provisions concern the internal market. Ownership autonomy cannot justify the fundamental restrictions on fundamental freedoms, which means that the member states can maintain their land registers' specific features.

The cross-border element, which has a significant role in the application of EU law, shall also be mentioned. In general, EU law is applied to the internal market if the case has any cross-border element; without this, individuals or economic operators cannot allege EU law. However, the cross-border element cannot be found in all infringement procedures launched by the European Commission. Exceptionally, the CJEU answers without the existence of a cross-border element within the scope of the free movement of capital related to the member states' activity on the property. These cases are exclusions from the general rule.

The consistency of the CJEU's case law on the member states' land policy and the margin of appreciation should also be mentioned. Two aspects shall be highlighted in this context. On the one hand, in the CJEU's judgments—within the monopoly of the authentic interpretation—the CJEU decides how EU law should be interpreted from the date of entry into force by EU actors and the courts of the member states. A judgment related to land policy could guide thousands of cases before the member states' courts.

On the other hand, particularly in the internal market, the CJEU—with a few exceptions—ensures that the developed case law changes as little as possible.

We should distinguish the member states' margin of appreciation related to the land policy. The first layer, where the *erga omnes* effect developed by the CJEU is relevant, covers the following factors: the margin of appreciation for the member states to regulate a specific area; the application of the provisions of the Charter of Fundamental Rights of the European Union and the general principles or the case law of the European Court of Human Rights; and, moreover, the reasons that can serve as public interest in a particular area.

In the second layer, the CJEU examines, in a preliminary ruling or an infringement procedure launched by the European Commission, the member state's regulation on land policy in light of EU law. In this case, the remarks by the CJEU cannot be automatically applied to the regulation of another member state because, in this case, the CJEU aims to take into account the entire system and logic of the regulation.

It should be added that the internal market law is determined by EU law, which sets significant rules from the perspective of the member states' margin of appreciation in land policy, its regulations, and the implementation by its administrative actors. If the rule does not allow a certain level of margin of appreciation in specific situations in which EU law would be applied, that violates EU law. If the member state's administrative bodies have too broad a margin of appreciation, preventing other member states' legal entities from investing there, that could also be against EU law.

The CJEU not only examines the member states' regulations to determine if they align with EU law, but if administrative or judicial practices do not meet the requirements of EU law, the CJEU presumes that the rule is against it.

The examination below addresses the CJEU's case law on the member states' margin of appreciation on land policy and how the "KOB" SIA judgment influenced it.

2. The member state's margin of appreciation is based on the free movement of capital

Turning back to the margin of appreciation in land policy, the case law shows that secondary law cannot be applied with the exemption of the 1988's Directive on the free movement of capital, which is used as a guideline by the case law, even though the Treaty of Amsterdam repealed it.[5] The CJEU addresses the goals mentioned above as a general public interest that can restrict the free movement of capital.

In the judgment of the Ospelt case, the CJEU examined an Austrian[6] rule that created a prior authorization system for the ownership and use of agricultural lands and forests. In the CJEU's interpretation, the rule's targets, such as preserving the rural population and farming establishments, were legitimate. The CJEU mentioned that not only these targets but also the rational use of agricultural lands and the prevention of speculation in the land market were in line with (following the numbering used then) Article 39 of the Founding Treaties, which, among other things, promotes farmers' living standards. This means addressing the CAP's goals in addition to fundamental freedoms, thus acknowledging the negative integration form the positive in the member states' land policy. The CJEU added that this Article emphasizes agriculture's specific characteristics, social aspects, and existing natural and structural differences.

After examining these targets, the CJEU also concluded that the prior authorization system was in accordance with EU law; on the contrary, although EU law only requires prior notification in other areas, according to the CJEU, cultivation by the acquirer and the local residency cannot be systematically obligatory.

In the Festersen case,[7] the Danish regulation limited the acquisition of agricultural property—among others—by requiring ex-posts living in the area and introducing criminal sanctions. According to the CJEU, this legislation did not comply with EU law.

The CJEU allows the member states to introduce restrictions to prevent speculation and preserve the rural populations. However, it could be difficult for the member states to regulate this issue in practice because the negative integration form, related to fundamental freedoms, dominates in case law, which is stronger than the public interest of the member state. The principles developed by the CJEU also make it more challenging to justify the member states' restrictive measures or create a vague environment for them to regulate, as this case underlies.

5 CJEU, C-370/05.
6 CJEU, C-452/01
7 CJEU, C-370/05.

In the judgment[8] of the Konle case, the CJEU examined an Austrian rule on secondary properties in light of the free movement of capital. The member state aimed to regulate the building plots to achieve rural development goals because few building plots can be found in the area. Although the goals are acceptable, the introduced prior authorization system does not seem to be an appropriate and necessary means to meet these goals.

We shall also highlight the CJEU's judgment[9] in the Ewald Burtscher case. The member state's rule was against the free movement of capital, violating EU law. The rule annulled a property transaction on a secondary residency only because of a statement's late submission about the acquisition of the property.

It should be added that the CJEU not only addresses these goals as public interest but admits that they are in line with the CAP's targets for the improvement of the farmers' living standards; therefore, in addition to the negative integration form (fundamental freedoms), the positive integration form (targets of the CAP) is also mentioned. Nevertheless, controlling fundamental freedoms is more significant in the CJEU's practice, undermining the member states' margin of appreciation on regulation; thus, the acknowledged goals cannot be implemented, and therefore, the positive integration form cannot be achieved.[10] In the case law of the CJEU, a difference exists between deciding operations on land policy or property: the prior authorization procedure examined in the Konle case did not meet the requirements of EU law; on the contrary, in land policy, a similar system is compatible with EU law.

It can be concluded that the member states' margin on land policy is subjected to the negative and positive integration form, and their measures promoting public interest will fail due to the CJEU's control; thus, the negative integration form will be more decisive—at least if the CJEU decides about it in an infringement procedure or a request on preliminary rulings. After several scientific events, we concluded that an EU legal framework would be essential for the member states, which acceded after 2004, allowing the creation of a predictable regulation. Of course, we have not mentioned the rules that clearly violate EU law and keep the citizens of other member

8 CJEU, C-302/97.
9 CJEU, C-213/04.
10 See Kurucz, 2015; Szilágyi, 2018, pp. 69–90.; Szilágyi, 2015, pp. 96–102.; Szilágyi, 2017, pp. 107–124.; Szilágyi, 2017, pp. 569–577.

states away, such as requiring the knowledge of the specific member state's language or agricultural qualification within its educational system. The CJEU's case law shows that the public interest addressed by the CJEU restricts or can restrict fundamental freedoms, or the measures aimed to implement them would be against the principle of proportionality, the provisions of the Charter, or the principles developed by the CJEU.

After the Commission concluded the comprehensive review of the new member states, no cases were brought before the CJEU, and other cases related to the above-mentioned situations have not been found. The judgments on the Hungarian-related SEGRO case[12] about the cancellation of usufruct rights and the Commission/Hungary[13] cannot be considered to be related to the member states' margin of appreciation on land policy; rather, they are more connected to the expiration of the Hungarian land market's derogation period.

It can result from the problems occurring in the CJEU's practice that the positive integration form would have a more significant role, which would allow the member states' constant regulation and prevent the introduction of protectionist measures. The CAP could serve as an example of this. In addition to the internal market for agricultural products, the main features of the CAP can be retrained.

Next, we will examine a case concerning a member state that acceded in 2004; a rule was brought before the CJEU as a preliminary ruling that violated EU law and caused a significant change in the member states' margin of appreciation on land policy.

3. The examination of the KOB SIA case

KOB is an agricultural company owned by German citizens established in Latvia, with a German citizen as director. Several other companies owned by German citizens have shares in KOB.

The company concluded a sales agreement on approximately 10 hectares of agricultural land in 2018 and asked for a license from the member state's authorities, which refused this. KOB turned to the Latvian courts, stating that the circumstances of the licensing scheme are discriminative based on nationality and incompatible with the free movement of capital or establishment, among other things.

It should be stressed that the regulation mentioned above allows legal persons to acquire agricultural property. In this case, if a legal person is led or represented by another member state's citizen, the Latvian law sets two more requirements to acquire agricultural lands. The citizens of other member states should be registered in Latvia, which includes being required to stay in the state for more than 3 months and prove their knowledge of the Latvian language on a conversational level.

12 CJEU, C-52/16.
13 CJEU, C-235/17.

As we have already mentioned, our examination of the judgment will focus on the changes in the member states' land policy and the fields not concerned by this legal development.

Article 345 of the TFEU does not change[14]: it is commonly agreed that ownership autonomy does not justify the derogation from fundamental freedoms, but it allows the member states to regulate this field. In light of Article 345 of the TFEU, the treaties do not consider the ownership system of the member states. We can conclude that the issues about ownership belong to the member states' regulatory power and are not affected by EU law. It should be also emphasized that the regulation of agricultural lands' ownership is also a prerogative of the member states. On the contrary, it is a specificity of the internal market that the member states should also meet the requirements of EU law related to this field, even if the area falls under the member states' regulatory powers. This principle should be applied in the case of the TFEU's Article 345.

A question was raised before the CJEU: should the free movement of capital or the freedom of establishment be applied? According to the consistent case law of the CJEU, the free movement of capital should be applied in the case of property. Jacques Pertek points out that the strengthening of the free movement of capital was started by the CJEU's case law in the 1980s.[15] A directive also represents, among others, the non-limitative nomenclature and that the operations of the member states related to the free movement of capital should be interpreted broadly. Thus far, in the case law of the CJEU, if it examines a member state's rule in light of the free movement of capital, it does not interpret the regulation in light of other fundamental freedoms; from this aspect, the free movement of capital can be considered the most potent fundamental freedom. However, the CJEU referred to the Van der Weegen judgment of 2017, according to which it examines a member state's measure in light of one fundamental freedom if the others are secondary. The regulation's objective should be examined by taking into account the case law, which the CJEU brought up in the KOB judgment. To this judgment, the CJEU also added that specific regulation not only targets the acquisition of agricultural lands—which is included in the free movement of capital according to the case law in cases with a cross-border element—but it also considers the agricultural lands' continuous use, which is related to the freedom of establishment because it is a permanent economic activity in another member state.

In light of the objectives of the regulations, we cannot conclude that in the CJEU's interpretation of the KOB SIA case, the freedom of establishment or the free movement of capital could be applied.[16,17] Therefore, the CJEU examined[18] the case's factual

14 CJEU, C-206/19.

15 Jacques Pertek.

16 CJEU, C-206/19, para 25.

17 The CJEU adds that, as it appears from the documents, the concerned person of the case aims to acquire agricultural lands for use. Furthermore, not only is the member state's particular regulation related to the acquisition of agricultural lands, but it aspires to provide continuous agricultural use.

18 As an analogy of the CJEU, C-375/12.

basis[19] to determine whether the freedom of capital or the establishment would be applied.

The Court applied the freedom of establishment and not the free movement of capital because an economic company can acquire agricultural property in Latvia to conduct agricultural activity on the condition that its representatives and members prove that they have residency in this member state and a certain level of knowledge of the Latvian language.[20]

In the case of Van der Weegen and others, referring to the judgment delivered in June 2017, if a member state's measure is linked to more fundamental freedoms, it should be examined only from the perspective of one fundamental freedom if the others are secondary regarding the circumstances of the case. The CJEU concluded that—contrary to other cases, such as the SEGRO case[21]—this case mostly belongs to the scope of the freedom of establishment; therefore, this fundamental freedom alone should determine the examination of the member state's[22] regulation.[23]

It should be noted that the Court mentioned the SEGRO judgment, in which the member state referred to the land policy's objectives, but the CJEU did not approve it. It has already been mentioned that this judgment does not primarily consider the member state's margin of appreciation on land policy but the expiration of the member states' (which acceded in 2004) derogation period. The CJEU did not mention the Festersen judgment,[24] in which the concerned person also purchased the land for agricultural use.

The CJEU addressed the exclusive application of the freedom of establishment; however, it forwent the application of Article 18 of the TFEU, raising the freedom of establishment to a similarly strong position as the free movement of capital.

The Court also recalled its case law, according to which[25] the measures introduced by the member states that are subject to a complete EU harmonization should be interpreted in the light of secondary law.[26] Thus, Directive 2006/123 will be applied. It must be stressed that, in general, primary law has a stronger position than secondary law; among others, primary law authorizes EU legislators to adopt secondary law.

The Directive sets the requirements for the member states' legislators if they introduce an authorization scheme for specific services. It lists forbidden requirements and presents the complete harmonization in particular provisions.

The Court does not find these requirements justifiable, considering Article 14 and the general requirements[27] for the member states of Directive 2006/123, which was

19 CJEU, C-206/19, para 25.
20 CJEU, C-206/19, para 26.
21 CJEU, C-52/16.
22 European citizenship.
23 CJEU, C-206/19, paras 27–28.
24 See Vauchez, 2019 and Navel, 2021.
25 CJEU, C-206/19 para 30.
26 CJEU, C-205/07, para 33.
27 Ibid. para 38.

supported by the judgments of the Rina Services and others[28] and the Commission/Hungary.[29]

As the plus requirements set by the examined Latvian regulation should be applied in the case of other member states' citizens, the particular provisions violate Articles 9, 10, and 14 of the Directive. Then, the CJEU added that the particular regulation should not be examined in light of the free movement of capital.[30]

4. Conclusions

In conclusion, we should highlight that examining the member state's regulation meant a land policy judgment; however, the provisions were intended to keep the citizens of other member states away, which undoubtedly violated EU law. This is dissimilar to the judgment mentioned in the introduction; thus, public interest, which aims to implement the CAP, cannot be fulfilled in practice because of the strict control of fundamental freedoms.

However, the KOB judgment significantly influenced the member states' margin of appreciation of land policy. It should be added that there would have been more detail of this change had the member state's examined regulation not been discriminative, and the CJEU would have reviewed that the particular provision reflected public interest. The measures meet the control requirements of the negative integration form, such as the principle of proportionality. However, after analyzing the judgments related to Directive 2006/123, we can discern the structure of EU control in this field compared to the CJEU's case law on the free movement of capital.

It was unexpected that the freedom of establishment and Directive 2006/123 were applied instead of the free movement of capital. This kind of legal development is relatively rare in the CJEU's case law. Hopefully, the following judgment—if it does not contain a discriminative provision on citizenship—will create a proper compromise between the control of the internal market and the margin of appreciation of the member states, and it would be consistent with the improvement of the KOB SIA case. For the positive integration form, it is expected that the targets developed in the Ospelt case on the improvement of the farmers' quality of life will be emphasized more.

It seems unanimous that if the member state's legislator bounds the purchase of the agricultural lands to particular conditions, in case the considerations of the KOB judgment will be part of the consistent case law, not the free movement of capital but the freedom of establishment will be applied—in particular, Directive 2006/123.

According to Marc Fallon, the comprehensive reform of the internal market never happened; the Single European Act and the Maastricht Treaty introduced partial

28 CJEU, C-593/13.
29 CJEU, C-179/14.
30 CJEU C-206/19, para 41.

changes to the substantive law.[31] The Single European Act strengthened the freedom of capital compared to other fundamental freedoms. In the judgment on the Festersen case—similarly to the KOB SIA judgment— the land was going to be bought for agricultural purposes, but the free movement of capital was applied. The judgment on the KOB SIA case promoted the freedom of establishment and reduced the significance of the capital's free movement.

Claude Bluman and Louis Dubouis indicate that the Commission proposed Directive 2006/123, and the so-called Bolkenstein Directive faced strong opposition, primarily because of the French referendum on the Constitution for Europe.[32] The Directive aimed to liberalize services, which, on the one hand, resulted in the codification of the case law, and on the other hand, introduced other innovations in regulation. If Directive 2006/123 were limited to the codification of the existing CJEU case law, it would not significantly influence the member states' margin of appreciation on regulation.

In the interpretation of Valérie Michel,[33] providing the negative integration form is an essential role played by EU law, mainly including prohibitions for the member states. For the first instance, the EU legislator does not have a significant part in this relation. Individuals and economic operators can claim their rights (derived from EU law) before the member states' courts; thus, not only do they aim to enforce their interests, but to a certain extent, they become the complementary agent of the Union.[34]

However, the EU legislator has a significant role—the Council and the Commission, with the help of the directives—to clear obstacles before the internal market.[35]

Codifying the case law on the negative integration form facilitates the accessibility of the regulations and strengthens legal certainty. However, the Directive does not remove all the doubts in the specific area of the land market. Nevertheless, the judgment of the KOB SIA case and the related case law can be a starting point.

In the judgment of the Rina Services case[36] referred by the CJEU, among other things, the CJEU aimed to answer the question that a member state's regulation—requiring residency in the member state to conclude certain activities—is compatible with Directive 2006/123, the freedom of establishment, and the free movement of capital. It is not directly connected to the member states' margin of appreciation on land policy; the following research should examine how the EU control's structure applied there appears in land policy.

Even though Article 14 of Directive 2006/123 explicitly prohibits it, the member state aimed to justify this requirement on residency by controlling the concerned

31 See Dubout and Maitrot de la Motte, 2013, pp. 413–455.
32 p. 139.
33 See Azoulai, 2011, p. 283.
34 Robert Lecourt realized first that the most efficient way to force member states to implement EU law is through the procedures started by individuals in work, titled *L'Europe des Juges*, p. 283.
35 Ibid. p. 284.
36 CJEU, C-593/13.

activities.[37] In the interpretation of the CJEU, this requirement is forbidden by Article 14 of Directive 2006/123 and by its general requirements.[38]

The primary considerations of Advocate General Pedro Cruz Villalón's general opinion are worth examining. Pedro Cruz Villalón reminds us that, in general, harmonization measures should be applied, rather than primary law.[39]

The other referred decision is the judgment in the Commission/Hungary case.[40] The general opinion raised the question that Directive 2006/123 could be applied in this case. According to the Advocate General's interpretation, it should be examined that the Directive includes a complete harmonization that ought to be judged in light of case law and not decided by primary law.[41] The Advocate General highlights that deciding whether an area is subject to a complete harmonization would lead to a consequence. In this case, justifications excluded from Directive 2006/123—the ones regulated in Articles 52 and 62 of the TFEU—and the existence of imperative reasons of major public interest could not be claimed.[42] Yves Bot adds, in the general opinion, that this issue is debated in legal literature.[43]

The general opinion[44] mentions the judgment in the Rina Services case, where the CJEU decided that Article 3 para (3) of Directive 2006/123 cannot be interpreted in a way that allows the member states to justify the prohibited requirements of Article 14 by referring to primary law because this would be a barrier to the Directive's harmonization. The general opinion concludes that the Court considered Advocate General Pedro Cruz Villalón's general opinion on the Rina Services case; according to him, the Directive's scope concerns a broad range of services as it is horizontal. However, it does not aim to harmonize the member states' different substantive rules. Nevertheless, certain factors realize complete and accurate harmonization.

In light of the above-discussed factors, we have no reason to suppose that in the case of agricultural land purchase, the KOB SIA judgment would not become a consistent part of case law. In other words, in such cases, not the free movement of capital and the Directive of 1988 on the liberalization of the capital but the freedom of establishment and Directive 2006/123 would have an influential role.

Several uncertainties remain regarding how the new case law could involve the CJEU's formerly developed considerations about land policy, the free movement of capital, and particularly the goals of the positive integration form because in the new case law, the goals of land policy face EU control within the negative integration form and the application of Directive 2006/123.

37 Ibid. paras 26–27.
38 Ibid. paras 28–29.
39 General opinion, paras 21–22.
40 CJEU, C-179/14, paras 68–69.
41 General opinion, C-179/14, paras 68–69.
42 Ibid. para 69.
43 Ibid. para 70.
44 Ibid. para 71.

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| PART II |

| Chapter 4 |

Croatia: Agricultural Land as Resource of Interest – Adjustment of Acquisition of Agricultural Land by Foreigners to EU Market Freedoms

Tatjana JOSIPOVIĆ

ABSTRACT

This article presents a special property regime for agricultural land in the Republic of Croatia, by which agricultural land, as a resource of interest to the Republic of Croatia, is granted special protection. The author analyzes Agricultural Land Act provisions providing statutory restrictions on the ownership of agricultural land and assesses their alignment with the Constitution of the Republic of Croatia regarding the constitutional guarantee of ownership and freedom of entrepreneurship. Special attention is given to the impact of EU law on the specific property regime of agricultural land. Some aspects of the property regime for agricultural land had to be aligned with EU market freedoms. During the accession negotiations, Croatia was bound to harmonize its national rules on foreigners' property rights with EU market freedoms. Within these processes, the restrictive rules on the prohibition of acquisition of ownership of immovables have been changed in favor of foreigners. The author also analyzes the effects of the changes and their impact on the development of the agricultural land market. She emphasizes that upon the expiry of the transitional period (June 30, 2023), when the application of the discriminatory prohibition of acquisition of agricultural land on nationals and legal persons from other member states will no longer be possible, the development of the market of agricultural land will have to be incited by different, nondiscriminatory, and nonrestrictive measures.

KEYWORDS

agricultural land, private agricultural land, state-owned agricultural land, transitional period, specific property regime, resources of interest of the Republic of Croatia, particular statutory restrictions on ownership

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1. Special property regime for agricultural land

1.1. Legal sources

In the Constitution of the Republic of Croatia, agricultural land[1] is proclaimed a resource of interest for the Republic of Croatia, and it enjoys special protection.[2] The Constitution of the Republic of Croatia establishes that the manner in which resources of interest to the Republic of Croatia may be used and exploited by holders of rights thereto, and by their owners, is regulated by law. In accordance with this constitutional provision, special statutory restrictions on ownership may be prescribed by law, and the owners of specified goods are bound to act in a particular manner to protect the interest and security of the state, nature, human environment, and health.[3,4] In such cases, compensation for restrictions imposed on holders of rights or owners for using and disposing of the resources of interest to the Republic of Croatia are prescribed by law.[5]

Pursuant to Article 52 of the Constitution, a separate law was adopted, which outlined a specific property regime for agricultural land: the Agricultural Land Act (hereinafter: ALA).[6] The ALA also stipulates that agricultural land is a resource of

1 Official Gazette NN Nos 56/90, 135/97, 113/00, 28/01, 76/10, 5/14.
The consolidated text of the Constitution of the Republic of Croatia as of 15 January 2014 published at https:/www.usud.hr/sites/default/files/dokumenti/The_consolidated_text_of_the_Constitution_of_the_Republic_of_Croatia_as_of_15_January_2014.pdf (Accessed: April 20, 2022).

2 See Art. 52/1 of the Constitution of the Republic of Croatia.
In the Constitution, the following goods are specified as resources of interest to the Republic of Croatia: the sea, seashore, islands, waters, air space, mineral wealth, and other natural resources as well as land, forests, fauna, and flora, other components of the natural environment, real estate, and items of particular cultural, historical, economic or ecological significance (Art. 52/1).

3 Ownership is proclaimed in the Constitution to be a fundamental right (Art. 48/1), and it may be restricted or rescinded by law, subject to indemnification equal to the market value (Art. 50/1). It may exceptionally be restricted by law for the purposes of the protection of interest and security of the Republic of Croatia, nature and the environment, and public health (Art. 50/2). In addition, pursuant to Art. 52 of the Constitution, specific restrictions may be imposed on the owners regarding the use of goods of interest for the Republic of Croatia.

4 Specific statutory restrictions on ownership are also based on the provisions of the Constitution of the Republic of Croatia (Art. 48/2), stiputing that ownership implies obligations for its holders (the so-called social component of ownership). Holders of the right of ownership are obliged to contribute to general welfare (Art. 48/2). See Gavella et al., 2007, p. 38, p. 355.
Restrictions on ownership must be proportionate to the principle of proportionality. Article 16/2 of the Constitution establishes that every restriction of freedoms or rights must be proportional to the nature of the necessity for restriction in each individual case. The proportionality of the restriction may be subject to constitutional law review.

5 See Art. 52/2 of the Constitution of the Republic of Croatia.

6 Official Gazette NN nos 20/2018, 115/2018, 98/2019.
The valid Agricultural Land Act is the fifth Act establishing a specific property regime for agricultural land since the independence of the Republic of Croatia. The first Act on Agricultural Land was adopted in July 1991 (Official Gazette NN Nos 34/91, 71/91, 40/92, 26/93, 79/93, 90/93, 29/94., 37/94, 65/94, 21/95, 48/9.4, 19/98, 105/99, 66/01). It was replaced by the Agricultural Land

interest to the Republic of Croatia and is therefore guaranteed special protection.[7] The ALA establishes the maintenance and protection of agricultural land, the use of agricultural land, the change of purpose of agricultural land, the disposal of agricultural land owned by the Republic of Croatia, the rights and obligations of the owners of agricultural land, and the cross-border acquisition of agricultural land. Apart from the Agricultural Land Act, many other separate acts that regulate agriculture, the market of agricultural products, and individual sectors of agricultural activities have been adopted, such as the Family Agricultural Holding Act,[8] the Agricultural Act,[9] the Act on Paying Agency for Agriculture, Fisheries and

Act of 2001 (Official Gazette, NN nos 66/01, 87/02, 48/05, 90/05, 152/08). The third Agricultural Land Act was enacted in 2008 (Official Gazette NN, nos 152/08, 25/09, 153/09, 21/10, 90/10, 39/11, 63/11, 39/13). The following Agriculture Land Act was enacted in 2013 (Official Gazette NN nos 39/13, 48/15, 20/18), which was later also replaced by the Agricultural Land Act of 2018.

7 Art. 2/1 ALA.
In this connection, the Constitutional Court of the Republic of Croatia emphasizes that the state's obligation to provide special protection for agricultural land arises from the circumstance that agricultural land is unrenewable and needs to be protected from unforeseeable developments on the free market. The Court also points out that agricultural land can neither economically nor ecologically—let alone socially—be equated with other immovables. The equitable regulation of agricultural land requires taking into consideration the general and public interests of the community more extensively than other types of immovables. See the decision of the Constitutional Court of the Republic of Croatia no. U-I-763/2009 *et al* of 30/3/2011 (Official Gazette NN, no. 39/11), p. 27.

8 Official Gazette NN nos 29/2018, 32/2019.
A family agricultural holding is defined in the Family Agricultural Holding Act (FAHA) as "an organisational form of agricultural operation of farmers (natural persons) who work to generate their income and independently and permanently perform farming and other linked activities" (Art. 5/1/point a) FAHA). The agricultural activity of family agricultural holdings is based on the use of their own or leased agricultural/productive assets and on the work, knowledge, and skills of the household members. A family agricultural holding, as a specific organizational form of farmers (natural persons) is not recognized as a legal person. Members of a family agricultural holding may be persons of legal age who possess business capacity, as well as their household and/or their family members (Art. 28/1 FAHA). Family agricultural holdings do not acquire any rights or obligations, and the holder of their rights and obligations is always a farmer—in other words, a natural person (the FAH holder). The Family Agricultural Holding Act does not establish any specific rules on the acquisition and succession of agricultural land, and it does not provide any specific rules on the acquisition of other rights (lease, usufruct, and the like) on agricultural land. The general property law and succession law rules referred to in the Property Act and the Succession Act apply to the acquisition of agricultural land owned by FAH holders as well as to the division of agricultural resources owned by the deceased. The Family Agricultural Holding Act only expressly stipulates that upon the death of a FAH holder, the production resources of family agricultural holdings may be inherited. In the case of death of the FAH holder, its members may continue their agricultural economic activity, but another holder must be appointed (Art. 35 FAHA). All rights and obligations connected with the FAH are then transferred from the deceased holder to the new holder (Art. 36/3 FAHA). The new holder takes over the overall business activity of that particular FAH. According to Art. 35 FAHA, lease contracts entered into by the deceased are transferred to the new FAH holder.

9 Official Gazette NN nos 118/18, 42/20, 127/20, 52/21.

Rural Development,[10] the Act on Paying Agency for Agriculture, Fisheries and Rural Development,[11] the Wine Act,[12] and the like. All these acts dealing with agriculture are harmonized with the regulations of the European Union adopted within the agricultural policy.

The Agricultural Land Act is the main legal source[13] for the development of a special property regime for agricultural land. It is considered a *lex specialis* in relation to the Act on Ownership and Other Real Property Rights (hereinafter: the Property Act/PA),[14] which is the main legal source of property law in the Republic of Croatia. The PA generally provides for ownership and other limited property rights; the acquisition, protection, and termination of property rights; as well as the cross-border acquisition of immovables by foreigners.[15] As regards the property regime of agricultural land, the ALA has precedence in application over the general provisions of the Property Act providing for property rights on immovables, including the provisions of the PA on cross-border acquisition of immovables by foreigners.[16] The ALA also has precedence over PA with regard to the restrictions of ownership laid down in a

10 Official Gazette NN nos 63/19, 64/20, 133/20.

11 Official Gazette NN nos 30/09, 56/13.

12 Official Gazette NN no. 32/19.

13 To implement the ALA, a large number of decrees have been adopted: Regulation on the manner for calculation of the initial lease of agricultural land owned by the Republic of Croatia and fees for the use of water for aquaculture activities, NN no. 89/18; Regulation on the necessary documentation needed for the adoption of the Program of agricultural land owned by the Republic of Croatia, NN no. 27/18; Regulation on methodology for monitoring the status of agricultural land, NN no. 47/19; Regulation on the economic program for the use of farmland owned by the Republic of Croatia, NN no. 90/18; Regulation on the protection of agricultural land from pollution, NN no. 71/19; Regulation on agrotechnical measures, NN no. 22/19; Regulation on the method of revaluation of rent or compensation fee for the use of agricultural land owned by the Republic of Croatia, NN no. 65/19; Regulation on the conduction of public tender for the sale of agricultural land owned by the Republic of Croatia by direct agreement, NN no. 94/18; Regulation on the Register of contract and payment collection records for agricultural land owned by the Republic of Croatia, NN no. 12/22; Regulation on the implementation of a public tender for the lease of common pastures owned by the Republic of Croatia, NN no. 36/21; Regulation on the manner for keeping the register of common pastures owned by the Republic of Croatia, NN no. 94/18; Regulation on the manner for keeping the register of fishponds owned by the Republic of Croatia, NN no. 94/18; Regulation on the procedure of public tendering for the sale of agricultural land owned by the Republic of Croatia, NN no. 92/18; Regulation on the manner of keeping records on the change of use of agricultural land, NN no. 22/19; Regulation on the benchmarks for determining the particularly valuable arable agricultural land and valuable arable agricultural land (P2), NN no. 23/19; Regulation on the conduction of public tenders for the lease of agricultural land and lease of fishponds owned by the Republic of Croatia, NN no. 47/19; Regulation on the manner and conditions for the establishment of construction rights and right to use the agricultural land owned by the Republic of Croatia, NN no. 84/19.

14 Official Gazette NN nos 91/96, 68/98, 137/99, 22/00, 73/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 90/10, 143/12, 152/14.

15 For more see in Gavella et al., 2007, pp. 40–43; Josipović, 2014, pp. 95–96.

16 For more see 2.2; 2.3.

separate Act on the resources of interest to the Republic of Croatia.[17] The PA applies to the property regime of agricultural land if the ALA contains no specific provisions on individual aspects of the property regime governing agricultural land, whose aim is to provide special protection of agricultural land as a resource of interest to the Republic of Croatia. The PA and other general Croatian private law regulations apply to all private law aspects of the property regime governing agricultural land not expressly stipulated in the ALA and in other separate agricultural acts.[18]

The legal definition of agricultural land is broad. It comprises, in addition to the plots used for agricultural production, all other plots that can be converted to be used for agriculture or that can be used for agricultural purposes until they are converted to their original purpose.[19] The use of land for agricultural production has precedence over other uses of land. In the Republic of Croatia, all agricultural areas registered in the cadastre according to their use as plow fields, gardens, meadows, pastures, orchards, olive groves, vineyards, fishponds, reeds, or marshland are considered agricultural land. Any other area that could only begin to be used for agricultural production is also considered to be agricultural land.[20] It is also expressly established that other types of land (woodland, building plots) may be used for agricultural production or must be kept suitable for agricultural production. The land outside the building zone that is a part of a forest (woodland) may be used for agricultural production if it can be adapted for it and if the costs for that purpose are below the market value of the land.[21] The plots located within the boundaries of a building zone larger than

17 In Art. 32, the PA generally provides for the owners' rights and obligations imposed by a separate piece of legislation laying down the restrictions on ownership to protect the interests and security of the state, nature, human environment, and public health. However, these provisions apply only if a separate law (e.g., ALA) does not expressly stipulate the rights and obligations of the agricultural land's owner with regard to its use and cultivation.
Article 33/3 of the PA is of particular importance when the owner's legal position is concerned because it provides for the entitlement to compensation for the restrictions imposed on their right of ownership. The owner is entitled to compensation (similar to expropriation) if they are subject to statutory restrictions that put them in a more difficult situation than with other owners of the same type of immovables. Indeed, Article 33/3 of the PA applies, accordingly, to an owner of agricultural land who is under more stringent restrictions compared to other owners of agricultural land. See Gavella et al., 2007, p. 415.

18 When specific provisions on agricultural land apply, they must be interpreted and applied in the way to enable subsidiary application of the provisions of the general property law. This is important to make the operation of the general provisions of property law possible to ensure the consistency of the system of regulations. See Gavella, 2011, pp. 22–23.

19 See Josipović, 2016, p. 55.

20 Art. 3/1 ALA.

21 Art. 3/2 ALA.
Forests, woodland, and nature conservation areas are also defined in separate acts as the resources of special interest to the Republic of Croatia. The Forest Act provides for forests and woodland (Official Gazette NN nos 68/18, 115/18, 98/19, 32/20, 145/20). Specific stipulation involving nature conservation areas is provided for in the Nature Protection Act (Official Gazette NN nos 80/13, 15/18, 14/19, 127/19). In practice, overlaps are possible between a separate legal regime for agricultural land and a separate legal regime for woodland or nature conservation areas (i.e., the protected parts of nature). It is possible that an obligation exists to cultivate a particular

500 m^2, as well as those marked in the documents for spatial planning as earmarked for construction, must also be kept suitable for agricultural production if they are entered in the cadastre as agricultural land.[22] Special rules also state that conversions in spatial plans from agricultural land to building zones are not possible,[23] and it is prohibited to use valuable agricultural land beyond the boundaries of a building zone for non-agricultural purposes.[24] Due to such broad definition of agricultural land and according to the 2021 data, more than 30% of the total area of the Republic of Croatia is agricultural land, of which 33% (3.0 million ha) is owned by the state.[25, 26]

A significant portion of state-owned agricultural land of the total area of agricultural land is the consequence of the transformation of social ownership on such land conducted under the Agricultural Land Act of 1991.[27] Upon the entry into force of that Act, the socially owned agricultural land became the property of the Republic of Croatia.[28,29] The agricultural land confiscated and transformed to social ownership after May 15, 1945 also became state-owned in 1991, until it was later returned to previous owners.[30] The agricultural land confiscated during the Yugoslav communist rule through the process of nationalization and confiscation, was subsequently returned to previous owners, or their heirs of the first line of descent, in conformity

piece of land, defined as woodland, or a protected part of nature for agricultural production. In every concrete case, it is assessed whether the land, under the ALA, must be cultivated for agricultural production although it is defined as woodland or is located in a nature conservation area.

22 Art. 4/5 ALA.

23 Art. 43/1 of the Physical Planning Act, Official Gazette NN nos 153/1, 65/17, 114/18, 39/19, 98/19.

24 Art. 22/3 ALA.
Only exceptionally is it possible to use valuable agricultural land for non-agricultural purposes (i.e., for building agricultural facilities or objects of interest for the Republic of Croatia, or the like).

25 Data taken from Lisjak, Roić, Tomić and Masatelić, 2021, p. 1.

26 On December 31, 2020, a total of 1,150,353.01 ha of agricultural areas were registered with ARKOD. Of that number, 75% was agricultural land used as plowland (856,8129.16 ha). Data received from the Agency for Payments in Agriculture, Fisheries and Rural Development: Annual Report 2020.

27 Official Gazette NN no. 34/91.

28 Art. 3/1 of the Agricultural Land Act (1991), Official Gazette NN nos 34/91, 71/91, 40/92, 26/93, 79/93, 90/93, 29/9, 37/94, 65/94, 21/95, 48/9, 19/98, 105/99, 66/01).

29 This rule also applied to agricultural land where the right to utilization belonged to socially owned enterprises. The transformation of socially owned companies into stock companies or limited companies was conducted based on the Law on the Transformation of Socially Owned Enterprises of 1991 (Official Gazette NN, nos 19/9, 26/91, 45/92, 83/92, 84/92, 18/93, 94/93, 2/94, 9/95, 42/95, 21/96, 118/99, 99/03, 145/10). The main rule was that a stock company or a limited company became the owner of the movables and immovables that the former socially owned enterprise had been entitled to utilize. However, that rule did not apply to socially owned agricultural land. It was expressly stipulated that agricultural land was not included in the assets of the enterprise (Art. 2/1) because by transformation, it became owned by the state. In such a way, and based on the regulations governing denationalization, it was possible to return agricultural land to previous owners.

30 Art. 3/2 of the Agricultural Land Act (1991).

with the Law on the Compensation/Restitution of Property Taken during the Yugoslav Communist Government (hereinafter: the Restitution Act).[31] However, although the nationalized agricultural land has been given back to previous owners, large areas of agricultural land are still state-owned, which is why the largest portion of the specific property regime for agricultural land continues to be dedicated to models of disposal by the state. These models frequently change to make the procedure of disposal more efficient, faster, and legally more secure.[32]

1.2. Special statutory restrictions of ownership of agricultural land

The Agricultural Land Act provides for different landowners' obligations for special protection of agricultural land as the resource of interest to the Republic of Croatia. These special statutory restrictions on ownership of agricultural land are based on Article 52/2 of the Constitution of the Republic of Croatia and Article 48/2 of the Constitution dealing with the social component of ownership. Special statutory restrictions imply particular obligations in connection with the maintenance, protection, and utilization of agricultural land.[33] They bind every owner, regardless of whether they are a private individual (a natural or legal person) or the state or whether the owner is a Croatian national or a foreigner.

The most important owner's obligation is to maintain the land to keep it suitable for agricultural production.[34] Owners are bound to take measures to prevent perennial weeds from growing, thus diminishing the land' fertility. Owners must also maintain the existing functional underground drainage system.[35] When state-owned agricultural land is involved, the obligation of maintenance binds both legal and natural persons in whose favor the state disposes of such land and who use it as lessees. If state-owned agricultural land has not been given for use to a natural or legal person on the basis of a contract, the obligation of maintenance of state-owned

31 Official Gazette NN nos 92/96, 92/99, 39/99, 42/99, 43/00, 131/00, 27/01, 34/01, 65/01, 118/01, 80/02, 81/02, 98/19.
The confiscated agricultural land was returned to previous owners by natural restitution. They were given both possession and ownership, together with any objects built on the land during the process of nationalization. Only exceptionally, if the land had been excluded from natural restitution, did previous owners receive pecuniary compensation (Art. 20 of the Restitution Act).

32 The organization of efficient procedures of disposition of state-owned land is the main reason why so many frequent amendments have been made to the ALA. Since the independence of the Republic of Croatia, five Agricultural Land Acts have already been adopted. The main reason for the amendments has been the change of the model of disposition of such land and the competences of the state and of the local self-government in the process of disposition. On the amendments to the ALA regarding the disposition of state-owned agricultural land, see Kontrec, 2014, pp. 73–93.
Therefore, the Government of the Republic of Croatia, in February 2022, proposed amendments to this Act again. See the final proposal of the Act on Amendments to the Agricultural Land Act (2002), pp. 29–31.

33 Arts. 4–17 ALA.
See: Belaj, 2011, pp. 109–112.

34 Art. 4/1 ALA.

35 Arts. 4–6 ALA.

agricultural land rests on the local self-government unit in whose territory the relevant agricultural land is located.[36] When farming of agricultural land is concerned, the obligation is prescribed for both the owners and possessors to farm the land by applying the necessary agrotechnical measures not to diminish its value.[37] In addition, both owners and possessors' duty is to grow plantations and crops over many years to prevent erosion.[38]

Failure to fulfill the obligation of maintaining agricultural land and cultivate it in accordance with agrotechnical measures is considered misdemeanor for which a fine is prescribed.[39] Moreover, when private agricultural land is not kept suitable for agricultural production, it may be seized from the owner's possession, and forced administration (sequestration) is imposed by way of lease. When the owner's residence is unknown, or they are inaccessible, agricultural land that is not properly maintained may be leased to a natural or legal person for a period of 10 years to protect the ground, the environment, and the people.[40] The decision to lease such land on the request of a natural or legal person interested in farming is issued by the Ministry of Agriculture. If several persons are interested in the same agricultural land, an invitation to tender for lease is organized. After a period of 5 years in the lessee's possession, the owner of agricultural land may request for it to be returned. The proceeds from the lease belong to the owner of the agricultural land. If the owner seeks the payment of the fee in the 10 years after the lessee's possession of the land, the proceeds from the lease become the revenue of the state budget (25%), the budget of the regional self-government unit (10%), and the budget of the local self-government unit in whose territory the agricultural land is located (65%).

The coercive measure by which forced administration is established by giving the agricultural land in lease must be in line with the constitutional guarantee of ownership. The seizure of the land from the owner's possession and its lease are

36 Art. 4/4 ALA.

37 Art. 4/6 ALA.
Agrotechnical measures are prescribed in the form of an ordinance by the minister competent for agriculture.

38 Art. 11/2 ALA.

39 Art. 91 ALA.

40 Arts 14, 15 ALA.
It is interesting to note that in the ALA, sequestration is allowed only if the residence of the agricultural land's owner is unknown, or if they are not accessible. When the owner is known and accessible, only a fine may be imposed (under Art. 91 ALA) for not maintaining the agricultural land.
The Property Act lays down the possibility of sequestration for failing to fulfill the obligations in a much broader way. Seizing an immovable from the owner's possession and leasing it is possible when the owner does not meet their obligations, even if they are known and accessible. Namely, the Property Act establishes that the owner may not be forced to act in accordance with the obligations specified in the statutory limitations of ownership. Temporary administration can then be established (sequestration), and the immovable may be leased. The owner is entitled to the immovable being returned to their possession after paying all the invested money or after fulfilling the obligations for which the temporary administration was established (Art. 32/3-7, PA). See Gavella et al., 2007, pp. 415–416.

conducted without the owner's consent. By this measure, the owner is dispossessed and thus deprived of the private disposition of ownership. The Constitutional Court of the Republic of Croatia has already been in the position of having to review the constitutionality of the provisions of the Agricultural Land Act of 2008 on compulsory lease. The Constitutional Court held that the legal concept of compulsory lease was in accordance with the Constitution because agricultural land was among the goods of interest to the Republic of Croatia and because of the social component of ownership. However, the Constitutional Court also indicated that this coercive measure must be in line with the principles of proportionality and the rule of law. It must not have the effect of disproportional interference in the owner's rights. In the process of assessing the proportionality of a coercive measure, several circumstances must be considered. It is essential to leave the owner with the possibility to try (within the appropriate period of time) to align the farming of the land with the requirements established in the ALA. If there are no such transitional measures, the compulsory lease may be an excessive burden to the owner. It is important for the owner to have effective legal remedies against the coercive measure to be protected from unlawful or arbitrary interference by the authorities into their own ownership rights. It is also important to know what compensation must be paid to the owner for forced dispossession. In the Court's opinion, in case of such restriction of ownership, the owner should be entitled to a compensation amounting to the market value of the agricultural land. According to the Constitutional Court, it is also important to consider the duration of the compulsory lease. Finally, the owner must know when they are allowed to seek the payment, so that the money does not end up in the state budget.[41] Regarding the criteria for the assessment of proportionality of the measure of compulsory lease, some aspects of the current concept of compulsory lease seem to be disputable from the point of view of the constitutional guarantee of ownership. The ALA contains no specific provisions on legal remedies against the decision of the Ministry of Agriculture on compulsory leases of agricultural land, nor on the owner's rights when their land is leased in such a way. In this segment, only a subsidiary application of the general provisions of administrative procedure is possible, pursuant to which proceedings before the Administrative Court may be initiated. There are also no specific provisions on the acting of the Ministry of Agriculture when the owner's residence is unknown or when the owner is inaccessible; indeed, no provisions exist on any transitional measures that would enable the owner to take the necessary agrotechnical measures prior to forced dispossession. In addition, the provision on the amount of the fee is not sufficiently clear, and it does not guarantee that it will always correspond to the market value. It is disputable whether the provision is in accordance with the Constitution, according to which the owner may as late as after 5 years request their agricultural land to be returned to their possession. Therefore, the provisions on compulsory lease

41 See the Constitutional Court Decision no. U-I-763/2009 *et al* of 30/3/2011 (Official Gazette NN, 39/11), points 27–34.
See Peček, 2011, pp. 1–4; Josipović, 2016, p. 58.

call for additional elaboration and harmonization with the standards of the protection of ownership as the fundamental right defined by the Constitutional Court in connection with the issue of compulsory lease.

Specific restriction on the ownership of agricultural land is also envisaged when the owner wishes to convert agricultural land to non-agricultural purposes.[42] The conversion may be conducted only in accordance with documents on spatial planning and by paying one-time compensation for diminishing the value and the surface area of agricultural land being considered as a resource of interest to the Republic of Croatia. The conversion fee amount depends on the quality of agricultural land and on whether this is considered to be particularly valuable arable land.[43] In addition, the conversion fee depends on whether, at the time of entry into force of the ALA, the agricultural land was within or outside the building zone, taking also into consideration any subsequent changes of spatial plans (after the ALA had become effective). Depending on the quality and location of the agricultural land, the conversion fee ranges from 2.5% to 70% of the average value of land,[44] and it is paid based on the surface area of the plot that used to be agricultural land. The conversion fee amount is specified in the administrative document permitting the construction. At the same time, possible situations where the investor is exempt from paying the conversion fee are expressly stated.[45] These are mostly cases where objects for the protection from floods, facilities for agricultural activities, transport and communal infrastructure, smaller housing objects, and the like are built. Changing the purpose of agricultural land contrary to the existing spatial plans and without any proof that a conversion fee has been paid is considered misdemeanor, and a corresponding fine is prescribed.[46]

Compensation for the conversion of agricultural land must also be in line with the constitutional guarantee of ownership and with the principle of proportionality. When assessing the constitutionality of the provisions of the Agricultural Land Act of 2008 on the compensation for the conversion, the Constitutional Court of the Republic of Croatia indicated that the test of proportionality and the ratio of conversion fee depended on the quality of agricultural land and where it was located prior to the

42 Arts 18–26 ALA.

43 The criteria for the assessment of the quality of land are to establish whether the natural characteristics, the shape, the position, and the surface area enable the most efficient application of agricultural technology and agricultural production (Art. 22 ALA).

44 For example, compensation amounting to 70% of the average value of land is paid for the conversion of particularly valuable arable land or for valuable arable land that had been outside the building zone prior to the entry into force of the ALA and was included in the building zone after the change of the spatial plan (Art. 24/2 ALA). For other agricultural land added to the building zone after the changes of the spatial plan, compensation of 50% of the average value of land is paid (Art. 24/1 ALA). For agricultural land within the building zone where it is allowed to build in accordance with the spatial plan, the compensation amounts to only 2.5% of the average value of land (Art. 24/3. ALA) and to 5% for particularly valuable agricultural land.

45 Art. 26 ALA.

46 Art. 95 ALA.

adoption of the spatial plan (within or outside the building zone).[47] The conversion fee amounts may be different, but they must be proportionate and objectively and reasonably justified. The Constitutional Court also held that it was unacceptable to differentiate between the positions of the owners of agricultural land when it came to paying the conversion fee depending on the area where a particular agricultural land was located at the time when the ALA entered into force or on spatial plans to be adopted or amended in the future. Indeed, these are the facts on which individual owners do not have any direct impact. When agricultural land is converted into a building area after the ALA entered into force, the owner is faced with unreasonably high compensation, and the conversion thus becomes more difficult if compared with those owners whose agricultural land had already been included into building zones before the ALA entered into force. The situations just described result in inequality between different owners of agricultural land.[48] The current rules on conversion fee for altering the purpose of agricultural land can still be considered constitutionally disputed even though the legislator had changed the ratios between them. The main criterion for distinguishing the level of compensation for the conversion continues to be the location of a particular piece of agricultural land at the time that the ALA entered into force, taking into consideration any subsequent changes of spatial plans. In addition, the proportionality, when the ratios between different compensations for the pieces of land of the same quality are involved, and whether they are within or outside a particular building zone, continues to be questionable (70% : 5%, or 50% : 2,5%). There are still substantial inequalities among the owners of agricultural land when it comes to conversion fees to be paid when changing the purpose of their land.

1.3. Property rights on agricultural land

1.3.1. General

In the Republic of Croatia, agricultural land may be private or state-owned. Although in the Constitution it is defined as resource of interest to the Republic of Croatia, the Croatian legislator has not decided to proclaim agricultural land to be common good

47 The main question raised to the Constitutional Court was whether, from the standpoint of the constitutional guarantee of ownership as a fundamental right, it was justified to restrict ownership in the way that the change of use of agricultural land was conditioned by the previous payment of the conversion fee. If such restriction was allowed, a question arose of whether the rules on the conversion fee were in line with the requirement that the restriction of ownership had to be proportionate to the objective (public interest) achieved by such restriction (principle of proportionality).

48 See Decision of the Constitutional Court of the Republic of Croatia no. U-I-763/2009 *et al* of 30/3/2011 (Official Gazette NN, 39/11), points 42, 43.
See Peček, 2011, pp. 4–5.

(public domain) and thus exclude it from the property law regime.[49] The legislation governing the acquisition and disposition of property rights on agricultural land depends on whether such land is privately owned, by a natural or legal person, or state-owned. General provisions on property rights laid down in the Property Act primarily apply to the acquisition, protection, and termination of property rights on private agricultural land.[50] The Agricultural Land Act does not provide for the acquisition of property rights on private agricultural land. The contracts based on which private agricultural land is used and cultivated (e.g., lease contracts) are governed by the Obligations Act.[51] However, when state-owned agricultural land is involved, the state's disposal of agricultural land is governed by particular provisions of the Agricultural Land Act. In that case, the Property Act and Obligations Act apply only as subsidiary legislation.

1.3.2. Property rights on private agricultural land

The Agricultural Land Act contains no specific limitations on the acquisition and disposal of private agricultural land. The legal regime governing the acquisition and disposition of property rights and contract rights on private agricultural land is, in principle, very liberal.[52] Both the acquisition and disposal of private agricultural land are governed by the general provisions of property law and contract law, and there are no specific limitations regarding the types of property rights or contract rights that

49 Common goods (public domain) cannot be considered as objects of ownership and other property rights. They may not be individually owned by natural or legal persons, although they may serve to satisfy public needs and may have the status of common goods of interest to the Republic of Croatia. Under Croatian law, the category of common goods includes water in rivers, lakes, and the sea as well as the seashore. See Gavella et al., 2007, pp.135–137.
The economic utilization of common goods takes place based on a concession contract defined as an administrative contract whose subject is the economic utilization of common goods of interest to the Republic of Croatia as established by law (Art. 3/3 of the Concession Act, Official Gazette NN nos 69/17, 107/20).

50 Since the ALA does not contain any specific rules on the acquisition of ownership of private agricultural land, all general property law provisions apply to the acquisition of ownership. The same applies to the acquisition of contractual rights on private agricultural land.

51 Arts 519–549 of the Obligations Act apply to contracts of lease for private agricultural land (Official Gazette NN nos 35/05, 41/08, 125/11, 78/15, 29/18, 126/21).

52 The only "attempt" to restrict by law the disposal of private agricultural land existed in the Agricultural Land Act of 2008 (Arts 81–85), and its aim was to encourage the consolidation of agricultural land. This Act laid down that sales and leases of private agricultural land were conducted by local self-government units or the City of Zagreb. The procedure of sale or lease included an invitation to tender and the selection of the best bidder to enter into a contract with the owner. Any contracts made contrary to these provisions were null and void. The right of preemption belonged to the state. The Constitutional Court of the Republic of Croatia annulled those provisions because they were contrary to the provisions of the Constitution guaranteeing ownership (Art. 48/1). The CC held that such compulsory mechanism for controlling the sale of private agricultural land was a disproportional measure which excessively restricted ownership. See the Decision of the Constitutional Court of the Republic of Croatia no. U-I-763/2009 et al of 30/03/2011 (Official Gazette NN, 39/11), points 44–54.
See Peček, 2011, pp. 5–6.

would exclude the possibility of acquiring particular rights on private agricultural land. There are also no bans on acquiring certain property rights on specific legal bases. In principle, all natural and legal persons are equated when it comes to the acquisition of rights on private agricultural land. Every domestic natural[53] or legal person may be the owner of private agricultural land and the holder of other property or contract rights on such land. What is important is that it is a person with legal capacity to be the holder of ownership and other real rights.[54] The only exceptions are prescribed for the acquisition of ownership of private agricultural land by foreigners who, except by succession, cannot otherwise acquire ownership of agricultural land. However, foreigners may be holders of all other property rights and contract rights on private agricultural land.[55] There are also no special rules to provide, in a different way, for the acquisition of agricultural land in favor of legal persons depending on how the legal person is organized or who owns it (a stock company or a limited company). The acquisition of ownership of agricultural land by legal persons is also governed by the Property Act. When a legal person acquires ownership of agricultural land, the land becomes the property of that legal person and is entered in the land register as the owner. Any changes of shareholders or members of a company, or its reorganization, do not have any impact on the ownership status of agricultural land, which remains private property of the company even when the shareholders or members of the company are different people. There are also no special rules on the conditions for the acquisition of private agricultural land depending on who the founder of the company is (a domestic or a foreign legal person) or whether a domestic or a foreign legal person, who is already the owner of agricultural land, has acquired shares in the company.[56] A change of the ownership structure of a private company does not have any impact on the changes of the private law status of agricultural land considered as property of a private company.

Private ownership of agricultural land may be acquired on any legal basis on which ownership of immovables can otherwise be acquired. Ownership of agricultural land is acquired by contract, succession, a court decision, or a decision of another competent authority, and by law.[57] The prerequisites for the acquisition of ownership

53 When an agricultural activity is conducted within a family agricultural holding (FAH), and because it is a specific organizational form of farmers not recognized as legal personality, the owner of agricultural land is a natural person—a holder of the family agricultural holding who has all the rights and obligations of the FAH. For more, see Josipović, 2021, pp. 114–116.

54 See Gavella et al., 2007, pp. 60–63.
In this regard, the Property Act, in Art. 1/1 expressly lays down that every natural and legal person may be holder of the right of ownership and other property rights unless otherwise provided by law.

55 For more, see 2.2; 2.3.

56 The establishment, organization, termination of companies, transfer of shares in a company, and the like are laid down in the Company Act (Official Gazette NN nos 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 111/12, 125/11, 68/13, 110/15, 40/19.
The Company Act expressly provides that in legal transactions, companies may acquire rights and assume obligations as well as become the owners of both movables and immovables.

57 Art. 114/1 PA.

on any of these legal bases are laid down in the Property Act.[58] Other property rights on agricultural land (easements, real burdens, the right to build, security rights) are also acquired upon the fulfillment of the preconditions provided for in the Property Act and in other acts laying down the acquisition of particular types of property rights (e.g., the Enforcement Act for judicial and notary security rights on immovables).[59] When the succession of agricultural land is involved, including the land whose owner was a deceased holder of a family agricultural holding, no specific provisions exist on the succession of agricultural land.

Although one of the biggest obstacles to a qualitative and productive use of agricultural land is its fragmentation,[60] Croatian regulations do not contain any special rules on how to organize minimal surface area of agricultural land by imposing restrictions on the landowners when dividing it. No specific rules also exist on the dissolution of co-ownership on private agricultural land to prevent the physical partition of agricultural plots. Keeping the unity of agricultural land in the procedure of division can be achieved only by the application of the general rules on the division of co-ownership community by which the division—instead of geometrical partition or civil partition—is conducted in such a way that agricultural land remains in the ownership of a co-owner who pays to all other co-owners the equivalent value of their shares. This can be done in the court proceedings for dissolution based on the provisions on the so-called civil partition by payment, on the request of a co-owner who has a particularly serious reason to acquire the whole agricultural land (e.g., because they are a farmer). The same will be possible in succession proceedings if an heir, who is a farmer, requests the possession of agricultural land (including all things used in agricultural activities) and if they pay out all the other heirs. In the same way, it is possible in the procedure of dissolution of ownership of agricultural land co-owned by the Republic of Croatia and a third person if the share owned by the state is smaller than 50% of the entire surface area of the agricultural parcel.[61] However, in all these cases, civil partition by payment, avoiding geometrical partition, is provided only as a possibility. It is an option that exists if the co-owner, who is a farmer, has requested such model of partition. In practice, an attempt has been made to solve the problem of fragmentation of agricultural land primarily by the rules on land consolidation. These

58 For more, see Josipović, 2014, pp. 110–115.

59 For more, see Josipović, 2014, pp. 116–131.

60 According to the data from the European Commission, the farm structure in Croatia in 2016 shows that 69.5% of farmers utilized agricultural land of the surface area of less than 5 ha or 11.4% of the total surface area of agricultural land in Croatia (178,670 ha). On average, small farmers used 1.9 ha of agricultural land, and only 1.2% farmers cultivated agricultural land larger than 100 ha. A single farmer utilized on average 11.6 ha of agricultural land. Compared to an average farmer in the European Union, a Croatian farmer uses agricultural land that is by 30% smaller.
See the European Commission (2021), Republic of Croatia – Ministry of Agriculture, Josipović, 2021, p. 119.

61 Art. 51 PA, Art. 143/2 Inheritance Act, Art. 75/3 ALA.
Josipović, 2021, p. 106.

rules are very frequently changed to ensure the efficient execution of highly complex land consolidation procedures.[62] On the other hand, to prevent fragmentation, a specific statutory prohibition of division of agricultural land outside the building zones is proposed for cadastre units smaller than 1 hectare.[63] However, such prohibition of the geometrical division of agricultural land, except for the provision to expressly prohibit it, would also call for the regulation of the legal position of the owner of agricultural land because of the imposed prohibition of the geometrical division. This would constitute a serious restriction on ownership rights that must be in line with the constitutional guarantee of ownership and the principle of proportionality both in relation to the reason for restriction and to the agricultural land to which the restriction is imposed.[64,65] For the same reasons, it will be necessary to regulate any legal relations arising between the co-owners and heirs involving agricultural land that cannot be geometrically divided.

1.3.3. Property rights on state-owned agricultural land

The Agricultural Land Act lays down specific rules on the disposal of state-owned agricultural land regarding all the prerequisites for the establishment of property rights and contractual rights as well as for the acting of the competent public bodies at the time of disposal. To this end, *numerus clausus* of property rights is not increased, and no specific contractual rights for the use of state-owned agricultural land are provided. The rules on the disposal of state-owned agricultural land are based on several special principles by which the better exploitation of agricultural land is ensured, untended agricultural land is brought back to its functionality and

62 The new Consolidation of Agricultural Land Act (Official Gazette NN, no. 46/22) entered into force on April 23, 2022. This Act replaced the Consolidation of Agricultural Land Act of 2015 (Official Gazette NN no. 51/15).
Consolidation is defined as a group of administrative and technical procedures by which agricultural land in one or several cadastral municipalities, fragmented in cadastral units of a small surface area and of very irregular shape, is consolidated and grouped into larger cadastral units whose shape is also more regular. The process of consolidation includes the development of networks of roads and canals as well as the proper development of ownership documentation and other legal relations on agricultural land. (Art. 1/4).

63 See Art. 44/4 of the final Draft of the Act on Amendments to the Agricultural Land Act (2022). The prohibition would not apply to the cases of exclusion of agricultural land to build infrastructural and other objects in accordance with the spatial plan.

64 For example, in the parliamentary discussion on this draft, it was pointed out that the minimum surface area of a cadastral unit of agricultural land was not properly specified. It was emphasized that a geometrical division must be excluded when dealing with too large surface areas of agricultural land regarding the average surface areas of cadastral units existing in practice.

65 The Constitutional Court already explained its position that the prevention of fragmentation of agricultural parcels had its legitimate goal. However, the Court also stated that when laying down possible restrictions of ownership to achieve that goal, the balance between the protection of the owner's rights and the protection of public interest must be taken into account. See the Decision of the Constitutional Court of the Republic of Croatia no. U-I-763/2009 *et al* of 30/03/2011 (Official Gazette NN no. 39/11), points 52, 53.

effectively maintained, the manner of disposal is transparent, and agricultural production is increased.

The main principles on which the disposal of state-owned agricultural land is based are the following: when deciding on property rights on state-owned agricultural land, the protection and enhancement of economic, ecological, and other interests of the Republic of Croatia and its citizens must be ensured[66]; the disposal of state-owned agricultural land is based on the Program of Disposal of State-Owned Agricultural Land[67]; and the legal disposal of state-owned agricultural land is expressly and specifically listed in the ALA. It is a *numerus clausus* of permitted disposals accomplished in the procedures specified in the ALA. They are the following: lease of agricultural land as a piece of land making up a production-technological unit of 100 ha and lease of fishpond for maximum 25 years with the possibility of extension for the same period of time, lease of common pastures for a period of 10 years with a possibility of several extensions, temporary use for a period of 2 years, barter aimed at the consolidation of agricultural land, sale, sale by direct negotiation, transfer of agricultural land for cultivation by direct negotiation, dissolution of co-ownership, establishment of the right to build for maximum 99 years and establishment of servitude[68]; and for some categories of agricultural land, prohibition of alienation of state ownership. This prohibition includes fishponds, common pastures, particularly valuable arable land, and valuable arable agricultural land,[69] and state-owned agricultural land may be disposed for utilization on the basis of an invitation to tender.[70] The main aim of public tenders is to secure the transparency of the procedure, the participation of as many persons as possible, and a large number of bids to be able to choose the most favorable one for lease or sale. Only exceptionally does disposal begin on the basis of direct negotiation (e.g., temporary disposal, barter, sale by direct negotiation, leasing for cultivation by direct negotiation).[71] However, even in these cases, the Agricultural Land Act lists the cases where disposal by direct negotiation is possible, the kind of special purpose that must be achieved by disposal (e.g., consolidation, scientific work) and to whose benefit it is given (e.g., to scientific institutions for cultivation); and participants in the public tender for the lease of state-owned agricultural land to natural and legal persons who have fulfilled all their obligations connected with the use of state-owned agricultural land and with paying the water fee and all public duties and persons against whom no proceedings are conducted for the transfer of state-owned agricultural land to their possession.[72] When an invitation to tender is

66 Art. 28 ALA.
67 Arts 29, 30 ALA.
The adoption of the Program is decentralized. Although it is state-owned agricultural land, the Disposition Program is launched by the unit of self-government in agreement with the Ministry of Agriculture after its draft has been presented to the public.
68 Art. 27/2 ALA.
69 Art. 59/1 ALA.
70 Arts 31/1, 52/1, 56/1, 59/1, 60 ALA.
71 Arts 57, 58, 72, 73 ALA.
72 Arts 35/1, 63/1 ALA.

organized for the lease of state-owned agricultural land, any domestic and foreign natural and legal persons who meet the prescribed conditions may participate. When an invitation to tender is organized for the sale of state-owned agricultural land, any domestic natural or legal persons who are eligible to acquire ownership of agricultural land may participate.[73]

The procedure of disposal of state-owned agricultural land is, as a rule, decentralized. It is conducted by local self-government units in whose territory the respective agricultural land is located. Bodies of local self-government units bring their decisions on invitations to tender, conduct the whole process, decide on the selection of the best bidder, and enter into a lease or sales contract for the agricultural land on behalf and for the account of the Republic of Croatia.[74] To this end, the Ministry of Agriculture, before the contract is made, gives its opinion and consent regarding the selection of the best bid.[75]

Particular groups of natural and legal persons are recognized the right of priority when the agricultural land is leased or sold, under the criteria established by law.[76] As a rule, priority is given to persons already engaged in agricultural production, to previous possessors of the same land, to persons whose permanent residence, seat, or production facility is in the territory of the local self-government unit where the agricultural land is located, or the like[77]; the proceeds from the lease or sale of state-owned agricultural land are divided between the local self-government unit, the regional self-government, and the state. The state budget receives 25% of the amount, the budget of the regional self-government unit 10%, and the largest portion of the amount (65%) is allocated to the budget of the local self-government unit in whose territory the agricultural land is located.[78] The amounts paid to the units of local self-government and regional self-government must be spent for designated purposes: various programs connected with the registration of agricultural land in the land register, land consolidation, rural infrastructure, and the like.[79]

Despite the particularly detailed stipulation of individual disposals of state-owned agricultural land, in practice, numerous barriers make the process of disposal more difficult and slow. Therefore, it is still necessary to simplify and speed up this process. A particular problem is the fact that the programs of disposal of agricultural land are not adopted within the prescribed time and that the implementation of tenders for leases and sales is particularly slow. In practice, state-owned agricultural land is most frequently utilized based on contracts on temporary use and on the basis of

73 For more, see 2.2; 2.3.
74 Arts 31/5, 12, 38, 56/5, 11, 57, 61, 65 ALA.
75 Arts 31/12, 56/8, 65/1 ALA.
76 čl. 36, 53, 56/6, 64 ALA.
77 For more, see 3.
78 Art. 49/1 ALA.
The funds received through a barter system, the establishment of the right to build, or servitude are allocated in their entirety to the state budget (Art. 49/6 ALA).
79 Art. 49/3 ALA.

out-of-court settlements that do not give sufficient security to farmers to be able to plan agricultural production for a longer period of time.[80] This is why the Government of the Republic of Croatia, in February 2022, again proposed amendments to the Agricultural Land Act. The proposal includes the introduction of a new rule according to which the Ministry of Agriculture would take over the disposal of agricultural land if the local self-government unit failed to adopt an adequate program within the statutory time limit. This would result in a situation where proceeds generated from lease or sale will be the revenue of the state budget and will no longer be paid to the local self-government unit. It is also recommended to cancel the uniform statutory maximum of agricultural land that an individual bidder may get through a lease and introduce more flexible rules on the maximum leased surface area determined for every public invitation to tender. There is also a plan to introduce electronic public invitation to tender, and as for the right of priority, a scoring system is proposed.[81]

2. Cross-border acquisition of agricultural land

2.1. General

The Constitution of the Republic of Croatia stipulates that a foreigner may acquire the right of ownership under the conditions established by law.[82] Property rights exercised by foreigners are generally provided for in the Property Act,[83] where it is expressly defined who is, in the context of acquiring property rights, considered a foreign natural or a legal person. A natural person is considered to be a foreigner if they do not have citizenship of the Republic of Croatia.[84] However, persons who do not have Croatian citizenship but have emigrated from the territory of the Republic of Croatia or are the emigrants' descendants, are not considered to be foreigners if the body competent for citizenship has established that they meet the conditions for the acquisition of citizenship of the Republic of Croatia.[85] A foreign legal person is a person whose registered seat is outside the Republic of Croatia.[86] Every legal person whose registered seat is in the territory of the Republic of Croatia is considered to be a domestic legal person regardless of whether it is established by domestic or foreign capital and of its organizational form, or regardless of whether they are shareholders or members of a domestic or foreign legal person's company. To establish whether it

80 See the final Draft of the Act on Amendments to the Agricultural Land Act, 2022, pp. 29–30.
81 See the final Draft of the Act on Amendments to the Agricultural Land Act, 2022, pp. 31–32.
82 Art. 48/3 of the Constitution of the Republic of Croatia.
83 Arts 35-358a PA.
84 Before the authorities of the Republic of Croatia, persons with dual citizenship, Croatian and foreign, are considered Croatian citizens (Art. 2 of the Croatian Citizenship Act, Official Gazette NN nos 53/91, 70/91, 28/92, 113/93, 4/94, 130/1, 110/15, 102/19, 138/21).
85 Art. 355/1 PA.
86 Art. 355/3 PA.

is a domestic or a foreign legal person, it is only decisive whether the legal person is registered in the Republic of Croatia.

In principle, foreign natural and legal persons are equated with domestic persons when acquiring property rights.[87] There is a general rule that when foreigners acquire ownership and limited property rights on movables as well as limited property rights on immovables (servitude, real burdens, the right to build, liens), no special restrictions exist. It is expressly stipulated that the statutory restrictions imposed on foreigners regarding the acquisition of ownership on immovables may not apply accordingly to the right of ownership on movables or to the limited property rights.[88] Cases in which the legal capacity of foreigners for the acquisition of real rights is restricted are expressly provided by law or an international treaty.[89] However, one must distinguish between the legal position of natural and legal persons from EU member states and the legal position of foreigners from third countries. The restrictions regarding the acquisition of ownership of immovables by foreigners are operational in two directions.

a) special prerequisites for the acquisition of ownership of immovables by foreigners
The acquisition of ownership of immovables by foreigners is regulated by special prerequisites that differ depending on the legal basis on which ownership is acquired. A foreigner may acquire ownership of immovables by succession under the condition of reciprocity (i.e., if Croatian nationals and legal persons may also acquire ownership of immovables by succession in the country of the foreigner's citizenship).[90] To be able to acquire ownership of immovables on another legal basis (by contract, by a decision of a court or some other authority, or by law), two preconditions must be met: reciprocity and prior authorization given by the minister of justice.[91] A contract on the basis of which a foreigner may acquire ownership of an immovable is null and

87 See Gavella et al., 2007, pp. 61–62.
88 Art. 354/2 PA.
89 Art. 354/1,2 PA.
Art. 11 of the Croatian Citizenship Act establishes who is considered an emigrant and under what conditions an emigrant and their descendants may acquire Croatian citizenship by birth. An emigrant is a person who emigrated from the territory of the Republic of Croatia prior to October 8, 1991 (i.e., before the proclamation of Croatia's independence with the intention to live abroad forever). An emigrant is also a member of the Croatian people who emigrated from the territory of the former state that included the territory of the today's Republic of Croatia at the time of their emigration (Art. 11/3,4).
90 Art. 356/1 PA.
The reciprocity required for the acquisition of ownership by succession is different from that required under the Succession Act to acknowledge the foreigners' right to inheritance in the Republic of Croatia (Art. 2/2). Under the Succession Act, foreigners may inherit in the Republic of Croatia if Croatian citizens may inherit in the foreigner's country. When the inheritance of immovables by foreigners is involved, the types of reciprocities are two: the reciprocity to acquire the legal position of an heir and the reciprocity for the acquisition of ownership of an immovable by succession.
91 Art. 356/2 PA.

void if no prior authorization was given by the minister of justice[92] on the basis of their discretionary assessment. The minister's authorization is considered an administrative act, and it is possible to start administrative action against it.[93]

These restrictions on the acquisition of ownership of immovables by foreigners apply only to foreigners from third countries. In the process of accession to the European Union, Croatia was bound to gradually liberalize the cross-border acquisition of immovables by foreigners from EU member states.[94] The obligation implied the removal of any obstacles to the cross-border realization of the right of establishment and free movement of capital in conformity with the Treaty of the Functioning of the European Union (TFEU). The provisions of the Property Act by which the acquisition of ownership of immovables by foreigners was conditioned by the prior authorization were considered to be contrary to the EU's market freedoms because they caused direct discrimination based on citizenship.[95] Therefore, in the first phase of harmonization with EU legislation, the procedure of obtaining the authorization for the acquisition of ownership of immovables was simplified and shortened because the issuance of prior authorization was transferred from the Ministry of Foreign Affairs to the Ministry of Justice (2006).[96] The second phase of harmonization included amendments to the Property Act of 2008, which entered into force on February 1, 2009. Following this date, natural and legal persons from all EU member states were fully equated with domestic persons when acquiring ownership of immovables because special rules on reciprocity and prior authorization no longer applied to them.[97] Direct discrimination was thus abolished *pro futuro*, for any future cross-border acquisitions of immovables, but also retroactively, for all legal transactions made with foreigners from EU member states before February 1, 2009. It was expressly regulated that all contracts concluded before February 1, 2009, by which foreigners from EU member states ought to have acquired ownership of immovables, were convalidated *ex lege* if no prior authorization had been issued before that date.[98] On the basis of the existing contract, foreigners from EU member states were thus able to acquire ownership of immovables under the same conditions valid for Croatian citizens. Such equalization of foreigners from the European Union with domestic persons had been established

92 Art. 357/1 PA.
A foreign person deprived of the authorization to acquire the right of ownership may not reapply for the authorization within 5 years following the first application (Art. 357/3 PA).

93 However, since the authorization is given on the basis of discretionary assessment, the administrative court deciding on refusal may examine only the decision's formal deficiencies and not the justification of the decision or the substantial reasons for the refusal.

94 The obligation to liberalize the cross-border acquisition of immovables arising from Art. 49/5/a, b and Art. 60/2 of the Stabilisation and Association Agreement between the Republic of Croatia and the European Communities and the Temporary Agreement on Trade and other Related Matters between the Republic of Croatia and the European Community (OG -International Agreements, 15/01).

95 See case law cited in Josipović, 2021, p. 109, note 37.

96 Act on Amendments to the Property Act (Official Gazette NN 79/06).

97 For more see in Josipović, 2021, pp. 108–111.

98 See Arts 5, 6 of the Act on Amendments to the Property Act (Official Gazette NN no.146/08)

even before Croatia became a member state of the European Union (July 1, 2013).[99] However, this nondiscriminatory treatment did not include agricultural land[100] and protected natural areas. Discriminatory rules of the then valid special laws prohibiting the acquisition of ownership of the excluded immovables by foreigners before the accession to the European Union could still be applied.[101]

The rules on prior authorization for persons from third countries have continued to be valid after Croatia's accession to the European Union, although they constitute direct discrimination of nationals and legal persons from third countries. Such discriminatory rules are allowed because of the restrictions that existed on December 31, 2002 for third countries and whose application continued under TFEU within the principle of free movement of capital between member states and third countries.[102] The provisions regulating the free movement of capital (TFEU) expressly stipulate that Croatia may continue applying discriminatory rules on third countries, including those on investing in immovables but only if they were effective on December 31, 2002.[103] Namely, in the relations with third countries, there is no obligation of liberalization of legal transactions involving immovables. However, there is no possibility of introducing new and stronger discriminatory restrictions for the acquisition of ownership and other property rights on immovables that would be less favorable than the discriminatory provisions in force on December 31, 2002. Any new rule which would, compared to the existing ones, worsen the position of persons from third countries in the process of cross-border acquisition of immovables would be contrary to the law of the European Union and considered a violation of the obligations stipulated in the TFEU.

b) statutory prohibition of the acquisition of ownership of specific immovables by foreigners

The Property Act expressly stipulates that foreigners may not own immovables located in the area which, because of the protection of interest and security of the Republic of Croatia, is proclaimed to be a protected area.[104] This prohibition also applies to natural and legal persons from EU member states because, in relation to

99 By the Stabilization and Association Agreement, Croatia committed itself, within the time limit of 4 years following the entry into force of the SAA, to fully liberalize the acquisition of immovables by nationals from EU member states (Art. 60/2 SAA). The time limit expired on February 1, 2009 (the SAA entered into force on February 1, 2005).

100 For more. see 2.3.

101 Art. 358 a/2 PA.
The exclusion of the agricultural land and the protected areas of nature was possible because, in Art. 60/2 and in Annex II to SAA, it was expressly concluded that those parcels were excluded from the obligation of liberalization of cross-border land acquisition in accordance with the free movement of capital.

102 See Art. 64/1 TFEU.

103 Art. 12 of the Treaty of Accession of the Republic of Croatia to the European Union (OJ L 112, 24/4/2012, pp. 10–110) expressly establishes that in Article 64(1) of the TFEU, the following sentence is added: "In respect of restrictions existing under national law in Croatia, the relevant date shall be 31 December 2002."

104 Art. 358 PA.

these immovables, there is an expressly stated exception from the nondiscriminatory regime established on February 1, 2009.[105] After a particular area is proclaimed to be an area of interest of the Republic of Croatia, foreign persons' ownership ceases to exist, and the ownership of the involved immovable is transferred to the state.

To protect particular types of immovables as goods of interest for the Republic of Croatia, separate laws expressly stipulate prohibitions for the acquisition of ownership by foreigners in the Agricultural Land Act for private and state-owned agricultural land. The only exception regarding foreigners is the fulfillment of the condition of reciprocity by way of succession and if it is prescribed accordingly by an international treaty or/and another piece of legislation.[106]

The prohibition of the acquisition of ownership is also established in the Forest Act,[107] unless differently provided by an international treaty.[108] Indeed, the prohibition of acquiring ownership of forests applies only to foreign natural and legal persons from third countries (i.e., natural persons who do not have citizenship of the Republic of Croatia or of another member state of the European Union and legal persons who have a registered seat outside the Republic of Croatia and outside other EU states).[109] Natural and legal persons from third countries cannot acquire ownership of forests in Croatia on any legal basis (not even by succession). Namely, forests were not included in protected areas in the Stabilization and Accession Agreement and had no obligation of liberalization in the process of accession. Forests were not even a subject during accession negotiations, when a derogation period was discussed. The nondiscriminatory status for the acquisition of ownership of forests by natural and legal persons from EU member states was established as early as February 1, 2009, when the general provisions of the Property Act on their equation with domestic persons entered into force.[110] The prohibition of the acquisition of forests by persons from third countries

105 Art. 358a/2 PA.

106 Arts 2/2,3 ALA. For more, see 2.2; 2.3.

107 The Forest Act provides for forests and woodland as the resources of interest to the Republic of Croatia. The FA lays down specific obligations of the owners of forests and woodland to protect them as domains of interest to the Republic of Croatia. However, the FA does not stipulate any specific rules on the acquisition of ownership and other limited property rights or lease rights on woodland by domestic persons, and neither does it provide any specific rules on the succession of woodland. General property and contract law rules apply to the acquisition of ownership and other real rights and lease rights on woodland. General succession law rules apply to the succession of woodland.

108 Official Gazette NN nos 68/18, 115/18, 98/19, 32/20, 145/20.

109 Art. 56 of the Forest Act.

110 In the association process, the Croatian legislator did not decide on any derogation period for the acquisition of the protected areas of nature by foreigners from EU member states, and no derogation period was agreed for the protected areas of nature in the Treaty of Accession. The provisions of the former Act on the Protection of Nature providing for the prohibition of acquisition by foreigners do not apply to persons from the EU since Croatia's accession to the European Union because the derogation period was not specified in the international treaty (Accession Treaty). By the entry into force of the Act on the Protection of Nature of 2013 (Official Gazette NN nos 80/13, 15/18, 14/19, 127/19), the prohibition of the acquisition of ownership of the protected areas of nature was abolished for all foreign persons.

remained in force because it had been introduced before December 31, 2002.[111] Therefore, it is possible to continue its application in relation to third countries according to the TFEU provisions on the free movement of capital between member states and third countries according to the TFEU.

Foreigners whose ownership of an immovable ceased to exist because the area of its location had been proclaimed to be an area of interest and security for Croatia, and who cannot acquire ownership by succession, are entitled to a compensation from the Republic of Croatia, now the owner of such an immovable. The compensation is determined in accordance with the regulations on expropriation.[112]

2.2. Prohibition of the acquisition of ownership of agricultural land

The prohibition of the acquisition of agricultural land by foreigners was introduced into Croatian legal order in 1993.[113] It was then extensively regulated and had a broad personal and substantial scope of application. Foreign legal and natural persons could not acquire agricultural land under any legal bases. It was not possible to acquire a particular agricultural land by capital investment or by buying a domestic legal person who was the owner of agricultural land, unless provided otherwise by an international treaty. However, the Government of the Republic of Croatia could exclude a particular agricultural land from acquisition. Little by little, the prohibition was becoming more lenient, or it was later intensified anew; with the Agricultural Land Act of 2001, it was narrowed, and it was stipulated that foreign legal and natural persons could not be holders of ownership of agricultural land unless otherwise established in an international treaty.[114] The provisions on the prohibition of acquisition by way of capital investments or by buying a domestic legal person were abolished. With the Agricultural Land Act of 2008, the prohibition of acquiring agricultural land was again alleviated, and it was expressly regulated that foreign natural and legal persons could not acquire ownership of immovables on the basis of a contract, unless otherwise stated by an international treaty.[115] What it

111 The prohibition of acquiring forests by foreigners was introduced in the amendments to the Forest Act and they entered into force on 1 March 2002 (Official Gazette NN no. 13/02).
If in Art. 64/1 TFEU (Treaty of Accession for Croatia) the relevant date in respect of the existing restrictions existing under national law had not been determined on December 31, 2002, the prohibition on the acquisition of forests could not have been applied to EU nationals.

112 Art. 358/2,3, Art. 358b PA.

113 Art.1 of the Act on Amendments to the Act on Agricultural Land Act (Official Gazette NN no. 79/93 entered into force on September 7, 1993).
Regarding foreigners who, that date, had acquired agricultural land, it was stipulated that they remained owners of agricultural land. This provision would apply to all cases where all the prerequisites had been fulfilled for the acquisition of ownership of agricultural land before the entry into force of the Act (regardless on the legal basis). See also Milaković, 2015, p. 5.
On the other hand, the prohibition of disposition of agricultural land was expressly stipulated for foreign natural persons—owners of agricultural land from one of the states established in the territory of the former Yugoslavia (Art. 15).

114 Art. 1/3 of the Agricultural Land Act 2001 (Official Gazette NN no. 66/01).

115 Art. 1/2 of the Agricultural Land Act 2008 (Official Gazette NN no. 152/08).

meant was that the acquisition of ownership by foreigners was allowed on other legal bases (by succession, a decision by the court or some other authority, or by law).[116] In the Agricultural Land Act of 2013, the prohibition was again intensified, and foreign natural and legal persons could no longer acquire ownership of agricultural land except by succession and under the condition of reciprocity.[117] The prohibition was thus again broadened to include all other legal bases of acquisition (contracts, decisions rendered by courts or other authorities, statutory). The valid Agricultural Land Act of 2018 also stipulated that foreign legal and natural persons could not own such land unless otherwise provided by an international treaty or by a specific regulation. Exceptionally, and with the fulfillment of the condition of reciprocity, foreign legal and natural persons were again able to acquire ownership of agricultural land by succession.[118] Under current legislation, foreign persons cannot acquire agricultural land based on a contract, by a decision rendered by the court, by other public authority, or by law.

However, the prohibition of acquiring ownership of agricultural land continues to have a wide scope of application. On the one hand, it includes all agricultural land regardless of whether it is private or state-owned. Therefore, foreigners are excluded from the participation in public tenders for the sale of state-owned agricultural land. On the other hand, since the derogation period for natural and legal persons has been extended to June 30, 2023,[119] the prohibition applies to all foreigners, regardless of whether they are the nationals or have their seat in an EU member state or in a third country.[120] Finally, the prohibition, in principle, applies to all legal bases of acquisition of ownership of agricultural land—in other words, for the acquisition on the basis of a contract (*inter vivos* or *mortis causae*), the court decision or a decision rendered by other public authority (e.g., in the process of expropriation), by succession, or by law (e.g., by prescription).[121] An exception is envisaged only for the acquisition by succession but only if Croatian citizens, in the country of an heir, may also acquire

116 See Milković, 2015, p. 5.

117 Arts 2/2,3, of the Agricultural Land Act 2013 (Official Gazette NN no. 39/13).

118 Arts 2/2,3 of the Agricultural Land Act 2018 (Official Gazette NN no. 20/18).

119 For more see 2.3.

120 The courts *ex officio* take into account the prohibition of acquisition of agricultural land. Land register courts reject applications for registration of ownership of agricultural land in favor of a foreigner by invoking the provisions of the ALA on prohibition of acquisition. See, for example, a decision of the County Court in Dubrovnik, Gž 639/13 of 4/2/2015; decision of the County court in Varaždin, Gž- Zk-469/18 of 15/4/2020.
Published at www.iusinfo.hr (Accessed: April 24, 2022).

121 The prohibition of the acquisition of ownership would also include the prohibition of the fiduciary transfer of ownership of private agricultural land. It is a special type of security rights on immovables (Arts 309–327 of the Enforcement Act). For more, see in Josipović, 2013, pp. 204–205.
However, in that case, there is also a transfer of ownership on the creditor. Therefore, it would not be possible to establish this type of security right on private land in favor of a foreign creditor.

agricultural land by succession.[122] Whether, in every concrete case, a foreign person will still be allowed to acquire ownership of agricultural land on any other legal basis will depend on whether it is a person from another member state or from a third country. In such a situation, the relevant provisions are the provisions of the Agricultural Land Act to which the law of the Union refers as the relevant provisions for the restrictions on the acquisition of ownership of agricultural land.[123]

Such a broad scope of application of the restriction on the acquisition of agricultural land is justified by a special protection of such land being a resource of interest to the Republic of Croatia and by the importance of agricultural resources for the Croatian economy, rural development, and environmental protection. Up to now, the prohibition of acquisition of agricultural land has not been the subject of the constitutional law review. This type of prohibition, just like all other national provisions on the cross-border acquisition of agricultural land, has not been a matter of proceedings before the Court of Justice of the EU within the infringement procedures or preliminary ruling procedures.

2.3. Transitional period for agricultural land until June 30, 2023

Agricultural land, as a resource of interest to the Republic of Croatia, has had a special status in the context of free movement of capital within the Union's internal market in the process of the EU accession negotiations and after Croatia became a member state of the European Union. The provisions of EU law on the prohibition of discrimination based on citizenship in cross-border acquisition of ownership do not yet apply. In the Stabilization and Accession Agreement in 2001, agricultural land was already exempt from the obligation of liberalization when acquiring ownership within the cross-border realization of the right of establishment and free movement. Although based on the SAA, during the accession negotiations, the cross-border acquisition of immovables by foreigners from the EU underwent gradual liberalization. The subsidiaries of EU companies, which exercised their right of establishment in Croatia, were not able to acquire ownership of agricultural land to conduct their economic activities. Likewise, the nationals of member states could not acquire agricultural land within the concept of free movement of capital. What resulted from the SAA was only the obligation that the Stabilization and Association Council 4 years after the entry into force of the SAA (February 1, 2005) would examine the modalities for extending the nondiscriminatory treatment to also include agricultural land.[124]

The prohibition of the acquisition of agricultural land by EU nationals remained in force even after Croatia had become an EU member state. In the Treaty of Accession,

122 Reciprocity pursuant to Art. 2/3 ALA must be interpreted narrowly and only in the context of the possibility of acquiring agricultural land by succession. This type of reciprocity is different from the reciprocity as a prerequisite for a foreigner to acquire ownership of any type of immovable by succession (Art. 356/1 PA) and from the reciprocity as a prerequisite that a foreigner is entitled to become an heir (Art. 2/2 ALA).

123 For more, see 2.3.

124 Arts 49/5/b, 60/2 SSA, Annex VII.

a transitional period of 7 years from the date of accession (July 1, 2013) was stipulated for agricultural land, (until June 30, 2020).[125] In addition, a possible extension of the transitional period was agreed for a maximum of 3 years, which was conditioned by the existence of sufficient evidence that there would be serious disturbances, or a threat of serious disturbances, in Croatia's agricultural land market.[126] During the transitional period, for the citizens and legal persons from other member states, the restrictions for the acquisition of agricultural land stipulated in the Agricultural Land Act of 2008 applied.

The transitional period was provided to make it possible for Croatia to remove the deficiencies in the agricultural land market and in the agricultural sector and to enhance its competitiveness in the internal market. The reasons for the transitional period arose from the necessity to protect the socioeconomic aspects of agriculture following the inclusion in the internal market and a transfer to Common Agricultural Policy. The main problem of the Croatian agricultural land market, at the time of accession, concerned the large differences in the prices of land and purchasing power of farmers compared to the old member states, difficulties to use agricultural land caused by unfinished privatization and restitution of land nationalized during the Yugoslav communist rule, unregulated and inconsistent land registers and cadastre, and a huge percentage of non-demined agricultural land after the Croatian War of Independence (1991–1995).[127]

After the expiry of the 7-year period, the prohibition of the acquisition of land was extended for an additional 3 years. Based on the request of the Government of the Republic of Croatia of November 2019,[128] the European Commission, on June 16, 2020, brought a Decision by which the transitional period was extended until June 30, 2023.[129] The request for the extension of the transitional period was justified by the danger of serious disturbances on the agricultural land market, which might be caused by the acquisition of agricultural land by foreigners. Additional moratorium was necessary to continue the structural transformation of Croatian agriculture. It was emphasized that compared to an average farmer in the European Union, an average Croatian farmer was using a smaller surface area of agricultural land by 30% and, on average, accomplished lesser economic results by 56%. The average productivity of agriculture in Croatia is only 30% that of the European Union. It has been pointed out that the prices of agricultural land in Croatia are among the lowest in

125 According to Annex V of the Treaty of Accession, Croatia was allowed to "maintain in force for seven years from the date of accession the restrictions laid down in its Agricultural Land Act (OG 152/08), as in force on the date of signature of the Treaty of Accession, on the acquisition of agricultural land by nationals of another Member State, by nationals of the States which are a party to the European Economic Area Agreement (EEAA) and by legal persons formed in accordance with the laws of another Member State or an EEAA State."

126 Accession Treaty of Croatia, Annex V, item 3, Free Movement of Capital.

127 See the Request for the extension of the transitional period (2019).

128 See the Request for the extension of the transitional period (2019).

129 See Art. 1, Commission Decision (EU) 2020/787 of June 16, 2020 extending the transitional period concerning the acquisition of agricultural land in Croatia, OJ L 192, 17-6-2020, p. 1.

the European Union and that the inflow of foreign capital to the agricultural market in Croatia would increase the trend of the rise of prices of agricultural land. This trend would have a negative impact on the structural transformation of agriculture because of the low purchasing power of Croatian farmers. It is also stressed that more time is needed for the privatization of agricultural land, updating of ownership rights, land consolidation, and demining.[130] To develop agricultural land and transform its agriculture, during the extended transitional period, Croatia has also planned to take a number of various measures, including the registration of property rights in the land register and cadastre, the development of agricultural land to be leased, and the enhancement of technology.[131]

In the course of the extended transitional period referred to in Annex V of the Treaty of Accession for the cross-border acquisition of agricultural land, in the territory of Croatia, the following rules are valid: the national prohibition of acquisition of agricultural land for natural and legal persons from EU member states is in force until June 30, 2023; the national prohibition of the acquisition of agricultural land is valid for the acquisition of both private and state-owned agricultural land; and the prohibition for nationals and legal persons from other member states on the acquisition of agricultural land on the basis of a legal transaction (a contract). The restrictions referred to in the Agricultural Land Act of 2008 apply to foreigners from other member states regardless of the fact that subsequent new acts on agricultural land containing more stringent measures regarding the prohibition of acquisition were adopted. The ALA of 2008 provided for the prohibition of acquisition of agricultural land only on the basis of a legal transaction (a contract), but it did not provide any prohibitions on other bases of acquisition of agricultural land (succession, decision of the court or other public authority, law).

As a result, foreigners from other member states can acquire ownership of agricultural land under other legal bases; for example, during the transitional period, when acquiring agricultural land, nationals of a member state or legal persons from another member state must not have a less favorable treatment than the one they had on the date when the Treaty of Accession was signed. This means that for the acquisition of agricultural land by foreigners from another member state, it is prohibited to apply a more stringent treatment, new restrictions, and new discriminatory rules compared to the ones that were valid at the time of accession under the Agricultural Land Act of 2008.[132] Therefore, more stringent restrictions for the acquisition of agricultural land under the more recent acts of 2013 and 2018 cannot apply to foreigners, by which the prohibition of acquisition was extended to all legal bases of acquiring ownership, such as by contract, decision by the court or other public authority, or by law, excluding the acquisition of ownership by succession; nationals and legal persons from another member state are equated with domestic persons in the acquisition

130 See the Request for the extension of the transitional period (2019).
131 See the Request for the extension of the transitional period (2019).
132 See Josipović (2021), p. 112.

of all other property rights (e.g., servitude, right to build, security rights) and contractual rights on agricultural land (e.g., lease); nationals and legal persons from another member state, when acquiring agricultural land, must not be treated in a more restrictive way than a national or a legal person from a third country[133]; national prohibition for the nationals and legal persons from other member states is allowed only within the concept of free movement of capital referred to in Art. 63 TFEU (i.e., in the context of cross-border acquisition of agricultural land considered as cross-border movement of capital).[134] National prohibition for the acquisition of agricultural land may not apply to cross-border acquisition of agricultural land exercised within the concept of freedom of establishment (Art. 49 TFEU), such as in an economic activity in Croatia. Therefore, self-employed farmers, who are nationals of another member state and who wish to establish themselves and reside in Croatia, are not subject to the prohibition. Since the accession to the EU, when self-employed farmers acquire agricultural land, the rules on nondiscriminatory treatment apply[135]; for natural and legal persons from third countries, the restrictions on the acquisition of agricultural land that were effective on December 31, 2002 apply. Under the Agricultural Land Act of 2001, which was valid on December 31, 2002, foreigners could not acquire ownership on any legal basis. However, the provisions of the TFEU on free movement of capital with third countries do not exclude the possibility that member states subsequently alleviate the discriminatory treatment of foreigners from third countries in the cross-border acquisition of ownership of agricultural land. The provisions of later acts on agricultural land would apply to the nationals from third countries because they contain a "milder" prohibition of the acquisition of agricultural land by opening the possibility for foreigners to be able to acquire ownership under particular legal bases (e.g., by succession)[136]; for natural and legal persons from third countries, the prohibition of the acquisition of ownership of agricultural land is also effective upon the expiry of the transitional period agreed upon for the nationals and legal persons from other member states—for example, until the Croatian legislator cancels the prohibition; it is prohibited to introduce a more stringent treatment, new restrictions, and new discriminatory limitations of the acquisition of ownership and use

133 Ibid.

134 Art. 63. of the TFEU does not expressly provide for the cross-border acquisition of immovables. However, Art. 63. of the TFEU also encompasses various transactions involving immovables, from direct investments, gifts, and succession to usufruct and mortgages. See Korte, 2022, p. 988.; Wojcik, 2016, p. 2008.; Streiblyté and Tomkin, 2019, p. 749.; Kotzur, 2015, p. 398.; Bernard, 2019, p. 524.; Frenz, 2012, p. 1163. The concept of "free movement of capital" is interpreted in EU law by reference to the nomenclature of free capital movements from Annex I (Nomenclature of Free Capital Movements) of the former Council Directive 88/361/EEC of June 24, 1988 for the implementation of Article 67. of the Treaty (OJ L 178, 8.7.1988, pp. 5–18.). This Nomenclature continues to have an indicative value in practice for defining the concept of "free movement of capital." See Judgment of March 6, 2018, *SEGRO*, Joined Cases C-52/16 and C-113/16, ECLI:EU:C:2018:157, point 56.

135 See Josipović, 2021, pp. 112–113.

136 E.g., Agricultural Land Act of 2008, Agricultural Land Act of 2013, and Agricultural Land Act of 2018.

of agricultural land by natural and legal persons from third countries compared to those valid on December 31, 2002[137]; the prohibition of acquisition of agricultural land for natural and legal persons from third countries applies to both private and state-owned agricultural land; natural and legal persons from third countries are equated with domestic persons in the acquisition of all other property rights (servitude, the right to build, security rights) and contractual rights (lease) on agricultural land.

Upon the expiry of the transitional period on June 30, 2023, a nondiscriminatory treatment will have to be applied to nationals and legal persons from other member states for acquiring agricultural land (i.e., the same treatment that applies to domestic persons). After June 30, 2023, the national prohibition of acquisition of agricultural land may apply only to nationals and legal persons from third countries, but only if the restrictions that were valid on December 31, 2002 are involved.[138] Regarding the nationals and legal persons from other member states, from June 30, 2023, it will no longer be possible to apply national discriminatory prohibition for the acquisition of ownership of agricultural land because its application is excluded by an international treaty (TFEU).[139] Nationals and legal persons from other members states will have to be fully equated with domestic persons, regardless of the legal basis on which they acquire ownership, whether they acquire private or state-owned land, and regardless of which EU market freedom they exercise by the cross-border acquisition of agricultural land. Upon the expiry of the transitional period, because it will no longer be possible to request its extension, Croatia will be able to conduct the transformation of agricultural production and enhance the development of the market of agricultural land only by nondiscriminatory measures.

3. Potential discriminatory restrictions on the cross-border acquisition of agricultural land in the context of the Commission Interpretative Communication

Upon the expiry of the transitional period (June 30, 2023), for nationals and legal persons from other member states, the national prohibition for the acquisition of ownership of agricultural land, considered as direct discrimination based on nationality, will no longer be valid. When the transitional period is over, nationals and legal persons from other member states will acquire ownership of agricultural land under the same conditions applied to domestic nationals, and neither will the provisions of the Property Act providing for specific prerequisites for the acquisition of ownership

137 Art. 64/1 TFEU.
See Wojcik, 2015a, p. 2066; Korte, 2022a, p. 1012.; Glaesner, 2019, p. 1115; Sedlaczek and Züger, 2018., p. 809.; Gramlich, 2017, p. 1066.
138 Art. 64/1, UDEU.
139 Even if the Agricultural Land Act did not expressly stipulate that national prohibition applies if not otherwise prescribed in the treaty, national prohibition would not apply because of the principle of primacy of EU law.

of immovable apply to nationals and legal persons from other member states. To acquire ownership of agricultural land, the principle of reciprocity and prior authorization given by the minister of justice will no longer be required since they are both considered to be inadmissible restrictions on the free movement of capital and freedom of establishment.[140]

However, potential discriminatory restrictions on nationals and legal persons from other member states might ensue from the provisions of the Agricultural Land Act providing for specific disposals of state-owned agricultural land. This Act does not expressly exclude foreigners from participation in public invitations to tender for the selling or leasing of agricultural land. Foreigners may already take part in invitation to tender for lease of agricultural land. Upon the expiry of the transitional period, foreigners from other member states will also be allowed to participate in invitations to tender when state-owned agricultural land is leased or sold. Indeed, the Agricultural Land Act stipulates that particular categories of persons have the right of priority in public invitations to tender aimed at leasing or selling state-owned agricultural land, leasing fishponds or common pastures.[141] Some of the reasons for which some categories of persons are recognized as having priority in such public invitations in the context of the Commission Interpretative Communication are held to be indirect discriminations and disproportionate restrictions on the acquisition of ownership of agricultural land. Namely, these are priority rules applying to all participants in a public invitation to tender (both domestic and foreign persons). In addition, some of the reasons for priority are organized in the way that may lead to a different treatment of foreigners when acquiring ownership of agricultural land compared to domestic persons who also participate. Some of the conditions for the recognition of priority may be discriminatory restrictions on foreigners who want to acquire agricultural land or may bring them into an unfavorable position. The right of priority, among others, may also concern those who are already engaged in agricultural production; holders of family agricultural holdings or who have had, for at least 3 years, their permanent residence, seat, or facility for agricultural production in the territory of the local self-government unit where the state-owned agricultural land is located. Among them may also be a possessor, whose primary activity is agriculture and who has utilized a particular piece of agricultural land based on a lease contract, or farmers, cooperatives, and companies who have already been registered in the Register of Farmers for at least 3 years. In addition, subsequent transactions involving bought state-owned agricultural land may be restricted by the prohibition of alienation for a period of 10 years from entering into a contract on sale and establishing the preemption right in favor of the state.[142] It arises from the Commission Interpretative Communication and the jurisdiction of the CJEU that the requirements dealing with the qualifications in farming, residence, and registration requirements and

140 See Commission Interpretative Communication, pp.12–17.
141 Arts 36, 53, 56/6, 64 ALA.
142 Art. 71/1,2 ALA.

privileges in favor of local acquirers[143] undoubtedly constitute restrictions on the free movement of capital and freedom of establishment. Some of these restrictions can be justified under EU law under certain circumstances because of the specific nature of agricultural land and specific public policy objectives in agriculture.[144] However, in some particular circumstances, some of these restrictions may be regarded as highly restrictive and disproportionate (e.g., residence or registration requirements) or even as indirect discrimination based on citizenship (privileges in favor of local acquirers). In further processes of transformation of the agricultural land market, and in particular upon the expiry of the transitional period, it would be useful to reexamine the alignment of the concept of the right of priority when acquiring ownership or lease with the EU law dealing with the prohibition of discrimination and restrictions in the process of acquiring agricultural land.

4. Conclusion

Agricultural land, as a resource of interest to the Republic of Croatia, is in the Croatian legal order regulated in a separate Act which, in accordance with agricultural policy, provides for various aspects of maintenance, use, and protection of such land. In the Agricultural Land Act, special attention is given to the maintenance and preservation of agricultural areas and their efficient cultivation. Agricultural land may be converted into a building site only against a conversion fee.

For a very long time, the national prohibition of the acquisition of ownership of agricultural land by foreigners existed to meet the national goals of agricultural policy. In the last 20 years, the prohibition of acquiring agricultural land by foreigners has assumed an extremely important—perhaps even decisive—role in the further development of the agricultural land market. To achieve this goal, the rules governing the prohibition of alienation have frequently changed. In some periods, the prohibition of acquisition was mitigated or became extremely restrictive. However, the legislation on the prohibition of acquisition of ownership of agricultural land by foreigners has not been properly followed by other activities to ensure the necessary conditions for an efficient development of the agricultural land market (land consolidation, improvement of land register, denationalization, etc.). This is the reason why the transitional period was extended for 3 years following the expiry of the first transitional period of 7 years. Namely, it became clear that the very declaration of the prohibition of acquisition of agricultural land by foreigners, without the corresponding structural changes in agriculture, could not ensure proper development of agriculture in Croatia.

After the accession to the European Union and the inclusion into the EU Common Agricultural Policy, Croatia was confronted with many new challenges for a reform

143 See Commission Interpretative Communication, pp. 15–16.
144 See Commission Interpretative Communication, p. 11.

of agriculture to achieve harmonization with EU law and policies. The inclusion of the national agricultural land market into the internal EU market calls for a removal of the national discriminatory restrictions on the acquisition of agricultural land and adjustment of the country's agricultural land market to EU market freedoms. So far, these processes have largely been postponed by contracting and extending the transitional period for the acquisition. However, Croatia will soon have to accept the fact that discrimination of nationals and legal persons from other member states on the grounds of citizenship and the harsh and disproportional restrictions on the acquisition of agricultural land will no longer be allowed. The prohibition of acquiring ownership of agricultural land, as the main measure for the development of the relevant market, must be replaced by new and different instruments based on modern economic and social principles by which investments in agriculture will be encouraged, agricultural production modernized, and rural development enhanced without discrimination and disproportional restrictions. The implementation of such measures must begin as soon as possible, without waiting for the expiry of the transitional period, to prepare all the answers to possible unfavorable effects following the liberalization of the agricultural land market.

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| Chapter 5 |

Czech Republic: An Open Market Dominated by Large Owners

Vojtěch VOMÁČKA – Jan LEICHMANN

ABSTRACT

This chapter focuses on the acquisition of agricultural land in the Czech Republic. It aims to describe this topic in its historical and property law context since the privatization of agricultural land after 1989 still concerns its transfer from the state to private individuals. Furthermore, transfers of agricultural land were restricted on the basis of nationality until being gradually abolished after the Czech Republic joined the European Union in 2004.

First, the chapter describes the Czech concept of agriculture and agricultural land and the general legal framework of both protection and transfer of agricultural land. Then, restrictions on the cross-border acquisition of agricultural land are analyzed in the context of land restitution and specific measures toward foreign investors. A separate subchapter is devoted to the application of the preemption right of the state. The last part introduces the general requirements on the transfer of agricultural land, with a particular focus on the evidence in the Real Estate Register. Additional requirements for the transfer of state-owned land are described with details on priority transfers of agricultural land, sales by public offer, and public tender.

The authors conclude that, currently, the only major obstacle to the cross-border acquisition of agricultural land in the Czech Republic is the state's preemption right, which applies only to selected land, particularly in protected natural areas. Transfers of state-owned agricultural land are governed by special rules, which, however, do not in principle restrict interested parties from other states within the EU or the European Economic Area. Neither do they distinguish between persons residing or established in the Czech Republic and in another member state, nor do they differentiate between the requirements for conducting agricultural activities.

KEYWORDS

Czech land law, acquisition of land, agricultural land, restitution, preemptive right

1. Introduction

This chapter describes the rules on the acquisition of agricultural land in the Czech Republic. Until recently, fundamental differences existed between the acquisition of agricultural land by Czech citizens or companies and foreign investors. As these

Vomáčka, V., Leichmann, J. (2022) 'Czech Republic: An Open Market Dominated by Large Owners' in Szilágyi, J. E. (ed.) *Acquisition of Agricultural Lands: Cross-border Issues from a Central European Perspective.* Miskolc–Budapest: Central European Academic Publishing. pp. 127–143. https://doi.org/10.54171/2022.jesz.aoalcbicec_6

differences have been basically eliminated, the Czech agricultural land market can be described as open and nondiscriminatory, and not only in relation to other member states. Czech legislation does not differentiate substantially between nationals of member states or third countries. On the other hand, a prospective buyer must be aware of the restrictions on the transfer of certain agricultural land applicable in the Czech Republic—in particular based on the state's preemption right—as well as the specific requirements governing the transfer of the land itself.

At the same time, Czech agriculture differs in many respects from other EU countries. The main differences are the larger average size of agricultural enterprises, a high share of leased land, and the high representation of corporations.[1]

Unfortunately, no up-to-date literature that would sufficiently describe the legal regulation of agricultural land transfers in the Czech Republic is available in foreign languages. For foreign lawyers, investors, and ecologists, it may not even be clear how and why the ownership and economic structure of Czech agriculture has evolved to its present state, which is specific even in European terms. At least a brief historical excursus, including the overview of land restitution after the 1989 revolutions, is provided in this chapter.

2. Theoretical backgrounds and summary of national land law regime

2.1. Concept of agriculture and agricultural land

The concept of agriculture is not defined in the Czech legal system. Agriculture is perceived as an activity tied to agricultural land, which is not only an object of property rights but also an essential component of the environment.[2] Then, agriculture is also a business activity aimed at the production of agricultural products, especially foodstuffs, in line with the definition of the agricultural production provided by Act no. 252/1997 Coll. on agriculture (hereinafter: the Agriculture Act): "an activity encompassing crop and livestock production, including the production of breeding animals and plant propagating material, as well as the processing and sale of own agricultural production, and further forest and water management."[3]

Agricultural issues are not directly addressed by the Czech Constitution (hereinafter: the Constitution), the Charter of Human Rights and Freedoms (hereinafter: the Charter), constitutional laws, and other sources of constitutional law, which together form the Constitutional Order of the Czech Republic.

The definition of agricultural land in the Czech legal system is closely related to the definition of the agricultural land fund, which is conceived by Act no. 334/1992 Coll. on the protection of the Agricultural Land Fund (hereinafter: the Agricultural Land Fund

1 Zdeněk and Lososová, 2020, p. 55.
2 Such a concept is well established in Czech legal science. See Tkáčiková, Vomáčka, Židek et al., 2020.
3 Section 2e(4) of the Agriculture Act.

Act), as an essential natural resource, a means of production, and a component of the environment. According to Section 1(2) of the Agricultural Land Fund Act, the agricultural land fund consists of land under agricultural cultivation, such as arable land, hop-growing areas, vineyards, gardens, orchards, permanent grassland, and land that has been and continues to be under agricultural cultivation but not under temporary cultivation. For these two basic categories, the Agricultural Land Fund Act introduces the legislative abbreviation "agricultural land." According to Section 1(3) of the Agricultural Land Fund Act, the agricultural land fund also includes ponds with fish or waterfowl farming and non-agricultural land needed for agricultural production, such as dirt roads, land with equipment important for field irrigation, irrigation reservoirs, drainage ditches, dikes used to protect against waterlogging or flooding, technical anti-erosion measures, and so on. In cases of doubt as to whether a piece of land is part of the agricultural land fund, the agricultural land fund protection authority at the level of the municipal authority of the municipality with extended competence shall decide.

The additional legislation governing the use of agricultural land—for example regarding rules on fertilizer use[4]—is based on the general definition of agricultural land in the Agricultural Land Fund Act and does not provide its own definition.

A separate act on forests (Act no. 289/1995 Coll., Forest Act) provides the definition of forests ("forest stands with their environment and land fulfilling forest functions"[5]), the standards of their protection, and the requirements for their use for other purposes. In particular, withdrawal or restriction proceedings shall be conducted.[6]

For the purposes of registration in the Real Estate Register, Act no. 256/2013 Coll. on the Real Estate Register (hereinafter: the Real Estate Register Act) defines the categories of land—also using the subcategory of agricultural land, which is similar to the one in the Agricultural Land Fund Act. Pursuant to Section 3(2) of the Real Estate Register Act, land is divided by type into arable land, hop-growing areas, vineyards, gardens, orchards, permanent grassland, forest land, water areas, built-up areas, and courtyards and other areas. Arable land, hop-growing areas, vineyards, gardens, orchards, and permanent grassland are agricultural land. The following information is available in the land register for agricultural land: type of land; type of use (e.g., tree planting, borders, photovoltaic power plant); type of land protection (i.e., national park or protected water management area); and the bonitated (evaluated) soil ecological units (BPEJ), which reflect the quality of the soil.

2.2. National legal framework

Although the Constitution has no *expressis verbis* norm concerning agricultural lands/holdings, the Czech legislation of the highest legal force is relevant to agriculture mainly because of protection of property and entrepreneurship and protection of

4 Act No 156/1998 Coll. on fertilisers, soil auxiliaries, plant biostimulants, and substrates and on agrochemical testing of agricultural soils (Fertiliser Act).

5 Section 2 (a) of the Forest Act.

6 Section 15 and 16 of the Forest Act.

the environment, particularly soil. The Constitutional Court interprets the constitutional requirements related to agricultural activities in the context of the obligations arising from the Czech Republic's membership in the European Union.[7] In particular, it reflects the principles arising from EU law, including the principle of protection of fundamental rights.[8] The constitutional protection of property in Art. 11 of the Charter is based on a general guarantee and equal protection. Therefore, any interference with real estate ownership, possession, or management can be brought before the Constitutional Court after exhausting the ordinary remedies available in the ordinary courts, provided it reaches a certain degree of seriousness.[9] Similarly, the landowners affected by agricultural activities may seek remedies before the civil or administrative courts and then file a constitutional complaint invoking their property rights protected under the same provision of the Charter. Article 11(4) of the Charter provides the conditions for expropriation and states that this is only permitted in the public interest, based on law, and for compensation.[10]

According to the Constitutional Court, the state may determine which property may be owned only by it to secure the needs of society, the development of the economy, or public interest.[11] The state may take care of the careful use of its natural resources and protect its natural wealth, even if it does not confiscate private property in favor of the interests of other private entities.[12] This corresponds, for example, to the statutory concept of land adjustments,[13] which are conducted in the interest of the public as defined in Section 2 of Act no. 139/2002 Coll. on land adjustments and land offices.[14] Nevertheless, no comprehensive guidance has been provided by the Constitutional Court on the acquisition of agricultural land.

The Agricultural Land Fund Act is a key regulation for the protection of agricultural land, and its provisions are based on a special law adopted for the same purpose

7 The Czech Republic has been a member of the European Union since 2004. Therefore, the regulation of agriculture must comply with the obligation arising from Art. 10a of the Constitution, on the basis of which an international treaty may delegate certain powers of the Czech Republic's authorities to an international organisation or institution.

8 In the *Sugar Quota* case, for example, the Constitutional Court assessed the compatibility of the national legislation with the principle of legitimate expectation, the principle of legal certainty and the prohibition of retroactivity, the prohibition of discrimination and the principle of equality, and finally also the principle of protection of the right to entrepreneurship and to operate other economic activities. For detail, see ruling of the Constitutional Court of March 8, 2006, No. Pl. ÚS 50/04.

9 For more details, see Vomáčka and Tomoszek, 2020.

10 For more details, see Hanák, Židek and Černocký, 2020.

11 See the ruling of the Constitutional Court of September 25, 2018, No. Pl. ÚS 18/17, para. 128.

12 See the dissenting opinion of Judge Šimáčková in the resolution of the Constitutional Court of August 5, 2014, No. Pl. ÚS 26/13.

13 Land adjustments should ideally also lead to an improvement in the functions of the landscape in terms of the water regime, soil erosion, and biodiversity, but the result may not always be only soil protection; it may also lead to a negative change in terms of maintaining the overall ecological functions of the land concerned.

14 See the ruling of the Constitutional Court of May 27, 1998, No. Pl. ÚS 34/97 and the resolution of the Constitutional Court of March 31, 2011, No. III ÚS 2187/10.

in 1959, which was replaced in 1966 and in 1992 (after the Velvet Revolution) by the Agricultural Land Fund Act. It ensures the protection of agricultural land from erosion, pollution, and non-agricultural use, and it further protects non-agricultural land that is essential for agricultural production (e.g., dirt roads, irrigation reservoirs, or drainage ditches) and ponds for fish farming.

Act no. 252/1997 Coll. on agriculture (hereinafter: the Agriculture Act) is a fundamental regulation governing the conditions for entrepreneurship in agriculture, the support for agriculture, and the implementation of the Common Agricultural Policy and the European Union's rural development policy. The conditions of ecological (organic) farming are mainly regulated by Act no. 242/2000 Coll. on organic agriculture.

The evidence of the immovables is covered by the Real Estate Register Act. The registration of the ownership in the Real Estate Register is compulsory. The Register includes a set of data on immovable property, including its inventory, description, its geometric and positional determination, and the registration of rights to such property.[15]

Furthermore, the registration is crucial in terms of private law requirements governing the transfer or disposal of agricultural land. Act no. 89/2012 Coll. on the Civil Code (hereinafter: the Civil Code) does not define agricultural land in any way. Therefore, the public law definition applies if, for example, it provides that

> "agricultural land may be divided only in such a way that the division results in land that is effectively cultivated both in terms of area and the possibility of permanent access. This does not apply if the land is to be divided for the purpose of erecting a building or for such a purpose for which the land may be expropriated."[16]

This general requirement is, of course, relevant for transfers of agricultural land because, if the whole land is not transferred or is to be divided, the possibility of efficient agricultural management is taken into account.

Unfortunately, the entry in the land register often does not correspond to reality, either because of historical inaccuracies or because landowners usually do not report changes. Any doubts about the nature of the land are resolved by the municipal authorities. The nature of the land had to be investigated retrospectively in the restitution process (most often since June 1991, when Act no 229/1991 Coll. on land came into force). For these transfers, it was necessary to interpret the definition of agricultural land as broadly as possible.[17]

Farmers in the Czech Republic still farm predominantly on rented land, although the proportion of rented land has fallen from 92% to less than 73% over the last 20

15 Section 1 of the Real Estate Register Act.
16 Section 1142(2) of the Civil Code.
17 Judgment of the Supreme Court of November 18, 2009, Ref. No. 28 Cdo 2969/2009.

years.[18] However, although land tenure relations are registered in the Real Estate Register on a voluntary basis, in practice, this does not happen for financial reasons. Fortunately, information on agricultural land users can be obtained from the public land register (LPIS),[19] which was created primarily to provide European subsidies.

In 1993, 4,283,010 hectares of agricultural land were registered in the Real Estate Register. In 2020, the hectares were only 4,200,204.[20] Thus, almost 8.5 hectares of fields, meadows, or gardens have disappeared every day since the Czech Republic was founded. Agricultural land has mostly been converted into building land, and some of it has been reforested. The price of agricultural land in the Czech Republic, on the other hand, has been rising steadily. From 2004, the earliest data available from the Czech Statistical Office, to 2020, it has increased almost fivefold: from CZK 4.98 per square meter to CZK 24.2 (approx. EUR 1) per square meter.[21]

The inheritance of agricultural land is governed by general civil law.[22] The inheritance rules are relevant to agriculture as far as they do not prevent the continuous fragmentation of agricultural land, which is arguably one of the main reasons that the owners do not farm the land themselves but rent it out. The law does not prevent in any way the land from being inherited cross-border by a foreign citizen based on the legal hierarchy of succession or the inheritance agreement concluded within the course of the testator's lifetime.

3. Restrictions on the acquisition of agricultural land and forests

Czech law does not apply special restrictions on transfers of agricultural land, except for the preemption right for certain land in favor of the state (see below). The rules for the acquisition of agricultural land are basically the same for both Czech and foreign persons—natural and legal. Czech law also does not restrict, in principle, the acquisition or disposal of other rights *in rem* relating to the use of agricultural land (e.g., usufruct, lease arrangement). Furthermore, no special regulation exists regarding the lease of agricultural lands and holdings.

18 Czech Statistical Office. Integrated Agricultural Survey (2020). [Online]. Available at https://www.czso.cz/csu/czso/integrated-farm-survey-2020 (Accessed: December 6, 2021).

19 Available at https://eagri.cz/public/app/lpisext/lpis/verejny2/plpis/ (Accessed: December 6, 2021).

20 Information available at https://cuzk.cz/Periodika-a-publikace/Statisticke-udaje/Souhrne-prehledy-pudniho-fondu.aspx. (Accessed: December 6, 2021).

21 Czech Statistical Office. *Table 7.1 The average agricultural land prices*. [Online]. Available at: https://www.czso.cz/csu/czso/ipc_ts (Accessed: December 6, 2021).

22 Czech inheritance law follows the principle on the universal succession of heir into the position of the deceased person. The heir is therefore liable for all the debts of the deceased person irrespective of the value of the acquired inheritance. The heir may relinquish the right to the inheritance or any part thereof in favor of another heir. This heir, however, cannot waive its right to the inheritance in favor of a person who is not an heir to any assets of the inheritance. See Section 1475 et seq. of the Act No. 89/2012 Coll., Civil Code. For more details, see Elischer, Frinta and Pauknerová, 2013.

However, until recently, there existed fundamental differences between the acquisition of agricultural land by Czech citizens or companies and foreign investors; now, these differences have been basically eliminated. The Commission Interpretative Communication on the Acquisition of Farmland and European Union Law (2017/C 350/05) is therefore not of a high relevance to the Czech legal regulation, aside from the general preemption rights, as it indicates no acquisition caps, price controls, residence requirements, or privileges in favor of local acquirers. Furthermore, it does not stipulate any prior authorization, self-farming obligation, prohibition on selling to legal persons, or condition of reciprocity.

In general, legal persons do not have to meet any special conditions when purchasing agricultural land compared to natural persons, and no specific national rules exist on the acquisition of shares in a company that already owns agricultural land. It was not always so; with Act no 95/1999 Coll. on the conditions for the transfer of agricultural and forest land from state ownership to other persons (hereinafter: the Act on Transfer from State), the legislator excluded the possibility for legal entities to acquire agricultural land sold by the state, due to fears that legal persons might buy larger amounts of land and speculate on it. This measure led to an increase in the area of land farmed by natural persons: more than 100,000 hectares between 2000 and 2005. During this period, the state, through the Land Fund, transferred 276,000 hectares of agricultural land to individuals.[23] Later on, the Act on Transfer from State was replaced by Act no. 503/2012 Coll. (see below). Still, as a result of the transformation of state-owned enterprises and agricultural cooperatives, land in the Czech Republic is managed mainly by legal entities—business corporations. In 1997, they managed 74.9% of the land; in 2005, 70.7%; in 2011, 70.1%; and in 2020, still 70.1%.[24]

As regards the requirements for qualifications in farming, the agricultural entrepreneur must meet several requirements in the case of a natural person: (a) to be fully competent, (b) to have permanent residence in the territory of the Czech Republic or present a document proving that a visa for a stay of more than 90 days or a long-term residence permit has been issued, unless they are a citizen of the Czech Republic or a citizen of a member state of the European Union, (c) by an interview before a municipal authority of a municipality with extended competence, to demonstrate basic knowledge of the Czech language, unless they are a citizen of the Czech Republic or a citizen of a member state of the European Union.[25]

The acquisition of forests is not restricted, with the exception of state-owned forests. In principle, state forests cannot be sold. Such rule does not apply to exchange, sale of a co-ownership share of the state, sale of a separated forest land, sale in the public interest protected by the Forest Act or other acts, restitution of property, the

23 Soil: situation and outlook report. December 2006, p. 26 and p. 34. [Online]. Available at https://eagri.cz/public/web/mze/puda/dokumenty/situacni-a-vyhledove-zpravy/ (Accessed: December 15, 2021).
24 Czech Statistical Office. Integrated Agricultural Survey (2020). [Online]. Available at https://www.czso.cz/csu/czso/integrated-farm-survey-2020 (Accessed: December 6, 2021).
25 Section 2e of the Agriculture Act.

transfer of forests to municipalities and the transfer of forest land in recognized farms to other owners of land in these recognized farms.[26] In this respect, the forests share a similar regime as agricultural land under the Act on Transfer from State and later regulations. Forests in the selected protected natural areas are also burdened with the same preemption right in favor of the state as agricultural land (see below). The same rules also apply to the transfer of the forests and their evidence in the Real Estate Register.

3.1. Land restitution and privatization after 1989

The current structure of land ownership and size is the result of a complex historical development. Between 1948 and 1989, the communist regime effectively nationalized land (both agricultural land and forests). Owners were often illegally deprived of their farmland or left with bare ownership (land was used by agricultural cooperatives). After the Velvet Revolution (as early as 1990 and 1991, while still in Czechoslovakia), legislation was adopted to regulate land restitution. Its aim was not only to alleviate the property injustices and wrongs committed by the communist regime. Former owners were given back their confiscated agricultural land or replacement land if the original land could no longer be returned (e.g., due to urban development); however, restitution was also considered a form of privatization.[27] By privatizing businesses and land, the state sought to establish a market economy.

Restitution and privatization are therefore intertwined. This link was also reinforced by the possibility for former owners (*restituents*) to sell their claims to replacement land. However, this was only valid until 2005 as, afterward, only the original restitution holders and their heirs were entitled to acquire land (this decision is the so-called "first restitution dot").[28] Neither the constitutional order nor the international obligations of the Czech Republic imply an obligation to redress historical wrongs: in other words, there is no constitutional right to restitution, which was therefore a benefit provided by the state.[29]

In the 1990s, buildings, technological equipment, livestock, and movable property were privatized. Transfers of agricultural land were sporadic in this period. Until 1998, transfers of state land were conducted by the Land Fund of the Czech Republic at the discretion of the state on the basis of the demands of former owners, which was extremely non-transparent.[30] Laws regulating the privatization mechanism in other areas were also not aimed at the de-nationalization of agricultural property.[31] Privatization and restitution of agricultural land, therefore, began only after the adoption of Act on Transfer from State in 1999.

26 Section 4 of the Forest Act.
27 Judgment of the Constitutional Court of June 4, 1997, Ref. No. Pl. ÚS 33/96.
28 Judgment of the Constitutional Court of December 13, 2005, Ref. No. Pl. ÚS 6/05.
29 For example, Judgment of the Constitutional Court of November 19, 1999, Ref. No. IV ÚS 432/98.
30 Zeman, 2013, p. 242. and p. 252.
31 Adamová et al., 2020, p. 766.

The state originally intended to privatize 500,000 hectares of land, subsequently increasing the scope to 600,000 hectares (i.e., about 14 % of the total agricultural land area). Already in 2005, approximately 276 thousand hectares were transferred; 3 years later, 452 thousand hectares were transferred, and in 2011, 547 thousand hectares. Thus, the restitution process was almost completed in 10 years. The latest figures (as of December 31, 2019) show that only a few particularly complex cases remain to be resolved, and 99.79% of restitution applications have been decided.[32]

Unfortunately, the Land Fund often gave priority to applications of farmers over those of former owners, which was considered a violation of the law. These practices were also criticized by the Supreme Audit Office.[33] After a great struggle and a search for a fair solution,[34] the following order of applicants was finally legislated after several years: (1) former owner (*restituent*); (2) a tenant who has been using the offered land for at least 36 months; (3) farmers who have been using at least 10 ha of the offered land for 36 months, or owners using at least 10 ha of agricultural land in the place of the offered land who have been farming on the territory of the Czech Republic for 36 months.

If no one expressed interest, the land was offered in a commercial tender to any natural person (citizen of an EU country or a country of the European Economic Area and Switzerland). Priority was thus given to former owners and farmers who actually farmed the land. The price was also more favorable as the land was sold at below-market prices—an approach intended to encourage private farmers. The income from the sale was not decisive for the state.[35] The advantage of the privatization process was that the beneficiaries could obtain replacement land outside their place of residence and outside the original location of the unjustly confiscated property.[36] However, the possibility to use agricultural land was often prevented by the fact that the land was located within larger blocks or that there was no access to it; this obstacle is still being removed today through land consolidation. On the other hand, former owners competed for the land offered, effectively reducing the value of their restitution claims. Although they could use the restitution claim to pay the price, they had to offer a higher price than others.

Church property restitution was also almost completed, covering approximately 33,000 hectares of agricultural land[37]; however, it took much longer. In fact, they only started with the adoption of Act no 428/2012 Coll. property compensation of churches and religious societies—a law that also led to the separation of Church and State.

32 Green report on agriculture, 2019, p. 123.
33 Sale of state-owned real estate managed by the Land Fund of the Czech Republic (2008). Audit conclusions [Online]. Available at https://www.nku.cz/informace/informace-08-12.pdf (Accessed: April 15, 2022).
34 Hálová and Doležal, 2012, p. 892.
35 Explanatory memorandum to the Act on Transfer from State.
36 Zeman, 2013, p. 251.
37 Explanatory Memorandum to Act No. 428/2012 Coll.

The sale of state-owned land had a significant impact on the land market. Privatization, as mentioned above, effectively started in 2001 and continued until approximately 2012. At that time, 99% of the allocated land had already been transferred; by contrast, in the 1990s, transfers of agricultural land were limited because agriculture was not profitable, and it was more convenient for farmers to rent land than to buy it. Agricultural land was mainly sold where it could be converted into building land (mostly around the larger towns).[38] The current Czech land market corresponds, in its scope, to European conditions.

The restitution disputes (return of confiscated property under the former regime) have been of high importance for agriculture. At their core, they have been somewhat technical, relating to proving that the conditions for restitution had been met—in particular, citizenship and permanent residence.[39] The Constitutional Court also reviewed and accepted the conditions for returning property to the churches, including extensive agricultural land.[40] Later on, it rejected an attempt to retroactively tax church restitution.[41]

3.2. Historical restrictions toward foreigners

For more than two decades, the rules for the acquisition of agricultural and other land by foreigners were regulated by the Act no. 528/1990 Coll., Foreign Exchange Act, replaced by Act no. 219/1995 Coll. with the same name (hereinafter: the Foreign Exchange Act). Before the Czech Republic's accession to the EU (i.e., until April 30, 2004), foreigners could acquire agricultural land in principle only by inheritance, and foreigners with permanent residence in the Czech Republic were not considered foreigners for these purposes.

The same rules applied to legal persons with their registered office in the Czech Republic, which, much like Hungary, Slovakia, and Lithuania, negotiated a 7-year transitional period restricting the acquisition of agricultural and forest land.[42] The main reason for the transitional period was the concern that Czech citizens and farmers would not be able to compete with offers from foreign bidders for agricultural land. Eventually, the income of foreign investment could lead to higher prices, land speculation, and consequently, a threat to the competitiveness of the agricultural sector. Foreign entities could not even participate in the privatization of agricultural land under the Foreign Exchange Act.

However, serious bidders could acquire agricultural and forest land relatively easily by setting up a commercial corporation or buying it.[43] In fact, Czech legal enti-

38 Soil: situation and outlook report. December 1999, p. 17. [Online]. Available at https://eagri.cz/public/web/mze/puda/dokumenty/situacni-a-vyhledove-zpravy/ (Accessed: December 15, 2021).
39 Ruling of the Constitutional Court of July 12, 1994, No. Pl. ÚS 3/94.
40 Ruling of the Constitutional Court of May 29, 2013, No. Pl. ÚS 10/13.
41 Ruling of the Constitutional Court of October 1, 2019, No. Pl. ÚS 5/19.
42 Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, and Slovakia (2003).
43 Fráňa, 2007, p. 840. and Gala, 2010.

ties owned by foreign capital could acquire agricultural land in the Czech Republic without restrictions.

The Czech Statistical Office or the cadastral authorities do not record the share of agricultural land owned by foreigners or Czech companies owned by foreigners; therefore, it is difficult to estimate the total size of foreign investment in Czech land. However, no significant foreign acquisitions have been announced before the end of the transition period,[44] and the farmland prices remain significantly lower in Czechia than in Western Europe. Therefore, the fears that agricultural land would fall victim to (foreign) speculation proved to be unfounded. For this reason, unlike other countries, the Czech Republic did not request an extension of the transition period, and no later proposals have been tabled in the Czech Parliament to restrict the acquisition of agricultural land by foreigners.

Another reason for not extending the transition period may be the fact that land has been gradually captured by large local agricultural entrepreneurs—and most recently, even by investment groups and banks. The structure of agricultural land ownership in the Czech Republic thus differs significantly from the situation in other countries in that land is concentrated in the hands of "big landowners" (such as Agrofert, Spearhead, Forestlaan, Rhea Holding, or Úsovsko). This is not only pushing land away from small farmers who actually farm it, but small farmers no longer have a chance to buy the land. Experts warn that the continued concentration of farmland also poses a security risk because it can put strong pressure on the government.[45]

The concentrated land holdings can only be bought by large companies. As a consequence, a foreign investor can buy a small amount of land or a huge amount, but hardly anything in between. The land market is therefore open but at the same time divided between strong players. It appears to us that the legislator is no longer under pressure to protect market from foreign investment since the current regulatory playfield suits the large owners well.

The European Commission and/or at the Court of Justice of the EU (CJEU) have not initiated any proceedings in connection with the cross-border acquisition of agricultural lands/holdings concerning Czech legal regulation or practice. Similarly, no case law of the Constitutional Court has dealt with the issues of the acquisition of agricultural land by foreigners before or after the expiry of the EU derogation period.

3.3. Preemption right

No legal regulation that would establish a preemption right for agricultural land for any entity other than the state exists in the Czech Republic. The most notable is the state's preemption right to vacant land (including agricultural land) located outside the built-up areas of municipalities in national parks, national nature reserves, and

44 Soil: situation and outlook report. December 2012, p. 47. [Online]. Available at https://eagri.cz/public/web/mze/puda/dokumenty/situacni-a-vyhledove-zpravy/ (Accessed: April 20, 2022).
45 Vejvodová, 2021.

national natural monuments.[46] Pursuant to Section 61 of Act no. 114/1992 Coll. on nature protection, the owner of such land is obliged to offer such land for purchase first to the nature protection authority. According to the Constitutional Court, the state has a positive obligation under the Constitution (Article 7) to protect the environment, which it can fulfill by, *inter alia*, centralizing the ownership of land in national parks. The right of preemption restricts only one of the components of the ownership triad (*ius disponendi*).[47]

Unlike the contractual preemption right, the preemption right established directly by law is not registered in the Real Estate Register. The buyer should be aware of its existence because the consequence of a breach of the preemption right is that the beneficiary (the state) can demand that the new owner transfer the property to them for an appropriate remuneration.[48] This appropriate remuneration, however, does not consider speculation, which could significantly increase the purchase price.

The state has had a preemption right for a relatively long time in respect of land that it privatized under the Act on Transfer from State, unless it was transferred to the former owners. Since 2013, however, the existence of this right has been limited to the period until the purchase price for the land has been paid in full or for a period of 5 years from the date of registration of the ownership right in the Real Estate Register.[49] The purpose of the restriction was to support the agricultural land market and improve the position of farmers.[50] The gradual repayment of the purchase price (approximately half of the land was privatized, with the possibility of installments) leads to the termination of this preemption right. However, the state rarely uses the preemption right (only 84 cases between 2013 and 2020),[51] despite the scarcity of agricultural land. Discussions have been conducted regarding the possible preemption right concerning agricultural land, but none have materialized.

4. Transfer of the land

The fundamental difference in the process of transferring agricultural land stems from who owns the land. In the case of state-owned land, specific requirements apply in addition to the general requirements, which may be perceived as an obstacle to

46 The Czech law also provides other preemption rights, usually in favour of the person entitled to certain activities. Most notably, persuant to Section 20(2) of the Mining Act (Act No. 44/1988 Coll.), an entity that has been granted a mining permit has priority over other applicants for the lease or sale of state-owned land located in a designated protected deposit area. For more details, see Vícha, 2017, p. 117–128.

47 Judgment of the Constitutional Court of September 25, 2018, Ref. No. Pl. 18/17.

48 Section 2144 of the Civil Code.

49 Section 15 of Act No. 503/2012 Coll. on the State Land Office.

50 Fialová, 2012.

51 Final accounts of the organisational unit of the State for 2020. [Online]. Available at https://www.spucr.cz/statni-pozemkovy-urad/povinne-zverejnovane-informace/ekonomika/rozpocet (Accessed: April 20, 2022).

the cross-border transfer of agricultural land, but not within the EU as persons from other member states are treated—in principle—in the same or in very similar way as Czech persons.

4.1. General requirements

The transfer of ownership of immovable property is regulated by Section 1105 et seq. of the Civil Code. The transfer agreement (e.g., a purchase, gift, or exchange contract) must meet several requirements. Most importantly, it must be in writing, with the parties' signatures on one document. Another requirement is that the property to be transferred must be sufficiently defined. In the case of land, this will primarily involve specifying the municipality, the parcel number, and the cadastral area in which the land is located.

If the immovable property is registered in the Real Estate Register (agricultural land in the form of parcels), the transfer of ownership takes place only by constitutive entry in the Register. The ownership right to real estate is entered in the Real Estate Register on application. The application for registration must be submitted on an approved form and must contain all the required information.[52] As a minimum requirement, the application must also be accompanied by the deed of registration, based on which the right is to be registered in the land registry. Most often, this is a contract of sale or gift, in which the parties express their intention to transfer ownership of the land.[53]

The entry is made based on a final decision by the Real Estate Register Office. It has a retroactive effect to the date of the application for registration, so that the transfer of ownership takes place at the time of the application. Rights to land other than ownership may be registered by registration or by note. The registration is used to record rights deriving from the ownership right, while the notation is used to record significant data relating to the registered property.[54]

If all the conditions for registration are fulfilled, the Real Estate Register shall authorize registration but not before 20 days have elapsed since the legal status has been indicated to be affected by the change. The reason for the introduction of the protection period was to limit possible undesirable—and in particular, illegal—changes to immovable property.

When deciding whether to allow registration, the Real Estate Register Office examines the details of the transfer contract (i.e., the contract for the transfer of ownership), but this examination does not preclude any judicial review of the contract by the ordinary courts.[55]

The data contained in the Real Estate Register is burdened with material publicity and a presumption of correctness. Consequently, there is a rebuttable presumption

52 Section 14 of the Land Registry Act.
53 Adamcová, 2019, p. 138.
54 Barešová, 2019, p. 89.
55 Barešová, 2019, p. 224–268, Pavelec, 2021, p. 194–264.

that the person registered may, in principle, also dispose of the land. This enables the individuals consulting that public register to rely on the correctness of the information entered and to draw legal conclusions from it.[56] This rule is particularly important for the purchase of real estate as it is usually checked before the acquisition, whether the seller and registered in the land register person are identical.

4.2. Additional requirements for state-owned land and forests

Agricultural land owned by the Czech Republic is managed, in particular, by the State Land Office, which was established in 2013 by Act no. 503/2012 Coll. on the State Land Office (hereinafter: the State Land Office Act) and is subordinated to the Ministry of Agriculture.

The State Land Office acts on behalf of the state in transfers of agricultural land owned by the state, and it also exercises the state's preemption right and administers restitution claims.[57] The law requires that the land reserve designated for the exercise of the State Land Office's powers should not fall below 50,000 ha.[58]

The State Land Office Act also lays down the conditions for the disposal of agricultural land by the state, including its transfer. It also defines the real estate that cannot be transferred from state ownership to other persons (agricultural land intended for public utility buildings or transport infrastructure, in protected natural areas or in military areas). With the exception of land for public utility buildings, such land also cannot be transferred to regions or municipalities.

The list of the persons to whom the State agricultural land can be transferred is limited. Section 9 of the State Land Office Act provides it is only (a) a natural person who is a citizen of the Czech Republic, another member state of the European Union, a state which is a Contracting Party to the Agreement on the European Economic Area or the Swiss Confederation; (b) a legal person who is an agricultural entrepreneur in the Czech Republic; or (c) a legal person who is an agricultural entrepreneur or has a similar status (1) in another member state of the European Union, (2) in a State which is a Contracting Party to the Agreement on the European Economic Area, or (3) in the Swiss Confederation.

The State Land Office Act provides for certain specific situations where transfers of agricultural land take precedence over sales by public offer.

The transfers of the state-owned land to municipalities, regions, and the owner of the building located on the land are prioritized.[59] A specific approach in the form of preemption rights is applied to persons establishing permanent crops on agricultural land under the jurisdiction of the authority.[60] The condition is that the permanent crop has been established with the consent of the authority and the person uses the land on the basis of a lease agreement for a period longer than 5 years. The preemption

56 Adamová, 2019, p. 141.
57 About the State land office. Available at https://www.spucr.cz/# (Accessed: April 24, 2021).
58 Section 3 of the Act No. 503/2012 Coll. on the State Land Office.
59 Section 10 of the State Land Office Act.
60 Section 10a of the State Land Office Act.

right to such land lasts only for the duration of the lease agreement. Permanent crops include, for example, forest, fruit trees, vineyards, and so on. The price at which such land is transferred shall be the price determined in accordance with the price code but excluding any fixtures and fittings that the tenant has established at their own expense. Priority for the transfer of agricultural land may also be given to authorized users of land situated in garden or cottage settlements established under a building permit or already in existence before October 1, 1976.[61] However, this was only possible for users until the end of 2018.

In the case of concurrent "priority" applications for the transfer of agricultural land, the highest priority is given to an application for the transfer of land in a garden or cottage settlement, followed by the owner or co-owner of an immovable building on agricultural land, followed by the founder of permanent vegetation, the municipality, and the region.[62] The time of application is not decisive for the order, but the reason for which they apply is.[63]

Aside from the preferential methods of transfer, the authority may transfer agricultural land on the basis of a public offer.[64] It addresses an unspecified number of addressees with a proposal to conclude a purchase contract for the agricultural land under its management.[65] The price for the land is determined according to its quality, and it is usually lower than the normal market price, since the purpose of the transfers of agricultural land is to promote the management of agricultural land.[66] A condition for the transfer of agricultural land by public offer is that the potential buyer must be an agricultural entrepreneur. The transfer of land by public offer almost never takes place, however—primarily because of the long-running restitution claims and secondly because of the obligation to ensure a sufficient reserve of state land.

The last way of transferring agricultural land is to announce a public tender for the most suitable offer.[67] Only agricultural land without built-up areas, buildings or groups of buildings (if they are separate immovable property and related immovable property), and agricultural land with built-up areas and related immovable property may be sold by public tender. Agricultural land without built-up areas may be sold by the authority by public tender only if it has been unsuccessfully offered in public tender. Buildings or groups of buildings and related property situated on land owned by another owner may be sold by the authority by public tender if the owner of the land does not exercise their preemption right over the property. The authority may

61 Section 10b of the Act No. 503/2012 Coll. on the State Land Office.
62 Section 10c of the Act No. 503/2012 Coll. on the State Land Office.
63 Judgment of the Supreme Court of the Czech Republic of January 28, 2015, No. 22 Cdo 3876/2012.
64 Section 12 of the State Land Office Act.
65 Hanák, 2020, p. 82.
66 Ibid.
67 Section 13 of the State Land Office Act.

offer agricultural land with built-up areas and related assets for sale directly by public tender without first having to launch a public tender.[68]

The authority shall first publish the tender on its official notice board. The notice must contain information on the properties offered and the purchase price. The purchase price shall be the normal price. The authority will then select the most suitable bid offering the highest purchase price. A deposit of 5% of the published price is a condition for submitting a bid.

5. Conclusion

The current structure of land ownership in the Czech Republic is the result of a complex historical development. Agricultural land that had been nationalized was returned to private ownership, but restitution processes took a long time and were accompanied by fears that agricultural land would fall victim to speculation of the foreign investors. These fears were strengthened with the accession to the European Union, but they proved to be false. On the other hand, agricultural land became concentrated in the hands of "big landowners," which, from our perspective, effectively prevents small and mid-sized Czech and foreign investors from entering the market. At the same time, the property market is considerably separated from agricultural land management. The Czech specificity is the prevailing share of farmers farming on rented land rather than their own. Currently, the only major legal obstacle to the cross-border acquisition of agricultural land in the Czech Republic is the state's preemption right, which applies only to selected land, particularly in protected natural areas. Transfers of state-owned agricultural land are governed by special rules; however, these do not (in principle) restrict interested parties from other states within the EU or the European Economic Area. Neither do they distinguish between persons residing or established in the Czech Republic or in another member state, nor do they differentiate between the requirements for conducting agricultural activities.

68 Hanák, 2020, p. 90.

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| Chapter 6 |

Hungary: Strict Agricultural Land and Holding Regulations for Sustainable and Traditional Rural Communities

János Ede SZILÁGYI

ABSTRACT

Hungarian land law is a dynamically changing area of Hungarian law. In the first few years after the regime change of 1989–90, the legislator reregulated this area—which had previously been, in a sense, underregulated—with the Arable Land Act of 1994, thus creating a regulatory environment in which many elements of the current national land law, such as the restrictions on the acquirement of land by legal persons and the system of preemption and prelease rights, were already present. Meanwhile, in parallel, the process of restitution for Hungarian agricultural lands and holdings, which was an important element in the restructuring of former large-scale socialist enterprises to capitalist conditions, was taking place. The restitution process settled many things, but it also became the source of many problems, the effects of which are still felt today. The next major change in Hungarian land law was linked to Hungary's accession to the EU. For 10 years after the accession in May 2004, Hungarian land legislation was temporarily allowed to maintain its previous national rules. The central element in the creation of EU-compliant regulation is Act CXXII of 2013 on Land Transfer, based on the Hungarian Constitution (the so-called Fundamental Law), and many other laws and regulations supplementing it. In designing this regulatory model, the legislator has sought to ensure both to guarantee the right to property and protect agricultural land as a priority natural resource and national asset protected by the Constitution. It has brought a major change to the Hungarian land law that, in addition to agricultural land, agricultural holding has become one of the central subjects of regulation, and the legislator has now moved toward a special regime for intestate succession of agricultural land. In relation to the regulation of agricultural land, important judgments have now been handed down by both the Hungarian Constitutional Court and the Court of Justice of the European Union. The regulatory framework provided by regional investment protection agreements is an important benchmark in Hungarian land law.

KEYWORDS

acquirement of agricultural land, acquirement of agricultural holdings, case law of the Constitutional Court, case law of the Court of Justice of the European Union

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1. Theoretical background and introduction to Hungarian land law

The main framework of the Hungarian land law applicable[1] as of May 1, 2014[2] is set out in the Hungarian Constitution, known as the Fundamental Law. On this constitutional basis, Hungarian land law is a complex body of law containing numerous restrictions and based on several pieces of legislation, including so-called cardinal acts passed by the affirmative vote of at least two-thirds of the Hungarian MPs, (ordinary) acts passed by the affirmative vote of at least half of the Hungarian MPs, and numerous decrees issued by the government. Hungarian land law, as a special body of law governing the acquirement of so-called "agricultural and forest land" (hereinafter: agricultural land or land) and "agricultural holdings," can only be interpreted and applied in conjunction with the general rules of the Hungarian legal system. In Hungarian land law, the category of agricultural holding[3] is a basic organizational and management unit that is a collection of assets (e.g., land, agricultural equipment). Concerning the acquirement of agricultural land and agricultural holdings, Hungarian land law includes or concerns the most varied forms of acquisition of ownership and certain limited rights *in rem* (such as the "usufruct" and a more limited form of it, the so-called "right of use *in rem*") and also the acquirement of the use of agricultural land or holdings by other means (such as a lease contract). In the case of the acquisition of ownership of agricultural land by inheritance, in addition to acquirement by testamentary disposition, Hungarian land law has recently included a number of special rules for acquirement by intestate succession.[4] An important formal feature of Hungarian land law is that, following certain common rules, it regulates in separate parts, on one hand, the rules concerning the acquisition of ownership and other rights *in rem*, and on the other hand, the law of obligations, such as the acquirement of use based, for example, on a lease contract. (For the purposes of this chapter, due to space constraints, we will concentrate primarily on the rules concerning the acquisition of ownership and will only refer to the acquirement of use as a supplementary matter.) Recently, Hungarian land law has also provided for a special option to facilitate the transfer of agricultural holdings between certain living persons (typically—but not exclusively—relatives). It is a central provision of Hungarian land law that, as a general rule, the ownership

1 This study has been written based on the legislation in force on February 1, 2022. However, because several essential legal provisions of Hungarian land law (Land Transfer Act, Implementation Land Act, etc.) have recently been amended, the new rules that will enter into force after the study's end (i.e., after February 1, 2022) will also be presented in connection with the essential legal provisions that are currently being amended.

2 Hungary has been a member state of the European Union since May 1, 2004, but under the Treaty of Accession governing it, it was entitled to apply transitional rules on land ownership for 7 years and then, as allowed by the European Commission, for a further 3, like many other newly acceded countries. See Szilágyi, 2010, pp. 48–52 and Szilágyi, 2017, p. 150–153.

3 Cf. Kurucz, 2010, pp. 151–176; Kurucz, 2012, pp. 118–130.

4 Cf. Hornyák, 2019; Hornyák, 2021, pp. 86–99; Hornyák and Prugberger, 2016, pp. 47–58.

of agricultural land cannot be acquired by domestic or foreign legal persons.[5] Legal persons are not, however, excluded from acquiring the use of agricultural land on other legal bases (such as through a lease).

The general introduction to Hungarian land law[6] is presented in this subsection in three points: first (1.1), we outline the most important legal foundations of Hungarian land law; then (1.2), we briefly introduce the organizations involved in the operation of Hungarian land law; finally (1.3), we review the key concepts of the system, including what is meant by acquirement.

1.1. The legal basis of Hungarian land law

I. Hungarian land law has been adopted respecting the specificities and requirements of human rights[7] (in particular, the right to property) and EU law.

II. Hungarian land law is, to a great extent, affected by the provisions of the Fundamental Law.[8] Three are worth mentioning: the right to property (Article XIII), the special protection of natural resources (Article P), and the protected status of national assets (Article 38). In addition to their analysis, relevant cardinal acts[9] are also discussed.

II.1. The *right to property* enshrined in Article XIII of the Fundamental Law has shaped the whole concept of Hungarian land law to a significant extent. In particular, according to the interpretation of both the European Court of Human Rights (ECHR)[10] and the Hungarian Constitutional Court,[11,12] the content of the right to property does

5 Csirszki, Szinek Csütörtöki and Zombory, 2021, pp. 29–52.

6 Cf. Hegyes, 2017.; Hornyák, 2015, pp. 88–97; Hornyák, 2018, pp. 107–131; Raisz, 2017, pp. 68–74; Olajos, 2017b, pp. 409–417; Olajos, 2017c, pp. 91–103.

7 See Marinkás, 2018, pp. 99–134.

8 Csák, 2018a, pp. 5–32; Hojnyák, 2019, pp. 58–76; Orosz, 2018, pp. 178–191; Olajos, Csák and Hornyák, 2018, pp. 5–19.

9 Cardinal acts can be adopted by a two-thirds majority of the members of Parliament and with reference to these provisions and form an important basis of Hungarian land law.

10 ECHR, Gasparetz v. Slovakia, inadmissibility decision, June 28, 1995, No. 24506/94. In the context of this case, Anikó Raisz rightly drew attention to the (rather unsavory) application of all this by the ECHR in the case of the Beneš decrees; Raisz, 2010, pp. 244–245.; Téglási, 2010, pp. 22–47.; Téglási, 2015, pp. 148–157.

11 "…the fundamental right to property does not extend to the acquisition of property. The right to acquire property is not a fundamental right… On the side of the 'purchasers', no limitation of fundamental right can be established, as the ability to acquire property and the freedom of contract are not fundamental rights. A restriction on these rights, which are not fundamental rights, would be unconstitutional if there were no reasonable justification for the restriction on the basis of an objective assessment." Decision No. 35/1994 (24.VI.) of the Constitutional Court, III/3. Lately: "The Constitutional Court stated in Decision No. 3387/2012 (30.XII.) (Explanatory Memorandum [16]): 'According to the interpretation of the Constitutional Court, the constitutional protection of property refers to existing property, the right to property does not confer the right to acquire property [Decision No. 35/1994 (24.VI.), ABH 1994, 201].' {See also Decision No. 3021/2014 (11.II.), Explanatory Memorandum [14]}." Decision No. 17/2015 (5.VI.), Explanatory Memorandum IV. [67.]. For an analysis of the relevant Constitutional Court practice, consult Bobvos et al., 2016, pp. 31–40.; Kocsis, 2014, p. 125.; Téglási, 2009, pp. 20–21; etc.

12 The right to property is also included in Article 17 of the Charter of Fundamental Rights of the European Union.

not imply that anyone has a fundamental right to acquire property. In essence, it is due to this fact that Hungarian land law (and even the previous land legislation of 1994[13]) does not impose restrictions on an existing property but on new land acquirements, thus not infringing the right to property.

II.2. Article P) Para. (1) of the Fundamental Law refers to natural resources such as arable land,[14] forests, and water resources as the "*common heritage of the nation*." The word "*heritage*" in the category of the nation's common heritage implies that the natural resources referred to in the Fundamental Law are not regarded by the legislator as mere objects of commercial transactions (goods, capital, etc.) but are also taken into account in their other *vital* functions and that *intergenerational* considerations are also taken into account, namely that they must be exploited by each generation in the interests of future generations.

Article P) Para. (2) of the Fundamental Law calls for a *cardinal act regulation* on (a) *the limits and conditions for the acquisition of ownership and for use of arable land and forests*, (b) *the organization of integrated agricultural production*, and (c) *agricultural holdings* and one type of agricultural holding, the *family farm*. Of the three issues requiring cardinal legislation, only the organization of integrated agricultural production has not yet been the subject of a cardinal act.[15] The cardinal acts adopted so far under Article P) Para. (2), which are of great importance for Hungarian land law, are described below.

II.2.1. Pursuant to the provisions of Article P) of the Fundamental Law, Act CXXII of 2013 on the Transfer of Agricultural and Forest Land (Land Transfer Act), which replaced the previous Act LV of 1994 on Arable Land (Arable Land Act),[16] was adopted as cardinal act, and Act CCXII of 2013 on Certain Provisions and Transitional Rules in Connection with the Land Transfer Act (Implementation Land Act) was adopted as a *partially cardinal act*.[17] In essence, these two laws form the basis of Hungarian land

13 Cf. Csák and Nagy, 2011, pp. 541–549.; Prugberger, 1999, pp. 81–116.

14 Although Article P) of the Fundamental Law does not use the term "agricultural land" but "arable land," taking into account the jurisprudence of the Constitutional Court, this different designation has not caused any difficulties of interpretation; in other words, the Hungarian Constitutional Court assesses the national rules on agricultural land in harmony with the category of arable land in the Fundamental Law.

15 See Csák, 2018b, pp. 6–21.

16 We consider it important to mention that the *entry into force* of the Land Transfer Act has been gradual (12.15.2013, 01.01.2014, 03.01.2014, 05.01.2014), and the provisions of the Land Transfer Act concerning the transitional period are of particular importance. In the Land Transfer Act, the relationship with other areas that also require cardinal act regulation pursuant to Art. P) Para. (2) of the Fundamental Law has been settled:
(a) On the basis of these, the act regulating *agricultural holdings* may also lay down different rules from the Land Transfer Act for the *acquisition of ownership* and *use* of land and related agricultural equipment for the purpose of commercial use; Land Transfer Act Art. 1(2)
(b) The future Act regulating *integrated agricultural production management* may lay down different rules from the Land Transfer Act for the acquisition of the *use* of land for the purpose of utilization in integrated production management; Land Transfer Act Art. 1(3)

17 In addition, certain provisions of the Implementation Land Act are not only cardinal under Article P) of the Fundamental Law but also under Article 38 of the National Property Act; Implementation Land Act Art. 107.

law. The Land Transfer Act and the Implementation Land Act cover a broad category of acquirement, which includes, on the one hand, the acquisition of ownership and, on the other hand, the acquirement of the use of land based on the law of obligations.

II.2.2. Family farm is a subtype of agricultural holding in the Hungarian land law. Its regulation, Act CXXIII of 2020 (Family Farms Act), entered into force as a cardinal act on January 1, 2021. By amending the Land Transfer Act and the Implementation Land Act, the Family Farms Act grants the so-called primary agricultural producer's[18] family farm[19] and the so-called family agricultural company[20] a preemption right[21]

18 A *primary agricultural producer* is [a] a natural person [b] over the age of 16, [c] registered as a primary agricultural producer, who [d] carries out primary agricultural activities [e] on their personal farm [e]; Family Farms Act Art. 3(1)–(2). One of the essential elements of the concept is the *primary agricultural activity*: agricultural, forestry, and supplementary agricultural activities *entered in the register* of primary agricultural producers; Family Farms Act Art. 2, point g). (The definition of agricultural and forestry activities is based, with some deviation, on the similarly named concept in Art. 5[18] of the Land Transfer Act; Family Farms Act Art. 2, point e)). The other essential element of the concept is *the personal farm*: *land* used for agriculture and forestry purposes by a natural person or jointly used by members of primary agricultural producer's family farm and *the means of agricultural production* (the latter being the totality of the assets used to conduct the activity of the primary agricultural producer, namely real estates, buildings and structures, and movable property), in respect of which the person or persons concerned have the right to organize the production and to use the results of the production; Family Farms Act Art. 2 points f) and h). As can be seen from the above concepts, a primary agricultural producer may carry out their farming activity either independently or as a member of a family farm. The annual income of a primary agricultural producer from their supplementary farming activity may not exceed one quarter of their annual income from their primary agricultural producer activity; Family Farms Act Art. 3(3)–(4). The Hungarian Chamber of Agriculture, Food Economy, and Rural Development (hereinafter: the Chamber of Agriculture) decides on the application for *registration*; Family Farms Act Art. 4(1).

19 A *family farm of primary agricultural producers* is [a] a production community established by [b] at least two [c] primary agricultural producers [d] who are relatives of each other [e] having neither legal personality nor assets separate from those of its members, within the framework of which [f] the primary agricultural producers conduct their agricultural activities *collectively* on their own holdings, [g] based on the *personal contribution* of all members and in a coordinated manner. A primary agricultural producer may be a member of *only* one family farm at the same time; Family Farms Act Art. 6(1) and 6(3). *Relatives*: a group of natural persons in a close family relationship within the meaning of the Civil Code as well as relatives and lineal relatives of these persons; Family Farms Act Art. 2, point b). For the purpose of setting up a family farm, the *members shall enter into a written contract*; Family Farms Act Art. 7(1). The background regulation of this formation beyond the Family Farms Act is provided by the provisions of the Civil Code on *civil law partnership contracts*; Family Farms Act Art. 6(2). The family farm of primary agricultural producers is established by *registration*; decided by the Chamber of Agriculture; Family Farms Act Art. 7(2)–(3).

20 A *family agricultural company* is a [a] company, cooperative, or forest management association [b] registered in the register of family agricultural companies, [c] exclusively engaged in agricultural, forestry, or additional activity defined by the Land Transfer Act, [d] with at least two members [e] who are related to each other. A person may be a member of only one family agricultural company at a time. A legal person may not be a member of a family agricultural association, except in the case of the acquisition of an own share or own stock; Family Farms Act Art. 14. Family agricultural companies are registered with the Chamber of Agriculture; Family Farms Act Art. 15(1).

21 Land Transfer Act Art. 18(4).

and a prelease right,[22] creating a favorable position for the selection of the person designated for regulatory use of lands.[23] In addition, the transfer of land use has further advantages for family farm associations,[24] and in some cases, they are allowed to transfer the use of land as gratuitous land use.[25]

II.2.3. Article P) of the Fundamental Law also provides the cornerstone for Act LXXI of 2020 on the Termination of Undivided Co-ownership of (Agricultural and Forestry) Land (Co-ownership Land Act), the provisions of which are *lex specialis* compared to those of the Land Transfer Act.[26] The creation of a clear and transparent land ownership structure for all public and privately owned land is a fundamental condition for the development of a Hungarian agricultural economy that is competitive at the European level. A major obstacle to the development of Hungary's agriculture is undivided co-ownership of land that is caused, to a great extent, by restitution following the regime change. Given that undivided co-ownership is unfavorable, legislation should play a key role in remedying the situation. Considering this, it is important that the legislator should offer the possibility of abolishing all undivided co-ownership of land, in the creation of which the state and regulation played a role.[27] However, this Act is also of great importance in other respects, and for the purposes of our topic, we will only deal with these aspects in detail. A future amendment of the Act will also regulate the *termination of undivided community property in the case of intestate succession*, laying down a special rule for cases where the object of the succession is immovable property[28] or ownership interest in immovable property.[29] As regards immovable property,[30] the rules of the Act provide that where the immovable property, which is the sole property of the deceased, is jointly inherited by several heirs in accordance with the rules of intestate succession, and the heirs shall, in order to avoid the creation of undivided co-ownership, (a) enter into an allocation agreement, (b) divide the property by assigning to each of the joint heirs a specific part of the property, (c) sell the property as a whole, or (c4) donate it to the state. Any one of the heirs may *declare their intention* to inherit the property on one hand and the share of another heir in the property on the other hand, if the creation of a property that meets the territorial minimum[31] outlined in the Co-ownership Land Act is not ensured. If

22 Land Transfer Act Art. 46(4).
23 Implementation Land Act Art. 91(9).
24 Land Transfer Act Art. 13(2) and Art. 42(2).
25 Land Transfer Act Art. 38(3a).
26 Land Transfer Act Art. 2(7); Co-ownership Land Act Art. 2.
27 General justification of the Co-ownership Land Act. Another aspect of the problem was to be regulated by Act XL of 2020 on The Regularization of Ownership of Land under the Right of Use of Land by Producer Cooperatives and Amending Certain Laws on Land.
28 Co-ownership Land Act Art. 18/A.
29 Co-ownership Land Act Art. 18/B.
30 Co-ownership Land Act Art. 18/A.
31 The property to be created as a result of the termination of the undivided common property may not be less than 3,000 m^2 in the case of vineyards, gardens, orchards, and reeds or less than 10,000 m^2 in the case of arable land, meadows, pastures, forests, and wooded areas; Co-ownership Land Act Art. 11(1)–(2).

several heirs declare so, the estate may be inherited by the heir who is professionally engaged in agricultural production or, in the absence of such or in the case of several heirs meeting this condition, it may be inherited by an heir who agrees to take into account the value of the property at a higher amount in the calculation of their share of the inheritance, or in the case of the same amount of undertaking, by the eldest of the heirs. If the value of the property inherited by the heir based on the declaration exceeds their share of the inheritance, they must pay the difference to the other heirs.

II.2.4. Article P) of the Fundamental Law also provides the cardinal act status for several provisions of Act CXLIII of 2021 on the Transfer of Agricultural Holdings (Farm Transfer Act), which will enter into force on January 1, 2023. The provisions of the Farm Transfer Act are *lex specialis* compared to those of the Land Transfer Act.[32] The Farm Transfer Act covers the transfer of the farm of a primary agricultural producer and an agricultural individual entrepreneur,[33] and its "farm" corresponds to a broad concept of an agricultural holding. Thus, the concept of the Act's *farm* includes the transferor's (a) real estate (including both agricultural and non-agricultural real estate necessary for agricultural activity), (b) movable property necessary for or related to agricultural and forestry activity, (c) rights *in rem*, (d) shares in a business partnership (cooperative, forestry management association), and (e) rights and obligations related to all these assets.[34] Both the transferor and the transferee must be *primary agricultural producers* or *self-employed* persons engaged in farming or forestry. A *transferee* under 50 years of age who is at least 10 years younger than the *transferor* who has reached the retirement age or will reach it within 5 years from the conclusion of the contract must either (a) be a *relative* of the transferor as defined in the Family Farms Act or (b) *have been employed or have been in other employment relationship with the transferor for at least 7 years*.[35] There are several main or subtypes of farm transfer contracts: (a) *property transfer contracts*,[36] such as (a1) farm transfer sale contracts, (a2) farm transfer gift contracts, (a3) farm transfer maintenance contracts, (a3) farm transfer annuity contracts; (b) *farm transfer land use contracts*,[37] which may be, for example, (b1) lease contracts and (b2) gratuitous land use contracts; (c) the law also recognizes *mixed* types of these contracts.[38] Based on the content of the farm transfer contract, the relevant provisions of the Land Transfer Act apply accordingly—for example, the obligation to make a declaration (in detail, see below);[39] in the case of a contract of use, the maximum term of land use;[40] land acquirement and land posses-

32 Land Transfer Act Art. 2(5).
33 Farm Transfer Act Art. 1.
34 Farm Transfer Act Art. 2, point a).
35 Farm Transfer Act Art. 2, points b–c).
36 Farm Transfer Act Art. 3(2).
37 Farm Transfer Act Art. 3(3).
38 Farm Transfer Act Art. 3(4).
39 Farm Transfer Act Art. 6(1).
40 Farm Transfer Act Art. 6(4)–(5).

sion limit.[41] A farm transfer contract as a gift, maintenance, or annuity contract may be concluded *only by close relatives* if the farm transfer contract provides for the transfer of ownership of agricultural and forest land; the provisions of the Land Transfer Act on gifts, maintenance, or annuity contracts shall apply to such a contract.[42] In the farm transfer contract, the parties may agree to cooperate in the *joint management of the farm* for a maximum period of 5 years.[43] The farm transfer contract *must be approved* by the agricultural administration body.[44] The transferee replaces the transferor in the *civil law contracts* relating to certain elements of the farm, as defined in the farm transfer contract, without the need for consent of the third party remaining in the contract.[45] The transferee shall, by means of the farm transfer contract, replace the transferor as the holder of any prior authorization required for the pursuit of the economic activity related to the farm, as defined in the contract of transfer of the holding, provided that they comply with the legislation laying down the conditions for pursuing that activity.[46]

II.3. Pursuant to Article 38 of Fundamental Law, "*the property of the state and local authorities is national property.*" Act LXXXVII of 2010 on the *National Land Fund* (National Land Fund Act) derives its cardinal act status not from Article P) of the Fundamental Law but from Article 38 of the Fundamental Law.[47] The National Land Fund Act regulates the so-called National Land Fund, which is linked to national property. The *National Land Fund* includes, as part of the Treasury's assets, (Hungarian) sate-owned lands that are registered in the land register (a) in one of the nine classes of agricultural zoning[48] or as a fishpond; and (b) *in certain cases,* land registered as withdrawn from cultivation. The National Land Fund Act implements special regulations in several aspects concerning the turnover of land belonging to the National Land Fund. The *purpose* of the National Land Fund[49] is specified in the National Land Fund Act, as are the *land tenure policy directives,* regarding which the land parcels belonging to the National Land Fund are to be utilized.[50] The rights and obligations of ownership of the National Land Fund on behalf of the Hungarian state shall be exercised by the minister responsible for the agricultural policy through the National Land Centre; in civil law relations relating to the National Land Fund, the state shall be represented by the National Land Centre, unless otherwise provided by law.[51]

41 Farm Transfer Act Art. 6(6)–(7).
42 Farm Transfer Act Art. 9(2).
43 Farm Transfer Act Art. 10(1).
44 Farm Transfer Act Art. 12(1).
45 Farm Transfer Act Art. 13(1).
46 Farm Transfer Act Art. 14(1).
47 National Land Fund Act Art. 48.
48 These are: arable land, vineyard, orchard, garden, meadow, pasture (grassland), reed, forest, wooded area.
49 National Land Fund Act Art. 1(3).
50 National Land Fund Act Art. 15(2)–(3).
51 National Land Fund Act Art. 3(1).

III. In addition to the Fundamental Law and the cardinal acts of Hungarian land law, there are several (ordinary) acts that form an important part of Hungarian land law, the adoption of which requires the support of a simple majority of half of the members of Parliament. Some of them are mentioned below.

III.1. A special case of *state property* is protected sites, for which special provisions are laid down in the Nature Conservation Act.[52] The alienation of a protected natural area owned by the State under the Nature Conservation Act *is not possible*, except in the case of an exchange with a protected natural area of at least equal conservation value or other cases specified by law, with the consent of the minister responsible for nature protection.[53] In the case of protected natural areas, the Nature Conservation Act lays down special preemption law rules for the state and, in the case of protected natural areas of local importance, for municipalities.[54]

III.2. The Hungarian national land transfer regime imposes several restrictions and conditions on land transfer to achieve its objectives. The *control and sanctioning* of all these regulations are an important element of the Land Transfer Act and Implementation Land Act rules. In addition to these, however, the legislator has taken other important legislative measures to protect the concept of the land transfer regime as enshrined in the Land Transfer Act. Thus, Act VII of 2014 on the *Detection and Prevention of Legal Transactions Aimed at Circumventing Legal Provisions Restricting the Acquirement or Use of Agricultural Land* was adopted, and a new criminal offense, the *unlawful acquirement of arable land*, was introduced in Act C of 2012 on the Criminal Code,[55] which did not exist in the Hungarian legal system until before. The two laws are, to a large extent, linked to abuses known colloquially as "fraudulent contracts."[56]

III.3. Regarding the legal basis of Hungarian land law, it is important to point out that it is an integral part of several other laws that form the basis of the Hungarian legal system, among which we consider it particularly important to mention the Civil Code, the Civil Procedure Code, the Real Estate Register Act,[57] and the General Administrative Procedure Act.[58] Some authors (such as *Zoltán Nagy*)[59] also firmly emphasize the *financial legislation* related to the land transfer regime.

52 Act LIII of 1996 on Nature Conservation. See Olajos, 2018, pp. 157–189.
53 Nature Conservation Act Art. 68(8).
54 Nature Conservation Act Art. 68(6).
55 Criminal Code Art. 349.
56 On fraudulent contracts, see, in particular, the following pioneering works in the literature: Bányai, 2014, 62–71.; Keller, 2013, pp. 191–198.; Kocsis, 2015, pp. 241–258.; Kozma, 2012, pp. 350–360; Olajos and Szalontai, 2001, pp. 3–10.; etc.
57 Until January 31, 2023, Act CXLI of 1997; from February 1, 2023, Act C of 2021. See Olajos and Juhász, 2018, pp. 164–193.
58 Act CL of 2016. It is cited by, for example, Art. 27(1) of Implementation Land Act.
59 Nagy, 2010, p. 187.

III.4. In addition to these, many other laws contain specific provisions on land transfer (Forestry Act,[60] Interbranch Organization of Wine Act,[61] Forestry Management Association Act,[62] etc.), several of which will be mentioned later in this paper.

IV. In addition to laws, other legislation, such as government decrees, are also important elements of Hungarian land law. Without wishing to be exhaustive, we only refer to the designation of the administrative bodies involved in the operation of land law,[63] the procedure for the exercise of preemption and prelease rights,[64] special registers,[65] security documents,[66] or even the regulations on auctions.[67]

1.2. The organizational foundations of Hungarian land law

One of the major innovations of the new Hungarian land regime adopted in 2013 was that, *as a general rule*, the acquirement of agricultural land and land use contracts were subject to *prior authorization*. It is important to note that this prior authorization and its procedure are not equivalent to the procedure of the Real Estate Register, which is intended to register the ownership of land in the Real Estate Register; nor is it equivalent to the procedure of the land use register,[68] which is intended to provide a certified record of land use. The special administrative approval of Hungarian land law precedes both the land register and the land use register stages.

The organization of the Hungarian land transfer regime, and as part of it the procedure for prior authorization, in addition to some actors of the state and the local government administration, also includes special status organizations, such as local land commissions.

I. Within the state administration, the county government office responsible for the location of the land (hereinafter: agricultural administration body) acts in the procedure for prior authorization for the acquisition of ownership[69] and also in the procedure for prior authorization for land use contracts.[70] It is also the body designated to monitor compliance with the acquirement conditions, restrictions, and prohibitions laid down in the Land Transfer Act and to apply the related legal consequences.[71]

II. *Municipalities* also play an important role in the land transfer regime—in particular, the notary of the affected local (municipal) government, which has been

60 Act XXXVII of 2009 on Forests, Forest Protection, and Forest Management.
61 Act CCXIX of 2012 on Interbranch Organization of Wine.
62 Act IL of 1994 on Forestry Management Association.
63 See Government Decree No. 383/2016. (2.XII.).
64 Government Decree No. 474/2013. (12.XII.).
65 Government Decree No. 38/2014. (24.II.).
66 Government Decree No. 47/2014. (26.II.).
67 Government Decree No. 191/2014. (31.VII.).
68 The land use register is an independent public official register of land use and land users kept separately from the land register, which is of certified authenticity (i.e., the data recorded therein shall be presumed as existing and true); for detailed rules of the register, see Articles 93–99 of the Implementation Land Act and Government Decree No. 356/2007. (23.XII.).
69 Government Decree No. 383/2016 Art. 43(3).
70 Government Decree No. 383/2016 Art. 43(5).
71 Government Decree No. 383/2016 Art. 43(2).

given an important role in the procedure for exercising the preemption and prelease rights.[72]

III. An organization of our land transfer regime, specifically created to fulfill certain objectives of land policy, is the local land commission.[73] Originally, local land commissions were to be organized as a sui generis institution, but from the beginning, their functions were performed by the competent territorial bodies of the Chamber of Agriculture, a solution that was considered temporary but remained final. The local land commissions have an advisory role in relation to the acquisition of certain types of land ownership. However, they do not have such a role concerning the transfer of the use or exploitation of the land.[74]

1.3. The conceptual foundations of Hungarian land law

We are presenting the concepts of Hungarian land law grouped around four conceptual categories.

I. *The concepts of agricultural activity and complementary activities*. One of the main objectives of the land transfer regime is to ensure that agricultural land in Hungary is owned and farmed, as far as possible, by persons who are skilled in agriculture and forestry and who conduct such activities in person. Consequently, what is considered an agricultural activity is a concept of fundamental importance for the regulation of Hungarian land law. In this respect, two concepts of the Land Transfer Act deserve to be highlighted: one is the term "*agricultural and forestry activity*"[75] and the other is "*complementary activity*."[76] The acquisition of ownership of agricultural land or the right to use it may be based on either of these two concepts. Examining the two concepts, it can be concluded that the Hungarian legislator has made it possible to recognize a wide range of activities as agricultural, forestry, or complementary activities, in line with the developing legal trends in the EU law.

II. *The concepts of agricultural holdings and agricultural land*. The other important conceptual area in Hungarian land law concerns the subject of land transfer. In this context, we have pointed out that Hungarian land law is now able to look beyond the category of agricultural land to a broader framework, namely agricultural holdings,

72 See, for example, Land Transfer Act Art. 21–23, 49–50.

73 Similar institutions can be found in other EU countries, as *Zsófia Hornyák* points out; see Hornyák, 2014, p. 75.

74 Land Transfer Act Art. 23/A.

75 *Agricultural and forestry activity*: crop production, horticulture, animal husbandry, animal breeding, fish farming, reproductive material production, game management, forestry, and farming mixed with additional activities as defined in Art. 5, point 14 of the Land Transfer Act, if the income from the additional activity does not exceed the income from other agricultural and forestry activities; Land Transfer Act Art. 5, point 18.

76 *Complementary activity*: rural and agrotourism, handicraft activities, processing of timber, production of fodder, production of food from agricultural products, processing of tobacco, production of biofuels, the recovery of byproducts of agricultural and forestry activities, plant and animal waste, its non-food processing and the direct sale of products derived from these products, agricultural and forestry services, and the recovery and sale of production factors belonging to the agricultural holding; Land Transfer Act Art. 5, point 14.

in regulating land transactions. That is why the Land Transfer Act defined the concept of *agricultural holding*[77] and, relevant to it, that of the *agricultural holding center*.[78] Previously, the concept of a subtype of an agricultural holding, the family farm, was also included in the Land Transfer Act (and its transitional rules were regulated by the Implementation Land Act), but since January 1, 2021, the concept and many detailed rules of this have been included in the Family Farms Act; however, the detailed rules on land transfer of family farms are still regulated in the Land Transfer Act and the Implementation Land Act. Similarly important in relation to agricultural holdings is the *farm* concept of the Farm Transfer Act, which will enter into force on January 1, 2023 and has already been detailed above, where the legislator has harmonized the detailed rules on the transfer of farms with the Land Transfer Act. Many of the concepts of farm are also reflected in the two other specific categories of the Land Transfer Act, namely the concepts of *farmstead*[79] and *livestock holding*.[80] According to the Land Transfer Act, unless otherwise provided for, a parcel of land classified as a farmstead under the Act shall also be regarded as land.[81] The operator of a livestock holding is entitled to several advantages in land transfers. Thus, in the case of the so-called land possession maximum, the operator of a livestock holding may also be entitled to the *preferential land possession maximum*[82] (i.e., 1,800 hectares instead of the 1200 hectares applicable as a general rule). The operator of the livestock holding is also in a favorable position in the order of persons eligible for exercising the right of preemption[83] and prelease.[84] The fundamental subject of Hungarian land law is agricultural land. This category replaced the concept of arable land, which was the subject of our previous legislation before May 1, 2014. The concept of agricultural land covers all land, irrespective of its location (urban or rural), which is registered in the land register as arable, vineyard, orchard, garden, meadow, pasture (grassland), reed, forest, and wooded land as well as land declared as set-aside, which is registered with a legal nature of a forest in the land register's National Forest Inventory Data Base.[85] Regarding the concept of agricultural land, it is also important to mention the definition of estate in the Land Transfer Act. The category of estate is intended to

77 *Agricultural holding*: the basic organizational unit of agricultural production factors (land, agricultural equipment, other assets) operated for the same purpose, which is also the basic unit of management through economic cohesion; Land Transfer Act Art. 5, point 20.
78 *Agricultural holding center*: owned or used by an agricultural producer or an agricultural producer organization, a property with a commercial, residential or office building or a farmstead for the purpose of agricultural and forestry or complementary activities, which serves as a place for the performance or organization of agricultural activities, as registered with the agricultural administration body; Land Transfer Act Art. 5, point 21.
79 Land Transfer Act Art. 5, point 25.
80 Land Transfer Act Art. 5, point 1.
81 Land Transfer Act Art. 3(1).
82 Land Transfer Act Art. 16(3).
83 Land Transfer Act Art. 18(2) point a). Also see: Art. 19(4).
84 Land Transfer Act Art. 46(3) point a). Also see: Art. 47(4).
85 Land Transfer Act Art. 5, point 17.

express all agricultural land owned, usufructuary, or otherwise used by the holder under any other valid title.[86]

III. *The concepts of agricultural producer and agricultural producer organization*. The typical—but not exclusive—subjects of Hungarian land law are the agricultural producer and the agricultural producer organization, on the side of those who gain the right to own or use land. While an agricultural producer can appear as such in relation to both property rights and land use rights, an agricultural producer organization can only acquire land use rights. Both categories are intended to ensure that the person involved in land transfer is preferably someone experienced in farming and forestry and who actually exercises such an activity.

The important elements of the *agricultural producer*[87] category are summarized below. An agricultural producer can only be a natural person who is a Hungarian *citizen* or a citizen of a member state of the European Union, of a state of the European Economic Area, or of a state treated as such by an international treaty. Agricultural producers must either have an appropriate agricultural or forestry *vocational training* or a *qualification* or, alternatively, at least 3 years' *experience* in a specific (possibly complementary) agricultural or forestry activity.[88]

The county government office keeps a register of agricultural producers. In the order of the exercise of the right of preemption and prelease, an agricultural producer who is a *local resident*[89] or a *local neighbor*[90] is granted preferential status (for the latter, the category of *adjacent land*[91] is relevant, for which category the adjacency is independent of the administrative boundary of the municipality). In addition to the right of preemption and prelease, the category of local resident may also be relevant

86 Land Transfer Act Art. 5, point 3.

87 *Agricultural producer*: A domestic natural person or a national of a member state registered in Hungary who has a vocational training or qualification in agriculture or forestry as defined by law or, alternatively, has been engaged in for at least 3 years continuously (a) agricultural, forestry, or complementary activities in Hungary in their own name and at their own risk, and it has been proven that they have generated revenue from this activity or that the revenue has not been generated because the investment in agriculture or forestry could not yet be used, or (b) they are a member of an agricultural producer organization registered in Hungary and in which they hold at least 25% of the shares, and they carry out agriculture, forestry, or complementary activities as a personal contribution; Land Transfer Act Art. 5, point 7.

88 Government Decree No. 383/2016 Art. 43(1).

89 *Local resident*: a natural person who has had their habitual residence for at least 3 years in the municipality in the administrative territory of which the land subject to the contract of sale, exchange, or lease is situated; Land Transfer Act Art. 5, point 9.

90 *Local neighbor*: (a) who is a local resident and owns or uses land adjacent to the land that is the subject of the sale, exchange, or lease, or (b) whose habitual residence has been for at least 3 years in the municipality adjacent to the municipality where the land that is the subject of the sale, exchange, or lease is situated and the land they own or use is adjacent to it; Land Transfer Act Art. 5, point 10.

91 *Adjacent land*: land which, irrespective of the administrative boundary of the municipality, is in direct contact with the land subject of the legal transaction or indirectly in contact with it by means of a road, ditch, or canal registered under a separate parcel number; Land Transfer Act Art. 5, point 23.

for the exchange of land. A special category of the agricultural producer is the *young farmer*,[92] who also enjoys a preferential status in the order of the exercise of the preemption or prelease rights. Although *new agricultural producers*[93] are not considered to be agricultural producers, the provisions applicable to agricultural producers should, as a general rule, also apply to them.[94] New agricultural producers have a preferential position in the order of preemption and prelease lease rights and are subject to additional obligations under the prior declaration system.[95]

The agricultural administration body registers all legal persons (or unincorporated organizations) based in an EU member state whose principal activity, revenue, or the activity of their executive officer is linked to an agricultural (complementary) activity as an *agricultural producer organization*.[96] Similar to the resident (neighbor) category of the agricultural producer, there is also a *locally registered entity*[97] and a *locally registered neighbor*[98] category for agricultural producer organizations, which provide preferential ranking in the order of exercise for prelease rights.

IV. *The concept of acquirement*. The new Hungarian land law created from 2013 does not seek to revolutionize the land ownership structure established after the regime change by the amendment of Act I of 1987 and the subsequent Arable Land Act. The new Hungarian land law aims to transform land ownership and land use for the future through land acquirements after its entry into force (fully implemented on May 1, 2014) in accordance with the right to property. The Land Transfer Act and the Implementation Land Act, which form the basis of Hungarian land law, cover a broad category of acquirement, which includes both the acquisition of ownership and

92 *Young farmer*: an agricultural producer who is over 16 years of age at the time of exercising the right of preemption and prelease but has not yet reached the age of 40; Land Transfer Act Art. 5, point 6.

93 Land Transfer Act Art. 5, point 22.

94 Land Transfer Act Art. 3(2).

95 See Land Transfer Act Art. 15 and Art. 42(4).

96 *Agricultural producer organization*: a legal person or an unincorporated organization *based in a member state* and registered by the agricultural administration body under conditions laid down by law, (a) whose (aa) *primary activity* is an agricultural, forestry, or complementary activity that it has pursued *continuously for at least three years* preceding the legal transaction; (ab) *more than half of its annual sales net revenue* is derived from agricultural, forestry, or complementary activities; and (ac) at least one of its executive officers or the company manager conducts agricultural, forestry, and complementary activities in connection with their *membership of the organization* and with an agricultural or forestry *vocational training* or *qualification* as defined in the decree implementing this Act or has at least *3 years' experience* certified by the agricultural administration body, or (b) which is considered a newly established agricultural producer organization, or (c) which is considered a national park management board, or (d) which is considered a forestry management company authorized to manage forests; Land Transfer Act Art. 5, point 19.

97 *Locally registered entity*: a legal person or other unincorporated organization the agricultural holding center of which is located for at least 3 years in the municipality in the administrative territory of which the land subject to the lease agreement is situated; Land Transfer Act Art. 5, point 11.

98 *Locally registered neighbor:* a locally registered legal person or other unincorporated organization, the land owned or used by which is adjacent to the land subject to the lease; Land Transfer Act Art. 5, point 12.

the acquirement of use of land based on the law of obligations. In the following, we will examine how Hungarian land law defines these two types within the category of acquirement in the general sense.

IV.1. *The acquisition of ownership of land.* The rules of land law on the acquisition of ownership shall be applied in some respects more broadly and in some respects more narrowly, as a set of all the ways of acquisition or titles which are defined by Hungarian private law on a doctrinal basis.

IV.1.1. Land law rules on acquisition shall also apply to limited rights *in rem*, such as usufruct and the right of use *in rem*. Both these rights are regulated primarily in the Civil Code and secondarily in the Land Transfer Act.

According to the general rules of the Civil Code,[99] the *right of usufruct* allows the holder to possess, use, exploit, and benefit from the property of another person. The usufruct continues to exist irrespective of any change in the person of the owner of the property. The usufruct of a natural person may last for a limited period, until the death of the beneficiary at the latest. For a usufruct to be created, in addition to a contract or other legal title, in the case of a usufruct established on immovable property, the usufruct must be registered in the land register. The usufructuary may not transfer the usufruct but may transfer the right of possession, use, and benefit.

Under the Civil Code,[100] the *right of use in rem* differs from the usufruct in that the rightsholder may use the property and receive its benefits only to the extent that it does not exceed their own needs and those of the members of family members living with them. Another difference is that the right of use *in rem* cannot be transferred to another person and is otherwise subject to the rules of usufruct.

The Land Transfer Act[101] restricts the above rules of usufruct and right of use *in rem* (hereinafter together: usufruct) of the Civil Code in the case of agricultural land by excluding (specifically: declaring null and void) the creation of such rights by contract or testamentary disposition, unless the contract or testamentary disposition creates such a right in favor of a *close relative*.

In the case of a usufruct created by contract or testamentary disposition between close relatives, the provisions of the Land Transfer Act on the acquisition of property apply, with the following exceptions: (a) the usufruct may be established for a maximum period of 20 years; (b) the validity of the contract or testamentary disposition establishing the usufruct does not require the approval of the agricultural administration body; (c) the provisions on land acquisition limit and land possession limit shall be applied to the extent of the permitted acquisition of the usufruct, with the notion that the right of ownership shall be understood as the usufruct and when setting the permitted extent, the area of land owned by the recipient shall be taken

99 Civil Code Art. 5:146–155.
100 Civil Code Art. 5:159.
101 Land Transfer Act Art. 37.

into account; (d) the ownership of the land may be transferred by retention of the usufruct only to a close relative.[102]

IV.1.2. The rules of the Land Transfer Act on the acquirement of property do not cover all titles and methods of it, since they do not cover (a) acquirement by intestate succession, (b) donation to the state during the inheritance procedure, (c) expropriation (including sale and exchange in lieu of expropriation), and (d) acquirement by auction for restitution.[103] It is also considered acquirement by intestate succession if the *testamentary inheritor,* considering a lack of testament and the exclusion of other intestate inheritors from inheritance, *becomes intestate inheritor.*[104] In other words, in these cases, not the special rules of the land transfer regime but the general rules set out in the Civil Code[105] should be applied.

IV.1.3. Certain types of the acquirement of property, namely exchange, gift, maintenance, and annuity contracts, are covered by the Land Transfer Act, but their application in the context of the transfer of agricultural land is subject to significant restrictions.

Ownership of land may be acquired by *exchange*[106] if the parties to the exchange contract undertake to transfer ownership of the land to each other and (a) one of the parcels of land exchanged is situated in the same municipality as the parcel of land already owned by the acquiring party, or (b) one of the exchange partners (ba) is considered a local resident, or (bb) one of them has had their residence or their agricultural holding center for at least 3 years in a municipality the administrative boundary of which is situated at a distance of 20 km or less (by road or private road not closed to public traffic) from the administrative boundary of the municipality in which the land is situated.

Ownership of land may be transferred by *gift* only to (a) a close relative, (b) a registered church or its internal ecclesiastical legal entity, (c) a municipality, and (d) the state.[107]

Ownership of land may be transferred by way of *maintenance and annuity* only to a close relative, a registered church or its internal ecclesiastical legal entity, a municipality, and the state, except that the state may only establish an annuity relationship.[108]

IV.2. *The acquirement of the use of land on the basis of the law of obligations.* The owner of the land or the usufructuary in the case of a usufruct right (hereinafter collectively referred to as the lessor) may transfer the use or exploitation of the land to a natural person or a legal person as defined in the Land Transfer Act only in certain

102 Land Transfer Act Art. 37(5).
103 Land Transfer Act Art. 6(2).
104 Land Transfer Act Art. 6(3).
105 Land Transfer Act Art. 12(4).
106 Land Transfer Act Art. 12(1).
107 Land Transfer Act Art. 12(2).
108 Land Transfer Act Art. 12(3).

ways[109]: (a) lease; (b) gratuitous land use; (c) use of the land for so-called recreational purposes[110]; and (d) in case of a forest, only on the basis of the legal title defined by the Implementation Land Act.

The provisions of the Land Transfer Act, the Implementation Land Act, and the Civil Code also apply to lease contracts.[111] A lease can be concluded for a fixed term of at least 1 financial year and up to 20 years.[112]

Under the gratuitous land use contract, the lessor grants the use of the land to their close relative or, in the case defined in the Land Transfer Act, to the family agricultural company free of charge.[113] A gratuitous land use contract may also be concluded for an indefinite period.[114]

For the use of land classified as forest under the Implementation Land Act and for the acquisition of the right to use land not classified as forest for the purpose of planting a forest[115]: (a) a forestry lease contract (up to 10 years after the end of the production period, also known as cutting maturity),[116] (b) a forest management integration contract (which may be concluded for a fixed term of at least 10 years but not more than 50 years), (c) a forest management contract (which may be concluded for an indefinite period), and (d) a gratuitous land use contract may be concluded.

2. Some institutions of national land law in the light of the Commission's Interpretative Communication on land acquisition

In the following, the detailed rules of Hungarian land law will be reviewed in the light of the aspects set out in the Commission's Interpretative Communication on the Acquisition of Farmland and European Union Law (2017/C 350/05).[117] Due to space constraints, we will focus on the analysis of the rules on the acquirement of property,

109 Land Transfer Act Art. 38(1).
110 A recreational land use contract is a contract between the municipal government as the lessor and a domestic natural person or a national of a member state who is not an agricultural producer or a nongovernmental organization not qualified as an agricultural producer organization as a lessee, on the basis of which the lessee uses the land owned by the municipal government, up to a maximum area of 1 hectare, for their own needs and those of their family members living with them, and receives the benefits of the land. A recreational land use contract may be concluded for a fixed term of at least 1 financial year and up to 5 years. If the lessee of the recreational land use contract is liable to pay compensation for the use of the land, the provisions on termination of lease contract shall apply to the termination of the contract. Land Transfer Act Art. 38(1a).
111 Land Transfer Act Art. 38(2).
112 Land Transfer Act Art. 44(1).
113 Implementation Land Act Art. 68(1).
114 Cf. Land Transfer Act Art. 38(3) and Art. 44, Implementation Land Act Art. 68.
115 Implementation Land Act Art. 68/B(1). For more details see: Implementation Land Act Art. 68/B–68/E.
116 Land Transfer Act Art. 44(2).
117 Cf. Bányai, 2016, pp. 5–15.

and in the subsections, we will only refer to the rules on the acquisition of use of land on the basis of the law of obligations.

2.1. Prior authorization

As a general rule, Hungarian land law requires prior authorization—on the one hand, for contracts on the transfer of ownership and acquisition of ownership by means other than transfer,[118] and on the other hand, for contracts on third-party use. The model contract for property acquisition cases is the sales contract. This means that the legislator has regulated the detailed rules for prior authorization for this contract and for other acquisitions of property, only special features, and derogations in comparison with the sales contract have been regulated. In the case of the acquisition of use of land based on the law of obligations, the legislator has regulated the lease contract as the basic case and has defined the specific features of other land use contracts in relation to it. As regards the prior authorization of both the acquisition of property and the land use contracts, the procedural rules for the exercise of the right of preemption and prelease are an integral part of these authorization procedures. A significant difference between the prior authorization of sales and lease contracts is that local land commissions only have a substantive role in the authorization of sales contracts. In the following, the detailed rules on the prior authorization of property acquisitions, and primarily of sales contracts, are examined in detail.

According to the provisions of the Land Transfer Act, as a general rule, the contract for the transfer of ownership is authorized by the agricultural administration, and similarly, the acquisition of ownership of land by means other than transfer requires the *authorization of the agricultural administration body*. The authorization of the agricultural administration body is not a substitute for the other conditions and requirements for validity laid down by law, nor is it a substitute for the prior authorization or approval of other authorities, which are also necessary for the conclusion or validity of the legal transaction.[119]

Compared with the above main rule of the Land Transfer Act, *the approval of the agricultural administration body is not required for*[120] (a) the acquirement of land by the state and other legal persons who may acquire land, (b) the alienation of land owned by the state or by the municipality, (c) the transfer of ownership of land via gift, (d) the transfer of ownership between close relatives, (e) the transfer of land by farm transfer contract, (f) and the acquisition of land in the context of land consolidation.

It is important to emphasize that the procedure of authorization of the agricultural administration body for the acquisition of property is not identical to the land

118 The Land Transfer Act lays down special rules for transactions other than sale, such as exchange, adverse possession, testamentary disposition, auction; see Land Transfer Act Art. 31–35/A.

119 Land Transfer Act Art. 7.

120 Land Transfer Act Art. 36(1), On request, the agricultural administration body shall issue a certificate that the validity of the contract on the transfer of ownership does not require authorization under the provisions of this Act; Land Transfer Act Art. 36(2).

registration procedure (important: the transfer of property ownership in Hungary is subject to the registration of the property right in the land register) but is separate from it, and the so-called land use registration procedure takes place only after the decision of the agricultural administration body authorizing the acquisition of the property. However, the land register and the land use register will not be discussed further in this paper.[121]

In the following section, the process of obtaining prior approval of a sales contract, which is the basic model for the prior authorization procedure, is presented.

I. The first step in the acquirement of property through a sales contract is *the incorporation of the purchase offer accepted by the owner into a sales contract*. The sales contract must include the declarations of the prior declaration scheme (these are dealt with in more detail in the section detailing the self-farming obligation).[122]

II. An interesting feature of the Hungarian land regime is that the owner of the land does not communicate the purchase offer to the persons entitled to preemption, but the *sales contract itself*, within 8 days of the signing of the contract, and this is only communicated indirectly (i.e., through another party).[123] Either forwarded directly by the buyer or by the agricultural administration body, the sales agreement, as specified in the ordinance issued for this purpose,[124] must be notified to the parties entitled to preemption, after a preliminary examination, (including, in addition to the Land Transfer Act, the parties entitled to preemption under other acts or agreements) by means of a notice published by the notary of the municipality in which the land is located.[125]

II.1. In the case of the sales contract subject to prior authorization, a *preliminary examination procedure* has been introduced as of January 1, 2022, prior to the notification of the sales contract to the preemption right holders by the notary. The preliminary examination procedure is conducted by the agricultural administration body, and if it does not refuse to authorize the sales contract, it will issue an order declaring the contract suitable for publication and ordering ex officio its publication by the notary (the declaration of suitability for publication does not constitute prior authorization of the sale contract).[126] Within 15 days of receipt of the documents, the agricultural administration body shall either decide not to approve the sales contract or shall issue an order declaring the contract suitable for publication and ordering its publication.[127] The agricultural administration body shall, on the basis of the preliminary examination, decide not to authorize the sales contract if it finds, for example, that (a) the sales contract is not concluded or is null and void because of a breach of

121 See also Bábits, 2016, pp. 54–60.
122 Land Transfer Act Art. 13–15.
123 Land Transfer Act Art. 21(1).
124 Government Decree No. 474/2013 (12.XII.) on the procedural rules for the exercise of the right of preemption and prelease.
125 Land Transfer Act Art. 21(1)–(1c).
126 Land Transfer Act Art. 21(1a).
127 Land Transfer Act Art. 23(1).

the legal provisions, (b) the sales contract does not contain the declarations of the buyer with the required content, and (c) the legal basis for the right of preemption or certain details thereof cannot be clearly established from the declarations made by the buyer in the sales contract.[128]

II.2. If the sales contract is not subject to prior authorization, the seller sends the contract to the notary directly after signing the contract, in order for the notary to notify persons entitled to preemption of the contract, as provided for in the Land Transfer Act.

III. Whether the sales contract is sent directly or indirectly to the notary for preemption right holder to be notified, the sales contract is communicated by means of a notice published on the government website.[129]

The holder of the right of preemption[130] may, within a limitation period of 60 days, either accept the sales contract or renounce the right of preemption.[131] The person entitled to preemption shall deliver their declaration to the notary personally.[132] The notary shall verify the identity of the holder of preemption right upon personal receipt of the declaration of acceptance.[133]

The declaration of acceptance must at least be made in a specific (so-called *private) document (representing conclusive evidence)*. The declaration of acceptance *must indicate* the legal basis for the preemption right, further details (legislative basis, ranking, etc.), and declarations of self-farming.[134] The seller is bound by a declaration of acceptance, which is made within the time limit by the holder of preemption right and in which they accept the sales contract in full.[135] In the event of a breach of the above rules, the declaration of the right of preemption shall be deemed as if the entitled has decided not to exercise it.[136]

Within 8 days after the expiry of the deadline for the submission of declarations, the notary shall draw up a register of the declarations duly received and send it (a) in the case of a contract subject to prior authorization, an anonymized sales contract, and a copy of the declarations to the agricultural administration body by electronic means,[137] or (b) if the contract is not subject to prior authorization, the original copy of the sales contract and the declarations to the seller.[138] In the latter (b) case, the buyer under the sales contract shall be replaced by the holder of preemption right on the

128 Land Transfer Act Art. 23(2).
129 Land Transfer Act Art. 21(2).
130 A person entitled to preemption under other legislation may also make a declaration of acceptance within the time limit set out in and in accordance with the Land Transfer Act. Land Transfer Act Art. 21(3a).
131 Land Transfer Act Art. 21(3).
132 Land Transfer Act Art. 21(3).
133 Land Transfer Act Art. 21(4).
134 Land Transfer Act Art. 21(5).
135 Land Transfer Act Art. 21(8).
136 Land Transfer Act Art. 21(9).
137 Land Transfer Act Art. 22(3).
138 Land Transfer Act Art. 22(1).

day of the communication of the declaration of acceptance to the seller. In the case of acceptance by more than one preemptor, the person replacing the buyer under the sales contract is the first in order of priority, and in the case of multiple preemptors with the same ranking, the seller can decide who should replace the buyer.[139]

IV. The *agricultural administrative body* receives the documents forwarded by the notary and, in the framework of *an intermediate procedure*, decides within 15 days of receipt of the documents to refuse to authorize the sales contract if it finds (a) on the basis of the documents sent by the notary, that the procedural rules governing the exercise of the right of preemption have been infringed or that (b) based on the preliminary examination procedure, the sales contract should not have been approved.[140] The agricultural administration body shall first examine and check the declarations of acceptance sent to it by the notary for compliance with the conditions of validity and effectiveness.[141]

If the agricultural administration body does not refuse to authorize the sales contract, the agricultural administration body shall rank the person or persons entitled to preemption and the buyer under the sales contract in the order laid down by law and shall draw up a list thereof.[142] The agricultural administration body shall, without delay, by electronic means, contact the local land commission for its opinion by forwarding the documents at its disposal, the declaration of acceptance of all the preemption right holders on the list, and the list it has drawn up.[143]

V. The *local land commission*, within 30 days of receiving the request from the agricultural administration body, issues its *opinion* required for refusing or granting authorization for the sales contract.[144] The local land commission shall take a position, *based on the facts known to the public and its best knowledge*,[145] on whether the sales contract is in accordance with general agricultural and land policy interests, such as (a) transparency of land tenure, (b) prevention of speculative land acquirements, (c) establishment and preservation of viable and competitive landholdings under working cultivation with a single tenure, (d) promotion of the interests of the local farming community, (e) assistance to agricultural producers who are local residents, and (f) promotion of generational change in agriculture.[146] In assessing the compliance of the sales contract with these criteria, the local land commission shall take into account (a) how much and what kind of land is owned or used by the buyer or the preemption right holder and their close relatives (hereinafter: examined persons) in the municipality where the land is located, or within a 20 km radius of it; (b) size of the land area used by the agricultural producer organization in the municipality where

139 Land Transfer Act Art. 22(2).
140 Land Transfer Act Art. 23(3).
141 Land Transfer Act Art. 23(4).
142 Land Transfer Act Art. 23(5)–(6).
143 Land Transfer Act Art. 23/A(2)–(3).
144 Land Transfer Act Art. 23/A(1), 24(1).
145 Land Transfer Act Art. 24(2).
146 Land Transfer Act Art. 23/A(1) and (4).

the land is located, or within a 20 km radius of it, in which the examined persons have an ownership share; (c) whether the buyer or the person entitled to preemption has entered into a legal transaction concerning land with a close relative within 3 years preceding the sales contract and by whom the land is used; (d) whether the buyer or the person entitled to preemption has made a declaration of acceptance in a preemption for land located in the municipality where the land in question is located or within a 20 km radius of it within the 5 years preceding the conclusion of the sales contract, but the transaction has not been completed due to their breach of contract; (e) the extent to which the sale of the land serves the acquisition of property in connection with the transfer of the holding to a young farmer; (f) whether the preemption right holder regularly makes a declaration of acceptance for lands where they have a right of preemption, while the size of their holding does not justify its acquirement; (g) owned by the buyer under the sales contract or the preemption right holder (g1) have a difference of magnitude in size, and (g2) there is a difference of magnitude in size in the average size of holdings of the municipality; (h) the price for the land under the transaction does not, without due justification, exceed (h1) in the case of land that is not forest, the income-producing capacity of the land over a 20-year production period, determined by indexation, and (h2) in the case of land that is forest, the income-producing capacity of the land over a 50-year production cycle.[147] These circumstances must be provided in writing within 15 days of the request of the local land commission by the buyer or the preemptor on the list.[148]

The local land commission shall conduct its evaluation in the same manner for all listed preemption right holders and the buyer under the sales contract, and in the evaluation, the local land commission may support more than one preemption right holder. If the local land commission does not support authorization of the sales contract for any of the preemption right holders based on the evaluation, it must take a position on whether to support authorization of the sales contract with the buyer under the sales contract.[149]

VI. After the resolution of the procedure of the local land commission, a *substantive assessment* is conducted by the agricultural administration body.

VI.1. During this, the body will reevaluate the aspects already evaluated during the intermediate procedure and will also evaluate new aspects, as a result of which it *must refuse* to authorize the sales contract if it finds that there are grounds for doing so. Such a situation, which goes *beyond the assessment in the intermediate procedure*, is a further ground for *mandatory refusal*: (a) if the local land commission, on the basis of its resolution, does not support the authorization of the sales contract with any of the persons entitled to preemption and the buyer under the sales contract; (b) if the agricultural administration body establishes against the person supported by the local land commission that (b1) the land in their possession has been definitively imposed

147 Land Transfer Act Art. 24(3).
148 Implementation Land Act 101(1).
149 Land Transfer Act Art. 25(1)–(3).

a land protection fine by the land authority for unlawful use for other purposes or for breach of the obligation to use the land within 5 years prior to the notification of the sales contract; (b2) a legally established land use fee is owed; (b3) a final fine for negligence has been imposed by the agricultural administration for breach of the obligation to acquire the land within 5 years before the notification of the sales contract.[150]

VI.2. In addition to the mandatory cases of refusal above, the agricultural administration body may *optionally refuse* to authorize the sales contract, notwithstanding the resolution of the local land commission supporting the authorization of the sales contract (or exchange contract).[151]

VI.3. If the agricultural administration body could decide to authorize in favor of *more than one preemption right holder of the same rank,* then the seller can choose from this pool, or if the seller does not make a statement within a 15-day time limit (and does not request an extension of this time limit), the agricultural administration body shall appoint a preemption right holder to replace the buyer under the contract of sale.[152] If the agricultural administration body could decide to authorize in favor of both the buyer under the contract and the preemption right holder in the same rank, the agricultural administration body shall approve the contract with the buyer under the contract of sale.[153]

VI.4. If the agricultural administration body authorizes the sales contract with a preemption right holder, the *buyer under the sales contract is replaced by the preemption right holder.* The agricultural administration body shall take an independent decision on the authorization within 15 days of the day following the date of receipt of the resolution of the local land commission and at the same time issue a clause to the sales contract. If there are no preemption right holders with whom the agricultural administration body would authorize the contract and there no grounds for refusal for the authorization of the sales contract with the buyer, the agricultural administration body shall authorize the sales contract *between the seller and the buyer* and at the same time issue the clause to the sales contract.[154]

VI.5. In administrative proceedings, the court cannot change the decision of the agricultural administration body.[155]

2.2. Preemption rights and rights of prelease in favor of farmers

Compared to the general rules of civil law,[156] prior to the general rights of preemption and right of prelease provided for therein, the Land Transfer Act provides for a special right of preemption in the case of the acquisition of agricultural land by means of a

150 Land Transfer Act Art. 27(1)–(2).
151 Land Transfer Act Art. 27(3)–(4).
152 Land Transfer Act Art. 29.
153 Land Transfer Act Art. 28/A.
154 Land Transfer Act Art. 30(1)–(2).
155 Land Transfer Act Art. 30(4)–(5).
156 See, for example, Article 5:81 of the Civil Code on the right of preemption or prelease entitled to the co-owners.

sales contract,[157] and a special right of prelease in the case of the acquisition of the use or exploitation of agricultural land by a lease contract. In both cases, it can be said that in addition to the special rules on the right of preemption and the right of prelease based on the Land Transfer Act, Hungarian law and Hungarian land law know special rules on the right of preemption[158] and the right of prelease[159] even compared to the Land Transfer Act.

The rules of the Land Transfer Act on the right of preemption and the right of prelease have many similarities; however, they differ in that, while the rules on the right of preemption in the Land Transfer Act provide for a uniform order of preemption, the rules on the order of prelease for a land that is classified as forest (Art. 45) and land that is not classified as forest (Art. 46) are sharply different. Unlike the right of preemption, the local land committees have no role in the procedure for exercising the right of prelease. In the following, we will only present the rules of the Land Transfer Act concerning the right of preemption, but due to space constraints, the right of prelease will not be examined in detail.

In Hungarian law, the right of preemption in the context of a sales[160] contract is a unilateral, conditional (i.e., that the owner of the thing wants to sell it), formative right of the prospective buyer.[161] The right of preemption can be based on law or contract. A statutory right of preemption precedes a *contractual right of preemption*.[162] This part of the book deals with statutory preemption rights regarding agricultural land. Based on the rules on preemption rights laid down in the Land Transfer Act, we consider it important to highlight the following provisions.

I. In the case of the *sale* of agricultural land, the Land Transfer Act sets out a strict *order of preemption*, which may, however, be overridden by the provisions on the right of preemption in more specific laws than the Land Transfer Act (see above). The order of preemption in the Land Transfer Act itself is as follows:

First, the state has the right to preemption.[163]

157 The right of preemption may also be exercised by the holder of the right of preemption at an auction held in the context of an enforcement, liquidation or municipal debt settlement procedure; Land Transfer Act Art. 35(3)–(4).

158 Such a right of preemption, which is more specific than the right of preemption in the Land Transfer Act, exists under the following laws: Act CCXIX of 2012 on Interbranch Organization of Wine, Act IL of 1994 on the Forestry Management Association, Act LIII of 1996 on the Protection of Nature, Act CXXVIII of 2003 on the Expressway Network, Act LXXVIII of 1993 on Certain Rules for the Rent and Disposal of Dwellings and Premises, Act CII of 2013 on Fish Farming and Fish Conservation.

159 Such a more specialized right of preemption exists under Act CCXIX of 2012 on Interbranch Organization of Wine.

160 Civil Code Art. 6:221–223, and Art. 6:226.

161 Bíró, 1999, p. 36. On the role of preemption rights in relation to agricultural land, see Bobvos 2004, pp. 1–25; Hegyes, 2009, pp. 199–207; etc.

162 Civil Code Art. 6:226(3).

163 Land Transfer Act Art. 18(1), point a). The state's right of preemption is exercised by the land fund management body; Land Transfer Act Art. 19(1).

Second, in the case of a co-owner selling jointly owned land, *the agricultural producer co-owner* who had co-ownership of the land for at least 3 years at the time of the conclusion of the sales contract is entitled to priority.[164]

Third, the right of preemption is granted to an *agricultural producer using land*,[165] (a) who is a local neighbor, (b) who is a local resident, or (c) whose residence or agricultural holding center has been located in the municipality for at least 3 years, the administrative boundary of which is situated at a maximum distance of 20 km from the administrative boundary of the municipality where the land is located, by a public road or a private road not closed to public traffic (hereinafter: locally related, using a term of our own devising, for the farmer referred to in point [c]).[166]

Fourth, the right of preemption is granted to an agricultural producer who is *a local neighbor*.[167]

Fifth, the right of preemption[168] shall be granted to a *locally residing agricultural producer*, who has been *operating a livestock farm*[169] for at least 3 years prior to exercising their right of preemption in the municipality where the land is located, whose purpose of acquiring the property is to ensure the necessary and proportionate supply of fodder for livestock farming and who has the livestock density specified in the decree implementing this act.

On the other hand, in the case of the sale of land registered as *arable or horticultural land, vineyard, or orchard*, preemption shall be granted to an *agricultural producer* who is locally related and for whom the purpose of the acquirement is the production and processing of a product with a *geographical indication* or a *designation of origin* or *organic farming*.[170] Thirdly, in the case of the sale of land registered as a *horticultural land, vineyard, or orchard*, preemption shall be granted to the *locally residing agricultural producer* who is acquiring the land for the pursuit of *horticultural activities*. Fourthly, in the case of the sale of land registered as *arable land*, preemption shall be granted to the *agricultural producer residing locally* for the purpose of acquiring the land for the production of seeds.

Sixth, the right of preemption shall be granted to an agricultural producer residing locally.[171]

164 Land Transfer Act Art. 18(3).

165 *An agricultural producer using land* is someone who has been using the land for at least 3 years according to the land use register or the forestry register, including someone who has been designated as a compulsory user of the land. Land Transfer Act Art. 19(2).

166 Land Transfer Act Art. 18(1), point b).

167 Land Transfer Act Art. 18(1), point c).

168 Land Transfer Act Art. 18(2).

169 The operation of the *livestock farm* must be certified. The official certificate for this purpose shall be issued by the food chain inspection body at the request of the operator; Land Transfer Act Art. 19(4).

170 To avoid misuse of *organic farming*, the legislator later introduced detailed rules for organic farming as § 18/A of the Implementation Land Act.

171 Land Transfer Act Art. 18(1), point d).

Seventh, the right of preemption shall be granted to an agricultural producer who is locally related.[172]

With the exception of the agricultural producer using the land and the state, there might be more than one claimant on the same level of other ranks.

In this case, the order of preemption within the groups of beneficiaries is as follows (a) member of a family agricultural company or member of a family farm of primary agricultural producers; (b) young farmer; (c) career entrant farmer.[173]

II. *Several plots of land can be sold at a unified price* if they are adjacent to each other. A sale at a unified price may also take place if the lands are located in the same or adjacent districts and the registered user of the lands is (a) the seller; or (b) the buyer for at least 3 years.[174] In such a case, the sales contract may only be accepted in its entirety by the preemption right holder. In this case, the relevant provisions of the Land Transfer Act shall apply to the order of the preemption right holders as if the circumstance giving rise to the preemption right of the preemption right holder who has made the declaration of acceptance existed in respect of the entirety of land covered by the sales contract as a whole.[175]

There is *no right of preemption* in the following cases[176]: (a) a sale between close relatives, (b) a sale by a buyer who has owned the land for at least 3 years resulting in the termination of common ownership, (c) a transfer of land by means of a farm transfer contract, (d) a sale by municipalities for a specific purpose, (e) acquisition of land for recreational purposes, (f) acquisition by the state, (g) acquisition of land by the exercise of an option right by a share-owner, and (h) transfer to a registered church or its internal ecclesiastical legal entity to establish or extend a cemetery.

We have already dealt in detail with the issue of the *exercise of the right of preemption* in the context of the prior authorization of the contract for the transfer of ownership of land and will therefore not deal with it in this section.

The circumstance giving rise to the right of preemption must exist at the time the declaration to exercise the right of preemption is made.[177]

2.3. Price controls

In our view, Hungarian land law does not have a direct price control instrument. However, this does not mean that Hungarian land law does not take land prices into account and that it does not address the issue of land prices in certain situations.[178]

172 Land Transfer Act Art. 18(1), point e).
173 Land Transfer Act Art. 18(4).
174 Land Transfer Act Art. 19(5).
175 Land Transfer Act Art. 19.
176 Land Transfer Act Art. 20.
177 Implementation Land Act Art. 20.
178 We do not consider the sale of several plots of land at a unified price (Land Transfer Act Art. 19) or the issue of a unified rent in connection with a lease (Land Transfer Act Art. 47) to be a price regulation issue; therefore, we will not deal with it in detail here.

When land is sold, the local land commissions must, in their prior authorization procedure, examine whether the sales contract is in line with the general agricultural and land policy interests of preventing speculative land acquirements, among other things.[179] In assessing whether the sales contract meets this criterion, account should also be taken, *inter alia*, of the fact that the consideration for the land under the transaction does not, without good reason, exceed (a) in the case of land not classified as forest, the income-producing capacity of the land over a 20-year production period, as determined by indexation, and (b) in the case of land classified as forest, the income-producing capacity of the land over a 50-year production cycle.[180] Moreover, the examination of the former aspects is not only the responsibility of the local land commissions but also of the agricultural administration body, which plays a key role in the prior authorization procedure, and the result of the examination may lead to the refusal to authorize the sales contract.[181]

In the procedure for the prior authorization of lease contracts, the agricultural administration body shall refuse to approve the lease if the value of the consideration under the lease (hereinafter: the rent) or other consideration provided for in the lease is disproportionate.[182] For the purposes of this provision, the value of the rent shall be considered disproportionate if the land concerned does not possess any advantageous characteristics justifying a deviation from the normal local rent. The location of the land, its quality (gold crown value), its irrigability, its arable land, and its accessibility by road may be taken into account as an advantageous feature, but not uncertain future events and circumstances that depend—at least in part—on the decision of the tenant to take risks. In the event of a deviation from the average rent, the reasons for this must be justified in the contract. In the procedure for the authorization of a lease contract, the lessor shall, at the request of the agricultural administration body, prove the proportionality of the value of the rent.[183]

2.4. Self-farming obligation

The self-farming obligation is not present in Hungarian land law in absolute form but as a complex system of general rules and exceptions. The relevant parts of Hungarian land law are relevant both for contracts on the transfer of ownership and for contracts on the transfer of the right to use land.

I. In the context of contracts for the transfer of ownership, the right to acquire ownership is subject to the condition that the contracting party (or the person with the right of preemption) undertakes in the contract for the transfer of ownership (and the person with the right of preemption in the declaration of acceptance)[184] (a) not to transfer the use of the land to another person and to use it themselves; (b) to fulfill

179 Land Transfer Act Art. 23/A.
180 Land Transfer Act Art. 24(3), point h).
181 Land Transfer Act Art. 27.
182 Land Transfer Act Art. 53(1), point g).
183 Land Transfer Act Art. 53(2a). See further Land Transfer Act 53(2b).
184 Land Transfer Act Art. 21(5).

their obligation to use the land; and (c) not to use the land for other purposes for a period of 5 years from the date of acquisition.[185] Hungarian land law provides for a number of exceptions to the above general rule, which are described below.

This obligation does not apply (a) to legal persons who may acquire ownership of land; (b) to transfers of ownership between close relatives; (c) and in cases of expropriation, termination of joint ownership, termination of the marital community of property, and exchange of land that was already owned on May 1, 2014.[186]

Under the Land Transfer Act, it is not deemed to be a transfer of use if the party acquiring the right of ownership[187] (a) transfers the use of the land by virtue of a valid title to (a1) a close relative who is considered an agricultural producer,[188] or (a2) an agricultural producer organization owned by them or their close relative in at least 25%, or (a3) a family agricultural company in which they are a member; (b) is engaged in associated forestry or transfers land considered as forest to forest management; (c) transfers the use to another person for the purpose of providing land for seed production under a valid title; or (d) transfers the use under a farm transfer contract; (e) transfers the use after the expiry of the period of use granted under the farm transfer contract. If the land which is the subject of the contract of transfer of ownership is already in the use of a third party, the contracting party must undertake (a) not to extend the duration of the existing land use relationship and (b) to assume the obligations detailed above for the period after its termination.[189]

The self-farming obligation is not governed by the Land Transfer Act but by the Arable Land Protection Act, which stipulates that the land user is obliged, as a general rule by their choice, to use the land for production in accordance with the type of cultivation or to prevent the appearance and spread of weeds without continuing production while complying with the soil protection regulations. This type of choice is not available to the land user in the case of vineyards and orchards, where the land can only be used in one way, by means of production corresponding to the type of cultivation.[190]

In certain cases, the Land Transfer Act allows the land to be used for other purposes, such as the construction of an irrigation facility, irrigation canal, water supply canal for landscape management, water storage facility, soil protection facility, agricultural road, farm building, residential building, or greenhouse.[191]

185 Land Transfer Act Art. 13(1), for the purposes of the Act, the temporary or permanent withdrawal of forest from production is also considered as the use of land for other purposes; Land Transfer Act. 13(1a). If it is transferred to a close relative within 5 years, on the conditions for this, see Land Transfer Act Art. 13(6).

186 Land Transfer Act Art. 13(1), For the specific case of exchange, see a Land Transfer Act Art. 17(2).

187 Land Transfer Act Art. 13(2).

188 For further conditions, see Land Transfer Act Art. 13(5).

189 Land Transfer Act Art. 13(4).

190 Act CXXIX of 2007 on The Protection of Arable Land Art. 5(1)–(2).

191 Land Transfer Act Art. 13(3).

In addition to these, career entrant farmers or other persons contracting under other laws[192] must also take on additional obligations.[193]

The prior declarations of the contracting party or the preemption right holders will be examined during the official procedure, and their absence will be an obstacle to the acquisition of ownership.

II. In the case of contracts on the transfer of the right to use land, the acquisition of the right to use land is conditional on the party acquiring the right to use land agreeing in the contract on the transfer of the right to use land (and the right of prelease holder in the declaration of acceptance)[194] not to transfer the use of the land to another party, to use it themselves, and to fulfill their self-farming obligation. This obligation does not apply to certain persons, such as forestry associations, public education, and higher education establishments belonging to the agricultural sector and established churches.[195]

It shall not be considered a transfer of use if the party acquiring the right to use (a) transfers the use of the land by virtue of a valid title to (a1) a close relative who is considered an agricultural producer, or (a2) an agricultural producer organization owned by them or their close relative in at least 25%, or (a3) a family agricultural company in which they are a member; (b) is engaged in associated forestry or transfers land considered as forest to forest management; (c) transfers the use to another person for the purpose of providing land for seed production under a valid title.[196]

In the procedure for prior authorization, the existence of all these declarations is verified by the agricultural administration body, and their absence is an obstacle to obtaining the right to use the land.

2.5. Qualifications in farming

Only natural persons can acquire ownership of agricultural land, with certain exceptions. Ownership of larger amounts of land can only be acquired by an agricultural producer, with certain exceptions. The requirement for agricultural producers is[197] that they shall have a qualification or vocational training in agriculture or forestry as defined in the Decree implementing the Land Transfer Act[198] or, alternatively, that (a) they have been engaged in agricultural, forestry, or complementary activities in

192 Such additional declaration obligation exists when a *member of an interbranch organization of wine* exercises their right of preemption by committing to establish a vineyard; Act CCXIX of 2012, Art. 20/A(1).

193 Thus, they must undertake (a) to reside in the municipality where the land is located within 1 year of the acquisition of the property (a1) as a permanent registered resident, or (a2) to establish an agricultural center, and (b) to conduct agricultural, forestry, or complementary activities; Land Transfer Act Art. 15.

194 Land Transfer Act Art. 49(4).

195 Land Transfer Act Art. 40(2)–(5), 42(1).

196 Land Transfer Act Art. 42(2).

197 Land Transfer Act Art. 5, point 7, see also the requirements for career entrant farmers with priority for right of preemption of prelease: Land Transfer Act Art. 5, point 22.

198 See Government Decree No. 504/2013 on vocational qualifications in agriculture or forestry.

Hungary for at least 3 years continuously in their own name and at their own risk, and it has been proven that they have generated revenue from this activity or that the revenue has not been generated because the investment in agriculture or forestry could not yet be used, or (b) they are a member of an agricultural producer organization registered in Hungary and in which they hold at least 25% of the shares, and conduct agriculture, forestry, or complementary activities as a personal contribution. In other words, the qualification requirement is apparently not an absolute condition but a condition that can be replaced by other means.

Similar rules apply to the acquisition of the right to use land on a contractual basis. Such use may, with certain exceptions, be acquired by agricultural producers or agricultural producer organizations.[199] There is a similar substitutable requirement for an executive officer or director of an agricultural producer organization, namely, such an executive officer or director must have a qualification or vocational training in agriculture or forestry as defined in the decree implementing the Land Transfer Act or at least 3 years' professional experience, certified by the agricultural administration body.[200]

2.6. Residence requirements

There are no land acquisition requirements for residence in Hungarian law, but local residence or local attachment is an advantage in both the preemption and prelease order, the details of which are given earlier in this chapter.

2.7. Prohibition on selling to legal persons

I. It is a characteristic feature of Hungarian land law that the Land Transfer Act[201] only allows the acquisition of ownership of agricultural land by legal persons in relation to a narrow group of legal persons.[202] The EU Commission considers this narrow scope as a general prohibition on legal persons to acquire land (see below for details).

The exceptional group of legal persons who can acquire ownership of agricultural land in Hungary under the Land Transfer Act can be divided into two groups based on the degree of restriction. On the one hand, the Hungarian state may acquire ownership of land *without restriction*.[203] On the other hand, the following persons may

199 Land Transfer Act Art. 40(1).

200 Land Transfer Act Art. 5, point 19, see also the requirements for a newly created agricultural producer organization benefiting from certain advantages: Land Transfer Act Art. 5, point 26.

201 The Arable Land Act, which had been in force for 20 years, also restricted the acquisition of land by legal persons as a general rule, but the scope of the relevant exceptions—for example, whether a legal person could acquire the land of its predecessor—was frequently amended, the direction of these changes depending largely on the political orientation of the government in power. For example, under the last concept of the Arable Land Act in force (after the change of government in 2010), even public foundations were allowed to acquire land, and municipalities had more freedom to acquire land.

202 Land Transfer Act Art. 6(1); cf. Land Transfer Act Art. 9(1), point c).

203 Land Transfer Act Art. 11(1).

acquire ownership of agricultural land *subject to restrictions*:[204] (a) A *registered church* or its internal ecclesiastical legal person may acquire ownership of agricultural land only by means of a testament, maintenance, annuity, care, gift contract, and by transfer to establish and expand a cemetery, i.e., there is a restriction by title in the case of registered churches and a restriction by purpose in the case of cemeteries. (b) A *mortgage credit institution* may acquire ownership of land subject to the restrictions (title restriction) and for the duration (time restriction) provided by the law[205] applicable to it. According to the provisions of said law, agricultural land may only be owned by a mortgage credit institution temporarily, for a maximum period of 1 year from the date of acquisition, by means of liquidation or executory proceedings. If the mortgage credit institution is unable to sell the land it has acquired within 1 year of the date of acquisition, the land becomes the property of the state and is transferred to the National Land Fund. The National Land Fund Management Organization shall pay the mortgage lending institution the collateral value of the land within 90 days of the date of registration of the state's ownership in the land registry. For the purposes of this paragraph, the date of acquisition shall be deemed to be the day following the date of registration of the title in the land register.[206] (c) The *local government of the municipality* in which the land is located may acquire it for the purposes of public employment, social land program, and municipal development, and, if the land is a protected natural area of local importance, for the purposes of protecting the land as defined in the Law on the Protection of Nature; in other words, in the case of local governments, the legislator imposes both a territorial restriction (namely the area of jurisdiction) and a purpose restriction, which in our view is general and difficult to interpret in the long term.

Considering that, prior to the entry into force of the Land Transfer Act, a group of legal persons may have acquired land at certain times, which may no longer acquire land under the Land Transfer Act, it is important to highlight, once again, that this group of persons did not lose their previously acquired land by force of law after the entry into force of the Land Transfer Act as their acquired rights could not be infringed with regard to the right to property, and also with regard to the present group of beneficiary legal persons, the legislator had to take a position on the question of the *transformation and succession of legal persons* and the impact of all this on land ownership. In view of this, the Land Transfer Act contains the following important provision: a legal entity established by division, spin-off, consolidation (merger, takeover), and change of organizational form (organizational transformation), not including a registered church or its internal ecclesiastical legal entity, may not acquire ownership of land acquired by its predecessor under the Arable Land Act (in force before the Land Transfer Act) or acquired before the entry into force of the Arable Land Act.[207]

204 Land Transfer Act Art. 11(2).
205 Act XXX of 1997 on Mortgage Credit Institutions and Mortgage Deed.
206 Act XXX of 1997 Art. 10(4)–(5).
207 Land Transfer Act Art. 9(2).

II. Legal persons have wider rights to acquire the right to use land based on the law of obligations. In addition to the wide range acquisition of land use of the so-called agricultural producer organizations, forestry associations, churches, and public and higher education establishments in the agricultural sector may acquire the use of land.[208]

2.8. Acquisition caps on the land

Restrictions on agricultural land acquired by a person, *typically*[209] measured in hectares, in Hungarian land law can be divided into two types. Firstly, the *land acquisition limit* only provides for restrictions on property rights and on limited rights *in rem* such as usufruct and use *in rem*. The *land possession limit*, on the other hand, applies to land in use by any other valid title in addition to ownership and other limited rights *in rem*. Neither the *land acquisition limit* nor the *land possession limit* applies to the exceptional category of legal persons who may acquire ownership of agricultural land,[210] nor does the *land possession limit* apply to public or higher education institutions in the agricultural sector[211] and to certain forestry[212] undertakings that are 100% state-owned.[213]

I. Under the *land acquisition limit*, (a) *an agricultural producer*, (b) a natural person or a national of a member state who is not an agricultural producer if they are a *close relative* of the person transferring the ownership, and (c) in the case of *land acquisition for recreational purposes*,[214] the person acquiring the land may acquire ownership of up to 300 hectares of land, taking into account the area of land already owned and usufructuarily used by them.[215] It is important to note that other domestic natural persons and nationals of member states who are *not agricultural producers* may acquire ownership of the land if the area of land they *possess*, including the area of land they wish to acquire, does not exceed 1 hectare together.[216] In other words, it is important to emphasize that in this case, the acquisition of ownership of land up to 1 hectare is subject to a stricter land possession limit than the land acquisition limit.

208 Land Transfer Act Art. 40–41.

209 The Arable Land Act set limits in hectares and gold crowns. The limit expressed in gold crowns has disappeared from the provisions of the Land Transfer Act, except for the land acquisition limit for the acquisition of *a share of land*, where the limit is *6,000 gold crowns*; Land Transfer Act 16(4), Cf. new § 6(2), § 24(3) points a) and b).

210 Land Transfer Act Art. 16(7).

211 Land Transfer Act Art. 16(7).

212 "Annex 1 to Act XXXVII of 2009 on Forests, Forest Protection and Forest Management"; Land Transfer Act Art. 16(8).

213 Land Transfer Act Art. 16(8).

214 *Land acquisition for recreational purposes*: the acquisition by a domestic natural person who is not an agricultural producer or a national of a member state of land owned by a municipal authority and designated by a decision for such acquisition, up to a maximum area of 1 hectare, for the purpose of the use and reap the benefits of the land by the acquirer for their own needs and those of their family members living with them; Land Transfer Act Art. 5, point 22a.

215 Land Transfer Act Art. 16(1) and 10(3) and (3a).

216 Land Transfer Act Art. 10(2) and (4).

There are certain cases, all of which apply to agricultural land *already existing on* May 1, 2014 (*the main date of entry into force of the Land Transfer Act*), where the 300 hectares and 1 hectare land acquisition limit may be exceeded (*exceptional land acquisition limit*). Under the provisions of the Land Transfer Act, in each of these cases of exceptional land acquisition limit, the legislator has laid down specific rules on how much the typical limit of the land acquisition limit may be exceeded: (a) by the area of land purchased with the compensation received from the *expropriation* of land, (b) by the area of land corresponding to the share of ownership of the owner in the case of the *termination of co-ownership of land,* or (c) by the area of land acquired by the former spouses in the case of the termination of the *marital community of property* on land, and (d) by the area of land acquired by the transfer of ownership of land by way of exchange.[217]

In addition, the legislator also establishes an exceptional land acquisition limit for the exchange of land acquired by intestate succession, without the time limit of May 1, 2014; namely, the land acquired by exchange of land acquired by intestate succession may exceed the 300 hectares and 1 hectare acquisition limit, respectively.[218]

II. In the context of the *land possession limit*, an agricultural producer, or an agricultural producer organization, as a general rule, may acquire a maximum of 1,200 hectares of land, taking into account the area of land already owned.[219] As a *preferential land possession limit,* the law allows for a maximum of 1,800 hectares in certain cases. These are[220] (a) the *operator of a livestock holding* shall be entitled to the preferential land possession limit if, in the year preceding the conclusion of the contract (or the declaration of acceptance of the right of preemption or prelease) or on average over the preceding 3 years, the average number of livestock units per year on the land already held by them has reached 600 livestock units.[221] (b) A *producer of seeds of arable and horticultural plant species* shall be entitled to the preferential land possession limit if, on average over the 3 years preceding the conclusion of the contract, one-tenth of the arable land already held by him, but not less than 120 hectares, has been used for the production of seeds or propagating material.[222] (c) The land possession limit may also be exceeded up to a maximum of 1,800 hectares *by using land owned by a member of the agricultural producer organization for at least 1 year.*[223]

217 Land Transfer Act Art. 17(1).
218 Land Transfer Act Art. 17(2).
219 Land Transfer Act Art. 16(2).
220 Land Transfer Act Art. 16(3).
221 Implementation Land Act 6(1), To this, the law adds that to acquire land in excess of the land possession limit of 1,200 hectares for the production of fodder for livestock, an average animal density of at least half a livestock unit per hectare is required. For the definition of the *number of livestock units,* see Decree No. 57/2014 (30.IV.) of the Ministry of Rural Development on The Rules for Determining the Average Animal Density. Accordingly, one cattle animal over 2 years old or one equine animal over 6 months old is 1 animal unit, one cattle animal over 6 months old but less than 2 years old is 0.6 animal units, one cattle animal under 6 months old or one equine animal under 6 months old is 0.4 animal units, one sheep or goat is 0.15 animal units, one laying hen is 0.005 animal units. Bee (per hive) 0,2; rabbit 0,002.
222 Implementation Land Act 7(1).
223 Land Transfer Act Art. 43(2).

Some special cases to be taken into account for the *calculation of the land possession limit*: (a) in the case of a person or organization *designated as a compulsory user* of land, the area of land used by them for compulsory use shall be disregarded when determining the land possession limit or preferential land possession limit[224]; (b) in the case of *an agricultural producer organization created by a division or spin-off*, the area of all land held by the predecessor shall be included in the land possession limit for a period of 5 years from the date of its creation.[225]

2.9. Privileges in favor of local acquirers

Hungarian land law allows a local resident agricultural producer, subject to several other requirements, to acquire land by exchange[226] and gives them an advantageous position in the order of preemption[227] or prelease.[228] Hungarian land law provides a favorable position in the prelease[229] order for locally registered legal persons. The right of preemption and prelease was discussed in detail earlier in this chapter.

2.10. Condition of reciprocity

Hungary did not make the purchase of agricultural land by an EU citizen of another member state conditional on the country of origin of the EU citizen of the other member state providing the possibility for Hungarian citizens to buy land.

2.11. Other specific legal institutions of Hungarian land law

A feature of Hungarian land law that is not discussed in detail in this study, but nevertheless worth highlighting, is the many regulations and legal institutions created to counteract legal transactions (colloquially: fraudulent contract) aimed at circumventing Hungarian land law.

3. Constitutional law aspects of Hungarian land law

As we have already mentioned in subchapter 1 of this chapter, three provisions of the Hungarian Constitution, the so-called Fundamental Law, deserve special mention for the purposes of our study. Article XIII, which regulates the right to property, Article P), which guarantees the special protection of natural resources, and Article 38, which guarantees the protected status of national property. In subchapter 1, we briefly described the content of these constitutional provisions, and which Hungarian land laws and legislations are directly based on them. In the present subchapter, we will refer to the case law of the Constitutional Court, supplementing subchapter 1,

224 Land Transfer Act Art. 16(6).
225 Land Transfer Act Art. 43(3).
226 Land Transfer Act Art. 12(1), point b).
227 Land Transfer Act Art. 18.
228 Land Transfer Act Art. 45–46.
229 Land Transfer Act Art. 45–46.

and show how the Constitutional Court has interpreted the acquirement of agricultural land.

I. Among the landmark decisions of the Hungarian Constitutional Court after 2014, Decision 17/2015 stands out, as it can be considered as a kind of comprehensive evaluation of land law and its legal institutions with regard to the acquirement of property.[230] The right to property has significantly determined the whole concept of Hungarian land law. Based on the interpretation[231] of both the ECHR[232] and the Hungarian Constitutional Court,[233] it is clear that the content of the right to property[234] does not imply that anyone has a fundamental right to acquire property. In essence, this is the reason why the new Hungarian land law (but also the previous land legislation of 1994) introduces restrictions not in relation to existing property but concerning new land acquisitions, thus not infringing the right to property.

In its Decision 17/2015, the Constitutional Court, in addition to specifically examining the constitutionality of local land commissions[235] and their procedures[236]

230 A detailed, multi-faceted evaluation of the Constitutional Court Decision No. 17/2015 was conducted by *István Olajos*. The significance of the following analyses lies in the fact that they have changed the procedural system of land transfer and reassessed the role and status of the local land commission: Olajos, 2017a, pp. 284–291.; Olajos, 2015, pp. 17–32. C.f. Holló, Hornyák and Nagy, 2015, p. 78.

231 The right to property is also included in Article 17 of the Charter of Fundamental Rights of the European Union

232 ECHR, Gasparetz v. Slovakia, inadmissibility decision, June 28, 1995, No. 24506/94; Raisz, 2010, pp. 244–245. C.f. Téglási, 2010, pp. 22–47; Téglási, 2015, pp. 148–157.

233 "...the fundamental right to property does not extend to the acquisition of property. The right to acquire property is not a fundamental right... On the side of the 'purchasers', no limitation of the fundamental right can be established, because the ability to acquire property and the freedom of contract are not fundamental rights. Restrictions on these rights, which are not fundamental rights, would be unconstitutional if there were no reasonable justification for the restriction on the basis of an objective assessment." Constitutional Court Decision No. 35/1994 (24.VI.), point III/3. More recently, "the Constitutional Court stated in Decision No. 3387/2012 (30. XII.) (Reasoning [16]) that 'According to the interpretation of the Constitutional Court the constitutional protection of property applies only to existing property, the right to property does not confer the right to acquire property (Decision No. 35/1994 [24.VI.], ABH 1994, 201).' {See also Constitutional Court Decision 3021/2014 (11.II,), Reasoning [14]}." Constitutional Court Decision No. 17/2015. (5.VI.), Reasoning IV [67]; see also IV [71]. For an analysis of the relevant Constitutional Court practice, see Bobvos et al., 2016, pp. 31–40; Kocsis, 2014, p. 125; Téglási, 2009, pp. 20–21; etc.

234 Cf. Constitutional Court Decision No. 3135/2021 in relation to the constitutional complaint against Article 71(6) of Act XXXVIII of 2010 on Probate Procedure in connection with the acquirement of land by the testamentary heir and Article 34(1) and (2) of Act CXXII of 2013 on the Transfer of Agricultural and Forest Land

235 See, in particular, Constitutional Court Decision 17/2015, paragraphs 51–53, 56–58, 66, 68–69, 71–72. Also relevant to the legal nature of the procedure and the resolution of local land commissions is Constitutional Court Decision 18/2016 on the obligation to communicate the decision of the body of representatives based on the resolution of the local land committee. Cf. Constitutional Court Decision 3128/2015 on the resolution of the land commission and legal remedies.

236 See, in particular, paragraphs 74–100 of Constitutional Court Decision No. 17/2015, where the Constitutional Court found several provisions of the Land Transfer Act to be unconstitutional and annulled them.

(the latter in relation to the right to a fair trial and legal remedy), also undertook a conceptual examination of the Hungarian land law in force since 2014, largely in relation to the right to property, essentially adopting the practice of the Constitutional Court established under the previous Constitution. In other words, it concluded that the solution of the new land regime, which is essentially based on the restriction of acquirement of property, is generally in line with the Fundamental Law[237] but that there may still be some unconstitutional provisions in relation to some of its specific provisions (as the Constitutional Court found, both in the current case and during the subsequent proceedings).

II. In addition to the management of state land assets,[238] the Constitutional Court's Decision 16/2015 is also of decisive importance for Hungarian environmental law. In this case, the Constitutional Court ruled that several provisions of an act on the management of state land assets are unconstitutional based on Article P) of the Fundamental Law, which guarantees the special protection of natural resources, and Article 38, which guarantees the protected status of national property, and Article XXI, which guarantees the right to the environment. The contested act would therefore have terminated the nature conservation trusteeship of the national park directorates with respect to the land parcels transferred to the National Land Fund as of April 1, 2016 and would have been replaced by another institution then known as the National Land Fund Management Organization (now the National Land Centre). In this context, the Constitutional Court examined what changes the abolition of this trusteeship would bring about in the specific nature conservation management of the land parcels. To this end, it was necessary to examine the functions and powers of the National Land Fund Management Organization. The Constitutional Court concluded from the economic land policy guidelines of the National Land Fund Act, already presented in subchapter 1 of this paper, that the National Land Fund Management Organization does not specifically perform nature conservation trustee tasks and is not obliged to enforce such nature conservation aspects under the existing legislation. By providing that, under the contested law, the National Land Fund Management Organization would, in certain cases, have been given the task of asset management instead of the national park directorates having reduced the level of protection already provided, since the special expertise and infrastructure of the national park directorates is lacking in the National Land Fund Management Organization.[239]

Constitutional Court Decision 16/2015 confirmed the so-called non-derogation principle of Hungarian constitutional environmental protection; in other words, the legislator may not reduce an already achieved level of environmental protection by a newly adopted substantive or procedural law norm, and the principle of non-derogation has now been clearly extended to amendments made by means of organizational norms. This has been interpreted in the present case in relation to public land.

237 See, in particular, Constitutional Court Decision No. 17/2015, paragraphs 48, 54, 67, 70.
238 See also Constitutional Court Decision 14/2013 on national property and arbitration.
239 See, in particular, Constitutional Court Decision No. 16/2015, paragraphs 106–111.

III. In land acquisition cases, Constitutional Court Decision 11/2020 may be of relevance from the perspective of the relationship between Hungarian national law and EU law. The background of the case was Article 108 Paragraphs (1), (4), and (5) of the Implementation Land Act (i.e., the provisions that declared the *ipso iure* termination of the right of usufruct and use *in rem* between non-close relatives as of May 1, 2014). In addition to Article XIII of the Fundamental Law, which guarantees the fundamental right to property, the Constitutional Court in the present case also examined, *inter alia*, Article B) of the Fundamental Law, which guarantees the rule of law, Article E) of the Fundamental Law, which regulates the shared competences of the European Union and Hungary, and Article 28 of the Fundamental Law, which deals with the interpretation methods of the ordinary courts.

The Administrative and Labor Court of Győr petitioned the Constitutional Court to annul a provision of the Implementation Land Act in an ongoing case concerning a legal dispute on land transfer. The Constitutional Court rejected the judicial initiative but also ruled on its own motion that it is a constitutional requirement for the application of a section of the Implementation Land Act that an ordinary court must apply Hungarian law in the absence of an EU law concern. In the case on which the judicial initiative was based, the applicant had registered rights of use *in rem* in respect of several immovable properties, but the administrative bodies acting on the case had terminated those rights of use under the contested provision of the Implementation Land Act. According to the main points of the petition, the legislator, by making such a decision on the contested provision of the law, which is also disputed in court practice, that the right of use *in rem* established in favor of a legal person is a defect in the law, violated the requirement of legal certainty, the prohibition of retroactive legislation, and the right to property. In its decision, the Constitutional Court stated that the contested provisions do not directly terminate a right and therefore do not infringe the petitioner's right to property; moreover, the law terminated the right of use *in rem* for the future, and therefore, the provision does not infringe the prohibition of retroactivity.[240] The Constitutional Court also found that, although it did not accept the petition, the petitioning judge had nevertheless initiated an examination of the statutory provision for a good cause. The Hungarian supreme judicial forum, the Curia, in its recent decisions, following the so-called SEGRO decision[241] of the Court of Justice of the European Union, declared the application of the relevant statutory provision to be contrary to EU law; thus, following the principle of the primacy of EU law, it excluded the application of the national legislation contrary to EU law and then extended this to situations not affected by EU law by Administrative Principle Decision 11/2019 of the Curia. The Constitutional Court, therefore, considered it necessary to resolve the contradiction between the primacy of EU law and the Fundamental

240 Constitutional Court Decision No. 11/2020, paragraphs 41–46.

241 Joined cases C-52/16 and C-113/16, judgment of the Court of Justice of the EU of March 6, 2018 SEGRO' Kft. v Vas Megyei Kormányhivatal Sárvári Járási Földhivatala (C-52/16) and Günther Horváth v Vas Megyei Kormányhivatal (C-113/16).

Law, which had arisen as a result of judicial interpretations.[242] The Constitutional Court has stated that the applicability of a valid and effective Hungarian law, with effect for all—outside a legislative act—can only be terminated by a decision of the Constitutional Court annulling the law, and the Constitutional Court's decision to that effect is excluded by the Fundamental Law. In the Constitutional Court's view, in the absence of a specific legal act of uniform application in the member states of the European Union, and by an extended interpretation of the judgment of the Court of Justice of the European Union, a court cannot disregard the law in force; on the contrary, the Fundamental Law imposes an obligation on all organs of the state, including the courts, to protect the constitutional identity of our country. The unjustified disregard of the application of existing domestic law violates the rule of law, and the arbitrary disregard of existing domestic law is unconstitutional, for whatever reason; therefore, the unjustified application of EU law or the resolution of a supposed but nonexistent conflict of laws does not justify this. The Constitutional Court has thus established as a constitutional requirement that the court may not disapply Hungarian law in the absence of the involvement of European law. Taking this constitutional requirement into account is not only relevant in the case at hand but also for the courts in general, and in case of doubt in this respect, it is justified to submit a judicial initiative concerning the domestic legislation to the Constitutional Court because, only in this case, the Constitutional Court will be in a position to resolve the possible conflict.[243]

IV. In connection with the previous case, several Constitutional Court decisions[244] have been made on the termination of the usufruct by law. Constitutional Court Decision 25/2015 was based on the former Article 108 of the Implementation Land Act, namely the provision according to which contracts for the transfer of the right to use the land by the holder of a usufructuary right between non-close relatives, which was in force on April 30, 2014 for an indefinite period or which is for a definite period expiring after April 30, 2014, shall be terminated by operation of law on September 1, 2014. In this case, among other things, the right to property enshrined in Article XIII of the Fundamental Law was examined. On July 14, 2015, the Constitutional Court ruled that the legislator had failed to lay down rules allowing for the compensation of exceptional pecuniary losses relating to valid contracts that could not be enforced in the settlement of accounts between the contracting parties, in relation to usufructuary rights or rights of use *in rem* terminated under Article 108 of the Implementation Land Act. The panel called on the legislator to remedy the unconstitutional omission by December 1, 2015. In the reasoning of the decision, the panel explained that a statutory modification of a contract should, as far as possible, consider the equitable interests of each party (i.e., such a modification should also seek to achieve a balance of interests). According to the constitutional judges, legislative intervention is a

242 Constitutional Court Decision No. 11/2020, paragraph 53.
243 Constitutional Court Decision No. 11/2020, paragraphs 58–61.
244 See Constitutional Court Decision No. 3199/2013 on the *ex lege* termination of usufruct on agricultural land, Constitutional Court Decision No. 25/2015 on the settlement rules for the termination of usufruct and usufruct rights.

matter of responsibility and must not cause disadvantages that are not justified by its purpose. By contrast, the contested legislation, by its very nature, does not strike the right balance between the restriction in the public interest and the protected rights of the persons concerned.[245] The questions relating to Article 108 of the Implementation Land Act have also been raised in the judgments of the Court of Justice of the European Union and will be dealt with in detail there.

V. In Constitutional Court Decision No. 3242/2017 on the acquisition of property by legal persons, concerning Article XIII of the Fundamental Law guaranteeing the right to property, the Constitutional Court rejected the judicial initiative to declare and annul Article 33(4) and Article 70(7) of the Land Transfer Act unconstitutional. According to Article 33(4) of the Land Transfer Act,

> "if the parties apply to the courts to establish the occurrence of adverse possession, the acquiring party must obtain a certificate from the agricultural administration body that the conditions for the acquirement of the property under this Act are fulfilled before bringing the action."

Under Article 70(7) of the Land Transfer Act, "the provisions [of the Land Transfer Act] shall not apply if the action to establish the occurrence of adverse possession was brought before the court before 30 April 2014." As stated in the initiative, an action was pending before the court to establish the adverse possession of part of the immovable property that is land. The plaintiff in the lawsuit is a legal person, who has indicated a date prior to the entry into force of the Land Transfer Act (i.e., May 1, 2014) as the date on which the acquisition occurred. Part of the respondent's property had been in the plaintiff's possession for a period exceeding the statutory period of adverse possession. The Land Transfer Act prohibits legal persons from acquiring ownership over arable land. The judge proposing the initiative pointed out that if the legal person plaintiff proves the adverse possession in the lawsuit, it is an acquirer of property outside the land register from the date on which the adverse possession occurred. The plaintiff's application for the issue of an official certificate had been rejected by the agricultural administration body, and in addition, the plaintiff brought the action after the date established in the Land Transfer Act. In the view of the judge proposing the initiative, those two provisions, taken together, make it impossible to register in the land register property acquired before their entry into force, thus depriving the owner of the property right acquired earlier by way of adverse possession, which is unconstitutional. The Constitutional Court declared the petition to be unfounded. The legal question raised in the case is that the plaintiff is alleged to have adversely possessed the land concerned under the old legislation, but this was only discovered after the entry into force of the Land Transfer Act. The fundamental difference between the two regulatory environments is that under the current provisions, it is not possible to establish the ownership of the plaintiff as a legal person by way of adverse possession.

245 Constitutional Court Decision No. 25/2015, paragraphs 58–67.

In the panel's view, the Land Transfer Act ultimately limits the protection of acquired property but does so in the public interest, with sufficient time to prepare for and thus in an avoidable way. The Constitutional Court has therefore held that the contested provisions of the Land Transfer Act neither infringe the prohibition of retroactivity nor restrict the fundamental right to property in an unconstitutional manner.[246]

VI. The right to property[247] and the protection of natural resources[248] were examined in Constitutional Court Decision 24/2017, in relation to the inheritance of land by testamentary disposition. The petitioner requested that the Constitutional Court declare the definition of agricultural producer,[249] the land acquisition limit of 1 hectare for non-producers,[250] and the acquisition of land by testamentary disposition[251] unconstitutional. The petitioner inherited three plots of arable land by testamentary disposition. The notary in charge of the case applied to the competent government office for an official certificate, which was refused on the grounds that the land owned by the petitioner (heir in the testament) already exceeded 1 hectare and the petitioner was not an agricultural producer, which means any further acquirement of land would result in a breach of the restriction on the acquisition of property and that the conditions for the acquisition of property under the contested provision of the law were not met. In view of this, the notary transferred the agricultural immovable property to the Hungarian state in accordance with the order of intestate succession. In the petitioner's view, the contested decision infringes the principle of the rule of law, disproportionately restricts fundamental rights, and violates the right to property and the principle of equality.

According to the Constitutional Court, a testamentary heir does not currently receive compensation from the state if they do not acquire the land intended for them because the authority, based on land acquisition restrictions, refused to approve it. The Constitutional Court ruled that this omission of the legislature was unconstitutional and that the right to inheritance may be restricted in the public interest, but the legislator must compensate the testamentary heir who did not acquire the land for this reason. In addition to establishing the legislator's omission, the panel ruled that the testamentary disposition in respect of which the authority refused to approve the acquisition was not invalid; if the testamentary heir is refused official approval, there is a financial disadvantage that is not compensated by law (i.e., the requirement of proportionality provided for by the Fundamental Law is not met). To correct the omission, it is necessary for the testamentary heir to receive pecuniary compensation from the state, which is a necessary heir. The Constitutional Court, therefore, found an infringement of fundamental rights by omission and called on the Parliament to

246 Constitutional Court Decision No. 3242/2017, paragraphs 20–24.
247 Article XIII of the Fundamental Law.
248 Article P) of the Fundamental Law.
249 Article 5(7) of the Land Transfer Act.
250 Article 10(2) of the Land Transfer Act.
251 Article 34(1) and (3) of the Land Transfer Act.

establish a compensatory rule by December 31, 2017; it also annulled the last sentence of Section 34(3) of the Land Transfer Act.[252]

VII. In addition to the above, the Constitutional Court has dealt with several other cases[253] relating to the acquirement of agricultural land, which will not be discussed in detail due to space constraints.

4. Hungarian land law in the light of EU law

4.1. The relationship between Hungarian land law and EU law until the expiry of the land acquisition derogation period

I. Hungary declared its intention to join European integration and then the European Community, as early as after the regime change. In the negotiations on the regulation of agricultural land, which started at that time, the negotiating partners treated the issues of acquisition of ownership and acquisition of use separately from the outset. Thus, while the European Agreement, which was meant to express the country's intention to join the European Union and was promulgated in Hungary by Act I of 1994, applied the principle of national treatment to the use of land by citizens of the member states of the European Community from the very beginning, different provisions were applied to the acquisition of land. In the European Agreement between Hungary and the European Community (later the European Union), which settled several issues, the question of land ownership was defined in relation to the establishment of Community companies and nationals (Article 44). The issue concerning the freedom of establishment has arisen regarding the date by which the applicant country must ensure "national treatment" for companies and nationals in the Community. The ownership, sale, long-term lease, or tenancy of immovable property, land, and natural resources was included in a so-called "perpetual list of exceptions," under which Hungary was not required to introduce national treatment for EU companies and citizens in respect of agricultural land until the date it became a full member of the European Union.[254]

252 Constitutional Court Decision No. 24/2017, paragraphs 34–44.

253 See, in particular, Constitutional Court Decision No. 3353/2021 on the right of prelease, Constitutional Court Decision No. 3297/2019 on the resolution of the local land commission and on legal remedies, Constitutional Court Decision No. 3224/2019 on the regulation of local land commissions, Court Decision No. 22/2018 on the amendment of a lease contract for agricultural lands, Constitutional Court Decision No. 20/2018 on the extension and retroactivity of the lease contract, Constitutional Court Decision No. 18/2018 on the authorization of a sales contract by the public authorities and land protection fine, Constitutional Court Decision No. 3255/2018 on the refusal to authorize a lease contract, Constitutional Court Decision No. 3278/2017 on the cardinal act requirement in connection with the amendment of the Implementation Land Act, Constitutional Court Decision No. 3146/2015, and Constitutional Court Decision No. 1120/2014 on the acquisition of the right to use agricultural land.

254 Cf. Prugberger, 1998, pp. 276–277.

II. In 2003, the Treaty of Accession was signed. In this, the issue of land acquisition was no longer regulated in the context of establishment but in the context of the free movement of capital, and an additional period of exemption was negotiated until the full implementation of the national treatment principle, as was the case with other countries that joined in 2004 and afterwards.[255] Before going into the detailed rules, it is important to note that this area was not included in the Treaty of Accession for countries that joined before 2004; in other words, it has become a permanent feature of the Treaty of Accession for countries that joined in 2004 and afterwards.

Pursuant to the Treaty of Accession and its Annex X, point 3 on the free movement of capital, Hungary has succeeded in obtaining certain exemptions for the acquisition of real estate: (a) the acquisition of ownership of real estate not constituting arable land by nationals of other member states; and (b) the acquisition of agricultural land (i.e., arable land) by natural persons not residing in Hungary or not being Hungarian nationals, or by legal persons.

In the latter case on arable land, Hungary may maintain, for 7 years from the date of accession (i.e., until 2011), the prohibition on the acquirement of agricultural land by natural persons not residing in Hungary or not being Hungarian citizens *as well as by legal persons*, included in its legislation in force at the time of signing the Treaty of Accession. However, even during this transitional period of 7 years (moratorium), certain rules protect the interests of nationals of member states to a certain extent, which means that a national of a member state or a legal person established under the legislation of another member state may not be treated less favorably in respect of the acquisition of agricultural land than they were treated on the date of signature of the Treaty of Accession. Furthermore, nationals of a member state may not be subject to stricter restrictions than nationals of third (i.e., non-EU) countries. While the above text of the Treaty of Accession is similar to the derogation rules of other member states, Hungary's derogation was unique compared to the transitional derogation arrangements of the countries that joined in 2004 and 2007 in that it also applied to legal persons (such accession provisions were later adopted for Croatia). This may be the reason why, while in other new member states, which also had derogations, we often heard of foreigners acquiring land *lawfully* during the derogation period, typically through their interests in domestic legal persons, in Hungary, the acquisition of land by foreigners—with certain exceptions—typically, if not exclusively, meant the *unlawful* acquisition of land, and these transactions were most often referred to by the common name of "fraudulent contract."

During the 7-year moratorium, however, nationals of member states had the possibility to acquire ownership of Hungarian arable land. Under this provision, nationals of another member state who wished to establish themselves in Hungary as self-employed agricultural producers and who had been legally resident and engaged in agricultural activities in Hungary for at least 3 years continuously were allowed to acquire ownership of Hungarian arable land and were not subject to any different

255 Cf. Szilágyi, 2010; Szilágyi 2017.

rules and procedures from those applicable to Hungarian nationals. This possibility was also regulated in detail in the Arable Land Act, which was in force from our accession until May 2014, by transposing and supplementing this provision of the Treaty of Accession. However, it should be noted that, especially after 2010,[256] few people made use of this land acquisition option.

Annex X to the Treaty of Accession also provided for the possibility of extending the 7-year moratorium. Under the rules, with sufficient evidence that there will be a serious disturbance or threat of serious disturbance on the agricultural land market in Hungary at the end of the transitional period, the Commission shall, at the request of Hungary, decide to extend the transitional period for a maximum of 3 years. On the basis of the Parliament's decision,[257] Hungary has attempted to extend the 7-year moratorium, taking into account, *inter alia*, that (a) the EU agricultural support to Hungary has only reached the average of the old EU member states from 2013 onwards; (b) average land prices in Hungary are still significantly below those of most EU member states, threatening to seriously disrupt the agricultural land market after 2011; (c) the land consolidation processes that started after the regime change was not (and still is not) completed. The Commission finally agreed[258] to extend the land moratorium until April 30, 2014; this was a good reflection of the fact that Hungary took over the rotating presidency of the EU Council at the beginning of 2011.

III. However, before the moratorium expired, the legislator now had to create the concept of a new land regime. In developing the legal basis for this concept, the Hungarian legislator had three sources, in particular, to draw on. Firstly, the primary and secondary sources of law of the European Union (mainly primary sources of law for land acquisition rules); secondly, the case law of the Court of Justice of the European Union; and thirdly, the national land law of the member states that had already joined the EU. The following can be said of these three sources: (a) the Treaty on the Functioning of the European Union (TFEU) is a key source of primary EU law, but its provisions on land acquisition are principles and objectives (free movement of capital and persons, CAP objectives) that lack detail (i.e., are too generic); (b) although the case law of the Court of Justice of the European Union interprets the aforementioned principles, very few concrete cases exist on land acquisitions, and the case law of the Court of Justice of the European Union is constantly changing. Consequently, even in the light of the case law of the Court of Justice of the European Union, it is not always clear how the principles of the TFEU should be applied when drafting new legislation; (c) *the national legislation of the previously acceded member states* serves as a model for

256 Personal statement by *Attila Simon*, Deputy State Secretary of the Ministry of Rural Development, at the conference 'Hungarian wine as an object of legal protection' organized by MTA-MAB, the Hungarian Lawyers' Association and ME-ÁJK on November 11, 2011 at the MTA-MAB Headquarters in Miskolc.

257 Decision No. 2/2010 (18.II.) of the Hungarian Parliament on the need to extend the prohibition on the acquisition of agricultural land by non-Hungarian natural persons and legal entities.

258 See EU Commission Decision 2010/792/EU (12.20.2010)

the new member states,[259] but it is worth pointing out that, on the one hand, the legislation of other member states cannot be taken over one by one due to the differences in their legal systems (i.e., the legislation of the new member states will necessarily be different from that of the model country when using a model)[260]; on the other hand, it is far from certain that the legislation of the model country conforms with EU law. The latter situation may arise for several reasons. For example, the legislation of the model country may never have been examined by the Commission of the European Union or may not have been referred to the Court of Justice of the European Union, or, if it has been, the case law of the Court of Justice of the European Union may have changed in the meantime.[261]

4.2. The relationship between Hungarian land law and EU law after the expiry of the land acquisition derogation period

In connection with the Hungarian land law legislation adopted at the end of the land acquisition derogation, the Commission of the European Union has initiated infringement proceedings, and, separately, preliminary ruling proceedings have also been initiated before the Court of Justice of the European Union.[262] The following points are worth highlighting in this context.

In the context of the EU's investigation of the Hungarian land use regime, it is worth noting that Hungary has so far been subject to two infringement procedures. Firstly, the Commission of the European Union initiated proceedings in a well-defined segment of the land regime, namely the *ex lege* termination of usufructuary rights established by contract between non-close relative (hereinafter: the usufructuary case)[263] and then infringement proceedings were initiated in respect of the Hungarian land regime as a whole[264] (as in the case of the other countries that joined the EU in 2004; hereinafter: the global case). It is important to note that in the meantime (i.e., in parallel to the infringement proceedings), preliminary rulings were also issued in the usufruct case, which is also worth mentioning in the context of the presentation of the usufruct case.

259 Prugberger and Szilágyi, 2004, pp. 38–41.
260 In applying the previous case law of the CJEU to the present case, we must be cautious "because the laws of the Member States on land acquisition differ in form and in the objectives pursued"; Opinion of the Advocate General in Case C-370/05 (Reported October 3, 2006), paragraph 23. See also: Korom, 2009, p. 15.
261 For similar reasons, *Ágoston Korom* speaks of "land policy uncertainties"; Korom, 2013, pp. 22–23.
262 See Korom, 2021, pp. 101–125.
263 The usufructuary case (Infringement 2014/2246, i.e. INFR(2014)2246) is described in detail: Andréka and Olajos, 2017, pp. 410–424. Press releases on the case:
https://ec.europa.eu/commission/presscorner/detail/hu/IP_14_1152
https://ec.europa.eu/commission/presscorner/detail/hu/IP_16_2102
264 Infringement No 2015/2023; i.e. INFR(2015)2023. Press releases on the case:
https://ec.europa.eu/commission/presscorner/detail/hu/IP_15_4673
https://ec.europa.eu/commission/presscorner/detail/hu/IP_16_1827

I. As regards the global case, the following should be highlighted, based mainly on the scientific paper by Tamás Andréka.[265]

In the global case, first, it is worth noting that in the procedure initiated by the Commission of the European Union, Hungary succeeded in having its arguments accepted regarding several concerned Hungarian provisions that the measures comply with EU law. This is how the scope of the provisions on (a) the procedural role of the local land commission, (b) the land acquisition and land possession limit, (c) the system of preemption and prelease entitlements, and (d) the duration of the lease was finally excluded from the infringement procedure, among others.[266]

All these measures—now considered EU law compliant—are critical elements of Hungarian land law. However, in the ongoing infringement proceedings, the Commission of the European Union continues to challenge their legality under EU law of institutions such as (a) the prohibition on legal persons to acquire and the prohibition of transformation, (b) the requirement of professional competence of agricultural producers, (c) the non-recognition of practice acquired abroad, (d) the self-farming obligation, and the Commission of the European Union also questions (e) the objectivity of the conditions for the prior authorization of sales contracts.[267] Among the issues challenged, the prohibition on legal persons to acquire land is one of the pillars of current Hungarian land law.

In relation to the inability of legal persons to acquire land, it is important to point out that (a) current land law applies not only to the acquisition of land by foreign legal persons but also, with certain exceptions, to domestic legal persons; (b) the general prohibition on legal persons applies only to the acquisition of land and not to the use of land.

The prohibition on legal persons to acquire land was already part of Hungarian land law before the new land regime, from 1994, and is one of the unique features of Hungarian land law in the region. The importance of the institution is summarized by Tamás Andréka:

> "The aim is to prevent the development of a complex chain of ownership that is in practice uncontrollable, which would contradict the aim of preserving the population retention capacity of the countryside, as it would be impossible to control the land possession limit and other acquisition conditions."[268]

In this sense, in our opinion, if the Hungarian legislator were to lift the prohibition on legal persons acquiring land, several other Hungarian provisions that the Commission of the European Union has otherwise deemed to be lawful would become "permeable" (so to speak, a kind of unwanted gap would be created in the strict web

265 Andréka and Olajos, 2017, pp. 410–424.
266 Andréka and Olajos, 2017, pp. 410–424.
267 Andréka and Olajos, 2017, pp. 410–424.
268 Andréka and Olajos, 2017, pp. 410–424.

of rules); in other words, this legal institution is not merely one of the fundamental institutions of the Hungarian land regime but a kind of conceptual framework, its spirit. Its possible abolition would entail a major rethinking of the Hungarian land law in force from 2014. The case would also set a precedent at the EU level[269] if the Court of Justice of the European Union were to rule on the issue.

II. It is important to point out, regarding the infringement proceedings of the usufruct case, that the judgment was preceded by the combined judgment in the preliminary ruling procedure in usufruct cases. With this in mind, among the cases on Hungarian land law concerning the *ex lege* termination of usufructuary rights based on a contract between non-close relatives, we first present in detail Joined Cases C-52/16 and C-113/16 (i.e., the SEGRO and Horváth judgments),[270] which was decided in a preliminary ruling procedure, and then briefly refer to an order of May 31, 2018 in Case C-24/18,[271] also decided in a preliminary ruling procedure, and Case C-235/17, a usufruct case,[272] decided in infringement proceedings. Finally, the most recent preliminary ruling case, C-177/20, the so-called Grossmania case,[273] is analyzed. Before describing the cases, it ought to be pointed out that this provision of Hungarian land law is also the subject of a decision of the Hungarian Constitutional Court, which has already been described in detail in subchapter 3 of this chapter.

II.1. In the Joint Cases C-52/16 and C-113/16 (i.e., the SEGRO and Horváth judgments), the provisions of the Land Transfer Act and the Implementation Land Act, which *ex lege* abolish usufructuary rights, as described above, were examined by the Court of Justice of the European Union in the light of Article 49 TFEU (freedom of establishment), Article 63 TFEU (free movement of capital), and also Article 17 (right to property) and Article 47 (right to a fair trial) of the Charter of Fundamental Rights of the European Union. In light of the case law of the Court of Justice over the last decade and a half, it is not surprising that the Court has delivered its judgment essentially in the context of the free movement of capital within the EU legal concept of land acquisition, which is situated at the intersection of positive and negative integration models,[274] and within that, nowadays, more toward the negative integration model.[275] In particular, in light of this approach of the Court of Justice, it was decided

269 In the Ospelt case, the CJEU found that an Austrian (concretely: Vorarlbergian) regulation restricting the acquisition of property of a Lichtenstein foundation (i.e., a legal person) is contrary to the EU law; however, the case was so different in principle that its application to the Hungarian land regime is not straightforward.

270 Joined cases C-52/16 and C-113/16, judgment of the Court of Justice of the EU of 6 March 2018, SEGRO' Kft. v Vas Megyei Kormányhivatal Sárvári Járási Földhivatala (C-52/16) and Günther Horváth v Vas Megyei Kormányhivatal (C-113/16).

271 Case C-24/18, order of the Court of Justice of the EU of 31 May 2018, István Bán v KP 2000 kft., Edit Kovács.

272 Case C-235/17, judgement of Court of Justice of the EU of 21 May 2019, European Commission v Hungary.

273 Case C-177/20, judgement of the Court of Justice of the EU of 10 March 2022, Grossmania v Vas Megyei Kormányhivatal.

274 Korom, 2021, pp. 101–125; Szilágyi, 2017; etc.

275 Korom, 2021, pp. 101–125; Szilágyi, 2017; etc.

that the Hungarian legislation constitutes an obstacle to the free movement of capital and that it cannot be justified on the basis of the principle of proportionality.[276] More interesting, however, was the position of the Court of Justice on the two provisions of the Charter of Fundamental Rights referred to. In this respect, it may be noted that no particular breakthrough in the case law has been made, with the Court of Justice stating that, having found an infringement of the free movement of capital, it was now "not necessary, in order to resolve the dispute in the main proceedings, to examine the national legislation in question in the light of Articles 17 and 47 of the Charter."[277]

II.2. With regard to the order of May 31, 2018 in reference to a preliminary ruling, Case C-24/18, the Court of Justice of the European Union ruled that the application was inadmissible. The question referred by the national court for a preliminary ruling was the following:

> "Does it infringe Articles 49 and 63 TFEU if a legislation of a Member State which, by operation of law, terminates, without compensation, the right of use of land for agricultural and forestry purposes in cases where the property to which the right of use relates is acquired by a new owner by way of execution and the user of the land has not benefited from agricultural rural development support from EU or national sources linked to land, which is subject to a statutory obligation to use the land for a certain period?" The Court of Justice, considering the application manifestly inadmissible, closed the case by order, arguing that "it appears from the order for a preliminary ruling in the present case that all elements of the main legal dispute are confined to Hungary. The dispute in question concerns the invalidity or nullity of a lease of land situated in Hungary concluded between a Hungarian national and company established in that Member State." [278] It added that "in the present case, the referring court does not indicate to what extent the dispute before it, despite its exclusively internal nature, is connected with the provisions of the TFEU concerning freedom of establishment and the free movement of capital, a connection which, for the purposes of the resolution of that dispute, requires the interpretation requested in the context of the reference for a preliminary ruling."[279]

II.3. In its preliminary judgment in Case C-235/17 on usufruct, the Court of Justice of the European Union ruled against Hungary in relation to the Hungarian legislation already known from the SERGO judgment. The interesting aspect of the case is that, this time, in addition to Article 63 TFEU on the free movement of capital the Court of Justice also assessed the merits of Article 17 of the Charter of Fundamental Rights on

276 Joined Cases C-52/16 and C-113/16, paragraphs 81–126 and 127.
277 Joined Cases C-52/16 and C-113/16, paragraph 128.
278 Case C-24/18, paragraph 16.
279 Case C-24/18, paragraph 19.

the right to property and found that it had been infringed. The Court of Justice held that the right of usufruct governed by Hungarian law fell within the scope of Article 17 of the Charter of Fundamental Rights, basing its interpretation on the case law of the European Court of Human Rights.[280] The Court of Justice also considered the right of usufruct to be a "lawfully acquired" right[281] and held that "the cancellation of usufructuary rights brought about by the contested provision constitutes a deprivation of property within the meaning of Article 17(1) of the Charter."[282] The Court of Justice also added that

"although that provision [of the Charter of Fundamental Rights] does not lay down an absolute prohibition on persons being deprived of their possessions, it does, however, provide that such deprivation may occur only where it is in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss."[283] "In any event, the contested provision does not satisfy the requirement laid down in the second sentence of Article 17(1) of the Charter, according to which fair compensation must be paid in good time for a deprivation of property such as the loss of the rights of usufruct concerned,"[284] which is why the Court of Justice found that "it must be held that the deprivation of property affected by the contested provision cannot be justified on the ground that it is in the public interest; nor are any arrangements in place whereby fair compensation is paid in good time. Accordingly, that provision infringes the right to property guaranteed by Article 17(1) of the Charter."[285]

To execute the judgment in C-235/17, Act CL of 2021 was enacted, commonly referred to as the Compensation Act, Article 128 of which, largely by amending the Implementation Land Act, created the possibility of appropriate compensation for *ex lege* termination of usufructuary rights.

II.4. The preliminary ruling judgment of March 10, 2022 in the so-called Grossmania case, C-177/20, is one of the most recent judgments on the subject. The case is again based on the 2013 Hungarian legislation which, as of May 1, 2014, abolished usufructuary rights in favor of persons who are not closely related to the owners of agricultural land located in Hungary. Such a right of usufruct was cancelled in the land register in the case of Grossmania, a company owned by nationals of other EU member states, which, although it did not appeal against the cancellation, requested the Hungarian authorities to reregister its right of usufruct on the property concerned following the SEGRO judgment. Since the Hungarian authority concerned was unable to do so under the rules in force at the time, Grossmania challenged the administrative decision

280 Case C-235/17, paragraphs 69–72 and 81.
281 Case C-235/17, paragraph 73.
282 Case C-235/17, paragraphs 82, 85–86; In paragraph 85, the Court of Justice repeatedly refers to the case law of the European Court of Human Rights.
283 Case C-235/17, paragraph 87.
284 Case C-235/17, paragraph 125; In paragraph 128, the Court of Justice repeatedly refers to the case law of the European Court of Human Rights.
285 Case C-235/17, paragraph 129.

before the competent Hungarian court, which referred the matter to the Court of Justice. Several points of the judgment of the Court of Justice may be important and interesting; however, in the present study, we consider it important to highlight the provisions relating to compensation, namely that, according to the Court of Justice, it is the duty of the Hungarian authorities and courts to take all measures capable of eliminating the unlawful consequences of national legislation. Such measures may consist, in particular, in the reregistration of usufructuary rights which have been unlawfully extinguished in the land register. Should such reregistration prove impossible because it would prejudice rights acquired in good faith by third parties following the cancellation of the usufructuary rights concerned, the former holders of the extinguished usufructuary rights should be granted a right to monetary or other compensation of a value sufficient to compensate for the economic loss resulting from the termination of those rights. In addition, those former holders should also be entitled to compensation for the loss suffered as a result of that termination, provided that the conditions laid down in the case law of the Court of Justice are met.[286]

286 Case C-177/20, paragraphs 67–75.

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| Chapter 7 |

Poland: An Attempt at a Balance Between the Protection of Family Holding and the Freedoms of the European Union

Paulina LEDWOŃ

ABSTRACT

The aim of this article is to present the problem of acquisition (including cross-border acquisition) of agricultural real estates and agricultural holdings in the Republic of Poland, with particular emphasis on the issue of regulating the acquisition of agricultural real estates as an instrument for the protection of family farms. By analyzing current legislation, jurisprudence, and doctrine, the author tries to discern the key issues in the field of agricultural law. Starting from fundamental notions on which the whole article is based, such as real estate, agricultural real estate (land), agricultural holding, individual farmer, and family holding, the author proceeds to detail issues concerning the acquisition of ownership of agricultural land (holdings), including inheritance, acquisition of other rights on agricultural land, establishment of a bonding relation in the form of a lease of agricultural land, and acquisition of shares (stocks) in companies that own agricultural land. Next, the author presents the constitutional norm of the agricultural system of the Polish state and attempts to answer the question of whether the Commission proceedings have been initiated against Poland in connection with the breach of obligations. In conclusion, the author concludes that a considerable part of the issues taken up by the European Commission in the Interpretative Communication touches upon the Polish legal instruments of agricultural law.

KEYWORDS

agricultural land, agricultural real estate, agricultural holding, individual farmer, Act on Shaping of the Agricultural System, Act on Acquisition of Real Estate by Foreigners, Poland

1. Theoretical backgrounds and summary of the national land law regime

1.1. Introduction

The shaping of the agricultural system of the Polish state and the legal status of the family holding have a long history. The very notion of an agricultural system appeared in the interwar period. The Act of March 17, 1921 (the March Constitution) provided in

Ledwoń, P. (2022) 'Poland: An Attempt at a Balance Between the Protection of Family Holding and the Freedoms of the European Union' in Szilágyi, J. E. (ed.) *Acquisition of Agricultural Lands: Cross-border Issues from a Central European Perspective.* Miskolc–Budapest: Central European Academic Publishing. pp. 199–217. https://doi.org/10.54171/2022.jesz.aoalcbicec_8

art. 99 in fine that the agricultural system of the Republic of Poland was to be based on agricultural holdings capable of proper production and constituting personal property. This provision was kept in force by the April Constitution of April 23, 1935. A fundamental change in the approach to the agricultural system took place with the introduction of the socialist system in Poland. The political aim of the authorities of that period was to win peasants for the introduction of the socialist system and, subsequently, the collectivization of agriculture. In the People's Republic of Poland, the Constitution of July 22, 1952 emphasized the superiority of state and cooperative forms of management in agriculture over individual forms. The political decisions of that era, also concerning agriculture, changed under the influence of strong social movements such as that of October 1956, December 1970, and especially, the rise of solidarity in 1980. Since 1989, there has been no regulation of the agricultural system in the basic law. The provision referring to the agricultural system of the state and the family holding reappeared in the currently binding Constitution of the Republic of Poland of April 2, 1997 (hereinafter: the Constitution). It is worth mentioning that, at the beginning of the 1990s, Poland entered the orbit of the European Union. Both the fact that Poland became a party to the European Agreement establishing an association between the Republic of Poland and the European Communities and their member states and that it finally joined the EU in 2004 have had a significant impact on the country's current agricultural policy.[1]

1.2. Sources of law on the acquisition of agricultural land

The agricultural system of the Polish state plays a significant role in the systematics of sources of law, which is evidenced by the very fact that it is referred to in the Constitution, the main and fundamental legal act of the Republic of Poland. In accordance with art. 23 of the Constitution, a family holding is the basis of the state's agricultural system.

The second legal act that plays a key role in the acquisition of agricultural land is the Act of April 11, 2003 (hereinafter: a.s.a.s.), which defines the principles of shaping the state's agricultural system by improving the area structure of agricultural holdings, preventing excessive concentration of agricultural real estate, ensuring that agricultural activity is conducted on agricultural holdings by persons with appropriate qualifications, supporting the development of rural areas, and implementing and applying agricultural support instruments and active state agricultural policy (art. 1 of the a.s.a.s.).

Another legal act that influences the way in which the state's agricultural system is shaped is one of the most important acts in the Polish law: the Act of April 23, 1964 Civil Code (hereinafter: c.c.), which, *inter alia*, determines key definitions for agricultural law, such as agricultural real estates or agricultural holdings, and regulates the issues of co-ownership of agricultural real estates and agricultural holdings, the lease of agricultural land, or the inheritance of an agricultural holding.

1 Korzycka, 2019.

In addition, regulations concerning the acquisition of agricultural real estate (land) are included in such acts as the Act of March 24, 1920 on the Acquisition of Real Estate by Foreigners (hereinafter: a.a.r.e.f.) or the Act of October 19, 1991 on the Management of Agricultural Real Estate of the State Treasury (hereinafter: a.m.a.r.e.).

1.3. The concept of agricultural land

When analyzing the notion of agricultural real estate, firstly, the notion of real estate itself should be explained. Pursuant to art. 46 § 1 of the c.c., real estates are parts of the land that constitute a separate subject of ownership (land) as well as buildings permanently connected with the land or parts of such buildings, if under special provisions they constitute an object of ownership separate from the land. Based on this legal definition, three types of real estate can be distinguished: land real estate, building real estate, and premises real estate.

From the category of land property, the legislator distinguishes the subcategory of agricultural real estate.[2] Art. 46^1 of the c.c. in principio emphasizes the land nature of agricultural real estate. In accordance with this provision, agricultural real estate (agricultural land) is real estate that is or may be used for conducting manufacturing activity in agriculture within the scope of plant and animal production, not excluding horticultural, orchard, and fishery production. This provision may indicate that the concept of "agricultural real estate" is the same as that of "agricultural land." Agricultural real estate is a unit of property and is a concept of private law, whereas agricultural land is not a unit of property and is a concept of public law. However, for the purpose of this article, these terms are assumed to be interchangeable.

The specific feature that distinguishes agricultural real estate from other types of real estate is its intended use. Only those properties that are or may be used for agricultural production activities in the field of plant and animal production are considered to be agricultural, not excluding horticultural, orchard, and fishery production. The list of types of production is exemplary. Certainly, such manufacturing activity also includes beekeeping, cotton growing, or silkworm rearing.[3] On the other hand, the scope of production activity in agriculture does not include forestry production, although forest land may be included in an agricultural holding.[4]

As stipulated in art. 46^1 of the c.c., agricultural real estate is such real estate that is both actually used to conduct production activities in agriculture and potentially used in the future for such activities.

The definition of agricultural real estate from art. 46^1 of the c.c. is universal and applies to all other acts concerning real estate, unless they contain provisions to the contrary. An example of another act defining the notion of agricultural real estate—albeit with reference to the provision of the c.c.—is the a.s.a.s. Pursuant to art. 2 point 1 of the a.s.a.s., on the basis of this act, the term "agricultural real

2 Wierzbowski, 2014.
3 Stańko, 2018.
4 Wojciechowski, 2019.

estate" should be understood as defined in the c.c., excluding real properties located in areas designated in the zoning plans for purposes other than agricultural. As can be seen from the above definition, classifying real estate as agricultural is a multi-stage process. Firstly, it must be established whether, in the specific factual situation, a given real estate falls under the designations set out in art. 46^1 of the c.c. Once it is established that a given real estate meets the criteria of art. 46^1 of the c.c., it is necessary to determine whether the given real estate is covered by the zoning plan and what its intended use is. In the methodology of the application of the a.s.a.s., after it has been ascertained that an agricultural real estate is the subject of acquisition, it is then determined whether the real estate being acquired is not covered by exemptions from art. 1a-1c of the a.s.a.s. (e.g., the agricultural land is part of the Agricultural Property Stock of the State Treasury, has an area of less than 0.3 ha, or is an internal road). These features do not imply that the property ceases to be agricultural but only that the restrictions of the a.s.a.s. do not apply to it. In addition, if the real property does not meet any of the prerequisites specified in art. 2 point 1 of the a.s.a.s., legal transactions with its share take place, bypassing specific solutions from the a.s.a.s. Therefore, the quoted definition is a kind of definition by exclusion.[5]

1.4. The concept of agricultural holding and family holding

Another term that is immensely important on the grounds of agricultural law is "agricultural holding." In principle, an agricultural holding is defined in art. 55^3 of the c.c. In accordance with the current wording, it is considered to be agricultural land, including forestry land, buildings or parts thereof, equipment, and livestock, if they constitute or may constitute an organized economic unit, as well as rights connected with running an agricultural holding.

An agricultural holding in the sense given to it by the abovementioned article is a set of tangible and intangible components, among which the most important—and constituting the existence of an agricultural holding itself—is attributed to agricultural land. Their special position is connected with the fact that only the determination of the existence of agricultural land allows for the qualification of a given set of components as an agricultural holding within the meaning of art. 55^3 of the c.c.[6]. As stated by the Supreme Court in the decision of December 9, 2010 (signature: IV CSK 210/10), the definition of an agricultural holding in art. 55^3 of the c.c. has introduced a hierarchy of material components, putting agricultural land in the first place; without this component, there cannot be an agricultural holding.

Similarly, as in the case of agricultural real estate, the a.s.a.s. defines this notion of agricultural holdings independently. The definition of an agricultural holding, which can be found in art. 2 point 2 of the a.s.a.s., is shaped by two premises. The first is the fulfillment of the criteria necessary for classifying a particular production unit as an agricultural holding within the meaning of art. 55^3 of the c.c. The second is

5 Osajda and Popardowski, 2022.
6 Osajda and Popardowski, 2021.

the maintenance of a minimum area standard for an agricultural land or agricultural lands constituting an agricultural holding, which cannot be smaller than 1 ha. If both prerequisites are not jointly fulfilled, there are no grounds for concluding that a specific production unit is an agricultural holding for the purposes of application of the provisions of the a.s.a.s.[7]

A special type of agricultural holding is a family holding. Its considerable role is confirmed by the fact that the Constitution itself refers to it (art. 23). However, the definition is contained in art. 5 para. 1 of the a.s.a.s., according to which an agricultural holding is recognized as a family holding run by an individual farmer (i.e., a natural person who is the owner, perpetual usufructuary, spontaneous holder or leaseholder of agricultural real estate whose total area of arable land does not exceed 300 ha, possessing agricultural qualifications and residing in the commune where one of the agricultural lands constituting a part of an agricultural holding is located for at least 5 years and personally running this holding for that period [art. 6 para. 1 of the a.s.a.s.]), in which the total agricultural area does not exceed 300 ha.

1.5. Acquisition of agricultural land (agricultural holding) with particular reference to acquisition by inheritance

The acquisition of agricultural real estate is understood as a transfer of ownership of agricultural real estate or the acquisition of ownership of agricultural real estate as a result of a legal transaction or a court or public administration authority ruling as well as any other legal event (art. 2 point 7 of the a.s.a.s.). The definition of acquisition of agricultural real estate is broad and is not limited to a traditional real estate sale agreement.

The issue of acquisition of agricultural real estate, including the terms of acquisition, the buyer's obligations, or the right of preemption, is regulated by the a.s.a.s. The completion of all formalities enabling the acquisition of agricultural land carried out in compliance with the a.s.a.s. is extremely important, since the acquisition of ownership of agricultural real estate (as well as share in co-ownership of agricultural real estate and perpetual usufruct and purchase of shares and stocks in a commercial law company owning agricultural land with an area of at least 5 ha or agricultural land with a total area of at least 5 ha) made in non-compliance with the provisions of the act is invalid (art. 9 para. 1 of the a.s.a.s.). The provisions of the a.s.a.s. apply not only to the acquisition of agricultural real estate but also, respectively, to the acquisition of agricultural holdings (art. 4a of the a.s.a.s.).

A Polish legislator has introduced several mechanisms limiting the trade in agricultural land. Pursuant to art. 2a para. 1 of the a.s.a.s., only an individual farmer may be a purchaser of agricultural real estate, unless the act provides otherwise. Additionally, as mentioned above, an individual farmer is the only person who can run the family holding. Such provisions essentially limit the purchase of agricultural land and family holding by legal persons. In addition, the area of the purchased

7 Osajda and Popardowski, 2022.

agricultural land together with the area of agricultural land constituting a family holding of the purchaser may not exceed the area of 300 ha of agricultural land (art. 2a para. 2 of the a.s.a.s.). However, the legislator has provided for some exceptions to the above, thanks to which entities that are not individual farmers may also purchase agricultural land. In accordance with this, the limitations provided in art. 2a para. 1 and 2 a.s.a.s. do not apply to the acquisition of agricultural land by, *inter alia*, a close relative of the vendor, a territorial self-government unit, the State Treasury, or the National Agricultural Support Centre (hereinafter: NASC) acting on its behalf, certain commercial law companies, or national parks (in the case of acquisition of agricultural land for nature protection purposes). These limitations also do not apply to the acquisition of agricultural land, *inter alia*, with an area smaller than 1 ha, as a result of inheritance or bequest, as a result of division, transformation or merger of commercial law companies, or during execution or bankruptcy proceedings (art. 2a para. 3 of the a.s.a.s.). However, what is the legal situation of other legal persons who would like to acquire an agricultural land? The only way for them to acquire the ownership of the agricultural real estate—in addition to the abovementioned exceptions—is to obtain the consent of the Director General of the NASC, which is expressed by way of an administrative decision (art. 2a para. 4 in fine of the a.s.a.s.). Situations in which the Director General may express consent to the acquisition of agricultural land by such legal persons as capital companies, foundations, registered associations, or cooperatives are enumerated in art. 2a para. 4 of the a.s.a.s. No regulations allow the Director to take into account exceptional circumstances occurring in a given case; therefore, the decision issued by him is binding and not discretionary.[8]

In turn, in the context of acquiring agricultural land by inheritance (regardless of whether the appointment to the inheritance results from the act or the will), the above means that if the inheritance includes an agricultural land (an agricultural holding), the heir can be any entity having the capacity to inherit, does not have to be an individual farmer, and the maximum area standard does not have to be met. Moreover, in the case of an appointment under a will, a legal person may also be an heir. The fact that a person is an heir to an agricultural real estate (an agricultural holding) does not mean that they will definitely keep this agricultural real estate (an agricultural holding). This results from the institution regulated in art. 4 of the a.s.a.s., by which the NASC has the right to acquire agricultural real estate. The right to purchase is vested, *inter alia*, when agricultural land is purchased as a result of inheritance or legacy. The NASC, acting on behalf of the State Treasury, may make a declaration on acquisition of this real estate against payment of the cash equivalent corresponding to its market value and then it has priority to acquire the agricultural real estate in question. However, this right is not absolute and is excluded, *inter alia*, when the acquisition is made by a close relative of the seller as well as a result of statutory inheritance or inheritance by an individual farmer or by an individual farmer as a result of a windup bequest. Acquisition by the NASC is excluded only in the case

8 Bieluk, 2017, p. 28.

of statutory inheritance and where the appointment to the inheritance results from a will, and the exclusion of acquisition is possible only if the testamentary heir is an individual farmer.[9] The acquisition right vested in the NASC raises many doubts; however, it is interesting that art. 4 of the a.s.a.s. has been analyzed by the Constitutional Tribunal. As the Tribunal stated in the judgment of March 18, 2010 (signature: K 8/08), this article is consistent with the Constitution, and it does not infringe the principle of a democratic state of law (art. 2 of the Constitution) and the right to property (art. 21 and 64 of the Constitution).

Another restriction regarding the purchase of agricultural real estate is the fact that the purchaser of agricultural real estate is obliged to run the agricultural holding in which the purchased agricultural real estate is included for at least 5 years from the date of purchase of the latter, and in the case of a natural person, to run the holding personally. Within this period, the purchased real estate may not be sold or given in possession to other entities unless the General Director of the NASC gives their consent due to an important interest of the agricultural property purchaser or a public interest. However, this restriction does not apply, *inter alia*, to agricultural real estate sold or given in possession to a relative or acquired as a result of inheritance, division of inheritance, or legacy (art. 2b of the a.s.a.s.).

Apart from the abovementioned provisions of the a.s.a.s., the inheritance subject is regulated by the provisions of the c.c. Apart from general provisions of inheritance law (art. 922–1057 of c.c.), the Polish legislator has also distinguished provisions that strictly relate to the inheritance of agricultural holdings. These provisions are to be found in art. 1058 and subsequent articles of the c.c. However, due to the amendment of the c.c. of 1990, which repealed some of its provisions, and a judgment of the Constitutional Tribunal of 2001, in which the Constitutional Tribunal stated that some provisions of the c.c. are contrary to the Constitution and should not be applied, many provisions concerning inheritance are now outdated, which means that only the general provisions concerning inheritance should be used.[10]

The next part of the considerations should be devoted to the issue of acquisition of agricultural land by foreigners. Trade in Polish real estate on behalf of foreign entities from the European Economic Area (EEA) and the Swiss Confederation has been significantly liberalized as a consequence of Poland's accession to the European Union; since then, foreigners from the EEA and the Swiss Confederation have not needed a permit to acquire real estate and to acquire or take up shares in companies that are owners or perpetual usufructuaries of real estate located in Poland. The exception was the acquisition of agricultural and forestry properties for a transitional period of 12 years, which expired on April 30, 2016.[11]

Trading in agricultural land in relation to foreigners is regulated not only by the provisions of the a.s.a.s. but also by the a.a.r.e.f. The latter act essentially divides

9 Kremer, 2019.
10 Ibid.
11 Łobos-Kotowska, 2018, p. 28.

foreigners into two categories: foreigners from the EEA and Swiss Confederation and foreigners from other countries. The principle expressed in art. 1 para. 1 of the a.a.r.e.f. applies to the former group; according to it, acquisition of real estate by a foreigner requires a permit. The permit is issued, by way of an administrative decision, by the minister in charge of internal affairs, if the Minister of National Defense does not object, and in the case of agricultural land, if the minister in charge of rural development does not object either. A permit is issued to a foreigner upon application if their acquisition of the real estate will not pose a threat to state defense, security, or public order; if it is not opposed by reasons of social policy and public health; and if the foreigner can demonstrate their ties with the Republic of Poland (art. 1 of the a.a.r.e.f.). In 2020, the Minister of Internal Affairs and Administration issued 76 permits to foreigners for the acquisition of agricultural and forestry properties with a total area of 21.68 ha,[12] while in 2021, it issued 121 permits for the acquisition of agricultural and forestry properties with a total area of 20.50 ha.[13]

A foreigner's obligations to obtain a permit have certain exceptions, which are specified in art. 8 para. 1 of the a.a.r.e.f. (e.g., a foreigner can acquire real estate by residing in the Republic of Poland for at least 5 years after being granted a permanent residence permit, or a long-term EU resident does not require a permit to acquire real estate). However, with regard to citizens and entrepreneurs from the EEA and the Swiss Confederation, a separate rule applies, as set out in art. 8 para. 2 of the a.a.r.e.f: a foreigner belonging to this category is not required to obtain a permit for the acquisition of real estate.

The acquisition of real estate within the meaning of the act is not only the acquisition of the ownership right to real estate but also the acquisition of the right of perpetual usufruct based on any legal event (art. 1 para. 4 of the a.a.r.e.f.). However, it does not apply to limited property rights (e.g., usufruct, easement) or rights arising from contractual relations (e.g., lease). The provisions of the a.a.r.e.f. also do not apply, *inter alia*, to the acquisition of real estate by inheritance or bequest by persons entitled to statutory inheritance (art. 7 para. 2 of the a.a.r.e.f.). If a foreigner who has acquired real estate forming part of the inheritance on the basis of a will fails to obtain permission from the minister competent for internal affairs on the basis of an application submitted within 2 years from the date of inheritance opening, the ownership right to the real estate or the right of perpetual usufruct is acquired by persons who would be appointed to the inheritance pursuant to the act (art. 7 para. 3 of the a.a.r.e.f.). In turn, if a foreigner who has acquired real estate on the basis of a legacy bequest fails to obtain permission from the minister competent for internal affairs on the basis of an application filed within 2 years from the date of the opening of the inheritance, the ownership right to the real estate or the right of perpetual

12 Report of the Minister of the Interior and Administration on the implementation in 2021 of the Act of 24 March 1920 on the acquisition of real estate by foreigners, p. 28. [Online]. Available at: https://orka.sejm.gov.pl/Druki9ka.nsf/0/30C23D9A1C342EDEC125881C003A5002/%24File/2155.pdf. (Accessed: March 30, 2022).

13 Ibid, p. 27.

usufruct are included in the inheritance (art. 7 para. 3a of the a.a.r.e.f.). These regulations apply accordingly to shares or stocks in a commercial company that is the owner or perpetual usufructuary of real estate in the territory of the Republic of Poland (art. 7, para. 4 of the a.a.r.e.f.).

1.6. Acquisition of shares in a company that owns agricultural land

In principle, under the current legal status, there are no specific statutory requirements as to the status or qualifications of persons who may be partners (shareholders) in a company owning agricultural real estate. In particular, they do not have to be individual farmers or show any other connection with agriculture.[14]

Only with regard to the acquisition or taking up of shares or stocks in a commercial company with its registered office in the territory of the Republic of Poland by a foreigner from outside the EEA and the Swiss Confederation does the a.a.r.e.f. establish certain restrictions.[15]

Pursuant to art. 3e para. 1 of the a.a.r.e.f., such an acquisition or taking up, as well as any other legal action concerning shares or stocks, requires a permit from the minister competent for internal affairs if, as a result, the company that owns or perpetually uses real estate on the territory of the Republic of Poland becomes a controlled one. In addition, pursuant to paragraph 2 of the said article, the acquisition or taking up by a foreigner of shares in a commercial company with its registered office on the territory of the Republic of Poland, which is the owner or perpetual usufructuary of immovable property on the territory of the Republic of Poland, requires a permit from the minister competent for internal affairs if the company is a controlled one and the shares are acquired or taken up by a foreigner who is not a shareholder in the company. In this case as well, the a.a.r.e.f. provides certain exceptions to the obligation to obtain a permit; for example, a permit is not required if the company's shares are admitted to trading on a regulated market (art. 3e para. 3 in fine of the a.a.r.e.f.). Importantly, art. 6 of the a.a.r.e.f. establishes the sanction of absolute nullity in the case of acquisition of real estate and acquisition or taking up of shares contrary to the provisions of the act.

On the other hand, with regard to the acquisition of shares and stocks in companies owning agricultural land, the a.s.a.s. refers to the preemptive and acquisition right vested in the NASC acting on behalf of the State Treasury. Pursuant to art. 3a para. 1 of the a.s.a.s., the NASC has a preemptive right to purchase shares and stocks in a capital company (i.e., a limited liability company or a joint-stock company) that is the owner or perpetual usufructuary of agricultural real estate with an area of at least 5 ha or agricultural real estate with a total area of at least 5 ha. This provision does not apply in the case of sale of, *inter alia*, shares and stocks to a relative (art. 3a para. 2 point 2 of the a.s.a.s.) or by the State Treasury (art. 3a para. 2 point 3). In art. 4 para. 1 of the a.s.a.s., the NASC was granted the right to acquire (buy out)—against

14 Czech, 2020.
15 Łobos-Kotowska, 2018, p. 30.

payment—for the benefit of the State Treasury, agricultural real estate which had previously been subject to trade (on a legal basis other than sale agreement). This right has been extended to purchase of shares (stocks) in a commercial law company, the assets of which include agricultural real estate with the total area of at least 5 ha (art. 4 para. 6 a.s.a.s.)—for example, when the shares (stocks) are subject to donation or contributed in kind to another company. This also applies to cases of taking up shares in a company as a result of its share capital increase.[16]

All shares of commercial law companies acquired by the NASC acting on behalf of the State Treasury are part of the Agricultural Property Stock of the State Treasury (art. 8 para. 1 of the a.s.a.s.). In turn, failure to exercise preemptive right by the NASC results in the fact that commercial law companies may, within the limits of the law and taking into account provisions of their statutes, voluntarily manage their shares.

1.7. Acquisition of other rights on agricultural land

The a.s.a.s. regulates the issue of acquisition of the ownership right to agricultural real estate (and agricultural holdings accordingly [art. 4a of the a.s.a.s.]). Additionally, pursuant to art. 2c para 1 of the a.s.a.s., the provisions of the act also apply accordingly to acquisition of perpetual usufruct of agricultural land or share in perpetual usufruct of agricultural land. Land owned by the Treasury and located within the administrative boundaries of cities and towns, land owned by the Treasury located outside those boundaries but included in the city's zoning plan and transferred for the performance of the tasks of the city's management, and land owned by local government units or their unions can be handed over for perpetual usufruct to natural persons and legal persons. In cases provided for in specific legislation, other land owned by the State Treasury, local government units, or associations thereof may also be subject to perpetual usufruct (art. 232 of the c.c.). The land is handed over for perpetual usufruct for a period of 99 years. However, in particularly justified cases, it is possible to let the land for a shorter period of at least 40 years (art. 236 § 1 of the c.c.). Perpetual usufruct generally provides that the perpetual usufructuary may use the land excluding other persons; within the same limits, the perpetual usufructuary may dispose of their right (art. 233 of the c.c.). However, such usufruct must be within the limits specified, inter alia, by other acts, one of which is the a.s.a.s. Consequently, all limitations regarding the acquisition of agricultural land under the a.s.a.s. should also apply to perpetual usufruct.

However, the scope of the act does not cover limited property rights, which in the Polish legal system include usufruct, easement, pledge, and cooperative ownership right to premises and mortgage (art. 244 § 1 of the c.c.). Consequently, these rights are acquired pursuant to the general principles of the c.c. and pursuant to separate provisions as regards the cooperative ownership right to premises and mortgage (art. 244 § 2 of the c.c.). Therefore, even if a given right is connected to agricultural land, the manner of its acquisition proceeds according to the same rules, as if it was not

16 Czech, 2020.

connected to this real estate. Purchasers of limited rights in rem on agricultural land do not have to fulfill any additional requirements to acquire such rights, unlike in the case of acquisition of ownership, share in co-ownership, perpetual usufruct, or share in perpetual usufruct of agricultural land.

1.8. Exploitation of an agricultural property for a longer period under a lease agreement

Similarly to the case of limited property rights, in the case of obligations whose subject matter is the exploitation of agricultural land for a longer period of time (e.g., lease or tenancy), the a.s.a.s. does not regulate this matter (except for the right of preemption of agricultural land by the tenant of such real estate). The general provisions of the civil law apply to them. However, because tenancy of agricultural land plays an important role in shaping Poland's agricultural system, it is worth devoting this part of the article to this issue.

Lease is a consensual and mutual agreement, in which the lessor undertakes to give the lessee something to use and collect benefits for a definite or indefinite period, and the lessee undertakes to pay the agreed rent to the lessor (art. 693 § 1 of the c.c.). Paid rent is a necessary feature of lease. The parties are free to determine the amount of rent and the manner of its determination and payment. It can be paid as a specific amount of money or in a fractional part of benefits or benefits of other kind.[17] If the rent is specified in benefits (e.g., one-fourth of the harvest), and the lessee does not obtain the harvest through no fault of their own, they are free from the obligation to pay rent; in this case, the lease is shaped as a partly fortuitous contract.[18] However, if due to circumstances for which the lessee is not responsible and which do not affect them personally, the ordinary income from the subject of the lease is significantly reduced, the lessee may demand a reduction in rent for a given marketing period (art. 700 of the c.c.). Examples of such circumstances are drought, rainfall, hailstorm, outbreak of infectious diseases with ineffective eradication, or free market games, causing excessive import of agricultural products and affecting the decrease in profitability of production.[19]

A property lease agreement concluded for a fixed term exceeding 1 year must be made in writing. If this requirement is not met, the lease agreement is treated as having been concluded for an indefinite term. Such a regulation results from the appropriate application of the lease provisions to the lease agreement (art. 660 of the c.c. in connection with art. 694 of the c.c.). In addition, a lease concluded for more than 30 years shall be considered as a lease concluded for an unspecified period of time after the expiry of this term (art. 695 § 1 of the c.c.). The lessee should exercise their right in accordance with the requirements of proper management and cannot change the purpose of the leased property without the lessor's consent (art. 696 of the

17 Nazaruk, 2022.
18 Ciepła, 2017.
19 Kozieł, 2014.

c.c.). It should be borne in mind that the requirements of proper economy depend on the subject of the lease. Therefore, in the scope that is of interest to us—the lease of real estate or an agricultural holding—the requirements may consist in the proper sowing and harvesting of land. Then, the profile of cultivation will not be allowed to change (e.g., plowing meadows into agricultural land).[20]

The lease agreement is additionally significant as it is also referred to in the a.s.a.s., albeit with regard to the preemptive right to purchase agricultural land. Nevertheless, a family farm may even be entirely based on leased agricultural land. Pursuant to art. 3 para. 1 of the a.s.a.s., in the case of sale of agricultural land, the preemptive right by virtue of the act is vested in its lessee. At the same time, this provision indicates two separate prerequisites of the tenant's preemptive right that must be fulfilled jointly for this right to be updated: formal and subjective. The formal prerequisite implies that the lease agreement must be concluded in writing and have a definite date and be executed for at least 3 years, counting from that date. On the other hand, the subjective condition of the tenant's preemptive right requires that the tenant has the status of individual farmer running a family holding, of which the sold real estate is a component. The content of the agreement on the sale of agricultural land is notified to the lessee of that real estate if the lease agreement has lasted at least 3 years from the date of its conclusion (art. 3 para. 2 of the a.s.a.s.). As a matter of principle, in the absence of the right of preemption referred to in art. 3, para. 1 of the a.s.a.s. or the failure to exercise that right, the right of preemption is vested by law in the NASC acting on behalf of the State Treasury (art. 3, para. 4 of the a.s.a.s.). However, the right of preemption is not vested in the NASC if, as a result of the acquisition of agricultural land, a family holding is extended (albeit up to an area of 300 ha) and the agricultural land being acquired is located in the municipality where the purchaser resides or in a bordering one. In addition, the above principles concerning the right of preemption do not apply, inter alia, if the purchaser of the agricultural land is a local government unit, the State Treasury, or a relative of the vendor (art. 3, para. 5 point 1 of the a.s.a.s.).

2. Land regulation in the Constitution and in the case law of the Constitutional Court

Contemporary constitutions rarely formulate separate principles concerning the agricultural system. Most often, they are implicitly included in the principles of the economic and social system.[21] However, the Polish Fundamental Law refers directly to the basis of the state's agricultural system, the basis of which is the family holding. Although the Constitution does not directly regulate the issue of agricultural land acquisition, it indicates the direction of shaping the agricultural system (including

20 Nazaruk, 2022.
21 Tuleja, 2021.

real estate acquisition) in other legal acts (e.g., in the a.s.a.s.). The obligation of statutory concretization of art. 23 of the Constitution is realized by, *inter alia*, establishing the principles of trade in agricultural holdings, which was stated by the Constitutional Tribunal in the verdict of March 18, 2010 (signature: K 8/08[22]). Conversely, agricultural land is a constitutive element of each agricultural holding.

The structure of art. 23 of the Constitution comprises two elements. The first formulates the principle of the agricultural family holding, while the second makes the reservation that this provision does not infringe the protection of property, inheritance, and freedom of economic activity, to which art. 21 and 22 of the Constitution refer. Art. 23 of the Constitution is contained in Chapter I, entitled "The Republic," which gives it a significant role and makes it to be perceived as a general principle of the state system, in accordance with which the other provisions of law placed in further chapters should be interpreted. However, it is a constitutional principle of the "second level" and complements and concretizes more general principles—in particular, that of social market economy.[23]

A significant problem that arises when analyzing art. 23 of the Constitution is that this provision does not formulate any subjective rights. It cannot be treated in the categories of provisions determining an individual's constitutional status, and the allegation of its infringement cannot constitute a self-contained ground of complaint in a constitutional complaint, as it is the case with art. 21 and art. 22 of the Constitution. Those provisions have in fact a dual legal nature and formulate both the principles of the economic system, as well as rights (freedoms) of a subjective nature[24]; thus, they may constitute an independent basis for a constitutional complaint.

Art. 23 of the Constitution has an important guarantee function as it orders the maintenance of such a structure in agriculture to ensure that agricultural family holdings are the basis of the state's agricultural system. It is not limited to ensuring the chance of survival of the family farm, but it also ensures the possibility of a resilient family farm, which to a significant extent shapes the agricultural system of the entire state. This provision also implies the obligation of the state to legislate in a way that will support family farms in the economic, social, and financial spheres and at the same time introduce legal regulations protecting the interests of family farm owners.[25] Nevertheless, art. 23 of the Constitution allows for the possibility of the existence of other types of farms. As indicated by the Constitutional Tribunal in the judgment of May 7, 2014 (signature: K 43/12), the principle expressed in art. 23 of the Constitution

> "does not exclude the existence of other types of agricultural holdings. However, it orders the maintenance in Polish agriculture of such a structure which ensures the character of family farms as 'the basis of the agricultural

22 Ibid.
23 Garlicki, 2016.
24 Ibid.
25 Skrzydło, 2013.

> system of the state'; thus, a family farm is to be an effective form of management, ensuring a 'decent' livelihood for farming families and satisfying the needs of society."

In the above-cited judgment, the Constitutional Tribunal indicated that a family holding is a holding whose ownership remains in the hands of a single family. However, the doctrine emphasizes that this term should not be understood literally as it also includes the situation in which the owner of the holding becomes a family member, and work in the holding is also performed by other family members.[26] It should be borne in mind, however, that both art. 23 of the Constitution and the concepts contained therein are dynamic in nature, and their meaning and interpretation change with the changing economic, social, or international context as well as with progressive globalization.

Summing up this part of the deliberations, it is worthwhile to draw attention to yet another provision of the Constitution—art. 31 para. 3, which provides that limitations to the exercise of constitutional freedoms and rights may be established only by statute and only when they are necessary in a democratic state for its security and public order; for the protection of environment, health, and public morals; or of the freedoms and rights of others. Such limitations may not impair the essence of freedoms and rights. In this perspective, it would be difficult to deny the existence of a strong public interest in the legislator's regulation of the issue of trading in agricultural land. In particular, it may concern the establishment of maximum and minimum area criteria to prevent both fragmentation and excessive accumulation of agricultural land. It is not possible to exclude the establishment of certain preferences resulting from the occupation of a farmer or the wish to maintain its agricultural character.[27] This thought is particularly important with regard to any regulations and limitations in the a.s.a.s. mentioned in the first part of the article. The precedence of the provisions of the Constitution over the regulations of the a.s.a.s. and the compliance of the act with the Constitution is stated as follows in the preamble of the a.s.a.s. itself: "In order to strengthen the protection and development of family holdings, which in accordance with the Constitution of the Republic of Poland constitute the basis of the agricultural system of the Republic of Poland (...) this act is enacted."

In the jurisprudence of the Constitutional Tribunal, the subject matter of individual elements of the agricultural system discussed by the Tribunal may be found more than once, which is evidenced by the above-cited judgments. In the publicly available database of rulings of the Constitutional Tribunal (Internet Portal of Rulings – https://ipo.trybunal.gov.pl/ipo), one can find judgments and decisions in which the Tribunal analyzed regulations concerning agricultural taxes, farmers' insurance, and agricultural reforms, among others. However, since the expiry of the EU derogation period, the Court's jurisprudence has not addressed issues relevant to the article. Therefore,

26 Tuleja, 2021.
27 Garlicki, 2016.

due to the limited volume frame of the article, the author decided not to cite the CT jurisprudence published since May 1, 2016.

3. No proceedings before the European Commission or the Court of Justice of the European Union

Admittedly, the European Commission has initiated a considerable number of proceedings for Poland's infringement of its EU treaty obligations. In 2021 alone, 24 cases were closed against Poland in the areas of environment, energy, taxation and customs union or justice, fundamental rights, and citizenship, among others[28]; however, none of them concerned the cross-border acquisition of agricultural land or farms. The database of infringement decisions of the European Commission on the official website of the Commission contains two decisions in the field of agriculture and rural development addressed to Poland, but they both concern the same case, namely the failure to notify measures transposing the Unfair Commercial Practices Directive by Poland (infringement number: INFR(2021)0318). The first decision, which was announced on July 23, 2021, was a letter of formal notice under art. 258 TFEU – art. 260(3) TFEU; the second, announced on February 9, 2022, closed the case. Accordingly, it may be concluded that Poland has not failed to comply with its EU obligations regarding the cross-border acquisition of land or farms.

4. Polish legal instruments in the context of the Commission's Interpretative Communication

This part of the article merely summarizes the issues raised above by referring to the national legal instruments of Polish agricultural policy in the context of the Commission's Interpretative Communication on the Acquisition of Agricultural Land and European Union Law (2017/C 350/05). Chapter four of the Communication presents some characteristics of the legislation regulating land markets that require special attention. It identifies 10 essential elements to which member states should pay attention when shaping their national policy on the acquisition of agricultural land. Therefore, it is worth briefly examining how the Polish legislator compares with the Commission's guidelines.

28 Data available from the European Commission's database of infringement decisions, located on the Commission's official website: https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions (Accessed: March 12, 2022).

a) prior authorization

The acquisition of agricultural land in the Polish legal system has been limited (as referred to in subchapter 1.5.) by the obligation to obtain the prior consent of the Director General of the NASC, if the entity is not an individual farmer or another entity that may also acquire agricultural land without prior authorization by way of a statutory exception. It is worth emphasizing that Polish law does not limit the possibility of purchasing agricultural land by foreigners from the EEA and the Swiss Confederation as they only need to meet the requirements of a.s.a.s. In turn, foreigners from outside the EEA and the Swiss Confederation must apply for the permit referred to in a.a.r.e.f.

b) priority rights (right of refusal) of farmers

The right of preemption of agricultural land by the lessee of such real estate is provided for in Polish legislation. Pursuant to art. 3 of the a.s.a.s., in the case of sale of agricultural land, the right of preemption is granted by law to its lessee. If no person is entitled to preemptive right, or if they do not exercise their right, then this is vested in the NASC acting on behalf of the State Treasury. The author refers to preemptive right in more detail in subchapter 1.8.

c) price controls

With regard to the acquisition of agricultural land, the Polish legal system enacts a kind of price control. Generally, agricultural land may be purchased by an individual farmer or other entities expressly indicated in the a.s.a.s. The acquisition of agricultural land by other entities requires the consent of the Director General of the NASC. After obtaining this authorization, it is possible to announce the intention to sell the agricultural land, to which potential buyers submit a response. According to art. 2a para. 4c point 1 of the a.s.a.s., a response to an announcement of agricultural land is deemed not to have been submitted if the proposed price of agricultural land is lower by more than 5% than the price specified in the announcement of agricultural land and has not been accepted by the seller of agricultural land. This means that even if a response to the announcement has been submitted, but the price contained therein does not exceed the specified ceiling, it is treated as if the response had not been submitted at all. On the other hand, pursuant to art. 3 para. 8 of the a.s.a.s. on preemptive right, if the price of the sold real estate grossly deviates from its market value, the person exercising such right may, within 14 days from the date of submission of the declaration on preemptive right exercise, apply to court to establish the price of such real estate. Thanks to such and other legal mechanisms, it is possible to control the price of real estate—whether it is abnormally low or high.

d) self-farming obligation

In art. 2b para. 1 of the a.s.a.s., the legislator introduces the obligation to personally manage an agricultural holding. In accordance with the provision, the acquirer of an agricultural land is obliged to run an agricultural holding, which includes the purchased agricultural land, for at least 5 years from the date of acquisition of the real estate—and in the case of a natural person, to run the holding personally. Exceptions to this obligation are provided for in paragraph 4, *inter alia*, in a situation where an agricultural land is sold or ceded to a relative. Even the very definition of individual farmer (i.e., an entity which, in principle, should be the purchaser of agricultural real estate on the basis of the a.s.a.s.) refers to the criterion of personal management.

e) qualifications in farming

One of the main objectives of the a.s.a.s., specified in art. 1(3) of the act, is to ensure that agricultural activity in agricultural holdings is conducted by persons with appropriate qualifications. In addition, the definition of individual farmer refers to the obligation to have agricultural qualifications (art. 6 para. 1 of the a.s.a.s.). Art. 6 para. 2 point 2 of the a.s.a.s. specifies what it means for a person to have agricultural qualifications. A natural person is deemed to have agricultural qualifications, inter alia, when they have obtained basic vocational, basic vocational, secondary, secondary trade, or higher agricultural education.

f) residence requirements

Admittedly, the Polish legislation does not introduce the requirement of inhabiting the agricultural land by the purchaser of such real estate; however, it has other requirements concerning the place of residence. One of the premises defining an individual farmer in art. 6 para. 1 of the a.s.a.s. is that they are a natural person who has been residing for at least 5 years in the commune of the area on which one of the agricultural real properties constituting an agricultural holding is located. In addition, if a given natural person applies for the acquisition of agricultural land on the basis of the consent of the Director General of the NASC, they must undertake to reside, within 5 years from the date of acquisition of the agricultural land, on the territory of the municipality where one of the agricultural land is located, which will constitute a family holding established by the purchaser or which is part of an existing agricultural holding (art. 2a para 4 point 2 letter c and point 3 letter d of the a.s.a.s.).

g) prohibition on selling to legal persons

Polish legislation does not prohibit legal persons from purchasing agricultural land. Admittedly, the provisions of the a.s.a.s., in principle, limit the acquisition of agricultural land by legal persons, which has been discussed in detail in subchapter 1.5.

However, this limitation is not absolute, and legal persons may also acquire non-movable agricultural land if they fulfill the remaining criteria resulting from the a.s.a.s.

h) acquisition caps

Polish legal regulations provide for ceilings regarding the area of land owned. Pursuant to art. 2a para. 2 of the a.s.a.s., the area of the purchased agricultural land, together with the area of agricultural land constituting a family holding of the purchaser, may not exceed 300 ha. Moreover, the sale of agricultural land belonging to the State Treasury is subject to an area limit of 300 ha (art. 28a para. 1 of the a.m.a.r.e.).

i) privileges in favor of local acquirers

As it was mentioned in paragraph (f) of this fragment, the legislator introduces a kind of preference for local purchasers—persons residing in the commune where the given agricultural land is located. This determines the granting of the status of an individual farmer or the possibility for other entities to apply for acquiring agricultural land.

j) condition of reciprocity

No provision in the laws referred to in the article refers to the condition of reciprocity. Polish law does not make the possibility of agricultural land being acquired by EU citizens from another member state conditional on their being able to acquire agricultural land in their state of origin. Polish law treats all the EEA states—including all the EU member states—and the Swiss Confederation equally in the matter in question.

Therefore, one may come to the conclusion that Poland has in many of the legal instruments referred to in the Interpretative Communication of the Commission its legislation. What is more, the Polish legislation is also enriched with other legal instruments; although they are not referred to in the Communication, their presence in the Polish legal order should be regarded as positive. An example is the exclusion of legal restrictions with regard to persons close to the vendor, thanks to which the vendor may freely acquire agricultural real estate (holding) after a relative.

Admittedly, the Polish legislation also contains instruments to which the Commission is not particularly favorable or the liberalization of which it postulates, such as the obligation of personal management of the holding, the requirements concerning the place of residence, or the privileges enjoyed by local purchasers. However, these may be explained by the implementation of the purposes of the a.s.a.s., which are set out in detail in the preamble and art. 1, and they do not infringe the principle of proportionality. This is evidenced by the fact that no infringement proceedings have been initiated against Poland before the European Commission or the Court of Justice of the European Union.

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| Chapter 8 |

Romania: Between Scylla of EU Law and Charybdis of National Interest – Belated Restrictions in the Land Market

Emőd VERESS

ABSTRACT

The cross-border acquisition of agricultural lands in Romania was subject to recent modifications. The regime of the circulation of agricultural lands after the EU accession of this country was designed through the provisions of Act no. 17/2014 on some measures to regulate the sale of agricultural land located outside the built-up area. The act was adopted to ensure food security and protect national interests in the exploitation of natural resources. These goals are perfectly justified and foreshadow changes in the global environment that will affect social and economic arrangements in the future with great impact. Protecting agricultural land as a natural resource of central importance is a legitimate goal. However, the methods used must be carefully chosen to create a legal regime for the sale of agricultural land that both respects the requirements of European law and conforms to the national interest as far as possible. The current system, created by amending Act no. 17/2014 into Act no. 175/2020, in force since October 13, 2020, shaped a legal regime that raises more questions than the answers it offers to the real challenges outlined above.

KEYWORDS

Romania, agricultural land, forestry land, preemption rights, precontracts, prior authorization of selling

1. Theoretical backgrounds and summary of the Romanian land law regime

1.1. The notion of agricultural and forestry land real estate

The Land Act no. 18/1991 (or, in literal translation, Act on Land Assets), with subsequent amendments, is partially a regulation on the regime applicable to assets consisting of land outside built-up (i.e., urban) areas but also a restitution law of immovables destined for agricultural use—previously nationalized, or collectivized

Veress, E. (2022) 'Romania: Between Scylla of EU Law and Charybdis of National Interest – Belated Restrictions in the Land Market' in Szilágyi, J. E. (ed.) *Acquisition of Agricultural Lands: Cross-border Issues from a Central European Perspective.* Miskolc–Budapest: Central European Academic Publishing. pp. 219–248. https://doi.org/10.54171/2022.jesz.aoalcbicec_9

by the Soviet-type dictatorship—to the former owners or their heirs.[1] It states that depending on its category of use, land can be considered used for agricultural purposes, when it constitutes (1) productive agricultural land—arable land, vineyards, orchards, vine nurseries, fruit orchards, hop and mulberry plantations, permanent grassland, greenhouses, seedbeds, and the like; (2) wooded areas, if not part of forestry management plans, and wooded pastures; (3) land occupied by buildings and agricultural-zootechnical installations, fish farms and works for land improvement, technological and agricultural roads, platforms, and storage areas serving the needs of agricultural production; (4) non-productive land that may be developed within improvement perimeters and used for agricultural production.

A distinct category of land is the one used for forestry purposes, such as woodland or land used for cultivation, production or forestry management; land used for afforestation; and non-productive land—cliffs, ravines, boulders, gullies, canyons, streams—if included in forestry planning. The Forestry Code of 2008 (Act no. 46/2008) gives a complex description of immovables classed as forestry land. The forests, land intended for afforestation, land used for cultivation, production or forestry administration, ponds, stream banks, and other land used for forestry purposes—such as non-productive land—included in forestry plans on 1 January 1990, embracing changes in area implemented in accordance with the law and according to the operations of entry and exit from this category, constitute national forest assets regardless of their form of ownership. National forest assets include not only forests but also land undergoing regeneration and plantations established for forestry purposes; land intended for afforestation (degraded land and unforested land established by law to be afforested); land used for growing purposes (nurseries, greenhouses, plantations, and mother crops); land for forestry production needs (wicker crops, spruce to be used as Christmas trees, ornamental and fruit trees, and shrubs); land serving forestry administration needs (land used for feeding game and producing fodder, land temporarily used by forestry staff); land occupied by buildings and their associated yards[2]; and ponds, riverbeds, and non-productive land included in forestry planning. All lands included in the national forestry assets constitute lands destined for forestry purposes.

The agricultural and forestry land within the perimeter of settlements is considered a distinct, third category.

The legal regime of the three types of land is not identical; specific rules, which will be analyzed in the context of the present chapter, apply to each category.

1 For an overview of nationalization, cooperativization and restitution, see Veress, 2022, pp. 241–269 and Veress, 2021a, pp. 332–350.

2 Administrative headquarters, huts, ranches, herdsmen's huts, game farms, forest transport roads and railways, industrial estates, other technical facilities specific to the forestry sector, temporarily occupied land and land affected by encumbrances and/or disputes as well as forest land within the border corridor and the state border protection strip and land intended for the realization of objectives within the Integrated State Border Security System.

1.2. Primary sources of the Romanian regulation on the cross-border acquisition of agricultural lands

The legal regime of cross-border acquisition of agricultural land is determined firstly by the rules laid down by the Constitution (of 1991, amended only once, in 2003), which sets forth the applicable conditions according to nationality, in accordance with EU law. The detailed rules on the circulation of agricultural land, located outside built-up areas, are included in Act no. 17/2014, as amended recently by Act no. 175/2020, which introduced a highly complex system of preemption rights to legally direct the sale of agricultural lands according to public policies.[3]

In Romania, no specific regulation exists on the transfer of agricultural holdings. Act no. 37/2015 on the classification of farms and agricultural holdings defines the "agricultural holding" as the basic economic unit for agricultural production, consisting of the agricultural land and/or enclosure containing buildings, storage facilities, agricultural machinery and equipment, other outbuildings, livestock and poultry, and related utilities contributing to agricultural activities (art. 1). The classification included in the Act serves for financing and statistical purposes. As farms and agricultural holdings may have one or more owner and may be uniquely or jointly owned, and their legal form is in accordance with the provisions of the legislation in force, the general rules remain applicable for the transfer of such a holding, depending on the type of ownership (for example, transfer of shares in a company, as regulated by Act no. 31/1990 on companies).

General norms, such as the Civil Code, supplement the legal regime of acquisition of agricultural land. In case of all types of land, the Civil Code states that whenever the acquisition of the right of ownership—whether exclusive or not—is subject to record in the land register, this record shall be entered based on the agreement of the parties, concluded in authentic (notarized) form, or, where applicable, based on a court decision (art. 589). In addition, another text of the Civil Code states that except for cases expressly provided for by law, agreements that transfer or constitute real rights *in rem* (i.e., meant to be recorded in the land register) must be concluded by an authentic instrument, on penalty of being considered null and void (art. 1244). Therefore, for the acquisition of agricultural land, the agreement must be concluded in authentic (notarized) form. A private deed, even formulated as a definitive sale, is null and void. Still, through the specific institution of the contract's conversion, a contract that is null and void may nevertheless produce the effects of the deed for which the substantive and formal conditions laid down by law are met. Thus, a private deed can have the value of a precontract, with the effect of obliging the parties to conclude an authentic agreement in the future. In addition, precontracts are also particularly common because, in many cases, the land register records for agricultural lands are

3 For this topic, see Veress, 2021b, pp. 155–173.

not up to date.[4] We must mention here that an agreement by which the parties undertake to negotiate with a view to concluding or modifying a contract does not constitute a promise to contract (precontract).

In both cases analyzed above (precontract by conversion or an actual precontract), in case of non-performance of the promise, the beneficiary (promisee) is entitled to damages. Moreover, if the promisor refuses to enter into the promised contract, the court, on the application of the promisee who has performed their own obligations, may render a judgment "in lieu of contract" where the nature of the contract permits it and the requirements of the law for its validity are satisfied. The right to action is time-barred to 6 months after the authentic notarized contract (deed) should have been concluded.[5] In the case of the precontract by conversion, the 6-month term runs from the moment of the conclusion of the (null and void) private deed of sale.

1.3. Inheritance of agricultural lands/holdings

The Romanian law has no specific rules on the inheritance of agricultural lands or holdings where the general rules of civil law are applicable.[6]

1.4. Acquisition of agricultural lands/holdings by legal entities

The Romanian law traditionally recognizes legal persons as subjects of the property rights over land (in general) or agricultural land (in particular). Even before the EU accession and during the transitional period of 7 years (until 2014) counted from the EU accession (2007), the rules that "protected" the Romanian agricultural land market against legal entities having their headquarters in the EU were of no real efficiency from a policy point of view, since Romanian law allowed, after the collapse of the Soviet-type dictatorship, legal entities (companies) established with foreign (EU and non-EU) capital but as Romanian legal persons to own agricultural land. This explains why Romanian companies were used as a vehicle to own large agricultural land holdings, with the land being indirectly owned by foreign legal or natural persons.[7] The available statistics on foreign-controlled agricultural land are completely inaccurate because they do not address the problem of a Romanian legal entity, often indirectly controlled by a foreign investor. Thus, only estimates are available of the amount of agricultural land directly or indirectly controlled by foreigners (these estimates range from 5% to as much as 50%). According to a 2015 report by the European Parliament, about 10% of all agricultural land is controlled by non-EU persons (through Romanian

4 This is affected also by restitution: the land register sheets drafted before nationalization cannot be used in many cases anymore because the restitution in its first phases did not respect the original location of the nationalized land; in other words, the historical land registration system was practically heavily damaged by the first phases of restitution. The new system of land registration started to be implemented in 1996, but the process is still ongoing. For details, see Sztranyiczki, 2013.

5 See, in principle, Articles 1260, 1279, 1669–1670 of the Civil Code, and Veress, 2020, pp. 67–71.

6 For the general rules on inheritance in the Romanian law, see Veress and Székely, 2020.

7 These companies were established to circumvent a legal requirement. Such shell-companies can be categorized as "vehicles" created to achieve this specific scope.

legal entities) and 20–30% by EU investors. Furthermore, the transitional period did not apply to farmers who registered their residence in Romania as they could already acquire ownership of agricultural land right after accession (under Article 5 of Act no. 312/2005). Investors from Lebanon, Italy, Lithuania, Denmark, the Netherlands, France, the United Kingdom, Portugal, Spain, and Austria have significant direct or indirect agricultural interests. An attempt was made to influence the process, to protect the national interest, and to enforce food safety considerations through the re-regulation of the system of preemption rights (see the provisions of Act 175/2020 analyzed below); however, not even this new regulation prohibited legal persons from owning agricultural land.

Nevertheless, through the system of preemption rights, Romania is approaching half of a solution that seeks to discourage legal persons from owning agricultural land or to favor legal persons controlled by natural and not by other legal persons. As a significant proportion of owners of agricultural land is currently constituted of legal entities, the effects of these policies may only be felt in the very long term.

Still, the guiding rule is that a national of an EU/EEA member state, a stateless person residing in an EU/EEA member state or in Romania, and a legal person established in accordance with the legislation of a member state may acquire ownership of land under the same conditions as those laid down by law for Romanian nationals and Romanian legal persons (art. 3 of Act no. 312/2005).

1.5. Acquisition of shares in a company that already owns agricultural land

In Romania, no specific rules exist on acquiring shares of a company that owns agricultural land. However, we must draw attention to some special fiscal rules that are applicable in case of the acquisition of controlling shares, if the company acquired agricultural land in the last 8 years, which represents more than 25% of the company's assets. The detailed rules are analyzed below, in the subchapter on national specificities.[8]

1.6. Acquisition of limited rights in rem

By interpreting the applicable legal texts, it was concluded[9] that the nationality prohibition concerns only the right of ownership (property) and not the acquisition of limited rights *in rem*, such as usufruct over agricultural land assets. Therefore, a non-EU/EEA citizen or legal person may acquire a usufruct over agricultural land.

Any movable or immovable property, whether corporeal or incorporeal, including an estate, a *de facto* universality of assets, or a share thereof, may be given in usufruct. Usufruct in favor of a natural person is at most for life. A usufruct in favor of a legal person may be for a period not exceeding 30 years. Where the usufruct is established after that period, it shall be reduced to 30 years *ope legis*. Where no provision is made for the duration of the usufruct, it shall be presumed to be for life or, as the case

8 See subchapter 4.12.
9 Bîrsan, 2007, p. 151.

may be, for 30 years. It is important to note that in the absence of any provision to the contrary, the usufructuary may transfer their right to another person without the consent of the bare owner, the provisions on recording the operation in the land register being applicable. The usufructuary shall have the right to rent the property received in usufruct or, where applicable, conclude an agricultural lease agreement. Having in mind that EU/EEA natural and legal persons can acquire the right of property, and non-EU/EEA natural and legal persons can establish a Romanian company that also can acquire the right of property, the use of usufruct to control agricultural land is not frequent in practice.

In this context, the right of superficies can also be of a certain importance (when the foreign citizen or foreign legal person acquires ownership of a building but only has a right of use of the land). Under the Romanian Civil Code, the right of superficies may be established for a maximum of 99 years. Upon expiry of the term, the right may be renewed.

1.7. Acquisition of other rights of use/exploitation

The Romanian Civil Code has specific regulations on agricultural lease (articles 1836–1850). This contract is used frequently in practice in cases where the owner desires to keep the property right but to transfer the right of exploitation of agricultural assets in general. The agricultural lease can have as its object any agricultural asset.[10]

If the duration is not fixed, the agricultural lease shall be deemed to be made necessary to harvest the produce for the whole period, which the agricultural asset is to crop during the agricultural year in which the contract is concluded. There is a general limit for any lease, which applicable also to agricultural lease agreements: leases may not be concluded for a period exceeding 49 years. If the parties stipulate a longer duration, it is automatically reduced to 49 years (art. 1783 of the Civil Code).

The agricultural lease agreement must be concluded in writing, under pain of being considered null and void. Under the sanction of a civil fine set by the court for each day's delay, the lessee must submit a copy of the contract to the local council in whose precinct the leased agricultural property is located, for registration in a special register kept by the local council secretary. Where the leased property is situated within the precincts of more than one local council, a copy of the contract shall be deposited with each local council within whose precinct the leased property is situated.

The lessee may change the category of use of the leased land only with the prior written consent of the owner and in compliance with the legal provisions in force.

10 Such as land used for agricultural purposes (productive agricultural land—arable land, vineyards, orchards, vine nurseries, fruit orchards, fruit bushes, hop and mulberry plantations, wooded pastures, land occupied by agro-zootechnical buildings and installations, fishery and land improvement installations, technological roads, platforms and storage areas serving the needs of agricultural production, and non-productive land that can be developed and used for agricultural production), but also livestock, buildings of all kinds, machinery, equipment, and other such items intended for agricultural use.

Lease contracts concluded in authentic form and those registered with the local council shall, in accordance with the law, constitute directly enforceable titles for the payment of the rent at the times and in the manner laid down in the contract (it is not necessary to obtain a judgment obliging the lessee to pay from the court).

Subletting agricultural assets in whole or in part is prohibited, and such a contract is null and void.

The agricultural lease agreement is renewed automatically for the same duration if neither party has notified the other party in writing of its refusal to renewal, at least 6 months before expiry and, in the case of agricultural land, at least 1 year before expiry. If the duration of the lease is a period of 1 year or shorter, the time limits for refusing renewal are reduced by half. The lessee has a right of preemption in respect of the leased agricultural property.

For state-owned agricultural lands, the State Domains Agency organizes tenders for concession or agricultural leases.

2. Land regulation in the Constitution and the case law of the Constitutional Court

The Romanian Constitution in Article 44 regulates private property as a fundamental right. A definition of private property is, however, given by the Civil Code: private property is the right of the owner to possess (*jus possidendi*), use (*jus utendi/fruendi*), and dispose (*jus abutendi*) of property exclusively, absolutely, and in perpetuity, within the limits established by the law (art. 555).

Among the limitations of the property right, the Constitution states that

> "foreign citizens and stateless persons shall only acquire the right to private property of land under the terms resulting from Romania's accession to the European Union and other international treaties Romania is a party to, on a mutual basis, under the terms stipulated by an organic law, as well as a result of lawful inheritance."[11]

Consequently, the Romanian Constitution does not have distinct rules on agricultural lands and holdings or on their acquisition, but the constitutional regime is identical for agricultural and urban land ownership. The text cited above is in force from 2003; between 1991 and 2003, the rule was absolutely restrictive: "foreign citizens and stateless persons shall not acquire the right to property of land" (Article 41[2] of the Constitution, not in force from 2003). Act no. 54/1998 on the legal circulation of land,

11 The official translation is not accurate: here, in reality, "lawful inheritance" means intestate (*ab intestato*) succession, excluding testate succession.

which repeated the initial, restrictive constitutional text, was declared unconstitutional immediately after the revision of the Romanian Fundamental Law in 2003.[12]

In this moment, the acquisition of land real estate is possible for EU citizens in general, the deadlines set by Articles 4[13] and 5[14] of Act no. 312/2005 having elapsed on January 1, 2012 and January 1, 2014, respectively. For agricultural land, the constitutional rule is reiterated by Act no. 17/2014 on some measures to regulate the sale of agricultural land located outside the built-up area. This law applies to Romanian citizens and to citizens of a member state of the European Union, of states in the European Economic Area (EEA), or of the Swiss Confederation; to stateless persons domiciled in Romania, in a member state of the European Union, in a state of the EEA, or in the Swiss Confederation; and to legal persons having Romanian nationality or nationality of a member state of the European Union, of states in the EEA, or of the Swiss Confederation.[15]

As regards foreign citizens, stateless persons, and legal persons belonging to third (non-EU/EEA) countries, they may acquire ownership rights over land *inter vivos* only under the conditions regulated by international treaties, on the basis of reciprocity (Article 44[2] of the Constitution and Article 6 of Act no. 312/2005). Similarly, according to the Act no. 17/2014, a third-country national and a stateless person domiciled in a third state and legal persons having the nationality of a third state may acquire ownership of agricultural land located outside the built-up area under the conditions regulated by international treaties, based on reciprocity. Consequently, if the legal norms (until this moment, only theoretically) recognize the right to acquire ownership over land in general to citizens of third countries and to legal persons headquartered in a third state, then Act no. 17/2014 for the acquisition of agricultural lands located outside the built-up area becomes applicable to these persons as well.

The texts mentioned above regulate a restriction of the civil capacity of persons, the violation of which is sanctioned—from the perspective of private law—by considering the contract null and void. We must mention that Romania has not concluded such an international treaty granting third-country nationals the right to acquire property over land assets until the moment the present chapter was finalized.

Regarding testate succession, no regulation exists that solves the situation in which a foreign citizen is designated as a legatee of land assets by a will (for example,

12 Constitutional Court Decision no. 408/2004.

13 "A national of a Member State not resident in Romania, a stateless person not resident in Romania residing in a Member State and a non-resident legal person established in accordance with the legislation of a Member State may acquire the right of ownership of land for secondary residences or secondary offices on the expiry of 5 years from the date of Romania's accession to the European Union."

14 "A national of a Member State, a stateless person residing in a Member State or in Romania and a legal person formed in accordance with the law of a Member State may acquire ownership of agricultural land, forests and woodland on the expiry of 7 years from the date of Romania's accession to the European Union."

15 For a general assessment of the cross-border acquisition of agricultural land, see Szilágyi, 2017, pp. 214–250.

a sale of the land in favor of the successor). This lacuna is problematic at least in the light of the fundamental right to inheritance (Art. 46 of the Constitution).

In addition, general requirements of the Fundamental Law have at least an indirect effect on the agricultural land regime:

a) the right of property obliges the owner to comply with environmental protection and good neighborliness obligations as well as other obligations which, by law or custom, are incumbent on the owner (art. 44[7] of the Constitution),

b) the state recognizes the right of every person to a healthy and ecologically balanced environment and provides the legislative framework for the exercise of this right (art. 35[1]–[2] of the Constitution),

c) natural and legal persons have a duty to protect and improve the environment (art. 35[3] of the Constitution),

d) the state must create a favorable framework for the exploitation of all factors of production; protection of national interests in economic, financial, and foreign exchange activity; exploitation of natural resources in accordance with the national interest; restoration and protection of the environment and maintenance of ecological balance; creation of the necessary conditions for improving the quality of life; implementation of regional development policies etc. (art. 135(2) of the Constitution).

3. Land law of Romania and possible proceedings by the Commission or the Court of Justice of the EU

Romania has no pending or closed proceedings initiated by the European Commission and/or before the Court of Justice of the EU (CJEU) in connection with the cross-border acquisition of agricultural lands/holdings. However, as it will be analyzed below, the current legislation is contested from the point of view of EU law; therefore, such proceedings may be possible in the near future.

4. National legal instruments of Romania in the context of the Commission's Interpretative Communication

4.1. General aspects

Act no. 17/2014 on some measures to regulate the sale of agricultural land located outside the built-up area[16] was adopted, among other reasons to ensure food security and protect national interests in exploiting natural resources. To achieve this goal, the law establishes important measures to regulate sales of agricultural land located

16 Act no. 17/2014 regarding some measures to regulate the sale-purchase of agricultural lands located outside the built-up area and to amend Act no. 268/2001 on the privatization of companies holding public and privately owned state lands for agricultural use and the establishment of the State Domains Agency, published in the Official Gazette, Part I no. 178 of March 12, 2014.

outside the built-up area. Agricultural land located inside built-up areas is not subject to this regulation, these sales being subject to the general provisions of the law.

This special legal regime of the circulation of agricultural lands located outside the built-up area has recently been substantially modified by the provisions of Act no. 175/2020 for the amendment and completion of Act no. 17/2014, by amendments that came into force starting with October 13, 2020.[17] We intend to analyze the legal regime of the sale of these agricultural lands, with special regard to the new amendments to this legal regime through the provisions of Act no. 175/2020. The legislation is recent, and the context of the COVID-19 pandemic has not yet facilitated scientific opinions and illuminative legal practice.[18] However, even under these circumstances, it is worth examining this new specific legal regime, especially in the light of the Commission's Interpretative Communication.[19] It must be mentioned that this law does not apply to the sales of agricultural lands located outside the built-up area that belong to the private property (domain) of local or county interest of the administrative-territorial units.[20]

4.2. Prior authorization

The Romanian law requires prior authorization only in special circumstances: for agricultural land assets situated in the state border areas and in the vicinity of special sites pertinent to national security or that might contain archeological remains.

Act no. 17/2014 introduced some special limitations for agricultural lands located outside built-up areas to a depth of 30 km from the state border and the Black Sea coast, inland, as well as for those located outside built-up areas at a distance of up to 2,400 m from special sites. For the sale of these lands, the Ministry of National Defense's specific approval is required, issued following the consultation with the state bodies with attributions in the field of national security. The 30-km distance is especially criticized by practitioners as being excessive.

However, these limitations do not apply to preemptors; in other words, if the buyer is the holder of a preemption right, approval is no longer necessary. The law does not specify which preemptors are exempted, and the right of preemption may

17 Act no. 175/2020 for the amendment and completion of Act no. 17/2014 regarding some measures to regulate the sale-purchase of agricultural lands located outside the built-up area and to amend Act no. 268/2001 regarding the privatization of the commercial companies that hold in administration lands of public and private property of the state with agricultural destination and the establishment of the State Domains Agency, published in the Official Gazette, Part I no. 741 of August 14, 2020.

18 Some regulatory deficiencies have already been identified when Act no. 175/2020 was still in the project phase. See Jora and Ciochină-Barbu, 2018, pp. 9–18. By referring to European law, the provisions of this new regulation were analyzed by Prescure and Spîrchez, 2020, pp. 21–40 and by Durnescu (Prăjanu), 2020, pp. 37–57.

19 Commission interpretative communication on the acquisition of farmland and European Union law (2017/C 350/05), published in the Official Journal of the European Union C 350 of 18.10.2017. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2017.350.01.0005.01.ENG.

20 Article 20(3) of Act no. of Act no. 17/2014, in the form established by Act no. 138/2014.

be established by law or by convention. The question arises: if the owner has recognized a right of preemption through a contract in favor of a person who subsequently exercises this right of preemption of a conventional nature, is the specific opinion from the Ministry of National Defense still required? In favor of a positive answer, we can invoke the principle *ubi lex non distinguit, nec nos distinguere debemus*. Indeed, the law makes no distinction between preemptors according to the legal or conventional source of the right of preemption. Thus, by establishing a preemption right by the parties' agreement, the need for approval should be removed. However, because the provisions of Act no. 17/2014 establish special norms that form a unitary whole, I believe that the removal of the approval of the Ministry of National Defense refers only to the preemptors whose rights have their origin in the text of Act no. 17/2014. Consequently, the holder of a conventional preemption right cannot invoke the fact that the approval established by Act no. 17/2014 is not necessary. Moreover, a preemption right would be invoked based on a law other than Act no. 17/2014. Applying the argument of the unity of concept of the law would also require approval in the case of these preemptors; instead, the possible speculative element (namely the situation in which the cause of establishing the conventional right of preemption would be the removal of the obligation for the approval of the sale by the Ministry of National Defense) in the case of the right of preemption is missing. In my opinion, in the case of all preemption rights arising from the law, the contract between the seller and the preemptor may be validly concluded in the absence of the approval. However, to resolve this issue definitively, the following amendment would be required in the law's text: it should be specified that these limitations do not apply to preemptors whose rights originate from the law.

Approvals must be communicated within 20 working days of the registration of the request by the seller. In case of non-fulfillment of this obligation to issue the approval, it is considered favorable. Thus, the law establishes a positive tacit approval procedure for non-compliance with the term of 20 working days.

Agricultural lands located outside the built-up area, where there are archeological sites with known archeological patrimony or areas where accidentally located archaeological potential has been established, can be sold only with the specific approval of the Ministry of Culture with regard to the deconcentrated public services, as the case may be, issued within 20 working days from the registration of the request by the seller. As in the previous case, in the event of non-compliance with this obligation, the approval shall be deemed to be favorable.

4.3. Preemption rights

In Romania, the main tool for state intervention in the legal circulation of assets constituted by agricultural land situated outside the built-up area is the regulation of preemption rights trough Act no. 17/2014 as modified by Act no. 175/2020. Undoubtedly, the regulation is, as of yet, far from solving the issues inherent to legal circulation of agricultural land. If the substantive issue—namely the creation of a special regime for the circulation of agricultural land located outside the built-up area in accordance

with public interest—is correct and fair, the administrative impediments created are excessive. The intention is correct, but the chosen path must be criticized. Although European rules in this area are not yet fully clarified, some new legal regime elements contradict European law. The establishment of any right of preemption by law is without a doubt a limitation of the contractual freedom and prerogatives of the property right holder. These limitations must be justified and proportionate.

In the initial form of Act no. 17/2014, the sale of the agricultural lands located outside the built-up area was allowed with the observance of the preemption right of co-owners, lessees, neighboring owners, and the Romanian state through the State Domains Agency, in this order and on equal terms.

Act no. 175/2020 modifies and expands the scope of preemptors, creating seven distinct categories:

a) preemptors of rank I: co-owners, first-degree relatives, spouses, relatives, and in-laws up to and including the third degree,

b) preemptors of rank II: owners of agricultural investments in orchards, vines, hops, exclusively private irrigation, and/or lessees. If on the lands subject to sale there are agricultural investments for fruit trees, vines, hops, and for irrigation, the owners of these investments have priority in the purchase of these lands,

c) preemptors of rank III: the owners and/or lessees of the agricultural lands adjacent to the land subject to sale, in compliance with some requirements to be analyzed in the next subchapter,

d) preemptors of rank IV: young farmers,

e) preemptors of rank V: the Academy of Agricultural and Forestry Sciences "Gheorghe Ionescu-Șișești" and the research and development units in the domains of agriculture, forestry, and food industry[21] as well as the educational institutions with an agricultural profile, in order to buy agricultural lands located outside the built-up area with the destination strictly necessary for agricultural research, located in the vicinity of existing lots in their patrimony,

f) preemptors of rank VI: natural persons with their domicile/residence located in the administrative-territorial units where the land is located or in the neighboring administrative-territorial units, [22]

g) preemptor of rank VII: the Romanian state, through the State Domains Agency.

The interpretation of the current regulation raises several questions.

The first is the following: how is the conflict between preemptors of identical rank resolved? For example, what happens when both the co-owner and the seller's child want to buy the agricultural land, or how is the conflict between the seller's child

21 Organized and regulated by Act no. 45/2009 on the organization and functioning of the Academy of Agricultural and Forestry Sciences "Gheorghe Ionescu-Șișești" and the research-development system in the fields of agriculture, forestry, and food industry, with subsequent amendments and completions.

22 We notice that this category of preemptors is vast. No difference exists between persons who have their domicile in the administrative-territorial unit where the land for sale is located or in the neighboring administrative-territorial units.

and the seller's brother (second-degree relative) resolved? In both examples, all the people shown have the quality of preemptor of rank I; we are not in the presence of a preemptor of higher rank and one of lower rank. Act no. 17/2014 is silent and does not offer a solution to the competition between identical rank preemptors.

Thus, we must rely on the provisions contained in Art. 1734 of the Civil Code, which regulates the competition between preemptors. [23] The provisions of Art. 1734 have a mandatory character. [24]

According to this legal text, if several holders have exercised their preemption rights over the same asset, the contract of sale is considered concluded:

a) with the holder of the legal right of preemption when they compete with holders of conventional preemption rights,

b) with the holder of the legal right of preemption chosen by the seller, when they compete with other holders of some legal rights of preemption,

c) if the property is immovable, with the holder of the conventional right of preemption, which was first registered in the land register when it competes with other holders of conventional preemption rights,

d) if the asset is movable, with the holder of the conventional preemption right having the oldest certain date, when it competes with other holders of conventional preemption rights.

Here the case is not that of competition between a legal right holder and the holder of a conventional right of preemption. Thus, the hypothesis provided in letter a) above does not find its applicability. Nor does letter c) apply to the analyzed situation because the norm resolves the conflict between the conventional preemption right holders. We may also exclude letter d) because it refers to the preemption exercised in the case of movable property. Thus, the only applicable norm is Art. 1734 para. (1) letter b), which practically establishes that in the case of a competition between legal preemptors (of the same rank), the seller is the one with the (unilateral) right to choose between the holders of the legal preemption right. The seller, in the situation shown, can choose the buyer at their discretion, preferring, for example, the brother over his child, both preemptors of rank I, and so on. [25]

The second issue refers to a legal text that remained unchanged by Act no. 175/2020. Article 20 para. (2) of Act no. 17/2014 establishes that "the provisions of this law do not apply to alienations between co-owners, spouses, relatives and in-laws up to and including the third degree." The law also stipulates that co-owners, first-degree

23 According to Art. 8 of Act no. 17/2014, the legal provisions regarding the preemption right exercise are completed with the general provisions of law.

24 Article 1734 para. (2) of the Civil Code establishes that any clause contrary to the regulations contained in this rule is considered unwritten.

25 The correct solution was also embraced by the Methodological Norms, which, in Art. 9 para. (1) stipulate that "in the case of a competition between preemptors within the same rank, the seller chooses the preemptor and communicates their name to the mayor's office." See the Methodological Norms regarding the exercise by the Ministry of Agriculture and Rural Development of the attributions incumbent on it for the application of title I of Act no. 17/2014, published in the Official Gazette, Part I no. 127 of February 8, 2021 (hereinafter: Methodological Norms).

relatives, spouses, relatives, and in-laws up to and including the third degree are first-degree preemptors. Is there a conflict in the text of the law, or is it a deliberate option? It is not easy to establish. If we interpret the two texts as conflicting, then we can say that Art. 20 para. (2) of Act no. 17/2014 was implicitly repealed by Act no. 175/2020. I do not believe that this the right interpretation. I consider the two texts to refer to distinct situations, as follows:

a) In reality, the owner can sell freely, under the conditions of Art. 20 para. (2) of Act no. 17/2014, their agricultural land located outside the built-up area, if the buyer is a co-owner, husband, relative, or in-law up to and including the third degree, without any obligation to submit to the special legal regime established by Act no. 17/2014. From this circle, the owner can freely choose the buyer because, in this context, the sale acquires an *intuitu personae* character; the determining reason for the sale is not limited simply to obtaining a price. Thus, preserving the property in the family is encouraged—a correct intention pursued by the legislator by establishing these legal provisions. Moreover, if the intention was to repeal Art. 20 para. (2) of Act no. 17/2014, then Act no. 175/2020 could have proceeded to an explicit repeal; thus, it can be presumed that the legislator intended to keep this regulation.[26]

b) If the owner has not negotiated and concluded a contract with the persons provided above but follows the specific procedure established by Act no. 17/2014, then the law recognizes the status of first-rank preemptor for co-owners, first-degree relatives, spouses, relatives, and in-laws up to and including the third degree, protecting these persons even against the will of the owner and other potential buyers.

A third problem is the artificial creation of the right of preemption for a potential buyer agreed by the seller. The easiest method was the conclusion of an agricultural lease, in which case the quality of lessee offered a right of preemption of rank II to the potential buyer. However, the law—absolutely correctly and through detailed rules—makes the use of these fraudulent leases particularly difficult. Several conditions are imposed on the lessee to have a right of preemption on the leased land, and some of them are even questionable under EU law:

a) the lessee wishing 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 1 year before the date of posting the sale offer at the mayor's office,

26 This interpretation is also adopted by the relevant ministry, which in the Methodological Norms, in Art. 7, provided the following: "(1) In the situation where the seller has not requested the display of the sale offer at the mayor's office, and the quality of buyer is held by the persons mentioned in Art. 20 para. (2) of the law, at the conclusion of the sales contracts, the presentation of the approvals provided by law is not required.
(2) In the situation where the seller requested the display of the sale offer, the persons mentioned it in Art. 20 para. (2) of the law may exercise the right of preemption, in which case the contract of sale is concluded with the request of the approvals provided by law."

b) in the case of natural person lessees, they must prove that their domicile or residence was 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 outside the built-up area,

c) in the case of legal entity lessees, the natural person members of such a legal person, must prove that their domicile or residence was located on the national territory for a period of at least 5 years before the registration of the offer for sale of agricultural lands outside the built-up area,

d) in the case of legal entity lessees, having as a member another legal entity, the shareholders controlling this second entity must prove that their registered office or secondary office is located on the national territory and has been established for a period of at least 5 years before the registration of the offer to sell agricultural land outside the built-up area.

Instead, a simulated sale could be orchestrated within an enforcement procedure because the provisions of Act no. 17/2014 do not apply to enforcement proceedings and sales contracts concluded as a result of the fulfillment of public tender formalities, as is the case of those carried out during insolvency proceedings. [27] The situation of a simulated sale in the form of a donation also remains open, but the sanction applicable to these fraudulent contracts, as will be seen, is that of being considered null and void. Fraud can also be staged using an exchange contract. For example, if an agricultural land located outside the built-up area is exchanged for shares issued by a listed company, thus having maximum marketability, the operation is more of a sale rather than an exchange. Another possible method of circumventing the legal provisions is establishing a unipersonal limited liability company, in which the owner contributes the agricultural land to the company capital. After the company's registration, the shares are sold to the buyer, in respect of whom the regime established by the law analyzed here does not apply. In addition, a giving in payment (*datio in solutum*[28]) can be used to achieve the transfer of property: the owner contracts a loan (practically collects the price), and instead of repaying the loan, they give the agricultural land as payment, extinguishing the debt. Given the severe restriction on the circulation of agricultural land found outside the built-up area (see the following subchapters), the number of such procedures will certainly increase.

The fourth problem is that of neighboring owners or neighboring lessees, preemptors of rank III. After establishing that the owner or lessee of the agricultural land adjacent to the land subject to sale has the quality of preemptor, the normative text refers to the specific conditions under which the quality of lessee must be held, these being assimilated to those applicable to the second-rank preemptor lessee. It is not very clear that this reference rule only applies to lessees or also to neighboring owners. If the interpretation that this reference rule extends the legal requirements to neighboring owners is accepted, then not every neighboring owner or lessee has the right of preemption, but only the ones who hold this quality for at least 1

27 See Art. 20 (3) of Act no. of Act no. 17/2014, in the form established by Act no. 138/2014.
28 Discharge of debt by giving something differing, in agreement with the creditor.

year before the date of posting the sale offer at the mayor's office and also meet the domicile or residence requirements set out above. I believe that the legislator did not want to extend these specific requirements to neighboring owners, even if the text is ambiguous, but wanted to impose identical conditions only for lessees regardless of whether they are lessees of the land for sale (preemptors of rank II) or lessees of neighboring agricultural lands (preemptors of rank III).

What happens if several neighbors want to exercise their preemption rights at the same time? The law here does not allow for the seller's free choice but imposes mandatory criteria that reflect abstract economic reasoning. Priority to purchase is granted to

a) the owner of a neighboring lot which borders on the longest side of the land that is the object of the sale offer,

b) if the land that is the object of the sale offer has two (equally) long sides or all its sides are equal, priority is granted to the owner of the neighboring lot who is a young farmer,[29] who has their domicile or residence located on the national territory for a period of at least 1 year prior to the registration of the offer for sale of agricultural land located outside the built-up area,

c) the owners of neighboring agricultural land who have a common border with the land that is the object of the sale offer, in descending order according to the length of the common border with the land in question,

d) if the longest side or one of the equally long sides of the land that is the object of the sale offer has a common border with land located within another administrative-territorial unit, priority to the purchase of the land is granted to the owner of the neighboring agricultural land with their domicile or residence within the administrative-territorial unit where the land being sold is located.

I also interpret this legal text in the sense that the category of preemptors of rank III has a specific order of priority: the owner of the neighboring land is preferred to the lessee of the neighboring land. In this sense, however, a constant, clarifying jurisprudence will be welcomed.

A final issue concerns the conflict of laws in the case of agricultural lands located outside the built-up area on which known archaeological sites are located. Which of the laws will have priority: Act no. 14/2014 or Act no. 422/2001 on the protection of historical monuments? In this case, the conflict is resolved correctly: the preemption regulation in Act no. 422/2001 is applied.

29 If several young farmers exercise the right of preemption, the young farmer who performs activities in animal husbandry has priority in the purchase of the land subject to sale, respecting the condition regarding the domicile or residence established on the national territory for a period of at least 1 year before registration of the offer for sale of agricultural land located outside the built-up area. See Art. 4 para. (3) of Act no. 17/2014, in the form established by Act no. 175/2020. The notion of a young farmer is the one envisaged by EU law: a person up to the age of 40 who has the appropriate professional skills and qualifications. See Art. 2 para. (1) letter n) of Regulation (EU) no. 1,305/2013 on support for rural development provided by the European Agricultural Fund for Rural Development (EAFRD).

In this context, we must also analyze the procedural rules on the exercise of the right of preemption.

In its current form, the legal regime for exercising the right of preemption stands as follows[30]:

a) The seller registers, at the mayor's office within the administrative-territorial unit where the land is located, an application requesting the display of the sale offer of the agricultural land located outside the built-up area to bring it to the knowledge of the preemptors.

b) The application shall be accompanied by the offer to sell the agricultural land and the supporting documents.[31]

c) Within 5 working days from the date of registration of the application, the mayor's office has an obligation to display, for 45 working days, the sale offer at its headquarters and, as the case may be, on its website.

d) The mayor's office has an obligation to send to the structure within the central apparatus of the Ministry of Agriculture and Rural Development (hereinafter referred to as the central structure)—to the county or Bucharest agriculture directorates (hereinafter referred to as territorial structures), as appropriate, and to the Agency of State Domains—a file containing the list of preemptors, copies of the application for displaying the sale offer and evidentiary documents, and the minutes of displaying the offer within 5 working days from the date on which the documentation was registered.

e) For the purpose of extended transparency, within 3 working days from the registration of the file, the central structure, respectively the territorial structures, as the case may be, have an obligation to display the sale offer on their own sites for 15 days.

f) Within 10 working days from the registration date of the application, the mayor's office has an obligation to notify the holders of the preemption right about the registration of the sale offer at their domicile, residence, or, as the case may be, their headquarters; if the holders of the preemption right cannot be contacted, the notification will take place by being displayed at the mayor's office or on the mayor's office website. If the area of land that is the subject of the intended sale is at the border of two administrative territories, the mayor's office will notify the adjoining territorial-administrative unit, which in turn will notify the holders of preemption rights.

g) The holder of the preemption right must, within 45 working days, express in writing their intention to buy, communicate the acceptance of the seller's offer, and register it at the mayor's office where it was displayed. The sanction that intervenes in case of non-observance of this term is forfeiture.[32] The mayor's office will display, including on its website, within 3 working days from the registration of the acceptance of the sale offer, the data from the offer, and it will send it for display on the central or

30 Art. 6-8 of Act no. 17/2014, in the form established by Act no. 175/2020.
31 See Art. 5 of the Methodological Norms.
32 See Art. 6 para. (1) of the Methodological Norms.

territorial structures' websites, as appropriate. The communication of the acceptance of the seller's offer is registered at the mayor's office by the holder of the preemption right accompanied by supporting documents.[33]

h) If, within 45 working days, several preemptors of different rank express in writing their intention to purchase, at the same price and under the same conditions, the legally established order shall apply.

i) If, within 45 working days, several preemptors of the same rank express their intention to purchase in writing, and no other preemptor of higher rank has accepted the offer, at the same price and under the same conditions, the legally established order shall be applicable.

j) If, within 45 working days, a lower-ranking preemptor offers a higher price than the one in the sale offer or the one offered by the other higher-ranking preemptors to the person who accepts the offer, the seller may resume the procedure, with the registration of the new price. The resumed procedure will be carried out only once, within 10 days from the fulfillment of the term of 45 working days previously analyzed.

k) Within 3 working days from the registration of the communication of acceptance of the sale offer, the mayor's office has an obligation to transmit to the central structure—and to the territorial structures, as the case may be—the identification data of the preemptors/potential buyers to verify the legal conditions.

The law contains rules derogating from the general rules relating to the offer to contract and its binding (irrevocable) nature. Under the conditions of Art. 1191 of the Civil Code, the offer is irrevocable as soon as its author undertakes to maintain it for a certain period. The offer is also irrevocable when it can be considered based on the parties' agreement, the established practices between them, the negotiations, the content of the offer, or applicable usages. The declaration of revocation of an irrevocable offer shall have no effect. Moreover, the offer without a deadline for acceptance addressed to a person who is not present must be maintained within a reasonable time, depending on the circumstances, for the recipient to receive it, analyze it, and issue the acceptance. The offeror is liable for damage caused by the offer's revocation before the expiration of the reasonable term. The revocation of the offer does not prevent the contract's conclusion unless it reaches the recipient before the offeror receives the acceptance or, as the case may be, before committing the act or fact that determines the conclusion of the contract (art. 1193 Civil Code). Within the procedure established by Act no. 17/2014, we are in the presence of an offer with a term established by law.

However, the special law makes it possible to modify the sale offer already published. If, within the 45 working days provided for the exercise of the right of preemption—within the 10 days provided for the resumed procedure—the seller changes the data entered in the sale offer, they must resume the application' registration procedure from the beginning.

33 See Art. 6 of the Methodological Norms.

The seller also has the right to withdraw their offer to sell.[34] Before the fulfillment of the 45-working-day term provided for the exercise of the preemption right, the seller may submit to the mayor's office where the request for display of the sale offer was registered as an application requesting the offer's withdrawal. In this case, the mayor's office will conclude a report canceling the procedure provided by this law and will communicate a copy of that report to the central structure or territorial structure, and as the case may be, to the State Domains Agency.

Thus, we are not in the presence of a veritable offer in the sense of the Civil Code but of an invitation to negotiate addressed to the preemptors.

Symmetrically, the law also allows the preemptor to waive their own acceptance of the offer before fulfilling the 45-working-day term provided to exercise the preemption right. If one of the holders of the preemption right who has expressed their acceptance of the offer registers a request to waive the communication of acceptance at the mayor's office, the preemptors' legal order applies.

Consequently, the exercise of the right of preemption generally leads to the selection of a buyer according to the law but can be perceived as a special selection procedure of the buyers, and the contract will be born when the mutual assent of the parties is expressed before the notary public, in authentic form.

In addition to the complicated regime of preemption rights, Act no. 17/2014 as modified by Act no. 175/2020 introduced a priority right to purchase, a specific legal restriction on the circulation of agricultural land located outside the built-up area if the right of preemption has not been exercised. These rules have a subsidiary character in addition to the regulation of preemption rights and become applicable if none of the holders of the preemption rights would exercise these rights. In this case, agricultural land may be alienated only to a natural or legal person who meets certain requirements imposed by law.

In the case of natural persons, these cumulative requirements are the following[35]:

a) the natural person concerned must have their domicile or residence located on the national territory for a period of at least 5 years before the registration of the sale offer,

b) they must carry out agricultural activities on the national territory for a period of at least 5 years, before the registration of the offer,

c) they must be registered by the Romanian fiscal authorities for at least 5 years before registering the offer to sell agricultural lands located outside the built-up area.

In the case of legal persons, the cumulative legal conditions are more complicated:

a) the legal person concerned must have its registered office and/or secondary headquarters located on the national territory for a period of at least 5 years before the registration of the sale offer,

34 Art. 7^1 of Act no. 17/2014, in the form established by Act no. 175/2020.
35 Art. 4^1 of Act no. 17/2014, in the form established by Act no. 175/2020.

b) it must conduct agricultural activities on the national territory for a period of at least 5 years before the registration of the offer for sale of agricultural lands located outside the built-up area,

c) it must present the documents showing that, from its total income over the last 5 fiscal years, at least 75% represents income from agricultural activities, as provided by Act no. 227/2015 on the Fiscal Code, with subsequent amendments and completions, classified according to the NACE code by order of the Minister of Agriculture and Rural Development,

d) the associate/shareholder who holds the control of the company must have their domicile located on the national territory for a period of at least 5 years before the registration of the offer for sale of the agricultural lands located outside the built-up area,

e) 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 their domicile is located on the national territory for a period of at least 5 years before the registration of the offer sale of agricultural land located outside the built-up areas.

In terms of the procedure to be followed, in case of non-exercise of the right of preemption by the legal holders, potential buyers can submit, to the mayor's office, a file containing the documents proving the fulfillment of the above conditions within 30 days from the expiration of 45 working days established for the exercise of the right of preemption. The mayors' office will send the file to the central structure—and to the territorial structures, as the case may be—within 5 working days from the date on which the documentation was registered.

The law refers first to natural persons and later to legal persons, but it cannot be deduced from the normative text that the legislator would prefer natural persons to legal persons. For both situations, the law simply establishes as a condition the existence of the situation "in which the holders of the right of preemption do not express their intention to buy the land." The correct interpretation, in my opinion, of the legal texts is that the selling owner has the freedom to choose any bidder—natural or legal person—who meets the conditions analyzed above. [36]

Unlike the right of preemption, this priority right to purchase is not a genuine option right, and its establishment seems to be only a restriction of contractual freedom. These provisions limit the owner to choose the buyer from a limited circle of people (favored buyers) meeting certain criteria set by the legislator, who thus wants to direct transfers of property rights on agricultural lands located outside the built-up area in a certain direction.

The sale of the land at a lower price than the one requested in the initial sale offer, under more advantageous conditions in favor of the buyer than those shown in this

36 This interpretation is also reflected in the Methodological Norms, which state that the seller chooses the buyer and communicates their name to the mayor's office in the case of competition between potential buyers. See Art. 9 para. (2) of the Methodological Norms.

or with the non-observance of the legal conditions regarding the person of the buyer, attracts nullity.[37]

In the procedure established by Act no. 17/2014, full freedom in choosing the buyer is regained only when neither the holders of the right of preemption nor the legally favored buyers exercise their rights within the legal term. Thus, the sale can be made to any natural or legal person in case of non-exercise of the right of preemption and if none of the potential favored buyers, within the legal term, meet the conditions to be able to buy the agricultural land located outside the built-up area.

From a procedural point of view, the freedom to choose the buyer requires a report on completing the procedure issued by the mayor's office. The minutes shall be issued to the seller and communicated to the central structure or territorial structures, as the case may be. This report certifies that no preemptor or person entitled to a priority purchase has exercised their rights and has not wished to buy the agricultural land.

The sale of agricultural lands located outside the built-up area without respecting the right of preemption or the rights of favored buyers or without obtaining the prior authorizations analyzed above is prohibited and sanctioned with being considered null and void. Before the amendments introduced by Act no. 175/2020, the sanction was that the contracts concluded by the violation of the preemption rights were voidable (subject to annulment only upon request), the sanction of being considered null and void being reserved to the situation in which the preemption right was not exercised and the immovable was sold at a lower price or in more advantageous conditions than those established through the sale offer brought to the attention of the preemptors.

The change of perspective is significant: the legal circulation of agricultural land outside the built-up area has become a matter of public policy entirely.

Act no. 175/2020 was subject to a constitutional review before promulgation. According to the Romanian Constitution, as a result of EU accession, the provisions of the constitutive treaties of the European Union, as well as other mandatory community regulations, have priority over the contrary provisions of domestic law, in compliance with the provisions of the Act of Accession (art. 148 para. [2] of the Constitution).

The authors of the objection of unconstitutionality, in essence, argued that the law has as its "indirect objective the restriction of the right of citizens of the EU member states and States party to the Agreement on the European Economic Area to acquire ownership of agricultural land outside built-up areas."[38]

Decision no. 586/2020 of the Romanian Constitutional Court (RCC) was adopted by a majority of votes. The constitutional judges who voted against it formulated two separate opinions, in which they supported the unconstitutionality of this legislation.[39]

The majority opinion concluded that

37 Article 7 para. (8) of Act no. 17/2014, in the form established by Act no. 175/2020.

38 Point 18 of the RCC Decision no. 586/2020.

39 The decision and the separate opinions were published in the Official Gazette, Part I no. 721 of August 11, 2020.

> "the criticized provisions 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, namely the development of the land property. 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 regarding the right to purchase agricultural land outside the built-up areas. The criticized texts do not prohibit 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/nationality, but with a set of objective criteria aimed at the buyer's ability to maintain the category of use of extra-urban agricultural land and to cultivate it effectively."[40]

The conclusion of a sales contract, as a buyer, presupposes a solid and well-defined material base on the national territory and a relevant work experience in the pedoclimatic conditions of Romania. It follows that the law does not establish arbitrary conditions to be able to buy agricultural land outside the built-up area but conditions that support the purpose of the law.[41]

Contrary to this majoritarian view, the first separate opinion argues that a conditioning

> "by a law adopted in 2020 (...) of the acquisition of agricultural land located outside the built-up area by establishing the domicile/residence of the acquirer on national territory is equivalent to a restrictive measure for potential acquirers, although they are citizens of the European Union, do not have their domicile/residence on the national territory, i.e., violate the commitments made by Romania towards the European Union as they result from point 3 of Annex VII to the Treaty on Accession of the Republic of Bulgaria and Romania to the European Union."[42] The other separate opinion states that "the provisions criticized, although they do not regulate an express and direct exclusion of natural or legal persons from the Member States from the purchase of agricultural land located outside the built-up area, impose certain conditions which can be classified as having equivalent effect."[43]

40 Point 100 of the RCC Decision no. 586/2020.
41 Point 101 of the RCC Decision no. 586/2020.
42 Point 3.2.2. from the Separate Opinion formulated by constitutional court judges Livia Doina Stanciu and Elena-Simina Tănăsescu.
43 Point 2 of the Separate Opinion formulated by constitutional court judge Mona-Maria Pivniceru.

The position of the European Union is currently not definitively clarified. The European Commission has issued an interpretative communication, which is also based on the current state of the caselaw of the European Court of Justice (CJEU). On the one hand, this communication recognizes the specific importance of agricultural land and considers that special regulation of agricultural land circulation is justified, including certain accepted restrictions. However, on the other hand, many restrictions are considered inconsistent with European Union law. As regards the residence requirements, the European Commission relied on Case C-452/01 Ospelt, paragraph 54, in which it was held that the conditions under which the acquirer must reside on the purchased land were not legal—Case C-370/05, Festersen, paragraphs 35 and 40, respectively, in which the CJEU

> "considered as disproportionate the requirement that the acquirer takes up his fixed residence on the property which is the object of the sale. The CJEU found that such a residence requirement is particularly restrictive, given that it not only affects free movement of capital and freedom of establishment but also the right of the acquirer to choose his residence freely."[44]

Similarly, CJEU held that national rules "under which a distinction is drawn based on residence in that non-residents are denied certain benefits which are, conversely, granted to persons residing within the national territory, are liable to operate mainly to the detriment of nationals of other Member States. Non-residents are in the majority of cases foreigners."[45] Following the interpretative communication issued by the Commission, the CJEU ruled that "articles 9, 10 and 14 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market must be interpreted as precluding legislation of a Member State which makes the right for a legal person to acquire agricultural land located in the territory of that member state –– in cases where the member or members who together represent more than half of the voting rights in the company, and all persons who are entitled to represent that company, are nationals of other Member States –– conditional upon, first, submitting a certificate of registration of those members or representatives as residents of that member state and, second, a document demonstrating that they have a knowledge of the official language of that Member State corresponding to a level which enables them to at least converse on everyday subjects and on professional matters" (case C-206/19, "KOB" SIA).

For forest land assets, a parallel regulation is in force (article 45 of the Forestry Code). In the order provided for in Article 1746 of the Civil Code, co-owners and neighboring owners of forest land—natural or legal persons, whether public or private—have a right of preemption to purchase privately owned forest land at equal prices and conditions. According to the Civil Code, privately owned forest land may be sold

44 See Interpretative Communication, p. 15.

45 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. See also the more recent solution in Case C-206/19, "KOB" SIA.

respecting, in this order, the rights of preemption of co-owners or neighbors. It must be observed that no perfect correlation exists between the Civil Code and the Forestry Code. The Forestry Code refers to the neighboring owner of forest land, whereas the Civil Code refers to any owner of neighboring land (e.g., a pasture). Courts have not yet resolved this conflict, but we tend, given that the Forestry Code itself refers us to the Civil Code, to give priority to the rules contained in the Civil Code. The Forestry Code does not have the status of a special rule in this case as the Civil Code itself regulates preemption in the case of woodlands. If the text of the Forestry Code seems correct from the point of view of the policy of merging forest land plots, however, we cannot neglect the express text of the Civil Code, which deals, in a broader concept, with the scope of the holders of the right of preemption.

As for the applicable procedure, the seller shall be obliged to notify all preemptors in writing—through the bailiff or notary public—of their intention to sell, showing also the price asked for the forest land asset to be sold. If the co-owners or neighbors of the land, other than the administrator of the state-owned forests, do not have a known domicile or place of business, the notice of the offer of sale shall be registered with the mayor's office or, as the case may be, the mayor's offices in whose district the land is situated, and it shall be posted, on the same day, at the mayor's office by the secretary of the local council.

Holders of the right of preemption must express their intention to purchase in writing and communicate their acceptance of the offer of sale or, as the case may be, register it at the mayor's office where it was posted, within 30 days of the communication of the offer of sale or, as the case may be, of its posting at the mayor's office. In addition to the Civil Code, the Forestry Code states that where the forest land real estate to be sold is adjacent to the forest land publicly owned by the state or administrative-territorial units, the exercise of the preemption right of the state or administrative-territorial units shall prevail over the preemptive right of other neighbors. If, within the period specified above, none of the preemptors express their intention to purchase, the land can be sold freely. Before the notary public, the proof of notification of the preemptors shall be made with a copy of the notifications made or, if applicable, with the certificate issued by the mayor's office, after the expiry of the period of 30 days within which the intention to purchase should have been manifested. Failure by the seller to comply with their legal obligations or the sale of the land at a lower price or under more advantageous terms than those stated in the offer of sale shall render the sale null and void.

4.4. Price controls

In Romania, no regulation exists on price control for agricultural or forestry land assets.

4.5. Self-farming obligation

In Romania, there is no explicit and direct self-farming obligation. However, Land Act no. 18/1991 states that all holders of agricultural land are obliged to ensure its

cultivation and soil protection (art. 74-76). Practically, the law gives rise to a *proprter rem* legal obligation,[46] and the method for ensuring this cultivation (personally or indirectly) does not matter.

Owners of land who fail to fulfill their obligations shall be summoned in writing by the commune, town, or municipal councils, as the case may be, to perform such obligations. Persons who do not comply with the summons and do not execute the obligations within the term set by the mayor, for reasons attributable to them, shall be sanctioned, annually, with the payment of an amount from 5 lei to 10 lei/ha[47] depending on the category of use of the land. The obligation to pay the amount shall be made by the mayor's reasoned order, and the amounts shall be paid to the local budget. Moreover, the law states a specific sanction: those who do not comply with the summons shall lose the right of use of the land at the end of the year.

4.6. Qualifications in farming

In Romania, no regulation exists on specific rights arising from qualifications in farming.

4.7. Residence requirements

In Romania, residence requirements are regulated in the context of preemption rights and the priority right to purchase, analyzed above.

4.8. Prohibition on selling to legal persons

As it was explained earlier in this chapter, in Romania, no prohibition exists with regard to selling to legal persons.

4.9. Acquisition caps

At this moment, Romania has no acquisition caps. Act no. 54/1998, the Land Sales Act (no longer in force) set a maximum of 200 hectares per family. This limit applied to the acquisition *inter vivos*, meaning that a larger plot of land could be transferred to a family's ownership through inheritance. The restriction was interpreted as applying only to natural persons. Act no. 247/2005 abolished this land acquisition cap, and no new ceiling was introduced even after the repeal of the relevant provisions (this repeal was linked to the entry into force of the new Civil Code in 2011). The repeal of the acquisition cap is meant to facilitate the concentration of agricultural land, which makes its exploitation economically reasonable; the reality is that, in addition to relevant exploitations in many areas of the country, the ownership structure is still highly fragmented due to the restitution policies of nationalized agricultural land.

46 Similar legal obligations are included in the Forestry Code (art. 17–18).

47 The fine was initially set by Act no. 169/1997 for the amendment of Land Act no. 18/1991, amending then Art. 54 of the latter act, to between 50,000 and 100,000 lei in the Romanian old currency lei (ROL). After the revaluation of the "old" lei at a rate of 10,000 to 1 to obtain amounts in the "new" lei (RON) in 2005, the amount of the fine was never updated. Therefore, now it represents a ludicrously small amount of between approximately 1 and 2 euros per hectare.

Moreover, to foster land concentration, Act no. 247/2005 was adopted, establishing an agricultural life annuity to consolidate agricultural areas in efficient farms imposed by the need to modernize Romania's agriculture. The object of the agricultural life annuity is constituted by the lands with agricultural destination located outside the built-up area. The agricultural life annuity represents the amount of money paid to the agricultural rentier, who alienates or leases the extra-urban agricultural lands in their property or concludes an agreement with the investor, having the security of a state-guaranteed source of income for life. The amount of the agricultural life annuity represents the equivalent in lei of 100 euros/year for each hectare of alienated agricultural land and the equivalent in lei of 50 euros/year for each leased hectare. The agricultural life annuity shall be paid in a single annual installment until November 30 of the year following that in which it is due. The agricultural life annuity is personal and non-transferable, and it ceases on the date of the agricultural rentier's death. In the case of lease, the agricultural life annuity is paid if the land that is the subject of the rent is leased continuously, throughout the calendar year. The agricultural rentier (annuitant) is a natural person over 62 years of age who, from the date of entry into force of the legal norm, does not own and will not own, accumulated over time, more than 10 hectares of agricultural land outside the built-up area, which they alienate by deeds *inter vivos* or leas—totally or partially—receiving from the National Office of Agricultural Life Annuities the agricultural rentier's card. To become an annuitant, only lands that after the year 1990 have not been the subject of another alienation *inter vivos* may be alienated or leased.

4.10. Privileges in favor of local acquirers

In Romania, privileges in favor of local acquirers are granted in the context of the preemption rights analyzed above.

4.11. Condition of reciprocity

In Romania, a condition of reciprocity is required by the Constitution and subsequent legal instruments only in case of third (non-EU/EEA) countries.

4.12. Characteristics of national legislation not mentioned in the Commission's Interpretative Communication

Another novelty element brought by Act no. 175/2020 is the over-taxation of speculative sales,[48] by which fiscal law instruments are used to achieve special goals in the circulation of agricultural land assets.

The owners of agricultural lands located outside the built-up area have an obligation to use them exclusively to conduct agricultural activities from the date of purchase. Sales that take place within 8 years from the purchase are considered speculative. In this situation, the legislator operates with an absolute presumption of purchase for resale, subject to over-taxation.

48 Art. 4^2 of Act no. 17/2014, in the form established by Act no. 175/2020.

Thus, agricultural land located outside the built-up area can be alienated, by sale, before the 8-year term from the date on which the purchase elapses, with the obligation to pay 80% tax on the amount representing the difference between the sale price and the purchase price, based on the notaries statistical grid of presumed prices for the relevant period. Consequently, the question arises: would the tax base not be determined based on the parties' contract price but based on notarial estimates? Or do these rules only apply if the contract prices are lower than those in the notarial grids? I am in favor of the second interpretation.

In case of direct or indirect alienation, prior to the 8-year term from the moment of purchase having elapsed, of the controlling package of shares in companies that own agricultural lands located outside the built-up area and which represent more than 25% of their assets, the seller will have an obligation to pay a tax of 80% of the difference in the value of the land calculated based on the notaries' grid between the time of acquisition of the land and the time of alienation of the control package. In this case, the profit tax on the difference in the value of the shares or shares sold will be applied on a reduced basis in proportion to the percentage of the agricultural land share in question in the fixed assets, any double taxation being prohibited. These provisions do not apply to the reorganization or reallocation of assets within the same group of companies.[49]

Very interestingly, the law for these situations refers to the provisions of Art. 16 of the Act (i.e., sanctions the contract in question with being considered null and void). It is not easy to determine when this sanction can be applied. The violation of some rules of fiscal law attracts considering the juridical act as null and void. The legislator probably meant that sales for which the tax is not paid should be null and void, given the situations in which the simulation would be used either by total concealment (a publicly simulated secret sale is concluded as a donation) or by partial concealment (declaration in the contract at a price lower than that actually agreed by the parties).

Moreover, the legal circulation of agricultural land is currently subject not only to a legal regime of civil law but also to a regime of administrative law, which can be highlighted by the special role of the mayors' offices, on the one hand, and the Ministry of Agriculture and Rural Development, on the other hand.

The Ministry of Agriculture and Rural Development, together with the subordinated structures, as the case may be, (a) ensures the publication of sales offers on its website; (b) ensures the verification of the exercise of preemption rights; (c) verifies the fulfillment of the legal conditions of sale by the preemptor or the potential buyer, provided by the law; (d) issues the approvals provided by law necessary for concluding the contract for the sale of agricultural lands located outside the built-up area; (e) ascertains contraventions and applies the sanctions provided by law; and (f) draws

49 Probably, the legislator considered the sales within a group of companies.

up, updates, and administers the Single National Register on agricultural lands circulation and category of use located outside the built-up area.[50]

The contract for the sale in authentic form can be concluded only in possession of a final approval issued by the territorial structures for lands with an area of up to 30 ha inclusively and for lands with an area of over 30 ha by the central structure.[51] If the seller or preemptor dies before the conclusion of the sales contract, the approval is canceled and therefore not transferable to the heirs.

This approval is practically an authorization, but the administrative authority does not have its own assessment right. The control is limited to verifying the fulfillment of the legality conditions. If following the verifications by the central structure—and the territorial structures, as the case may be—it is found that the chosen preemptor or potential buyer does not meet the conditions provided by this law, a negative opinion will be issued.

For the purposes of control, the administrative authority has a term of 10 working days at its disposal from the expiration of the 45-working-day term of provided for the exercise of the preemption right—or from the expiration of the term of 10 days in case of resumption of the procedure for modifying the offer (i.e., the situation analyzed above). In case of fulfilling the legal conditions, within 5 working days from the term's expiration for verification, the central structure—and the territorial structures, as the case may be—will issue the approval/final approval necessary for concluding the sales contract.

If no preemptor has expressed its intention to purchase, the verification of the fulfillment of the conditions by the potential favored buyers will be done by the central structure—and by the respective territorial structures at the location of the land—within 10 working days upon transmission of the file by the mayor's office.

The administrative law regime is accentuated by the fact that, along with the specific sanctions of civil law (nullity, compensations), the legal provisions' violation is also sanctioned by administrative law penalties. Thus, the following facts constitute contraventions[52]: (a) the sale of agricultural lands located outside the built-up area, where there are archeological sites, where areas with detected archeological patrimony or areas with archaeological potential that accidentally became known have been established, without the specific approval of the Ministry of Culture of its deconcentrated public services, as the case may be; (b) the sale of agricultural lands located outside the built-up area without the specific approval of the Ministry of National Defense, if this situation was noted in the land register at the date the

50 The register is kept electronically. The local public administration authorities and the National Agency for Cadaster and Real Estate Registry have an obligation to transmit to the Ministry of Agriculture and Rural Development the data and information regarding the procedural stages, cadastral documents, and transfer deeds of ownership of agricultural land located outside built-up areas. See Art. 12 (2)–(6) of Act no. 17/2014, in the form established by Act no. 175/2020.

51 The rule also applies if the court rules the transfer of ownership based on a pre-contract.

52 See Art. 14 of Act no. 17/2014, in the form established by Act no. 175/2020.

excerpt from the land register for purposes of authentication was requested; (c) the sale of agricultural lands located outside the built-up area without the approval of the central structure and of the territorial structures of the Ministry of Agriculture and Rural Development, as the case may be; (d) non-compliance with the right of preemption and the rights of favored buyers; non-compliance with the norms regarding the special taxation of alienations of agricultural lands considered as speculative; (e) non-compliance by the mayor's office with the obligations regarding the display of the sale offer, transmission of the file to the central or territorial structure, notification of the holders of preemption rights, display of the offer acceptance, and communication to the central or territorial structure of the preemptor identification data of potential buyers.

For all the above contraventions, the fine is currently set between 100,000 and 200,000 lei. Act no. 175/2020 doubled these fines.

5. Conclusions

In the future, the compliance of the current Romanian regulation with European law will be verified. The separate opinions to the Constitutional Court judgment no. 586/2020, respectively a careful analysis of the European Commission's Interpretative Communication, foreshadow a solution of non-compliance of national law with European norms.

In Romania, the 2020 reforms clearly aimed to control and direct the acquisition of agricultural land through the system of preemption rights and "second-round" bidders and, ultimately, to maximize the domestic ownership of agricultural land. This reform is belated, of an urgent nature, because foreign control already affects a significant proportion of Romania's most valuable agricultural land.

However, it is undeniable that public policy requirements, such as food security, the exploitation of natural agricultural resources in accordance with the national interest, and the making of these resources available to those who actually work in agriculture and who do not use the transfer of ownership of agricultural land for speculative investment purposes require the adoption of serious restrictions on the legal circulation of agricultural land, which cannot be regarded as mere assets whose freedom of movement is essential. This aspect should also be recognized and reflected by European law—both in its written form and in the case law emanating from the European Court of Justice. In fact, the Romanian regulation is far from ideal for achieving the desired goals. A rethink will undoubtedly be needed from the perspective of European law in the process of formation in this field and the means used to achieve otherwise legitimate aims. Comparative law can offer pertinent solutions to be adapted to Romanian realities.

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| Chapter 9 |

Serbia: Strict Laws, Liberal Practice

Miloš ŽIVKOVIĆ

ABSTRACT

The issue of cross-border acquisition of agricultural land is regulated in an inconsistent manner in Serbian law: on the one hand, constitutional provisions are very liberal and impose minimal restrictions to the ownership acquisition of such land by foreign nationals; on the other hand, statutory provisions are extremely restrictive and seem to exclude not only acquisition of ownership of agricultural land by foreign nationals but also the very capacity of non-Serbian nationals to own agricultural land. Given that the Stabilization and Association Agreement between Serbia and EU and its member states, which came into force in 2013, foresaw a 4-year deadline for Serbia to equalize the legal position of EU member states nationals with Serbian nationals in respect of the conditions for the acquisition of ownership of agricultural land, the statutory provisions were altered in 2017. However, these amendments not only failed in the abovementioned objective, but they contained such complex conditions for EU member state nationals to acquire agricultural land in Serbia that it made it impossible at least until 2027 and practically impossible even after that year. This is confirmed when the existing conditions are analyzed from the point of view of the 2017 Commission Interpretative Communication on the Acquisition of Farmland and EU law. This Communication analyzed the restrictions imposed by EU countries to the acquisition of agricultural land by both domestic and EU member state nationals from the point of view of EU law. Many of the conditions that exist in Serbia only for EU member states nationals would not adhere to EU law even if they applied to Serbian and EU member states nationals equally. This is reflected in the recent annual reports of the European Commission on the state of relations between Serbia and the EU, where it is noted that the obligation to equalize the position of domestic and EU member state nationals in respect of the acquisition of agricultural land contained in the SAA is not fulfilled. All this is in sharp contrast with the fact that, in practice, foreign nationals may acquire the ownership of agricultural land in Serbia indirectly, by establishing a legal entity in Serbia, or even directly, if such right is provided in an international treaty. Such inconsistent regulation and commercial practice are highly likely to cause further friction and political debate in Serbia in the coming years.

KEYWORDS

ownership acquisition, agricultural land, right of foreigners

1. Theoretical backgrounds and summary of the affected national regime

The first and highest legal source pertaining to the rules of the acquisition of land in Serbia is the 2006 Constitution of the Republic of Serbia (*Ustav Republike Srbije,*

Živković, M. (2022) 'Serbia: Strict Laws, Liberal Practice' in Szilágyi, J. E. (ed.) *Acquisition of Agricultural Lands: Cross-border Issues from a Central European Perspective.* Miskolc–Budapest: Central European Academic Publishing. pp. 249–266. https://doi.org/10.54171/2022.jesz.aoalcbicec_10

hereinafter: the Constitution).[1] The Constitution came after the 1990 Constitution of the Republic of Serbia,[2] which was adopted at the time Serbia was still a part of Yugoslav Federation and which, in fact, did not completely abandon the socialist ideas from the previous period. Therefore, the Constitution is, in fact, the first genuinely transitional constitution in Serbia, which was adopted once the last of the former socialist republics of Yugoslavia, Montenegro, declared its independence from FR Yugoslavia, leaving Serbia also independent. The Constitution contains several provisions relevant for the system of ownership acquisition and the position of foreigners in that respect, as well as on agricultural land. Status of foreign nationals is defined in Art. 17 of the Constitution in the following manner:

> "Pursuant to international treaties, foreign nationals in the Republic of Serbia shall have all rights guaranteed by the Constitution and law with the exception of rights to which only the citizens of the Republic of Serbia are entitled under the Constitution and law."

The possibility of foreigners to acquire real property is regulated in Art. 85 of the Constitution, which reads:

> "Foreign natural and legal entities may obtain real estate property, in compliance with the law or international treaty. Foreigners may obtain a right of concession over natural resources and goods of common interest, as well as other rights stipulated by the law."

As for the legal regime of the land, the Constitution is also relatively liberal, providing in its Art. 88 as follows:

> "The use and disposal of agricultural land, forest land and city construction land in private ownership is free. The law may restrict the models of use and disposal, respectively stipulate terms of use and disposal, in order to eliminate the danger of causing damage to the environment or prevent the violation of rights and legally based interests of others."

Thus, under the Constitution, the freedom of use and disposal of land, including agricultural land, may be limited for ecological reasons and for the reasons of protection of the rights of others. These two grounds for restriction of said freedom are interpreted widely by the legislators, and the freedom of use and disposal of agricultural land has significant limitations both in Serbian legislation

1 Official gazette of the RS No. 98/2006, 115/2021 (16/2022). The amendments were promulgated on February 9, 2022 and would thus not be taken into consideration even if they were relevant for the topic of the paper.
2 Official gazette of the RS No. 1/1990.

and in practice. The last important feature of the Constitution of relevance for the topic of our paper is the provision on a hierarchy of legal sources under which confirmed international treaties have a higher position than national laws and which must be in accordance only to the Constitution.[3] This means that any and all restrictions provided in national laws but not directly in the Constitution may be bypassed via an adequate international treaty confirmed (ratified) by the lawmaker in Serbia.

The general rules of acquisition of ownership are contained in the 1980 Law on Basic Ownership Relations (*Zakon o osnovama svojinsko-pravnih odnosa*, hereinafter: the ZOSPO),[4] a socialist era codification of property law that was rump even at the time it was passed and was significantly reduced after the amendments of 1990, 1996, and 2005, when the hypothec was carved out of the codification and received its special law. The 1990 amendments were of importance for the right of foreign nationals to acquire ownership, which was introduced then and finetuned by the 1996 amendments, which are still in force. The codification was partly purged from its "socialist" elements in 1990 and completely in 1996, but it is still essentially insufficient for a comprehensive regulation of property law (*stvarno pravo, Sachenrecht*) in a modern European country. Therefore, it is usually concluded that the biggest issue in Serbian private law—at least at the normative level—is the lack of a comprehensive and modern codification of ownership and other *in rem* rights. Be it as it is, the ZOSPO generally accepted the Roman doctrine of acquiring ownership by contract, as receipted from Austrian law in the XIX century, which requires *iustus titulus* and *modus acquirendi* for acquiring ownership from the owner of a thing, land included. In case of immovable property, *modus acquirendi* is registration in the land registry or other appropriate manner provided by the law.[5] The registration is, thus, constitutive for acquiring ownership of land by contract, even though there are significant departures from this rule in the recent case law of Serbian courts.[6] As for the rights of foreign nationals, the current text of ZOSPO provides for different rules for acquiring movable and immovable property, on the one hand, and acquiring by legal transaction *inter vivos* or by inheritance, on the other hand. As for the movable property (chattels), foreigners are fully equalized with domestic nationals.[7] For the immovable property, ZOSPO provides that foreign natural persons may

3 Art. 16 Para. 2 and Art. 194 of the Constitution.

4 Official gazette of SFRY Nos. 6/1980 and 36/1990, Official gazette of FRY No. 29/1996, and Official gazette of RS No. 115/2005.

5 Art. 33 ZOSPO reads: "On the basis of a legal transaction, the right of ownership over immovable property is acquired by registration in a public book or in other appropriate manner provided by law." This other "appropriate manner provided by law" referred to the territory not covered by land books, in which the deed system was in place and where the transfer of deed was the *modus acquirendi*. See Živković, 2004, pp. 90–91.

6 See Živković, 2015, pp. 118–124.

7 Art. 82 ZOSPO.

acquire it by inheritance, under condition of reciprocity,[8] or by legal transaction *inter vivos* (contract). In the latter case, performing of business activities in Serbia is of importance for the possibility of foreign national to acquire ownership over immovable property by contract *inter vivos*. Therefore, a foreign natural person or legal entity that performs business in Serbia can, under conditions of reciprocity, acquire ownership of immovable property in Serbia in case it is necessary for their business activity in Serbia[9] (the opinion on the "necessity" of the type of real property to be acquired is provided by the ministry competent for trade).[10] Foreign natural persons that do not perform business activity in Serbia can acquire ownership of apartments or apartment buildings under condition of reciprocity.[11] Last but not least, ZOSPO explicitly provides the possibility that, as an exception, the acquisition of immovable property located in determined territories of Serbia can be excluded for foreign natural persons or legal entities altogether by provision of a special law.[12] As for the condition of reciprocity, factual reciprocity suffices, and in case of doubt, the ministry competent for justice issues an opinion on whether it exists in a concrete case (i.e., with the concrete foreign country).[13]

The general regime of the acquisition of immovable property by contract is completed by the Law on Transfer of Immovable Property (*Zakon o prometu nepokretnosti*, hereinafter: the ZPN).[14] The transfer of immovable property is defined as the transfer of ownership right over an immovable, with or without consideration,[15] and it is declared that the transfer of immovable property is free, unless otherwise provided by law. Immovable property is defined as land (agricultural land is explicitly included), buildings, and other construction objects and special parts of buildings that can be separately owned.[16] ZPN requires solemnization (*javnobeležnička potvrda, solemnizacija*) of a contract on transfer of immovable by a competent public notary as statutory form, sanctioned by nullity in case it is not respected.[17] This in fact means that the form of notarial deed (*javnobeležnički zapis*) is also possible if contracted by the parties. The ZPN also contains provisions on the statutory preemption right, in

8 Art. 82b ZOSPO. Even though this provision is restricted to foreign natural persons and does not explicitly pertain to foreign legal persons, Art. 85b ZOSPO provides that, unless specifically regulated in other law, the provisions of ZOSPO shall apply to both foreign natural persons and foreign legal entities, which could create confusion in respect of foreign legal entities as heirs. However, since this situation is quite rare, it did not cause any practical problems. The intended purpose of Art. 85b ZOSPO, in fact, is that the legal regime provided by ZOSPO; it pertains to domestic natural persons and legal entities and applies to foreign ones as well, but it was not precisely defined.

9 Art. 82a Para. 1 ZOSPO.

10 Art. 82v Para. 4 ZOSPO.

11 Art. 82a Para. 2 ZOSPO.

12 Art. 82a Para. 3 ZOSPO.

13 Art. 82v Paras. 2 and 3 ZOSPO.

14 Official gazette of RS Nos. 93/2014, 121/2014 and 6/2015.

15 Art. 2 Para 1 ZPN.

16 Art. 1 ZPN.

17 Art. 4 ZPN.

case of co-ownership in favor of all co-owners when one of the ideal parts is being sold, and in case of agricultural land, in favor of owners of the adjoining agricultural land.[18] The law provides that the owner of the adjoining agricultural land that predominantly borders with the land to be sold has priority in the realization of the preemption right; moreover, if more such adjoining lands exist, and the borderlines are of the same length, the owner of the adjoining land with the biggest surface shall have the priority in the realization of preemption right. If a co-ownership stake of the adjoining agricultural land is for sale, the preemption right of the owner of the adjoining agricultural land ranks, in priority, behind that of other co-owners. The preemption right itself and the manner of its realization are also regulated in the ZPN[19]: the offer, containing all conditions of sale, must be delivered to all bearers of the preemption right simultaneously, in written form; they then have 15 days to accept, also in written form; if no one accepts, the seller has a year to sell the immovable but not under more favorable conditions for the buyer; after a year, a new cycle of sending offers is required. In case the immovable is sold in breach of the preemption right (without making an offer or under conditions more favorable than the ones in the offer), the bearer of the preemption right may, within 30 days from the day they became aware of the sale and not longer than 2 years after the sale, file an action and thus initiate court proceedings in which they may request that the sale contract is declared without effects toward them and that the immovable be sold to them under the same terms and conditions stipulated in that contract. Simultaneously with filing the action, the plaintiff must deposit to the court the amount equaling the market value of the contested immovable on the day of filing. In practice, until September 2014, when the courts were verifying signatures of parties to the immovable transfer contract, the preemption right could not actually be breached because the courts denied signature verification if the seller did not make an offer to the bearer of the preemption right or was selling under terms and conditions more favorable to the buyer than the ones contained in the offer (dealing with the preemption right in advance was condition for concluding the legally enforceable contract on the sale of an immovable). Since September 2014, when public notaries of Latin type were introduced in Serbia, the conclusion of the contract of sale of an immovable without dealing with the preemption right in advance has been possible in practice but is still quite rare because the notary would have to put a warning in the solemnization clause that the preemption right is breached, and most buyers do not want such a warning in their contract. Therefore, court cases involving breaches of preemption right in immovable property transactions are fairly rare. As for the purpose of introducing the preemption right in favor of the owner of the adjoining agricultural land in case a piece of agricultural land is being sold, it is rather obvious and serves the interest of increasing the surface of agricultural land of one owner (land concentration and consolidation).

18 Art. 6 ZPN.
19 Arts. 7-10 ZPN.

As for the general regime of inheritance, one should note that it is based upon the principle of universality of inheritance,[20] which means that no special rules exist depending on who is inheriting or what is being inherited. Only one provision of the 1995 Law on Inheritance (*Zakon o nasleđivanju*, hereinafter: the ZON)[21] refers to the situation where agricultural land is a part of inheritance (bequest), and that is Art. 233. This provision instructs the court to warn the heir who is a farmer and who lived or worked together with the deceased (bequeather) of the right to request from the court that some assets from the bequest be left to them in kind, whereas they would compensate the other heirs by payment of money,[22] in case agricultural land is a part of inheritance (bequest). This demonstrates the lawmakers' intention to apply this rule in cases where agricultural land is being inherited, and not all heirs are farmers who lived with the deceased. The court shall decide on such request by taking into consideration the "justified need" of the heir to have these items in kind. In other words, the court has a relatively wide margin to grant such request and not many precise criteria for deciding provided by the law.

With regard to the special rules on agricultural land and acquisition of ownership thereof, agricultural land in Serbia is subject of a "special regime" (i.e., special rules on scope of ownership right) differing from the general regime provided in the ZOSPO. The main legal source in this area is the 2006 Law on Agricultural Land (*Zakon o poljoprivrednom zemljištu*, hereinafter: the ZPZ),[23] which sets out the "special regime" for this type of immovable property. Under the ZPZ, agricultural land is defined as land that is used for agricultural production (fields, gardens, orchards, vineyards, meadows, grasslands, fishponds, bulrushes, and swamps) as well as land that could be brought to the purpose of agricultural production. Agricultural land may be arable and non-arable. The ZPZ defines arable agricultural land as fields, gardens, orchards, vineyards, and meadows.[24] Forests and woodlands are not deemed agricultural land, and they are subject to their own "special regime" contained in other special legislation,[25] according to which state-owned forests and woodlands may not be sold or disposed of (there are very limited exceptions of possibility of exchange); state-owned forests may not be leased and state-owned woodland can, but to a limited extent; and the government may grant and revoke the right of use of state-owned forests.[26] In addition, nature preservation areas are not interlinked with the notion of agricultural land in Serbian law (though there are implications for agriculture deriving from legislation on the preservation of nature[27]). The ZPZ, in its Art. 4, contains the provision

20 See Đurđević, 2020, pp. 30–31.
21 Official gazette of RS Nos. 46/1995, 101/2003 – Constitutional Court Decision and 6/2015.
22 This right is provided in Art. 232 ZON.
23 Official gazette of RS Nos. 62/2006, 65/2008, 41/2009, 112/2015, 80/2017, and 95/2018.
24 Art. 2 of the ZPZ.
25 See Law on Woods (*Zakon o šumama*), Official gazette of RS Nos. 30/2010, 93/2012, 89/2015, and 95/2018.
26 Arts. 98–99a of the Law on Woods.
27 See Law on Preservation of Nature (*Zakon o zaštiti prirode*), Official gazette of RS Nos. 36/2009, 88/2010, 91/2010 – correction, 14/2016, 95/2018, and 71/2021.

that it also applies to agricultural land in protected areas, except if special legislation provides otherwise. The ZPZ regulates the planning, protection, regulation, and use of agricultural land; supervision over implementation of the law; and other issues of relevance for the protection, regulation, and use of agricultural land as a good of common interest. As this includes agricultural holdings, no special legislation on agricultural holdings exists in Serbia. Other laws are relevant for agriculture, such as the Law on Agriculture and Rural Development (*Zakon o poljoprivredi i ruralnom razvoju*, hereinafter: the ZPRR), which, however, deals with agricultural policy and policy of rural development and not with property relations in respect of agricultural land.[28] As for the rules of the acquisition of ownership over agricultural land by contract, the ZPZ contains special provisions on the acquisition of state-owned agricultural land and on the acquisition of agricultural land by nationals of EU countries. We shall first present the rules on acquisition of agricultural land by foreigners and then the rules on acquisition of agricultural land from the state (acquisition of state-owned land by contract), while the acquisition of privately owned land by domestic nationals falls within the general regime.

In the first article, the original 2006 text of the ZPZ contained a provision that foreign natural person or legal entity cannot own agricultural land in Serbia.[29] This provision was noteworthy because it, taken verbatim, did not only prohibit foreigners to acquire agricultural land but rather prohibited foreigners to own it. Therefore, it was highly problematic from the point of view of Serbian diaspora and the right of its members to inherit (in case they were not Serbian nationals but had ancestors in Serbia). It also created trouble in respect of the restitution of agricultural land if the heirs of the former owners were foreign nationals. Lastly, it created problems with the existing rights (acquired rights) if the owner ceased to be a Serbian national. Therefore, this provision is usually interpreted to mean that a foreign national cannot acquire agricultural land in Serbia. The situation became even more complicated when the Stabilization and Association Agreement between Serbia and the EU and its member states came into force in late August 2013; its Article 53 Section 5 (b) provided that

> "subsidiaries of Community companies shall, from the entry into force of this Agreement, have the right to acquire and enjoy ownership rights over real property as Serbian companies and as regards public goods/goods of common interest, the same rights as enjoyed by Serbian companies respectively where these rights are necessary for the conduct of the economic activities for which they are established,"

28 It, for example, defines the notion of agricultural holding or agricultural farm, see Dudás (2021), 60. This notion is, on the other hand, relevant for the possibility of acquisition of agricultural land by nationals of an EU member state.

29 Art. 1, Para. 3 of the original ZPZ text from 2006.

and its Article 63 Section 3 provided that

> "as from the entry into force of this Agreement, Serbia shall authorise, by making full and expedient use of its existing procedures, the acquisition of real estate in Serbia by nationals of Member States of the European Union. Within four years from the entry into force of this Agreement, Serbia shall progressively adjust its legislation concerning the acquisition of real estate in its territory by nationals of the Member States of the European Union to ensure the same treatment as compared to its own nationals."

This made the Serbian lawmaker rephrase the article of the ZPZ that simply prohibited foreigners to own agricultural land in Serbia, by introducing an exception to the rule:

> "...unless otherwise provided in this law, in accordance with the Stabilization and Association Agreement between the EU and its Member States, on the one side, and Republic of Serbia, on the other."

This was done in August 2017 before the expiry of the 4-year deadline and came into force on September 1, 2017. Along with the amendments to Article 1, Article 72đ, labeled "Conditions for Transfer of Privately Owned Agricultural Land," was introduced. This article, in fact, deals with the conditions that nationals of EU member states must fulfill to be able to acquire agricultural land in Serbia, and these conditions are quite complex. First, the acquisition is possible not only by contracts with consideration but also by gratuitous contracts. However, an EU member state national must meet four requirements to be able to acquire agricultural land in private ownership: (1) if they have had permanent residence in the municipality in which the transfer is made for at least 10 years, counting from the day the amendments came into force (that is, from 2017); (2) if they cultivated the subject agricultural land for at least 3 years; (3) if they have registered agricultural economy (farm) in active status as bearer of the family agricultural economy (farm), in accordance with the law regulating agriculture and rural development, for at least 10 years without interruption[30]; (4) if they own machinery and equipment for performing agricultural production. Meeting these requirements is not only postponed to at least 2027, but it is almost impossible for a foreign national in real life. In addition, some lands were explicitly excluded from the possibility to be acquired by a national of EU member state (1) if these are agricultural land determined as construction land, in accordance with special law; (2) if they are within a nature preservation area; (3) if they are part of a military installation or complex or bordering such installations or complexes, or if they are part of a protected zone around military installations, complexes, constructions, or constructions of military

30 See Dudás, 2021, p. 60.

infrastructure, or part or bordering the land security zone[31]; (4) if they are within 10 kilometers of the national borders of the Republic of Serbia. Moreover, EU member state nationals have a quantitative limitation because, even if all the above conditions are fulfilled, not more than 2 hectares of agricultural land can be acquired. Lastly, the Republic of Serbia has preemption right in case agricultural land is to be sold to a national of an EU member state. This preemption right is regulated rather vaguely, as if its content is purposefully left to be determined by the competent ministries. If the contract is concluded in breach of any of those conditions, the ZPZ explicitly declares it to be null and void. It is rather obvious that Serbia did not meet its obligation under the Stabilization and Association Agreement to change its legislation within 4 years of that Agreement coming into force so as to equalize the position of nationals of EU member states to Serbian nationals for the acquisition of real property.[32] EU member state nationals must fulfill a heavy burden of conditions to be able to acquire agricultural land in Serbia, and none of these conditions apply to domestic persons. In addition, it has been noted that the legal entities are completely left out from these provisions since they cannot fulfill some of the conditions even in theory.[33]

As for the rules of acquiring agricultural land from the state, this acquisition also used to be completely prohibited,[34] but it was subsequently allowed under certain conditions,[35] one of which is that the buyer be a national of Serbia.[36] Therefore, these rules do not apply to the cross-border acquisition of agricultural land and shall not be presented in any more detail.

However, all these restrictions to foreign nationals can be circumvented easily and simply in Serbian law by establishing a legal entity (e.g., a limited liability company). A company established by a foreign natural person or legal entity in Serbia is deemed to have Serbian nationality,[37] and therefore, none of the restrictions applicable for foreign nationals and legal entities apply. The only thing that a foreigner needs to do to acquire agricultural land in Serbia is to establish a legal entity through which the acquisition of agricultural land will be possible without burdensome conditions. In other words, no national rules exist on the special conditions for acquiring a share

31 The Land Security Zone (*Kopnena zona bezbednosti*) is a perimeter around the administrative border between Kosovo and Metohija and the rest of the Republic of Serbia.

32 This is the conclusion of Baturan and Dudás, 2019, pp. 67–68; see also Nikolić Popadić, 2020, p. 227. Baturan and Dudás also point out that this provision is unconstitutional (Baturan and Dudás, 2019, p. 69, but it seems their argumentation, in this respect, remained not fully developed).

33 Dudás, 2021, pp. 68–69.

34 Art. 72 of the original ZPZ text from 2006.

35 The conditions are, among other, registered agricultural economy for at least 3 years; residence; having means/machinery/equipment for agricultural production; etc.

36 Art. 72a Para. 2 Item 1) of the ZPZ.

37 Art. 3 of the Law on Foreign Trade, Official gazette of RS Nos. 36/2009, 36/2011, 88/2011 and 89/2015. Even though this law is explicit in defining subsidiaries of foreign legal entities and companies established in Serbia by foreign nationals as domestic persons only for the purposes of that law, it is universally accepted that the same qualification applies while acquiring agricultural land, and this is verified in practice. See Baturan, 2013, p. 487; Nikolić Popadić, 2020, p. 228.

or a stake in a legal entity that owns agricultural land in Serbia. In practice, many investment funds and foreign companies indeed purchased shares in Serbian companies that own agricultural land and did not have any troubles or issues because of that. Moreover, if an international treaty enables the acquisition of ownership of agricultural land to foreign nationals, it makes the situation even more legally secure and certain because it can derogate all conditions set forth in national legislation, save the Constitution—and, as we have seen, the Constitution itself is rather liberal in this respect.

As has been said, the general rule of Serbian law for acquiring ownership over real property by a foreign national by inheritance is reciprocity. Now, this general rule is derogated by a special rule of the ZPZ, which in principle prohibits foreigners not only to acquire but to be owners of agricultural land in Serbia. This rule of ZPZ is most often being interpreted as prohibiting the acquisition of real property by foreigners irrespective of reciprocity even in case of inheritance.[38] Usually, when a foreign national is among the heirs, the division of inheritance is made in a way that the foreigner does not inherit the agricultural land in kind but rather other assets from the bequest.

Apart from ownership right, farmers often use agricultural land based upon a lease (especially of state-owned agricultural land) or some forms of joint farming (in case of privately owned agricultural land). The use of personal servitudes, such as usufruct, is not common in Serbia, mostly because personal servitudes are not regulated by existing laws but rather by rules of the 1844 Civil Code of Serbia, which apply as a type of "soft law."[39] That, in fact, means less legal certainty in respect of personal servitudes compared to some other ways of using agricultural land, and they are thus avoided. As for the lease, the ZPZ regulates the lease of state-owned agricultural land in much detail,[40] leaving the lease of privately owned agricultural land to the (much more liberal) general regime of civil law. State-owned land is leased for a period between 1 and 30 years (40 years for fishponds and vineyards) to natural persons or legal entities. Among the highly complex conditions that a lessor must fulfill, nationality is not mentioned; thus, foreign nationals are not excluded as such. However, after a closer examination, one might conclude that foreign natural persons cannot practically fulfill the conditions for participation in public tender and getting the lease but they could, if they are already operating in agriculture, acquire the lease over state-owned land. As for privately owned agricultural land, in addition to lease, it can be subject to sharecropping (Serbian: *napolica*, usually shares are 50–50),[41] and it can be used through agricultural cooperatives and by cooperation agreements (contract farming, credit financing of agricultural production).[42] In practice, however, foreign nationals usually use the agricultural land by establishing a local legal entity

38 Stanivuković, 2012, p. 551.
39 More details on that in Živković, 2017, p. 355.
40 Arts. 62 to 71 ZPZ, whereas Art. 64a has 27 paragraphs (i.e., is a "statute within a statute.")
41 Nikolić Popadić, 2020, p. 149.
42 Nikolić Popadić, 2020, pp. 151–156.

that either owns or leases agricultural land, or they bypass the statutory limitations by an international treaty that provides them special status in respect of the possibilities to use agricultural land.

2. Land regulation in the Constitution and in the legal practice of Constitutional Court

As it could be seen in the previous chapter, the Constitution is rather liberal when it comes to the legal regime of (privately owned) agricultural land: its use and disposal is, in principle, free and may be restricted for the protection of environment and for the protection of the rights of others. The highly conservative regime contained in the ZPZ, which significantly limits the use and disposal of agricultural land even when it is privately owned, appears to be in sharp contrast with the Constitution. Therefore, it is quite unexpected that only three cases of the Constitutional Court dealing with the constitutionality of the PZP exist; in all three, the motions were dismissed.[43]

The first case, No. IU-175/2006, decided on September 17, 2009, dealt with Art. 27 Para. 1 of the ZPZ, which reads: "Arable agricultural land cannot be divided to parcels the surface of which is less than half a hectare." The Constitutional Court dismissed the case, finding that the cited provision is in adherence to the Constitution and that the limitation of the ownership right is made "in a manner allowed by the Constitution and within the constitutional authorities of the legislator" ("*na Ustavom dopušten način i u granicama ustavnog ovlašćenja zakonodavca*"). In its reasoning, the Constitutional Court did mention Art. 88 Para. 2 of the Constitution but did not cite it in its entirety; rather, it cited only the part that allows restricting the models of use and disposal stipulating the terms of use and disposal of agricultural land, respectively, without referring to the part that defines the grounds for such limitations (ecology and rights of others). The Constitutional Court than found that, given the possibility of limitation in Art. 88 Para. 2, "the state is authorised to determine the conditions of use of agricultural land in accordance with the common interest of all citizens." Therefore, the Constitutional Court has bent an "overly liberal" constitutional provision toward enabling more significant limitations by law, provided that they are "in interest of all citizens" (common interest of society).

The second case, No. IU-82/2007, decided on September 10, 2009, dealt with the procedure of leasing state-owned agricultural land (Art. 64 Para. 3 ZPZ and its amendments from 2009). The Constitutional Court also dismissed this case, which dealt with the procedural issues (i.e., the commencement of the deadline for filing a complaint), and is thus of no particular relevance for this paper.

The third case No. IUz-280/2009, decided on March 24, 2011, dealt with Art. 3 of the ZPZ, which provides that the agricultural land that has changed purpose to

43 The cases are accessible online in Serbian language at the web address of the Constitutional Court, case law. Available at http://www.ustavni.sud.rs/page/jurisprudence/35/.

construction land according to a special law shall continue to be used for agricultural production until it is "brought to its planned purpose" (this means until actual construction on that land commences). The Constitutional Court dismissed this case as well, explaining that the provision that declares that agricultural land shall be used as such even after a planning document provided it shall become construction land, until the construction actually takes place, does not change any proprietary relations in respect of the land but rather provides its continued use in the same manner and therefore does not breach constitutional guarantees of ownership protection.

Interestingly, no cases dealt with the issue of acquisition of agricultural land by foreign nationals, before or after the 2017 amendments of the ZPZ that were inspired by the expiration of the deadline of the Stabilization and Association Agreement between EU and its member states, on the one side, and the Republic of Serbia (hereinafter: SAA), on the other. In addition, no cases arose from the fact that the mentioned 2017 amendments of the ZPZ apparently did not meet the obligations provided in the SAA, which, as an international treaty, has a higher ranking in the hierarchy of legal sources than the ZPZ under the Constitution.

3. Land law of the country and its possible control by the Commission or the Court of Justice of the EU

Not being a member state of the EU, but rather a candidate, Serbia is in a specific position in respect of the issues covered in this chapter. Given the fact the relations of Serbia and the EU in respect of Serbia's accession are currently regulated by the SAA, we shall revert to its provisions on the control and supervision of its implementation and eventual practice in that respect.

In its article 8, the SAA provided for a mechanism of supervision to be conducted by the Council for Stabilization and Association, established by Articles 119 *et seq*. SAA. This mechanism provides for periodical reports and dispute settlement arrangements (Article 130 SAA), including the arbitration proceedings (Protocol 7). However, things related to Serbia's path to EU membership have changed over time, and in 2020, the methodology of accession was amended, which Serbia accepted.

Be that as it may, the main source of determining the state of relations between the EU and Serbia is still the annual report prepared by the European Commission. The issue of agricultural land ownership or use has not been specially highlighted in recent EC reports as problematic in respect of the *acquis*, nor have there been any formal or political disputes in that respect. The 2018 report mentions agricultural land in the context of restitution,[44] but it also notes that the SAA obligation to equalize the position of nationals of EU member states and Serbian nationals in respect

44 See EC Commission Staff Working Document *Serbia 2018 Report*, p. 27. Available at https://www.mei.gov.rs/upload/documents/eu_dokumenta/godisnji_izvestaji_ek_o_napretku/ec_progress_report_18.pdf (Accessed: April 15, 2022).

of conditions for acquiring agricultural land has not been fulfilled by the 2017 ZPZ amendments.[45] The 2019 report contains the same note[46] and adds, in the section on privatization of socially owned enterprises, that "non-EU investors acquired some of the largest firms in mining, metallurgy, and agriculture."[47] Both these claims are also to be found in the 2020 report[48] and in the last published report for 2021 (dated 10/19/2021).[49] Therefore, it is fair to argue that, even though the EC is aware of the fact that the ZPZ does not comply with the SAA when it comes to acquisition of ownership over agricultural land by nationals of EU member states and that non-EU nationals acquired agricultural companies through privatization, these issues have not been politically raised in accession negotiations (at least not yet). Because they have to do with the obligations of Serbia deriving from the SAA, the forum to raise these issues legally is the Council for Stabilization and Association. It might be worth mentioning that Protocol 7 of the SAA excludes the arbitrability in respect of the obligation of Serbia to, within 4 years from the year the SAA comes to force, progressively adjust its legislation concerning the acquisition of real estate in its territory by nationals of the member states of the European Union to ensure the same treatment as compared to its own nationals.[50]

1.4. National legal instruments in the context of the Commission's Interpretative Communication

This chapter is dedicated to the presentation of national instruments that aim to restrict the possibilities of foreign nationals to acquire ownership over agricultural land, in the context of the Commission's Interpretative Communication on Farmland and EU Law from October 18, 2017 (the Communication). The Communication was prepared by the Commission to analyze the existing national instruments that restrict other EU member nationals from acquiring agricultural land in an EU member state in the context of their compliance to EU law, based on the existing case law of the Court of Justice of the European Union (CJEU). The main purpose of the Communication was "to publish guidance on how to regulate agricultural land markets in conformity to the EU law." The exiting national measures of

45 See EC Commission Staff Working Document *Serbia 2018 Report*, pp. 56 and 90. Available at https://www.mei.gov.rs/upload/documents/eu_dokumenta/godisnji_izvestaji_ek_o_napretku/ec_progress_report_18.pdf (Accessed: April 15, 2022).
46 EC Commission Staff Working Document *Serbia 2019 Report*, p. 59. Available at https://www.mei.gov.rs/upload/documents/eu_dokumenta/godisnji_izvestaji_ek_o_napretku/Serbia_2019_Report.pdf (Accessed: April 15, 2022).
47 EC Commission Staff Working Document *Serbia 2019 Report*, p. 48, available at https://www.mei.gov.rs/upload/documents/eu_dokumenta/godisnji_izvestaji_ek_o_napretku/Serbia_2019_Report.pdf (Accessed: April 15, 2022).
48 EC Commission Staff Working Document *Serbia 2020 Report*, pp. 58 and 71. Available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/serbia_report_2020.pdf (Accessed: April 15, 2022).
49 EC Commission Staff Working Document *Serbia 2021 Report*, pp. 62 and 84. Available at: https://europa.rs/wp-content/uploads/2021/10/Serbia-Report-2021.pdf (Accessed: April 15, 2022).
50 See Art. 2 of Protocol 7 to the SAA.

EU member states were discussed in part 4 of the Communication, and we shall present Serbian measures according to the list contained in the Communication. Lastly, we shall examine whether Serbia has national instruments that restrict foreign ownership of agricultural land that were not analyzed by the Commission in its Communication.

a) prior authorization

Prior authorization is the first instrument analyzed in the Communication. It was concluded that prior authorization as such is not in breach of EU law and might even increase the level of legal certainty compared to some alternative instruments; however, it is important not to allow too much discretion to the body deciding on authorization and too vague and imprecise criteria for granting authorization. Serbian law does not contain provisions on the prior authorization of the sale of agricultural land to foreigners, including EU member states nationals.

b) preemption right (rights of first refusal) in favor of farmers

The Communication contains a relatively positive analysis of this instrument, favoring it in comparison to the ban on non-farmers to acquire ownership over agricultural land. Even though Serbia does recognize preemption rights both within the general regime and in the context of acquisition by an EU member national (as explained in Chapter 1 above), it does not recognize this type of preemption right (i.e., this right in favor of farmers). In other words, preemption rights in respect of agricultural land in Serbian law do not exist in favor of farmers (i.e., persons engaged in agriculture) but rather in favor of other persons who may but need not be farmers by vocation. The idea behind this type of preemption right is that the agricultural land continues to be in agricultural use (and, eventually, maintain a viable farming community). This idea is not behind any of the preemption rights over agricultural land existing in Serbian law.

c) price controls

The price control of the agricultural land is assessed as compliant with EU law in cases in which it is used to prevent excessive speculation with the land and maintain the viability of existing farmers, provided that it is based upon transparent and clear criteria. The case law dealt mostly with sales of state-owned land and the need for its price to be as close to the genuine market price as possible. Serbian law does not recognize price controls in the context of foreign nationals acquiring ownership of agricultural land because foreigners cannot acquire ownership of agricultural land from the state (they are explicitly excluded), and there are no price regulations related to transactions with privately owned agricultural land.

d) self-farming obligation

The Communication is clear in identifying the condition of self-farming as being too restrictive and thus in breach of EU law. The idea behind this condition is to keep the land in agricultural use, which can be achieved by more proportional measures. Serbian law, however, contains this very condition for the possibility of an EU member state national to acquire ownership of agricultural land in Serbia.[51] Namely, one of the "general conditions" for an EU member state national to acquire ownership of agricultural land in Serbia is that they farm the agricultural land that is being acquired for at least 3 years, with or without compensation. Moreover, the 3-year deadline is calculated from the day the amendments of the ZPZ came into force, namely from September 1, 2017.[52] This, in principle, excludes legal entities, but even if one allowed legal entities to fulfill this condition through their employees, it still has a clear purpose to be restrictive toward foreign ownership and not to pursue legitimate policy goals, which would make such a restriction compliant with EU law.

e) qualifications in farming

This condition, given the fact farming is not a regulated profession that requires special skills, was deemed doubtful by the Communication, even though it was not a definite breach of EU law. Serbian law, however, does not have this type of condition for an EU member state national to acquire agricultural land in Serbia (it has something similar but different enough, as shall be seen later.)

f) residence requirements

The Communication has labeled residence requirements highly likely in breach of EU law because they do not serve any legitimate purpose that would justify restricting the possibility to acquire ownership of agricultural land. However, Serbian law contains this very conditions as one of the "general conditions" for a EU member state national to acquire ownership of agricultural land in Serbia; they must have permanent residence in the municipality where the land is satiated for at least 10 years[53]; moreover, these 10 years are being calculated from the day that the legal amendments to the ZPZ came to force,[54] namely from September 1, 2017, meaning that until then, no EU member national can acquire ownership of agricultural land in Serbia.

51 Art. 72đ, Para. 2 Item 2 of the ZPZ.
52 Art. 72đ, Para. 8 of the ZPZ.
53 Art. 72đ, Para. 2 Item 1 of the ZPZ.
54 Art. 72đ, Para. 8 of the ZPZ.

g) prohibition on selling to legal persons

The Communication clearly stated that such a restriction can hardly be justified. Serbian law does not contain such restriction explicitly but does so implicitly through the condition of self-farming and having a registered agricultural economy (farm) for 10 years, counting from September 1, 2017.[55]

h) acquisition caps

The Communication explains the possible legitimate reasons to introduce an acquisition cap (i.e., the maximum quantity of agricultural land a person may acquire). Serbian law contains an acquisition cap for EU member nationals who fulfill the conditions to acquire ownership of agricultural land in Serbia, which is set to a modest 2 hectares.[56]

i) privileges for local acquirers

The Communication analyzes some of the typical instruments that, in fact, privileges national buyers of land in comparison to foreigners, based mostly on the *Libert* case of the CJEU. The only instrument that is contained in the Communication and that really exists as a condition to all acquirers, not only foreigners, is the preemption right of the owner of the neighboring agricultural land because it applies irrespective of whether the acquirer is Serbian or foreign national (all the other restrictions explicitly apply only to foreigners, i.e., EU member state nationals, who are the only foreigners capable of acquiring agricultural land in Serbia; such application is in obvious breach of both Serbia's SAA and EU law). The purpose of this preemption right, introduced in 1998, is to enable the formation of bigger parcels of agricultural land ("increasing the size of land holdings") to develop viable farms in local communities or preserve a permanent agricultural community. As for other such privileges, the state has preemption right if agricultural land is being sold to a foreigner,[57] which is particularly difficult to reconcile with the fundamental freedoms of EU law because its purpose of preventing foreign ownership of agricultural land is rather obvious.

j) condition of reciprocity

This condition is, understandably, irreconcilable with the EU law, as shortly explained in the Communication. It can apply only to foreigners and not to domestic nationals and is thus discriminatory from the point of view of internal EU law. Serbian rules on the acquisition of agricultural land do not explicitly mention reciprocity; thus, even if

55 Art. 72đ, Para. 2 Item 3 of the ZPZ.
56 Art. 72đ, Para. 5 of the ZPZ.
57 Art. 72đ, Para. 9 of the ZPZ.

the general regime of acquiring real property by contract requires reciprocity, it is in fact not required in the special case of acquiring agricultural land.

k) instruments not mentioned in the Communication

First, one needs to take note of the fact that the Serbian legislator clearly misunderstood the requirements of the SAA and provided for special rules for EU member state nationals in respect of acquiring ownership of agricultural land. The instruments mentioned in the Communication are, mostly, of a different nature: they are applicable to all acquirers, which actually restricts the possibility of a national of another EU member state to acquire agricultural land. In Serbia, laws still imply special rules for foreign nationals—EU member state nationals included—and do it quite openly. Therefore, foreigners are explicitly excluded from the possibility to acquire agricultural land from the state[58]; they are excluded from acquiring agricultural land in some territories[59] in which Serbian nationals are not excluded, and some conditions apply only to them and not to Serbian nationals (self-farming, residence, acquisition cap... foreigner/EU member state nationals must even prove to own agricultural machines and equipment to be able to acquire agricultural land in Serbia[60]). Therefore, speaking of some instruments not tackled by the Communication is in fact erroneous as Serbia explicitly disadvantages foreigners from acquiring agricultural land, practically excluding such possibility, and does not realize the necessity to do that in a less explicit way that is justified by legitimate reasons (agricultural land is not high on the political agenda between the EU and Serbia).

Thus, one might conclude that Serbia is still in the early phase of dealing with the EU accession because many questions that are begging to be asked have not yet been asked. For the time being, Serbia is in open breach of the SAA because it did not make equal EU member state nationals with Serbian nationals in respect of the acquisition of ownership of agricultural land within the agreed period. Some special conditions and limitations apply only to foreign nationals—EU member states nationals included (as explained in Chapter 1 above)—and it is beyond doubt that foreigners are discriminated in that sense. It remains to be seen how this relation shall develop in the future and whether Serbia will adhere to EU law or whether this will become more lenient to member states and candidates introducing rules that limit or exclude foreign ownership of agricultural land.

58 Art. 72a, Para. 2 Item 1 of the ZPZ.
59 Art. 72đ, Paras. 3 and 4 of the ZPZ. See details in Chapter 1 above.
60 Art. 72đ, Para. 2 Item 4 of the ZPZ.

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| Chapter 10 |

Slovakia: Open Land Market and No Restrictions

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ABSTRACT

Slovakia's accession to the European Union opened a whole new chapter in the country's history and brought dynamic changes to its land transfer regulation. In the Slovak Republic, the moratorium forbidding the purchase of agricultural land by foreigners expired in 2014. Following this period, the European Commission launched a comprehensive examination regarding land acquisition regulations in the newly acceded member states. The investigation revealed that specific provisions of the Slovak land regulation restricted the EU's fundamental economic freedoms. The Slovak legislator responded to this situation by amending a particular paragraph of the Foreign Exchange Act, which has resulted in opening the agricultural land market not only to EU nationals but also to third-country nationals. In addition, several new rules concerning this subject were adopted, namely the Act on the acquisition of ownership of agricultural land. It should be noted that even before the mentioned revelation, this Act had been the subject of numerous public debates. Consequently, the Constitutional Court of the Slovak Republic annulled a significant part of the Act on land acquisition in its decision on November 14, 2018, which has contributed to the agricultural land market becoming fully open in Slovakia.

This chapter introduces the current legislation on land protection and characterizes the rules on agricultural land regulation and land transfer law in Slovakia, exploring the constitutional level with particular regard to the decision delivered by the Constitutional Court of the Slovak Republic in detail. Moreover, the proceeding initiated by the European Commission is also a subject of this study. Finally, the national legal instruments of Slovakia are also analyzed in light of the Commission's Interpretative Communication.

KEYWORDS

land law, cross-border land acquisitions, agricultural land, Slovakia

1. Theoretical background and brief summary of the national land law regime

Agricultural land as a natural resource plays an integral and important part of every country's natural heritage, and for that reason, every country is ought to be responsible for protecting it. In Slovakia, this duty was declared on the supreme

Szilágyi, J. E., Szinek Csütörtöki, H. (2022) 'Slovakia: Open Land Market and No Restrictions' in Szilágyi, J. E. (ed.) *Acquisition of Agricultural Lands: Cross-border Issues from a Central European Perspective.* Miskolc–Budapest: Central European Academic Publishing. pp. 267–292. https://doi.org/10.54171/2022.jesz.aoalcbicec_11

layer of the legal order.[1] As a result, it can be stated that the basis of the Slovak land law regulation is the Constitution of the Slovak Republic,[2] according to which the state shall ensure a cautious use of natural resources.[3] In addition, the Constitution specifically highlights the protection of agricultural land and forest land. Furthermore, these natural resources are defined as non-renewable natural resources,[4] and the Constitution accords them priority protection to ensure the country's food security.

The Slovak land regime regulation is a complex system of legal norms. At this point, we also must note that a detailed listing of all relevant legal sources is beyond the scope of this study.[5]

1 At this point, we will refrain from a detailed description of the constitutional rules as this will be covered in the following subchapter.

2 Constitution of the Slovak Republic, Act no. 460/1992 Coll. Hereinafter referred to as the Constitution of the Slovak Republic or Constitution or the Slovak Constitution *(Ústava Slovenskej republiky, č. 460/1992 Zb.)*

3 For more on this subject, see, for example, Hornyák, 2017; Orosz, 2018; Olajos, 2018; Szilágyi, 2018a.

4 Constitution of the Slovak Republic, Article 44 (5).

5 For the most essential sources of Slovak land law, see, for example, Act no. 229/1991 Coll. on the regulation of ownership relations to land and other agricultural property, as amended *(Zákon č. 229/1991 Z. z. o úprave vlastníckych vzťahov k pôde a inému poľnohospodárskemu majetku)*, which regulates the rights and obligations of owners, users, and lessees of land, as well as the competence of the State in regulating ownership and user rights on land; Act no. 180/1995 Coll. on specific measures for land ownership arrangements, as amended *(Zákon č. 180/1995 Z. z. o niektorých opatreniach na usporiadanie vlastníctva k pozemkom)*; Act no. 504/2003 Coll. on the lease of agricultural land plots, agricultural holding, and forest plots, as amended *(Zákon č. 504/2003 Z. z. o nájme poľnohospodárskych pozemkov, poľnohospodárskeho podniku a lesných pozemkov)*; Act no. 180/1995 Coll. on specific measures for land ownership arrangements, as amended *(Zákon č. 180/1995 Z. z. o niektorých opatreniach na usporiadanie vlastníctva k pozemkom)*; Act no. 330/1991 Coll. on land arrangements, settlement of land ownership rights, district land offices, the Land Fund, and land associations, as amended *(Zákon č. 330/1991 Zb. o pozemkových úpravách, usporiadaní pozemkového vlastníctva, pozemkových úradoch, pozemkovom fonde a o pozemkových spoločenstvách)*; Act no. 162/1995 Coll. on cadastre of real estate and on registration of ownership and other real estate rights, as amended *(Zákon č. 162/1995 Z. z. o katastri nehnuteľností a o zápise vlastníckych a iných práv k nehnuteľnostiam)*; Act no. 220/2004 Coll. on the protection and use of agricultural land, as amended *(Zákon č. 220/2004 Z. z. o ochrane a využívaní poľnohospodárskej pôdy)*; Act no. 40/1964 Coll. Civil Code, as amended *(Zákon č. 40/1964 Zb., Občiansky zákonník)*; Act no. 202/1995 Coll. on the foreign exchange act, as amended *(Zákon č. 202/1995 Z. z., Devízový zákon).* For the legislative framework of agricultural land in SR see for example Ilavská, 2016. Although the chapter primarily focuses on issues of land ownership, we would like to briefly mention the regulations resulting from other legislation in the field of agriculture or land protection, such as Act no. 136/2000 Coll. on fertilizers, as amended *(Zákon č. 136/2000 Z. z. o hnojivách),* Act no. 405/2011 Coll. on plant medicine care and on the amendment of Act of the National Council of the Slovak Republic No. 145/1995 Coll. on administrative fees, as amended *(Zákon č. 405/2011 Z. z. o rastlinolekárskej starostlivosti a o zmene zákona Národnej rady Slovenskej republiky č. 145/1995 Z. z. o správnych poplatkoch v znení neskorších predpisov)*, Act no. 151/2002 Coll. on the use of genetic technologies and genetically modified organisms, as amended *(Zákon č. 151/2002 Z. z. o používaní genetických technológií a geneticky modifikovaných organizmov).* These regulations have a significant impact on the use of the land and therefore interfere with ownership rights.

While exploring the level of regular acts, it can be seen that one of the most important sources of law is Act no. 220/2004 Coll. on the protection and use of agricultural land, as amended. The subject of this act is undoubtedly the "agricultural land," which is characterized as a productively potential land registered in real estate cadastre as arable land, hop fields, vineyards, fruit orchards, gardens, and permanent grasslands.[6] This act provides for the protection of the characteristics and functions of agricultural land, ensuring its sustainable management and agricultural use, the protection of its environmental functions as well as the protection of its areas from unauthorized use for non-agricultural purposes.[7]

Act no. 140/2014 Coll. on the acquisition of ownership of agricultural land, as amended[8] regulates certain legal stages of the acquisition of ownership of agricultural land by transfer and also the powers of public administrative bodies regarding the transfer of ownership of agricultural land. It is also worth noting that the term "agricultural land" is also defined in the Act on land acquisition,[9] and this definition is based on the aforementioned act. In the Act on land acquisition, agricultural land is legally defined as an agricultural land or land built up with a construction intended for agricultural purposes up to June 24, 1991.[10] However, the legislator exhaustively defines the exceptions to which the given law does not apply: the list includes gardens regardless of their location; land plot in a municipality's built-up area regardless of its type; land plot outside the municipality's built-up area if it is intended for other than agricultural use, separate regulations limit the possibility of its agricultural use, and its acreage is less than 2,000 m^2; in addition, it is adjacent to the construction, together with which it creates one functional whole.[11]

As can be seen from the definition, the forest land or nature conservation areas are excluded from the definition.

The basic legal regulation in the field of forest land and forest management is the Act no. 326/2005 Coll. on forests, as amended,[12] which can be regarded as a certain code in the field of legal relations to forests, forest land, and forest management.[13] The Forest Act provides the definition[14] of forest lands[15] by means of a broad definition, and their protection in the permanent set-aside, which means a permanent

6 Act on the protection and use of agricultural land, Para. 2 point b)

7 Dufala, Dufalová and Šmelková, 2017, p. 160.

8 *Zákon č. 140/2014 Z. z. o nadobúdaní vlastníctva poľnohospodárskeho pozemku.* Hereinafter referred to as Act on land acquisition.

9 I.e., the basic legal act directly related to the possibility of agricultural land acquisition is the Act on land acquisition, which regulates the transfer of agricultural land and also the competence of specific bodies operating in this area.

10 This term (both positive and negative) is defined in the Act on land acquisition, Para. 2 (1).

11 Act on land acquisition, Para. 2.

12 *Zákon č. 326/2005 Z. z. o lesoch.* Hereinafter referred to as Forest Act.

13 Máčaj, 2021b, p. 84. See also Máčaj, 2020.

14 See the Forest Act, Para. 2 point a): "Forest is an ecosystem created by the forest land with forest stand and factors of its atmospheric environment, plant species, animal species and soil with its hydrological and atmospheric regime."

15 Forest Act, Para. 3.

change of forest land use or permanent change of land type.[16] As in the case of agricultural land, constitutional regulation is paramount in the case of legal protection of forest land.[17] The protection of forest land is primarily provided by the fact that forest land can be primarily used to fulfill functions of forests. For other purposes, they may only be used based on a decision of the competent state administration forestry authority, which may decide about its temporary or permanent exemption from the functions of forests or about restrictions on the use of forest functions on them.[18]

Protected sites of national importance are regulated according to Act no. 543/2002 Coll. on nature and landscape protection, as amended.[19] The legislation on nature and landscape protection, which is part of the unique nature and landscape protection, contributes to land protection mainly by territorial protection. This protection is stricter than the general protection of nature and landscape as it represents a sum of over-standard rules that apply concerning exceptional and unrepeatable components of the environment.[20]

The land is part of a specific territory of different categories and types that are protected by relatively broad legislation. In this context, the legislation regarding land protection and land care can be divided into two groups. The first group includes legal acts regulating specific categories of territory with the land as a part of these territories,[21] while the second group includes legal acts regulating land protection against sources of danger or damage.[22,23]

It is necessary to mention the issues of measures and the prohibition of land fragmentation, which are contained in Act no. 180/1995 Coll. on specific measures for land ownership arrangements, as amended. This fragmentation is mostly caused by the past, from the period of different legal regulations. However, the measures and the ban on land fragmentation represent a tool to prevent further

16 In the Forest Act, the lease of forest land is specified in more detail, while the basic provisions of the Civil Code shall apply to these relations if the Forest Act does not provide otherwise. Particular attention shall be paid to the content of the lease agreement, which are mandatory (obligatory) provisions of every forest land lease agreement. They are set out in the wording of paragraph 2 and include three elements in total—only those defined in the Forest Act; for the remaining elements, the Civil Code applies. For the lease, which is forest management, there must be a fixed term, at least for the duration of the forest management program. There is no such restriction for any other purpose of the lease. For more information, see Beracka, 2019.

17 Máčaj, 2021b, p. 84.

18 For more information, see Dufala, Dufalová and Šmelková, 2017, p. 159.

19 *Zákon č. 543/2002 Z. z., o ochrane prírody a krajiny*

20 Cepek et al., 2015, p. 261.

21 For example, Act no. 543/2002 Coll. on nature and landscape protection, as amended; Act no. 364/2004 Coll. on water, as amended; and Act no. 326/2005 Coll. on forests, as amended.

22 For example, Act no. 39/2013 Coll. on integrated pollution prevention and control, as amended; Act no. 223/2001 Coll. on waste, as amended; Act no. 188/2003 Coll. on the application of sludge and bottom sediments into the land and on the amendment of Act no. 223/2001 Coll. on waste, as amended; and Act no. 136/2000 Coll. on fertilisers, as amended.

23 Dufala, Dufalová and Šmelková, 2017, p. 157.

fragmentation, which is one of the most significant problems of Slovak land law and needs to be solved by comprehensive land consolidation at the state level. Moreover, it is necessary to mention the possibility of conducting land consolidation in terms of Act no. 330/1991 Coll. on land consolidation, settlement of land ownership rights, district land offices, the Land Fund, and land associations, as amended.[24]

Furthermore, since Slovakia has no uniform Land Code, the legal regime of leasing of agricultural land is regulated by several sources of law, such as the Civil Code, Act no. 229/91 Coll. on the arrangement of ownership of agricultural land and other agricultural real estate, as amended, and Act no. 504/2003 Coll. on the lease of agricultural land, agricultural holding, and forest land, as amended. The Civil Code contains general rules within the provisions on the issue of leases; these rules apply only if the issues are not regulated by a specific law.[25]

It should be also noted that in the Slovak legal environment, no separate legislation on agricultural holdings exists. The relevant specific rule concerning this topic is included in the Act no. 504/2003 Coll. on the lease of agricultural land, agricultural holding, and forest land, as amended,[26] which contains relevant provisions on leasing.

Moreover, Slovakia has no special regulations for the succession of agricultural land or holding, and general succession rules of civil law[27] shall be applied. Furthermore, there is no land possession limit (minimum or maximum) that cannot be exceeded by succession.

Land associations are a noteworthy feature of the Slovak land law.[28] Land associations are currently regulated by Act no. 97/2013 Coll. on land associations, as amended.[29] A land association is a legal entity according to the law, and this term includes many entities regulated by different legislation in history. In Slovakia, the Register of Associations is managed by the District Office.[30] It is worth noting that these associations represent a special type of co-ownership that is particularly difficult to cancel and, in this way, also represent a certain way of protecting the ownership of the land in question.[31]

24 For more on this subject see for example Máčaj, 2021, p. 117–126.
25 Lazíková, Bandlerová and Palšová, 2017, pp. 101–102.
26 *Zákon č. 504/2003 Z. z., o nájme poľnohospodárskych pozemkov, poľnohospodárskeho podniku a lesných pozemkov*
27 See, for example, Act no. 40/1964 Coll., the Civil Code, as amended *(zákon č. 40/1964 Zb., Občiansky zákonník)*
28 On this topic, see Bandlerová, Lazíková, Rumanovská and Lazíková, 2017, pp. 80–94; Lazíková, 2014, pp. 61–70.
29 *Zákon č. 93/2013 Z. z., o pozemkových spoločenstvách*
30 Máčaj, 2018a, p. 156.
31 For more on this subject, see Máčaj, 2018b, pp. 173–179.

As far as the issue of real estate ownership[32] is concerned,[33] it can be stated that titles to real estate in Slovakia are well protected, mainly by the Constitution and the Civil Code.[34] According to the highest legal source of the country, everyone has the right to own property, and everyone's property right is equally protected. However, specific properties are exclusively owned by the State.[35] It is worth noting that the ownership right is not time-barred because of the title claims to real estate that may be brought by third parties without time a limit. Relevant legal norms in connection with real estate ownership are not amended frequently and are generally considered stable – with the exception of the agricultural land regulation.[36] It can be stated that under current legislation, both natural and legal persons can acquire agricultural land ownership with almost no restrictions.[37]

2. Land regulation in the Constitution and the case law of the Constitutional Court

In Slovakia, significant changes in agricultural land and forest land legislation occurred in 2017. It is essential to point out that they were primarily linked to the constitutional protection of agricultural land and forest land, which can be found in Chapter Two, Part Two of the Slovak Constitution under the title "Basic Human Rights and Freedoms." Similar protective measures are enacted in Part Six of the Constitution, titled "The Right to the Protection of the Environment and Cultural Heritage." It should be noted that until May 31, 2017, the protection of agricultural land was regulated by the general environmental provisions of the Constitution, in particular Articles 4 and 44. However, following the constitutional amendment, now with effect from June 1, 2017, the Constitution also provides for special protection of agricultural land not only as a component of the environment but also with some specificities related to the acquisition of ownership. [38]

32 In Slovakia, a single public register (cadastre) is available for the registration of certain real estate rights, regulated primarily by Act no. 162/1995 Coll., as amended (Cadastral Act), and its implementing legal norms. This act enumerates the real estate assets and also real estate rights that are to be registered in the cadastre.

33 In connection with this topic, see, for example, Bandlerová, Lazíková and Palšová, 2017, pp. 98–103.; Lazíková and Bandlerová, 2011; Lazíková, Takáč, Schwarcz and Bandlerová, 2015, pp. 367–376.; Palšová, Bandlerová, Melišková and Schwarcz, 2017, pp. 64–72.; Palšová, 2019, pp. 72–76.; Palšová, 2020; Lazíková and Bandlerová, 2014, pp. 115–124.; Illáš, 2019, pp. 8–15.

34 In each type of transfer, the legislator refers to the Civil Code and its specific provision. Therefore, it can be assumed that agricultural land cannot be the subject of a transfer under other legislation (e.g., under the Commercial Code, where the transfer of real estate would otherwise be considered as a contract for the purchase of the leased item or a contract on the sale of a holding).

35 Constitution of the Slovak Republic, Article 4 (1).

36 Prokopová, Vagundová and Stripaj, 2021.

37 For exceptions, see Para. 7 of the Act on land acquisition.

38 Dufala, Dufalová and Šmelková, 2017, p. 157.

Agricultural land, which is both an integral part of a country's territory and an important natural heritage, is available only in limited quantity. As it is a unique natural resource that cannot be replaced by anything else, its indispensability, capacity for renewal, sensitivity to risk, and low profitability embody the particular social nature of land ownership,[39] and it should be the duty of every country to protect their own agricultural land.[40]

In the case of Slovakia, this "duty" has been declared in the Slovak Constitution[41] via amendment no. 137/2017 Coll.,[42] with effect from June 1, 2017.[43] This change responds to the Program Declaration of the Government of the Slovak Republic for 2016–2020,[44] according to which Slovakia is a predominantly rural country, and therefore, the policies of the Government of the Slovak Republic[45] aim to support and promote rural development and improve the living conditions of rural populations. The government considers agriculture, food, and forestry as strategic sectors of the state's economic policy and as irreplaceable in the economy's structure.[46]

The Constitution enshrines the fundamental right to a favorable environment. Additionally, it is the constitutional duty of the state to protect and enhance the environment and different types of cultural heritage. Moreover, the provision that no one may endanger or damage neither the environment nor natural resources and cultural heritage beyond reasonable limits is also enacted in the Constitution.[47] According to it, the state shall ensure a cautious use of natural resources, protection of agricultural land and forest land, ecological balance, and effective environmental care, and protect specified species of wild plants and animals. The Constitution explicitly emphasizes the protection of agricultural land and forest land among natural resources.[48] Additionally, these two natural resources are defined as non-renewable natural resources,[49] and the Constitution accords them priority protection

39 Bányai, 2016, p. 2. See also Bányai, 2016, p. 16.
40 Szinek Csütörtöki, 2021, p. 161.
41 In Slovakia, it should be noted that the constitutional system consists not only of the Constitution but also of several constitutional acts (in other words, constitutional laws). It should also be noted that the question of the relationship between the Constitution and constitutional laws has been addressed by the Constitutional Court of the Slovak Republic, which, in its decision no. I. ÚS 39/93, stated that the Constitution is the supreme layer of the legal order. In this context, see, for example, Giba et al, 2019, p. 64.
42 *Ústavný zákon č. 137/2017 Z. z., ktorým sa mení a dopĺňa Ústava slovenskej republiky č. 460/1992 Zb.*
43 The amendment to the Constitution was adopted on May 16, 2017.
44 *Programové vyhlásenie vlády Slovenskej republiky.* Hereinafter referred to as Program Declaration.
45 *Vláda Slovenskej republiky.* Hereinafter referred to as Slovak Government or Government.
46 For further information, see the Program Declaration, p. 17. Available at https://www.mosr.sk/data/files/3345_6483_programove-vyhlasenie-vlady-slovenskej-republiky.pdf (Accessed: February 22, 2022)
47 Constitution of the Slovak Republic, Article 44 (1)–(3).
48 Constitution of the Slovak Republic, Article 44 (4)–(5).
49 Constitution of the Slovak Republic, Article 44 (4).

to ensure the country's food security.[50] In Slovakia, agricultural land and forest land are no longer considered commodities[51] but non-renewable natural resources that enjoy special protection by the state and society under the Slovak Constitution.[52,53] It is worth noting that the adoption of this constitutional regulation meant in the least that it pointed to the importance of the significance of agricultural land and forest land as a component of the environment and the instrument of organic farming. By systematically incorporating these provisions in the section that establishes the right to the protection of the environment and of cultural heritage, we could assume that the primary objective of adopting this regulation was to highlight environmental aspects. However, it can be inferred from the explanatory memorandum[54] that the primary aim of this amendment was to prevent the speculative purchase of land and to establish the obligation for the state to protect agricultural land and forest land, to support the rural nature of the land, and to ensure its protection by defining and distinguishing it from other goods as a subject of legal relations. Thus, in the explanatory memorandum to the draft of this constitutional act, the protection of land is primarily perceived through the regulation of the conveying of property rights.[55]

However, the rights enshrined in Article 44 of the Constitution are not directly enforceable but can be enforced through different acts. This possibility is stated in Article 44 (6) of the Constitution, which explicitly refers to the enforceability of third-generation human rights, also known as solidarity rights. It is important to underline that solidarity rights include the right to protect cultural heritage and the right to protect the environment. It arises from the provision of the Constitution that everyone has a right to a favorable environment. Notwithstanding the previous sentence, this right cannot be considered an individual right as its purpose primarily ensures that society benefits from it. That is why it must be considered an intergenerational right, but it should also be noted that solidarity is inherent in the right to the environment.[56]

It is also noteworthy that Article 20 (2) of the Constitution has been amended as follows:

50 On this topic, see Szilágyi, 2018b, pp. 69–90.; Szilágyi, Hojnyák and Jakab, 2021, pp. 72–86.; Csirszki, Szinek Csütörtöki and Zombory, 2021, pp. 29–52.

51 Pavlovič, 2021.

52 See. for example. the paper issued by the Office of the National Council of the Slovak Republic on the occasion of the 25th anniversary of the Slovak Constitution: Rolková Petranská, 2017, p. 70.

53 Constitution of the Slovak Republic, Article 44 (4).

54 I.e., Explanatory Memorandum to the Bill of the Members of the National Council of the Slovak Republic Andrej Danko, Eva Antošová, Jaroslav Paška and Tibor Bernaťák for the Issue of the Constitutional Act amending the Constitution of the Slovak Republic No. 460/1992 Coll., as amended.

55 Máčaj, 2019, p. 294.

56 Pavlovič, 2020, p. 63.

> "The law shall lay down which property, other than the property specified in Article 4 of this Constitution,[57] necessary to ensure the needs of society, food security, the development of the national economy and public interest, may be owned only by the State, municipality, or designated individuals or legal persons. The law may also state that certain things may be owned only by citizens or legal persons resident in the Slovak Republic."[58]

This amendment enables the legislator to restrict the acquisition of agricultural land and forest land by certain groups of persons—legal as well as natural—including foreigners. The explanatory memorandum to the Act on land acquisition[59] justifies these changes based on the need to establish a framework for protecting agricultural land against speculative purchases, which could have negative consequences.[60]

The state ought to be responsible for protecting its land through legislation as well as control of certain activities, supported by sanction mechanisms. These instruments should, therefore, be legally binding and enforceable. Specific arguments state that the changes in the Constitution on land protection are rather declaratory, which, however, enabled the legislator to adopt laws on land protection anchored in the Constitution.[61]

In this chapter, the constitutional rules are presented, and in this context, the relevant case law will also be analyzed. Among other reasons, the key Constitutional Court decision, which will be introduced in detail below, has brought about significant changes in Slovak land legislation.

57 See the Constitution of the Slovak Republic, Article 4, which states that raw materials, caves, underground water, natural and thermal springs, and streams are the property of the Slovak Republic. Furthermore, the Slovak Republic protects and develops these resources and makes careful and effective use of mineral resources and natural heritage to benefit its citizens and subsequent generations. In addition, the transport of water taken from water bodies located within the territory of the Slovak Republic outside its borders by vehicles or pipelines is prohibited. This prohibition does not apply to water intended for personal use, drinking water put into consumer containers within the territory of the Slovak Republic, and natural mineral water put into consumer containers within the territory of the Slovak Republic, nor to water provided for humanitarian help or assistance in states of emergency. Details of conditions for transporting water for personal use or water provided for humanitarian help and assistance in states of emergency shall be stated in a specific law.

58 It is important to note that, according to some considerations, agricultural land, as the basis of food security, can be limited to the ownership of the state, citizens, and legal persons resident in the Slovak Republic based on the provision in question. Food safety is part of national security and thus should fall under the legislation of a member state rather than the European Union. This opinion has, of course, not yet prevailed in legislation.

59 Hereinafter referred to as the Explanatory Memorandum. The explanatory memorandum to the Act on land acquisition is available in the Slovak language on the website of the National Council of the Slovak Republic: https://bit.ly/30bIv97 (Accessed: February 2, 2022).

60 Pavlovič and Ravas, 2017.

61 Pavlovič, 2020, p. 63.

On November 14, 2018, the Constitutional Court of the Slovak Republic[62] ruled, in a closed session on the motion of a group of 40 members of the National Council of the Slovak Republic,[63] to initiate proceedings under Article 125 (1) Point (a) of the Constitution of the Slovak Republic,[64] examining the conformity of the Act on land acquisition with specific provisions[65] of the Constitution of the Slovak Republic; on the other hand, on the motion of a group of 33 members of the National Council of the Slovak Republic, it ruled to initiate proceedings under Article 125 (1) Point (a) of the Constitution on the conformity of the Act on land acquisition with certain provisions[66] of the Constitution.[67] In its decision,[68] the Constitutional Court found that the provisions of Paragraphs 4, 5, and 6 of Chapter I[69] of the Act on land acquisition in question were not in line with certain provisions of the Constitution of the Slovak Republic.[70,71]

It is clear from the nature of the legal norms examined and the petitioner's arguments that the critical issue for the Slovak Constitutional Court was the assessment of the constitutionality of the problematic legislation concerning Article 20 (1) of the Slovak Constitution.[72] As stated above, Article 20 of the Constitution enshrines that everyone has the right to own property, and the property rights of all owners shall be uniformly construed and equally protected by law. The Article further states that

62 *Ústavný súd Slovenskej republiky*. Hereinafter referred to as Constitutional Court or Slovak Constitutional Court.

63 *Národná rada Slovenskej republiky*. Hereinafter referred to as the Slovak Parliament.

64 Constitution of the Slovak Republic, Article 125 (1) Point a): "The Constitutional Court decides on the compatibility of laws with the Constitution, constitutional laws and international treaties to which a consent was given by the National Council of the Slovak Republic and which were ratified and promulgated in a manner laid down by law…"

65 More specifically, Article 1 (1), first sentence, in conjunction with Article 2 (2); Article 12 (1) and (2); Article 13 (3) and (4); and Article 20 (1), (2), and (4) of the Constitution of the Slovak Republic.

66 More specifically, Article 1 (1); Article 2 (2); Article 12 (1) and (2); Article 13 (3) and (4); Article 20 (1), (2), and (4); Article 35 (1) and (2); and Article 55 of the Constitution of the Slovak Republic.

67 The Slovak Constitutional Court, in its preliminary examination of the motions to open proceedings, concluded that the conditions for the substantive examination of the two cases provided for in the Constitution and in Act no. 38/1993 Coll. on the organisation of the Constitutional Court of the Slovak Republic, the procedure before it, and the status of its judges, as amended, were met; therefore, by its decision of September 17, 2014, PL. ÚS 20/2014, it merged the two motions to open proceedings into a joint procedure and accepted them for further proceedings. It did not grant the requests for suspension of the contested legislation.

68 For a detailed description of the decision, see Szinek Csütörtöki, 2022, pp. 126–143. See also Veliký, 2019.

69 A procedure for transferring ownership of agricultural land, publication of an offer for the transfer of ownership of agricultural land, verification, and demonstration of the conditions for acquiring ownership of agricultural land.

70 More specifically, Article 1 (1); Article 13 (4), and Article 20 (1) of the Constitution of the Slovak Republic.

71 Decision of the Constitutional Court of the Slovak Republic, no. PL. ÚS 20/2014, p. 1 and 2.

72 For more on the right to property, see, for example, Drgonec, 2019; Orosz et al., 2021; Čič et al., 2012.

property acquired in a manner that is contrary to Slovak laws shall not enjoy such protection and that the right of inheritance is fundamentally guaranteed.[73] Thus, based on this, it can be concluded that the property rights of all owners have the same legal content; however, no precisely defined (delimited) definition exists for such content.[74] It can be concluded that the right to property is considered a fundamental right by the Slovak Constitutional Court, but the right to acquire property is not. The Constitutional Court has already ruled in several cases that Article 20 (1) of the Constitution does not guarantee the right to acquire property[75] and that Article 20 (1) of the Constitution only protects property acquired under the law in force.[76,77]

As highlighted by the Constitutional Court, the legislation in question is substantially related to the fundamental right to property, and the Act on land acquisition is intended to impose limits on the transfer of ownership to a form of individualized ownership, where the limits are determined by the legal conditions of the entity to which the owner of the agricultural land wishes to transfer ownership. The inspected legislation, therefore, focuses directly on the conditions for the use of one of the legal elements of the right to property, namely the right to dispose of the object of property (*ius disponendi*),[78] and therefore falls within the scope of Article 20 (1) of the Constitution of the Slovak Republic.[79]

In its resolution, the Constitutional Court upheld the contradiction of the Act on land acquisition with Article 20 (1) of the Slovak Republic's Constitution regarding the restriction of the right to property. The Constitutional Court logically justifies its decision by stating that agricultural land is part of the land—immovable property—subject to property rights and other rights *in rem* and obligations.

73 Constitution of the Slovak Republic, Article 20 (1).

74 It is worth mentioning that the Slovak Constitutional Court has repeatedly accepted the content of the right to property as defined by the Roman private law by stating that the owner is entitled to possess, use, enjoy, and dispose of the object of the right to property (see, for example, decisions no. PL. ÚS 15/06 and II. ÚS 8/97). This is, therefore, the most complete and broadest definition of a subjective right to ownership, which includes the general characteristics of a subjective right and specific characteristics that clearly distinguish it from other subjective rights (PL. ÚS 30/95).

75 Decision of the Constitutional Court of the Slovak Republic, no. PL. ÚS 13/97.

76 Decision of the Constitutional Court of the Slovak Republic, no. PL. ÚS 33/95.

77 As in the Constitutional Court of Hungary. In this context, see the Decision of the Constitutional Court of Hungary, no. 743/B/1993, ABH 1996, p. 417. The Constitutional Court of Hungary has also ruled that fundamental rights must protect acquired property and that the guarantees for the protection of this property right must be defined (Decision no. 575/B/1992). On the constitutional issues of land transactions regulation, see, for example, Csák, 2018. For the related Hungarian case law, see Olajos, Csák and Hornyák, 2018; Olajos, 2015.

78 Civil Code, Para. 123.

79 For further, see the Decision of the Constitutional Court of the Slovak Republic, no. PL. ÚS 20/2014, p. 31.

Based on the proportionality test,[80,81] the Slovak Constitutional Court concluded that all the three factors of this test[82] failed in terms of the restriction of the fundamental right to property.[83] Within the framework of the proportionality test, the Constitutional Court considered whether a balance was struck between the needs of public interest, which is the protection of agricultural land and rural development, and the protection of the individual and their fundamental rights. In this test, the Constitutional Court concluded that the Act is heavily dominated by the regulation of the property rights of agricultural landowners and fails to protect public interest. The Act significantly limits the right of disposition as an element of property rights and seeks to protect agricultural land by concentrating ownership rights in agricultural land in the hands of potential purchasers who have been carrying out agricultural production in the vicinity of the transferred land for a certain period.

Additionally, the Constitutional Court stated that protecting agricultural land and its productive potential is a public interest whose nature legitimizes regulatory intervention by the state in the agricultural land market environment. Furthermore, agricultural land is part of the land, that is, of immovable property, which is the subject of property rights and other rights in rem and legal obligations. The two characteristics outlined above logically require that the requirement to protect the productive potential of agricultural land (public interest) and the fundamental right granted to agricultural landowners by Article 20 (1) of the Constitution be constitutionally compatible.[84] The Act on land acquisition is a piece of legislation that predominantly regulates the content of the property rights of agricultural land owners. In the view of

80 The proportionality test has still not found its place in the Slovak legal environment because the Constitutional Court was relatively late in applying this test in its decision making. Although the first two steps of the proportionality test were defined in a simplified form in 2001 (see, in this respect, Decision of the Constitutional Court of the Slovak Republic, no. PL. ÚS 3/00), they were not developed and applied to the extent necessary and were used only as part of the supporting argument. The actual application of the legislation in the constitutional procedure can only be discussed since 2011. See Zelenajová, 2016, p. 379.

81 The proportionality test can also be characterised as a constitutional restriction of a human right or fundamental freedom only if several—usually three—steps (in other words, a subtest) are met. See Ľalík, 2016, p. 285. In the first stage, the appropriateness test is applied, whereby an act restricting a fundamental right is examined to determine whether it is suitable for achieving the objective pursued, which may include the protection of public interest. The second stage is the test of indispensability—the test of necessity—that is, the need to compare the legislative measure under examination, which restricts a fundamental right or freedom, with other measures that serve the same purpose but do not affect fundamental rights and freedoms or affect them to a lesser extent. The final stage is to examine the criterion of proportionality in the strict sense.

82 In other words, the inadequacy of the legislation under examination to achieve the objective pursued, the existence of other legislation allowing targeted and technically justified interference with the beneficial element of the property right, and the restriction imposed by the legislation under examination on the dispositive element of the property right.

83 Furthermore, see the decision of the Constitutional Court of the Slovak Republic, no. PL. ÚS 20/2014, Point 3. Available at https://www.aspi.sk/products/lawText/4/3178032/1/2?vtextu=ÚS%20 20/2014#lema0 (Accessed: February 15, 2022)

84 The decision of the Constitutional Court of the Slovak Republic, no. PL. ÚS 20/2014, p. 78.

the Constitutional Court, its protective function concerning the productive potential of agricultural land is more a matter of legislative wish than reality.[85]

Furthermore, the Slovak Constitutional Court considers the Act on land acquisition to be a good and effective instrument for the protection of agricultural land. It notes, however, that the legislature undoubtedly has room to optimize the legislation in question or even introduce new regulatory restrictions of a targeted nature capable of guaranteeing the achievement of the objective pursued. In this respect, the Slovak Constitutional Court highlights the examples of foreign legislation—notably Austria and, to some extent, Hungary[86]—which require proven professional competence of the organization owning or managing the agricultural land. The Slovak legal system, *de lege lata*, does not require any professional experience from the person carrying out agricultural production.[87]

It should also be noted that three dissenting opinions accompany the Constitutional Court decision.

In the conclusion of this chapter, it can be summarized that the Constitutional Court has confirmed the unconstitutionality of parts of the Act on land acquisition that also coincide with the problems raised by the EU. It is noteworthy that Slovakia addressed the problem much earlier than the EU did. While Slovakia's swift response is a positive step, the decision of the Constitutional Court shows that the need to harmonize the rules for the protection of agricultural land has recently been on the agenda. Slovakia has recognized that agricultural land is a valuable natural resource that should be protected.

3. Land law of the country and its possible proceedings by the European Commission or the Court of Justice of the European Union

As stated above, the accession of Slovakia to the EU on May 1, 2004 was an important milestone in the history of Slovak land regulations. It can be stated that the legal framework of the EU has undoubtedly played a decisive role in its land protection.

Generally speaking, the member states that joined the EU in 2004, including Slovakia, are legally obliged to harmonize their national rules with the rules of the European Union. For most member states, this transitional period lasted 7 years,

85 The decision of the Constitutional Court of the Slovak Republic, no. PL. ÚS 20/2014, p. 255.
86 See, for example, Csák, 2017, pp. 1125–1134.
87 Decision of the Constitutional Court of the Slovak Republic, no. PL. ÚS 20/2014, p. 79.

until 2011, but the Slovak Republic submitted a request[88] to the European Commission for a 3-year extension.[89]

Consequently, on April 14, 2011 the European Commission adopted Decision no. 2011/241/EU,[90] approving the application and extending the transitional period concerning the acquisition of agricultural land in Slovakia until April 30, 2014.[91]

Since then, the European Commission has conducted an extensive investigation among the newly acceded member states.[92] It learned that specific provisions in the national laws of these states still restricted the EU's fundamental economic freedoms—in this case, the free movement of capital and the freedom of establishment.[93]

Therefore, in 2015, the European Commission launched infringement proceedings against five member states: Hungary, Bulgaria, Latvia, Lithuania, and Slovakia. In the case of Slovakia,[94] the legal provisions related to preference to interested parties conducting business in agricultural production on the territory of the municipality in which the land to be transferred is located, the 10 years of permanent residence or registered office and the minimum of 3 years of commercial activity in agricultural production were controversial. The most problematic, however, was the criterion of a long-term residence in Slovakia,[95] which resulted in discrimination against other

88 The main reason for the transitional period was the need to protect the socioeconomic conditions for agricultural activities in Slovakia, owing to the introduction of a single market system and the transition to the common agricultural policy. Additionally, concerns about the potential impact on the agricultural sector were to be considered because of the significant initial differences in land prices and incomes, especially in comparison with Western and Northern countries. The transitional period was intended to facilitate the process of land restitution and privatization for farmers. See Nociar, 2016.

89 Lazíková and Bandlerová, 2014, p. 121.

90 Commission Decision of April 14, 2011, extending the transitional period concerning the acquisition of agricultural land in Slovakia (2011/241/EU), is available in the English language (also in official languages of the EU) at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011D0241&from=HU (Accessed: February 17, 2022).

91 Commission Decision of April 14, 2011, extending the transitional period concerning the acquisition of agricultural land in Slovakia (2011/241/EU), is available in the English language (also in official languages of the EU) at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011D0241&from=HU (Accessed: February 17, 2022).

92 Some authors indicated that although "the European Commission has discretionary powers as to which Member State to open a full investigation or infringement procedure against" and the European Commission "monitors the application of EU law for all Member States on an ongoing basis and takes action on complaints against the laws and measures of all Member States equally," they found the discrimination against the new member states to be worrying, unjustified, and unfounded. For further information, see Korom and Bokor, 2017, pp. 262–263, p. 266.

93 See the press release of the European Commission: "Financial services: Commission requests BULGARIA, HUNGARY, LATVIA, LITHUANIA and SLOVAKIA to comply with EU rules on the acquisition of agricultural land." The press release is available on the website of the EC: https://ec.europa.eu/commission/presscorner/detail/hu/IP_16_1827 (Accessed: February 18, 2022).

94 By letter from the European Commission no. C(2015) 3060 final dated May 27, 2016, the Slovak Republic received the reasoned opinion of the Commission issued on May 26, 2016 in accordance with Article 258 of the Treaty on the Functioning of the European Union concerning infringement No 2015/2017.

95 Macejková, 2016, pp. 19–20.

EU nationals.[96] These requirements of the Act on land acquisition were therefore not acceptable to the Commission. It follows that the other requirements of the Act were acceptable to the Commission—in particular, the system of publication of offers for the transfer of ownership of agricultural land and the identification of the selected bidder for its acquisition in the web-based Register of Publication of Offers for the Transfer of Ownership of Agricultural Land; the certification of the fulfillment of the conditions for the acquisition of agricultural land; and the absolute prohibition on the acquisition of agricultural land by entities from outside the EU member states, the EEA, and Switzerland.

The Slovak legislator responded to this situation by amending a particular paragraph of the Foreign Exchange Act,[97] resulted in opening the agricultural land market not only to EU citizens but also to third-country nationals. Additionally, several new rules concerning the purchase of agricultural land were adopted by the country.[98]

The Act on land acquisition, which came into force on June 1, 2014, regulated the transfer of agricultural land while ensuring a relatively wide contractual freedom. The explanatory memorandum of this Act stated that a principal objective of the legislation was to regulate the acquisition of agricultural land to prevent speculative land purchases and thereby create a legal framework to allow agricultural production to continue as originally intended. The primary objective of the law, therefore, is to ensure that the user uses agricultural land for its intended agricultural purposes.[99]

One of the most important provisions of the Act on land acquisition was the introduction of a strictly regulated tendering procedure, according to which the seller was obliged to upload his intention to sell the agricultural land[100] at least 15 days before the transfer to the database on the transfer of ownership of agricultural land, which was established by the Ministry of Agriculture and Rural Development of the Slovak Republic. Additionally, the landowner had to publish their offer on the bulletin board of the territorially competent municipality. The publication of the official notice on the bulletin board of the municipality was free of charge, and the municipality had to cooperate in publishing such offers.[101] The potential buyer was obliged to indicate their intention to acquire ownership of the land at the owner's address, within the time limit specified, and for the price offered in the register.[102] If these conditions were fulfilled, the ownership of the agricultural land could be acquired by a natural or legal person who had been resident or had a registered office in the country for at least 10 years and had been engaged in an agricultural activity for at least 3 years

96 Szilágyi, 2017, p. 176.
97 Act no. 202/1995 Coll. on the Foreign Exchange Act, Para. 19a: "A foreigner can acquire ownership of real estate in the country if there are no restrictions on the acquisition of such property in special laws."
98 Lazíková, Bandlerová and Lazíková, 2020, p. 100.
99 Kollár, 2019.
100 The procedure for the transfer of ownership of land, laid down in Para. 4 of the Act on land acquisition.
101 Strapáč, 2015, p.15.
102 Lazíková, Bandlerová and Lazíková 2020, p. 101.

before the conclusion of the contract.[103] If no one expressed the intention to buy the land offered for sale in this way, the agricultural land could be claimed (in the first place) by a person having permanent residence or a registered office in the municipality where the agricultural land was located. In the absence of interest, an offer could be made to natural person residents or legal persons with an office registered in a neighboring municipality.[104] If no one expressed the intention to buy the land offered for sale in this way, the agricultural land could be offered to the person having permanent residence or a registered office outside the municipality in whose administrative territory the agricultural land was located. If no acquirer (irrespective of permanent residence or registered office) expressed interest in acquiring the land in the tendering procedure, the transferor may transfer the land exclusively for the price or value equal to that indicated in the unsuccessful tendering procedure and exclusively to a person who had been a permanent resident or had a registered office in the territory of the Slovak Republic for at least 10 years. Additionally, the transfer may be made no later than 6 months after the unsuccessful completion of the tendering procedure.[105] The competent district office[106] was responsible for verifying the existence of legal requirements for the transfer of ownership of land.

It should be noted, as it was stated in the previous subchapter, that even before the request of the European Commission, the Act on land acquisition was the subject of numerous professional and political debates because of its provisions. Consequently, the Constitutional Court examined the constitutionality of specific provisions of the Act on land acquisition.[107] In conclusion, it can be stated that the Constitutional Court has confirmed the contradiction of parts of the Act on land acquisition in points that also coincide with the problems raised by the EU. It is also worth noting that although Slovakia dealt with the problem at the national level long before the EU did, it was a long and challenging process that lasted about 4 years.

The European Commission's proceeding against the Slovak Republic became irrelevant due to the Constitutional Court's ruling, promulgated on February 11, 2019 in the Official Gazette of the Slovak Republic.[108] By the promulgation of this ruling in the Collection of Laws, Paragraphs 4–6 of the Act on land acquisition ceased to have effect. As the legislator did not remove the contradiction of the provisions in question with the Constitution of the Slovak Republic within 6 months from the date of their loss of effectiveness, the provisions in question also lost their validity on the expiry

103 Kollár, 2019.

104 Act on land acquisition, Para. 4 (7). We would like to add that in the previous legislation, the condition of an applicant from a neighbouring municipality was applied in some cases. However, this concept is problematic in some regions of Slovakia as, in some cases, the territories of two municipalities border on mountainous terrain, and access to them is much more problematic than to more distant municipalities. The same applies to possible cooperation in the area of agricultural implementation.

105 Relevans advokátska kancelária, 2017.

106 The territory of Slovakia is divided into eight regions (*kraje*) and 79 districts (*okresy*).

107 Drábik and Rajčániová, 2014, p. 84.

108 *Zbierka zákonov Slovenskej republiky.* Hereinafter referred to as Collection of Laws.

date (August 11, 2019). Consequently, the Commission's proceeding against the Slovak Republic was discontinued on October 10, 2019.

It is worth mentioning that there have been no proceedings at the Court of Justice of the EU (CJEU) in connection with the cross-border acquisition of agricultural lands/holdings concerning Slovak legal regulation or practice.

4. National legal instruments in the context of the Commission's Interpretative Communication

On October 18, 2017, the European Commission published the Commission's Interpretative Communication on the Acquisition of Farmland and European Union Law,[109] in which it sets out the benefits and challenges of foreign investment in agricultural land, describes the applicable EU law and related jurisprudence of the Court of Justice of the European Union, and draws some general conclusions in connection with the jurisprudence on how to achieve legitimate public interests in conformity with EU law.[110] The document aims to provide a basis for discussion on foreign investment in farmland, to support the member states that are in the process of amending their legislation or are about to do so, and to help disseminate best practices more widely in this complex area.[111]

In addition, the document also responds to the request of the European Parliament for the Commission to publish guidance on how to regulate the agricultural land markets in conformity with EU law.[112] On this basis, it states that member states can define appropriate policies for their land markets under EU law. Certain objectives have been recognized by the Court of Justice of the European Union as justifications for restricting fundamental freedoms. In formulating these objectives, clarity must be sought, and the means chosen must be proportionate to these objectives, which means that they must not be discriminatory or go beyond what is necessary.[113]

It should be noted, however, that the Commission has also addressed, in this document, the different needs and forms of regulation of agricultural land and even discussed some of the features of the legislation governing land markets and drawn some conclusions from case law that can guide member states on how to regulate their land markets in conformity with EU law and in a way that balances the capital needs of rural areas with the pursuit of legitimate policy objectives.

109 For further information, see the Official Journal of the European Union, 2017/C 350/05. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC1018(01)&from=HU (Accessed: March 10, 2022).
110 Commission Interpretative Communication on the Acquisition of Farmland and European Union Law, Section 3.
111 Ibid.
112 Ibid.
113 Hornyák, 2018, p. 27.

This document assists in writing the final chapter of this country study by summarizing—for the most part—what has already been described above regarding the individual legal institutions.

a) prior authorization

The Slovak law does not contain neither provisions on prior authorization nor provisions on prior administrative approval for the transfer of agricultural land.

b) preemption rights (rights of first refusal) in favor of farmers

The current Slovak legislation does not contain provisions on preemption rights favoring farmers.[114] It should be noted, however, that in Slovakia, it has recently been mooted to "grant" a right of first refusal on agricultural land put up for sale.[115]

In Slovakia, parties may agree on the preemptive right either as an *in rem* obligation or as a contractual obligation[116], but it is worth noting that some preemptive rights may also be created by statute. In order to justify the preemtive right *in rem*, a contract has to be in writing and becomes effective upon its registration in the cadastre. If the seller has not purchased the property offered by the buyer, it retains the preemptive right, and in case of violation of such right, the entitled party may either demand that the acquirer offer the property for sale or that the seller shall retain the preemptive right for the future. As mentioned earlier, under Slovak law, the co-owners of real property have a statutory preemptive right. Additionally, various acts (such as for the preservation of nature or significant investment) contain several statutory preemptive rights. Moreover, such acts also provide for the consequences of a preemptive right breach.[117]

c) price controls

It can be said that the legislation in Slovakia does not provide for a uniform price regulation that would determine the price of agricultural land.[118]

114 With regard to preemptive rights, it should be noted that the general provisions are contained in Act no. 40/1964 (i.e., the Civil Code). It should be noted, however, that the Civil Code's rules on the preemption rights are not coherent, which obviously raises several problems in the application of the law. On this topic, see, for example, Lazíková, 2014, pp. 61–70. Furthermore, in Slovak law, a special rule on the preemption right excludes the application of the Civil Code to land associations. For the literature, see Bandlerová, Lazíková, Rumanovská and Lazíková, 2017, special, pp. 80–94.

115 See, for example, the proposed legislation no. LP/2020/504, special part, p. 16.

116 It can be stated that, in general, contractual preemptive right is only binding for the contracting parties, and breach thereof causes only contractual liability and does not void the title to real estate.

117 Prokopová, Vagundová and Stripaj, 2021.

118 Bandlerová, Marišová and Schwarcz, 2011, p. 20.

It should be noted that in the case of sales and purchases between natural and legal persons, it is essential that the market price of agricultural land be established by an agreement between two parties and, in practice, be the result of an agreement between the seller and the buyer.[119] The agreed price is not subject to any legal restrictions and is independent of the value of the agricultural land, whether it is calculated based on an expert report or other legislation in force.[120] It should be emphasized, however, that no price regulations restrict individuals or legal entities from transferring real estate, while the official prices[121] provide them with important information for price determination.[122]

In our view, therefore, Slovak land law does not have a direct instrument for regulating prices; however, this does not mean that Slovak land law does not take land prices into account and does not address the issue of land prices in certain situations.

d) self-farming obligation

The Slovak law does not contain any provisions on self-farming obligations.

e) qualifications in farming

The current Act on land acquisition does not contain any provisions on qualifications for farming. However, it can be noted that the former legislation was stricter, and the ownership of agricultural land could be acquired by a natural or legal person who had been a resident or established in the country for at least 10 years *and* who had been engaged in an agricultural activity for at least 3 years before the end of the contract.[123]

f) residence requirements

The Act on land acquisition does not contain any provisions on residence requirements. However, it may be noted that the former legislation was stricter as the conditions for acquiring agricultural land in the country included a minimum of 10 years of permanent residence for natural persons and a minimum of 10 years of registered office for legal persons.

119 Blažík et al., 2014, p. 69.
120 Lazíková and Bandlerová, 2006, p. 140.
121 The official price of agricultural land is used primarily to express the value of agricultural land for the purpose of determining the amount of property tax. See, in this context, Decree no. 492/2004 on the determination of the general value of immovable property. See also Bradáčová, 2007, pp. 184–188.
122 Lazíková and Bandlerová, 2006, p. 144.
123 Kollár, 2019.

g) prohibition on selling to legal persons

The Act on land acquisition in force allows both natural and legal persons to acquire land ownership without almost any restriction. However, at this point, it should be noted that the legislator, based on the principle of reciprocity, has formulated an express prohibition and related exceptions to the acquisition of ownership of agricultural land, which is contained in Paragraph 7 (1) of the Act on land acquisition. For further details, see point (j).

h) acquisition caps

The current Slovak land legislation does not provide for acquisition caps, but the idea of introducing land acquisition limits is not alien to the Slovak legislator.[124]

i) privileges in favor of local acquirers

The current Act on land acquisition does not contain any provisions on the privileges in favor of local acquirers.

j) condition of reciprocity

The current Slovak land law allows both natural and legal persons to acquire land ownership with almost no restrictions. The only restriction is that agricultural land cannot be owned by a state, a citizen, a resident, or a legal person of a state whose legal system does not allow ownership of agricultural land by Slovak citizens, residents, or legal persons. An exception to this prohibition is the acquisition of agricultural land by inheritance.[125] In addition, the law also provides exceptions to the prohibition's territorial scope, namely the member states of the European Union, the European Economic Area, the Swiss Confederation, and states bound by an international treaty that is also binding for Slovakia.[126]

124 In this context, see, for example, proposal no. LP/2017/429, which was submitted in June 2017 as a reaction to the amendment to the Constitution of the Slovak Republic approved by the Parliament on May 16, 2017 and to the infringement proceeding initiated by the European Commission. The amendment was intended, among other things, to prevent speculation for capital investment purposes. The proposal by former Slovak Minister of Agriculture Gabriela Matečná would have introduced a maximum land acquisition limit of 300 hectares for natural persons and farmers and 700 hectares for legal persons. As another example, the bill presented by the Ministry of Agriculture under Minister of Agriculture Ján Mičovský for 2020 also included provisions for land acquisition limits: 300 hectares for natural persons and farmers and 1,200 hectares for legal persons. According to the explanatory memorandum to the draft, the specified land acquisition limit would not have applied to the acquisition of agricultural land by inheritance or by the state, the county council, or the municipality.
125 Act on land acquisition, Para. 7 (1).
126 Act on land acquisition, Para. 7 (2).

Conclusions

Agricultural land is an irreplaceable natural resource and heritage of every country; therefore, it should be a priority for every country to protect it. The Slovak Constitution explicitly emphasizes the protection of agricultural land and forest land among natural resources. In addition, these two natural resources are defined as non-renewable, and the Constitution accords them enhanced protection to ensure the country's food security.

The study of the constitutional level and the level of regular acts indicates that the Slovak land regime should be seen as a complex system of legal norms. The most important act in this context should be the Act on land acquisition.

In Slovakia, restrictions on the acquisition of agricultural land have been in force for more than 4 years. It can also be concluded that the legislator clearly intended to protect agricultural land; however, as it is clear from the decision of the Slovak Constitutional Court and the infringement proceeding initiated by the European Commission against Slovakia, the legal restrictions on the acquisition of agricultural land were not in line with the EU's fundamental economic freedoms. Thus, pressure from the European Commission and the efforts of certain members of the Slovak Parliament to annul certain provisions of the mentioned act undoubtedly contributed to the Slovak Constitutional Court's finding that certain provisions were not in conformity with the Slovak Constitution, which led to the annulment of certain contested provisions of the Act on land acquisition.[127]

The decision of the Slovak Constitutional Court has resulted in cardinal changes, especially with regard to the acquisition of agricultural land; it can be seen that not only natural persons but also legal persons can now acquire ownership of agricultural land in Slovakia, with almost no restrictions. In our opinion, this leads to the conclusion that the Slovak state is not adequately performing its important tasks in land protection, but it is worth highlighting the fact that several efforts have been made in this direction to change the abovementioned situation and the possibility of sufficient regulation of disposals of ownership to agricultural land. At the same time, it is necessary to point out how the Slovak Constitutional Court emphasizes, in its decision analyzed in this chapter, that the more important the constitutionally protected interest is, the greater the responsibility of the state to protect it effectively, since the land becomes a commodity that can easily be abused if not adequately protected in legal and institutional terms.[128]

Thus, for the legislator, the biggest challenge is to adopt such measures for the protection of land—especially agricultural land and forest land—that would be in accordance with the European Union law as well as the protection of fundamental rights and freedoms in accordance with the Slovak Constitution and the European Convention on Human Rights.

127 See Ptačinová: i. m.
128 Palšová, Bandlerová and Machničová, 2021, p. 11.

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Chapter 11

Slovenia: In Search of a Sensitive Balance Between Economic, Social, and Ecological Functions of Agricultural Land and Rural Areas

Franci AVSEC

ABSTRACT

The Slovenian Constitution guarantees the right to private property and inheritance; emphasizes the economic, social, and environmental functions of property and grants special protection to agricultural land. According to these provisions, middle-sized family farms are protected against division so that they are, in principle, inherited by a single testamentary or intestate heir, while the number of other heirs and their inheritance shares are reduced. The legal transfer of agricultural land, forests, and farms is subject to several substantial restrictions and prior administrative control. After a general prohibition to divide the protected farms *inter vivos* was lifted in spring 2022, the disposal of protected farms has been less restricted, but the number of protected farms is expected to decrease. The legislation on agricultural land, protected farms, forests, and agricultural communities, as well as on nature conservation, water, cultural heritage protection, and spatial planning, regulate several preemption rights, of which two or more concur in many a case. To prevent the circumvention of statutory preemption rights, conclusion donation contracts are also restricted. In certain cases, the physical division of agricultural and forest plots is prohibited by the law. Lease contracts of agricultural land are also regulated by some special provisions (relating to prelease rights, minimum lease period, and so on) and subject to prior administrative control. The current legislation and international treaties allow citizens and legal persons of certain states (e.g., the EU member states) as well as persons with the status of a Slovene without Slovene citizenship to acquire agricultural land, so that reciprocity is not required. Citizens and legal persons of certain other states may acquire agricultural land based on a legal transaction, inheritance, or a state body's decision under condition of reciprocity, while citizens and legal persons of all other states may acquire agricultural land only on the basis of inheritance and under a condition of reciprocity. The statutory provisions on the legal transfer of agricultural land and holdings have been assessed several times by the Constitutional Court from the standpoint of constitutional right to private property and inheritance; economic, social, and environmental function of property; free economic initiative; rule of law; and the principles of legal certainty and proportionality.

KEYWORDS

agricultural land, farms, legal transfer, Slovenia

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1. Theoretical backgrounds

1.1. Definitions and agricultural land legislation

The Agricultural Land Act (ALA)[1] defines agricultural land as land that is (1) suitable for agricultural production and (2) designated as agricultural land by the spatial planning documents of local communities (art. 2). Weighing both requirements, the Slovenian Supreme Court ruled that, in the case of usurpation of agricultural land, the formal condition prevails in assessing whether the land is agricultural land. The material criterion (suitability for agricultural production) comes into play only if the land was already barren before its usurpation according to its actual intended use, and the establishment of such barren land into fertile agricultural land would be associated with disproportionate costs.[2]

The ALA regulates the protection and management of agricultural land by laying down its classification, use and cultivation, legal transfer of agricultural land, agricultural land lease contracts, and agricultural operations.

The ALA provisions pursue three main goals: (1) to preserve and improve production potential and increase agricultural land area intended for food production; (2) to foster the sustainable management of fertile soil; (3) to foster landscape preservation and to preserve and develop rural areas (art. 1a).

The inheritance of agricultural land and agricultural holdings is regulated by the general provisions of the Inheritance Act (IA),[3] while middle-sized agricultural holdings belonging to one individual, spouses, or ancestor and descendant (protected farms) are inherited in accordance with special provisions of the Inheritance of Agricultural Holdings Act (IAHA).[4]

The agricultural land and forests in the former social ownership were, during the ownership transformation, excluded from the privatization of enterprises and transferred to the state in accordance with the National Agricultural Land and Forest Fund Act (NALFFA).[5]

The Forest Act (FA)[6] distinguishes forest and wooden land as a wider notion that includes forests and other wooden land. A forest is defined as (1) land covered with forest trees in the form of a stand that can reach at least 5 meters in height and spanning at least 0.25 hectares; (2) land under the process of tree colonization spanning at least 0.25 hectares, which has not been used for agricultural purposes over the last 20 years and on which forest trees can reach a height of at least 5 meters and tree crown density has reached 75%; (3) riparian zones and windbreaks wider than the height of adult trees, spanning at least 0.25 hectares.

1 Zakon o kmetijskih zemljiščih (1996).
2 VSRS, Sklep X Ips 297/2015 z dne 23. 3. 2016.
3 Zakon o dedovanju (1976).
4 Zakon o dedovanju kmetijskih gospodarstev (1995).
5 Zakon o Skladu kmetijskih zemljišč in gozdov Republike Slovenije (1993).
6 Zakon o gozdovih (1993).

Other wooded land includes land covered with forest trees or other forest vegetation, covering at least 0.25 hectares, which is not forest and has not been used for agricultural purposes over the last 20 years; pens in forests used for raising game; and areas within forests spanning at least 0.25 hectares that lie beneath overhead electrical power lines (art. 2 FA).

According to a special act (Management of State Forests Act, MSFA),[7] on July 1, 2016, the management of state forests was transferred from the National Agricultural Land and Forest Fund to a limited liability company named Slovenski državni gozdovi (Slovenian State Forests Ltd). Since then, this company has performed tasks of disposing, managing, and acquiring state forests.

A special act (Agricultural Communities Act, ACA)[8] regulates agricultural communities organized by members (individuals and legal persons) who are co-owners or common owners of certain agricultural land and forests to ensure the management of the common immovables. Agricultural community is not a legal entity, but it has the ability to be a party in judicial, administrative, and other proceedings, excluding tax proceeding with regard to the community's activities. According to the amendments of the ACA from 2022, the ACA is also applicable to agricultural communities that are entered in the land register as owners of the common agricultural land and other immovables, so that the rules on common ownership in the agricultural communities apply to such communities (art. 4a). In comparison with general regulation on co-ownership or common ownership, the provisions on agricultural communities simplify and facilitate the members' decision making on matters of common interest. The management of common immovables is entrusted to bodies of agricultural community (general meeting and administrative committee), while members may individually dispose of their ownership shares.

The chapter on land law in Slovenia is structured in four sections. After listing the main pieces of the agricultural land legislation in Slovenia and basic definitions (in this subsection – 1.1), general provisions of the property law (with regard to notion of immovables, ownership, and other rights in rem) are presented (1.2.). As ownership and other inheritable rights are transferred from one individual to others at the latest after death of their holder, general and special inheritance rules in agriculture are dealt with before other legal bases for acquiring agricultural land and agricultural holdings (1.3.). The next subsection (1.4.) explains the notion of legal transfer of agricultural land, forests, and farms outside inheritance as well as provisions on preventive administrative control over such transfer (1.4.1.). The statutory restrictions on legal transfer are classified as those that refer to legal transactions of at least two or more types (for instance sale, donations, etc., 1.4.2.) or to sale contracts (where contractual freedom is restricted by the statutory preemption rights by several acts, 1.4.3.) and donation contracts (1.4.4.). The owner's entitlement of disposal is also restricted by statutory provisions, which prohibit the division of certain agricultural

7 Zakon o gospodarjenju z gozdovi v lasti Republike Slovenije (2016).
8 Zakon o agrarnih skupnostih (2015).

land and forest plots unless certain conditions are fulfilled (1.5.). Since the notion of legal transfer of agricultural land and forest does not include the lease of agricultural land, special provisions on such lease are systematized in a special chapter of the ALA, what justifies a separate analysis of this issue (subsection 1.6.). At the end of the first section, conditions under which foreign individuals and legal persons may acquire ownership right on immovables in Slovenia are dealt with (1.7.).

The second section analyses the provisions on agricultural land in the Constitution and their interpretation in the case law of the Slovenian Constitutional Court.

The third section highlights the relationship between Slovenian agricultural land law and EU legal system, particularly in light of possible proceedings by the Commission or the Court of Justice of the EU.

The fourth section evaluates legal instruments in Slovenia from the standpoint of the Commission Interpretative Communication on the Acquisition of Farmland and European Union Law (2017).

The fifth section highlights some of the characteristics of Slovenian agriculture that have influenced the legal regulation of agricultural land and emphasizes the need to constantly monitor, analyze, and evaluate the effects of this regulation. The survey outlines the legal regulation of the acquirement of agricultural land and holdings in Slovenia as of February 1, 2022. To keep the survey up to date as much as possible, the novelties introduced by the amendments of the ALA, the ACA, and the Agriculture Act (AA),[9] all adopted on March 16, 2022, are included and denoted as such.

1.2. Property law

From the viewpoint of property law, agricultural land and forest are immovables. The Real Estates Cadastre Act (RECA)[10] defines immovable as parcel (plot), building, part of a building, or land.

A parcel or plot is a spatially measured land located in one cadastral municipality and is entered in the real estate cadastre with a border and marked with a parcel number (art. 3 pt. 21), which consists of a cadastral municipality code and a number determined within the cadastral municipality and may have subdivisions (art. 12[1] of the RECA).

A building is edifice and other covered construction that may be entered, is intended for residence, activities, or protection, and cannot be relocated without harm to its substance (art. 10[1], [3]). The building number consists of the cadastral municipality code and the number determined within the cadastral municipality (art. 12[2] of the RECA).

Part of the building is a functional set of rooms suitable for independent use. An individual part of the building may be object of divided co-ownership which means ownership of individual unit and co-ownership of the common parts of the building (art. 3 pt. 5 of the RECA). The part of a building has a number consisting of the building

9 Zakon o kmetijstvu (2008).
10 Zakon o katastru nepremičnin (2021).

number and the current number determined for each part within the building (art. 12[3] of the RECA).

Land is area of one or more parcels, part of one parcel, or parts of several parcels (art. 3 pt. 36).

General provisions on property rights (rights *in rem*) as well on acquisition of ownership and other property rights on immovables are prescribed by the Property Law Code (PLC).[11]

The Property Law Code enumerates five property rights (rights *in rem*): ownership right, mortgage, easement, right of encumbrance, right of superficies, and land debt (art. 2 of the PLC).

The right of ownership is the right (1) to have a thing in possession, (2) to use and (3) enjoy it in the most extensive manner, and (4) to dispose of it. The use, enjoyment, and disposal of a thing's ownership right may only be restricted by an act (art. 37 of the PLC).

The theory holds that possession, use, and enjoyment represent a single entitlement that comprises three aspects of use: possession is a precondition for use, while enjoyment designates such form of use that enables the owner to obtain natural fruits from a thing.[12]

As the most extensive property right on an individualized thing, the ownership right includes also the legal protection claim, which is an entitlement of the owner to obtain a legal protection of the ownership right from the court.[13]

The entitlement to dispose of an immovable enables the owner (1) to transfer the ownership right to other person, (2) to limit the ownership right by establishing a derived right, and (3) to transform it (e. g., through division or merger of immovables).[14]

Ownership right may be acquired based on a legal transaction, inheritance, a statutory provision, or a decision issued by a state authority (art. 39 of the PLC).

Two or more persons who own the same (undivided) thing may be co-owners or common owners. Co-ownership is based on co-owners' shares, which are, for each co-owner, determined as a proportion of the whole, while the shares of common owners are not determined in advance (art. 71 and 72 of the PLC).

A mortgage is the right of a pledgee to be repaid together with interest and costs in the event of non-payment of a secured claim, which has fallen due from the value of the pledged property ahead of all other creditors of the pledger (art. 128[1] of the PLC).

An easement is the right to use another's thing or to demand from the owner of a thing to refrain from actions that the owner would otherwise have the right to perform on the thing concerned (servient estate, art. 210 of the PLC). Easement may be constituted for the benefit of owner(s) of a certain thing (real easement) or for the benefit of

11 Stvarnopravni zakonik (2002).
12 Plavšak, 2020b, p. 194.
13 Plavšak, 2020b, p. 197.
14 Plavšak, 2020, p. 455.

certain person (personal easement), but the real estate easement may be established also for the benefit of a certain person (quasi-real easement, art. 226 of the PLC).

Encumbrance is a right based on which the owner of an encumbered immovable is bound to a future charge or service (art. 249 of the PLC).

The right of superficies is the right to own a built structure above or beneath the immovable property of another person (art. 256[1] of the PLC).

The PLC from 2002 also introduced, in the Slovenian legal system, land debt as a new property right. Land debt was defined as a right to demand repayment of a certain amount of money from the value of an immovable ahead of all creditors with lower-tiered claims (see previous art. 192 of the PLC). In 2013, the amendment to the PLC stipulated that new land debts may no longer be established, but the existing land debts may continue to exist until their expiration.[15]

The PLC does not explicitly state necessary prerequisites for the derivative transfer of ownership right *inter vivos*, but it requires a valid legal transaction from which the obligation to transfer the ownership right derives and the fulfillment of other conditions is determined by an act (art. 40). Legal scholars enumerate four general prerequisites for the transfer of ownership right on immovable with full legal effects: (1) a valid legal transaction instituting the obligation to transfer the right of ownership; (2) a valid real transaction between the transferor and transferee; in the case that the ownership right on an immovable is transferred, the accord of the transferor to the registration of the transferee in the land register must be expressed in the form of an unconditional written statement where the signature of the transferor is attested by the notary (*clausula intabulandi* or land registry permission), while a special form for a transferee to declare their intention to conclude such contract is not prescribed[16]; (3) the registration of the acquirer as owner of the immovable concerned in the land register; (4) the entitlement to dispose.[17]

According to a ruling of the Constitutional Court from 2010, the current land registry owner of an immovable enjoys no more protection against the acquirer of the same immovable as soon as the judgment that replaces the binding and dispositional

15 The land debt could be established by a legal transaction of owner or mortagagee in agreement with the owner of an immovable. The legal transaction establishing the land debt had to be made in the form of a notarial protocol. After the land debt was entered into the land register, the court issued the land letter to the founder of the land debt. The land letter was a negotiable instrument; thus, the land debt could be transferred out-of-register (Kramberger Škerl and Vlahek, 2020, p. 106.), and the owner of the encumbered immovable was obliged to pay the land debt on maturity to the entitled holder of the land letter. The legislator's decision to cancel the whole chapter on land debt within the LPC in 2013 was motivated by some abusive practices where individuals facing damage claims or criminal charges had established fictional land debts on their immovables to protect their property from creditors. For a critical view on this legislator's intervention and possible alternative solutions, see Kramberger Škerl and Vlahek, 2020, pp. 103. and 104.

16 According to the Obligation Code (Obligacijski zakonik, 2001), "the intention to conclude a contract may be declared verbally, through customary signs or through any other action from which it may reliably be concluded that the intention exists" (art. 18). The acquirer's consent with the land registry permission is usually expressed by taking over the document containing the land registry permission (Plavšak and Vrenčur, 2020, p. 257).

17 Kramberger Škerl and Vlahek, 2020, p. 165.; Plavšak and Vrenčur, 2019, p. 230.

legal transaction with the acquirer for the immovable becomes final, although the acquirer's ownership right on the immovable is not (yet) registered in the land register. Otherwise, the constitutional right to private property would be violated.[18] According to this decision, the theory holds that the transfer of ownership right is *inter partes* (in relation between the transferor and the acquirer) effective as soon as legal transaction instituting the obligation to transfer ownership right (e.g., a sale contract) and real transaction (issuance of land registry permission with a transferor's signature being attested by the notary) come into existence, since the acquisition of the ownership right in the full extent depends exclusively on the acquirer's submission of a proposal by which they are registered as owner of the immovable in the land register.[19]

1.3. Inheritance law

1.3.1. General rules of the Inheritance Act

The IA outlines the general succession rules applicable to the inheritance of estates that are not protected farms (including unprotected farms).

The inheritance of protected farms is regulated by special rules of the IAHA. As far as the special rules do not regulate the succession of protected farms, general succession rules are applicable.

The ACA prescribes special rules for intestate or testamentary inheritance of ownership shares in agricultural communities (as far as these shares are not a constitutive part of a protected farm)—these rules being very similar to those from the IAHA.

The inheritance of protected farms and other estates is based on the will (testamentary succession), or, if the will was not made or is not valid, on the law (intestate succession).

In Slovenian succession law, men, women, and children born in or outside marriage have equal inheritance rights (art. 4 of the IA). Adoptive children and their descendants have equal succession rights with regard to their adoptive parents and their relatives as the adoptive parents' blood children and their descendants, while the adoptive parents and their relatives are intestate heirs of the adoptive child (art. 21 od the IA).

The deceased's partner in cohabitation (long-term domestic community of a man and a woman, who are not married, if there are no reasons for a marriage between them to be invalid), as well as the deceased's partner in a registered or an informal civil union, have the same rights of succession as a deceased's spouse (art. 11 of the IA, art. 2 and 3 of the Civil Union Act, CUA[20]).

The intestate heirs are classified into three succession orders. The intestate heirs of a lower succession order exclude from inheritance intestate heirs from a higher succession order. Intestate heirs of the first succession order are the deceased's spouse and descendants, who inherit equal shares. If a child or adoptive child died before the

18 USRS, Odločba Up 591/10 z dne 2. 12. 2010.
19 Škerl Kramberger and Vlahek, 2020, p. 166.; Tratnik, 2020, p. 163.; Plavšak and Vrenčur, 2020, p. 257.
20 Zakon o partnerski zvezi (2016).

deceased, their children and adoptive children (grandchildren of the deceased) step in the place of their parents and inherit their parent's share in equal shares, and so forth (*ius representationis*, the right of representation).

Intestate heirs of the second succession order are the deceased's spouse and the deceased's parents, who inherit the estate if the deceased did not leave any descendants (natural and adoptive children or grandchildren and so forth). The spouse inherits one half of the estate, and the parents inherit the other half. If the deceased left neither parents nor descendants, the spouse inherits the entire estate. If the spouse died before the deceased, the entire estate is inherited by the deceased's parents. When one or both parents died before the deceased, the estate is inherited by the descendants of the deceased parent(s).

The heirs of the third (last) succession order are the grandparents of the deceased and their descendants, who inherit the estate if the deceased left no spouse, descendants, parents, and descendants of parents. According to the law, the grandfather and grandmother on the father's side, as well as the grandfather and grandmother on the mother's side, inherit one half (each one of them one quarter) of the estate. If one of the grandparents from the father's or the mother's side died before the deceased, their share is inherited by their descendants by the right of representation. Where one grandparent has no descendants, the share of the deceased grandparent falls to the other grandparent. If both grandparents from one side died before the deceased without leaving descendants, the grandparents from the other side or their descendants inherit the estate alone.

The testamentary succession has priority before the intestate succession. However, the freedom of the testator to dispose of the estate is restricted by provisions, according to which some persons who are close to the deceased (the forced heirs) have the right to a certain part of the estate (compulsory share). In Slovenian general succession law, forced heirs are the deceased's spouse, children, and adopted children and their descendants, parents, grandparents, brothers, and sisters, if they were entitled, in case of intestate inheritance, to inherit the deceased's estate according to their succession order. Grandparents, brothers, and sisters of the deceased are forced heirs under additional conditions, namely if they are permanently incapable of work and do not have the necessary means of subsistence (art. 25 of the IA).

The compulsory share for the descendants, adoptees, and their descendants and the spouse is one half, while the compulsory share for the other forced heirs is one third of the share that would go to each of them according to the rules on intestacy succession (art. 26 of the IA). If the compulsory share is deprived, testamentary dispositions are reduced proportionally, as much as necessary, to supplement the compulsory share. If the compulsory share is not yet covered, the gifts are returned in the reverse chronological order in which they were given (art. 35 and 38 of the IA).

Through will, the testator may give a material benefit to another person without appointing them as an heir (legacy).

The IA exhaustively lists grounds on which a testator may deprive a forced heir of their compulsory share (disinheritance, art. 42 of the IA) as well as grounds on

which any person is *ex lege* unworthy to inherit based on the Act or a will or to obtain anything according to the will (unworthiness of inheritance, art. 126 of the IA).

1.3.2. Special rules on the inheritance of protected farms (Inheritance of Agricultural Holdings Act)

Agricultural holdings of middle size (comprising between 5 hectares and 100 hectares of comparable agricultural land[21]) and belonging to one individual, to spouses, cohabiting partners or civil union partners, and to an ancestor and descendant are protected farms.

A protected farm may be inherited, in principle, only by one intestate or one testamentary heir with certain exceptions.

If the deceased left no will, the IAHA prescribes several rules according to which the court determines the intestate heir of the protected farm.

If a protected farm belonged only to the decedent, according to general succession rules, it is taken over by that intestate heir who intends to cultivate agricultural land and is chosen by a mutual agreement of all intestate heirs.

If the mutual agreement is not achieved, subsidiary criteria are prescribed (training for agricultural or forestry activity, growing up on the farm, and contributing to its maintenance and development through work and earnings, and so on). Under the same conditions, the spouse has priority in inheriting the protected farm of the decedent.

If the protected farm is owned, co-owned, or jointly owned by spouses, cohabiting partners, or civil union partners, the heir of the farm is the surviving spouse or partner (art. 8).

If the protected farm was co-owned by an ancestor and a descendant, the heir of the deceased co-owner is the surviving co-owner if they are the intestate heir. If the survivor is not an intestate heir, the heir of the deceased co-owner is determined in accordance with criteria relating to a protected farm belonging to one individual (art. 9).

The Act also contains some additional priority and excluding criteria to determine the heir of a protected farm (art. 7 and 11).

To alleviate the takeover of the protected farm, the circle of intestate heirs who are entitled to hereditary shares and their rights are reduced: the spouse, the decedent's parents, the decedent's children and adopted children, and their descendants who do not inherit the protected farm are entitled to a monetary value of the compulsory share

21 To make different agricultural land comparable, the IAHA states that 1 ha of the comparable agricultural area is equal to (a) 1 ha of land that has a land rating from 50 to 100 in accordance with the regulations governing the registration of real estate; (b) 2 ha of land with a land rating of 1 to 49, or (c) 8 ha of forest land. Farms that meet the conditions but mainly consist of forests are protected farms only if they have at least 2 ha of comparable agricultural land registered as agricultural land in the real estate cadastre (Art. 2[2 and 3] of the IAHA). According to some authors, the criteria for determination of protected farms that classify all agricultural land in only two categories are not precise enough to measure the real economic potential of agricultural land and of a farm as a whole (cf. Drobež, 2017, p. 1457; Avsec, 2021, p. 31).

in accordance with general rules on inheritance, provided that they would be intestate heirs according to their succession order. The hereditary shares of these heirs must be paid in cash by the heir who inherited the protected farm in a deadline set by the court, taking into account of the economic capacity of the protected farm and the social situation of the heirs (5 years or, in exceptional cases, 10 years at the longest).

Exceptionally, for justified reasons, the heir who does not take over the protected farm may also inherit land or other immovable or movable property if this property is not important for the protected farm, but up to the amount of their intestacy share (art. 15 of the IAHA).

If no intestate heir fulfills the conditions to take over the protected farm, this may be inherited according to general succession rules and divided physically (art. 13 of the IAHA).

The testator can leave the protected farm by will to only one heir, which must be an individual (natural person). Exceptionally, the testator may leave the protected farm to two heirs if these heirs are spouses, cohabitants, or civil union partners or one parent and their descendant; in both cases, however, the protected farm may not be divided into physical parts.

If the testator disposes of a protected farm in contravention of the IAHA, this is inherited according to rules on intestacy succession.

Granting a legacy must not significantly affect the economic viability of the protected farm. At the request of a testamentary heir, the court may reduce the legacies that would overburden the heir of the protected farm. In doing so, the court must ensure that other entitled heirs are not deprived of their compulsory shares.[22]

A heir who disposes of the inherited protected farm or a significant part of it before the expiration of 10 years after the takeover and neither acquires another farm, agricultural land, or forest nor invests the funds so obtained in the protected farm within 1 year after the alienation may be faced with claims of certain heirs, as if the farm had not been protected: (1) in case of intestacy succession, all intestate heirs who would have been called to inheritance according to general provisions may claim (a) either the payment of a difference between intestate hereditary shares they would have been entitled to according to general succession rules and lower intestate hereditary shares according to special succession rules on protected farms, or (b) payment of the full hereditary share if they were not intestate heirs according to special provisions on protected farms but would have been entitled to intestate share according to general inheritance rules; (2) in case of testamentary succession, all forced heirs according to general provisions (these are not only forced heirs according to special provisions—spouse, descendants, and parents of the deceased—but also siblings and grandparents who would have no means of sustenance and would be unable to work

22 The Act allows legacies, if their object is forest land or agricultural land with a credit rating lower than 40, building land, other things, or rights belonging to a protected farm; if an individual legacy does not exceed 2%; and if all legacies together do not exceed 10% of the total value of the estate (art. 22 of the IAHA).

if inheriting the estate on intestacy) are entitled to be paid a compulsory hereditary share (art. 19 of the IAHA).[23]

1.3.3. Inheritance of ownership shares in agricultural communities

The IAHA explicitly considers rights on land in agricultural communities as a part of a protected farm subject to special provisions of the IAHA.

The member ownership shares in agricultural communities that are not part of a protected farm are subject to special inheritance rules prescribed by the ACA.

Like IAHA, the ACA also lays down the principle that a member's share may be inherited only by one heir.

If there are several intestate heirs of the same inheritance order, the person who inherits the share of the deceased member is determined in the following order: (1) an intestate heir who shows an interest in participating in the agricultural community and is chosen by agreement of all heirs; (2) an intestate heir who has a permanent residence in the area of the municipality where the agricultural community lies. If there are several, a heir from the local community (subdivision of a municipality) where the agricultural community is located has priority. If there are still several heirs enjoying priority, an heir from the nearer knee is preferred. Under the same conditions, the one chosen by the board of directors of the agricultural community shall prevail; (3) an intestate heir who is appointed by the court. In determining the heir, the court takes into account the distance of an intestate heirs' permanent residence from the municipality where the agricultural community lies, the fact that the heir is a transferee of the protected farm, the competence in performing agricultural and forestry activities, and the opinion of the agricultural community's administrative committee.

An estate without heirs becomes the property of the municipality where the agricultural community has its seat.

The heir must pay compulsory shares to persons who are entitled to such share according to general inheritance rules. The time limit for the payment of the compulsory share is determined by the court according to the heir's economic capacity and social conditions and may not be shorter than 1 year and not longer than 10 years (art. 52 of the ACA).

The same principle is also applicable to testamentary inheritance: a testator may leave the share on agricultural land in the agricultural community by will only to one heir. If the testator disposes of property contrary to the law, the co-ownership or common ownership share of the deceased is inherited based on the law.

1.4. Legal transfer of agricultural land, forests, and farms inter vivos

1.4.1. Definitions and administrative control

The ALA contains several provisions that restrict the legal transfer of agricultural land, forest, or farm (in Slovenian, *kmetija*). The legal transfer is defined as the

23 Zupančič, 2005, p. 145; Zupančič and Žnidaršič Skubic, 2009, p. 306.

acquisition of the ownership right through legal transactions between living partners and "in other events, specified by the Act." Although this definition is not entirely explicit and refers to unnominated provisions of the Act, it is important that the legal transfer according to the ALA encompasses only legal transactions instituting transfer of the ownership right but not the establishment and/or transfer of derived rights *in rem* (e.g., mortgage, easement, or right of usufruct on agricultural land). The legal transfer, as regulated in Chapter III of the ALA, covers neither lease contracts transferring the owner's entitlement of use to another person, although the contract on the lease of agricultural land is separately regulated within Chapter IV of the ALA and is subject to prior administrative control, such as legal transactions implying the transfer of ownership right.

The ALA does not contain a general definition of farm or agricultural holding. According to the AA, a farm is one organizational form of agricultural holding where the holder, members of the farm (individuals of at least 15 years of age residing at the same address as the holder, and closer relatives of the holder residing in Slovenia if they agree to be entered in the register of agricultural holdings as members) and employees are engaged in agricultural activity (art. 4 and 5 of the AA).

The AA has defined the agricultural holding as an organizational and operational economic entity comprising one or several production units; dealing with agricultural or agricultural and forestry activity; and having a uniform management, address, or head office, as well as a name or corporate name. The amendments to the AA from March 16, 2022 simplified the definition, bringing it in line with the Regulation 2021/2115/EU, so that "agricultural holding" covers all units used for agricultural activities, managed by the holder and located in the territory of the Republic of Slovenia. The holder of an agricultural holding may be (1) an individual, (2) a legal entity, (3) an agricultural community, or (6) a grazing community (art. 3).

Compliance with special provisions on the legal transfer of agricultural land, forests, and holdings is ensured through extensive administrative control. The ALA stipulates that the notarial attestation of the alienator's signature on the "land registry permission" (registration clause) is not allowed without the approval of the competent administrative body or a decision issued by the same body that the legal transaction meets the requirements according to which approval is not necessary (e.g., if a legal transaction is concluded by all co-owners of agricultural land, etc., see art. 19 of the ALA). As the notarial attestation of the alienator's signature is a condition *sine qua non* for the transfer of ownership right on the new acquirer, such provisions prevent violations of special provisions on the legal transfer of agricultural land.

The ALA provides for various restrictions with regard to the legal transfer of agricultural land, forests, and farms. These restrictions may be classified into formal and substantial. Formal restrictions originate from the preventive administrative control requiring that legal transactions with agricultural land, forest, and farms may have full effects only if the administrative authority issues a decision that the legal transaction is approved or that the approval is not necessary.

Substantial restrictions limit the substance of disposal entitlement with regard to the object, subjects, and legal effects of a legal transaction.

Certain substantial restrictions do not refer to a certain type of legal transaction (e.g., sales contract) but to legal transactions generally or at least to legal transactions of two or more types (e.g., prohibition to divide protected farms).

Other substantial restrictions refer to sales contracts and donation contracts.

1.4.2. Restrictions relating to legal transactions of two or more types

1.4.2.1. Restricted division of protected farms

The ALA prohibited protected farms to be divided by legal transfer (e.g., legal transactions *inter vivos* and donations *mortis causa*) but laid down some exceptions from this prohibition. A protected farm was allowed to be divided by legal transactions in the following cases: (1) when an existing protected farm was expanded or territorially consolidated or when a new protected farm was formed; (2) when another farm was expanded or territorially consolidated or when agricultural land owned by an agricultural organization or an individual entrepreneur was expanded or territorially consolidated; (3) when building land was alienated; (4) when land that was allowed to be disposed of by a will pursuant to rules on inheritance of protected farms was alienated; (5) when the ownership right to a protected farm was obtained by the Republic of Slovenia or a municipality; (6) when the owner increased or established a co-ownership share relating to a protected farm to the benefit of a co-owner, spouse or cohabiting partner, descendant, or adoptee in such a manner that the protected farm still met the conditions for protected farms (art. 18 of the ALA).[24]

This prohibition was abolished by the amendments of the ALA from 2022.

However, these amendments did not abrogate a special prohibition according to which a holder of a protected farm may not dispose of protected farm contrary to provisions of the IAHA by concluding a contract on delivery and distribution of property, a contract for annuity for life or a donation contract *mortis causa* (art. 24 of the

24 The Supreme Court of Slovenia (VSRS, Sodba II Ips 90/2015 z dne 8. 9. 2016) classified the exceptions from the prohibition to divide a protected farm into two groups: "In order to prevent the division or fragmentation of medium-sized farms (only these are subject to protection), the legislator restricted legal transfer according to two criteria: (1) with regard to assets (by allowing physical division in the form of alienation of certain immovable from the protected farm if such immovable becomes part of another protected farm or farm or agricultural land owned by an agricultural organization or individual entreprenur; if building land or land which may be, in accordance with the provisions on inheritance of protected farms, transferred through will to a person who is not the heir of the protected farm is disposed of (and) (2) with regard to the acquirer, the owner may alienate the protected farm in favor of one of the acquirers determined by law. In both cases, there is an additional restriction that the protected farm must continue to meet the conditions under the regulations on the inheritance of protected farms (minimum 5 ha and maximum 100 ha of comparable agricultural land and the condition relating to holders of a protected farm: one natural person or two persons only if they are spouses, cohabitants or civil partners, or ancestor and descendant)."

IAHA).[25] This prohibition does not include other contracts (donation contracts *inter vivos*, sales contracts, etc.) which may result in the physical division or fragmentation of protected farms.[26]

Nevertheless, the regulatory change with regard to legal transactions resulting in division of protected farms from 2022 will have a double-edged effect. On one side, the disposal of agricultural land will be less restrictive for holders of protected farms; on the other hand, the holder of a protected farm may now, through legal transactions *inter vivos*, alienate so much agricultural land that the farm no longer meets the requirements for a protected farm and will not be subject to special inheritance rules.

1.4.2.2. Restricted disposal of agricultural land in agricultural communities

Immovables in co-ownership or common ownership of members in agricultural community may be, as a whole, object of a transfer for consideration only in the following cases: (1) sale of building land; (2) sale of agricultural land that has no physical contact with other immovable property of members and whose area does not exceed 0.5 hectare; (3) sale of forest land that has no physical contact with other immovables of members and whose area does not exceed 1 hectare; (4) sale of land for the purpose of construction of facilities for which an expropriation procedure may be initiated; (5) sale of all land in case of termination of the agricultural community; (6) transfer of ownership rights in the process of agricultural operations; (7) sale of immovables on which public infrastructure facilities or facilities of public importance stand; (8) sale on the basis of a final court decision or a final decision of another state authority; (9) transfer of ownership on the basis of an exchange contract provided that another immovable subject to the exchange contract has the same actual use.

In cases referred to by points 2, 3, 5, 6, 8, and 9, the sale is subject to provisions on the transfer of agricultural land and forests, including the preemption right (art. 41 of the ACA).

1.4.2.3. Restrictions with regard to establishing new co-ownership shares on agricultural land, forest, or farm

The conclusion of sale contracts transferring the ownership right on agricultural land, forest, or farm is restricted through the statutory preemption right of certain persons (see *infra*, Section 1.4.3.). As co-owners enjoy the statutory preemption right

25 According to the standpoint of the Slovenian Supreme Court, the purpose of this provision is to preserve the unity of a protected farm. The court emphasizes that the holder of a protected farm, when choosing the other party to conclude one of the mentioned contracts, is not bound by statutory criteria for determination of the intestate heir: "the responsibility for selecting the appropriate transferee of the protected farm, who will continue to manage the farm, is left to the owner" (VSRS, Sklep II Ips 88/2013 z dne 11. 12. 2014, pt. 9).

26 Cf. Zupančič and Žnidaršič Skubic, 2009, p. 313. The authors consider that the prohibition should also be applicable to contract of subsistence and statutorily unregulated delivery contracts if concluded with a view to circumventing the regime of the IAHA.

of first priority (in order to decrease the number of co-owners or abolish co-ownership and make the management of the immovable simpler and easier), some individuals acquired, through contracts of various types (e.g., donation), a co-ownership share on the agricultural land just with a view to be able to purchase shares of other co-owner(s) as holders of the best preemption right. The amendment of the ALA from 2011 allowed only the entire ownership right or entire existing co-ownership share on agricultural land, forest, or farm to be sold. [27]

The same amendment of the ALA in 2011 introduced restrictions with regard to donation contract limiting the free choice of donors. A farm holder who has become the young transferee of a farm in the last 5 years and obtained funds from the rural development program or through a sales contract is also among the potential donors (Art. 17.a[2] of the ALA), but in such a case, only the whole ownership right or co-ownership share of the agricultural land, forest, or farm may be transferred by a donation contract. As far as other potential donors (e.g., spouse and closest relatives of the donor, the state, and the municipality) are concerned, this restriction does not apply.

It should also be considered that establishing a new co-ownership share is not necessarily a consequence of legal transaction for the transfer of the ownership right. The co-ownership share may be established through disposal which results in restriction of the ownership right through establishing a derived right *in rem* on the immovable (e. g., mortgage on ½ co-ownership share of the immovable, where the ownership right was neither entirely nor partially transferred and the immovable is not co-owned, being still owned by one person).[28]

1.4.2.4. Prohibited division of ownership shares on immovables in agricultural communities

Each member of an agricultural community disposes freely of the co-ownership share, unless otherwise provided in the ACA. The ACA sets the principle that only the entire co-ownership share *on all land plots* within the agricultural community may be disposed of art. 37[2] of the ACA, but this requirement was attenuated, to a certain extent, by the amendments of the ACA from 2022.[29]

As far as common ownership in agricultural communities is concerned, it is presumed that, for purpose of the ACA, member shares in the common property are equal, unless otherwise determined by the basic act of the agricultural community.

27 Ibid.

28 Plavšak, 2020, p. 197.

29 The amendments allow division of co-ownership share into as many parts as there are different legal titles on the basis of which the co-ownership share was acquired, if the law does not specify otherwise. The provision was explained with the following example: "In the case where person acquired a co-ownership share from three other members, this co-ownership share may be further divided into three parts" (Predlog Zakona o spremembah in dopolnitvah Zakona o agrarnih skupnostih, 2021). On the other hand, the amendments to ALA from 2022 emphasize the obligatory integral transfer of existing co-ownership share by contract on delivery and distribution of property and contract of lifelong maintenance (art. 43a and 43b of the ACA).

Therefore, the provisions of the ACA on co-ownership apply, *mutatis mutandis*, to common ownership, unless otherwise provided by this Act (art. 4). The ACA explicitly allows members of agricultural communities to dispose of their undetermined shares in common ownership analogously to provisions on co-ownership shares (art. 44).

1.4.3. Restrictions with regard to sale contracts: Statutory preemption rights

1.4.3.1. General provisions on statutory preemption rights on agricultural land, forest, and farms

The ALA regulates the general rules on the statutory preemptive right on agricultural land, forest, or farms, which are applicable unless another an act provides otherwise.

If agricultural land, forest, or farm is offered for sale, certain persons have statutory preemption right in the following order: (1) co-owner(s); (2) farmers who own the agricultural land bordering that offered for sale; (3) lessee of the agricultural land offered for sale; (4) other farmers; (5) agricultural organizations or individual entrepreneurs who need land or farm to conduct agricultural or forestry activity; and (6) the National Agricultural Land and Forest Fund of the Republic of Slovenia (art. 23[1] of the ALA).

According to the ALA, a farmer is an individual who cultivates agricultural land as its owner, lessee, or other user; is adequately qualified for this cultivation; and obtains a significant part of the income (at least 2/3 of the average salary in Slovenia in the past year) from agricultural activity. The status of being a farmer is retained by an individual who cultivated agricultural land and no longer conducts agricultural activity due to disability or age but takes care of the land cultivation. Individuals who do not conduct agricultural activity yet but intend to do so may obtain the status of a farmer by stating before the administrative authority the intent to cultivate the agricultural land on their own or with the help of others, providing evidence on acquiring the agricultural land, possessing necessary professional qualifications, and the significant future foreseen income from agricultural activity (new entrants, art. 24[1] of the ALA).

An individual entrepreneur (natural person) or agricultural organization (legal person) are statutory preemptors if they have notified (individual entrepreneur) or registered (legal person) agricultural activity and generate more than 50% of the revenue from an agricultural activity, including revenue from agricultural policy measures and state aid, which must be evident from the most recent verified balance sheet and income statement (art. 24[4]–[5] of the ALA).

The ALA prescribes specific procedures for the enforcement of the preemption right. An owner who intends to sell agricultural land, a forest, or a farm must submit the sale offer to the competent administrative body ("administrative unit") in the area where the agricultural land, forest, or farm is located. By submitting the offer to the administrative unit, the owner is deemed to have authorized the administrative unit to receive a written statement of the offer's acceptance.

The administrative authority must immediately publish the offer on its notice board and on the unified state portal of the "E-government." The deadline for acceptance of the offer is 30 days from the day when the offer is published on the notice board of the administrative unit. If no one accepts the offer within the time limit, the seller who still wishes to sell the agricultural land, forest, or farm must repeat the offer.

If two or more farmers within the same priority class (e.g., two farmers owning land bordering to that offered for sale) enforce their priority rights by accepting the offer, the buyer is determined in the following order of priority: (1) a farmer who conducts an agricultural activity as their only or main activity; (2) a farmer who cultivates land on their own; (3) a farmer appointed by the seller, except in the case of the sale of agricultural land, a forest, or a farm that is real property of the state, and the seller must appoint a buyer applying the method of public auction (art. 23[2] of the ALA).

According to amendments of the ALA in 2022, a lessee who took on the lease of agricultural land owned by natural and legal persons of private law may enforce the statutory preemption right with regard to the leased agricultural land only if they have—at least during the previous 3 years—applied for agricultural subsidies according to executive regulations (art. 23a[3] of the ALA).

The same amendments introduced a new statutory preemption right for a person who sold agricultural land necessary to implement the development projects of national importance or whose agricultural land has been expropriated for such purpose. The statutory preemption right of such person has priority before all other statutory preemptors, except the co-owner (art. 25a of the ALA).[30]

1.4.3.2. Statutory preemption right on forests

The FA contains several special provisions on preemption rights with regard to forests.

For the purchase of forest complexes with an area spanning over 30 hectares, the statutory preemption right of the highest priority belongs to the Republic of Slovenia or a legal entity managing state forests. If the forest is located within protected areas under the regulations on nature conservation, such legal entity must obtain the opinion of the minister responsible for nature conservation.

In other cases, the Republic of Slovenia has statutory preemption right to purchase forests declared as protective forests (forests with a particularly important ecological functions) and forests designated as forests with a special purpose (e.g., forests with an especially emphasized research function or those protecting natural values or cultural heritage), unless the special emphasis on the functions for which the forest was

30 Two draft bills foreseeing important changes of the provisions on the statutory preemptors of agricultural land had been launched in public discussion in 2019 and 2020 (see, Avsec, 2020 and 2021), but the amendments to the ALA adopted on March 16, 2022 essentially maintained the existing regulation.

designated as a forest with a special purpose is in the interest of the local community. In the latter case, the local community in which a designated forests with special purpose are situated has a statutory preemption right on the forest concerned.

In cases where forests from the preceding paragraphs are offered for sale, the administrative unit notifies a legal entity managing state forests or a local community of its preemption right, which is exercised in such a way that the beneficiary notifies the forest's owner and the administrative unit, in writing, about the offer's acceptance within 30 days after having been notified by the administrative unit. If a legal entity managing state forests or a local community exercises its preemption right, the publication of the offer on the notice board of the administrative unit and on the "E-government" national portal according to the ALA is not necessary.

In cases where a forest is offered for sale and the state, legal person managing state-owned forests, and local community do not exercise their preemption rights or, given the status of the concerned forest, do not possess the statutory preemption rights according to the mentioned provisions, the owner whose forest borders the forest offered for sale may enforce the statutory preemption right. If this owner does not exercise the priority right, another owner whose forest is the nearest to the forest that is being sold has statutory priority right to purchase the forest (art. 47 of the FA).

The amendments of the ALA brought more precise rules on the preemption right in cases where the land concerned is, according to its intended use, partly agricultural land and partly forest.[31]

1.4.3.3. Preemption rights on a protected farm or part thereof

If an heir of a protected farm within 10 years after inheritance ceases to cultivate the protected farm by disposing or leasing the protected farm or a substantial part of it without acquiring other agricultural land, forest or without investing the funds obtained in the protected farm in one year after alienation, or ceases to use the protected farm in other ways, other co-heirs have priority right to purchase or to take on lease the protected farm or part of it (art. 19[2] of the IAHA).

The literature interprets this provision that the coheirs have a statutory priority right to purchase or to take on lease the protected farm or part of it before expiration of 10 years after the takeover of the protected farm. With regard to enforcement modalities of this preemption right, an interpretation can be found according to which the coheirs as statutory preemptors would be placed immediately after the co-owner(s) who enjoy preemption right of the highest priority. Such interpretation

31 If the sale offer refers to a plot of land with the agricultural and forest intended use where the agricultural intended use prevails over the forest one, the statutory preemption right is exercised according to the ALA, unless the state has a preemption right under a special law. Similarly, in case where several plots of land as a whole are sold together—some of which are, according to the intended use, agricultural land plots and other forest plots—and the share of agricultural intended use represents at least 20% of the plots' total surface, the ALA is applicable to the purchase, unless the Republic of Slovenia has a preemption right under a special law (art. 23a[2]–[3] of the ALA).

leans on the provision that the ALA provisions on preemption right apply to all sales of agricultural land if special provisions in other acts do not provide otherwise, while co-owners of an immovable have a statutory preemption right according to the ALA as well as to PLC (art. 66[3]).[32]

1.4.3.4. Preemption right on the ownership share on agricultural land in agricultural communities

If a member ownership share on immovable in agricultural community is offered for sale, the preemption right of certain subjects may be enforced in the following priority order: (1) an agricultural community of which the seller is a member, if such a decision is taken by the general meeting by a two-thirds majority of all members; (2) a member of the agricultural community of which the seller is a member (if the preemption right is exercised by several members, the buyer is selected by the seller); (3) an accession member of the agricultural community of which the seller is a member (if so provided by the founding act, general meeting of agricultural community may nominate accession members who have preemption right if an ownership share is offered for sale; through acquiring the ownership share, an accession member becomes ordinary member of the agricultural community); (4) an individual who has a permanent residence in the municipality where the immovable subject to sale is located.

The amendments of the ACA from 2022 determined stricter conditions with regard to the fourth priority class, stating that only individuals with residence in the cadastral municipality or nearest to cadastral municipality[33] where the agricultural community has most of its land are eligible. If two or more of preemptors of the fourth priority class enforce the preemption right, the priority is given to that one who is a holder of the agricultural holding in accordance with the law governing agriculture, or subsidiarily, to that one chosen by the seller.

When the immovable is sold to the agricultural community, the purchase price is paid provided in full from the agricultural community's account, and the ownership shares of all members are proportionally increased.

The preemption right is enforced in procedure, deadlines, and manner as prescribed by the provisions on legal transfer of agricultural land and forests (art. 42 of the ACA).

32 Vrenčur, 2020, p. 932. According to Plavšak, 2020, p. 912., the statutory preemption right of co-owners has priority before statutory preemption rights in the public interest also in cases where such priority is not determined explicitly by the law.

33 Slovenia counts 212 municipalities as local, self-governing communities and 2,696 of cadastral municipalities as territorial units on which the land cadaster and land register are based. The average of cadastral municipalities is more than 10 times smaller than the average municipality [cf. Establishment of Municipalities and Municipal Boundaries Act (Zakon o ustanovitvi občin ter o določitvi njihovih območij), 1994 and Pravilnik o območjih in imenih katastrskih občin (Rules on the areas and names of cadastral communities), 2006].

1.4.3.5. Concurrence of several statutory preemption rights according to the ALA and other Acts

The statutory preemption rights on agricultural land are determined not only by the agricultural land legislation but also by some other acts.

The Nature Conservation Act (NCA)[34] regulates the statutory preemption right on immovables on the protected areas in favor of the state or local community that adopted the legal instrument on protection. This preemption right has priority before preemption rights according to agricultural land, forest, water, and building land legislation. If the state or local community does not exercise their first preemption right, the preemption rights laid down by the agricultural land, forest, water, and land building legislation may be exercised so that within the same category of preemptors, priority is given to those who already own immovables of the same type located in the protected area (art. 84). This rule modifies the priority order established in the ALA.

According to the Water Act (WA),[35] the local community that is going to proclaim costal land or part of it as a natural aquatic public good has the best preemption right on such coastal land of inland waters (art. 16), while the state has the best preemption right relating to other coastal land of inland waters (art. 22). In both cases, the best priority right may be exercised regardless of provisions on the priority order of preemptors in other legislation.

The Cultural Heritage Protection Act (CHPA)[36] regulates the priority right of the state or local community to purchase a monument of national or local importance or immovable in an area of influence with an immovable monument of such importance, if so foreseen by the legal act proclaiming the monument. If the state does not exercise its preemption right on the immovable concerned, this right may be exercised by the local community (art. 62).

The Spatial Management Act (SMA[37]) from 2021 introduced a special preemption right of the state or local community on land, which meets certain requirements and is determined by the state or local community (e.g., agricultural land in area where constructing public utility infrastructure and facilities used for protection against natural and other disasters is planned). This preemption right does not apply in some cases (e.g., in a sales contract between spouses or close lineal relatives), but it has priority before the preemption right determined by the ALA. The seller must repeat the offer to the state or local community if 3 months have passed since the previous offer, although the price and other terms of sale remain unchanged (art. 199–201).

According to theory, the statutory preemption rights may be ranked in the following priority order: (1) preemption right of co-owner, (2) preemption right according to the NCA, (3) preemption right according to the WA, (4) preemption right according to

34 Zakon o ohranjanju narave (2004).
35 Zakon o vodah (2002).
36 Zakon o varstvu kulturne dediščine (2008).
37 Zakon o urejanju prostora (2021).

the CHPA, (5) preemption right according to the SMA, (6) preemption right according to the FA, the IAHA, and the ALA.[38]

1.4.4. Restrictions of donation contracts

1.4.4.1. Restricted donation of agricultural land and co-ownership shares

The ALA restricts the conclusion of donation contracts the object of which is agricultural land, forest, or a farm, with regard to persons who may be donees. An owner may donate agricultural land, a forest, or a farm only to (a) a spouse or cohabiting partner, children, or adopted children; parents or adoptive parents; siblings; nephews or nieces; and grandchildren; (b) a son-in-law, daughter-in-law, or a child's or adoptive child's cohabiting partner, provided they are members of the same farm; (c) an individual who is a farm holder in accordance with the Act regulating agriculture and has obtained funds from the rural development program as a young transferee of a farm, if no more than 5 years have passed since the transfer of the farm; (d) a local community or the state (art. 17a of the ALA).

This provision was adopted to restrict circumvention of the statutory preemption right through the conclusion of donation contracts.[39]

1.4.4.2. Restricted donations of immovables and ownership shares in agricultural communities

The immovable that is object of co-ownership or common ownership of members in an agricultural community may be the subject of a donation contract if it is transferred to the municipality or the Republic of Slovenia.

The disposal of ownership shares in agricultural communities is also restricted. Members of the agricultural community may conclude donation contracts for transfer of the ownership shares only with their spouses, cohabitants or civil partners, children or adoptive children, parents or adoptive parents, siblings, nieces and nephews and grandchildren; or with the agricultural community, whereby the share that is the object of the transfer is acquired by all other members in proportion to their shares (art. 43 of the ACA).

1.5. Other restrictions of the entitlement to use and dispose of agricultural land, forest, or farm

While the notion of legal transfer of agricultural land, forest, and farm in the ALA covers only legal transactions transferring the ownership right, the disposal entitlement may be restricted also with regard to the transformation of ownership right.[40] Some statutory provisions established the conditions under which the division of agricultural land and forest plots (parcels) is prohibited.

38 Vrenčur, 2020a, pp. 74–75.; Vrenčur, 2020, p. 941.
39 Predlog Zakona o spremembah in dopolnitvah Zakona o kmetijskih zemljiščih, 25. 1. 2011.
40 Plavšak, 2020, p. 456.

Among the agricultural operations, the ALA also regulates land consolidation as a procedure through which land within a certain area is assembled and redistributed among the previous owners so that each is allotted land that is territorially compact to the highest extent possible (art. 55). Land plots that have been consolidated can be divided only when the plot structure achieved by the land consolidation does not deteriorate as a result of such division (art. 75 of the ALA).

According to the FA, land plots that constitute a forest and are smaller than 5 ha may only be divided (a) if the land use on such parcels or parts thereof is not specified as forest in spatial planning documents, (b) if a division is necessary due to the construction of public infrastructure, or (c) if they are co-owned by the Republic of Slovenia or a local community (art. 47[6]).

An owner may also dispose of an immovable or movable through establishing derived property rights.[41] In this regard, the ALA provisions on the legal transfer of agricultural land foresee no explicit special restrictions for establishment of derived property rights on agricultural land, forests, and farms, but the extent of certain derived property rights (e.g., usufruct or encumbrance) may be restricted by special provisions of the IAHA (cf. art. 17 and 22 of the IAHA).

1.6. Lease of agricultural land

The lease contract is regulated by the Obligation Code (OC).[42] The ALA contains some special provisions on the lease of agricultural land, which relate to statutory prelease rights, the content and written form of the lease contract, the minimum lease period, and the lessee's duties to cultivate and use land with due diligence. A lessee who grew permanent crops on the leased land has the right to be reimbursed the market value of permanent crops after the termination of the contract if such investments were made with the lessor's consent.

A lease contract must include the land register and real estate cadastre data of the leased land; the description and unamortized value of equipment, facilities, and permanent crops; the depreciation period of permanent crops; the rent amount; the purpose and period of the lease; and a provision as to whether the leasehold right shall be inheritable or not. A lease relationship must also be entered in the land register and the real estate cadastre.

The ALA regulates the priority to take agricultural land, forests, or agricultural holdings on lease. Several persons may exercise these priority rights in the following order of priority: (1) the present lessee (if the contract was not terminated with this person due to breach of their duties); (2) a lessee of land bordering the land that is being leased and a farmer who owns the land bordering the land that is being leased; and (3) another farmer, agricultural organization, or individual entrepreneur who needs the land or the farm that is being leased to conduct an agricultural activity (art. 27 of the ALA).

41 Ibid.
42 Obligacijski zakonik (2001).

The lease period must correspond to the purpose of the use of the leased land and may not be, in principle, shorter than 25 years for the establishment of vineyards, orchards, or hop fields; 15 years for the establishment of plantations of fast-growing deciduous trees; and 10 years for other purposes. If a special act allows so—or if the lessor, after the announcement of a lease offer, is unable to conclude a lease contract for the prescribed minimum period—the lease contract may be concluded for a shorter period. Where permanent crops already exist on leased land, a lease relationship may be concluded for a period necessary for the full amortization of the lessee's investments in these crops.

The provisions on the right of prelease, entry of the lease contract in the land register and real estate cadastre, and procedures for enforcing the right of prelease and getting the lease contract approved by the administrative authority were strictly complied with, in practice, only by the National Agricultural Land and Forests Fund and far less by individuals and other legal entities.[43] That is the reason why special provisions on agricultural leases in the ALA are, according to amendments from 2022, applicable only to agricultural land leased by the National Agricultural Land and Forests Fund and municipalities (art. 23a of the ALA). On the other hand, contracts on the lease of agricultural land concluded by other lessors are regulated only by the general provisions of the OC.

1.7. Ownership right of aliens (including legal persons) on agricultural land

The Slovenian Constitution ensures aliens to enjoy all constitutionally and statutorily guaranteed rights, except for those rights that, pursuant to the Constitution or law, only citizens of Slovenia enjoy (art. 13). In this regard, the constitutional theory distinguishes general rights (enjoyed by all individuals regardless of their citizenship), reserved rights (which may be enjoyed by aliens only under certain conditions), and absolutely reserved rights (guaranteed only to citizens). The right of ownership on immovable is one of the reserved rights since art. 68 of the Constitution determines that "aliens may acquire ownership rights to immovables under conditions provided by law or a treaty ratified by the National Assembly."

With regard to the acquisition of ownership right on immovables, three categories of aliens can be distinguished.

According to international treaties and internal legislation currently in force, individuals and legal persons meeting certain requirements may acquire the ownership of immovables without a decision establishing reciprocity, namely (a) citizens and legal entities of EU member states[44]; (b) citizens and legal entities of OECD member countries[45];

43 Kunc et al., 2018, p. 189.

44 Treaty on the Functioning of the European Union (Consolidated version), 2022, art. 63[1].

45 Act ratifying the Agreement on the Terms of Accession of the Republic of Slovenia to the Convention on the Organisation for Economic Co-Operation and Development, Annex 1 and Annex 2 to the Agreement.

(c) citizens and legal persons of EFTA states[46]; (d) individuals having the status of a Slovene without Slovene citizenship[47]; (e) foreign intestate heirs and foreign testamentary heirs, who would be heirs even in the case of intestate inheritance, when they acquire the right of ownership on immovable by inheritance[48]; (f) aliens from the former republics of the Socialistic Federative Republic of Yugoslavia who met all the conditions for registration before December 31, 1990, but whose registration was not realized or the registration procedure not started.[49]

Natural and legal persons of EU candidate countries may acquire the right of ownership on agricultural land and other immovables on the basis of a legal transaction, inheritance, or decision of a state body if reciprocity is established.[50] Natural persons of EU candidate countries are citizens of those countries, while legal persons of EU candidate countries are legal persons established in those countries. The reciprocity is established in accordance with a Reciprocity Establishing Act (REA[51]).

The third category are citizens and legal persons of other states who may inherit agricultural land, forest, and agricultural holdings under certain conditions. The IA places aliens (literally "foreign citizens" and *tuji državljani* in Slovenian) in the same position as citizens of Slovenia with regard to inheritance, stating that foreign citizens have succession rights equal to those of citizens of the Republic of Slovenia, provided that the principle of reciprocity applies (art. 6 of the IA) and reciprocity is established (art. 4[1] of the REA). As mentioned above, if the alien is an intestate heir or a testamentary heir who would be heir also in a case of intestate inheritance, reciprocity is presumed until proven otherwise. In all other cases, the alien as an heir may acquire ownership right on immovable only if material reciprocity is established (art. 4[2] of the REA).

Although the IA allows foreign citizens to inherit immovable under condition of reciprocity, legal theory also applies this rule by analogy to legal persons.[52] An addi-

46 Zakon ratifikaciji Sporazuma o udeležbi Češke republike, Republike Estonije, Republike Ciper, Republike Latvije, Republike Litve, Republike Madžarske, Republike Malte, Republike Poljske, Republike Slovenije in Slovaške republike v Evropskem gospodarskem prostoru s sklepno listino (Act ratifying the Agreement on the participation of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic in the European economic area with the final act), art. 40 of the Agreement.

47 Zakon o odnosih Republike Slovenije s Slovenci zunaj njenih meja (Act Regulating Relations between the Republic of Slovenia and Slovenians Abroad), 2006, art. 66[1].

48 Zakon o ugotavljanju vzajemnosti (Reciprocity Establishing Act), 2017, art. 4[1].

49 Zakon o ratifikaciji sporazuma o vprašanjih nasledstva (Act on Ratification of the Agreement on Succession Issues), 2002, Annex G, art. 2.

50 Zakon o pogojih za pridobitev lastninske pravice fizičnih in pravnih oseb držav kandidatk za članstvo v Evropski uniji na nepremičninah (Act Governing Conditions for the Acquisition of Title to Property by Natural Persons and Legal Entities of European Union Candidate Countries), 2006.

51 Zakon o ugotavljanju vzajemnosti (2017).

52 Zupančič and Žnidaršič Skubic, 2009, p. 63. and 64. (with regard to art. 2 of the former Reciprocity Establishing Act, which is identical to the art. 2 of the omonimous act currently in force).

tional argument for such interpretation is the legal approach in the REA, according to which the notion of "alien" designates individuals not having Slovenian citizenship as well as legal persons with a registered office outside of Slovenia.[53] Because legal persons may only be testamentary (and never intestate) heirs, reciprocity must be always established by a special decision before a legal person acquires the right of ownership on the immovable.

According to the REA, material reciprocity exists if citizens of the Republic of Slovenia or a legal person established in the Republic of Slovenia may acquire ownership of immovable in the alien's country under the same or similar conditions under which the alien may acquire ownership of an immovable in the Republic of Slovenia, and the fulfillment of these conditions is not significantly more difficult for a citizen of the Republic of Slovenia or a legal entity with a registered office in the Republic of Slovenia than that of conditions which are prescribed for the alien by the legal order of the Republic of Slovenia (material reciprocity, art. 7[1] of the REA).

Reciprocity is determined for each immovable separately (Article 2 of the REA). Depending on the legal regime for agricultural land and other immovables in the alien's country, it is possible that reciprocity may exist for building land but not for agricultural land or vice-versa.

In principle, there are no special requirements for acquiring a share in a legal person owning agricultural land in Slovenia. An exception from this principle is the mechanism of preliminary review of foreign direct investments, which was introduced at the EU level by the Regulation 2019/452/EU and in Slovenia by the Act Determining the Intervention Measures to Mitigate and Remedy the Consequences of the COVID-19 Epidemic.[54] If a foreign investor acquires at least 10% of the share capital or voting rights in a Slovenian company (foreign direct investment), and the activity of the target company refers to one of the risk factors enumerated by the Regulation and the Act, the foreign direct investment must be notified to the ministry of economy. The risk factors may refer, *inter alia*, (a) to land and other immovables, which are essential for the use of critical infrastructure, land, and immovables located in the vicinity of such infrastructure or (b) to the supply of critical resources, including food security, so that agricultural land may also be involved. If a review procedure is initiated, and it is established that the foreign direct investment affects the security and public order of the Republic of Slovenia, the procedure may be prohibited or revoked, or the conditions for its implementation may be determined.[55]

53 Zupančič and Žnidaršič Skubic, 2009, pp. 63. and 64.

54 Zakon o interventnih ukrepih za omilitev in odpravo posledic epidemije COVID-19 (2020), art. 60–75.

55 The theory criticizes the respective provisions (which apply until June 30, 2023) for the lack of precision and unsufficient elaboration of criteria, laid down by the relevant EU Regulation (Peček, 2021, p. 40).

2. Land regulation in the Constitution and the case law of the Constitutional Court

Agricultural land as such is *verbis expressis* addressed by the art. 71 Slovenian Constitution. The first paragraph of this article authorizes the legislator to establish special conditions for land utilization to ensure its proper use, while the second one grants "special protection of agricultural land which is provided by law."

According to the case law of the Slovenian Constitutional Court, space is natural wealth and an irreplaceable good; therefore, the state has powers to assure such conditions for using space, which would preserve it not only from the viewpoint of environmental protection but also from the viewpoint of its regional and urban appearance.[56]

The special protection of agricultural land is ensured by the ALA, the SMA, and other spatial planning legislation.

According to general provisions on spatial planning, the planned use of space is determined by considering sectoral regulations with regard to the physical characteristics of the space and its intended use. Areas of land use are areas of building, agricultural, forest, water, and other land (art. 37 of the SMA).

Agricultural land is determined by the spatial planning documents of local communities as areas of agricultural land in accordance with the law and executive regulations. It is classified as either areas of permanently protected agricultural land or areas of other agricultural land (art. 2[2] of the ALA).

In principle, spatial developments may take place first on land designated for non-agricultural use; if this is not possible, on other agricultural land and—only exceptionally, in the last line—on permanently protected agricultural land, where developments may first take place on agricultural land with a lower land rating (art. 3b of the ALA).

Agricultural land is also specially protected by provisions on special parafiscal duty, which is named compensation on conversion of agricultural land for non-agricultural purposes. The ALA also protects fertile soil. As outlined in Section 1, legislation on agricultural land imposes several restrictions on the inheritance of and legal transactions with agricultural land, forests, and protected farms. In addition, the ALA prescribes the user's duties to cultivate agricultural land with due diligence, to prevent the overgrowing of agricultural land and to apply appropriate farming methods. To improve agricultural land in the public interest, the ALA prescribes the prerequisites and procedures for the following agricultural operations: exchange of agricultural land, rounding off, commassation, land improvement operations, and, since the amendments from 2022, the division of agricultural land co-owned by the state if co-ownership was established after the final decision on denationalization and some other requirements are met.

56 USRS, Odločba U-I-227/00-14 z dne 19. 10. 2000, pt. 19.

The Slovenian Constitution guarantees, *inter alia*, the "right to private property and inheritance" (art. 33).

The notion of private property is interpreted widely in the case law as well as in theory. The Constitutional Court stated that the provisions of art. 33 of the Constitution or art. 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms extends to all legal positions, which have a property value for the individual in a similar way as the right to ownership and which enable an individual to act freely in the field of property and thus shape their own destiny freely and responsibly.[57]

In numerous decisions, the Constitutional Court has ruled that the guaranteed private property encompasses not only the right of ownership[58] but also mortgage[59] and other rights *in rem*, rights of obligation law (rights *in personam*),[60] corporate rights,[61] justified expectation of acquiring a property right,[62] licenses or prohibitions of conducting certain activities,[63] and also pension rights.[64]

The Constitutional Court holds that the constitutional guarantee of property contributes to the provision and realization of individual freedoms, including property freedom, which encompasses four elements: (1) freedom to acquire property, (2) enjoyment of property, (3) right to transfer property, and (4) confidence in acquired rights.[65]

The constitutionally guaranteed right to property and inheritance is inextricably linked to the provision in Chapter 4 ("Economic and Social Relations") of the Constitution, according to which "the manner in which property is acquired and enjoyed shall be established by law so as to ensure its economic, social, and environmental function" (art. 67).

The Constitutional Court holds that legislative regulation that assures the economic, social, and environmental function of property is based on constitutional empowerment and may be qualified not as violation but as definition of the right to property. However, according to art. 67 of the Constitution, the legislator's powers are not unlimited. Statutory provisions that go beyond the limits of this power no longer determine the manner of acquiring and enjoying property but encroach on the right to private property.[66] Drawing the line between the constitutionally conforming manner of acquiring and enjoyment of property, on one side, and the encroachment on the right to private property, on the other, depends not only on the nature of the property but also on the obligations imposed by the legislature on the owner in

57 USRS, Odločba U-I-47/15-8 z dne 24. 9. 2015, pt. 10.
58 USRS, Odločba U-I-122/91 z dne 10. 9. 1992.
59 USRS, Odločba U-I-47/15-8 z dne 24. 9. 2015, pt. 11.
60 USRS, Odločba U-I-267/06-41 z dne 15. 3. 2007, pt. 24.
61 USRS, Odločba U-I-165/08-10, Up-1772/08-14 and Up-379/09-8 z dne 1. 10. 2009, pt. 16.
62 USRS, Odločba Up-77/04-43 z dne 11. 10. 2006, pt. 9.
63 USRS, Odločba U-I-63/00-8 z dne 7. 3. 2002, pt.15.
64 USRS, Odločba Up-770/06-18 z dne 27. 5. 2009, pt. 4 and 5.
65 USRS, Odločba U-I-47/15-8 z dne 24. 9. 2015, pt. 10.
66 USRS, Odločba U-I-70/04-18 from 15. 2. 2007, pt. 6.

determining the manner in which the property is to be enjoyed as well as on other relevant circumstances.[67]

From the Constitutional Court case law, three steps in assessing whether statutory provisions encroach on the right to private property may be distinguished.[68]

If the Constitutional Court ascertains that the challenged measure determines the manner of acquisition and enjoyment of private property and may not be qualified as an encroachment upon the right to private property, only the reasonableness of the measure is assessed. According to an alternative opinion of legal theory, a more appropriate approach would be "to consider the economic, social and environmental determinants as a legitimate, constitutionally determined restrictions of right to private property what does not exclude, *a priori*, the proportionality test."[69]

In the second step, the Constitutional Court verifies whether the challenged measures infringe the constitutionally protected substance (core) of the right to private property. If the substance of the right is not affected and a reasonable ground for the challenged measure exists (soft test of reasonableness), the measure is in conformity with the Constitution.[70]

Statutory provisions that encroach upon the substance of the right to private property are in conformity with the Constitution only so far as they pursue a legitimate goal and the encroachment on the ownership right passes the strict test of proportionality.[71]

The Constitutional Court has extensively dealt with statutory provisions that restricted the inheritance and legal transfer of agricultural land and agricultural holdings, not seldom annulling entire act or entire chapter of an act. Such were decisions on annulling the entire previous Agricultural Land and Private Agricultural Holdings (Farms) Inheritance Act,[72] the entire previous Agricultural Land Act,[73] and the whole Chapter 3 (regulating legal transactions with agricultural land) of the Agricultural Land Act from 1996, which was adopted to replace the previous homonymous Act.[74]

All the three decisions of the Constitutional Court have some general common grounds. Referring to principle of the state governed by the rule of law (art. 2 of the Constitution), the Constitutional Court holds that the statutory provisions must be sufficiently definite and precise, consistent with the requirements of legal certainty; otherwise, they allow the arbitrary conduct of authorities and are incompatible with the rule of law.[75] In addition, statutory restrictions encroaching on entitlements to dispose of agricultural land, forest, and agricultural holding may be in accordance

67 Ibid.
68 Zobec, 2019, p. 322 and 323.
69 Ibid., p. 329.
70 Ibid., p. 323.
71 Ibid.
72 USRS, Odločba U-I-57/92 z dne 3.11.1994.
73 USRS, Odločba U-I-184/94-9 z dne 14.9.1995.
74 USRS, Odločba U-I-266/98 z dne 28.2.2002.
75 USRS, Odločba U-I-57/92 z dne 3.11.1994, pt. 4; USRS, Odločba U-I-184/94-9 z dne 14.9.1995, pt. 11; USRS, Odločba U-I-266/98 z dne 28.2.2002, pt. 14 and 31.

with the Constitution only if and to the extent these measures are justified by the protection of the rights of others (art. 15[3] of the Constitution) directly or through the public interest, provided that they are necessary, appropriate, and proportionate.[76]

The restriction relating to the owner of a protected farm to conclude a contract for annuity for life was found to be not in line with the principles of the social state (art. 2 of the Constitution) because it prevented the holders of protected farms from solving their own social hardship while the legislator had not envisaged and prepared another equivalent solution for them.[77]

The Constitutional Court considered that a broad statutory preemption right on agricultural land considerably restricts the disposal of owners who want to sell their agricultural land, while restrictions with regard to selling and buying agricultural land represent an interference with the right of ownership on agricultural land, for which the legislator does not have a special, explicit authorization in the Constitution. According to the assessment of the Constitutional Court, such interference cannot be justified by the first paragraph of art. 67 of the Constitution, which authorizes legislation to establish the manner of acquiring property in conformity with its economic, social, and ecological function. However, as the statutory preemption right on agricultural land as such was not challenged, the Constitutional Court assessed the relevant provisions only from the standpoint if a weaker preemption right of agricultural organizations (legal persons) in comparison with preemption right of farmers according to the ALA was in conformity with the Constitution. The Constitutional Court ruled that agricultural organizations still enjoyed a statutory preemption right and that the interest of strengthening and rounding off small- and medium-sized (family) farms was a sufficient reason for giving priority to farmers before agricultural organizations.[78]

The Constitutional Court found that statutory provisions, which, in a general way, restricted or denied the right of ownership over agricultural land, were not in conformity with constitutionally guaranteed rights to private property and to inheritance. Such was the case with the maximum of agricultural land that was allowed to be owned by a private agricultural holding according to the previous ALA from 1973[79] or by one natural or legal person according to original text of the present ALA from 1996. Assessing the latter Act, the Constitutional Court ruled that provisions on agricultural

76 USRS, Odločba U-I-57/92 z dne 3.11.1994, pt. 4; USRS, Odločba U-I-184/94-9 z dne 14.9.1995, pt. 11; USRS, Odločba U-I-266/98 z dne 28.2.2002, pt. 21.

77 USRS, Odločba U-I-266/98 z dne 28.2.2002, pt. 29.

78 Odločba U-I-266/98 z dne 28.2.2002, pt. 36. However, after the abrogation of land maximums for private ownership, no threshold is prescribed over which a holder of a (family) farm would be obliged to register as an individual entrepreneur or to establish a legal person (an agricultural organization). Thus, the hypothesis that all family farms are small- or medium-sized, is not correct. On the other hand, agricultural individual entrepreneurs and agricultural organizations dealing with agriculture may also be micro-, small-, or middle-sized enterprises. Agricultural individual entrepreneurs have statutory preemption right of the same priority as agricultural organizations (cf. Avsec, 2020, p. 22).

79 USRS, Odločba U-I-122/91 z dne 10. 9. 1992.

land maximum were inconsistent with the constitutional provisions on free economic initiative and unrestricting of competition (art. 74 of the Constitution).[80]

Assessing the previous Agricultural Land and Private Agricultural Holdings (Farms) Inheritance Act, the Constitutional Court held that special rules concerning the inheritance of agricultural land and private farms were not contrary to the Constitution, for thereby the commitment of Slovenia to the social state (art. 2 of the Constitution) was observed. Restrictions on a testator's freedom and on a heir's right to inherit agricultural land did not infringe the principle of equality before the law (art. 14 of the Constitution) because the differentiation was introduced by statute based on generally acknowledged specificities. However, the legal restriction of property rights on agricultural land to limit the transfer of agricultural land to those who do not cultivate the land exceeded the scope of art. 67[2] of the Constitution as it completely deprived a certain category of citizens of the possibility to inherit agricultural land or farms.[81]

3. Land law of the country and its possible proceedings by the Commission or the Court of Justice of the EU

The Treaty on the Functioning of the European Union (TFEU) enumerates four freedoms on which the internal market is based, namely free movement of goods, persons, services, and capital (art. 26[2]). According to the Council Directive 88/361/EEC, the free movement of capital also covers investment in real estate through the purchase of buildings and land, the construction of buildings of private persons for gain or personal use, and the acquisition of usufruct, easements, and building rights (Annex I). The provisions on the free movement of capital and payments of the TFEU (art. 63–66) can usually be relatively easily distinguished from the free movement of goods, but in some situations, they are also closely linked to other freedoms, such as the right to establishment (art. 49–55 of the TFEU), free movement of workers (art. 45–48 of the TFEU) and free movement of services (art. 56–62 of the TFEU).

Slovenia became a member of the European Union on May 1, 2004. Unlike some other countries that acceded to the EU at the same time and were allowed to maintain, during a transition period, certain derogations from the free movement of capital with regard to agricultural land, Slovenia had already made important steps to adapt its legal regime to *acquis communautaire* in this area before the accession. Due to international reasons, the constitutional provisions on conditions under which the aliens may obtain ownership right on immovables had been adapted to *acquis communautaire* in two steps before Slovenia's accession to the EU in 2004.[82]

80 USRS, Odločba U-I-266/98 z dne 28. 2. 2002, pt. 33.
81 USRS, Odločba U-I-57/92 z dne 3. 11. 1994, pt. 2.
82 Fikfak, 2019a, p. 549.

The first provisions of the Slovenian Constitution, adopted in 1991, established very strict conditions under which aliens may acquire ownership right on land and other immovables.

The working draft of the Constitution from August 31, 1990 foresaw that conditions under which aliens could acquire ownership right on immovables would be outlined by constitutional act or, according to a variant proposal, by an ordinary act (art. 66[2]).[83] After a public discussion, the Draft Constitution from October 12, 1991 added a more restrictive third option to the two already mentioned, namely that only citizens of the Republic of Slovenia could hold ownership right on land (art. 66[2]).[84]

The final proposal of Constitution of the Republic of Slovenia (dated December 12, 1991) contained a compromise solution between the three options. It foresaw that aliens might acquire ownership right on immovable under conditions established by the Act, adding that they were allowed to acquire ownership right on land only by inheritance under a condition of reciprocity.[85] This provision was, with a small linguistic improvement, taken over in the original text of art. 68 of the Constitution adopted on December 23, 1991: "Aliens may acquire ownership rights to real estate under conditions provided by law. Aliens may not acquire title to land except by inheritance, under the condition of reciprocity."[86]

In the final proposal for the Constitution, the following grounds were officially stated for extremely strict conditions under which aliens were allowed to acquire the ownership rights on agricultural and other land:

> "Commission on Constitutional Affairs has assessed that, taking into account the geographical and economic position of Slovenia and economic power of its citizens, it would not be appropriate to allow foreigners to acquire ownership right on immovables too widely. Especially the land must be protected against the 'selling off' to foreigners. Of course, European regulation and European standards on the ownership right of aliens on immovables must also be taken into account."[87]

A similar view could also be found in one of the first commentaries to the Constitution, namely that "the geopolitical position of Slovenia and its size (as a matter of fact, smallness) requires a permanent constitutional restriction of ownership right on immovable or, respectively, exclusion of ownership right on land."[88] The literature of that time claimed that a completely liberalized land market would lead to undesirable

83 Delovni osnutek Ustave Republike Slovenije, 2001, p. 82.
84 Osnutek Ustave Republike Slovenije, 2001, p. 117.
85 Predlog Ustave Republike Slovenije, 1991, art. 68.
86 Ustava Republike Slovenije, 1991, art. 68. (English translation)
87 Predlog Ustave Republike Slovenije, 1991, p. 15.
88 Ude, 1992, p. 53.

social consequences with regard to an unfavorable economic situation immediately after Slovenia gained independence.[89]

The negotiations on Europe Association Agreement between Slovenia and the then European Communities ended in 1996 with the Spanish compromise, where Slovenia confirmed two commitments, namely (1) to allow those citizens of EU member states who had permanently resided on the territory of the Republic of Slovenia for a period of 3 years, on a reciprocal basis, the right to purchase property from the entry into force of the Association Agreement, while (2) other citizens of EU member states would be allowed, on a reciprocal basis, the right to purchase property in Slovenia on a nondiscriminatory basis by the end of the fourth year from the entry into force of the Association Agreement.[90]

Before Slovenia ratified of the Europe Association Agreement, art. 68 the Constitution had been amended in 1997, so that the conditions under which aliens were allowed to acquire ownership rights to real estate had to be established by the law or ratified treaty adopted by a two-thirds majority of all deputies:

> "Aliens may acquire ownership rights to real estate under conditions provided by law or if so, provided by a treaty ratified by the National Assembly, under the condition of reciprocity. Such law and treaty from the preceding paragraph shall be adopted by the National Assembly by a two-thirds majority vote of all deputies."[91]

After the Europe Association Agreement entered into force on February 1, 1999,[92] aliens were allowed to acquire ownership right on immovables if they were citizens of a EU member state, if they had resided for at least 3 years on the territory of Slovenia, and if reciprocity existed between Slovenia and the alien's member state. According to the first Reciprocity Establishing Act from 1997, a material reciprocity was necessary.[93]

The Europe Association Agreement did not allow community legal persons to acquire the ownership right on immovables in Slovenia, but their subsidiaries established there could acquire and sell real property and enjoy, as regards natural resources, agricultural land, and forest, the same rights as Slovenian nationals and companies, if these rights were necessary for the conduct of the economic activities for which they were established.[94]

89 Vlahek, 2008, p. 8.
90 Zakon o ratifikaciji Evropskega sporazuma o pridružitvi med Republiko Slovenijo na eni strani in Evropskimi skupnostmi ..., 1997, Annex XIII.
91 Ustava Republike Slovenije, 1991, art. 68 (English translation).
92 Obvestilo o začetku veljavnosti nekaterih sporazumov Republike Slovenije z Evropskimi skupnostmi, 1999.
93 Zakon o ugotavljanju vzajemnosti, 1999.
94 Europe Agreement establishing an association between the European Communities ..., 1999, Art. 45[7][b].

The Treaty of Commerce between the USA and the Kingdom of Serbia from 1881 foresaw that the citizens of each contracting party were entitled to acquire the ownership right on immovable located in the other contracting party under the most favored conditions established by the latter contracting party for citizens of any foreign state (most favored nation clause).[95] The Treaty was succeeded by the Kingdom of Serbs, Croats, and Slovenes (1918); the Kingdom of Yugoslavia (1929); the Democratic Federative Yugoslavia (1945); the Federative People's Republic of Yugoslavia (1946); the Socialistic Federative Republic of Yugoslavia (1963); and the Republic of Slovenia (1991).[96] According to the most favored nation clause from this Treaty, USA citizens could acquire ownership rights on immovable in Slovenia under the same conditions as EU citizens after the Europe Association Agreement entered into force.

Before accession to the EU, Slovenia concluded treaties on property issues with Croatia[97] and Macedonia.[98] Each treaty allowed natural and legal persons of the other contracting party to acquire ownership right and other property rights on immovables and to apply for their entry in the land register on the territory of Slovenia if the valid legal basis of the acquisition had arisen before the independence of the contracting party on the territory of which the immovable was located.[99]

The citizens of other states, however, could acquire ownership right on immovables only according to the IA based on inheritance and under condition of reciprocity (art. 6 of the IA).

Starting from February 1, 2003, the Europe Association Agreement allowed all EU citizens to acquire ownership right on agricultural land, forests, and other immovables in Slovenia under the same conditions as Slovene citizens if the immovable concerned was necessary for conducting economic activity.

To enable the full legal effects of the new legal regime for EU citizens from February 1, 2003, the ALA was amended in 2002, so that the status of farmer was no longer reserved only for local residents (Slovenian: *občani*, residents of municipalities), but it became open for those individuals who were entitled to have the same position as Slovenian citizens acquiring ownership right on agricultural land. The equal position also included the statutory preemption right of farmers.

95 Treaty of Commerce between the United States of America and Serbia, 1881.

96 Akt o notifikaciji nasledstva sporazumov nekdanje Jugoslavije z Združenimi državami Amerike, ki ostajajo v veljavi med Republiko Slovenijo in Združenimi državami Amerike (Act on succession to agreements between the former Yugoslavia and the United States of America that shall remain in force between the Republic of Slovenia and the United States of America), 2020.

97 Zakon o ratifikaciji Pogodbe med Republiko Slovenijo in Republiko Hrvaško o ureditvi premoženjskopravnih razmerij (Act on the Ratification of the Treaty between the Republic of Slovenia and the Republic of Croatia on the Regulation of Property Relations), 1999.

98 Zakon o ratifikaciji Pogodbe med Republiko Slovenijo in Republiko Makedonijo o ureditvi medsebojnih premoženjskopravnih razmerij (Act on the Ratification of the Treaty between the Republic of Slovenia and the Republic of Macedonia on the Regulation of Property Relations), 1999.

99 See the text of the Treaty with Croatia (Art. 4[1]) and the Treaty with Macedonia (Art. 4[1])

In 2003, art. 68 of the Constitution was amended for the second time, and the new wording was shorter than previous formulations: "Aliens may acquire ownership rights to real estate under conditions provided by law or a treaty ratified by the National Assembly."[100]

According to the Act concerning the Conditions of Accession (2003), seven acceding member states (Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, and Slovakia) were each granted a transitional period for maintaining existing legislation that restricted the acquisition of agricultural land and forest by citizens of other member states. With regard to the free movement of capital, Slovenia was not granted such transitional measure, but it was allowed to resort to the general safeguard clause for a period of up to a maximum of 7 years after the date of accession.[101]

Since 2004, EU citizens and legal persons of EU member states may acquire ownership rights on immovables on all legal bases without the requirement of reciprocity.[102]

According to publicly accessible information, the European Commission has so far initiated no infringement procedure against Slovenia with regard to the acquisition of agricultural land in the country,[103] and no judgment or decision of the Court of Justice of the European Union was found either.

The Court of Justice of the European Union has an important role in interpreting measures that may depart from the free movement of capital. Exceptions may be either discriminatory measures based on explicit exceptions provided by the TFEU (certain provisions of the tax law and measures for prevention of infringement of national law and regulations, (art. 65[1] of the TFEU) or indistinctly applied measures based on exceptions explicitly allowed by the same provision of the TFEU) or adopted in the overriding public interest, provided that they are suited to attaining the objective sought, do not go beyond what is necessary to achieve that objective and cannot be replaced by less restrictive alternative means (principle of proportionality).[104] Some judgments the EU Court of Justice adopted in this field will be briefly referred to in the next chapter dealing with the national legal instruments mentioned in the Commission Interpretative Communication on the Acquisition of Farmland and European Union Law (2017).

100 Ustava Republike Slovenije, 1991, art. 68. (English translation).

101 Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, Annex XIII, List referred to in Article 24 of the Act of Accession: Slovenia, 4. Free movement of capital, 2003.

102 Tratnik and Vrenčur, 2015, p. 1456; Štemberger, 2020, p. 31.

103 European Commission at work, 2022.

104 Commission Interpretative Communication on the Acquisition of Farmland and European Union Law, 2017, pt. 2(b).

4. National legal instruments of Slovenia in the context of the Commission's Interpretative Communication

4.1. Prior authorization

In Slovenia, compliance with special provisions on the legal transfer of agricultural land, forests, and farms is ensured through preventive administrative control (see subsection 1.4.1.).

As the notarial attestation of the alienator's signature is a condition *sine qua non* for the transfer of ownership rights on the new acquirer, prior administrative control prevents violation of the special provisions on legal transfer of agricultural land and also protects the interests of contractual parties.[105] The Court of European Communities ruled that the provisions of the founding treaties did not preclude the acquisition of agricultural land being made subject to the grant of prior authorization if the measure pursued an objective in the public interest in a nondiscriminatory way, was appropriate for ensuring that the pursued aim is achieved, and did not go beyond what is necessary for that purpose.[106] In 2002, the Constitutional Court of Slovenia annulled the entire Chapter 3 in the original version of ALA, stating, *inter alia*, that statutory provisions were not in accordance with the principles of the rule of law, being too vague in terms of content, making arbitrary decisions of administrative authorities possible and leaving those interested in too much legal uncertainty as to whether the already concluded transaction on the sale or purchase of agricultural land would be valid.[107]

4.2. Preemption rights

The priority right to buy agricultural land, forest, and farm is stated by the ALA and other legislation which pursues public interest in the field of agricultural policy and other (spatial planning, water, nature conservation, etc.) policies (see subsection 1.4.3.).

The Commission's Interpretative Communication explicitly states that preemption right for farmers and tenants "could be considered as proportional restriction" since it is less restrictive than the prohibition of acquisition of agricultural land by non-farmers.[108] The same could be said for preemption right of agricultural organizations. The co-owner's statutory preemption right is laid down to make decisions on cultivation and the use of agricultural land easier, which is not only in the interest

105 Toplak Bohinc, 2013, p. 60.

106 Court of Justice of the European Communities, Judgment 23 September 2003, Case C-452/01, Margarethe Ospelt and Schlössle Weissenberg Familienstiftung, pt. 34.

107 USRS, Odločba U-I-266/98 z dne 28. 2. 2002, pt. 31.

108 Commission Interpretative Communication on the Acquisition of Farmland and European Union Law, Sect. 4, pt. b). The statutory preemption right of neighbouring farmer(s) with a higher priority than that of other farmer(s) directly pursues the goals of rounding off of agricultural land and more rational cultivation (see also Hafner, 2017, p. 22).

of other co-owners but also in the public interest.[109] The National Agricultural Land and Forest Fund, as the statutory preemptor in the last place, fulfills public interest by "taking care of the sustainable management of agricultural land and farms in a way which pursues the goals of adapting to climate change, preserving nature and maintaining good water status" (art. 4[1] [1]of the NALFFA).

4.3. Price controls

The price control in the legal transfer of agricultural land through sales contracts was foreseen by the original version of the ALA from 1996. The provisions on pre-emption right with regard to agricultural land gave any prospective buyer the option to initiate a procedure before the administrative authority to establish the value of the offered land according to the prescribed methodology within 30 days after the offer was filed on the notice board. The seller (offeror) who did not withdraw the offer within 15 days after having learned of the established value was obliged to sell this land at a price equal to the established value. In such case, the price in the seller's offer was adjusted to the established value, and buyers could accept the new offer in writing within 15 days after the amended offer had been filed on the notice board of the administrative authority. If the value was not determined within 30 days after the deadline for the acceptance of the original offer expired, the seller was allowed to sell the land at the originally offered price (art. 15[2] of the ALA from 1996).

Annulling all provisions in Chapter 3 of the ALA in 2002, the Constitutional Court held the official setting of a sale price of agricultural land to be inconsistent with the right to private property and free economic initiative in so far as it did not concern the statutory preemptors.[110] Although such decision does not entirely exclude price control in the legal transfer of agricultural land, the legislator, while adopting new provisions in 2003, did not regulate price control for sale of agricultural land, forests, and agricultural holdings.

Taking into account the relatively high prices of agricultural land in some regions of Slovenia compared with other EU member states (published by Eurostat on November 30, 2021[111]), the issue of relationship between the price and value of agricultural land is important as excessively high sale prices may actually circumvent and completely water down the purpose of the statutory preemption right.

4.4. Self-farming obligation

According to a decision of the Constitutional Court, the restriction of transfer of agricultural land for those who do not cultivate the land exceeds the scope of the legislative regulation of inheritance (art. 67[2] of the Constitution) as such regulation

109 See also Hafner, 2017, p. 22.
110 USRS, Odločba št. U-I-266/98 z dne 28. 2. 2002.
111 Agricultural land prices: huge variation across the EU, 2021.

completely deprives certain categories of citizens of the opportunity to inherit agricultural land or farms.[112]

4.5. Qualifications in farming

The original text of the ALA from 1996 prescribed that the administrative authority should deny the approval of legal act for transfer of ownership right on agricultural land "if the acquirer was not qualified for farming or it was otherwise evident that the acquirer would not cultivate the agricultural land in accordance with the statutory provisions" (art. 19[3][4]). The Constitutional Court ruled that this requirement was formulated too vaguely, making arbitrary decisions of the administrative authority possible. The Constitutional Court did not exclude the qualification requirement *a priori* if the legislator could provide firm reasons and evidence for such a rule. According to the reasoning of the Court of the European Communities, the qualification requirement could be replaced by the acquirer's obligatory assurances that the land will be properly farmed.[113]

4.6. Residence requirements

The Slovenian law does not require the acquirer of agricultural land, forest, or agricultural holding to reside on or near the land in question. The Court of European Communities ruled that the requirement of fixed residence of the acquirer on the agricultural property is not compatible with provisions on the free movement of capital.[114]

4.7. Prohibition on selling to legal persons

The law contains no prohibition of selling agricultural land to a legal person. Legal persons who satisfy conditions to be considered agricultural organizations have a statutory preemption right—albeit on the second-to-last place. As protected farms may belong only to individuals, the IAHA prohibits legal persons from inheriting the protected farms as testamentary heirs (arg. *a contrario*, art. 21[2]). The Administrative Court ruled that a protected farm may not be in-kind contribution in a newly established legal entity as it would lose its status and the prohibition of fragmentation and division of farm would be circumvented.[115]

4.8. Acquisition caps

The Constitutional Court has ruled twice against the acquisition cap, annulling first (in 1992) the then-existing maximum of agricultural land and forest for natural persons established by the ALA from 1973, and second, in 2002, the provision on the

112 USRS, Odločba št. U-I-57/92 z dne 3. 11. 1994.
113 Court of Justice of the European Communities, Judgment 23 September 2003, Case C-452/01, Margarethe Ospelt and Schlössle Weissenberg Familienstiftung, pt. 52.
114 Court of Justice of the European Communities, Judgment 25 january 2005, Case C-370/05, Uwe Kay Festersen, pt. 48.
115 UprSRS, Sodba št. U 1271/2008 z dne 20. 4. 2010.

maximum surface that should not be exceeded by future acquisitions of agricultural land, which was introduced by the ALA in 1996. The European Commission considers that the acquisition cap may be compatible with EU law if it pursues a legitimate goal of public interest (e.g., a more balanced ownership structure) and does not infringe EU fundamental rights and general principles of EU law, such as those of non-discrimination and proportionality.[116]

4.9. Privileges in favor of local acquirers

The provisions on the statutory preemption rights on agricultural land, forest, and agricultural holding are indistinctly applicable to local and other acquirers, domestic and foreign citizens, and legal persons. Although some persons holding statutory preemption rights are more likely to be domestic citizens and domestic legal persons (e.g., a co-owner or a farmer owning agricultural land bordering that offered for sale), the preemption right of these persons pursues a legitimate objective in public interest (to make decisions on cultivating the agricultural land by reducing the number of co-owners easier or to develop viable farms by increasing their size and rounding off their land[117]), and it seems to be proportional as it does not exclude sale to non-local acquirers, which may, as co-owners, neighboring or other farmers, and agricultural organizations, enjoy a statutory preemption right of the same or a subsequent priority order.

4.10. Condition of reciprocity

From the standpoint of condition of reciprocity for the acquisition of agricultural land by alien persons, three categories of individuals and legal persons may be distinguished. Individuals and legal persons who are entitled to inherit or to acquire agricultural land through legal transactions without condition of reciprocity (e.g., citizens and legal persons of the European union) belong to the first category; those who may acquire agricultural land on the basis of inheritance, legal transaction, or decision of the state authority but on condition of reciprocity belong to the second category; while the third category includes individuals and legal persons who may acquire agricultural land only by inheritance and on the condition of reciprocity (for more details, see subsection 1.7.).

Conclusion

The special protection of agricultural land in article 71[2] of the Slovenian Constitution could be explained by the relative scarcity of agricultural land in Slovenia. In comparison with other countries, the share of cropland in the total surface of Slovenia

116 Commission Interpretative Communication on the Acquisition of Farmland and European Union Law, 2017, p. 16.
117 Ibid., p. 17; Hafner, 2017, p. 22.

represents only 11.0% (24.2% in the EU as a whole), that of grassland 17.8% (17.4% in the EU), while the largest share of the total surface is occupied by woodland and shrubland (65.8% in Slovenia and 46.8% in the EU).[118] A major part of the utilized agricultural land in Slovenia is situated in areas with natural constraints for agricultural production (76% in 2020).[119] This situation is addressed by a Constitutional provision, by which "[t]he state shall promote the economic, cultural, and social advancement of the population living in mountain and hill areas" (art. 71[3]). Together with forestry and fisheries, agriculture contributed 2.3% to total value added and 6.9% to total employment in Slovenia (data for 2020).[120] In the last decades, the environmental role of agriculture has become more important. As Slovenia is rich in terms of biodiversity, almost one fourth (24.7%) of all utilized agricultural land is situated in the Natura 2000 areas,[121] and 11.4% of agricultural land lies in the protected areas of national, regional, and landscape parks.[122]

As the agricultural land is highly fragmented (the average surface of agricultural land per agricultural holding was only 7.1 hectares in 2020[123]), special provisions regulate inheritance and legal transactions for the transfer of ownership right on agricultural land and forest as well as agricultural lease contracts with a view to preventing deterioration and stimulating the improvement of parcel and farm structure.

From the standpoint of agricultural land policy goals, a drawback of the current, quite extensive special provisions on legal transactions with agricultural land is a rather casuistic approach that is, to a great extent, linked to certain types of legal transactions (e.g., sale and donation). Namely, the contractual freedom allows interested parties to conclude not only other statutorily regulated types of contracts but even innominate and mixed contracts that have the same impact on the structure of agricultural land plots and agricultural holdings as the type of legal transaction to which the statutory provisions explicitly refer. Therefore, agricultural land legislation should be more focused on the effects of legal transactions in terms of preservation and improvement of production potential than to the legal form (type) of transaction.

The Constitutional Court has assessed various statutory provisions on the inheritance of and legal transactions with agricultural land and agricultural holdings several times. Interpreting the constitutional authorization of the legislator to establish the manner for acquiring and enjoying property so that the economic, social, and environmental functions of property are ensured (art. 67), the Constitutional Court holds that the legislator may, through statutory provisions on property rights on agricultural land, define the manner of acquirement and enjoyment of property without encroaching on the right to private property in more detail (art. 33 of the

118 Land cover statistics, 2022.
119 Bedrač et al., 2021, p. 108.
120 Slovenain Agriculture in Numbers 2021, 2022, p. 3.
121 Bedrač et al., 2021, p. 109.
122 Ibid., p. 110.
123 Slovenian Agriculture in Numbers 2021, 2022, p. 3.

Constitution). The constitutional right to private property and to inheritance may be restricted only to achieve a legitimate goal (protecting rights of others or ensuring the public interest) under the condition that the restriction is adequate, necessary, and proportional.[124] It is interesting that the Constitutional Court, when adopting the decision on annulling provisions on the legal transfer of agricultural land (2002), stated that the legislator (State Assembly) as opposing party "did no demonstrate that stricter substantive and procedural restrictions of legal transactions with agricultural land, beside the special legal protection of 'protected' farms and enacted preemption rights, were essential, adequate and proportional."[125] This means that draft bills containing special provisions on the legal transfer of agricultural land and agricultural holdings should be based on a comprehensive analysis of developments in this area and on the evaluation of policy options. The amendments to the ALA from March 16, 2022 (nearly 50 years after Slovenia adopted its first Agricultural Land Act in 1973), provide for the systematic gathering and evidence of data relating to the legal transfer of agricultural land, which must be, after a statistical procession, published in periodical reports on agriculture and agricultural land by the competent ministry (amended art. 1c).

124 For right to private property, cf. USRS, Odločba U-I-266/98 z dne 28.2.2002, pt. 21; for right to inheritance, cf. Dežman, 2019, p. 331.
125 USRS, Odločba U-I-266/98 z dne 28.2.2002, pt. 26.

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Conclusions on Cross-border Acquisition of Agricultural Lands in Certain Central European Countries

János Ede SZILÁGYI – Hajnalka SZINEK CSÜTÖRTÖKI

This comparative analysis focuses on national land law and related case law[1] of eight countries:[2] Poland, the Czech Republic, Slovakia, Romania, Slovenia, Croatia, Serbia, and Hungary. In this respect, we consider highlighting the following observations.

The comparison of national land laws is based on their status as of February 1, 2022, while two national land law regimes – namely the Slovenian and Hungarian – have undergone significant changes, which have also been taken into account in the present analysis.

One basis for the comparison was the document called "Commission Interpretative Communication on the Acquisition of Farmland and European Union Law,"[3]

1 We would like to express our gratitude to the authors of the national chapters for their support and helpful comments while preparing this concluding chapter. Especially for: the document sent to us by Franci Avsec: Some explanation and additional information concerning regulation in Slovenia (May 7, 2022), and also the document called Some additional information (May 23, 2022); comments sent to us on May 20, 2022, by Tatjana Josipović and Paulina Ledwoń; comments sent to us on May 23, 2022, by Vojtěch Vomáčka, Jan Leichmann, and Miloš Živković.

2 On current issues of Czech legislation, see in particular: Vomáčka and Leichmann, 2022, pp. 127–143.; Vomáčka and Tkáčiková, 2022, pp. 157–171. On current issues of Hungarian legislation, see in particular: Szilágyi, 2022, pp. 145–197.; Hornyák, 2021, pp. 86–99.; Csák, 2018, pp. 5–32.; Csák, 2017, pp. 1125–1136.; Raisz, 2017, pp. 68–74; Udvarhelyi, 2018, pp. 294–320.; Olajos, 2017, pp. 91–103. On current issues of Polish legislation, see in particular: Ledwoń, 2022, pp. 199–217.; Blajer, 2022a, pp. 7–26.; Blajer, 2022b, pp. 9–39.; Zombory, 2021, pp. 174–190.; Kubaj, 2020, pp. 118–132.; Wojciechowski, 2020, pp. 25–51. On current issues of Slovak legislation, see in particular: Szilágyi and Szinek Csütörtöki, 2022, pp. 267–292.; Szinek Csütörtöki, 2022, pp. 126–143.; Szinek Csütörtöki, 2021, pp. 160–177. On current issues of Croatian legislation, see in particular: Josipović, 2022, pp. 93–125.; Staničić, 2022, pp. 112–125.; Josipović, 2021, pp. 100–122. On current issues of Romanian legislation, see in particular: Veress, 2022, pp. 219–248.; Sztranyiczki, 2022, pp. 144–156.; Veress, 2021, pp. 155–173. On current issues of Serbian legislation, see in particular: Živković, 2022, pp. 249–266.; Dudás, 2021, pp. 59–73. On current issues of Slovenian legislation, see in particular: Avsec, 2022, pp. 293–334.; Avsec, 2021, 24–39. o.; Avsec, 2020, 9–36. o. Regarding the Visegrád cooperation countries, see Csirszki, Szinek Csütörtöki and Zombory, 2021, pp. 29–52.

3 Hereinafter referred to as Commission's Interpretative Communication or document.

Szilágyi, J. E., Szinek Csütörtöki, H. (2022) 'Conclusions on Cross-border Acquisition of Agricultural Lands in Certain Central European Countries' in Szilágyi, J. E. (ed.) *Acquisition of Agricultural Lands: Cross-border Issues from a Central European Perspective.* Miskolc–Budapest: Central European Academic Publishing. pp. 335–374. https://doi.org/10.54171/2022.jesz.aoalcbicec_13

published by the European Commission, which analyzed the measures applied by the member states of the European Union (EU), mainly concerning intra-EU land transactions between the EU member states. However, applying this document to the national land laws of the two countries covered in this book was only possible with the following reservations. Serbia is not yet a member state of the EU and has only candidate status, whereas Croatia is a member state of the EU but has the legal possibility to maintain its previously adopted non-EU-compliant land law regulations until June 30, 2023. In the case of these two countries, we have therefore analyzed these provisions in the light of the Interpretative Communication, which in practical terms meant that we did not take as a basis the rules currently in force for EU citizens, but mainly those applicable to their nationals or legal entities.

The so-called "national land law" referred to in the comparative analysis is the body of laws or regulations of a country that contains the rules on the transfer of ownership or use of agricultural or forestry land and, where they exist, of agricultural holdings. It should also be stressed that, although national land laws may contain substantial special rules for state (or possibly municipally) owned land, in the present comparison, the specific land rules for such land are only mentioned and not dealt with in detail.

At this point, we think it is essential to clarify what we mean by "acquirement" and "acquisition" in this book. While "acquirement" covers a broader category, which includes ownership, limited rights *in rem*, and use of lands via the law of obligations, "acquisition" is a narrower category that includes ownership and limited rights *in rem*.

We consider it essential to highlight – as was stated in the introduction of this book – what we mean in this book by the term "acquirement". The concept of acquirement includes the different ways of acquisition of ownership; the acquisition of limited rights *in rem*; the acquisition of the use of land; indirect acquirement; intestate succession and testamentary disposition; and last but not least other cases of farm-transfers *inter vivos* or in the event of death.

1. Special legal sources of national land law

We consider it essential to answer the question of which laws in a given country contain specific rules directly and explicitly referring to the transfer of agricultural and forestry land and agricultural holdings (ownership, other rights *in rem*, use of land).

It is important to note, however, that we do not specifically mention constitutions in this chapter – even though there are provisions in the constitutions of the countries covered by the book that specifically address this issue.

Moreover, the civil codes of the countries concerned (or the acts that exist in their place) are not included in the table below – but for some countries, we have done

otherwise. This is because, in some countries, these acts contain special, *expressis verbis* legal rules on the current issue.

Furthermore, the rules on land registration are not mentioned below.

We have also not highlighted specific legislation that includes, for example, special preemption rights for agricultural or forestry land.

As far as forestry land is concerned, we have not included in the table the acts on forests in question if it only contains transfer rules for state-owned forestry land but no other rules.

The specific legislation for each country is summarized in the table below.

Table no. 1.

Country	Special legal sources of national land law
Poland	Act on shaping the agricultural system, Act on the acquisition of real estate by foreigners, Civil Code (which also includes *lex specialis* land law regulations), National Land Fund Act.
Czechia	Agricultural Land Fund Act, Agriculture Act.
Slovakia	Land Ownership Act, Land Lease Act, Forest Act (transfer of forests), Land Association Act, Act on the protection and use of agricultural land, Land Consolidation Act.
Hungary	Land Transfer Act, Implementation Land Act, Family Farm Act, Farm Transfer Act, Co-ownership Land Act, National Land Fund Act, Fraudulent contract Act, Civil Code (which also includes *lex specialis* land law regulations).
Slovenia	Agricultural Act, Agricultural Land Act, Inheritance of Agricultural Holdings Act, Management of State Forest Act, Agricultural Communities Act.
Croatia	Agricultural Land Act, Property Act, Obligations Act, Forest Act (transfer of forests)
Serbia	Act on agricultural land, Act on inheritance, Act on transfer of real estate, Forest Act (transfer of forests owned by the state)
Romania	Land Act, Act on sale of agricultural land, Civil Code (which also includes *lex specialis* land law regulations), State Domains Agency Act.

2. Types of primary legal sources of national land law

In our research, we have also focused on the question of the type of legislation that *formally* contains provisions on agricultural and forestry land and rules on the transfer of agricultural holdings. Our research findings are reflected in the table below.

Table no. 2.

Country	Types of primary legal sources of national land law			
Poland	constitution		acts	
Czechia			acts	decrees
Slovakia	constitution		acts	decrees
Hungary	constitution	cardinal acts	acts	decrees
Slovenia	constitution		acts	decrees
Croatia	constitution		acts	decrees
Serbia	constitution		acts	
Romania	constitution	organic acts	acts	decrees

As seen from the table above, only in the case of the Czech Republic can we not speak of the constitution as the *lex specialis* primary legal source of national land law. However, it should also be noted at this point that in this chapter about Czech law, the term constitution is understood to include the constitution in the narrow sense (i.e., Constitution of the Czech Republic, hereinafter referred to as the Czech constitution) and the Charter of Fundamental Rights and Freedoms (hereinafter referred to as the Charter), which is part of the Czech constitutional order.[4]

As regards Slovakia, Slovenia, Croatia, and Romania, besides the constitution, acts and government/ministerial decrees are of particular importance, whereas in Poland and Serbia, the importance of decrees is not particularly significant in the context of the research topic.

The specificity of Hungarian legislation is that, in addition to the constitution, acts and decrees, we can also find provisions relevant to the research topic in so-called cardinal acts.[5]

3. *Expressis verbis* norms concerning agricultural land, forestry land, and agricultural holdings in the constitutions

The *expressis verbis* inclusion of agricultural land in a country's constitution is particularly noteworthy, given that agricultural land makes an integral part of a country's

4 Examining the constitutional level, both shall be analyzed.

5 A cardinal act is an act that requires a two-thirds majority of the Members of Parliament present to be passed or amended.

territory and, not least, an essential natural resource.[6] Since it is a unique natural resource that is not available in unlimited quantities, it cannot be reproduced or replaced by others. Its indispensability, its capacity for renewal, its particular sensitivity to risk, and its low profitability, embody the particular social nature of land ownership;[7,8] its inclusion in the highest legal source of the country reflects, in our opinion, the priority given to this issue by the constitutional authority.

The table below summarizes the countries' highest legal sources that expressly mention agricultural and forestry land and holding.

Table no. 3.

Country	***Expressis verbis* norms concerning agricultural land, forestry land, and agricultural holdings in the constitutions**
Poland	Art. 23 family holding is the basis of the agricultural system of the state
Czechia	No *expressis verbis* norms
Slovakia	Art. 44 the state looks after a cautious use of natural resources, and protection of agricultural and forestry land; agricultural and forestry land are non-renewable natural resources that enjoy special protection by the state and society
Hungary	Art. P) agricultural land and forests are natural resources that are part of the nation's heritage; transfer of lands and holdings shall be stipulated by the cardinal Act; Art. 38 national assets of state and local government
Slovenia	Art. 71 the law shall establish special conditions for land utilization special protection of agricultural land shall be provided by law
Croatia	Art. 52 land, forests enjoy special protection

6 In connection with natural resources, see Hornyák, 2017, pp. 188–204.; Olajos, 2018, pp. 190–212. For a possible approach to the law of natural resources, see Szilágyi, 2018, pp. 282–293.; Orosz, 2018, pp. 178–191.

7 Bányai, 2016a, p. 2. See also Bányai, 2016b, p. 16.

8 See the Decision of the Hungarian Constitutional Court no. 35/1994 (VI.24.) – although it was repealed by the 4th Amendment of the Fundamental Law of Hungary, it can be found in several legal sources, referring to the decision of the Hungarian Constitutional Court in this question. See, for example, Curia of Hungary, Knk. IV.38.133/2015/3. For the relevant provision of the Fundamental Law of Hungary, see: Fundamental Law of Hungary, Final Provisions, point 5.

Country	*Expressis verbis* norms concerning agricultural land, forestry land, and agricultural holdings in the constitutions
Serbia	Art. 88 utilization and management of agricultural land, forestry land on private assets shall be permitted however, the law may restrict them
Romania	No *expressis verbis* norms (but see Artt. 44 and 135)

I. In connection with agricultural land, we can make two main groups.
The first group includes the constitutions of countries that do not contain *expressis verbis* provisions on agricultural land. These are the Czech, Romanian, Croatian and Polish constitutions.

As already mentioned above, in the case of the Czech Republic, there are no constitutional provisions relevant to the research topic, so there are no *expressis verbis* norms in the highest legal source of the country. The Czech constitution only mentions the term "natural resources" and emphasizes that the state shall concern itself with the prudent use of its natural resources and the protection of its natural wealth.[9]

However, the Romanian and Croatian constitutional legislation, unlike the Czech legislation, can be described as specific since, in the constitutions of these two countries, there are no *expressis verbis* norms on agricultural land, only on "land". In the case of Romania, it is clear from the constitutional provisions that "Foreign citizens and stateless persons shall only acquire the right to private property of land under the terms resulting from Romania's accession to the EU and other international treaties. Romania is a party to, on a mutual basis, under the terms stipulated by an organic law and a result of lawful inheritance."[10] Furthermore, the constituent is defined as a state's task to exploit natural resources in conformity with national interests.[11] In the case of Croatia, the country's constitution mentions land as one of the natural resources. However, the country's constitution also allows for exceptional protection of natural resources.[12]

In addition, the Polish constitution also falls into this group. However, it should be pointed out that, although agricultural land is not mentioned *expressis verbis* in the highest legal source of the country, we can find it in Art. 23 of the constitution that the basis of the agricultural system of the state, which means family farms.[13]

The second group forms the Hungarian, Slovak, Slovenian, and Serbian legislation because their constitutions contain *expressis verbis* norms regarding agricultural land.

9 Constitution of the Czech Republic, Art. 7
10 Constitution of Romania, Art. 44 (2) second sentence
11 Constitution of Romania, Art. 135 (2) point d)
12 Constitution of the Republic of Croatia, Art. 52
13 Constitution of the Republic of Poland, Art. 23

The Fundamental Law of Hungary refers to natural resources such as arable land, forests, and water resources as the nation's common heritage.[14] Therefore, Art. P) of the Fundamental Law does not use the term agricultural land, but an older terminology, arable land. Art. P) is also of great importance in that it provides for the regulation of the crucial foundations of Hungarian land law in a cardinal act, namely, it provides for the regulation in a cardinal act of, inter alia, the limits and conditions for the acquisition and use of the ownership of agricultural land (and forests).[15]

Regarding the Slovak Constitution, the Slovak state shall ensure the cautious use of natural resources and give special attention to protecting agricultural land (and forestry land).[16] Furthermore, these two natural resources have been recorded as non-renewable natural resources and enjoy special protection by the state and society.[17]

According to the wording of the Slovenian constitution, the law shall lay down special conditions for land utilization, and also special protection of agricultural land shall be provided by law.[18]

Furthermore, the Constitution of Serbia stipulates that the utilization of management of agricultural land and forestry land on private assets shall be permitted but may be restricted by law.[19]

II. As far as the forestry land is concerned, the Croatian, Hungarian, Slovakian and Serbian constitutions contain *expressis verbis* provisions. In the case of Croatia, the county's constitution mentions forests as a natural resource;[20] the Fundamental Law of Hungary designates natural resources such as forests as the common heritage of the nation;[21] the Slovak Constitution explicitly mentions the protection of forestry land – with agricultural land – among the natural resources;[22] whereas the Serbian constitution lays down rules on using and utilizing privately owned forestry land.[23]

III. *Expressis verbis* norms on agricultural holdings are found only in the Polish and Hungarian constitutions. The Polish constitution provides for family holding as the basis of the agricultural system of the state,[24] whereas the Hungarian constitutionalist in Art. P) of the Fundamental Law of Hungary lays down the regulation of the essential foundations of Hungarian land law in a cardinal law, namely, the regulation

14 Fundamental Law of Hungary, Art. P) (1)
15 Fundamental Law of Hungary, Art. P) (2)
16 Constitution of the Slovak Republic, Art. 44 (4)
17 Constitution of the Slovak Republic, Art. 44 (5)
18 Constitution of the Republic of Slovenia, Art. 71 (1) and (2)
19 Constitution of Serbia, Art. 88
20 Constitution of the Republic of Croatia, Art. 52
21 Fundamental Law of Hungary, Art. P)
22 Constitution of the Slovak Republic, Art. 44
23 Constitution of Serbia, Art. 88
24 Constitution of the Republic of Poland, Art. 23

of, among other things, agricultural holdings and one type of agricultural holding, the family farm.[25]

4. Legal concept of agricultural lands and forests in national land law

In our research, we also addressed whether there is a specific category of "agricultural land" or "forestry land" in the sense of whether they also constitute a land unit.

However, before presenting the results of our research, conceptual clarification is necessary to be made.

It should be noted that the common element of "agricultural land" and "forestry land" is the category of "land". It is essential to distinguish this category from other categories with similar names. These are a) plot – used in this chapter as a basic unit of land registration, and b) real estate or immovable property – which is considered to be a unit of real estate registration and also a civil law instrument.

It should also be highlighted that, concerning the category of "real estate", it is worth distinguishing three sub-categories, which better describe the regulation of the countries in our chapter: 1. land real estate, 2. building real estate, and 3. other real estates.

In the table below, an attempt is made to identify how the concept of agricultural land is evolving in the countries in the focus of this book and whether or not forestry land is included in this category. Information on forestry land has been included in the table below only in so far as the transfer of forestry land is governed by specific, separate legislation in the countries concerned (and not by the general rules of civil law, and not only by state property).

Table no. 4.

Country	The legal concept of agricultural lands and forests in national land law
Poland	denomination: agricultural land, agricultural real estate definition: yes (exemplary) the category includes forests: no *lex specialis* regulation on transfer of forests: no potential overlap with nature conservation areas: yes
Czechia	denomination: agricultural land (without forestry land) definition: yes the category includes forests: no *lex specialis* regulation on transfer of forests: no potential overlap with nature conservation areas: yes

25 Fundamental Law of Hungary, Art. P) (2)

Country	The legal concept of agricultural lands and forests in national land law
Slovakia	denomination: agricultural land (without forestry land) definition: yes the category includes forests: no *lex specialis* regulation on transfer of forests: special rules are laid down in a separate act potential overlap with nature conservation areas: yes
Hungary	denomination: agricultural and forestry land definition: yes the category includes forests: yes *lex specialis* regulation on transfer of forests: yes potential overlap with nature conservation areas: yes
Slovenia	denomination: agricultural land (without forestry land) definition: yes the category includes forests: no *lex specialis* regulation on transfer of forests: a special act regulates the preemption rights on forests; for other aspects of the acquisition of forests, general provisions of the Agricultural Land Act on legal transactions are applicable potential overlap with nature conservation areas: yes
Croatia	denomination: agricultural land (without forestry land) definition: yes the category includes forests: no *lex specialis* regulation on transfer of forests: no potential overlap with nature conservation areas: yes
Serbia	denomination: agricultural land (without forestry land) definition: yes the category includes forests: no *lex specialis* regulation on transfer of forests: a forest is stipulated in a separate act concerning the transfer potential overlap with nature conservation areas: yes
Romania	denomination: agricultural land (without forestry land) definition: yes the category includes forests: no *lex specialis* regulation on transfer of forests: yes potential overlap with nature conservation areas: yes

It can be seen that almost all the countries we examined in this book use the term agricultural land, for which a definition is provided. In the case of Poland, the Polish literature considers it essential to distinguish between the categories of "agricultural land" and "agricultural real estate." While agricultural real estate is a category based

essentially on a private law approach, agricultural land is a category based on a public law approach.[26]

Hungary has a special status in this respect because it can be stated that this is the only country that governs the acquirement of so-called "agricultural and forest land."

Regarding forestry land, it should be noted that it is typical in several countries that the legislator lays down relevant provisions for the transfer of forestry land in a separate act, typically in the forest act of a country (see, for example, the Slovak, Slovenian, Croatian, Serbian, or Romanian legislation).

5. Legal contents of national land law in connection with agricultural lands

One of the key elements of this work is undoubtedly the acquisition of ownership of agricultural land. The table below summarizes the information on this.

Table no. 5.

Country	Legal contents of national land law in connection with agricultural lands
Poland	acquisition of ownership: yes (including perpetual usufruct) acquisition of limited rights *in rem*: no acquirement of use: no testamentary disposition: yes intestate succession: yes
Czechia	acquisition of ownership: no acquisition of limited rights *in rem*: no acquirement of use: no testamentary disposition: no intestate succession: no
Slovakia	acquisition of ownership: yes acquisition of limited rights *in rem*: no acquirement of use: yes testamentary disposition: no intestate succession: no
Hungary	acquisition of ownership: yes acquisition of limited rights *in rem*: yes acquirement of use: yes testamentary disposition: yes intestate succession: partial

26 Ledwoń, 2022, subchapter 1.3.

Country	Legal contents of national land law in connection with agricultural lands
Slovenia	acquisition of ownership: yes acquisition of limited rights in rem: no acquirement of use: yes testamentary disposition: no intestate succession: no
Croatia	acquisition of ownership: yes acquisition of limited rights *in rem*: yes acquirement of use: yes testamentary disposition: no intestate succession: no
Serbia	acquisition of ownership: no acquisition of limited rights *in rem*: no acquirement of use: yes (only on state lands) testamentary disposition: yes (foreigners shall not inherit agricultural land) intestate succession: yes (foreigners shall not inherit agricultural land)
Romania	acquisition of ownership: yes acquisition of limited rights *in rem*: no acquirement of use: yes testamentary disposition: no intestate succession: no

It should be noted that the Czech Republic does not have any special rules on the acquisition of ownership of agricultural land, nor on the acquisition of limited rights *in rem* or rights of use.

In the case of Slovakia, rules on the acquisition of agricultural land are laid down in the Act on land acquisition, while the legal regime of leasing agricultural land is regulated by several acts. The Civil Code contains general rules within the provisions on the issue of leases, but these rules apply only if the issues are not regulated by a specific law.

Both foreign and domestic, natural and legal persons can acquire ownership of agricultural land in these two countries.[27] In the present cases, acquisitions are governed by the general rules of civil law. No specific provisions on inheritance have been implemented for these two countries either.[28]

27 In the case of Slovakia, the legislator introduced some exceptions based on the principle of reciprocity (but these do not apply to EU citizens).

28 It should be noted, however, that in the case of Slovakia, specific rules concerning the prohibition of the fragmentation of agricultural (and forestry) land must be respected in succession proceedings under Art. 23 of the Act no. 180/1995 Coll. on certain arrangements for the holding of land, as amended *(Zákon č. 180/1995. Z. z. o niektorých opatreniach na usporiadanie vlastníctva k pozemkom)*. For more on this subject, see Palšová, Bandlerová and Ilková, 2022 (in press).

Regarding the acquisition of ownership of agricultural land in other countries, and taking into account the length limits of this chapter, we consider it necessary to highlight the following.

The Polish legislator lays down important detailed rules on the perpetual usufruct about acquiring agricultural land. Polish law also recognizes other categories of limited rights *in rem*, but there is no *lex specialis* rule for agricultural land. Even though the country's land law focuses on the acquisition of real estate by individual farmers, the legislator has not expressly laid down any restrictions on acquiring real estate by legal persons. However, those non-individual farmers may acquire agricultural land only based on an official permit. In addition, the relevant legislation provides for a right of preemption for the state in the case of the transfer of agricultural land and in the case of the transfer of shares. It should be stressed that the Polish legislator acquires real estate by foreign legal and natural persons subject to a ministerial authorization, except for EU/EEA nationals.[29]

A specific feature of the Hungarian land law is that, as a general rule, neither domestic nor foreign legal persons may acquire ownership of agricultural land. However, it is essential to note that the Land Transfer Act allows the acquisition of ownership of agricultural land only to a narrow group of legal persons.[30] It is also worth noting that restrictions on agricultural land acquired by a person in the country's land law can be divided into two types: the land acquisition limit provides for restrictions on property rights and on limited rights *in rem* such as usufruct and use *in rem*. In contrast, the land possession limit applies to land in use by any other valid title in addition to ownership and other limited rights *in rem*.[31]

In Slovenia, since 2004, there have been certain restrictions on intra-EU land acquisitions, such as prior authorization, preemption rights, and privileges for local acquirers.[32]

The Romanian legislator has formulated strict rules on preemption rights. However, it should be emphasized that ownership by legal persons in connection with large agricultural estates is predominant in the country. Through the new system of preemption rights, the country is tending to move toward a solution that seeks to discourage legal persons from owning agricultural land and to favor legal persons controlled by natural persons and not by other legal persons.[33]

About the two countries covered in this book – Serbia and Croatia, as already mentioned in the introduction of this chapter, it is necessary to note that Serbia is not yet a member of the EU but rather a candidate, and Croatia, although a member of the EU, has the legal possibility to maintain its previously adopted non-EU-compliant land law regulations until June 30, 2023. In light of this, the table refers to the provisions applicable to nationals while examining land law regulations in these two countries.

29 Zombory, 2020, p. 302.
30 See Land Transfer Act, para. 6 (1); see also Land Transfer Act, para. 9 (1) point c)
31 Land Transfer Act para 16 (8).
32 Avsec, 2022, subchapters 4.1., 4.2. and 4.9.
33 Veress, 2022, subchapter 4.3.

In Croatia, all natural and legal persons are equated when it comes to the acquisition of rights on private agricultural land.[34]

Serbian law is inconsistent on this issue: on the one hand, it can be stated that the constitutional provisions are very liberal and impose very few restrictions on acquiring agricultural land by foreigners, and the legal provisions are very restrictive. On the other hand, these restrictive measures are not enforced in practice. Concerning the acquisition of ownership of agricultural land by Serbian citizens or legal entities, the legislator has not formulated any provisions.[35]

Only the Polish and Hungarian legislatures contain specific provisions concerning the inheritance of agricultural land.[36]

6. Legal contents of national land law in connection with forests

The table below summarizes the provisions concerning the acquisition of ownership of forestry land, the acquisition of limited rights *in rem*, rights of use, and issues regarding inheritance.

Table no. 6.

Country	Legal contents of national land law in connection with forests
Poland	acquisition of ownership: yes acquisition of limited rights *in rem:* no acquirement of use: yes testamentary disposition: no intestate succession: no
Czechia	acquisition of ownership: no (but they also stipulate that state forests cannot be sold) acquisition of limited rights *in rem:* no acquirement of use: no testamentary disposition: no intestate succession: no

34 Josipović, 2022, subchapter 1.3.2.

35 Živković, 2022, chapter 2.

36 In the case of Slovakia, even though no special provisions on inheritance have been included in the table – which is justified by the fact that the general rules of civil law apply to the inheritance of agricultural land, we have to pay attention to the provision included in the Act no. 180/1995 Coll. on certain arrangements for the holding of land, as amended. Art. 23 of this Act prohibits the inheritance decision resulting in the division of existing land to land that is smaller than 2000 m2 in the case of agricultural land (due to an amendment in force from September 1, 2022, it is going to be 3000 m2), and less than 5000 m2 in the case of forest land. For more information, see Palšová, Bandlerová and Ilková, 2022 (in press).

Country	Legal contents of national land law in connection with forests
Slovakia	acquisition of ownership: no acquisition of limited rights *in rem:* no acquirement of use: yes testamentary disposition: no intestate succession: no
Hungary	acquisition of ownership: yes acquisition of limited rights *in rem:* yes acquirement of use: yes testamentary disposition: yes intestate succession: partial
Slovenia	acquisition of ownership: yes acquisition of limited rights *in rem:* no acquirement of use: no testamentary disposition: no intestate succession: no
Croatia	acquisition of ownership: no acquisition of limited rights *in rem:* no acquirement of use: no testamentary disposition: no intestate succession: no
Serbia	acquisition of ownership: no acquisition of limited rights *in rem:* no acquirement of use: no testamentary disposition: no intestate succession: no
Romania	acquisition of ownership: yes acquisition of limited rights *in rem:* yes acquirement of use: yes testamentary disposition: no intestate succession: no

Croatia, Serbia, and the Czech Republic do not have specific rules on the acquisition of ownership of forests, acquisition of limited rights *in rem,* and rights of use, nor are there any rules on inheritance in their national land laws. Also, in the case of Romania, general rules on inheritance govern the case of forests. In the Czech Republic, it should be pointed out that, despite the absence of specific legislation on forests, the Czech legislator has laid down a prohibition on the sale of state forests.

As regards Slovakia, special rules on the acquisition of use (lease) are laid down in the Forest Act.

In the case of Slovenia, the Forest Act also contains some special provisions on statutory preemption rights in connection with forests. The preemption right, which, due to specific characteristics of the forest, belongs to the state, local community, or legal entity managing state forests, is enforced in a special procedure prescribed by the Forest Act. In cases where forest owners enforce the statutory preemption right, general procedural provisions of the Agricultural Land Act apply.[37]

As regards Poland, neither the Civil Code nor the Act on shaping the agricultural system explicitly regulates the issue of the acquisition of forests. A different act governs them, the Forest Act of September 28, 1991.

Regarding the Hungarian legislation, it should be pointed out that the rules on the acquisition of forestry land are part of national land law, given that it is treated in the same way as agricultural land and is subject to the same *lex specialis* rules as agricultural land. Certain other specific rules supplement these rules. Moreover, in addition to these, there are additional special rules for the acquisition of forests.

7. Legal concept of national land law in connection with agricultural holdings

For this work, the category of agricultural holding is understood as a set of agricultural assets operated for the same economic purpose and treated as a single legal unit for the acquisition and transfer of rights.

In the majority of the countries, the category of agricultural holding is known. Some of these countries have special land transfer regulations for this category, but there are also countries where the legislator has created this legal institution for other social reasons, such as subsidies.

Table no. 7.

Country	The legal concept of national land law in connection with agricultural holdings
Poland	denomination: different types in different acts (agricultural holding, family agricultural holding) definition: yes components: agricultural and forest land, buildings, equipment, livestock, rights connected to agricultural holding
Czechia	denomination: no definition: no components: no
Slovakia	denomination: agricultural holding definition: no components: no

37 In this respect, the Slovenian Agricultural Land Act *(Zakon o kmetijskih zemljiščih, 1996)* does not apply.

Country	The legal concept of national land law in connection with agricultural holdings
Hungary	denomination: different types in different acts (agricultural holding, personal farm, farm) definition: yes components: real estate, movable property, rights *in rem,* shares in a business partnership, rights and obligations related to all these assets
Slovenia	denomination: different types (agricultural holding, farm, protected farm) definition: yes components: production units
Croatia	denomination: family agricultural holding definition: yes components: use of their own or leased agricultural/productive assets and the work, knowledge, and skills of the household members
Serbia	denomination: farm definition: no components: no
Romania	denomination: farm, agricultural holding definition: yes components: agricultural land buildings, machinery, livestock and poultry, associated utilities, etc.

As seen from the table, the national regulations on agricultural holding vary from country to country. This can be seen from the name itself since all the countries we have examined, except for the Czech Republic, have some form of this category in their national legislation. It should be noted that in some countries, several types of agricultural holdings are recognized, as seen in the examples of Poland, Hungary, Slovenia, and Romania.

In connection with regulating agricultural holdings, we can make three groups.

The first group includes countries where several categories of agricultural holding are recognized and defined. This includes the Polish, Hungarian, Slovenian and Romanian regulations. The Polish legislator defines a holding as agricultural land (including forestry land), buildings or parts thereof, equipment and livestock, provided that they form or may form an organized economic unit, and rights related to the holding operation. In addition, Polish law also defines the category of the family farm. In Hungarian legislation, the concepts of agricultural holding, personal farm, and farm are defined, whereas in Slovenia, in addition to agricultural holding and farm, the concept of the protected farm is also defined. In Romania, the concepts of holding and farming are regulated. A common feature of the countries mentioned above is that the concepts and their components are clearly defined. However, of the four countries listed, there is no detailed rule on the specific transfer in Romania, but this legal category is applied only concerning other living situations.

The second group includes countries where only one category of agricultural holding is known, such as Slovakia, Croatia, and Serbia. Although the category of agricultural holding is recognized in Slovakia and Serbia, no specific definition nor specific provisions have been laid down by the legislator. Croatian law defines family farms by defining their components.

The third group includes the Czech Republic, where the category of agricultural holding is not mentioned, and therefore neither a definition nor components are laid down by the legislator.

8. Legal contents of agricultural holdings in national land law

In the table below, the answers collected to the question of whether the national land laws of the countries examined contain special provisions on the transfer or acquisition of agricultural holdings concerning ownership, limited rights *in rem* or usufruct, and whether or not the legislator has formulated special provisions on the inheritance of agricultural holdings, are recorded.

Table no. 8.

Country	Legal contents of agricultural holdings in national land law
Poland	acquisition of ownership: yes (including perpetual usufruct) acquisition of limited rights *in rem:* no acquirement of use: no testamentary disposition: yes intestate succession: yes
Czechia	acquisition of ownership: no acquisition of limited rights *in rem:* no acquirement of use: no testamentary disposition: no intestate succession: no
Slovakia	acquisition of ownership: no acquisition of limited rights *in rem:* no acquirement of use: no testamentary disposition: no intestate succession: no
Hungary	acquisition of ownership: yes acquisition of limited rights *in rem:* no acquirement of use: yes testamentary disposition: no intestate succession: no

Country	Legal contents of agricultural holdings in national land law
Slovenia	acquisition of ownership: yes (as to protected farm) acquisition of limited rights *in rem:* no acquirement of use: yes (prelease right) testamentary disposition: yes (as to protected farm) intestate succession: yes (as to protected farm)
Croatia	acquisition of ownership: no acquisition of limited rights *in rem:* no acquirement of use: no testamentary disposition: no intestate succession: no
Serbia	acquisition of ownership: no acquisition of limited rights *in rem:* no acquirement of use: no testamentary disposition: no intestate succession: no
Romania	acquisition of ownership: no acquisition of limited rights *in rem:* no acquirement of use: no testamentary disposition: no intestate succession: no

Concerning the acquisition of ownership of agricultural holdings, it can be noted that only the Polish, Hungarian and Slovenian legislatures have drafted relevant provisions. The Polish legislation also provides for the right of usufruct about the acquisition of ownership, whereas the Slovenian legislation only provides for this issue concerning protected farms.

Regarding the question of use, the Hungarian and Slovenian legislation is relevant, with the difference that the Slovenian legislation provides for a special prelease right concerning agricultural land and agricultural holding.

Hungarian land law covers and affects not only the acquisition of agricultural land but also the acquisition of agricultural holdings, including the various forms of acquisition of property and certain limited rights *in rem* and a more limited form of so-called "right of use *in rem*," as well as the acquisition of the use of agricultural holdings by other means (such as leases).[38]

Concerning the succession of agricultural holdings, whether by testamentary disposition or intestate succession, the Polish and Slovenian legislation contains the most relevant provisions. Unlike Polish legislation, Slovenian legislation lays down rules on the succession of a holding only in respect of the protected farm.

38 For more on this topic, see Szilágyi, 2022, subchapter 1.1.

9. Special regulations concerning acquiring shares in a company that already owns agricultural land

In countries where legal entities can acquire agricultural land, the question arises: if a company or legal entity already owns agricultural land, how can its shares be acquired? This is particularly important because it is essentially an *indirect* land acquisition. The table below shows the relevant national legislation.

Table no. 9.

Country	Special regulations concerning acquiring shares in a company that already owns agricultural land
Poland	acquisition of shares in a company owning agricultural land: the right of preemption and acquisition by NASC is regulated acquisition of shares by non-EU foreigners in a company owning real estate: authorization by the Minister of the Interior is required
Czechia	no special regulation
Slovakia	no special regulation
Hungary	no special regulation (due to general prohibition on the acquisition of land by legal persons)
Slovenia	no special regulation (note: if a foreign investor acquires a 10% or more stake or voting rights in a Slovenian company (FDI) and the activities of the target company indicate risk factors, this must be reported to the Ministry of Economy)
Croatia	no special regulation
Serbia	no special regulation (on the contrary: foreigners can acquire land through a legal entity established by a foreign person)
Romania	no special regulation (but special tax rules apply if the company has acquired agricultural land that represents more than 25% of its assets in the last eight years)

When looking at the specific rules for the acquisition of shares in companies already owning agricultural land in the countries in the research focus, it can be concluded that the vast majority of them do not have specific rules on this topic. This can be seen in the Czech, Slovak, Slovenian, Croatian and Serbian legislation. Concerning the Hungarian legislation, because of the general prohibition on the acquisition of land by legal persons, this issue is therefore not even raised as a regulatory subject here.

In Romania, there are no specific special rules regarding the subject, but rather special tax rules are relevant.[39]

In principle, the Polish legislator only imposes certain restrictions on foreigners from outside the EEA and the Swiss Confederation in respect of their shareholdings in commercial companies established in the Republic of Poland – the authorization of the Minister of the Interior is required if this results in the company owning or permanently using real estate in the Republic of Poland becoming a controlled company. Concerning the acquisition of shares in companies owning agricultural land, the legislator provides for the right of preemption and acquisition of shares by the NASC,[40] acting on behalf of the State Treasury.[41]

10. National measures by Commission's Interpretative Communication in general (intra-EU focus)

The Commissions Interpretative Communication, published by the European Commission on October 18, 2017,[42] sets out the benefits and challenges of foreign investment in farmland, describes the applicable EU law and the relevant case law of the Court of Justice of the European Union (CJEU), and finally, draws general conclusions from the case law on how legitimate public interests can be pursued under EU law.[43] This document is intended to provide a basis for the debate on foreign investment in agricultural land, support the member states that are in the process of amending their legislation or are about to do so, and help disseminate best practices more widely in this complex area.[44]

The document also concludes the regulation of the acquisition of agricultural land, given that the legislation governing land markets has some features that deserve particular attention. In this document, the Commission draws some conclusions from case law which can serve as a guide for the member states on how to regulate their land markets in a way that is consistent with EU law and balances the capital needs of rural areas with the pursuit of legitimate policy objectives.

In this context, the following table illustrates the regulatory situation in the countries under review, based on the points outlined in the Commission's document. It should be noted, however, that the Commission has essentially analyzed the measures

39 Veress, 2022, subchapter 1.5.

40 National Support Centre for Agriculture *(Krajowy Ośrodek Wsparcia Rolnictwa)*. Hereinafter referred to as: NASC.

41 Ledwoń, 2022, subchapter 1.6.

42 For more information, see the Official Journal of the European Union, no. 2017/C 350/05. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC1018(01)&from=HU [Accessed: July 10, 2022]

43 Commission Interpretative Communication on the Acquisition of Farmland and European Union Law, Section 3.

44 Commission Interpretative Communication on the Acquisition of Farmland and European Union Law, Section 3.

applied by each EU member state concerning the so-called intra-EU land transport relations between the EU member states. For two of the countries examined, however, the application of this interpretative communication was possible only with reservations, given that Serbia is not yet a member of the EU but merely a candidate country, and Croatia, although a member of the EU, has the legal possibility to maintain its previously adopted land law provisions which do not conform to EU law until June 30, 2023. Therefore, these two countries' rules were analyzed in the light of the Commission's document, which meant, in practical terms, that they were subject to the agricultural land acquisition rules applicable to their nationals or legal entities.

The national measures for each country are listed in the table below. However, given that each point will be outlined and presented separately in the following subchapters, we will not go into a detailed analysis of each feature in this part.

Table no. 10.

	National measures by Commission's Interpretative Communication in general (intra-EU focus)							
countries	**PL**	**CZ**	**SK**	**HU**	**SLO**	**HR**	**SRB**	**RO**
prior authorization	✓			✓	✓			✓
preemption rights and rights of first refusal	✓	✓		✓	✓	✓	✓	✓
price controls	✓							
self-farming obligations	✓ (non-absolute)			✓ (non-absolute)				
qualifications in farming	✓			✓ (non-absolute)				
residence requirements	✓							
prohibition on selling to legal persons	✓ (partial)			✓				
acquisition caps	✓			✓				
privileges in favor of local acquirers	✓			✓	✓	✓		✓
condition of reciprocity								

10.1. Prior authorization

Among the national specificities identified by the Commission's Interpretative Communication, the institution of prior authorization is at the top of the list. It was therefore examined which countries' national legislation provides prior authorization in connection with agricultural land.

It should be noted here that the information in the table is only given where the land law of the country concerned contains special rules compared with the land registration procedure.

Table no. 11.

Country	Prior authorization
Poland	✓
Czechia	–
Slovakia	–
Hungary	✓ (strict rules)
Slovenia	✓ (administrative control)
Croatia	–
Serbia	–
Romania	✓ (just in specific circumstances)

As seen from the table, some prior authorization system exists only in Poland, Hungary, Slovenia, and, in specific cases, Romania.

Regarding Poland, the acquisition of agricultural land has been limited by the obligation to obtain the prior consent of the Director General of the NASC in case the entity is not an individual farmer or another entity that may also acquire agricultural land without prior authorization by way of a statutory exception. It should also be stated that the possibility of purchasing agricultural land by foreigners from the EEA and the Swiss Confederation Polish is not limited as they only need to meet the requirements of a.s.a.s., however, foreigners from outside the EEA and the Swiss Confederation must apply for the permit referred to in a.a.r.e.f.[45]

In the case of the land law of Hungary, prior authorization is required in connection with contracts on the transfer of ownership and acquisition of ownership by means other than transfer, furthermore in connection with contracts for third-party use. It should be noted that the procedural rules for exercising the preemption and

45 Ledwoń, 2022, chapter 4.

prelease right make an integral part of these previously mentioned authorization procedures.[46]

In the case of Slovenia, we have to highlight that compliance with special provisions in connection with the legal transfer of agricultural land, forests, and agricultural holdings is ensured through preventive administrative control.[47]

Prior authorization is required just in exceptional cases in Romania, for example, for agricultural land assets situated in the state border areas, in the vicinity of particular sites pertinent to national security, or which might contain archaeological remains.[48]

10.2. Preemption and first refusal rights

In this subchapter, we need to draw attention to two important legal terms: preemption right and prelease right. In the course of our research, it became clear that there are some countries where, in addition to the preemption right, the legislator also regulates provisions on the prelease right.

At this point, it should be stressed that both the preemption and prelease rights may be established by contract or law. The preemption right is essentially linked to the acquisition of property and the sale, while the prelease right is a special right typically linked to the lease of agricultural land.

In the table below, we have examined the rights established by law for preemption and prelease rights.

Table no. 12.

Country	Preemption and prelease right
Poland	special preemption rights
Czechia	special preemption rights (state)
Slovakia	–
Hungary	special preemption rights special prelease rights
Slovenia	special preemption rights special prelease rights
Croatia	special preemption rights
Serbia	special preemption rights
Romania	special preemption rights

46 Szilágyi, 2022, subchapter 2.1.
47 Avsec, 2022, subchapter 4.1.
48 Veress, 2022, subchapter 4.2.

Slovakia is the only one where no provision is found in connection with the preemption rights of farmers.

The Czech national land law only lays down rules on the preemption right of the Czech State,[49] whereas the Polish legislation lays down the preemption right of the lessee of agricultural land; if no one is entitled to the preemption right or does not use it, the preemption right is granted to the NASC acting on behalf of the State Treasury. The Romanian legislation also establishes the preemption right in a specific order, but the author of the country chapter points out that the legislation is far from perfect.[50]

Compared to the general rules of Hungarian civil law[51], prior to the general preemption rights and prelease rights set out therein, the Land Transfer Act lays down a special preemption right in connection with the acquisition of agricultural land through a sales contract and also a special prelease right is established for the acquisition of use or exploitation of agricultural land by a lease contract.[52] It can be stated that in both cases mentioned previously, besides the special preemption and prelease proper rules based on the Land Transfer Act, the Hungarian legislator introduced rules on special preemption and prelease right in separate acts compared to the Land Transfer Act. Moreover, the Hungarian legislation establishes a specific order in connection with the previously mentioned rules, i.e., the legislation is clear.

In Slovenia, two or more different preemption rights may concur with regard to the same agricultural land according to various acts (dealing with agricultural land, protected farms, nature conservation, cultural heritage, etc.). If the relationship or the priority order between the preemption rights concerned in such cases is not regulated explicitly, the legal scholarship has proposed solutions based on general methods of interpretation.[53]

In Croatia, the legislator also provides a preemption right for farmers with residence in the country to sell state land.[54]

Regarding Serbia, the only instrument contained in the Commission's Interpretative Communication that exists in the country as a condition for all acquirers, not only foreigners, is the preemption right of the owner of the neighboring agricultural land.[55]

10.3. Price controls

Price regulation regarding agricultural land is considered to be in line with EU law if it is designed to prevent excessive speculation in land and maintain the viability of existing farmers, provided that it is based on transparent and clear criteria. Our research findings in this respect are set out in the table below.

49 Vomáčka and Leichmann, 2022, subchapter 3.3.
50 Veress, 2022, subchapter 4.3.
51 See, for example, the Hungarian Civil Code, para. 5:81.
52 Szilágyi, 2022, subchapter 2.2.
53 Avsec, 2022, subchapter 4.2.
54 Vranken, Tabeau, Roebeling and Ciaian, 2021, p. 113.
55 Živković, 2022, subchapter 1.4.

Table no. 13.

Country	Price controls
Poland	✓
Czechia	–
Slovakia	–
Hungary	–
Slovenia	–
Croatia	–
Serbia	–
Romania	–

As seen from the table above, only Poland has introduced some kind of price regulation to acquire agricultural land. It can be noted that, generally, agricultural land can be purchased by individual farmers or by organizations explicitly designated in the Act to shape the agricultural system (i.e., a.s.a.s.). However, the purchase of agricultural land by other entities requires the approval of the Director General of the NASC, and after obtaining such approval, the intention to sell agricultural land can be announced, and a response can be submitted by potential buyers. In connection with this process, the Polish legislator has also laid down specific detailed rules concerning the price.[56] In Poland, there are also relevant provisions concerning the preemption rights, according to which, if the price of the sold real estate grossly deviates from its market value, the person exercising the preemption right may, within 14 days of the submission of the declaration of exercise of the preemption right, apply to the court to have the price of the real estate determined. Thanks to this and other legal mechanisms, it is possible to control the price of real estate in Poland.[57]

Regarding Hungary, it should be pointed out that although Hungarian land law does not provide a direct price control instrument, this does not mean that the country's land law does not take into account the issue of land prices.[58]

10.4. Self-farming obligation

The Commission's Interpretative Communication identifies national specificities as including self-farming obligations. This issue has also been given particular attention in our research, and the results of our research are illustrated in the table below.

56 Ledwoń, 2022, chapter 4.
57 Ledwoń, 2022, chapter 4.
58 Szilágyi, 2022, subchapter 2.3.

Table no. 14.

Country	Self-farming obligation
Poland	✓ (strict rules with numerous exceptions)
Czechia	–
Slovakia	–
Hungary	✓ (strict rules with numerous exceptions)
Slovenia	–
Croatia	–
Serbia	–
Romania	–

The self-farming obligation is in force in the national land laws of two countries: Poland and Hungary.

The Polish legislation lays down the obligation to manage the agricultural holding personally. Certain exceptions to this obligation are also provided.[59]

The obligation to manage the farm on a self-employed basis is not present in Hungarian land law in a final form but as a complex system of general rules and exceptions. It is important to note that certain parts of Hungarian land law are relevant for contracts on the transfer of ownership and for contracts on the transfer of the right to use land.[60]

10.5. Qualifications in farming

For the countries in the research focus, exploring the condition of qualification in farming has also proved to be a key issue. The table below provides an overview.

Table no. 15.

Country	Qualifications in farming
Poland	✓
Czechia	–
Slovakia	–

59 For more information, see Ledwoń, 2022, chapter 4.
60 Szilágyi, 2022, subchapter 2.4.

Country	Qualifications in farming
Hungary	✓ (can be replaced by professional practice)
Slovenia	–
Croatia	–
Serbia	–
Romania	–

Only the Polish and Hungarian national land laws contain a qualification requirement for farming.

A characteristic feature of Hungarian land law is that, with certain exceptions, only natural persons can acquire ownership of agricultural land. It should be stated that the main objective of the Hungarian legislator is to ensure that agricultural land is cultivated only by persons with appropriate qualifications. However, this requirement is not absolute but can be replaced by a sufficient period of experience. In the case of Poland, the definition of the term "individual farmer" refers to the obligation to have qualifications in the field of agriculture.[61]

At this point, we would like to comment on two more land law legislation in force. On the one hand, concerning Romania, although the Romanian legislator has not formulated a general qualification requirement for farming, it has done so concerning preemption rights. On the other hand, regarding Slovakia, given that the legislation previously in force contained provisions concerning qualifications.

10.6. Residence requirements

The table below illustrates which country's land law legislation sets out the provisions on residence requirements for the acquisition of agricultural land.

Table no. 16.

Country	Residence requirements
Poland	✓ (numerous exceptions)
Czechia	–
Slovakia	–
Hungary	–

61 Ledwoń, 2022, chapter 4.

Country	Residence requirements
Slovenia	–
Croatia	–
Serbia	–
Romania	–

Only in the case of Poland, the legislator introduced such a "restriction". No residence requirement exists in the national land laws of the other countries examined in this book.

Concerning Poland, the a.s.a.s.[62] as a general rule stipulates that only individual farmers may acquire ownership of agricultural land. The status of the individual farmer, according to Art. 6 (1), is granted only to persons who have been resident for at least five years in the municipality where the agricultural land is located;[63] therefore, it can be stated that Polish law stipulates as a general rule the residence requirement as one of the conditions for acquiring ownership of agricultural land.

As regards Slovakia, it should be noted that the legislation previously in force explicitly provided that the ownership of agricultural land could only be acquired by a natural or legal person who had been resident or had registered office in the country for at least ten years.[64]

Although Hungarian law does not contain any land acquisition requirements for residence, it is important to highlight that local residence and attachment are advantageous in the preemption and the prelease order.[65]

In the case of Romania, the local residence is relevant in the context of the preemption rights.[66]

10.7. Prohibition on selling to legal persons

The issue of selling to legal persons is also a national characteristic of the Commission's Interpretative Communication. This aspect has also been given particular attention in our research, and the results of our research are illustrated in the table below.

Table no. 17.

Country	Prohibition on selling to legal persons
Poland	✓ (partial with exceptions)

62 See Art. 2a (1) of the Act on shaping the agricultural system.
63 Ledwoń, 2022, chapter 4.
64 Szilágyi and Szinek Csütörtöki, 2022, chapter 4.
65 Szilágyi, 2022, subchapter 2.6.
66 Veress, 2022, subchapter 4.7.

Country	Prohibition on selling to legal persons
Czechia	–
Slovakia	–
Hungary	✓ (strict rules with exceptions)
Slovenia	–
Croatia	–
Serbia	–
Romania	–

It is clear from the table that the Polish and Hungarian legislatures lay down relevant rules on this issue.

Polish legislation does not contain explicit provisions on the prohibition on selling to legal persons when purchasing agricultural land. However, the Act on shaping the agricultural system (i.e., a.s.a.s.) does, in principle, restrict the acquisition of agricultural land by legal persons. It should be noted, however, that this restriction is not absolute and that legal persons may acquire agricultural land if they fulfill other criteria laid down by the a.s.a.s.[67]

A long-standing characteristic feature of Hungarian land law is the prohibition on selling agricultural land – with some exceptions – to legal persons. The Hungarian land law, which was previously in force for twenty years, also restricted the acquisition of agricultural land by legal persons, while the scope of the relevant exceptions was frequently amended; the direction of these changes depended mainly on the political orientation of the government in power. The current Land Transfer Act allows the acquisition of ownership of agricultural land by legal persons only concerning a narrow group of legal persons.[68]

At this point, the Slovenian legislation should also be mentioned since, although the relevant legislation in force does not prohibit the sale of agricultural land to legal persons, in the case of protected farms, private individuals can only own them; the relevant Slovenian legislation prohibits legal persons from inheriting protected farms as testamentary heirs.[69]

67 Ledwoń, 2022, chapter 4.
68 Land Transfer Act, para. 6 (1); see also: Land Transfer Act para. 9 (1) point c). For further information, see Szilágyi, 2022, subchapter 2.7.
69 Avsec, 2022, subchapter 4.7.

10.8. Acquisition caps

The issue of acquisition caps also appears in the Commission's Interpretative Communication. The table below illustrates whether or not the issue is reflected in the national legislation of the countries examined in this present book, and if so, how.

Table no. 18.

Country	Acquisition caps
Poland	✓ (land acquisition limit)
Czechia	–
Slovakia	–
Hungary	✓ (land acquisition limit and land possession limit)
Slovenia	–
Croatia	–
Serbia	–
Romania	–

Only the Polish and Hungarian legislatures use such a restriction.

Polish legislation sets only a land acquisition limit; whereas in the case of the land law of Hungary, restrictions on agricultural land acquired by a person can be divided into two types: the land acquisition limit, which sets restrictions on property rights, and limited rights *in rem* such as usufruct or use *in rem;* and the Hungarian legislator also provides land possession limit, which – unlike the land acquisition limit – applies to land in use by any valid title in addition to property rights and other restricted rights *in rem*.

According to Hungarian law, it is important to note that none of the limits listed previously apply to the special category of legal persons who may acquire ownership of agricultural land, nor does the land possession limit apply to public education or higher education institutions in the agricultural sector and to certain forestry undertakings which are 100% state-owned.[70]

70 Szilágyi, 2022, subchapter 2.8.

10.9. Privileges in favor of local acquirers

Research has also been carried out into the privileges granted to local acquirers. The results of the research are set out in the table below.

Table no. 19.

Country	Privileges in favor of local acquirers
Poland	✓ (for residents of the municipality where the agricultural land is located)
Czechia	–
Slovakia	–
Hungary	✓ (in the context of preemption rights and prelease rights; in the context of barter)
Slovenia	✓ (in the context of preemption rights)
Croatia	✓ (in the context of preemption rights)
Serbia	–
Romania	✓ (in the context of preemption rights)

The following information should be highlighted regarding the privileges in favor of local acquirers.

First is the national land law of Poland, where the legislator introduces a preference for local acquirers, thus determining the granting of individual farmer status. This also determines the possibility for other organizations to apply for the acquisition of agricultural land.[71]

Second, the Hungarian legislation, as Hungarian land law, allows a resident farmer to acquire land in barter,[72] among other requirements and gives him a beneficial position in the preemption[73] or prelease[74] order. Moreover, the Hungarian land law provides a favorable position in the prelease order[75] for resident legal persons.

Third, Romania, Slovenia, and Serbia form a group, as they grant privileges to local acquirers in preemption rights.[76]

71 Ledwoń, 2022, chapter 4.
72 Land Transfer Act, para. 12 (1) point b).
73 Land Transfer Act, para. 18.
74 Land Transfer Act, paras. 45–46.
75 Land Transfer Act, paras. 45–46.
76 Veress, 2022, subchapter 4.10.; Avsec, 2022, subchapter 4.9.; Živković, 2022, subchapter 1.4.

10.10. Condition of reciprocity

Among the national specificities identified by the Commission's Interpretative Communication, we can also find the issue of the condition of reciprocity. The table below sets out all the relevant information concerning this issue.

Table no. 20.

Country	Condition of reciprocity
Poland	–
Czechia	–
Slovakia	–
Hungary	–
Slovenia	–
Croatia	–
Serbia	–
Romania	–

Given that this chapter focuses on intra-EU issues, the condition of reciprocity is not relevant in this respect.

11. Land law in the practice of constitutional courts

In the research, particular emphasis was placed on exploring the practice of the constitutional court. See the table below for a summary.

Table no. 21.

Country	Land law in the practice of constitutional courts
Poland	Right to property: inheritance (NASC) Family holding (Art. 23): dynamic definition of family holding, other types of agricultural holdings are not excluded
Czechia	No relevant case law
Slovakia	Right to property: in general Freedom to conduct a business: permanent residence/registered office (10 years), commercial activity in agricultural production (3 years)

Country	Land law in the practice of constitutional courts
Hungary	Right to property: general structure of the regime, usufruct, acquisition by legal persons, testamentary disposition Right to a healthy environment: competence of authorities Relationship between EU and national law
Slovenia	Right to property and inheritance: other rights *in rem,* preemption right, official setting of a sale price, self-farming, etc. Social state: owner of the protected farm to conclude a certain contract Free economic initiative: acquisition cap
Croatia	Right to property: compulsory lease of non-cultivated land Discrimination: compensation for conversion of agricultural land to non-agricultural use
Serbia	Only dismissed cases
Romania	Right to property: preemption right, restitution Relationship between EU and national land law

Constitutional courts have a crucial role in interpreting constitutions. It can be concluded that the practice of the constitutional courts in the countries examined in this book – except the Czech Republic[77] – can be considered significant concerning the protection of agricultural land. In the case of Serbia, the practice of the constitutional court is limited to cases dismissed.

It is worth noting that the constitutional courts of the various countries have mainly examined the right to property concerning our research topic. In the following, given the limitations of this chapter, only those decisions and information that we consider the most relevant are recorded.

The Polish Constitutional Tribunal case law contains several decisions relevant to the research topic. It should be noted, however, that after the end of the transitional period, no decisions of relevance to the research topic can be found in the practice of the Constitutional Tribunal. We consider it essential to mention that the tribunal has adopted a dynamic interpretation of the concept of family holding, whereby a family holding is a holding whose ownership remains in the hands of a single family. However, this concept cannot be interpreted literally. As the author of the national chapter highlights, it includes a situation where a family member owns the holding and other family members carry out the work.[78]

The Slovak Constitutional Court has reached the general interpretation of the right to acquire property. The right to property is considered a fundamental right by the Slovak Constitutional Court, but the right to acquire property is not. It should

77 Vomáčka and Leichmann, 2022, subchapter 3.2.
78 Ledwoń, 2022, chapter 2.

be noted, however, that the court has focused, to a significant extent, on examining certain provisions of the Act on land acquisition previously in force.[79]

The Hungarian Constitutional Court has been particularly active in regulating agricultural land and has issued several important decisions in this area. For example, the focus of the examination has been on issues such as land acquisition, the right to property, and the right to a healthy environment.

The Slovenian Constitutional Court, like the Hungarian one, has been particularly active in land issues. In its several decisions, it has ruled that guaranteed private property includes not only property rights but also, for example, mortgages and other rights *in rem*, rights *in personam*, also corporate rights. Furthermore, this includes the legitimate expectation of acquiring property rights, the right to authorize or prohibit certain activities, and pension rights.[80]

The Croatian Constitutional Court emphasized that the state's obligation to provide exceptional protection for agricultural land stems from the fact that agricultural land is non-renewable and must be protected against unforeseen developments in the free market. Furthermore, the court also pointed out that agricultural land cannot be treated as equivalent to other immovable property, either economically, ecologically, or socially. The fair regulation of agricultural land requires that the general and public interests of the community be taken into account to a greater extent than in the case of other types of immovables.[81]

Regarding the Romanian case law, it should be noted that the relationship between the EU and national law will probably be examined in the future to analyze whether the Romanian legislation currently in force is in line with the rules of the EU. A key decision[82] accompanied by dissenting opinions will undoubtedly contribute to this. In addition, the Commission's document and thorough analysis foresee the need to resolve the non-compliance of Romanian land law with the norms of the EU.[83]

12. Infringement procedures and preliminary rulings

In the case of the countries that acceded before 2004, agricultural land acquisition was not included as a specific regulatory point in their accession treaties. This issue has become part of the treaties for countries that joined in 2004 and afterward. This leads to the conclusion that agricultural land acquisition as a subject is of particular relevance and is a feature of these countries' legal policies and land regulations.

Generally speaking, those member states that formally became members of the EU in 2004 (and afterward) are legally obliged to harmonize their national rules with

79 In connection with this see the decision of the Slovak Constitutional Court no. PL. ÚS 20/2014.
80 Avsec, 2022, chapter 2.
81 The decision of the Constitutional Court, no. U-I-763/2009.
82 Veress, 2022, chapter 2. For further see the Decision of the Constitutional Court of Romania no. 586/2020.
83 Veress, 2022, chapter 2.

the EU rules. In their accession treaties, they were given the possibility to maintain, for a so-called transitional period, their national rules in force at the time of signature of the accession treaties, which were concerned with restrictions on the acquisition of ownership of agricultural and forestry land. [84] For the majority of member states, this transitional period was seven years.[85] Although a few member states made use of the possibility of extending the transitional period. Following the expiry of this period, the European Commission carried out a comprehensive investigation of the national regulations of the member states that joined the EU in 2004,[86] which found that certain provisions of the new national land regulations of some of the new member states resulted in restrictions on the fundamental economic freedoms of the EU. In this case, the restriction of the free movement of capital and the freedom of establishment should be highlighted as fundamental freedoms, as they could lead to a significant reduction in cross-border agricultural investment.[87] For the reasons just outlined, infringement procedures were launched against certain member states in 2015.

The present subchapter, therefore, describes the infringement proceedings concerning the land legislation of the new member states at the end of the derogation period and notes that, unlike the previous subchapter, preliminary rulings were also made before the CJEU. An overview is given in the table below.

At this point, however, we would like to reiterate that Serbia is not yet a member of the EU, only a candidate, whereas Croatia, although a member of the EU, has the legal possibility to maintain its previously adopted non-EU compliant land legislation until June 30, 2023. Therefore, in light of the above, this part is not relevant for these two countries in this respect.

Table no. 22.

Country	Infringement procedures and preliminary rulings
Poland	–
Czechia	–

84 Szilágyi, 2017, p. 117.

85 It should be noted that in the case of Poland, for example, this transition period was longer. In fact, for several countries, with the approval of the European Commission, this period could be extended (typically by three years). For example, the exceptions are Romania (and Bulgaria), as their accession treaty did not include the possibility of extending the original seven-year period. See Szilágyi, 2017, p. 117.

86 Except for Poland, given the long transition period.

87 In connection with this, see the press release of the European Commission: *"Financial services: Commission requests BULGARIA, HUNGARY, LATVIA, LITHUANIA and SLOVAKIA to comply with EU rules on the acquisition of agricultural land*." The press release is available at the European Commission's website: https://ec.europa.eu/commission/presscorner/detail/hu/IP_16_1827 (Accessed: 30 June, 2022)

Country	Infringement procedures and preliminary rulings
Slovakia	✓ general infringement procedure (No. 2015/2017)
Hungary	✓ general infringement procedure (No. 2015/2023) special infringement procedure (No. 2014/2246, No. C-235/17) preliminary ruling (No. C-52/16, No. C-113/16, No. C-24/18, No. C-117/20)
Slovenia	–
Croatia	– (given the fact that the transitional period lasts until June 30, 2023)
Serbia	– (given the fact that Serbia is not a member state of the EU)
Romania	–

In the case of Slovakia, the restrictions in the national land law previously in force were problematic (the most controversial was the existence of a longer residence criterion).[88] However, the European Commission's proceeding against Slovakia became irrelevant due to the Constitutional Court's ruling on the issue. Consequently, the proceeding against the country was discontinued on October 10, 2019.[89]

In the context of the EU's examination of the Hungarian land law regime, it is worth noting first of all that two infringement proceedings have been initiated against Hungary so far: one concerning the termination of *ex lege* usufructuary rights established by contract between non-related parties,[90] and subsequently initiated infringement proceedings in respect of the Hungarian land law regime as a whole as in other countries that joined the EU in 2004.[91] It is important to note that in the meantime, i.e., in parallel with the infringement proceedings, preliminary ruling procedures were also opened in the usufruct case.[92]

It is worth mentioning that the CJEU[93] ruled against Hungary in relation to the Hungarian legislation already known from the SERGO judgment. The reason for highlighting this issue at this point is that this time, in addition to Art. 63 TFEU on the free movement of capital, the CJEU also assessed the merits of Art. 17 of the Charter of Fundamental Rights on the right to property and found that it had been infringed.[94]

As seen from the above-mentioned, of the countries examined in this book, the cases against Hungary definitely stand out.

88 Szilágyi, 2017, p. 176.
89 Szilágyi and Szinek Csütörtöki, 2022, chapter 3.
90 Case no. 2014/2246, INFR(2014)2246.
91 Case no. 2015/2023; INFR(2015)2023.
92 Szilágyi, 2022, chapter 4.
93 In its preliminary judgment in Case C-235/17 on usufruct.
94 Case C-235/17, paragraphs 69–72 and 81.

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