| Chapter 8 |

Romania: Between Scylla of EU Law and Charybdis of National Interest – Belated Restrictions in the Land Market

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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

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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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