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Hasrat ARJJUMEND* – Konstantia KOUTOUKI**

Analysis of Indian and Canadian Laws on Biofertilizers***

Abstract

Biofertilizers are known to be effective green alternatives to chemical fertilizers. Biofertilizers are regulated under the Fertilizer (Control) Order, 1985 in India and the Fertilizers Regulations (C.R.C., c. 666) of the Fertilizers Act, 1985 in Canada. The laws in both countries originally evolved to regulate chemical fertilizers; however, appropriate amendments have been made to accommodate biofertilizers and organic fertilizers in India, and organic fertilizers in Canada. Yet there have been no critical analyses of the laws and regulations governing the manufacture, business, transport, storage, use and disposal of biofertilizers in India and Canada. This article seeks to understand the different legal provisions of the Indian and Canadian laws regulating biofertilizers. The legal analysis is based on dialectical, qualitative and comparative legal research, as well as gap analysis. This study not only identifies the legal gaps existing in the Indian and Canadian frameworks, but also suggests ways forward to avoid bottlenecks impeding the entry into the market and free trade of biofertilizers.
Keywords: biofertilizers, microbial products, legal analysis, gap analysis, legal reform.

1. Introduction

The unsustainable application of chemical fertilizers has resulted in the steady decline of soil and crop productivity the world over. Agricultural practices must evolve to sustainably meet the growing global demand for food without irreversibly damaging the world's natural resources (especially soil), while also maintaining food security.[1] Green microbial products, such as biofertilizers, hold the potential to increase current agricultural productivity, while at the same time contributing to the soil's ability to produce more.[2] This study is the first critical analysis of the laws and regulations governing the use of biofertilizers in India and Canada.

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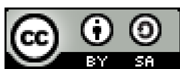
[1] Arjjumend, Koutouki & Neufeld 2021.
[2] Arjjumend, Koutouki & Donets 2020a & 2020b.



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Many countries face major challenges with respect to the regulation of biofertilizers, including inadequate legislation, inadequate capacity, and the weak implementation of policies related to biofertilizers.[3] A number of countries have amended their policies to minimize the use of chemical fertilizers and promote the use of biofertilizers; however, biofertilizers are still largely regulated by the system originally designed for chemical fertilizers.[4] This situation has created market entry barriers by imposing burdensome costs on the biofertilizer industry.[5] Other challenges include the relative immaturity of the policy network, limited resources and capabilities, and a lack of trust between regulators and producers. In India, manufacturers and importers of biofertilizers also face additional problems. For example, at the time of registration of new products, the manufacturer/trader/importer is required to generate data that are easily obtainable for chemical-based products, but which are difficult to obtain for biofertilizers.[6] Furthermore, there are questions as to the utility of some of this data when applied to biofertilizers. The analysis in this study finds that the Indian law on fertilizers is one of the most comprehensive in the world in terms of its treatment of biofertilizers. However, challenges lie at the level of the technical or administrative personnel who deal with the registration, testing, monitoring, surveillance, inspection and authorization tasks. Their level of understanding and their capacities are limited to chemical synthetics, and they have little or no experience with biofertilizers. Therefore, compliance and implementation of the regulations are major challenges in India.

2. Context and Methodology

This study was conducted in order to understand the various legal provisions in Indian and Canadian laws regulating biofertilizers. It aims not only to identify the policy and legal gaps existing in the Indian and Canadian frameworks governing biofertilizers, but also to suggest ways forward in order to avoid bottlenecks impeding the entry and free trade of green products that can contribute to the achievement of the sustainable development goals (SDGs). This study was conducted through an analysis of the pertinent clauses and sections of laws regulating fertilizers. Research methods included dialectical, qualitative and comparative legal research,[7] as well as gap analysis.

3. Analysis of the Indian Law on Biofertilizers

After independence, the Government of India declared fertilizers an essential commodity, and began regulating the sale, price and quality of fertilizers.

[3] Urs, 2015.
[4] Arjjumend et al. 2020.
[5] Kumar & Singh 2014.
[6] Arjjumend & Koutouki 2020.
[7] Dialectical research or dialectical inquiry or dialectical investigation is a form of qualitative research which utilizes the method of dialectic, aiming to discover fact through examining and interrogating competing ideas, perspectives or arguments. Dialectical research may also be thought of as the opposite of empirical research, in that the researcher is working with arguments and ideas, rather than data. Ollman 1993.

In 1985, the Government of India passed the Fertilizer (Control) Order, 1985 [FCO] under Section 3 of the Essential Commodities Act, 1955. This law applies in all states and union territories of India. The Indian Ministry of Agriculture issued an order in 2006, later amended in 2009, which added biofertilizers to the Essential Commodities Act, 1955.

As a result, India now has one of the world's most comprehensive legal frameworks governing biofertilizers, defined in the FCO as follows: Biofertilizer means the product containing carrier based (solid or liquid) living microorganisms which are agriculturally useful in terms of nitrogen fixation, phosphorus solubilization or nutrient mobilization, to increase the productivity of the soil and/or crop.[8]

Coinciding with the insertion in the FCO of the term biofertilizer, new schedules – Schedule III, IV and V – were also added. Schedule III relates to mixtures of biofertilizers, whereas Schedule IV concerns organic fertilizers. Similarly, Schedule V was added in 2010 to address non-edible de-oiled cake fertilizers,[9] which are obtained through residue oil extraction (by expeller and/or through solvent extraction) from the crushed seeds of non-edible oilseeds (such as castor oil) for use in soil as fertilizer. Schedules III, IV and V also introduced standards to maintain the quality of biofertilizers. In this way, a conventional law dealing with chemical fertilizers was amended to address microbial and organic products developed through novel innovations.

3.1. Registration of Dealers

Schedule IV of the FCO contains provisions for the registration of dealers. Under clauses 7, 8, 9 and 10 of the FCO, a dealer (a firm, company or organization) can register with the state government (generally the Department of Agriculture) to sell, trade, transport, store or transfer fertilizer, including biofertilizer. The registration of dealers or manufacturers/importers is a decentralized process conducted by respective state government only; the Government of India does not perform any registration functions. A firm or company that wishes to obtain dealership registration must apply using Form A (Appendix 1), along with Form O (Appendix 2) under clause 8 of the FCO. In order to understand the registration process, it is important to discuss these forms. In Form A, serial number 7 and 8 require the details of the fertilizer (or biofertilizer) to be handled by the applicant dealer. In particular, information is required about the site and process of manufacturing is required. This information is also required in further detail in Form O. The rest of the information in Form A pertains to general details about the applicant firm and the promoter of the firm.

[8] Ins. by SO 391(E), Agriculture and Cooperation Department, dated 24.03.2006 published in Gazette of India, Ext. No. 276.

[9] Ins. by SO 2886(E), dated 03.12.2010.

In Form O, information regarding the product source must be provided in items number 1(c) & (d) and 3. All such details must also be supported by documentary evidence. Clause 8(2) of the FCO provides for the registration by a manufacturer, importer, pool handling agency[10], wholesaler or retail dealer, and replaces Form A (Appendix 1) with Form A1, which is slightly different.

Clause 8(4) was added in 2015 to establish the minimum technical qualification required for the applicant/promoter of firm/company applying for registration.[11] The applicant should possess, at a minimum, a BSc in Agriculture, BSc in Chemistry, Diploma in Agriculture, or a Certificate in Agri-inputs from specified institutes. Cooperatives and marketing federations are exempted from this requirement. Registration is granted for 36 months as per clause 10 of the FCO and may be renewed as provided in clause 11.

3.2. Registration of Manufacturing of Mixtures of Biofertilizers

In part IV of the FCO, clauses 12 to 18 provide for the registration of manufacturing units. Special mixtures of fertilizers, biofertilizers and organic fertilizers were included in clause 12 in 2006.[12] Clause 13(b) states, *"no person shall manufacture any biofertilizer unless such biofertilizer conforms to the standards set out in Part A of Schedule III."* In different schedules, the FCO has very elaborately provided standards for all categories of mineral fertilizers, biofertilizers and organic fertilizers. Part A of Schedule III contains specifications for all 10 categories of biofertilizers: Rhizobium, Azotobacter, Azospirillum, Phosphate Solubilizing Bacteria, Micorrhizal Biofertilizers, Potassium Mobilizing Biofertilizers, Zinc Solubilizing Biofertilizers, Acetobacter, Carrier Based Consortia, and Liquid Consortia. Part B of Schedule III specifies the tolerance limit of biofertilizers, while Part C explains the procedure of sampling biofertilizers. Part D comprehensively elaborates the methods of analyzing biofertilizers. The detail and guidance given in the schedules of the FCO make it user friendly. Hence, as clause 13(b) advises, compliance with its stringent quality standards and specifications is mandatory. No manufacturing or import can be allowed until given specifications and standards are satisfied in accordance with the provisions. Similarly, the requisite standards and specifications need to be adhered to in the case for organic fertilizers [clause 13(c) and Part A of Schedule IV]. Any firm or company that wishes to apply for registration as a manufacturer of biofertilizers or organic fertilizers must apply using Form D under clause 14(3). In accordance with clause 17 of the FCO, registration for manufacturing is issued for a period of 36 months, and renewal can be applied for under clause 18.

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[10] Pool handling agency means an agency entrusted by the Government of India with functions relating to handling and distribution of imported fertilizers.
[11] Ins. by SO 2776(E), dated 10.01.2015.
[12] Subs. for by SO 391(E), dated 24.03.2006.

3.3. Packing and Labeling

Under clause 21(aa) of the FCO, manufacturers, importers and pool handling agencies are given explicit instructions regarding packing and packaging. The container should be marked with the word 'biofertilizer'. Other information printed on the packaging or container must be in accordance with the instructions released by the Controller (the registering authority in each state). Further, clause 21(b) prohibits tampering with packed or canned material. This clause is also applicable to imported material. However, the regulation does not address the issue of leakage and spillage from the containers, cans or packages causing contamination, pollution, impacts of human and animal health or occupational hazards.

3.4. Inspectors and Inspection

The quality and quantity of commodities available on the market for consumers are monitored and inspected by a system of inspectors. In the context of fertilizers, these inspectors are appointed by notified authorities under clause 27 of the FCO. Clause 27-B concerns the qualifications[13] of inspectors appointed for the purpose of monitoring biofertilizers and organic fertilizers. Inspectors should have bachelor's degree in agriculture, chemistry or microbiology, with training in the quality control of biofertilizers and organic fertilizers. Their responsibilities include the verification of information provided by manufacturers, wholesale dealers, retail dealers, importers or pool handling agencies (clause 28a), as well as the sampling of biofertilizers (clause 28ba) in accordance with the procedure laid down in Schedule III of the FCO. In accordance with the powers vested under clauses 28c, 28d and 28e, an inspector can inspect and examine the premises of manufacture, sale or storage of the fertilizer or biofertilizer in addition to examining the financial accounts or documents associated with the material. An inspector can also seize or detain any fertilizer or biofertilizer. The inspection machinery having inspectors is an inevitable apparatus of the regulatory and executive wing of a state government.

3.5. Sampling and Analysis of Biofertilizers

In Part C of Schedule III of the FCO, the procedure for biofertilizer sampling is described in detail. Part C covers: 1) the general requirements of sampling, 2) the scale of sampling, and 3) the procedure for taking samples. Only a trained inspector can perform sampling of the biofertilizer, as the material contains microorganisms. During the handling of the samples, precautions must be taken to prevent any possible contamination and exposure to sun, dust, soot, air or moisture. In Schedule III, the quantity of samples is also simplified. Using the Form J-1, three packets must be sampled from a consignment of up to 5,000 packets. Similarly, four packets must be sampled if the consignment is of 5,001-10,000 packets, and five packets must be sampled in case the consignment consists of more than 10,000 packets.

[13] ffranciIns. by SO 391(E), dated 24.03.2006.

The sampling method must be strictly random and instructions for the proper handling of the samples are described. One sample is to be sent to a laboratory notified by the state government under clause 29 of the FCO, to the National Centre for Organic Farming (Ghaziabad), or to any of its Regional Centres of Organic Farming at Bangalore, Bhubaneswar, Hissar, Imphal, Jabalpur or Nagpur. The inspector must send the sample to a laboratory along with the details outlined in Form K1 within seven days from the date the samples are drawn. The FCO regulations not only guide the manner in which notified authorities and inspectors implement the legal provisions, but also provide the manufacturers, wholesale dealers, importers, pooling agents and retail dealers with all necessary forms, reporting requirements, and technical specifications.

The samples of biofertilizers received by the notified laboratory must be analyzed and tested in strict adherence to the norms given in clause 29(1-A). For each of the ten categories of biofertilizers, an elaborate method and procedure is set forth in Part D of Schedule III of the FCO. These procedures conform to the technical specifications for biofertilizers as described in Part A of Schedule III of the FCO. For example, for analyzing the Phosphate Solubilizing Bacterial (PSB) biofertilizer, a testing laboratory must have to follow these major segments: (1) Apparatus, which a testing laboratory must have before analysis, (2) Reagents required for creating medium and sterilization of plates etc., (3) Preparation of serial dilutions for plate counts, (4) Incubation of plates, (5) Determination of soluble phosphorus using ascorbic acid, (6) Estimation of total viable propagules, (7) Estimation of infectivity potential, (8) Maintenance and preparation of culture and quality control at broth stage. After sample analysis, the laboratory must send the test report to the notified authority within 30 days from the date of receipt of the sample. This sample analysis report is completed in Form L2.

3.6. Quality Control

Quality control issues pertaining to biofertilizers have received special focus in the stringent standards and specifications set in the FCO. Having stringent high standards checks the crop failure and crop loss that occurs due to the ineffectiveness of biofertilizers, in order to avoid the economic and agronomic costs to farmers. The FCO's Schedule III includes standards and specifications for all ten categories of biofertilizers identified and recommended by the Advisory Committee, which functions according to the provisions of clause 38 of the FCO. These standards set out seven quality parameters for biofertilizer samples: the physical form, the minimum count of viable cells, the contamination level, pH, the particle size in case of carrier-based materials, the maximum moisture percent by weight of carrier-based products, and the efficiency character. For example, in the case of bacteria, the minimum count of viable cells is 5×10^7 cells per gram of solid carrier, or 1×10^8 cells per ml of liquid carrier (Part A of Schedule III of the FCO). For products containing mycorrhizal fungi, at least 100 viable propagules must be present per gram of finished product. In addition, the efficiency of nitrogen fixation must be shown with different tests:

Rhizobia shall show effective nodulation, Azotobacter strains shall be capable of fixing at least 10 mg N per g of sucrose consumed, and Azospirillum strains must be able to form a white pellicle in semisolid N-free bromothymol blue media.[14] The activity of phosphate solubilizing bacteria (PSB) can be assessed spectrophotometrically (30% P solubilization) or by the formation of a solubilization zone of at least 5 mm in a media having at least 3 mm thickness.[15] Similarly, products with mycorrhizal fungi shall be able to provide 80 infection points in roots per gram of inoculum used (Malusá and Vassilev, 2014). Sample analysis in laboratories is described in Part D of Schedule III of the FCO.

3.7. Ecological and Health Safety Issues

Having been amended in 2006 and 2009 to insert provisions for biofertilizers and organic fertilizers, the FCO is the most progressive regulation in the world concerning fertilizers. Yet while the FCO has addressed quality control issues indirectly in several ways (as described in the preceding subheading), other quality-related aspects, ecological risks, human and animal health safety, spillage, contamination, and occupational hazards are not considered anywhere in the regulation. Though the chemical fertilizers have higher risks to ecosystems, human and animal health, occupational safety, microbial biofertilizers may also pose risks to the ecosystems and human health if not handled carefully. Amended legislation, i.e., the FCO, does not have direct instructions to regulate ecological hazards and health safety issues that may emanate from biofertilizers. By contrast, the Canadian regulation has addressed these issues in a comprehensive manner.

4. Canadian Regulation on Biofertilizers and Comparison with Indian Law

4.1. Background

Under the Fertilizers Act, 1985, regulations governing fertilizers (the Fertilizers Regulations – C.R.C., c. 666) were consolidated and most recently amended on February 27, 2015 and on October 26, 2020.[16] Under section 11 of the regulations, manures are exempt from classification as fertilizers provided they do not harm plants or animals in any manner. As per the provisions of section 11, raw materials like rock phosphate and supplements for experimental use are also exempt. However, the Canadian regulations are silent with respect to emerging technological products such as biofertilizers, organic fertilizers and non-edible de-oiled cake fertilizers, which are recognized explicitly in India's law. In Canadian regulations, there is no explanation or illustration about biofertilizers in these regulations. In Schedule II, fertilizers are divided into Class 1 (nitrogen products) consisting of mineral-based chemicals (clause 1.1-1.10, 1.12), biologically dead and sewage wastes (clauses 1.11, 1.13, 1.15, 1.17, 1.19-1.20), organic waste (clauses 1.14, 1.16), compost (clause 1.18), synthetic derivatives (clauses

[14] Malusá & Vassilev 2014.
[15] Malusá & Vassilev 2014.
[16] Consolidation Fertilizers Regulations.

1.21-1.28, 1.30-1.32), and soybean cakes (clause 1.29). Class 2 (phosphorus products) of Schedule II consists of by-products of chemical reactions (clauses 2.1-2.4, 2.6, 2.8), biological dead wastes (clauses 2.5, 2.9-2.10), and mineral-based chemicals (clause 2.7). Class 3 (potassium products) consists of chemicals only (clauses 3.1-3.6). Class 4 (calcium and magnesium products) also consists entirely of chemicals (clauses 4.1-4.2). Class 5 (supplements) consists of chemicals (clauses 5.1-5.4), in addition to peat matter (clause 5.5).

It is notable that the biofertilizers have been excluded from all five classes listed in the Canadian regulations. This exclusion can be understood, given that when the Fertilizers Act, 1985 was drafted the science of biofertilizers was nascent. At that time, it might have been difficult to imagine the scientific, technological, production, trade and application implications of biofertilizers. However, at the time of the most recent amendment to the Fertilizer Regulations in 2015, at least four to seven categories of biofertilizers (Rhizobium, Azotobacter, Azospirillum, Mycorrhiza, Phosphate Solubilizing Bacteria and Potassium Solubilizing Bacteria) were popular in agricultural use. Microbial products could have been accommodated in the Fertilizer Regulations through appropriate amendments at that time. Such amendments would have positioned Canada as a leader on progressive legislation for innovative, ecological products. India showed the world such a path in 2006 by amending existing its law and incorporating biofertilizers as a distinct category of soil nutrients.

4.2. Registration of Manufacturers and Traders

Product registration is required for all fertilizers that have not been exempted. Registration is necessary to ensure that the circulation of products for research or commercial purposes has been authorized and that the products are safe, efficacious, and effective as per their label claims. According to section 5 of the Fertilizer Regulations, every application in respect of a fertilizer or supplement must contain a guaranteed analysis of the fertilizer or supplement as prescribed in section 15 of the Fertilizer Regulations. The guaranteed analysis is not comprehensive; rather, the parameters provided in the guaranteed analysis are merely indicative. By contrast, in the case of India, an applicant for the registration of a product is required to submit a declaration that the firm or company conforms to the technical specifications of the microbial product as laid down in Part A of Schedule III of the FCO. No efficacy test, guaranteed analysis report or field trial data is not required at the time of the registration process. Moreover, India's FCO provides detailed analysis parameters with laboratory analysis guidelines for all kinds of fertilizers, including ten different categories of biofertilizers. In addition, details on post-registration warehouse storage and inspection are also required.

Under Canadian regulations, biofertilizers are not listed in the registration application. The same is true for guaranteed analysis (section 15). Only the section 15(m) mentions manure, compost, humus or leaf mould, but these items are classified as organic fertilizers rather than biofertilizers or microbial products. Similarly, in the registration application (Schedule III of the Fertilizer Regulations), biofertilizers are not included as a separate category.

Furthermore, under Canada's Fertilizer Regulations, the required guaranteed analysis report is not specific to the type of fertilizer, and is less elaborate than India's fertilizer- or biofertilizer-specific standards/specifications.

Certain fertilizer products are exempt from registration under the Canadian regulations. They are the following: (a) a customer-formula fertilizer containing a pesticide registered under the Pest Control Products Act for the purpose stated on the label (section 3.1 (1)); (b) all items in Schedule II; and (c) organic matter made of peat, peat moss, sphagnum moss, tree bark and other fibrous organic matter that is represented for use only in improving the physical conditions of the soil.

Various items contained in Schedule II are already listed in the preceding subheading 'Background'. Notably, biofertilizers and microbial products are not included in Schedule II, implying that biofertilizers are not exempt and must be registered if manufacturing, import, trade, transport and sale are to take place in Canada. However, as noted above, biofertilizers are not explicitly recognized in the Fertilizers Regulations of Canada.

4.3. Precautions for Environmental Protection

According to the section 11(1) of Canada's Fertilizers Regulations, a fertilizer or supplement shall not contain (a) any substance in quantities likely to be generally detrimental or seriously injurious to vegetation (except weeds), domestic animals, public health or the environment when used according to directions, and (b) must not leave in the tissues of a plant a residue of a poisonous or harmful substance. Section 6.1 categorically prohibits the registration of products having adverse impacts on the environment and agroecology of farms. The guaranteed analysis (as per section 15) does not make any mention of an environment-related assessment of the product to be registered under the Canadian regulations. In other words, the registration process does not address the ecological compliance of products. However, post-registration the fertilizers and biofertilizers are monitored for environmental performance and compliance in terms of given indicators provided in section 11(1).

A comparison between Canada and India in relation to environmental precautions and preventions shows that Canada is better placed in terms of safeguarding agroecosystems and public health. India's regulations do not take into account any quality-related aspects, ecological risks, human or animal health safety, spillage, contamination, or occupational hazards. Nevertheless, the FCO has addressed quality control aspects indirectly in several ways, especially through stringent standards and specifications not only for conventional chemical fertilizers but also for biofertilizers, organic fertilizers and cake fertilizers (see Schedules I to V of the FCO).

4.4. Labeling

Canadian regulations focus on the labeling of containers and packages by setting strict norms for label information and registration. For example, according to section 7 of the Fertilizers Regulations, if label information is changed, new registration of the fertilizer (or biofertilizer) is required, demonstrating how stringent the labeling

requirements are. The regulation also provides support for the manufacturers, traders, sellers and users of fertilizers and biofertilizers in the context of labelling, as the instructions and standards for labeling are detailed and comprehensive (see sections 16-21 of the Fertilizers Regulations). In the same vein, India's regulation under clause 21(aa) of the FCO provides guidance to manufacturers, importers and pool handling agencies with respect to packing and packaging. Under India's regulation, which explicitly recognizes biofertilizers, containers must be clearly labeled with the word 'biofertilizer'. Other information printed on the packages or containers must be in accordance with the instructions released by the Controller (the registering authority in each state). This special treatment for biofertilizers is not given in the Canadian regulations. Finally, in sections or clauses dealing with labelling and packaging, neither the Canadian nor the Indian regulations address the risks of leakage/spillage and exposure to ecosystems and public health. Leakage and spillage from containers causing contamination, pollution, exposure to humans or animals, or occupational hazards are not systematically addressed in these regulations.

4.5. Sampling and Analysis

Sampling is highlighted in section 22 of the Canadian regulations. Section 23 provides that the analysis of fertilizer samples must be conducted using state of the art methods, stating that *"the methods of chemical analysis used to test a fertilizer or supplement shall be the latest methods published and approved by the Association of Official Analytical Chemists (AOAC International)."* Biofertilizers and microbial products are not explicitly addressed in this section. However, the 21st edition of Official Methods of Analysis℠ (OMA) of AOAC is said to be the most comprehensive and reliable collection of chemical and microbiological methods and consensus standards available (AOAC International), and the word 'microbiological' indicates that microbial products are addressed in the AOAC methods. Thus, the standards and methods given in this guideline may be applied to biofertilizers. Compared to the Canadian regulations, India's FCO is far more advanced, as it includes the sampling and analysis of chemical fertilizers, biofertilizers and organic fertilizers. The procedure and methods for all categories of fertilizer (including ten categories of biofertilizers) have been elaborated in Schedules I to V.

5. Conclusion and Recommendations

The unsustainable application of chemical fertilizers has caused a steady decline in soil and crop productivity the world over. Compared to biological products, chemical fertilizers pose higher risks to ecosystems, human and animal health, and occupational safety. Agricultural practices must evolve to sustainably meet the growing local and global demand for food without irreversibly damaging the world's agroecosystems and natural resources, including soil. Considering these circumstances, biofertilizers have received the global attention of scientists, research and development laboratories, manufacturing companies, sale and trade networks, and food producers. At the same time, the need to regulate the production, storage, transport, sale, trade, packing, packaging, use, disposal and labeling has emerged in different countries, especially

producer countries and importer countries. In India, biofertilizers came under legal regulation in March 2006 with amendments to the Fertilizer (Control) Order, 1985. Similarly, Canada regulates biofertilizers under the Fertilizers Regulations (C.R.C., c. 666) of the Fertilizers Act, 1985. India's legal framework relating to biofertilizers is amongst the most comprehensive in the world. The standards, specifications, analytical parameters, procedures, methodologies, and guidelines given in the FCO for biofertilizers are extremely detailed, as is attention to quality control and health and environmental risks. Quality control issues pertaining to biofertilizers are strictly regulated. It ensures the crop protection due to the ineffectiveness of biofertilizers. Consequently, economic losses and agronomic crop losses may be avoided. By contrast, the Canadian Fertilizers Regulations do not recognize biofertilizers or microbial products for soil fertility enhancement. In addition, the registration process for companies or firms wishing to manufacture, trade, sell, transport, store, use, import or export organic fertilizers is not as easy in Canada as it is in India. However, the Canadian regulations are more explicit and elaborate on issues of environmental protection, public health, safety and labeling (Canada Food Inspection Agency, 2020). The following recommendations are based on the gaps identified in the laws of both countries.

5.1. Recommendations for Indian Law

The only weakness of the FCO concerns safeguards for public health and environmental risks; quality-related aspects, ecological risks, human and animal health safety, spillage, contamination, and occupational hazards are not taken into account anywhere in the regulation. The FCO should amend existing provisions and bring in new notifications to adopt clauses to ensure ecological safety and to safeguard public health. Relevant provisions of the Canadian Fertilizers Regulation can be useful in this context. According to section 11(1) of the Fertilizers Regulations of Canada, a fertilizer or supplement shall not contain (a) any substance in quantities likely to be generally detrimental or seriously injurious to vegetation (except weeds), domestic animals, public health or the environment when used according to directions, and (b) must not leave in the tissues of a plant a residue of a poisonous or harmful substance. Section 6.1 categorically prohibits the registration to products having adverse impacts on environment and agroecology of farms. Furthermore, following registration, the Canadian regulation monitors fertilizers and biofertilizers for environmental performance and compliance in terms of given norms in section 11(1).

5.2. Recommendations for Canadian Law

Under section 11, Schedule II, the Fertilizers Regulations include organic fertilizers in the form of biologically dead & sewage wastes (clauses 1.11, 1.13, 1.15, 1.17, 1.19-1.20), organic waste (clauses 1.14, 1.16), compost (clause 1.18), and soybean cakes (clause 1.29). However, biofertilizers are not explicitly recognized in the regulation.

To remedy this situation, clauses explaining biofertilizers or their constituents should be included as a separate sixth class within the Schedule under section 11 through appropriate amendments. This legal reform would aid in greening Canada's fertilizer sector. Accordingly, the clauses and sections of the Regulations dealing with the registration process (Schedule III), labeling (section 7), and environmental health, ecological safety, etc. (section 11.1) would also cover aspects related to biofertilizers. For example, guaranteed analysis (section 15) would include biofertilizers along with manure, compost, humus or leaf mould. Similarly, with respect to the registration application, biofertilizers would be included as a separate category. The technical specifications for microbial products delineated in Part A of Schedule III of India's FCO can be helpful in broadening the guaranteed analysis (section 15) of the Canadian regulations. Finally, under section 7 of the Fertilizers Regulations, sections or clauses dealing with labelling and packaging, the risks of leakage/spillage, and exposure to ecosystems and public health should also be considered and addressed. Leakage and spillage from containers causing contamination, pollution, exposure to humans or animals or occupational hazards must be systematically addressed in the regulations.

Appendix 1

PRESCRIBED FORMS UNDER FERTILIZERS CONTROL ORDER 1957/1985
FORM A
(See Clause 8)
Form of Application to obtain Dealer's
(Wholesale or Retail or Industrial)
Certificate of Registration

To
The Registering Authority / Controller,
Delhi

1. Full Name and address of the applicant:
   (a) Name of the concern and postal address:
   (b) Place of business (Please give exact address)
      (i) for Sale
      (ii) for Storage

2. Is it a proprietary / partnership/limited Company / Hindu Undivided family concern? Give the name(s) and address(es) of the proprietor partners/manager karta.

3. In what capacity is this application field:
   (i) Proprietor
   (ii) Partner
   (iii) Manager
   (iv) Karta

4. Whether the application is for wholesale or retail or industrial dealership?

5. Have you ever had a fertilizer dealership registration certificate in the past? If so give the following details:
   (i) Registration Number:
   (ii) Place for which granted –
   (iii) Whether wholesale or retail or industrial dealership.
   (iv) Date of grant of registration certificate.
   (v) Whether the registration certificate is still valid?
   (vi) If not when expired
   (vii) Reasons for not removal
   (viii) If suspended / cancelled and if so when?
   (ix) Quantity of fertilizers handled during last year?
   (x) Names of products handled
   (xi) Names of source of supply of fertilizers.

6. Was the applicant ever convicted under the Essential Commodities Act 1955 or any order issued thereunder, including the Fertilizers (Control) Order, 1957, during the last three years proceeding the date of Application, if so give details:

7. Give the details of the fertilizer to be handled:

S.No.	Name of Fertilizer	Source of Supply

8. Please attach certificate (s) of source from the supplier(s) indicated under column 3 of sl. No. 7.

9. I have deposited of the registration fee of Rs…………………….. vide Challan no…………….. dated …………………. in treasury / Bank ……………… or enclose the Demand Draft No. ………………. Dated ………………… for Rs………………. Drawn on ……………… Bank, in favour of ……………. Payable at ………………. Towards registration fee (Please strike out which ever in not applicable).

10. Declaration:
    (a) I/We declare that the information given above is true to the best of my/our knowledge and belief and no part there is of false.
    (b) I/We have carefully read the terms and conditions of the Certificate of Registration given in Form 'B' appended to the Fertiliser (Control) Order, 1985 and agree to abide by them.
    (c) I/We declare that I/We do not possess a certificate of registration of Industrial dealer and that I/We shall not sell fertilizers for industrial use (Applicable in case a person intends to obtain a wholesale dealer or retail dealer certificate of registration, excepting a state Government, a manufacturer or a pool handling agency).
    (d) I/We declare that I/We do not passes a certificate of registration for wholesale dealer or retail dealer and that I/We shall not sell fertilizers for agricultural use. (Applicable in case a person intends to obtain a industrial dealer certificate of registration, excepting a State Government a manufacturer or a pool handling agency).

Dated …………….   Signature of the Applicant(s)

Note:
1. Where the business of selling fertilizers is intended to be carried on at more then one place a separate application should be made for registration in respect of each such place.
2. Where a person intends to carry on the business of selling fertilizers both in retail and wholesale business should be made
3. Where a person represent intends to represent more than one State Government, Commodity Board manufacturer of Wholesale dealer, separate certificate of source from each such source should be enclosed.

For use in the office of Registering Authority/Controller.

Date of receipt.   Name & Designation of
Office receiving the application

Appendix 2

FORM 'O'
[See Clauses 8 and 11]
Certificate of Source for Carrying on the Business of Selling Fertilizers in Wholesale/Retail for Industrial Use
No.001. Date of Issue 2018-06-14

1. Particulars of the concern issuing the certificate of source:

   (a) Name and full address:

   (b) Status: (i) State Government
   (ii) Manufacturer
   (iii) Pool handling agency
   (iv) Wholesale dealer

   (c) If manufacturer of mixture of fertilizers, the details of certificate of manufacturing of mixture of fertilizers being possessed:
   (i) Number
   (ii) Date of Issue
   (iii) Date of expiry
   (iv) Grades of mixtures of fertilizers allowed to be manufactured
   (v) Authority by whom issued

   (d) Details of certificate of recognition:
   (i) Number:
   (ii) Date of issue:
   (iii) Date of expiry:
   (iv) Authority by whom issued:

2. Particulars of the person to whom the certificate of source is being issued:

   (a) Name and full address:

   (b) Status: (i) Wholesale dealer
   (ii) Retail dealer
   (iii) Industrial dealer

   (c) If holds a valid certificate of registration, the details thereof:
   (i) Number :
   (ii) Date of issue :
   (iii) Date of expiry :
   (iv) Authority by whom issued:

   (d) Purpose of obtaining the certificate of source:
   (i) For obtaining a fresh certificate of registration
   (ii) For renewal of the certificate of registration

3. Details of the Fertilizers to be supplied:

Sl.No.	Name of Fertilizers	Trade Mark/ Brand Name
1	2	3
1.		
2.		
3.		

4. *Declaration*: Declared that the fertilizers mentioned above will be supplied conforming to the standards laid down under the Fertilizer (Control) Order, 1985, and as the case may be, grades/formations (of mixtures of fertilizers) notified by the Central/State Government and packed and marked in container as provided under Clause 21 of the Fertilizer (Control) Order, 1985.

Signature with stamp of the Authorized Officer

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Franci AVSEC*

Legal Framework of Agricultural Land/Holding Succession and Acquisition in Slovenia**

Abstract

Agricultural land legislation in Slovenia contains extensive special provisions that directly regulate the legal transfer of agricultural land and holdings inter vivos and mortis causa, including inheritance. Additionally, some measures within the common agricultural policy (such as financial support for the takeover of farms by young farmers) and tax policies (exemptions) provide incentives or alleviations for certain legal transactions involving the transfer of agricultural land and holdings. Among special provisions on the transfer of agricultural land and holdings, those relating to a statutory preemption right and a statutory priority right to lease agricultural land have the longest continuity (from the late 1950s). The holders of these priority rights must meet certain requirements and range in several priority classes. At first, agricultural organisations as legal persons had better priority rights than farmers. In 1990, the priority order was reversed by placing individual farmers before legal persons, individual agricultural entrepreneurs, and the National Agricultural Land and Forest Fund (NALFF). In 1973, the agricultural land legislation prohibited the division of certain middle-sized family farms (protected farms) through inheritance (mortis causa) and later (1986), also inter vivos, (with certain exceptions). The Agricultural Land Act and the Forests Act also restrict the division of certain agricultural or forest land plots. The draft acts of 2019 and 2020 prepared by the Ministry of Agriculture foresee important changes of the agricultural land policy, including the priority order between the statutory preemption rights and the removal of a general restriction on the division of protected farms inter vivos.
Keywords: agricultural land legislation, protected farms, Slovenia.

1. Introduction

In Slovenia, the transfer of agricultural land and holdings inter vivos and mortis causa is regulated by a complex set of special rules within the agricultural land legislation, which partly supplement and derogate general provisions of property, obligation, and succession law. General provisions on legal transfer of property in Slovenia are systematically codified in the Property Code (PC),[1] the Obligations Code (OC),[2] and the Inheritance Act (IA).[3]

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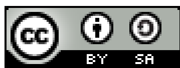
[1] Stvarnopravni zakonik 2002, with subsequent amendments.
[2] Obligacijski zakonik 2001, with subsequent amendments.
[3] Zakon o dedovanju 1976, with subsequent amendments.



The most important special provisions for the transfer of agricultural land, forests, and agricultural holdings are included in four pieces of Slovenian agricultural land legislation.

The Agricultural Land Act (ALA)[4] defines agricultural land as land that is suitable for agricultural production and is designated as agricultural land in spatial planning documents. The legal transfer of agricultural land, forests, and agricultural holdings is defined as the acquisition of ownership rights on agricultural land, forests, and agricultural holdings through legal transactions inter vivos, and in some other cases, regulated by this Act (Art. 17(1); in this regard, the ALA mentions contracts of donations mortis causa). Interestingly, the narrow definition of legal transfers is limited to legal transactions of the translative type (where the ownership right is transferred in its entirety). The definition of legal transfers in the ALA does not include constitutive legal transfers, where only one essential constituent part of the ownership right – for instance, the right of use – is transferred. The provisions of the ALA on legal transfer, therefore, apply to contracts transferring ownership rights, such as sales contracts,[5] exchange contracts,[6] donation contracts,[7] delivery contracts,[8] lifelong maintenance contracts,[9] and subsistence contracts.[10] Indeed, the ALA regulates, in a separate chapter, the contractual lease of agricultural land without formally including lease contracts in the notion of legal transfers. Other legal transactions where the right of use as an obligation law right (for instance, right of use originating from loan for use contracts) or a real right (right in rem, for instance, usufruct on agricultural land or forest) is established or transferred, are completely out of the scope of the ALA. One would expect a wider scope of the agricultural land legislation with regard to the relevant provisions of the Slovenian Constitution,[11] according to which, the law establishes special conditions for land utilisation to ensure its proper use, while the agricultural land enjoys special protection (the first and the second paragraph of Article 70).

The Forests Act (FA)[12] contains provisions on silviculture, protection, harvesting, and the use of forests to provide the sustainable, close-to-nature management of forests, which also tackles the legal transfer of forests directly (such as statutory preemption right) or indirectly (for instance, prohibited division of plots).

The Inheritance of Agricultural Holdings Act (IAHA)[13] contains special succession rules for certain agricultural holdings (protected farms). According to these general succession rules, inheritance may be based on the last will of the deceased (testamentary inheritance), or, if there is no will or the will is not valid, on the provisions of inheritance legislation (intestate inheritance).

[4] Zakon o kmetijskih zemljiščih, 1996, with subsequent amendments.
[5] Obligacijski zakonik 2001, Art. 435–527.
[6] Ibid. Art. 528–529.
[7] Ibid. Art. 533–545.
[8] Ibid. Art. 546–556.
[9] Ibid. Art. 557–563.
[10] Ibid. Art. 564–568.
[11] Ustava Republike Slovenije 1991, with subsequent amendments.
[12] Zakon o gozdovih 1993, with subsequent amendments.
[13] Zakon o dedovanju kmetijskih gospodarstev 1995, with subsequent amendments.

Slovenian law does not allow, in principle, inheritance contracts: contracts by which someone leaves their estate to other contractors, disposes of an expected inheritance to someone who is still alive, undertakes to determine something in their will or revoke it are null and void (Art. 103–105 of the IA). The only exemption from this prohibition is the agreement on renunciation of a descendant to inherit from an ancestor or of one spouse to inherit from the other spouse (Art. 138–140 of the IA).

During privatisation, socially owned agricultural land and forests were transferred to the State, which had established a national agricultural land and forests fund through a special act (National of Agricultural Land and Forests Fund Act, NALFFA).[14] The State-owned agricultural land that was not restored to former owners during denationalisation process was leased out by the National Fund primarily to privatised enterprises as former users and, subordinately, to other lessees (individual farmers and legal persons dealing with agricultural activity).

The legal transfer of agricultural land, forests, and agricultural holdings is at least influenced by some measures of tax policy (exemptions and alleviations) and (common) agricultural policy (for instance, financial support for young farmers taking over a farm). In the next section, the paper analyses the special provisions on the legal transfer of agricultural land, forests, and agricultural holdings inter vivos. The statutory preemption right and agricultural land leases will also be outlined in more detail.

The paper analyses the present legislation in force (de le lata) and the most important proposals from two draft acts prepared by the Ministry of Agriculture in 2019 and 2020 to amend the present regulation (de lege ferenda). The Draft Act of 2019 contained proposals to amend and supplement several acts in the field of agricultural land policy.[15] Following the results of the public consultation on the Draft Act of 2019, the Ministry of Agriculture published, in November 2020, a new Draft Act with a narrower scope and more moderate legislative changes for a public discussion.[16]

Special rules on the legal transfer of agricultural land, forests, and holdings, inter vivos cannot be understood without taking into account the regulation of inheritance, including special succession rules for protected farms. The third section, therefore, outlines some basic general and special succession rules in agriculture. The fourth section briefly mentions policy measures that stimulate certain legal transactions for agricultural land and holdings. The fifth section of the paper deals with the acquisition of agricultural land by legal persons and the sixth section contains concluding findings and remarks.

[14] Zakon o Skladu kmetijskih zemljišč in gozdov Republike Slovenije 1993, with subsequent amendments.

[15] Osnutek Zakona o spremembah in dopolnitvah določenih zakonov na področju kmetijske zemljiške politike, 22 March 2019.

[16] Osnutek Zakona o spremembah in dopolnitvah Zakona o kmetijskih zemljiščih, 23 November 2020.

2. Special legal framework for legal transactions inter vivos

2.1. Overview of the rules

Compliance with special provisions on the legal transfer of agricultural land, forests, and holdings is ensured through extensive administrative control. Namely, the ALA stipulates that the notarial notification of the alienator's signature on the 'land register permission' (registration clause) is not allowed without the approval of the competent administrative body or a decision issued by the same body that the approval of the legal transaction is not necessary according to the statute.[17] As the notarial notification of the alienator's signature is a condition sine qua non for the transfer of ownership rights on the new acquirer, such provisions contain a very efficient sanction against any violation of the special provisions.[18]

The special legal framework for the transfer of agricultural land, forests, and agricultural holdings through legal transactions inter vivos includes the following: (a) a statutory preemption right of several subjects who enjoy the priority right to purchase agricultural land, forest, or agricultural holdings offered for sale; (b) restrictions on donation contracts; (c) restrictions on physical divisions of certain agricultural land and forest plots; (d) restrictions on establishing new co-ownership shares; (e) restrictions on the division of the protected farms; and (f) special rules for agricultural land lease contracts.

2.2. The statutory priority right to buy agricultural land and holdings

The priority right to buy agricultural land or agricultural holding is stated in the ALA and may be exercised by certain beneficiaries who may enforce their statutory pre-emption rights in the following order: (1) co-owner(s), (2) farmer(s) whose agricultural land borders on the agricultural land offered for sale; (3) the lessee of the agricultural land offered for sale; (4) another farmer; (5) an agricultural organisation or an individual entrepreneur who needs land or a farm to perform agricultural or forestry activities; and (6) the NALFF for the Republic of Slovenia (Art. 23).

According to the ALA, a farmer is an individual who cultivates agricultural land as its owner, lessee, or 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 from the past year) from agricultural activity. The status of being a farmer is retained by an individual who cultivated agricultural land and does not carry out agricultural activity any more due to disability or age but manages the land cultivation. An individual who does not carry out agricultural activity yet, but intends to do so, may obtain the status of a farmer by stating before the administrative authority their intent to cultivate the agricultural land on their own or with the help of others, evidence of the necessary

[17] ALA Art. 19 and 22.

[18] According to Art. 49 of the Property Code, *"an entry in the land register is required for the acquisition of an ownership right over immovable property through a legal transaction"* (the first paragraph), while the *"[E]ntry in the land register shall be made on the basis of a document containing the land register permission"* (the second paragraph).

professional qualifications, and evidence of their future foreseen income from agricultural activity as significant (new entrants, Art. 24 of the ALA).

The ALA prescribes specific procedures for the enforcement of the preemption right. An owner who intends to sell agricultural, forest, or farm must submit their 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 authorised the administrative unit to receive a written statement of the acceptance of the offer.

The administrative body must immediately publish the offer on their notice board and 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 must repeat the offer if they still wish to sell the agricultural land, forest, or farm. If two farmers within the same priority class (for instance, two farmers as neighbours to the agricultural land for sale) enforce their priority rights by accepting the offer, the ALA provides additional rules to determine the buyer.

According to the Forests Act, the State and municipality have preemption right on certain forests with emphasised non-economic functions (protective forests and forests with a special purpose). Notwithstanding these provisions, the Republic of Slovenia or a legal entity managing State forests has the pre-emptive right to purchase forest land with an area over 30 ha (Art. 47(3) of the FA).

The statutory preemption rights on other forests may be enforced by an owner whose land borders a forest that is being sold, and subordinately, by another owner whose forest is the nearest to the forest that is being sold. In these cases, the corresponding provisions on preemption rights from the ALA apply (Art. 47(10), (11) of the FA).

The statutory preemption rights, the object of which may be agricultural land, are also regulated in other pieces of the Slovenian legislation (for example, the Nature Conservation Act[19] and the Water Act[20]). The statutory preemption rights, according to other acts, sometimes have a higher priority than the preemption rights according to the ALA. For some sale contracts, the approval of the administrative body is not necessary (for instance, if a sale contract is concluded between spouses or cohabiting partners or between an owner and their intestate heir, which conforms with the statutory provisions (see infra, Section 3.2), or if a sale contract is concluded between all co-owners of agricultural land, a forest or a farm).

According to the literature, the circle of statutory preemptors in the present regulation is too wide, in particular, because 'other farmers' and 'agricultural organisations and individual entrepreneurs' may enforce their priority rights to purchase agricultural land without further requirements that would guarantee the rational use and inclusion of the concerned agricultural land in an existing or a new holding of the preemptor.[21]

[19] Zakon o ohranjanju narave 1999, with subsequent amendments.
[20] Zakon o vodah 2002, with subsequent amendments.
[21] Rejc 2018, 272–278. He also criticises provisions on recognition of a farmer's status regardless of qualification and the income requirement for farmers who ceased farming activities.

Otherwise, such preemptors could act as 'strawmen' for the purchase and resale of the agricultural land, which is not the purpose of the statutory preemption rights according to the agricultural land legislation.[22]

The Draft Act 2019 proposed an altered definition of preemptors and their priority order. Namely, (1) co-owner(s) who retained the first place, would be immediately followed by (2) the NALFF, while the successive holders of statutory preemption rights would be farmers, defined neutrally with regard to their legal form. These farmers would be natural or legal persons who manage agricultural holdings and have been registered in the register of agricultural holdings (RAH) for a minimum period of five years. Among these preemptors, the priority would be given to (3) neighbouring farmers (farmers whose land borders the agricultural land for sale), followed by (4) local young farmers (farmers who have, instead of being registered in the RAH for at least five years, received financial support in the last five years from the rural development programme if they comply with the farm size requirements [6–80 ha of comparable agricultural land], are younger than 40 years, and are residents in the municipality where the agricultural land for sale is situated or in a neighbouring municipality), (5) local farmers who manage comparable agricultural land within the same range and are socially insured as farmers, (6) other local farmers, and finally, (7) other farmers registered in the RAH. Sales contracts with buyers who are local farmers meeting the requirements for the fourth and fifth place in the proposed new priority order would be allowed as preemptors without formalities related to the statutory preemption rights.

Compared to the prior version from 2019, the Draft Act from 2020 reserves the first three places for (1) co-owners followed by the local farmers[23] who are (2) neighbours or (3) a lessee of the agricultural land offered for sale. The next place is reserved for (4) local young farmers managing 5-100 ha of comparable agricultural land, followed by local farmers managing the agriculturral land of the same surface who are (5) socially insured as self employed in agriculture or (6) not (local farmers with farms capable of development). The National Fund has slipped to the last but one (7) place, before (8) other local farmers.

2.3. Restrictions on donations of agricultural land

To prevent the statutory preemption rights from the conclusion of donation contracts, the legislation restricts subjects who obtain agricultural land as donees. Potential donees in such transactions may only be: (a) a spouse or cohabiting partner, children, or adopted children, parents or adoptive parents, brothers or sisters, nephews or nieces, and grandchildren of the donor; (b) a donor's son-in-law, daughter-in-law,

However, the income requirement, if applied, could have a discriminatory effect on citizens from certain EU Member States.

[22] Ibid. 284.

[23] Both draft acts define a local farmer as farmer having a permanent residence (individual) or registered office (leal entity) in the same or a neighbouring municipality in which the agricultural land subject to sale is located.

or cohabiting partner of a donor's child or adoptive child, provided that they are members of the same farm; (c) a farm holder who has obtained funds from the rural development programme as a young transferee of a farm, if no more than five years have passed since the transfer of the farm; or (d) a local community or the State (Art. 17a(1) of the ALA).

2.4. Restrictions on the physical division of agricultural land and forest plots

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 that has not been consolidated can be divided only when the area achieved by the land consolidation does not deteriorate as a result of this division (Art. 75 of the ALA).

The Forests Act provides that 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 the division is necessary due to the construction of public infrastructure; or (c) if they are a subject of joint ownership with the Republic of Slovenia or a local community (Art. 47(6)).

2.5. Restriction on establishing new co-ownership shares

The ALA prohibits the creation of new co-ownership shares on agricultural land through donation contracts in favour of a young farmer or sales contracts (Art. 17a(2)). This provision is understandable as new co-ownership shares make the common use of the agricultural land more complex[24] and increase, in principle, the fragmentation of agricultural land.[25] The provision also prevents the artificial creation of co-ownership shares with the aim of obtaining statutory preemption rights of the first priority on the entire agricultural land plot.

[24] According to the Slovenian Property Code, co-owners have the right to jointly manage a co-owned object. Transactions in connection with the regular management of objects require the consent of the co-owners whose undivided shares comprise more than half of its value. Transactions that exceed the scope of regular management include the disposal of the object and determine 'the method of use' and designate 'the manager of the object' and require the consent of all co-owners (Art. 67). To enable the use and cultivation of co-owned agricultural land plots with due diligence, the ALA partly derogated the quoted provision from the Property Code so that the determination of agricultural land user and land-use practices, if an agricultural land plot is co-owned, requires the consent of co-owners whose undivided interest represents more than half of the entire value (Art. 7(2)).

[25] Following the Roman law maxim 'Communio est mater rixarum' (co-ownership is the mother of disputes), a co-owner may not waive their right to the division of a thing for an extended period (Art. 69(2) of the Property Code).

2.6. Restrictions on the division of protected agricultural holdings (protected farms)

2.6.1. Notion of the protected farm

According to the present legislation, a protected farm is an agricultural or agri-forestry economic unit that encompasses agricultural land, forests, agricultural machinery, tools and livestock, farm-related easements, and similar rights, earmarked for agricultural and forestry activities (Article 3 of the IAHA), and must meet two requirements related to its holder(s) and the surface of agricultural land and forests.

The holders of a protected farm can only be individuals. According to the IAHA, a protected farm may belong either to one individual or to two individuals if they are closely linked (through marriage, cohabitation, and partnerships, or lineal relationships) to ensure that the common management of the protected farm by both holders is based on their close relationship. Ownership and other property rights that constitute a protected farm of a married couple may belong to both of them as holders of exclusive entitlements to different objects and/or co-holders (by definite shares) or joint holders (by indefinite, but definable shares) of entitlements to the same objects. A protected farm of ancestor and descendant must belong to both of them as co-holders of property rights (for instance, as co-owners of agricultural land, conf. Art. 2(1) of IAHA).

However, only middle-sized farms are protected, and a protected farm must cover a minimum of at least 5 ha and a maximum of no more than 100 ha of comparable agricultural land.[26] Additionally, the present criteria for the determination of protected farms are criticised by legal theory on two grounds.

First, the quantitative criteria only relate to the surface of comparable agricultural land, regardless of other means of production, which are also necessary for a farm as a productive operating unit.[27] Second, the lower limit for a protected farm is too low and too rigid. Therefore, a protected farm does not always enable its holder to make a living out of agricultural activity, which is not in conformity with the Constitution. The legal theory proposes two alternative solutions: either leave decisions on the protection of farms to the holders or improve the criteria for determination of a protected farm ex officio.[28] The Draft Act from 2019 opted for the first solution: the farms that satisfy quantitative requirements should be protected on the request of their holder(s). However, this proposal was dropped by the Draft Act of 2020.

[26] 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 (credit rating) from 50 to 100 in accordance with the regulations governing the registration of real estate; (b) 2 ha of land with a credit 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 land cadastre (Art. 2(2 and 3) of the IAHA).
[27] Rajgelj 2016, 27.
[28] Drobež 2017, 1457.

2.6.2. Restrictions on legal transactions dividing protected farms

Since 1986, the division of protected farms inter vivos has been prohibited in Slovenia. However, the list of exceptions has become more extensive. At present, the division of a protected farm through legal transactions inter vivos is exceptionally permitted in several cases, which can be classified to specific groups.

The first group of exceptions encompasses the alienation of land that is not earmarked for agricultural activity (building land not used for agricultural activities) or is less suitable for agricultural production so that the holder of the protected farm may exceptionally bequeath these land plots through a will to an heir who is entitled to a hereditary share but does not overtake the protected farm.[29]

The second group of exemptions consists of transactions through which the division of a protected farm results in (1) creating or enlarging another protected farm, (2) enlarging and rounding off (but not the creation) of a non-protected farm or agricultural land belonging to an agricultural organisation or individual entrepreneurs so that the overall result of the transaction with the agricultural land structure is not negative in the eyes of the legislator. The Act also allows transfers of agricultural land and other component parts of protected farms to the State or a municipality (Article 18 of the ALA).

Restrictions on the division of protected farms inter vivos seem to be too rigid as they only address single transactions without taking into account that a transaction may be a part of a wider plan for a more rational use of the agricultural land (for instance, a holder of a protected farm sells a plot of land to purchase another similar plot used in a similar way that is of better quality nearby), while casuistic exemptions linked to certain legal types of contracts could open a way to circumvent the statutory preemption rights and restrictions on donation contracts. The restrictions on the division of protected farms may also considerably prolong the sale of agricultural land in compulsory execution procedures.

2.7. Lease of agricultural land

The ALA contains several special provisions on the lease of agricultural land relating to statutory pre-lease rights, the content and written form of the lease contract, the minimum lease period, the lessee's duties to cultivate or use land with due diligence, and the rights of lessees to the cash value of unamortised crops after the termination of the contract (depending on whether the investments were made with the consent of the landlord or not).

A lease contract must include land register and land cadastre data on leased land; a description and the unamortised value of the facilities, equipment, and permanent crops; the depreciation period of long-term plantations; the rent amount; the purpose and period of the lease; and a provision as to whether the leasehold right shall be

[29] More precisely, these heirs may inherit land or other real estate or movable property if they are not important for the protected farm but only up to the amount of the compulsory share (Art. 15(3) of the IAHA).

inheritable or not. A lease relationship must also be entered in the land register and the land 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 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 organisation, or individual entrepreneur who needs the land or the farm to carry out an agricultural activity (Article 27 of the ALA).

The lease period must correspond to the purpose of the use of the leased land (for at least 25 years for the establishment of vineyards, orchards, or hop fields, at least 15 years for the establishment of plantations of fast-growing deciduous trees, and at least ten years for other purposes). A lessor who, after the announcement of a lease offer, is unable to conclude a lease contract for the prescribed minimum or longer period, may offer the agricultural land for lease for a shorter period. Where permanent crops already exist on leased land, a lease relationship may also be concluded for a period necessary for the full amortisation of the lessee's investments in these crops.

The Draft Act from 2019 foresaw new special and more detailed provisions to be inserted into the NALFFA for the lease of state-owned agricultural land. The priority rights to lease state-owned agricultural land would be granted to several persons in the following priority order: (1) local young farmers who received financial support for the takeover of the farm in the past five years and are managing 6–80 ha of comparable agricultural land, (2) local farmers who are compulsorily socially insured on the basis of agricultural activity and manage 6–80 ha of comparable agricultural land, (3) other local farmers, and (4) other farmers.

All special provisions on the lease of agricultural land in the ALA (including the present statutory pre-lease rights) would be abrogated so that the general provisions (the Obligation Code) would apply to lease contracts of non-state-owned agricultural land.

These proposals were strongly criticized by the agricultural companies as the largest lessees of the State-owned agricultural land (see also infra, Section 5). Therefore, they were left out from Draft Act of 2020.

3. Agricultural land and agricultural holdings in succession law

3.1. General succession rules and the inheritance of unprotected farms

The general succession rules, that is, the Inheritance Act (IA), applies to the inheritance of estates that are not protected farms (including unprotected farms). Some special rules, contained by the Inheritance of Agricultural Holdings Act (IAHA) apply to the inheritance of protected farms. As far as the special rules do not regulate the succession of protected farms, general succession rules are applicable. At several points, the IAHA refers to certain provisions of the IA.

The inheritance of protected farms and other estates is based on several universally applicable principles. One of these principles concerns the basis for succession: the inheritance of the estate 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 (Article 4 of the IA). As the adoption of a child produces an equal legal relationship between the adopted child and the adoptive parents, adopted children have the same succession right vis-a-vis their adoptive parents as natural children (and vice-versa, Article 10 of 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 (Article 11 of the IA, Articles 2 and 3 of the Civil Union Act, CUA).[30]

The intestate heirs are classified into three succession orders. The intestate heirs of a lower succession order exclude intestate heirs from a higher succession order from inheritance. Intestate heirs of the first succession order are the deceased's spouse and descendants who inherit equal shares.[31] If a child or adopted child died before the 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 would be 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). 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 would be grandparents of the deceased and their descendants who inherit the estate if the deceased left no spouse, descendants, parents, or 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.

[30] Zakon o partnerski zvezi 2016.

[31] The Act also permits certain departures from the principle of equal share. On the request of the deceased's spouse or descendant who does not have the necessary means for sustaining a livelihood and inherits along with other heirs of the first succession order, the court may, at the request of such an heir, decide that the requesting heir also inherits a part of the share of the estate that would be, according to the law, inherited by the co-heirs. The deceased's spouse or descendant may request an increase in their share of the inheritance against all or individual co-heirs. The court may decide that the requesting heir inherits the entire estate if the value of the estate is so small that this heir would suffer hardship if it were divided (Art. 13 of the IA).

Where there are no descendants of one grandparent, 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 would inherit the estate alone.

Each intestate heir is credited with what they receive as a gift from the deceased unless the deceased stated at the time of the gift or later, or in the will that the gift should not be included in the hereditary share; or if it can be concluded from the circumstances that it was the will of the deceased (Article 46 of the IA). 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 very 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, adopted children and their descendants, parents, grandparents, brothers, and sisters, if they are entitled to inherit according to their succession order. Additionally, grandparents, brothers, and sisters of the deceased are forced heirs under additional conditions: if they are permanently incapable of work and do not have the necessary means of subsistence (Article 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 (Article 26 of IA). The IA prescribes special rules on how the value of the estate is calculated to establish the value of the compulsory share. From the estimated value of the property that the testator had at the time of their death (including the property disposed of by the will and all claims of the testator, except manifestly uncollectible claims), the costs for the inventory and estimation of the estate and the testator's funeral are deducted. The difference is increased by the value of gifts given by the testator in any way to intestate heirs who would inherit from the deceased and the value of gifts given by the testator in the last year before their death.

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 (Articles 35 and 38 of the IA). Through their will, the testator may give a material benefit to another person without appointing this person as an heir (legacy).

The Inheritance Act exhaustively lists grounds on which a testator may deprive a forced heir of their compulsory share (disinheritance, Article 42 of the IA) as well as grounds on which any person is ex lege unworthy to inherit on the basis of the Act or a will or to obtain anything according to the will (unworthiness of inheritance, Article 126 of the IA).

5. Acquisition ownership of agricultural land or holding by a legal person

In the period before the transition, when social ownership was the prevailing ownership form in the economic system (except in agriculture and forestry), the agricultural land legislation first introduced the statutory priority rights of socially

owned agricultural organisations (enterprises) to purchase and lease privately owned agricultural land. In 1973, the first Slovenian Agricultural Land Act recognised the statutory preemption and pre-lease right to farmers, who were placed behind agricultural organisations and before citizens who were not deemed to be farmers (non-farmers).

In 1990, the amendments to the ALA reversed the priority order so that farmers obtained better statutory preemption and pre-lease rights compared to agricultural organisations, while the statutory preemption and pre-lease rights were extended from private to all agricultural land.

During the ownership transformation of social enterprises, agricultural land and forests were excluded from the privatisation of agricultural and forestry enterprises.[32] They were transferred to the State and have since been managed by the NALFF. Agricultural and forestry enterprises could continue their activities by leasing previously socially owned, and then state-owned, agricultural land or concluding concession contracts (forests), if the land was not an object of denationalisation (restitution to the former owner(s) or their heirs).

According to the Draft Act of 2019, the lease contract of state-owned land would be for at least ten years and could be prolonged for the same period unless the lessee notified the National Fund that they are not interested in prolongation. However, the proposed provisions from the Draft Act of 2019 would mostly affect the position of legal persons as lessees of the National Fund. These provisions related to (a) the maximum state-owned agricultural land (100 ha) that may be leased to one natural or legal person, (b) the gradual, but progressive adaptation (decrease) of the agricultural land area that was leased to lessees who exceed the maximum lease area (through future successive lease periods) until the upper limit of 100 ha is achieved, (c) the exclusion of the lease period prolongation in cases where the ownership structure of a legal person has been changed with regard to more than a 50-per cent share(s), and (d) the obligation of larger lessees taking on leases of more than 5 ha of comparable agricultural land to submit a plan for agricultural holding development. It was proposed that in cases where the plan would not be submitted, or the lessee would not comply with the commitments, the lease contract would not be prolonged.

These proposals unleashed a controversial discussion. Some studies have criticised the proposed provisions as an ungrounded and unconstitutional encroachment on the legitimate expectations of legal persons that are large lessees of the National Fund, which, if adopted, would have negative consequences for rational agricultural production and food security in Slovenia, contrary to the general interest.[33]

Due to diverging standpoints about these proposals, the Draft Act of 2020 does not foresee any amendments of the present regulation relating to state-owned agricultural land leases.

The abuses related to the acquisition of agricultural land by legal persons are limited due to strict provisions on the registration of nearly all users of agricultural land.

[32] Zakon o lastninskem preoblikovanju podjetij (Ownership Transformation of Companies Act) 1992, with subsequent amendments, Art. 5.

[33] Korže 2019, 1437.

According to the Agriculture Act,[34] individuals or legal persons who are either obliged to be entered into the Ministry of Agriculture, Forestry, and Food records according to special regulations (for seed material, for instance); or who are using at least 0.1 ha of olive groves, 0.2 ha of strawberry plots or hop gardens (regardless of its size), or 1 ha of other agricultural land; who sell agricultural products; or submit an application for agricultural policy subsidies, must be entered in the register of agricultural holdings. The chain of owners must be followed by publicly accessible data on the beneficial ownership of legal persons set up by the business register according to the Slovenian Prevention of Money Laundering and Terrorist Financing Act.[35]

6. Conclusion

It is difficult to assess the effectiveness and efficiency of the Slovenian special provisions on the legal transfer of agricultural land. First, the production factors, in particular the land, are less mobile in agriculture than in other sectors. However, extensive special regulations also contribute to a slower pace of legal transfers. Expectations that administrative restrictions alone can improve agricultural land and holdings structures are unfounded. They can only prevent or at least curb undesirable changes. Due to various circumstances in life situations, the restrictions are not absolute but must allow some exceptions.

Considering these limitations, a very dense and complex regulation of the legal transfer of agricultural land and holdings in Slovenia seems to have shortcomings that need to be rectified.

First, the special regulation seems to be too narrow because it only tackles transactions resulting in the transfer of ownership rights and agricultural land lease contracts, leaving some important rights for use agricultural land (such as usufruct) out of the scope of this regulation.

However, simultaneously, the special regulation seems to be too extensive, as far as it provides special provisions on certain types of contracts. Namely, the participants in obligation relationships are free to shape their contracts and may also conclude mixed and compound contracts and even contracts that are not foreseen in the Obligation Code (innominate contracts). Various contracts may include the same economic and social goals and have the same consequences for agricultural land structures.

Despite the comprehensive administrative control of agricultural land and agricultural holding transactions, very few statistical data are available on these transfers. The Draft Act of 2020 introduces some improvements in maintaining updated records and collecting statistical data in this field.

The amendments to the ALA that are proposed in the Draft Act of 2020 introduce important substantial and terminological changes. The definition of farmer in the ALA originates from a period when an individual having such a status was allowed to own larger surface and better quality of agricultural land and forests than

[34] Zakon o kmetijstvu 2008, with subsequent amendments.

[35] Zakon o preprečevanju pranja denarja in financiranja terorizma 2016, with subsequent amendments, Art. 41.

other individuals (non-farmers). After the abolishment of the agricultural land maximum in 1992, the status of farmer became important for the preemption right and tax exemptions linked to agricultural land purchase and some other transactions. The common agricultural policy denotes a farmer in a wider meaning, namely as an individual or a legal person managing unit(s) for agricultural activity.[36]

The current ALA regulates, inter alia, donation contracts in favour of young farmers who obtained financial support to take over farms, thus referring explicitly to the common agricultural policy. The Draft Act of 2020 defines certain categories of statutory preemptors following the notion of farmer within the common agricultural policy. The proposed provisions on preemption rights in the Draft Act of 2020 which place local farmers who meet certain requirements before the National Fund which is followed by non-local farmers, obviously lean on the Interpretative Communication of the European Commisssion.[37]

These provisions demonstrate a convergence between the agricultural land legislation and the common agricultural policy. The advantage of this process is the synergy between administrative restrictions and policy incentives, while too frequent changes of the policy may prove to be its shortcoming.

Another substantial change in the Draft Act of 2020 is cancellation of prohibition to divide protected farms inter vivos. If such proposal is enacted, the protection of these farms against division mortis causa will actually, to a great extent, depend on the will of the protected farm holder(s) because certain legal transactions inter vivos could result in the loss of the protected farm status.

[36] See, for instance, Article 4(1)(a) of Regulation (EU) No 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009, with subsequent amendments.

[37] Commission Interpretative Communication on the Acquisition of Farmland and European Union Law (2017/C 350/05). The Communication stresses that privileges for local acquireres, to be compatible with free movement of capital principles, *"have to pursue, in a proportionate manner, legitimate objectives in the public interest"* what *"could be the case if pre-emption rights are granted to local farmers to address land ownership fragmentation, for instance, or if other special rights are given to locals to accommodate concerns resulting from their geographical situation (for example, less developed regions)"* (cursive added).

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Martin Milán CSIRSZKI*

The applicability of Parsons' action system to the food system**

Abstract

In this paper Talcott Parsons' systems theory is applied to the food system. After the introduction of the basic categories of the food system, the main elements of Parsons' theory are drawn up. Then, the detailed analysis takes place on three abstraction levels: within the general paradigm of human condition, the action system and the social system. During the analysis, two conclusions are formulated: one of them is in connection with the correction of abstraction levels concerning the food system, the other one creates the classes of the food system that can be corresponded to the four Parsonsian functions. In the end of the study, a final conclusion is formulated.
Keywords: Talcott Parsons, action system, food system, systems theory.

1. Introduction

If we start to think about the word 'system' from a lay viewpoint, we can feel – in my opinion – a touch of qualitative surplus. This qualitative surplus may be in connection with the fact that our knowledge on any systems assumes order. If we scrutinise 'system' with scientific approach, an excellent starting point is served by the definition of the dictionary of Merriam-Webster: "*a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose.*"[1] The English word 'system' is derived from Latin 'systema', and the latter one goes back to Greek 'σύστημᾰ' [sústēma comes from the verb σῠνῐ́στημῐ (sunístēmi) and the nominal suffix -μᾰ (-ma); sunístēmi means 'associate', 'unite'] (Online Etimology Dictionary, n.d.). 'Ordering' or 'orderliness' already appeared in the early Greek expression in order that the activity of ordering has become the basis of systems. Both lay and scientific approaches establish the feeling of qualitative surplus.

If we go further, we can handle the system as the starting point of our point of view, and we can turn to it with a methodological approach. In this case, we can say that we approach the object to be examined with a systems approach, and we are able to reach results due to our method of examination which can be attributed to the qualitative surplus (orderliness) that gives the essential characteristic of the system.

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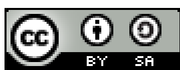
[1] Merriem-Webster 2002, 2322.



These results would not appear if the individual elements of the system were examined separately, since the relations between the self-contained parts and their interactions do not surface with an isolated, single-element-concentrated way of examination. Systems approach can be used both in (natural) sciences and social sciences. The founding father of systems theory, Ludwig von Bertalanffy, said the following about the purpose of the systems approach: *"[a] systems approach became necessary. A certain objective is given: to find ways and means for its realization requires the systems specialist (or team of specialists) to consider alternative solutions and to choose those promising optimization at maximum efficiency and minimal cost in a tremendously complex network of interactions."*[2] The systems approach means the assumption of the world as the object of scientific cognition in which individual phenomena can only be understood in their context, namely in their hierarchical context. It can only be understood as a unit that is a part of higher-level units and is itself organised from lower-level units.[3]

Although Ludwig von Bertalanffy developed his theory as a general systems theory applicable for each discipline, outstanding results in connection with society were achieved by the works of Talcott Parsons and Niklas Luhmann with their determinations on sociological systems theory.[4] Consequently, in the present study I intend to rely on the works of Parsons, since I argue that his systems theory can be applied to the food system. In this context, firstly I would like to present the food system and its parts based on the scientific literature, and secondly Talcott Parsons' systems theory, hence he can be considered the father of sociological systems theory preceding Luhmann. Finally, by comparing these, I would like to formulate my conclusions and suggestions.

2. The food system

2.1. Fundamentals

With regard to the food system, I think it is important to settle some fundamentals in the beginning. It is necessary to draw attention to a distinction of outstanding significance. Food system is not equal with food supply system. Their relation can be drawn as the previous one includes the latter one, therefore food supply system is a part of food system. Their more detailed relation is introduced later. As a consequence of inappropriate use of terms, a number of studies consider these two expressions interchangeable. I think it should not be maintained in this way for the interest of coherence.

The question arises: how can food system be defined? I consider this question extraordinarily necessary, because the definitions of the food system are indispensable based on that the definitions contribute to the reaching and strengthening of boundaries between the system and its environment.[5]

[2] von Bertalanffy 1972, 4.

[3] Szabó 2015, 161.

[4] See Parsons 1937; Luhmann 2002.

[5] Morel et al. 2000, 160.

Through the definition – its etymological origin comes from the word 'delimitation'[6] – we can get to the system that is the object of our examination, and to its constitutive structured phenomena.[7] In my opinion, a Dutch analysis in scientific literature gives a remarkably accurate and concise definition: *'Food systems comprise all the processes associated with food production and food utilisation: growing, harvesting, packing, processing, transporting, marketing, consuming and disposing of food remains (including fish). All these activities require inputs and result in products and/or services, income and access to food, as well as environmental impacts. A food system operates in and is influenced by social, political, cultural, technological, economic and natural environments.'*[8] According to a much earliear definition, food and nutrition system is *"the set of operations and processes involved in transforming raw materials into foods and transforming nutrients into health outcomes, all of which functions as a system within biophysical and sociocultural contexts."*[9] Although we can find many attempts of defining the food system,[10] I would have liked to emphasise these two. The reason of presenting the first one is that it gives us a really broad definition and gives us an exemplificative list of forms of activity related to the food system. I say exemplificative, because – in my opinion – trade in food chain is such a factor that has a key role concerning the possible outputs of food system, so it could only be left out of the list because of the list's exemplificative nature. In the second definition, its second part is relevant to us from the point of view of systems theory, as it highlights the biophysical and social nature of the food system. This piece of information will be especially important to us later. Although even the first definition mentions the environment in which the food system is embedded, and we can also meet the natural (biophysical) and social environment, but in the second definition it is much more pronounced. The fact that the food system is a biophysical and social system is an essential element that needs to be emphasised in an extraordinary way, as it strongly influences the functioning of the whole system. The relationship between man and nature is the most determining factor.

Those structured phenomena belong to the food system that are directly related to whether or not the food system achieves its main goal, the food security. The interaction of these structured phenomena within the system affects the extent to which we are able to achieve food security: there are interactions that worsen the achievement of this goal, whilst others improve it. We have to clarify what food security means. The term is not to be taken here in the sense that e.g. the food in front of us must be free of pesticide residues or all hygiene requirements shall be complied with in the processing plant. In the sense that can be considered as the goal of the food system, it has a much broader context: it means having the appropriate quantity and quality of food available to everyone anywhere in the world. This will be explained in detail later, since food security can be considered as the main 'output' of the food system, which can be divided into several separable parts. I would like to note one more addition here: the food system is often associated with the concept of 'from farm

[6] Benkő, Kiss & Papp 1967, 602.
[7] Morel et al. 2000, 160.
[8] van Berkum, Dengerink & Ruben 2018, 6.
[9] Sobal, Kettel Khan & Bisogni 1998, 853.
[10] See Tansey & Worsley 1995; LaBianca 1991.

to table',[11] but I do not think it gives back the degree of complexity the food system has, therefore this metaphor is much more appropriate for illustrating the food supply system. You can see the illustration of the food system by van Berkum, Dengerink, and Ruben.[12]

2.2. The structure of the system

As for the structure of food system, of course its most obvious description can be given along the input-output scheme used for any type of systems. There are basically three main input groups: (1) socio-economic drivers, (2) food system activites, and (3) environmental drivers.

Socio-economic drivers can be divided into five groups: (a) markets, (b) policies, (c) science and technology, (d) social organisations, and (e) individual factors.

Food system activities include the following: (a) enabling environment, (b) food environment, (c) food supply system, (d) business services, and (e) consumer characteristics.

Environmental drivers encompass: (a) minerals, (b) climate, (c) water, (d) biodiversity, (e) fossil fuels, as well as (f) land and soils.

Among the above-mentioned inputs, food system activities can be considered the most important for a sociological research, which therefore I would like to elaborate on now.

Among food system activities, the food supply system plays a central role. As I mentioned earlier, in most cases this is identified with the food system, and they are considered the same. However, this approach is not appropriate. The food supply system can be identified with the concept 'farm to table', but this leaves a number of important factors out of the examination. The food supply system is, in fact, the food chain *sensu stricto*, which begins with agricultural production (crop and livestock production). This is followed by the storage, transport and wholesale of food, the processing and transformation of food, the retail and supply of food, and finally consumption itself.[13]

Enabling environment includes transport networks, regulations, institutional arrangements and research infrastructure. Food environment consists of food labeling, nutrient quality and taste, physical access to food and food promotion. Business services can be divided into the parts of extension services, agro-chemical services, technological support and financial services. The group of consumer characteristics refers to the knowledge, time, purchasing power and preferences of consumers.[14]

In order to illustrate the enormous network of connections that can emerge from these elements, I would like to give a few examples of some element of the food supply system: (a) Agricultural production, which includes all activities related to the cultivation of raw materials, is influenced by factors such as climate, land use opportunities, the spread of agricultural technologies or even various agricultural

[11] See Kneen 1989.
[12] van Berkum, Dengerink & Ruben 2018, 10.
[13] See the legal analysis of the food chain and its supervision: Reiterer 2016.
[14] van Berkum, Dengerink & Ruben 2018, 10–11.

subsidies. (b) Food processing and packaging involves the various transformations that are made with the raw material (e.g., fruits and vegetables) before it is sold on the market. These activities affect, for example, the nutrient content, the 'use by' date or even the appearance of foods. (c) Food distribution and trade are the activities by which food is moved from one place to another and placed on the market there. This is strongly influenced by transport infrastructure, various trade regulations or even storage requirements.[15]

Legal research may be helped by highlighting the input factors in the food system that directly represent the law. Here we can emphasise the issue of policy located within socio-economic drivers, as well as regulations within the enabling environment. Policy means the drawing up of different objectives on various levels. Global objectives concerning the food system are determined – among others – by the World Trade Organization, within which the liberalisation of agricultural markets is an important aim. On the level of the European Union, the most important and complex policy is Common Agricultural Policy, which tends to follow the path of interventional conceptions much more powerfully. On the national levels, the main determining actor is the high political sphere of the agricultural ministry of a state. The essence of the policy is that the outcomes of the food system take a fruitful and accepted direction at social level, however, in many cases this is not achieved, and unexpected turns are against the interests of some non-state actors in the food system.[16] Policies orientate the legal regulations sensu stricto, i.e. the statutes and the decrees of a state. This encompasses the whole food system, as 'the law' now regulates almost everything: what market behaviour can be shown by the actors in the food chain, how foodstuffs should be labeled, what environmental aspects must be taken into account during production, what food safety requirements a food processor must meet in its plant etc.

Another important piece of information, that I consider to be of paramount importance for the determination of the food system and its outcomes is that there has been a change of attitude, a paradigm shift. I could also say that different aspects are prioritised in the formulation of the policy than before. This policy shift is nothing more than a shift in the focus from the agricultural producer to the consumer.[17] This causes such a degree of deformation in the food supply system, that is, in the food chain, which, in my opinion, jeopardises the achievement of the outputs of the food system, i.e. certain elements of food security.

2.3. The objective of the system

Now I would like to move on to discussing the main output of the food system. As I mentioned earlier, this is food security. The basis of scientific research from the point of view of the food system is that the food system is a goal-oriented system that strives to achieve the highest possible level of food security. *'Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their*

[15] Ericksen 2007, 238.
[16] van Berkum, Dengerink & Ruben 2018, 15.
[17] Lang & Heasman 2004, 12.

dietary needs and food preferences for an active and healthy life."[18] Unfortunately, there are authors who consider the term 'food insecurity' to be more appropriate for today's relations, especially in developing countries.[19]

We can distinguish three aspects of food security, which are the following: (1) 'food availability': (a) in terms of cultivation, how much and what kind of food is available through local cultivation; (b) in connection with distribution, how the food is made (physically) available, i.e. in what form, when and to whom; (c) from the point of view of exchange, how much available food is procured through exchange mechanisms, such as barter, trade, sale or loan. (2) 'food access': (a) the purchasing power of households or communities relative to food prices (affordability); (b) the economic, social and political mechanisms that control when, where and how consumers have access to food (allocation); (c) the diverging demands of consumers in the light of their social, religious and cultural norms and values regarding different types of foodstuffs (preference). (3) 'food utilisation': (a) the nutritional value of the foods consumed in terms of calorie, vitamin, protein and other micronutrient intake; (b) the social value, i.e. the social, religious, cultural functions and benefits that food provides; (c) food safety, i.e. the harmful ingredients that are formed during cultivation, processing, packaging, distribution and marketing, and food-borne diseases such as salmonella.[20]

3. The re-structuring of food system based on Parsons

3.1. Introductory thoughts

The reason I chose Talcott Parsons to theoretically systematize the food system is simple. He was the first to introduce systems theory into sociology, so his work can be considered pioneer. Although Parsons states in the very first lines of one of his major works, in 'The Social System' that his work is strictly theoretical in nature, so he does not undertake empirical generalisations and methodological procedures, but he adds that the usefulness of the theoretical system will be revealed in empirical research.[21] Consequently, I would like to attempt to apply certain categories of Parsons to the food system.

There have been a number of critical remarks about the intelligibility of Parsons' writings, and it has also been formulated against him that he uses different terms for the same categories in his various works, which makes it even more difficult to interpret his works.[22] At the same time, this is not an obstacle for me, as I do not intend to use his theory to the smallest details; I only would like to work with his clearly crystallised conceptual system, which I can use for my own research.

[18] FAO 1996, 1.
[19] Ingram 2011, 417.
[20] FAO 1996.
[21] Parsons 1991, 1.
[22] Pokol 1987, 159.

First of all, it is worth making two basics about Parsons' theory. One of them is revealed by Niklas Luhmann: Parsons' theory can be called both a theory of action and a systems theory. *"The theory of action is said to be oriented more towards the subject, the individual, and therefore more capable of including psychic and even bodily states in sociology. In contrast, systems theory is seen as rather abstract and thus perhaps more capable of depicting macro-structures."* Then he adds: *"In any case, the view expressed by a number of representatives of the theory of action is that action and system are incompatible paradigms."*[23] According to Luhmann, this was disproved by Parsons: *"[i]t is possible to understand the entirety of Parsons' work as a sort of endless commentary on just one proposition, and this proposition reads: Action is system."*[24] This proposition is perfectly useable concerning the food system, because during the examination of food system we need to consider both individuals (e.g. agricultural producers) and macrostructures. The other that needs to be highlighted in relation to Parsons, and this is somewhat related to the conceptual difficulties already mentioned, is that it is very important to clarify at which level of abstraction we are working in Parsons' theory. I explain it in more detail below, and for the ease of understanding, I indicate in parentheses that which level of abstraction we speak of (see later Abstraction Level I, II and III).

3.2. The most important categories of Parsons

According to Parsons, four basic functions must be fulfilled in order to build action systems.[25] These four basic functions are called the AGIL schema. The letters constructing the acronym mean the following: (a) A for Adaption, (b) G for Goal Attainment, (c) I for Integration, (d) L for Latent Pattern Maintenance.

Parsons places these four functions in a cross-classificiation table: there is an external-internal axis and an instrumental-consummatory axis.[26]

The levels of abstraction mentioned above go back to the fact that Parsons first places the action system itself in the general paradigm of the human condition. The action system is placed in the field of Integration, that is, it performs an integrative function (Abstraction Level I). By reducing the level of abstraction, the four functions of the action system are fulfilled by: (a) The *behavioral system* fulfils the function of adaptation. (b) The *personality system* fulfils the function of goal attainment. (c) The *social system* fulfils the function of integration. (d) The *cultural system* fulfils the function of latent pattern maintenance. (Abstraction Level II)

Working as a sociologist, the social system is the most elaborate in Parsons' theory. By further reducing the level of abstraction, the four basic functions has to be also fulfilled in the social system. Concerning the functions within the social system Parsons' view is the following: (a) The *economy* fulfils the function of adaptation. (b) The *polity* fulfils the function of goal attainment. (c) The *societal community* fulfils the function of integration. (d) The *fiduciary system* fulfils the function of latent pattern maintenance (see in detail Luhmann, 2013). (Abstraction Level III)

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[23] Luhmann 2013, 7.
[24] Luhmann 2013, 7.
[25] Morel et al. 2000, 165.
[26] Morel et al. 2000, 166.

With regard to the analysis of the food system, the most relevant levels of abstraction are Abstraction Level I and III.

On Abstraction Level I, that is, in the general paradigm of human condition the action system was the only one to be placed so far – as a function fulfilling the integration. However, the existence of further systems as the environment of action systems is indispensible for the food system. Of these further systems, the telic system fulfilling the function of latent pattern maintenance is less relevant to us, but the physico-chemical system fulfilling the function of adaptation and the organic system fulfilling the function of goal attainment are of paramount importance.

The reason is simple. The food system is a system in which the physico-chemical system of Talcott Parsons, i.e. the nature and natural environment surrounding the human world, and the action system including its integrative social system determine the operation of the food system, as well as the position of those belonging to the system. As a sociologist, Parsons – self-evidently – dealt with the social system in detail, much less with the systems that surround the action system. At the same time, with regard to the food system, which relies heavily through the activity of agriculture on the environment and nature around us due to the flora and fauna and, above all, climatic conditions, as well as weather factors, we cannot ignore the systems that surround the action systems. It is crucial to understand that the food system is incomprehensible and even meaningless without these 'surrounding' systems.

3.3. Abstraction Level I

As I have already mentioned, if we look at the abstraction level of the general paradigm of the human condition, the integrative function is fulfilled by the action system. However, examining this first level of abstraction, now we should turn our attention for a short time to the other two systems: the physico-chemical and the organic system. Within the food system, the physico-chemical system is embodied by the input group of environmental drivers, namely the previously mentioned minerals, climate, water, biodiversity, fossil fuels, as well as land and soils. These factors significantly determine the functioning of the entire food system, as they are objectively existing factors, independent of mankind, that determine agricultural production everywhere and at all times. The agricultural production must be at the heart of the food system, as it is the *sine qua non* of the system. Here, I would like to draw attention once again to the frustrating fact already mentioned: food policy, which once focused on agricultural production and the producer himself, has shifted the focus to consumption and to consumers. This is, in my view, unacceptable because it is farmers who are the first to come into direct contact with the physico-chemical system, and because of the added value of their activities food can start its journey 'from the field to the table.' It can be said that this shift in emphasis coincided with the transition from the traditional agricultural model to the modern agricultural model, during which farmers gradually lost their importance even though there is no food without their activity. As food policy has been increasingly determined by giving preference to consumer interests, the balance between agricultural activity and the underlying natural environment has been overthrown, and the environmentally damaging, resource-utilising side of agriculture has become more and more apparent.

This, I think, will not be able to recover as long as the preferences of consumers, who are furthest from the physico-chemical system, are preferred to production. There is a system that has existed from the beginning: the natural environment, which system is utilised exclusively by the farmers who produce goods that can be consumed, and yet producers are in no position to dictate terms.

According to Parsons: *"[t]he physical world is the ultimate source of the generalized resources on which all living systems on the earth depend, and it provides the ultimate conditions of their functioning."*[27] The fact that Parsons interpreted the physico-chemical system as the adaptive function, i.e. he placed it into the external-instrumental field, offers an excellent solution regarding the food system. The reason for this is that the natural environment is an objective, external factor in relation to agricultural production, which plays an instrumental role, as it is a 'tool' in the hands of the farmer to produce food.

The organic system, in my interpretation, is thought at by Parsons as human in his own physiological reality. This includes, for example, breathing, eating, digesting, and so on. It can be presented most plastically by that example of Parsons which shows the relation of the organic system to the physico-chemical system: *"[o]rganically, probably the most basic relationship is human dependence, along with all other animals, on the plant world for food materials or, indirectly so far as he consumes animal foods, on the food animal's utilization of plants."*[28] The human in his own physiological reality, i.e. the human-organic system is placed into the external-consummatory field: it fulfils the function of goal attainment. Relatively speaking, it is more difficult to be placed in connection with the food system, but it is perhaps clear that without this system and without the relationship of dependency mentioned as an example, the food system would not be interpretable, as it is predominantly an action system, more narrowly a social system, the embeddedness of which in the physico-chemical system can become complete through the human-organic system.

If we turn our attention to the detailed analysis of the food system outlined above, it turns out that its core is provided by the food system activities. The food system activities, as a summary category, can correspond to the system of action itself as it is located in the general paradigm of the human condition. The similarity of these two categories is even provided by their names. Thus, the food system activities have an integrative function in the whole food system, i.e. it is placed in the internal-consummatory field. The goal of the food system as a whole, as well as the direct goal of the food system activities, is the food security already analysed; the food system activities can be placed within the food system as internal categories. And thus, the integrative function of the food system activities arises. Abstraction Level I can be closed here: (a) Food system activities fulfilling the function of integration of the food system as action system. (b) Environmental drivers fulfilling the function of adaptation of the food system as physico-chemical system. (c) Human in his own physiological reality fulfilling the function of goal attainment as human-organic system. (It is not specificly emphasised in the literature on food systems, since its existence is evident.) (d) The function of latent pattern maintenance is irrelevant regarding the food system, in my opinion.

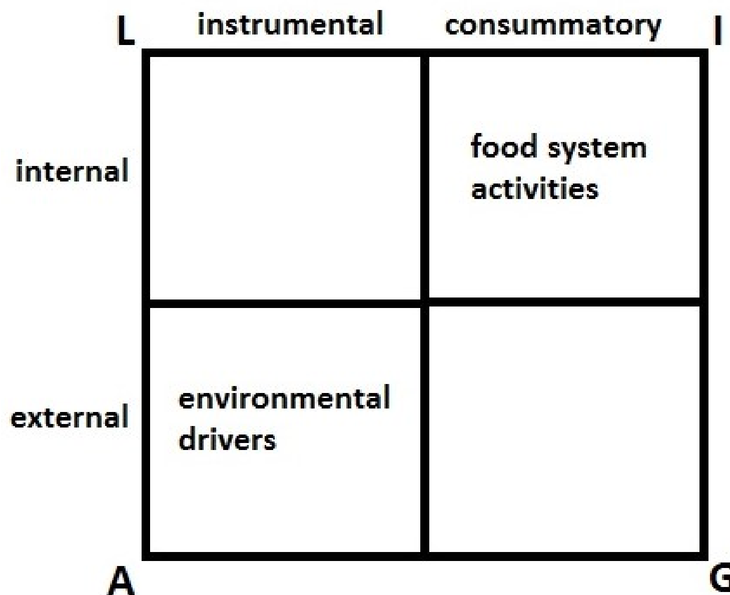
[27] Parsons 1978, 362.

[28] Parsons 1978, 385.

As can be seen, I did not place the third main input group (besides environmental drivers and food system activities), i.e. the socio-economic drivers at Abstraction Level I, because, in my view, they should be listed within the input group of food system activities. According to my view, the socio-economic drivers of the food system do not appear at the appropriate level of abstraction in the concept of food system. The elements of socio-economic drivers, such as markets, policies, science and technology, social organisations and individual factors, are all factors that can be analysed within the system of food system activities, i.e. beside the followings: enabling environment, food environment, food supply system, business services, consumer characteristics. I am analysing it in more detail, I would just like to draw attention to the fact that the food system, if we look at the Abstraction Level I, would have to present only two main input groups: (a) the food system activities with the function of integration that can be interpreted as an action system, and (b) the economic drivers with the function of adaptation that can be interpreted as a physico-chemical system.

(The telic system, which fulfills the function of latent pattern maintenance, has not been dealt with so far, while the human-organic system, which fulfills the function of goal attainment, is self-evident.)

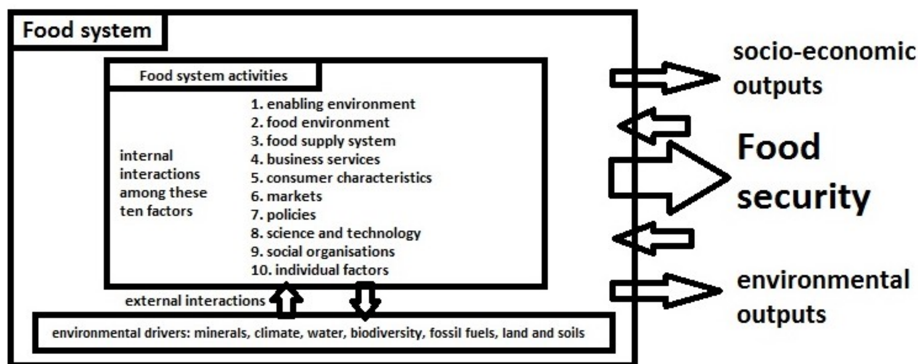
The socio-economic drivers (the third input group) shall be integrated into the food system activities, since at Abstraction Level I there is only the action system, i.e. the food system activities embedded in the physico-chemical system, i.e. the environmental drivers. These two systems are the relevant ones concerning the food system. Let us look at the cross-classification table of Abstraction Level I of Parsons, in which only the two most important systems of the food system are indicated.



3.3.1. Conclusion of Abstraction Level I

The systems theory of Parsons with its Abstraction Level I, which finds the place of the action system within the general paradigm of human condition, can provide the food system such a conceptual framework that makes its rectification possible. Thus, two systems are relevant to the food system: the action system and the physico-chemical system, to which the system of food system activities and the system of environmental drivers can be corresponded. The absence of a human-organic system, as well as a telic system in the construction of the food system does not mean that these functions are not performed within the food system, only that they are not relevant enough to be singled out when the food system is created.

Within the food system, the dependence of the action system on the physico-chemical system is extremely prominent, as environmental drivers have a decisive influence on the food system activities. Not indicating a separate group of socio-economic drivers and integrating it to the system of food system activities does not mean that there are no socio-economic outputs. Talcott Parsons' systems theory has created an opportunity for us to properly place the abstraction levels of the food system and make it look like the following:



3.4. Abstraction Level II

In the previous two chapters, I defined the food system activities as an action system, which is possible because the vast majority of systems can be perceived as an action system. I have previously indicated that, from the point of view of the food system, Abstraction Level I and III are of outstanding relevance. I have highlighted the need for the analysis of Abstraction Level I in the previous two chapters, since it can be used to demonstrate the fact that the food system activities within the food system are also determined by the environmental drivers. That is, at Abstraction Level I, I illustrated the relationship between the action system and the physico-chemical system, i.e. the embeddedness of the former in the latter.

However, Abstraction Level II, that distinguishes the cultural, social, behavioural and personality systems within the action system, is negligible to us because it seeks the answer to the following question: 'What guarantees the possibility of action as such?'[29] This is the question, the answer to which does not provide us with useful information for the analysis of the food system. Abstraction Level I highlighted what this action is embedded in. Abstraction Level III in the next chapter will provide an answer to the question that if the action in the general sense has its given conditions from Abstraction Level II, which elements of the food system activities fulfil the functions of Abstraction Level III.

To do this, however, we must decide that the systems fulfilling the different functions of Abstraction Level II correspond to which of the food system activities. The possibilities are the following: the cultural system with the function of latent pattern maintenance, the behavioural system with the function of adaptation, the personality system with the function of goal attainment, and the social system with the function of integration. I would equate the food system activities with the last one, that is, I would perceive the food system activities as a social system for two reasons. On the one hand, Parsons provides a definition of the social system in his work 'The Social System': *"[a] social system is a mode of organization of action elements relative to the persistence or ordered processes of change of the interactive patterns of a plurality of individual actors.'*[30] I think, this fits perfectly with the whole system of food system activities as a system, and anyway, matching the other three system options would seem extremely forced. On the other hand, the food system definitions mentioned in Chapter II clearly capture the food system as a social system, regardless of any examinations from the standpoint of a systems theory. It can be seen that perceiving it as a social system is located at a different level of abstraction than the fact according to which the food system also has certain elements of a biophysical system, but shifting abstraction levels is not a particular concern until the examination is from a systems theory perspective.

Thus, Abstraction Level II only adds to our analysis that within the food system, the food system activities can be perceived as a kind of social system.

3.5. Abstraction Level III

This is how we arrived at the perception of food system activities as a social system, which must be supplemented with the previously independent input group of socio-economic drivers discussed in the food system literature at an inappropriate level of abstraction. The four functions of the social system are fulfilled according to the following: (a) adaptation – economy; (b) goal attainment – polity; (c) integration – societal community; (d) latent pattern maintenance – fiduciary system.

Let us therefore see into which groups the elements within the food system activities can be classified, but first list the individual elements, including the socio-economic drivers classified here as new elements. These are the following: (1) enabling environment, (2) food environment, (3) food supply system, (4) business services,

[29] Luhmann 2013, 14.
[30] Parsons 1991, 15.

(5) consumer characteristics, and as new elements (6) markets, (7) policies, (8) science and technology, (9) social organisations, 10. individual factors.

If we detail these ten elements, we can see an extremely diverse picture of what belongs to each and every element based on the literature. Let us list these (some of them I have already mentioned earlier): (1) enabling environment: transport networks, regulations, institutional arrangements, research infrastructure; (2) food environment: food labeling, nutrient quality and taste, physical access to food, food promotion; (3) food supply system: agricultural production, food storage, transport and trade, food processing and transformation, food retail and provisioning, food consumption; (4) business service: extension services, agro-chemical providers, technological support, financial services; (5) consumer characteristics: knowledge, time, purchasing power and preferences; (6) markets: income and profits, labour and wages, trade, prices, market systems; (7) policies: land tenure, food and nutrition, labour and trade, environment, health and safety; (8) science and technology: farm inputs, food processing, food preparation, transport/storage, medical technology; (9) social organisations: media, social movements, household structures, education, health care; (10) individual factors: lifestyle, attitudes, beliefs, values, culture.[31]

The subelements of these ten elements show us an extremely differentiated picture, therefore it is not possible to insert these elements into one and only subsystem (economy, polity, societal community, fiduciary system) of the social system. In many cases, there are overlaps, as – for example – trade is a key part of the food supply system, but we also need to link trade activities to the element of policy from a different perspective. Furthermore, trade is also present as a determinant of the market, as the level of trade greatly influences market developments, prices, demand and supply. The list can go on almost indefinitely.

If an element (for example, the enabling environment) wants to be corresponded to any of the subsystems of the social system, we experience an obstacle. Within the enabling environment there is the legal regulation which fulfils the function of integration (as all types of legal regulation),[32] although the transport infrastructure should be perceived as fulfilling the function of latent pattern maintenance. Thus, we can say that within an element, the subelements fulfil different kinds of functions.

3.5.1. Conclusion of Abstraction Level III

As a result of the above-mentioned, it can be said that the system of food system activities perceived as a social system is so complex that in most cases, through its individual elements, it inevitably integrates and maps all functions. Here we could draw attention to Luhmann's vision: *"All this leads to the general theorem that the system can be repeated within itself, and that from each box four subordinate boxes, or from each partial system four – and always only four – other systems, may emerge in turn. The question of how far this can be pushed – whether, say, a system that consists of the sixteenth part of the original system can be divided up even further – is a practical question concerning the level of system complexity that can actually be*

[31] van Berkum, Dengerink & Ruben 2018, 14–16.
[32] Pokol 1987, 206.

reached and the complexity of the reality within which action occurs.'[33] And indeed, the system of the food system activities perceived as a social system, suggests this, so we have to draw a line in order to avoid further disintegration and, as a result, chaos. If we look at it through an example: the subelement 'transport infrastructure' can also be further detailed as road, water, rail and air transport, but such resolution of abstraction level no longer adds to our theory, but rather contributes to the loss of its meaning. Thus, we must stop there that the system of food system activities can be perceived as a complex social system, in which the individual elements can, in most cases, correspond to several of the functions of the social system.

As a consequence of the above, I therefore believe that by analysing the food system activities as a social system, the following general concepts can be linked to each social system function of the food system activities: (a) Economy fulfilling the function of adaptation is equivalent to the economy of agriculture. (b) Polity fulfilling the function of goal attainment is equivalent to the agricultural policy. (Polity is understood here as the process of government, which, concerning the food system, is orientated by agricultural policy.) (c) Societal community fulfilling the function of integration is equivalent to the legal regulation of agriculture in a broad sense. (d) Fiduciary system fulfilling the function of latent pattern maintenance is equivalent to agricultural culture as an ethos.

Let us go through these now. We first turn our attention to the function of integration, which is called ' societal community' within the social system. It has already been determined earlier that the integrative function of the action system is fulfilled by the social system (Abstraction Level II). *'It must be conceded that we encounter a peculiar composition here, insofar as we are dealing with a function of integration that occurs within the function of integration. After all, the social system already serves to integrate the action system. And now we have a situation in which the same function is repeated within this function. The reason for this can be seen when we pose the question of how the social system itself can be integrated – that is, how it is that the social system all by itself can motivate actions in the service of purely social functions.'*[34] Most generally, modern social systems seek to achieve and perform this through legal regulation. Thus, although the Parsonsian term 'community' is a bit misleading, it is legal regulation that can be classified as one that appears as a factor with an integrative function. Thus, law is a general normative code that regulates the actions of the members of society while also defining their situation,[35] that is, law integrates. Consequently, the integrative function of the food system is performed by legal regulations related to the elements of the food system. Whether these legal regulations include solely the rules of a specific branch of law (such as agricultural law) is an irrelevant question in the present case, although I think we need to answer 'no'. If we acknowledge that the general rules of civil law also apply in the process of buying and selling between actors in the food supply chain, it becomes clear why I mentioned the legal regulation of agriculture in a broad sense as the factor ensuring integration.

[33] Luhmann 2013, 13.
[34] Luhmann 2013, 35.
[35] Némedi 1988, 97.

I used the expression 'broad sense' because the legal regulation of agriculture can be directly corresponded to the field of agricultural law, but civil law, as well as administrative law serve as the underlying legal material and branch of agricultural legal regulation.

Concerning the fiduciary system fulfilling the function of latent pattern maintenance Parsons *"envisions a culture that has its own dynamic and within which change happens – for example, in much longer intervals […] than can be reproduced in the social system."*[36] In my opinion, it tends to display some sort of a more pathetic category in the case of the food system, which is why I wrote that it is the agricultural culture as an ethos. It must be emphasised that the English word 'agriculture' originates from the Latin word *'agricultura'*, which has two main elements: *ager* means field, and *cultura* means cultivation. *Cultura* comes from the verb *'colere'*, which also means 'to take care of' in English. In the case of agricultural culture, we can talk about value obligations, which latently transcend the values of the given community and, through this, its relationship with agriculture. A good example of this is the respecting of certain animals in some religions as sacred, which totally defines the agricultural culture of a given community. *"Religion and food are inextricably linked. Many types of food have special religious significance, for example 'bread' in Christianity is linked to ideas of sacrifice, salvation and the ceremony of the Last Supper, which is reenacted in Christian religious ceremonies every Sunday."*[37]

The following can be said about agricultural policy as the factor of fulfilling the function of goal attainment of the food system activities. Agricultural policy (as a branch of economic policy) can best be grasped by its purpose, as economic policy can also focus on agriculture because it is also in the national interest to improve the situation of people living from agriculture in addition to increasing production yields. Social justice requires that economic policy ensure a fair standard of living for all productive strata; and if one of them is unable to achieve this on its own, the state must intervene by burdening other branches of production and perhaps even at the expense of the productivity of the entire national economy.[38] These are serious words, but they are very much in line with the privileged role of agriculture, which is still valid today. Agriculture is the source of our food. If we look at the example of Hungary, we can say that the country has not only remarkable land resources, but also significant water resources,[39] due to which agriculture can function as a breakout point for Hungary.[40] As the thoughts cited show, there is a strong national interest behind agricultural policy that varies by age and state. Recently, however, the agricultural policy objectives have crossed national borders, as in the case of Hungary as well, due to our membership in the European Union and global international organisations EU and global agricultural policy interests are emerging, which are embodied in various legal documents. Thus, agricultural policy is now present at three levels: national, EU and global.

[36] Luhmann 2013, 21.
[37] Smith 2009, 21.
[38] Ihrig 1941, 185.
[39] See the detailed legal analysis of Hungarian water law: Szilágyi 2013; Szilágyi 2016, 70–82; Szilágyi 2018; Szilágyi 2019; Szűcs & Ilyés 2019, 299–324.
[40] Szilágyi 2017, 17–18.

The function of adaptation is fulfilled by the economy of agriculture. This is best embodied by the food supply system, where economic processes must be emphasised. In Luhmann's words: *"The differentiation of this complex occurs always when long-term adaptations of the action system to environmental situations are at stake - that is, to put it crudely, when capital is created, which is to say, when a monetary mechanism is introduced. This monetary mechanism ensures that one is always capable of reacting to hitherto unforeseen situations in the environment by using capital in order to, say, produce or buy something, to draw resources from the environment or, these days, to remove the refuse."*[41]

"Two of the imperatives – pattern maintenance and integration – are concerned with normative issues and two – adaptation and goal attainment – are concerned with the non-normative."[42] The normativity of agricultural culture comes from moral considerations, the normativity of legal regulation comes from the immanent core of law, i.e. the fact that we have to obey the law. The economy of agriculture and the agricultural policy do not have normative content.

These above-mentioned categories fulfilling the four functions, i.e. the economy of agriculture, the agricultural policy, the legal regulation of agriculture in a broad sense, the agricultural culture as an ethos, unify and include the subelements of these 10 elements, so the subelements are not needed to be put under a certain function, since a subelement can incorporate more than one function within itself. This shows us that we are facing enormous complexity. Let us take a look at the system of food system activities at Abstraction Level III based on Parsons' cross-classification table:

L	instrumental	consummatory	I
internal	agricultural culture	legal regulation of agriculture in a broad sense	
external	economy of agriculture	agricultural policy	
A			G

[41] Luhmann 2013, 18–19.
[42] Holmwood 2014, 87.

4. Final conclusion

As I have already explained in the chapter 'Conclusion of Abstraction Level I', Talcott Parsons' system theory provided an opportunity to adjust the content of the food system on a theoretical level. In the chapter 'Conclusion of Abstraction Level III' I named special categories in connection with the food system, which can be thought of as classes fulfilling the different functions within the food system based on Parsons' theory. I do not intend to repeat these again.

What I find important to emphasise, however, is that Parsons' systems theory or action theory categories are indeed also applicable to the food system, and this is a tremendous scientific achievement from Parsons. He created abstract concepts that can be utilised across disciplines and can be used to review and adjust any system. Perhaps it can be said that neither before, nor after Parsons did anyone create such a comprehensive, yet scientifically and empirically usable systems theory.

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Attila DUDÁS*

Legal Frame of Agricultural Land Succession and Acquisition by Legal Persons in Serbia**

Abstract

The rules on the succession and transfer of agricultural land in Serbia may be characterised as liberalistic. There are no special inheritance regimes applicable specifically to the succession of agricultural land. There is only the possibility of an heir, engaged in agricultural production, to request that the court name him the sole heir of the agricultural land, with the obligation to compensate others. Similarly, the transfer of agricultural land by inter vivos transaction is also essentially devoid of any serious legal restrictions, either for natural persons or for legal entities. There is no cap on the acquisition of ownership, nor must the buyer prove that he or she is, in fact, engaged in agricultural production. Serbian law excludes the possibility of foreign persons or legal entities acquiring ownership of agricultural land. According to the Stabilisation and Association Agreement concluded with the European Union, it was expected that Serbia would gradually enable natural persons and legal entities from the member states of the EU to acquire ownership of agricultural land by no later than 1 September 2017 when the four-year period for the implementation of this obligation expired. Seemingly, in order to fulfil the obligation, the Serbian National Assembly amended the Law on Agricultural Land in August 2017. The amendments explicitly regulate under which conditions natural persons and legal entities from the EU may acquire ownership of agricultural land. However, even a superficial reading of the new regulation reveals that the opposite effect has been achieved. Instead of enabling natural persons and legal entities from the EU to obtain ownership of agricultural land on equal footing with domestic natural persons and legal entities, the legislature created a set of special conditions applicable only to the former but not to the latter. Moreover, the conditions are so strict that no legal entity could meet them, while natural persons only hypothetically could, if at all. Therefore, it seems that the 2017 amendments to the Law on Agricultural Land hardly aimed to implement the Stabilisation and Association Agreement.

Keywords: agricultural land, agricultural holding, family farm, acquisition of ownership by legal entities, acquisition of ownership by EU nationals.

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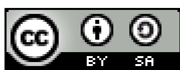

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1. Registration of agricultural farms/holdings

The basic statutory act that regulates agriculture in Serbia is the Law on Agricultural Production and Rural Development. This law distinguishes different categories of persons that may be engaged in agricultural production. The broadest category is agricultural holding/agricultural farm (Serb. *poljoprivredno gazdinstvo*), which is defined as a production unit in which a company, agricultural cooperative, public institution or other legal person, private entrepreneur, or individual agricultural producer maintains agricultural production.[1] The family agricultural holding or, simply, family farm (Serb. *porodično poljoprivredno gazdinstvo*) is a subtype of agricultural holding, where an individual agricultural producer together with the members of his or her household maintains agricultural production.[2] The family farm must have its representative or holder (Serb. *nosilac*), which is defined in the law as a natural person who is an individual agricultural producer or an entrepreneur maintaining agricultural production and registered as such in the registry of agricultural farms.[3] A member of the family of the holder of a family farm is also defined by the law: an adult member of the holder's household who is regularly or occasionally engaged in the agricultural holding and is, as such, registered in the registry upon his or her statement. A minor member of the holder's household becomes a member of the family agricultural holding upon the statement of consent of his or her parents or statutory guardian, respectively.[4]

The law differentiates two types of family farms based on their economic power: commercial and non-commercial holdings. A commercial family farm is market-oriented, while a non-commercial farm is non-market oriented and the representative of which is a beneficiary of the agricultural pension scheme.[5]

The agricultural holding itself does not have the status of a separate subject of law; that is, it does not have its own juridical personality. Hence, it is not a separate subject of tax obligations or the obligation to pay contributions to mandatory social insurance.[6] The subject of tax and social security contributions is the legal person who registered the agricultural holding or the natural person or entrepreneur as the holder of the holding, respectively.

The pension of the natural person, being a holder or member of a family farm, depends on the contribution of the mandatory social insurance that they have paid in or that has been paid in by the legal entity on behalf of which the natural person acts. This means that the obligation to pay the contribution does not depend on the existence and registration of agricultural holdings.

[1] Law on Agriculture and Rural Development, Art. 2, s. 1, 4).
[2] Ibid. Art. 2, s. 1, 5).
[3] Ibid. Art. 2, s. 1, 6).
[4] Ibid. Art. 2, s. 1, 7).
[5] Ibid. Art. 16.
[6] On different aspects of the taxation of agricultural production, see Milošević et al. 2020, 6–12.

2. Transfer of agricultural holding/family farm

Agricultural holdings cannot be transferred as such. Registering an agricultural holding does not affect ownership rights over the land: the owner of the land remains the subject of law, a natural or legal person that established and registered the holding. This means that the land, which is registered under a given agricultural holding, may be transferred as a matter of course by inter vivos transactions, under the general rules of civil law, via a contract concluded by their owner, that is, by the natural or legal person.

The only exception to non-transferability of the agricultural holding itself is envisaged by the Ministerial Decree on entry in the Registry of Agricultural Holdings and Renewal of Registration, as well as on the Conditions for Passive Status of Agricultural Holdings, and only with respect to registered family farms.[7] It prescribes the possibility that the members of a registered family farm, in case of the demise of its nominated holder, can request the registry of agricultural holdings to have the farm transferred to one of its members elected by the members of the family farm, that is, to request to have him or her registered as the nominated holder of the family farm, without losing the identity of the farm (registration number, address, banking accounts, etc.).

Establishing or dissolving an agricultural holding has no effect on the ownership and leasehold rights of its members. In establishing an agricultural holding, the holding does not become the owner of the land of its members.

3. Succession of agricultural land on grounds of dissolution of marriage or family household and on grounds of inheritance

Family farms in Serbia are not recognised as subjects of law in terms of proprietary relations or marital and inheritance law. However, the law takes into consideration that there may be situations in life in which spouses or members of the same household live and acquire property together, but the property is regularly registered under the name of one person, usually the husband in the case of a simple family, or, in the case of an extended family, most often, the eldest male member of the household. This practice is most common in families in rural areas, where many generations live and work on the family estate together, accumulating wealth and acquiring new tiles of agricultural land. The convoluted perplexity of legal relationships between spouses, partners in common-law marriage, or members of family households becomes legally relevant when the marriage, common-law marriage, or household dissolves, or one or more members wish to leave it. There are three statutes in Serbian law that offer rules applicable to such situations. First, the Law on the Basis of Ownership and Proprietary Relations prescribes that a special form of joint property (joint property with undivided but, if need be, divisible shares of the joint owners) may exist if envisaged by a special law.[8] This form of ownership with a plurality of owners should be distinguished from co-ownership, in which the share of each co-owner is precisely determined.

[7] Ministerial Decree, Art. 4, s 2. and 3.

[8] Law on the Basis of Ownership and Proprietary Relations, Art. 18.

The special law in this regard is the Family Act, which offers rules applicable to several situations in which more people, closely related one to another, live in the same household and acquire assets jointly, but the real estate is usually registered only under the name of one of them. Most typically, this happens with spouses in the case of marriage and partners in common-law marriage. They live in the same household and acquire assets together, but the assets, especially real estate, are usually registered under the name of only one of them, most commonly that of the husband or male partner, respectively. The basic tenet of Serbian patrimonial law is that spouses acquire assets in joint matrimonial ownership. This applies to all assets acquired by work (including all types of work, even household activities).[9] The exclusive property of spouses comprises the property they had already owned before the marriage was concluded as well as the assets they acquired during the marriage gratuitously (by testament, donation, etc.) or by the dissolution of joint matrimonial property.[10] To protect the party with the weaker position in the marriage, typically the wife in rural areas, the Family Act prescribes a presumption that all real estate registered under the name of one spouse is considered joint matrimonial property, even if only one of them appears as the sole owner in the Real Estate Registry.[11] All of these rules are appropriately applicable to partners in common-law marriages as well[12, 13]. The dissolution of joint matrimonial property may have a serious impact on ownership and the right to use agricultural land. Upon the dissolution of the marriage, the spouses will acquire a divided co-ownership, usually in equal shares, regardless of whether they are both engaged in agricultural production. The co-ownership between a spouse who is an agricultural producer and one who is not distorts the efficient functioning of ownership rights, thus restraining the transfer or use of agricultural land. This caveat has been taken into account in the Family Act, which prescribes that in the case of dissolution of joint matrimonial property, each spouse may request that the court establish his or her exclusive ownership over assets that are required for their profession or trade on the account of their share in the joint matrimonial property.[14] This means that the court will compensate the other spouse by granting exclusive ownership or a higher ownership share in other assets constituting joint matrimonial property. The Act refers only to assets required for conducting a trade or profession. It does not explicitly name agricultural production. However, there is no reason that agricultural production would not qualify as a trade or profession in this respect.

The complex proprietary relationship between spouses becomes even more complicated when members of their narrower or wider family participate in the acquisition of property.

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[9] Family Act, Art. 171.

[10] Ibid. Art. 168.

[11] Ibid. Art. 176, s. 2.

[12] Ibid. Art. 191.

[13] At present, there is no civil union or registered partnership in Serbia, only the traditional common-law marriage alongside the regular marriage. A common-law marriage under the Serbian Family Act exist if a man and a woman who are not in marriage but between whom there are no obstacles for concluding one, live in lasting matrimonial-like community. Family Act, Art. 4, s. 1.

[14] Family Act, Art. 184.

Until the 19th century, it was very common in the history of Serbian (and most South Slavic) nations that people lived in so-called extended family groups or extended family communities (Serb. *porodična zadruga*, Ger. *Hauskommunion*), in which more families linked by kinship lived and worked together, predominantly making their living from agriculture. In the extended family group, the proprietary relationships were largely regulated by customary law[15] and were hallmarked by the inferior legal position of female members[16].

Although extended family groups gradually disappeared in the 19th century, the tradition of living and accumulating wealth together in wider family groups outlived them to some extent. For this reason, the Family Act prescribes that assets acquired through work by spouses or partners together with other members of their family household during the time when they lived together in that household represents their joint property.[17] Blood relatives, relatives by marriage, and adoptive relatives of the spouses or partners who live with them in the same household are considered members of a family household.[18] The Family Act prescribes the appropriate application of rules pertaining to the proprietary relations between spouses, except for the rules on the registration of ownership in the registry of real estate and the presumption of equal shares of the members of the household in joint ownership.[19] With respect to all legal relationships arising between the members of the household that are not governed by the Family Act, the Act prescribes the appropriate application of the rules of the Law on the Basis of Ownership and Proprietary Relations and the Law of Obligations.[20]

A similar position has also been adopted in the Law on Inheritance. There is no special set of rules pertaining to the inheritance of agricultural land in the Law on Inheritance in the sense of a special intestate inheritance regime applicable to the succession of agricultural land. However, the law considers that, in the case of succession of agricultural land, not all heirs might be interested to the same degree to use it for agricultural production. Therefore, it prescribes that upon the request of an heir who lived in the same household with the deceased, the court may decide, if it finds it appropriate, that certain assets or groups of assets and rights are to be inherited by that one heir, which would otherwise belong to others. On the other hand, the court obliges that one heir to reimburse those others for the value of such assets or rights, within a deadline determined by the court in light of the circumstances of the given case.[21] Until the reimbursement of their value, the other heirs have a statutory lien on the assets and rights inherited by the heir who lived in the same household as the deceased.[22] If the heir fails to pay the reimbursement by the deadline determined by the court, the other heirs may request payment or a transfer of assets and rights that they

[15] Kulauzov 2010, 281–289.
[16] Kulauzov 2008, 807–816.
[17] Family Act, Art. 195, s. 1.
[18] Ibid. Art. 195, s. 2.
[19] Ibid. Art. 195, s. 3.
[20] Ibid. Art. 196.
[21] Law on Inheritance, Art. 232, s. 1.
[22] Ibid. Art. 232, s. 2.

would otherwise inherit.[23] This general regulation applicable to numerous types of assets and rights is further enforced by a separate regulation applicable only to agricultural land. The law, namely, prescribes that if the inheritance comprises agricultural land, the court is obliged to warn the agricultural producer who lived together in the same household with the deceased that he or she is entitled to request to have his or her inheritance of ownership of the agricultural land declared.[24] The succession of agricultural land between family members is further supported by tax regulations. The Law on Property Taxes envisages a tax exemption for inheritance or donation if the heir in the second order of succession or the donee, who would, in the case of inheritance, belong to the same order of succession, is engaged in agricultural production if they inherit or receive as a gift the property serving farming purposes for them and if they have lived with the decedent or donor in the same household for at least one year prior to the decedent's death or receiving the gift, respectively.[25]

The succession of ownership of agricultural land is thus accomplished in two steps. The first is to divide the joint property between spouses or partners or members of the extended family if there is such property. Once any joint property has been divided by the application of the rules of the Family Act, the agricultural land constituting the bequest may be transferred to the heir who lived together with the deceased and is engaged in agricultural production according to the rules of intestate succession of the Law on Inheritance.

Aside from the rules of intestate succession, the Law on Inheritance provides broad freedom of the testator in terms of disposition over their assets at their best consideration. The only restriction in respect of the freedom of testamentary disposition is the rules of compulsory share of inheritance. Heirs who are the descendants and the spouse of the testator would acquire half of the share under the regime of intestate succession, while other heirs would acquire one third. Taking into account the perplexity of legal relationships that may arise between the heirs, it is prudent for the testator to allocate by testament the agricultural land to heirs who are already engaged in agricultural production or have the best prospects to do so.

The registration of ownership, acquired by inheritance, is conducted by the court or a public notary. Once the competent organ delivers the inheritance degree, the registration of title in the Real Estate Registry is accomplished ex officio. There is no ownership limit for agricultural land with respect to domestic natural persons or legal entities.

4. Transfer of agricultural land by contract

4.1. General rules on the transfer of agricultural land by contract

As it is commonly accepted in European civil law systems, particularly in countries following the traditions of Austrian law, in general, a contract alone is not capable of transferring ownership. It is merely the valid legal ground (*iustus titulus*) of

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[23] Ibid. Art. 232, s. 3.
[24] Ibid. Art. 233.
[25] Law on Property Taxes, Art. 21. sec. 1. subsection 2).

the acquisition of ownership, based on which the means of acquisition (*modus acquirendi*) must also be accomplished. With respect to agricultural land, as is the case with all real estate, the means of acquisition is the registration of the ownership of the buyer in the Real Estate Registry. This system of acquisition of ownership is commonly denoted as the *titulus-modus system*.[26] However, it is not being implemented clearly and consistently in Serbia, in some cases due to the conclusion of contract and in others because the possession of the real estate determines whether the buyer acted in good faith, which is also a condition of acquiring ownership.[27] Regardless of its distortions, the system could still be considered a sort of titulus-modus system or, at a minimum, a mixed system that is predominantly based on the logic of titulus-modus.

The conditions of the validity of contracts aimed at the conveyance of real estate are set out in the Law on the Transfer of Real Estate and partially in the Law on Public Notaries, which are considered exceptional in relation to the general rules of contract law envisaged by the Law on Obligations. The Law on the Transfer of Real Estate prescribes that all contracts aimed at the conveyance of ownership of real estate, including agricultural land, must be concluded in a strict from of a notarial deed, specifically in a form of notarial solemnisation.[28] Failing to comply with the requirement concerning the form results in the nullity of the contract.[29]

Solemnisation or *notarial confirmation* of a contract means that parties draft the text of the contract (or have an attorney prepare it for them), and the notary public reads it out to the parties at a hearing. If the parties confirm the text of the contract as read out by the notary public, they sign it, and the notary issues a certificate of confirmation, which is to be attached to the contract signed by the parties. Solemnisation is, therefore, more than a simple certification of signatures of the parties but less than a notarial deed in the narrow sense, whereby the notary him- or herself prepares the text of the contract. After the conclusion of the contract, the notary public ex officio sends its copy in electronic form to the competent tax authority[30] and to the court administering the registry for contracts of transfer of real estate[31]. In addition, the notary public ex officio sends to the Real Estate Registry the request for the registration of the title of the buyer.[32]

The most important peculiarity of the sale of agricultural land, in contrast to other real estate, is that the Law on the Transfer of Real Estate envisages a statutory right of pre-emption. The pre-emption right in relation to agricultural land has a long tradition, not only in Serbia but in other countries that belonged to the former Yugoslavia as well.[33] The topicality of the need to restrict the free market for agricultural land using a right of pre-emption is supported by the fact that Hungary

[26] Živković 2015, 112.
[27] Živković 2015, 125.
[28] Law on the Transfer of Real Estate, Art. 4, s. 1.
[29] Ibid. Art. 4, s. 4.
[30] Ibid. Art. 4v, s. 2.
[31] Ibid. Art. 4v, s. 1.
[32] Law on the Procedure of Registration with the Cadastre of Real Estate and Utilities Conduits, Art. 22, s. 1, 2.
[33] As for Slovenia S. Avsec 2020, 10.

recently introduced rules that are, in comparison to Serbian legislation, much more nuanced and elaborate.[34]

The owners of neighbouring lots have a pre-emptive right if the owner of agricultural land decides to sell it.[35] The owner is obliged to make an offer to the owners of all neighbouring lots.[36] The offer has to be made in writing, contain all terms of the prospective sale[37], and be sent by registered mail[38]. The beneficiary of the right of pre-emption has 15 days to accept or reject the offer.[39] The acceptance of the offer is likewise to be sent by registered mail to the seller.[40] If the beneficiary fails to notify the seller in time and by the means envisaged by the law or does not react to the offer in any way, the seller is entitled to sell the agricultural land to any third party, but not under more favourable terms.[41] If the seller fails to notify the owners of the neighbouring lots or does so in infringement of the aforementioned procedure, the beneficiary may request the court to have the contract with the third party declared ineffective towards him or her and transfer the ownership to him or her under the same conditions.[42] The beneficiary may exert this right within two years from the day of the formation of the contract and within 30 days from the day he or she gained knowledge thereabout.[43] The major shortcoming of these rules is that the parties, especially the seller, are not obliged to prove in the process of formation of a contract for the notary public that the beneficiaries of the right of pre-emption have been duly notified. Moreover, the notary public has no authority to determine whether the beneficiaries have actually been notified. He or she will merely state in the confirmation of solemnisation that a pre-emptive right exists because the object of the sale is agricultural land. Therefore, the existence of a right of pre-emption is a contractual risk for the seller, that is, the owner of the agricultural land, and the third-party buyer, but it does not preclude the formation of a contract nor the transfer of the title in the Real Estate Registry. The parties simply need to 'wait out' the time limits of two years and 30 days, respectively, as when they expire, the sale, regardless of the infringement of the right to pre-emption of the owners of the neighbouring lots, becomes legally perfect.

4.2. Acquisition of agricultural land by domestic and foreign legal persons

The Law on the Basis of Proprietary Relations sets out no special requirements for domestic legal persons with respect to the acquisition of agricultural land based on contract.

[34] See for example Olajos 2017, 92.; Raisz 2017, 68–74; Csák & Szilágyi 2013, 215–233; Szilágyi et al. 2019, 40–50, etc.
[35] Law on the Transfer of Real Estate, Art. 6, s. 1.
[36] Ibid. Art. 6, s. 2.
[37] Ibid. Art. 7, s. 1.
[38] Ibid. Art. 7, s. 4.
[39] Ibid. Art. 7, s. 3.
[40] Ibid. Art. 7, s. 4.
[41] Ibid. Art. 8.
[42] Ibid. Art. 10, s. 1.
[43] Ibid. Art. 10, s. 2.

All domestic subjects of law, being natural or legal persons, may acquire ownership of agricultural land without any restrictions. There is no cap envisaged in the acquisition of agricultural land or special duties applicable only to legal persons.

The situation is rather different with respect to foreigners. Under the Serbian Constitution, foreign nationals are considered equal to domestic citizens in terms of acquisition of rights and performance of duties unless there is an exception provided by the Constitution or a statute.[44] Such an exception is prescribed by the Law on the Basis of Proprietary Relations. It sets out a different regime of acquiring the ownership of real estate by foreign nationals. In general, these rules pertain to all types of real estate. There are no special rules pertaining to agricultural land in this statute. It prescribes that a foreign natural or legal person conducting activity in Serbia may obtain ownership of real estate, provided reciprocity exists and that the real estate is necessary for the activity they conduct in Serbia.[45] Both conditions, namely the existence of reciprocity with the state from which the foreign natural or legal person has nationality and the requirement that the real estate is necessary for conducting their activity in Serbia, must be fulfilled and proven in each individual case. The law prescribes that special rules excluding foreign nationals from acquiring ownership of real estate may be introduced by special statutes pertaining only to specific areas of Serbia.[46] A contract by which ownership is transferred onto foreign nationals could be confirmed by the notary public only when the aforementioned conditions are fulfilled.[47] The Ministry of Justice provides information on whether reciprocity exists with the state of foreign nationals' nationality. The fulfilment of the other requirement, that is, that the real estate is necessary for the legal entity's activity in Serbia, is to be determined by the Ministry of Commerce.[48]

Before one rushes to a conclusion from the labyrinthine logic of the Law on the Basis of Proprietary Relations that foreigners may acquire ownership of agricultural land, if it is required for their activity in Serbia, the Law on Agricultural Land short-circuits this riddle. It explicitly states that no foreign natural person or legal entity may acquire ownership of agricultural land except for EU nationals under the terms prescribed by the same statute or by the Agreement on Stabilisation and Association.[49] Therefore, non-EU foreign natural or legal persons cannot obtain ownership of agricultural land in Serbia.

[44] Constitution of the Republic of Serbia, Art. 17.
[45] Law on the Basis of Proprietary Relations, Art. 82a, s. 1.
[46] Ibid. Art. 82a, s. 2.
[47] Ibid. Art. 82v, s. 1.
[48] Ibid. Art. 82v, s. 4.
[49] Law on Agricultural Land, Art. 1, s. 4.

4.3. Acquisition of agricultural land by EU nationals

As in all countries in the process of accession to the European Union,[50] the question of enabling natural and legal persons from the European Union to obtain ownership of agricultural land became one of the most debated issues in Serbia. The negotiations with the EU began in 2005, and the Stabilisation and Association Agreement was concluded in 2008; it entered into force on 1 September, 2013, after the necessary approvals and ratifications had been obtained.[51] The Agreement prescribes the duty of the Republic of Serbia, as from the entry into force of the Agreement, to 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. The Agreement obliges Serbia to progressively, within four years from the entry into force of the Agreement, adjust its legislation concerning the acquisition of real estate in its territory in order to ensure nationals of the member states of the European Union the same treatment as compared to its own nationals.[52]

Just before the expiry of the mentioned period of four years, on 28 August, 2017, the Serbian National Assembly adopted amendments to the Law on Agricultural Land, the aim of which was to implement the aforementioned article of the Agreement. The legislator inserted a new article[53] into the text of the statute, which seems more to limit than to enable EU nationals to acquire ownership of agricultural land. It applies to all cases of obtaining ownership based on contract, be they onerous or gratuitous.[54]

An EU national may acquire ownership of agricultural land in Serbia under the following conditions: (1) He or she must reside in the territory of the same municipality in which the agricultural land is located; (2) must cultivate that same land for at least three years; (3) must have a registered family farm in Serbia without interruption for at least ten years, in which he or she is the registered representative/holder of the farm; (4) must be in the possession of necessary agricultural machines and equipment.[55]

Under these conditions, the agricultural land in private ownership may be obtained by an EU national if it: (1) is not declared by special statute as a building plot; (2) cannot be considered a natural resource; (3) is not a military establishment or a protective strip around one.[56]

[50] As for the complexity of legal issues arising from the acquisition of agricultural land in one EU country by the nationals of other member state of the EU, see especially: Szilágyi 2016, 1427–1451.; Szilágyi 2017, 1055–1072.
[51] As for the adoption of the Agreement and its impact on the legal order of Serbia see especially: Stanivuković & Đajić 2008, 391–412.
[52] Stabilisation and Association Agreement, Art. 63, s. 3.
[53] Law on Agricultural Land, Art. 72đ.
[54] Ibid. Art. 72đ, s. 1.
[55] Ibid. Art. 72đ, s. 2.
[56] Ibid. Art. 72đ, s. 3.

Moreover, the law prescribes that the object of acquisition may not be any agricultural land located in the 10km-wide strip along the borders of Serbia,[57] with the exception of agriculture land originating from the process of restitution of nationalised property.[58]

Even if these conditions are met, an EU national may not obtain more than two hectares of agricultural land.[59]

The Ministry of Agriculture determines if the statutory conditions are met.[60]

The law states explicitly that all three time periods are computed from the day of entry into force of the Law, that is, as of 1 September, 2017.[61] This means that no EU national may obtain ownership on agricultural land prior to 1 September, 2027. Theoretically, this is the first day when the time period of 10 years of having a registered agricultural farm in Serbia may expire.

In addition, the Republic of Serbia has the right to pre-emption.[62] This means that even if an EU national satisfies all statutory conditions, the Republic of Serbia may exercise its right to buy the agricultural land under the terms as offered to the EU national.

Finally, the Law states that a contract aimed at the acquisition of agricultural land by an EU national is deemed null and void if any of the statutory conditions are not met.[63]

A conclusion may be drawn that the amendments of the Law on Agricultural Land from August 2017 do not explicitly deprive legal persons from the EU from the possibility of obtaining ownership over agricultural land. However, only natural persons who are nationals of a member state of the EU may appear as buyers as legal persons cannot have family farms, nor can a legal person be registered as the representative of a family farm. Even the possibility of acquiring ownership of agricultural land by EU citizens is a theoretical contingency rather than a real possibility. Until 1 September, 2027, no natural person who is a citizen of the EU may acquire agricultural land in ownership at all, but even after this date, the prospects of acquisition of ownership are still very slim.

4.4. Establishing a domestic legal person as a means to circumvent the prohibition of the acquisition of agricultural land by foreigners

The restrictions in respect to acquiring ownership of any real estate, including agricultural land, by foreign natural or legal persons can easily be circumvented by utilising the rules of company law. The effective Law on Companies has a highly liberalistic approach towards the issue of establishing companies by foreign natural persons or legal entities. In general, aside from some special branches, it imposes no

[57] Ibid. Art. 72đ, s. 4.
[58] Ibid. Art. 72đ, s. 7.
[59] Ibid. Art. 72đ, s. 5.
[60] Ibid. Art. 72đ, s. 6.
[61] Ibid. Art. 72đ, s. 8.
[62] Ibid. Art. 72đ, s. 9-12.
[63] Ibid. Art. 72đ, s. 13.

restrictions on establishing a domestic LLC, which is the most popular and frequently used form of company, with a cost of no more than 100 RSD (less than EUR 1), which is the minimal capital requirement of an LLC.[64] Therefore, by establishing a domestic LLC with a negligible amount of capital, the foreign natural or legal person obtains a domestic subject of law, which is, in legal terms, fully capable of acquiring ownership of real estate, including agricultural land. The issue of acquisition of ownership of real estate by foreign natural and legal persons as members of the company would eventually surface again when the company is dissolved or liquidated. However, taking into account the low capital requirement of establishing an LLC and the relatively low costs of maintaining it, its members rarely choose to dissolve it.

The chain of owners of real estate, including agricultural land, may be followed by looking into the Real Estate Registry. For a considerable time, the registry of real estate was administered by the courts (in most of Serbia) in the form of land registries, following the Austrian model. After a two-decade-long transition, which varied in pace over the course of time, the administration of the registry of real estate was delegated from judicial to administrative competency: the Real Estate Registry now not only administers factual data about real estate but also contains data on ownership and other rights related to real estate as well.

With respect to legal persons, the Law on the Central Registry of Real Owners, adopted in 2018, prescribes the duty of all legal persons to register the natural person who is to be considered as the real or beneficiary owner of the legal entity. Per this legislative measure, even in the case of multiple, chainlike ownership relations among several companies, the natural person who stands at the end of the ownership chain must be registered.

5. Conclusions

Serbia profoundly relies on agriculture. Around 85% of the territory of Serbia is declared to be rural areas, where around 55% of the population lives and generates approximately 41% of the national GDP[65], in which family farms play a major role. Family farms have always been considered the major propulsive force in the realisation of policy considerations with respect to agricultural and rural development, even in the era of Yugoslav socialism. Namely, the collectivisation of agricultural land in Yugoslavia was not as efficient as in other CEE countries, the consequence of which was that 75-80% of arable land remained in private ownership and was used by small family farms.[66] The situation has not changed profoundly as of the present day. According to statistical data from 2018, more than 84% of the arable land in Serbia is cultivated by family farms, the members of which can only be natural persons.[67] This means that less than 15% of agricultural land is in the possession of legal persons, even though there is no ownership or possession cap for either natural persons or legal entities on the one hand, and legal entities can, without restriction, access the market of agricultural land

[64] Law on Companies, Art. 145.
[65] Subić, Jeločnik & Jovanović 2015, 15.
[66] Hartvigsen & Gorgan 2020, 87.
[67] Statistical Office of the Republic of Serbia 2018.

on the other. Although land ownership and land use is predominantly concentrated in family farms, the system still faces profound challenges as both the fragmentation of ownership and the fragmentation of the use of agricultural land are considered high.[68]

Only registered agricultural farms/holdings can be beneficiaries of agricultural subsidies. The most privileged position among them is family farms, a category reserved for natural persons belonging to one family, living together and engaged in agricultural production.

The rules on the succession and transfer of agricultural land in Serbia may be characterised as liberalistic. There are no special inheritance regimes applicable specifically to the succession of agricultural land. There is only the possibility of a heir, engaged in agricultural production, to request that the court name him or her the sole heir of the agricultural land, with the obligation to compensate other heirs. Similarly, the transfer of agricultural land by *inter vivos* transaction is also essentially without any meaningful legal restrictions, either for natural or legal persons. There is no cap on the acquisition of ownership, nor must the buyer prove that he or she is, in fact, engaged in agricultural production. The Serbian market for agricultural land is much more advanced than that of other CEE countries.[69] According to the model developed by Williamson et al.[70], which distinguishes five stages in the development of the market of agricultural land, according to Hartvigsen and Gorgan, no CEE country has reached stage five, while only five have reached stage four, including Serbia.[71] In stage four, the land market becomes more mature, and the number of transactions is growing.[72]

The Serbian law excludes the possibility of acquisition of ownership of agricultural land by foreign natural persons or legal entities. According to the Stabilisation and Association Agreement concluded with the European Union, it was expected that Serbia would gradually enable natural persons and legal entities from the member states of the EU to acquire ownership of agricultural land no later than by 1 September, 2017, when the four-year period for the implementation of the aforementioned obligation expired. Seemingly with the aim of meeting this obligation, the Serbian National Assembly amended the Law on Agricultural Land in August 2017. The amendments explicitly regulate under which conditions natural and legal persons from the EU may acquire ownership of agricultural land. However, even a superficial reading of the new regulation reveals that the opposite effect has been achieved. Instead of enabling natural and legal persons from the EU to obtain ownership of agricultural land on equal footing with their domestic counterparts, the legislator created a set of special conditions applicable only to the former but not to the latter. Moreover, the conditions are so strict that no legal person could meet them, while natural persons only hypothetically could do so, if at all. Therefore, it seems that the 2017 amendments to the Law on Agricultural Land can hardly be said to have the aim of implementing the Stabilisation and Association Agreement.[73]

[68] Hartvigsen & Gorgan 2020, 88.
[69] Ibid. 93.
[70] Williamson et al. 2010, 151.
[71] Hartvigsen & Gorgan 2020, 94.
[72] Hartvigsen & Gorgan 2020, 90.
[73] Baturan L & Dudás A 2019, 71.; Baturan L 2017, 1174.

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Luciana GOMES DE FREITAS*

Brazilian Environmental Law: An Overlook

Abstract

The article aims to give an overlook on Brazilian law system in the environmental field. It will follow the logic going from the constitutional analysis to under legislation exposition. The main principles of Brazilian environmental law will be given with a short description of how they interconnected with the upper mentioned legislation and the entities' activities of the National System of the Environment (Sisnama). The final subchapter will give a global view of the executive, deliberative and advisory organs that act on the preservation of a safe and healthy environment in Brazil.
Keywords: Environment, Brazil, Law System, Environment Protection, Regulation, Principles, Administrative organs, Enforcement.

1. Introduction

The existence of climate change may be for certain groups a fallacy, but the international gatherings on a range of climate forums and conventions shows that the phenomenon is not only real, but a burden that the entire world has to deal with. For this purpose, actions have been taken all across the globe as the carbon sequestration deals of UNFCCC[1] with the Kyoto Protocol[2] and the Paris Agreement.[3]

Brazil ratified both agreements[4] turning it into law in its jurisdiction, committing to the protection and achievement of the goals set. Further, the Brazilian law system correlated to the environment protection was adapted over the years to accommodate the research, technologies and trend legislation innovations, equipping the administrative and legal institutions that enforce the laws and policies on environmental protection. The Brazilian law system concerning the environment is intricate and extensive, as Brazil adopts the civil law system, which can lead to overprotection.

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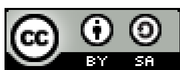
[1] UNTS 1994, 107.
[2] Farkas Csamangó 2014, 154.
[3] Paris Agreement 2015.
[4] Camara dos Deputados 2016.



The Constitution brings several rights concerning the preservation of the environment, contributing to an entanglement of laws, policies and institutional aspects, all tied to the Constitution of 1988, in the hope to safeguard as many subjects as possible from any potential authoritarian government,[5] has a long list of rights and duties, being one of them the environment.[6]

Having it in mind, the Constitution chapter on the environment will be analysed along with the significant laws that guide the environment protection and the regulation of the bureaucratic system and the legal actions. After that, it will be given the guiding principles that may impact the environmental field and other principles that are focused on the environment.

At last, will show the organs that constitute the Brazilian system on environment defence and preservation. As well the organ responsible for legal actions in case of environmental harm and disasters, giving a broad but prolific view of Brazilians laws on environment as well of its organisms and mechanisms to implementation of the laws and its enforcement.

2. The Constitution and Relevant Legislation

The Constitution of the Federative Republic of Brazil from 1988 gives the guidelines for other legislations, setting in its text rights that must be implemented, most of them by regulations.

Brazil follows a centralised federal system, so all the federated states must comply with national and federal laws, and are obliged to inspect their application within their state and city borders.[7] Although, the administrative competency to protect the environment, to combat the pollution, to preserve forest, fauna and flora, is common and is set in the Article 23, items VI, VII and VII of the Constitution[8].

As per the legislative competency on the environment, it is concurrent between Union, States, Municipalities and the Federal District, as transmitted by its article 24, items VI and VIII. The concurrent competency means that the Union will set general base legislation and the other members of the federation will subsidise, complementing the general legislation of the Union where it let blanks or gave away the competency.[9]

The Constitution has an entire chapter likewise to verse on Environment, placing it as an essential asset that must be protected and inspected.[10] Article 225, Federal Constitution of Brazil[11] recognises environmental protection and equilibrium as

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[5] Silva 2014, pp. 45–47.
[6] Brazil 1988, Article 225.
[7] Silva 2014, pp. 481–483.
[8] Brazil 1988, Chapter II, Article 23.
[9] Bessa 2010, 88–90.
[10] Ibid 319–320.
[11] Brazil 1988, Article 225. *"All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations.*
Paragraph 1. In order to ensure the effectiveness of this right, it is incumbent upon the Government to:
I – preserve and restore the essential ecological processes and provide for the ecological treatment of species and ecosystems;

a fundamental right that must be protected for the present and future generations. The Constitution's text also declares some valuable principles among others: polluter pays, precautionary, public participation, sustainable development, preventive action and the risk assessment, social function of the property, intergenerational solidarity and ubiquity.

Inferior legislations regulate most items of the constitutional chapter as the National System of Nature Conservation Units,[12] the Mining Codex,[13] the National Policy on Water Resources,[14] National Solid Waste Policy (PNRS),[15] the National Basic Sanitation Policy,[16] Urban Land Installment Law,[17] the Public Forest Management Law[18] and the Cities Statute.[19] Nonetheless, the second major legislation in the environment field is The National Environment Policy instituted by the Law n. 6.938 from August 1981,[20] that focus on giving goals and mechanisms to preserve the environment. Besides, the law constituted the National System of the Environment *(Sisnama)* and instituted the Environmental Defence Register, all focusing on the general ground given by the Federal Constitution of 1988.

II – preserve the diversity and integrity of the genetic patrimony of the country and to control entities engaged in research and manipulation of genetic material;
III – define, in all units of the Federation, territorial spaces and their components which are to receive special protection, any alterations and suppressions being allowed only by means of law, and any use which may harm the integrity of the attributes which justify their protection being forbidden;
IV – demand, in the manner prescribed by law, for the installation of works and activities which may potentially cause significant degradation of the environment, a prior environmental impact study, which shall be made public;
V – control the production, sale and use of techniques, methods or substances which represent a risk to life, the quality of life and the environment;
VI – promote environment education in all school levels and public awareness of the need to preserve the environment;
VII – protect the fauna and the flora, with prohibition, in the manner prescribed by law, of all practices which represent a risk to their ecological function, cause the extinction of species or subject animals to cruelty.
Paragraph 2. Those who exploit mineral resources shall be required to restore the degraded environment, in accordance with the technical solutions demanded by the competent public agency, as provided by law.
Paragraph 3. Procedures and activities considered as harmful to the environment shall subject the infractors, be they individuals or legal entities, to penal and administrative sanctions, without prejudice to the obligation to repair the damages caused.
Paragraph 4. The Brazilian Amazonian Forest, the Atlantic Forest, the Serra do Mar, the Pantanal Mato-Grossense and the coastal zone are part of the national patrimony, and they shall be used, as provided by law, under conditions which ensure the preservation of the environment, therein included the use of mineral resources.
Paragraph 5. The unoccupied lands or lands seized by the states through discriminatory actions which are necessary to protect the natural ecosystems are inalienable. (…).”

[12] Lei n· 9.985 2000.
[13] Lei n. 6.567 1978.
[14] Lei n. 9.433 1997.
[15] Lei 12.305 2010.
[16] Lei 11.445 2007.
[17] Lei n. 6.766 1979.
[18] Lei n. 11.284 2006.
[19] Lei n. 10.257 2001.
[20] Lei n. 6.938 1981.

Another critical aspect are the environmental principles in Article 2 and items, which brings ten principles, as the sustainable development and protection of ecosystems.[21] The National Environment Policy also will guide all the sectors, on the preservation, improvement and restoration of the environment which can lid to a better and healthier life, socio-economic development, human dignity and national security – being much similar to the ones charted in the Constitution.

Additionally, the law gives the definition of 'environment' which is the "*joint of conditions, laws, influences and interactions of physical, chemical and biologic nature that enables and rules the life in all its forms.*" 'Degradation' is the adverse modification of the environment and 'pollution' as being the degradation that affects the quality of the environment in all its forms (aesthetically to health), direct or indirectly.[22] 'Polluter' is any person (legal or physical) that contributes to the activity that caused the environmental damage, direct or indirectly, independent of guilt, implementing the objective responsibility for environmental damages.[23]

That last innovation conveyed by the policy is the legitimacy of Public Ministry (state and federal)[24] to prosecute civil and criminally responsible for the damages caused to the environment,[25] not needing to prove them guilty, only required to prove the existence of action by omission or commission. Furthermore, the causation, facilitating the application of the polluter pays principle and the accountability of polluters and public agents to indemnify and repair the damages caused.

Thirdly, but not less critical legislation on environment, is the Law 12.651/2012, known as The New Brazilian Forestry Code, revoking the old codex from 1965. It arrived in the system carrying many dissents on the constitutionality of some of its articles,[26] after years the Supreme Federal Court declared the constitutionality most of the tackled articles and clarified the interpretation of others, preserving most of it unaltered. The new code determines that the owner has responsibility to protect the environment and to maintain the borders of its property and the areas of preservation. The codex treats two different forms of protection: The Area of Permanent Protection (*APP*) and the Legal Reserve (*RL*).[27] The *APP* area is inside the property designated to ensure the sustainable use of the land and as well to safeguard the natural resources and is not delimited by law where it should be. The *RL* is a protected area also located within the property to preserve the water resources, landscape, geological stability and biodiversity which delimitates its location in the land. These are usually areas surrounding water (rivers, ponds, lakes), mountains, mounts, plateaus, sand bars, mangroves, slopes and others important areas to assure the quality of the environment. The legislation also made some important definitions, as the technical concepts of sustainable uses and the composing regions in the Legal Amazon:[28]

[21] Ibid.
[22] Ibid. Article 3, I-III, free translation.
[23] Bessa 2010, 217–221.
[24] Ibid. 117.
[25] Lei n. 6.938 1981, Articles 14-15.
[26] STF 2018.
[27] Lei n. 12.651 2012, Article 3.
[28] Ibid. Article 3.

the states of Acre, Pará, Amazonas, Rondônia, Amapá and Mato Grosso and the regions on the parallel north 13°S of the states of Tocantins and Goiás and the meridional west 44°W of the state of Maranhão.

Another important definition is the carbon credit included in 2012, which means lawful title under an intangible and immaterial asset that can be transacted with economic value.[29] The carbon credit later in Brazil evolved to more elaborated plan, integrated to the Reducing Emissions from Deforestation and Forest Degradation – REDD+.[30]Now it is implemented as the REM for early movers[31] in the Legal Amazon, that has been contributing to the reduction of deforestation in the Legal Amazon, especially in the State of Mato Grosso, before leading on it.

Furthermore, beneficial laws on accountability and enforcement instituted by the previous laws: the law of Crimes Against the Environment,[32] that brings new aspects of the fight against environment damages and crimes, giving the administrative organs and the Public Ministry (state and federal) power and mechanism to tackle these types of crimes and damages.

The sanctions can be administrative and criminal, and one does not annul the other. The law defines the typification of the crimes and its sanctions. The crimes against the environment the ones are committed to the fauna, flora, and that cause any pollution. It instituted as well the accountability and penalisation of legal entities in this kind of crimes. The sanctions can be of right restrictions, liberty privation and fines.

The penalty of imprisonment can be substituted for the right restrictions penalties if the crime committed was unintended or the penalty is up to 4 years and when by the analysis of the circumstances and the social conduct of the condemned comes to the conclusion that the deprivation of right is enough to the effects of reprobation and privation of a new crime.[33]

The rights' restriction penalties can be community services, temporary interdiction of rights, total or partial suspension of activities, pecuniary fine and domicile reclusion.[34] The imprisonment penalty will depend on the circumstances and the crime committed, the hirer condemnation can be up to five years of prison, whether without aggravating. This penalty can be combined with a pecuniary fine to be applied according to the damage caused. Other factors of the case, which goes from fifty BRL up to fifty millions BRL,[35] all the pecuniary amount collected as fines per environmental infraction will be reverted to the National environment Fund, navy Fund, and states and municipal funds for the environment.[36] These penalties do not exclude the administrative infringement process and penalties, being independent.

[29] Ibid, Article 3, XXVII.
[30] Gomes de Freitas 2015.
[31] REM Mato Grosso 2020.
[32] Lei n. 9.605 1998.
[33] Ibid. Article 6.
[34] Ibid. Article 8.
[35] Ibid. Article 75.
[36] Ibid. Article 74.

The administrative sanctions can be an advertence, fine and daily fine (until the conduct and its effects are ceased and the restrictive of rights are suspension and cancellation of licenses and authorizations, loss or restriction of tax and financing benefits and, the prohibition to engage in contracts with the Public Administration.[37]

A remarkable mechanism to tackle damages is the Term of Adjustment of Conduct (*TAC*) which is an extrajudicial agreement made when there is the eminence or an existing action or omission that causes environmental damage before any legal measures are taken, so the polluters can regularise their conduct. The *TAC* can be proposed by any of the organs of the *Sisnama* according to the article 79-A and by any of the legitimates to present the Public Civil Action *(ACP*) from the law n. 7.347/1985 in Article 5, § 6.[38] The *ACP* Law regulates actions of diverse thematic, being one of its subjects the environment, focus on finding the persons responsible for damages caused to the environment. The *ACP* can be proposed by the Public Ministry (state and federal), Public Defenders, all the federation members, any public organism (private or public), and associations.

3. Principles of Brazilian Environmental Legislation

The polluter pays principle is the most classic principle of environmental law, and it is charted in the Constitution at Article 225, § 3, Article 4, VIII and Law n. 6.938/81 and regulated by the law of Crimes Against the Environment. The principle instituted the responsibility of the polluter, and in Brazil this principle went further and typified it as an objective responsibility, facilitating the prosecution of the crimes committed against the environment.

The precautionary and the preventive principles[39] are core for the survival of a healthy environment when well applied and enforced, they intend to act before the damage is done and before any action is taken, assessing the possible consequences of the intended action. Both work tightly with the action and risk assessment principle proposed in the Constitution of 1988, and mostly executed and enforced by the executive entities of the *Sisnama.*[40]

Public participation is a constitutional principle that calls the entire population to its responsibility for the implementation of norms and enforcement of them. Also calls the people to exercise their civilian duty to supervise, learn about and maintain the natural ecosystems and to participate in public hearings and deliberations concerning the environment.[41]

The sustainable development is principal and an objective at the same time addressing the need to economic return with the equilibrium between human activity and preservation of natural ecosystems and improvement of life quality of the population.[42]

[37] Lei n. 9.605 1998, Article 72.
[38] Lei n. 7.347 1985.
[39] Perrez 2002, 10–12.
[40] Bessa 2010, 107.
[41] UNECE 1998.
[42] Fiorillo 2013, 341–362.

Beside sustainable development, there is a peculiar principle of Brazilian legal structure: the social function of the property.[43] That is a constitutional duty and is implemented by most of the regulations on the use of the land in rural and urban areas, establishing that the owner of land has to use it adequately, observing the legislation and preserving the environment to maintain the land as productive and within the legal reserves of natural areas.[44]

Intergenerational solidarity principle, set in the Forestry Code at article 1-A, inaugurates the solidarity between generations, with a pro-future attitude and responsibilities of nowadays generations to the next to come, guaranteeing the implementation the right to a safe and clean environment for the future generations.[45]

To establish the object of the environment protection comes the ubiquity principle. It serves not to deviate the attention and efforts from what wants to be protected in the Brazilian legal systems, the human right constituted by a healthy and safe environment, being these parameters for any future action.[46]

The last principle is the international cooperation consolidated by the Forestry Code, and as well by the law of Crimes Against the Environment,[47] it consecrates the Brazilian international and national commitment to tackle alongside the degradation of the environment and cooperate to preserve it.[48]

4. Enforcement and Regulative Organs Main Structure

The *Sisnama*, National System of the Environment, is a system created to structure the national environmental policy, the structure has six organs:[49] The Superior, the Advisory and Deliberative, the Central, the Executor, the Sectionals and the Locals.[50] The System is a circular and integrated practices of councils to facilitated and implement measures to safeguard the equilibrium of the environment.

The Government Council will act beside the President of the Republic as "*an advisor on the formulation of the national policy and the guidelines of the government for the environment and natural resources*"[51] and, as the name proposes it is superior to other organs. The National Environment Council (*Conama*) is the advisory and deliberative branch, that has a scope to propose and advise per studies the Government Council, guidelines to achieve norms and compatible patterns as ecologically balanced environment that is essential to life.[52] It is composed per the advisory, studies and workgroups, technical chambers, a committee for integration of Environmental Policies and by Plenary which is integrated by the Ministry of Environment and its executive secretary, the president of Brazilian Institute of the Environment and Renewable

[43] Brazil 1988, Article 186, II.
[44] Silva 2014, 262–276.
[45] Sands 2003, 256–257.
[46] Sands 2003, 483.
[47] Lei. 9.605 1998, Chapter VII.
[48] Trindade 1997.
[49] Bessa 2010, 110.
[50] Decreto n. 99.274 1990, Article 3.
[51] Lei n. 6938 1981, Article 6, I, free translation.
[52] Ibid. Article 6, II.

Natural Resources (*IBAMA),* the representatives of indicated ministries, representatives of state and municipal governments, representatives of the environmental entities and enterprises entities of certain industries.[53]

The *Conama*[54] has an important role to the general regulation of the sector. It has the power to issue resolutions about criteria, patterns and technicities on environment protection and the sustainable use of the natural resources, motions and, recommendations to implementation of policies, norms and public programs on the environmental area.[55] As the central organ, there is the Ministry of the Environment, late Presidency of the Republic's Environment Secretariat, which is responsible for the implementation of environmental policies and strategies and, to give administrative support to the *Conama*.[56]

The *IBAMA*[57] is the executor organ, it is an independent federal autarchy, it exercises the environmental police power, executes the national environmental policies concerning the federal sphere and many other executive measures.[58] At the same level as *IBAMA* two others can be found as insulated entities: the Chico Mendes Institute for Biodiversity Conservation (*IMCBio*), that has the same juridical composition as the *IBAMA* and is responsible for fomenting and implementing programs focusing on the protection, preservation and conservation of the biodiversity.[59]

The Sectional organs are *"state agencies or entities responsible for executing programs, projects and for the control and inspection of activities capable of causing environmental degradation."*[60] These are federate states' organs and usually are responsible for operating most of the inspection related to environment and the concession of licenses, excluding the ones related to national patrimony, as some bodies of water, subterranean land assets (mining) and certain federal natural reserves, that are done by federal sectional organs. The locals are municipal entities responsible for the protection of the environment and urban space and, are managed by the cities, as an example is the Municipal Councils to sustainable development.

5. Conclusion

The international attention turned to Brazil in reason of the numbers of deforestation of Amazon Forest may lead to the conclusion that Brazil has inadequate legislation on the field. Otherwise, of what can be thought, the Brazilian legislation was ahead of international efforts to preserve its native forest and biomes, which are quite diverse, before any international alliance.

[53] Decreto n. 99.274 1990, Article 5.
[54] Bessa 2010, 112–115.
[55] Ministério do Meio Ambiente 2020.
[56] Decreto n. 99.274 1990, Section IV.
[57] Bessa 2010, 127.
[58] Lei n. 11.516 2007, Article 5.
[59] Lei n. 11.516 2007.
[60] Ministério do Meio Ambiente 2020, free translation.

The international efforts to tackle climate change started actually in Rio de Janeiro, southeast of Brazil[61] (far off from Amazon region), where was decided what the term 'climate change' means centring the subject of the change on human action. Another international alliance was the Kyoto Protocol discussing the carbon emissions and its danger, leading the European Union to set a new principle within their borders, the solidarity.[62]

Apart from the international determination to deal with climate change and its consequences, Brazil had already a dense frame of laws and regulations, leading back to Colonial times.[63] By 1965[64] Brazil already had an Environment codex limiting the use of land, and protection natural areas and creating the *APP* (Areas of permanent protection) and the National Environment Policy still in use is dated from 1981.

Unfortunately, well-structured legislation is not enough to ensure good enforcement of it,[65] that is the area that Brazil has difficulties. Many factors corroborate to the result, as one, the size of its territory leads to the necessity of a big structure not only bureaucratic but of policing of protected areas and borders with other countries.

The size of the bureaucratic machine leads to more troubles related to the control of inspectors, controllers, politicians and polluters, which can culminate in corruption that hardly can be addressed. Explaining the creation of laws and organs that help to inspect who is inspecting, an example of the Public Civil Action law[66] and to address the polluters and public agents, a law that instituted more incisive sanctions and penalties to harmful actions against the environment was promulgated.[67] Although all the efforts, the negative attention is always attracted to the bad practices, as the large properties with its monocultures, which impoverish the soil and the illegal mining that opens and pollutes forestry regions are at large in Brazil. These practices tend to obscure the good practices in the territory, that try to overcome political and legislative barriers and implement sustainable developing practices which ensures the economical return expected by the land owners but as well the consecration of natural ecosystems. As examples, can be quote the REM program cited previously, the organic creation of cattle, the agroforestry and many other practices that include preservation and production at the same time.

From this analysis, it is possible to conclude that the Brazilian environmental system for protection was well established and is severe when dealing with polluters and protection of the natural environment.[68] And will only not fulfil its purpose, if misguided political strategies start emptying the power of the organs, nullifying the outstanding efforts of them to ensure that best practices are put to use.

[61] Farkas Csamangó 2014, 152–153.
[62] Ibid. 155–156.
[63] Lei n. 601 1850.
[64] Lei n. 4771 1965.
[65] UNEP 2019.
[66] Lei n. 7.347 1985.
[67] Lei n. 9.605 1998.
[68] Chiavari & Lopes 2017, 18.

The solution to the main problems of current Brazilian scenario regarding environment protection is the fortification of these systems, providing the necessary tools for the purpose as well as a shift on the political understanding of Brazilian position in the international scenario, demystifying the aura where the developed countries built their wealth on, that revenues are only achieved by degradation of the environment.

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Zsófia HORNYÁK*

Legal frame of agricultural land succession and acquisition by legal persons in Hungary**

Abstract

The study presents the way leading to the development of the Hungarian land transaction regulation and the most important points of the new legal provisions. In the analysis, we also touch on the issue of land acquisition by legal persons. The research focused on examining the inheritance of agricultural lands. In the case of the inheritance of land, legal inheritance and inheritance by disposition of property upon death are also mentioned. Inheritance of land by disposition of property upon death is prioritised in the analysis. In addition, the issue of transfer of holding inter vivos is examined.
Keywords: land transaction; land inheritance; legal inheritance; disposition of property upon death; transfer of holding

1. Introduction

In this study, we highlight two topics. First, after the presentation of the legislative background and general rules of Hungarian land transaction, the rules pertaining to the inheritance of agricultural land are analysed. Within this scope, we emphasise the regulation of land inheritance based on the disposition of property upon death, which contains special rules. Within the framework of this section, during the introduction of the general land transaction dispositions, we also show the possibilities of acquiring ownership for legal persons. Second, the issue of the transfer of holding inter vivos is analysed.

Both topics are interesting because the Hungarian legislator is lagging behind Western European countries in the development of regulation. In most of these countries, special rules can be found for the acquisition of ownership of agricultural land through both legal inheritance and disposition of property upon death. Special rules have also been laid down for the transfer of agricultural holdings inter vivos. In these areas, the Hungarian legislator lays down special rules only for agricultural inheritance with a disposition of property upon death. In other areas, we must start from the general rules of civil law, which of course, does not consider the special nature of agricultural land and farms. From an economic viewpoint, it is necessary to embed

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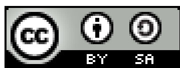

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these special provisions in the Hungarian legal system so that the lands and farms remain together and be subject to continuous and appropriate cultivation.

2. Specialties of the Hungarian land transaction regulation

According to the Accession Treaty (23 September 2003) and point 3 of its Annex X – on the free movement of capital[1;2] – Hungary may maintain in force for seven years from the date of accession the prohibitions laid down in its legislation existing at the time of the signature of this Act on the acquisition of agricultural land by natural persons who are non-residents or non-citizens of Hungary and by legal persons.[3] With Decision 2010/792/EU (20.12.2010), the European Committee agreed to maintain the land moratorium until 30 April 2014,[4] at which end it was necessary to legislate a new act on land transaction in Hungary.[5] Thus, Act CXXII of 2013 on Transactions of Agricultural and Forestry Land (hereinafter referred to as Land Transaction Act)[6] was adopted, and entered into force on 1 May 2014.

The Land Transaction Act was the first cardinal act in this sector adopted among the others prescribed by the Fundamental Law. The partly cardinal act, Act CCXII of 2013[7] (hereinafter referred to as Act on Land) was also adopted, which is on certain provisions and transition rules related to Act CXXII of 2013 on Transactions of Agricultural and Forestry Land. In addition, two other cardinal acts will be adopted, namely the act on agricultural holdings and on integrated agricultural production.[8]

The Land Transaction Act governs the acquisition of ownership of and usufruct rights on agricultural and forestry land (hereinafter referred to as land), use of land, and monitoring of restrictions on land acquisitions, and contains provisions on local land commissions.[9]

[1] See more: Korom 2013, 11–24.
[2] See more: Fodor 2010, 115–130.
[3] Benedek 2005, 13.; Kurucz 2008b, 12.
[4] Korom 2009, 7–16.; See more about the end of land moratorium: Téglási 2014, 155–175.
[5] See more about the new Land Transaction Act: Csák 2010b, 20–31.; Csák & Hornyák 2013b, 12–17.; Csák & Szilágyi 2013, 220–224.; Jakab & Szilágyi 2013, 52–57.; Kapronczai 2013, 79–92.; Kurucz 2008a, 13–22.; Prugberger 2012, 62–65.; Szilágyi 2013, 110–111.; Vass 2003, 159–170.; Alvincz 2013.; Mikó 2013, 151–163.; Andréka 2010, 7–19.
[6] For more about the analysis and its history, see: Csák & Hornyák 2013a, 7–10.; Csák & Prugberger 1994, 489–497.; Holló 2013, 111–140.; Hornyák 2014, 117–121.; Horváth 2013, 359–366.; Kecskés & Szécsényi 1997, 721–729.; Novotni 1992, 30–104.; Olajos 2002b, 13–17.; Olajos 2002a, 8–12.; Prugberger 1989, 609–617.; Prugberger 1990, 149–156.; Prugberger 1993, 6–14.; Prugberger 1995, 232–234.; Prugberger 1998, 276–287.; Prugberger & Olajos 1999, 165–185.; Raisz 2014, 125–142.; Tanka 2013, 109–136.; Zsohár 2013, 23–24.
[7] Certain provisions of the act according to Fundamental Law Article P) Section (2), and other certain provisions of the act according to Fundamental Law Article 38 Section (1) are considered to be the cardinal act. Act on Land 107. §
[8] Fundamental Law Article P) Section (2).
[9] Land Transaction Act 1. § Section (1).

The scope of this Act shall cover the acquisition of ownership of land under any title and by any means, but not including where ownership is acquired by way of intestate succession, offer to the State in probate proceedings, through expropriation, or through auction for the purpose of indemnification.[10] Thus, the scope of the Land Transaction Act does not cover the acquisition of ownership of land by way of intestate succession. Therefore, we must use the general rules of the law of succession based on the Civil Code. However, the act contains special rules for the acquisition of ownership of land by testamentary disposition.

The Act applies to all lands located in the territory of Hungary[11]; however, the rules on agricultural holdings will be governed in a specific act, although only conceptual definitions relating to agricultural holding[12] can be found in the Land Transaction Act.

In principle, the ownership of land may be acquired by domestic natural persons and EU nationals. The Land Transaction Act introduced the concept of a farmer, and only those people who meet these criteria can take part in the domestic land market.[13] In the case of the land acquisition limit, the size of land that can be acquired by a farmer and someone other than a farmer who is a close relative of the person transferring the ownership right of the land may not exceed 300 ha.[14,15] Other than farmers, domestic natural persons and EU nationals may acquire the ownership of land if the size of the land does not exceed 1 ha (previously, domestic natural persons could acquire the ownership of a maximum 300 ha land[16]).

Currently, the ownership of agricultural land can only be acquired by certain legal persons, and they can only acquire it with special conditions. Among legal persons, ownership of land can be acquired without any restrictions by the State and with conditions by a listed church or the internal legal entities thereof under a maintenance or life-annuity agreement, an agreement for providing care, or a contract of gift, and by testamentary disposition.

[10] Land Transaction Act 6. § Section (2).

[11] Land Transaction Act 5. § Point 17. Agricultural, forestry land: shall mean any parcel of land, irrespective of where it is located (within or outside the limits of a settlement), registered in the real estate register as cropland, vineyard, orchard, garden, meadow, permanent pasture (grassland), reed bank, or forest or woodland, including any parcel of land shown in the real estate register as non-agricultural land noted under the legal concept of land registered in the Országos Erdőállomány Adattár (National Register of Forests) as forest.

[12] Land Transaction Act 5.§ Point 20. Agricultural holding: shall mean the basic organization unit of production equipment and other means of agricultural production (land, agricultural equipment, other assets) operated with the same objective, functioning also as a basic economic unit by way of economic cohesion.

[13] Land Transaction Act 5.§ Point 7. Regarding the concept of a farmer, see: Olajos 2013, 124–125.; Raisz 2017b, 72.

[14] For more about exceeding the land acquisition limit, see: Hegyes 2017, 116–118.

[15] According to the Land Transaction Act 5. § Point 13, close relative shall mean spouses, next of kin, adopted children, stepchildren, foster children, adoptive parents, stepparents, foster parents, and siblings.

[16] Csák 2010a, 104–105.

Ownership of land may also be acquired by a mortgage loan company, but only subject to the limits and for the duration provided for in the Act on Mortgage Loan Companies and Mortgage Bonds.[17] It can also be acquired by the municipal government of the community where the land is located for the implementation of public benefit employment programs and social land programs, for urban development purposes, and if the land is a protected site of local importance to protect the land under the Act on Protection of the Natural Environment.[18] A further favourable rule for these legal persons is that the rule of the land acquisition limit, land possession limit, and preferential land possession limit shall not be applied to them.[19] In addition, other legal persons, third-country natural persons, and foreign states (including their provinces, local authorities, and the bodies thereof) may not acquire ownership of the land.

Ownership acquisition rights shall exist on condition that the acquiring party undertakes in the contract for the transfer of ownership not to permit third-party use of the land, and to use the land himself, and in that context, to fulfil the obligation of land use. The party further agrees not to use the land for other purposes for a period of five years from the time of acquisition. In addition, ownership acquisition rights shall exist on condition that the acquiring party provides a statement enclosed with the contract for the transfer of ownership of having no outstanding fee or other debt owed in connection with land use, as established by final ruling relating to any previous land use. Moreover, the party must not have been found to be involved during the period of five years before the acquisition in any transaction aiming to circumvent restrictions on land acquisitions.[20]

In the case of a land transaction between living persons,[21] the approval of the competent authority, as a public law tool, is a special regulatory instrument. We highlight the pre-emption rights as a civil law tool.

Transactions in the case of land acquisition can be classified into three groups in respect of approval of the competent authority. The first group includes the acquisition of ownership of land by sales contract. The second group includes the acquisition of ownership of land under other titles, and the third group consists of land acquisition for which the approval of the competent authority is not required. In the case of the approval of the sales contract by the competent authority, the sales contract shall be communicated to the holders of pre-emption rights by way of public notice through the notary.

[17] Act XXX of 1997 on the mortgage credit institution and mortgage 10. § (4) Real estate qualifying as agricultural and forestry land according to the Act on the Transactions of Agricultural and Forestry Land can become the ownership of a mortgage credit institution only temporarily for a maximum period of one year from the date of acquisition through liquidation or enforcement proceedings.
[18] Land Transaction Act 11. § (1) and (2).
[19] Land Transaction Act 16. § (7).
[20] See for more: Csák & Hornyák 2013b, 12–17.; Csák & Hornyák 2013a, 7–10.
[21] See for more: Andréka & Olajos 2017, 410–424.; Szilágyi et al. 2019, 40–50.; Raisz 2017a, 434–443.; Szilágyi 2018, 182–196.

The agricultural administration body shall then check and examine the sales contract and statement of acceptance, and adopt a decision within 15 days of receipt of the documents for the refusal of approval of the contract of sale if one of the cases listed in the act occurs. If the agricultural administration body decided not to refuse the approval of the sales contract, it shall contact the regional body of the Magyar Agrár-, Élelmiszergazdasági és Vidékfejlesztési Kamara (Hungarian Association of Agriculture, Food, and Rural Development) where the land affected by the contract is situated, namely the local land commission, to make its opinion. The local land commission shall consider the local situation, public knowledge, and criteria specified in the act. Based on these criteria, the local land commission shall formulate its opinion whether to support the approval of the sales contract of the holders of pre-emption rights listed in the protocol or the buyer. The agricultural administration body shall consider the opinion of the local land commission in its decision, consider again the conditions of approval or refusal of the sales contract, and shall make its resolution, which shall be endorsed.

3. Special rules relating to agricultural inheritance – disposition of property upon death

In the case of a disposition of property upon death, the same restrictions shall be applied to the acquisition of ownership of land as to other acquisitions of ownership falling within the scope of the Land Transaction Act. In the case of a disposition of property upon death, a situation can easily occur that a person who cannot be qualified as a farmer[22] will be named as an heir by the testator. However, for them, the legislator has set a strong limit on the size of the area that can be acquired.[23] As a general rule, a non-agricultural resident natural person and national of a Member State can acquire ownership of land if the size of the land in his possession, including the size of the land to be acquired, does not exceed 1 ha. An exception to this is when a non-farmer resident natural person or national of a Member State is a close relative of the person transferring the ownership.[24] In the case of close relatives who cannot be qualified as farmers, the general land acquisition limit applicable to farmers must be considered so they can acquire the ownership of agricultural land up to 300 ha.[25] Of course, in the case of a testamentary disposition, these limits must also be considered and the land acquisition limit of 1 ha, or where applicable, 300 ha, may not exceed the total area of all land owned by the heir, so pre-existing and inherited land.

[22] For more regarding who qualifies as a farmer, see: Olajos 2013, 121–135.; Raisz 2014, 125–142.; Szilágyi 2015, 44–50.
[23] See for more: Szilágyi 2013, 110–111.
[24] Land Transaction Act 10. § (2), (3).
[25] Land Transaction Act 16. § (1).

In the case of a disposition of property upon death on land ownership, the approval of the agricultural administration body is also required.[26] Therefore, the testamentary heir – only in the case that s(he) would not be the legal heir of the testator in the absence of a will – who is the contractual heir named in the agreements as to succession, and the donee of the testamentary gift contract can acquire ownership of the land only with the approval of the authority.[27]

Regarding the approval of acquisitions of land by way of testamentary disposition, the provisions on pre-emption rights, holders of pre-emption rights, on statements of acceptance made by holders of pre-emption rights, on the protocol and the owners' right to choose, and on the related designations to be made by the agricultural administration body shall be ignored. Another difference to the approval of the sale contract by the competent authority[28] is that in these proceedings, the opinion of the local land commission is not necessary.

The agricultural administration body shall consider the eligibility of the heir and whether testamentary disposition is predisposed to breach or circumvent restrictions on land acquisitions. The agricultural administration body shall communicate the decision to the public notary as well.

In the case of the acquisition of land ownership with a disposition of property upon death, certain special rules shall also be applied in the proceedings. The public notary can contact the agricultural administration body without sending the disposition of property upon death. In this case, the public notary's request must contain the information available to the public notary on the heir in respect of the land affected by the disposition of property upon death.[29] The procedure begins on the day following the receipt of the public notary's request to the agricultural administration body.[30] The agricultural administration body shall also examine whether the transfer of the estate would not result in a breach or circumvention of the restriction on the acquisition of ownership.

If the agricultural administration body refuses to approve the acquisition of title by the heir, and the land in question is transferred under State ownership and assigned to the National Land Fund, the heir shall be entitled to compensation. The amount of compensation shall cover the value established by the appraisal of the property, minus the estate debt falling upon the State, as the heir. The person exercising ownership rights shall make provisions about preparing the appraisal and payment of compensation within 60 days from the date of acquisition. This disposition shall not be applied if the ownership acquisition of the State occurred because the heir disclaimed the inheritance. This provision was entered into the law based on decision No 24 of 2017 of the Constitutional Court.

[26] Land Transaction Act 7. § (1).
[27] Orosz 2015, 75.
[28] For more about the approval of the authority, see: Jani 2013, 15–28.
[29] Identity data, citizenship, address.
[30] Act CCXII of 2013 on certain provisions and transition rules related to Act CXXII of 2013 on Transactions of Agricultural and Forestry Land 41. §

The special rules on the disposition of property upon death are fundamentally applicable to the inheritance of land as the scope of the act extends to land. A special rule is included in the general inheritance rules of the Civil Code, which applies specifically to agricultural holdings, in connection with the disclaimer of inheritance. Based on this, the heir shall be entitled to separately disclaim inheritance of a farmland, its equipment, accessories, livestock, and tools and implements if he is not engaged in agricultural production by profession. With this rule, the Act provides the opportunity that a successor who is engaged in agricultural production by profession can possibly receive the agricultural land and adherent instruments. This rule was considered favourable anyway, because according to the main rule, the successor can refuse the estate only as a whole, and only by the abovementioned inheritance assets can be disclaimed separately by the successor.

In the current regulation, we mention the providing of statements necessary for the acquisition of ownership, the land acquisition limit, and institution of the approval by the competent authority as the limitation of the freedom of testamentary disposition. The acquisition of ownership based on a disposition of property upon death also requires declarations from the acquirer.[31] The question arises as to the justification for making such declarations in the case of a disposition of property upon death, since if the acquisition of ownership by inheritance is made conditional, if the heir does not do so, he cannot acquire ownership of the land, which is contrary to the will of the testator and thus a barrier to freedom of will.

The rules in force since 2014 mainly restrict the freedom of choice of the subject and freedom of content. The declarations to be made by the transferee as the conditions of the acquisition of ownership will restrict the testator's free choice of subject, because if the named heir cannot make the necessary declarations, the authority will not give the required approval. Thus, the heir in the disposition of property upon death cannot inherit the land.

In addition to the freedom of choice of subject, the land acquisition limit also restricts the freedom of content, as the testator can only benefit the person whose land, together with the land he or she already owns, does not exceed the maximum according to law. However, the testator has the option of leaving his lands to his heir in such a way that the size of the lands owned by the heir remains within the land acquisition limit. This can, however, mean restricting the freedom of content if for example, the testator's will originally intended to become the ownership of the testamentary heir of all his lands, but for this reason, he will leave only a certain portion of his lands to the named heir.

The authority's approval is also a restriction on both directions of the freedom of testamentary disposition, because the agricultural administration body examines each named heir to confirm whether the conditions of the acquisition of ownership are met. If it considers that one of the heirs cannot fulfil the conditions, the authority will not approve the acquisition of ownership in respect of that named heir.

[31] See for more: Csák & Hornyák 2013b, 12–17.; Csák & Hornyák 2013a, 7–10.

Since the aim of the legislator with the enactment of the Land Transaction Act in 2013 was to acquire ownership of the land by a person who is able and willing to cultivate it,[32] it is fully compatible with the purpose of enacting the law that even in the case of the acquisition of ownership by a disposition of property upon death, the legal restrictions must be complied with. If a disposition of property upon death were not subject to the restrictions set out above, the strict rules of the Land Transaction Act on the acquisition of ownership by contract of sale could be easily circumvented. However, another important principle is that of the freedom of testamentary disposition. The question is which principle shall we put before the other. Which principle is more important? The *'let the land belong to him who is able to cultivate it'* introduced into the agricultural land circulation by the legislator, or the freedom of testamentary disposition in the Civil Code, which is the basis of the right of inheritance? The former principle was intended as a guideline by the legislator, but is reinforced by purposes of the property policy set out in the preamble of the Land Transaction Act to which certain provisions of the Land Transaction Act have been subordinated. Based on this, the Land Transaction Act should serve to suppress the access of non-farmers to land and to eliminate speculation.[33] In contrast, the principle of freedom of testamentary disposition, which derives from the freedom of disposition of the owner, can be seen as a universal principle of legal systems based on civil private property [34] and has been part of our legal system since 1715. [35]

Our proposal would be to amend the regulation by disposition of property upon death – in the present case, the disposition of property upon death is expressly meant by a will – to allow the named heir to meet the conditions of the Land Transaction Act within a specified period, so that the applicability of the will of the testator would depend on the heir's decision. This would only be possible on the basis of a will, since the unilateral declaration of the rights of the testator, the content of which can only be known to the heirs only after the testator's death, in the probate proceedings is therefore not known or certain to inherit.

In the regulation of land circulation, the legislator treats the inheritance based on a disposition of property upon death and inheritance based on legal succession differently. The acquisition of ownership of land by way of disposition of property upon death falls within the scope of the Land Transaction Act. Thus, the legislator sets special rules for this, but removes the legal succession from the scope of the act. Therefore, we apply the general rules to them. Assuming that the restriction of the right to property and right to inheritance is due to the enforcement of property policy principles, and the main consideration in the regulation is the preference for the acquisition of ownership by the farmer, then the different regulation of legal inheritance compared to succession based on disposition of property upon death is not acceptable.

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[32] The debate on the new land act pp. 8.
[33] The debate on the new land act pp. 8.
[34] Anka 2014b, 436.
[35] Act XXVII of 1715 on wills abolished the principle that only a will that provides for the entire estate of the testator is valid. See: Teller 1939, 228.

After all, in the case of legal inheritance, the heir shall not meet any special conditions based on property policy principles, but in the case of a disposition of property upon death, the condition for the acquisition of ownership is compliance with the conditions specified in the Land Transaction Act. The only reason for this can be that the legislator had in mind the prevention of speculative land acquisition, which we cannot talk about in the case of legal inheritance. As such, its restriction is not justified in this respect. However, in the case that inheritance based on disposition of property upon death is possible, it is necessary to make the acquisition of ownership conditional under this title.

However, it would be worthwhile to consider the objectives of the property policy and keep them in mind when laying down the rules in the case of legal inheritance as well. In addition, the specific nature of agricultural land should be considered in the regulation of legal inheritance, and the restrictions on land acquisition should be applied in this process – of course adapted to the rules of legal inheritance. We recommend that this shall be ensured by placing forward the person bound to the land – the farmer in this case – in the order of succession by following the examples of the legal regulations of Western European countries. These special rules could be developed either in the future act on agricultural holdings or possibly in a land inheritance act.

4. Transfer of holding inter vivos

The Hungarian legislator is lagging behind Western European countries in relation to the development of rules on the transfer of holding inter vivos, because in those countries, there is a special solution and regulation in the agricultural law for this situation. Legislation on agricultural holdings, which is a cardinal act under Article P) of the Fundamental Law, has not yet been created, and currently, the Land Transaction Act, the only one of the legal acts prescribed for the area by the Fundamental Law, does not contain a special rule in this regard. In Western European countries, the contract for the transfer of the holding is found, and the main aim is to keep it together. In the absence of special regulations, we can proceed from the provisions of the Civil Code (Act V of 2013). The option regulated by the Civil Code is the transfer of fiduciary assets. Under a fiduciary asset management contract the fiduciary (recipient of the holding) undertakes to manage the assets, rights, and receivables entrusted to him by the principal (transmitter of the holding) in his own name and on the beneficiary's behalf, and the principal undertakes to pay the fee agreed upon. Thus, the agricultural holding becomes the property of the fiduciary, which operates it for a fee in its own name but for the benefit of the named beneficiary. The beneficiary may request from the fiduciary the release of the holding and its benefits in accordance with the provisions of the contract. The holding thus taken over is separate from the fiduciary's own assets and is not part of his legacy. However, under the provision of the Land Transaction Act introduced on 1 July 2020, ownership of land may not be acquired by way of a fiduciary asset management contract. Therefore, we cannot find regulations on the transfer of holding inter vivos in the present Hungarian legal system.

5. Closing thoughts

We consider that specific rules of land succession shall be adopted within the national legislation. The reason on one hand is to eliminate the fragmentation of estate structure, while using the general rules of succession for intestate succession lands may be easily fragmented. The purpose of introducing sui generis rules of land succession would be to hold the land as a unit. On the other hand, it should be considered during the establishment of rules – which is not considered by the general rules of succession – that such a person shall be the heir who is competent, has special skills, and has practice in land cultivation. This would ensure the land is properly farmed. There are special rules for the acquisition of ownership of land by testamentary disposition.[36] Therefore, in this case, the special nature of land was considered during the establishment of regulation. It would be worthwhile approaching the rules of intestate succession to this. In addition, the purpose of the principles behind the land transaction is to promote acquisition by those people who are able and willing to cultivate the land, but it is not provided in the case of using the general rules for intestate succession. The provision of testamentary disposition should be reconsidered to avoid a chance of speculative land acquisition, and specific rules should be established in one system for both intestate succession and testamentary disposition.[37]

[36] See for more: Olajos, Csák & Hornyák 2018, 5–19.
[37] See for more Hornyák 2019.; Hornyák 2018, 107–131.

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Acquisition of Agricultural Land by Foreigners and Family Agricultural Holdings in Croatia – Recent Developments**

Abstract

This paper presents two important aspects of the structural transformation of the agricultural sector of the Republic of Croatia. First, there is an analysis of the legal regulation of the acquisition of agricultural land by foreigners by which Croatia has aligned its rules on the acquisition of real property with EU law. In particular, attention is drawn to the differences in the legal position of foreigners depending on whether they are nationals or legal persons of EU Member States or from third countries, as well as on the grounds on which they acquire agricultural land in Croatia. Second, the author points to the new regulation of family agricultural holdings of 2018 (Family Agricultural Holdings Act) and highlights the importance of the separate regulation of family agricultural holdings for the development of Croatian agriculture, particularly with regard to the existing structure of agricultural holdings and the structure of the farm labour force.
Keywords: agricultural land, family agricultural holding, freedom to provide services, freedom of establishment, free movement of capital.

1. Introduction

In the Republic of Croatia, structural agricultural reform started immediately after the country's independence. This was also the time of all other legal and economic reforms that were necessary for the introduction of a market economy and the abolition of social ownership. The transformation of Croatia's agricultural sector became particularly intensive at the time of the country's accession to the European Union (1 July 2013)[1] when the development of agriculture had to be adjusted to the new economic circumstances and to the European Common Agricultural Policy. The positive outcomes of those processes resulted in an increase in the overall agricultural production of the Republic of Croatia following accession.[2] The value of the output of the agricultural industry in 2018 was 5.2% higher than the previous year (HRK/hrvatska kuna 17.308/approx. EUR 2.308).[3]

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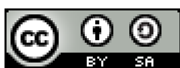
[1] See the Report of the Technical Team of Staff and Consultants in The World Bank 2019, 7.
[2] In the period from 2014-2017, total agricultural production increased by 2.6 when compared to the period from 2000-2013 before accession to the European Union. See Bratic, Grgic & Krznar 2019, 487, 494.
[3] Data taken from the Croatian Bureau of Statistics 2019.



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According to Eurostat data, in 2019 the share of the agriculture, forestry and fishing sector in the Republic of Croatia, in gross value added, amounted to 3.6% while the employment rate in that sector was 6.2%.[4] However, in the past several years, some negative trends have been observed, such as the fall of the employment rate in the agricultural sector (in relation to overall employment) and a smaller share of farmers' income compared to wages in the rest of the economy.[5] The share of gross value added of the agriculture, forestry and fishing sector in the Republic of Croatia from 1995 to 2019 varied from 5.7% to 2.9% and at the same time, a multi-year fall in the share of gross value added of the agricultural sector in the GDP structure was observed.[6] The reform of the agricultural sector continues to be a very complex process requiring the coordination of various strategies and policies at both national and international levels.

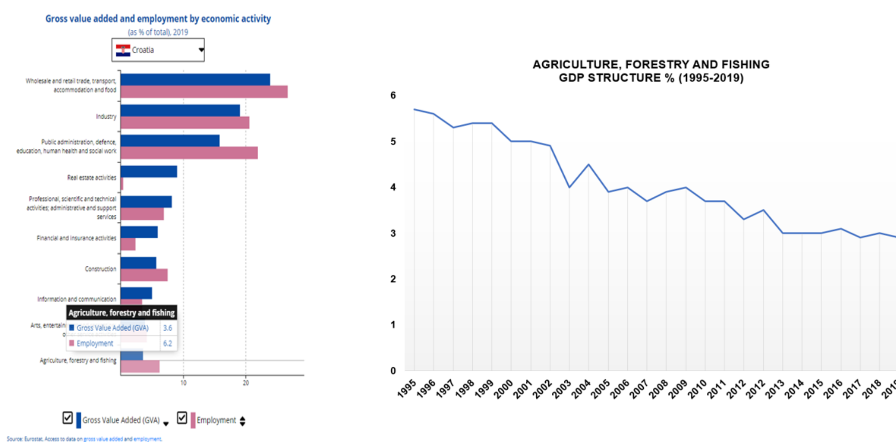

Figure 1
Croatia: Gross value added and employment by economic activity – agriculture, forestry and fishing[7]

[4] See European Commission – Eurostat 2020.
[5] See European Commission 2020.
[6] See the Croatian Bureau of Statistics 2020b.
[7] This picture is taken from European Commission – Eurostat 2020. Data obtained from the Croatian Bureau of Statistics 2020b.

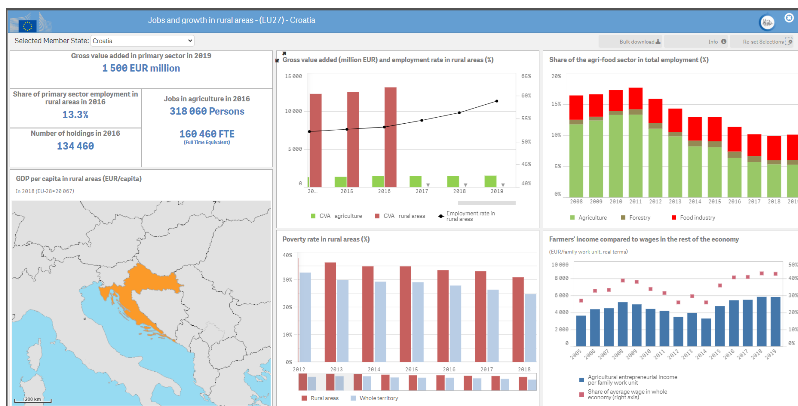

Figure 2
Croatia – Jobs and growth in rural areas[8]

The dynamics of the structural transformation of the agricultural sector, among other factors, has also been significantly impacted by the very slow development of the agricultural land market in the Republic of Croatia. Agricultural land prices are relatively low although in the last few years we have been witnessing a slight rise.[9] The main reasons for such a trend have been the fragmentation of ownership of agricultural land, privately or socially owned, a large number of diverse types of crops grown, the segmented legal system of the organisation of agricultural activities, uncoordinated public registers of agricultural land (land register, cadaster, ARKOD – the land parcel identification system, and the like), the lack of investment in agricultural land due to the very low purchasing power of Croatian citizens, and a shortage of farm labour. Most agricultural land is privately owned (70%) and as much as 30% of agricultural land in the Republic of Croatia is state owned. Such a high percentage of state-owned agricultural land is the consequence of a complex process of transformation of social ownership of agricultural land after the abolition of the socialist system. The abolition of the social ownership of agricultural land was carried out by its transformation into state ownership. Disposal of private agricultural land is governed by general property law provisions[10] while the models of disposal of state-owned agricultural land is regulated by separate and very complex provisions of the Agricultural Land Act.[11] Indeed, the search for optimum models of disposal and management of state-owned agricultural land has lasted for a very long time.

[8] This picture is taken from the website of the European Commission 2020.
[9] Data obtained from the Croatian Bureau of Statistics – on agricultural land prices in 2019; in comparison with 2018, they show a slight increase in the prices of agricultural land. In 2019, the average prices of purchased arable land in the Republic of Croatia amounted to HRK 25,184 per hectare (approx. EUR 3,350.00 per hectare), of meadows to HRK 13.963 (approx. EUR 1.862) and of pastures to HRK13.458 (EUR 1.794). These data are obtained from the Croatian Bureau of Statistics 2020a.
[10] See the Act on Ownership and Other Real Rights.
[11] OG Nos 20/18, 115/18, 98/19.

Since the independence of the Republic of Croatia in 1991, when the first Agricultural Land Act was adopted, there have been several reforms of the model of disposal of state-owned agricultural land.[12] There have also been several reforms of the rules on the acquisition of agricultural real property by foreigners (including agricultural land) aimed at harmonising them with the law of the European Union. At this point in time, there are still various restrictions on the acquisition of agricultural land by foreigners applied differently to citizens and legal persons from the European Union and to foreigners who are nationals of third countries.

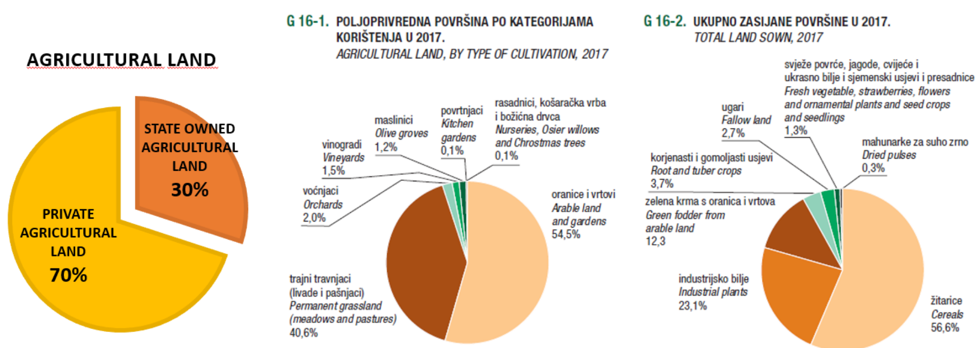

Figure 3
Croatia: Agricultural land – by type of ownership and cultivation[13]

In addition, the transformation of the agricultural sector is also significantly impacted by the fact that agricultural production in Croatia has largely been achieved by agricultural holdings organised in the form of small family farms, i.e. family agricultural holdings (*obiteljsko poljoprivredno gospodarstva*/OPG). Family agricultural holdings have for years been defined as "*strategically important organizational forms of agricultural holdings in the Republic of Croatia to achieve the goals of sustainable development or to accomplish the principles of general safety of food and preservation of agricultural resources, along with the enhancement and increase*

[12] The first Agricultural Land Act in the independent State of Croatia was adopted in 1991. After that, new agricultural land acts were adopted in 2001, 2008, 2013. At present, the Agricultural Land Act of 2018 is in force (OG Nos 20/2018, 115/2018, 98/2019) containing separate provisions on the disposal and ownership of agricultural land by the Republic of Croatia (leasing, temporary use, exchange, sale, dissolution of joint ownership, establishment of the right to build, establishment of the right of easement). In various analyses of the problem, it is emphasised that ineffective management of state-owned agricultural land is mainly the result of long-lasting administrative proceedings, uncoordinated land and cadastral registers, restrictive criteria for the selection of bids, restrictive requirements for the protection of land, agricultural practices and the lack of subsequent examination of the compliance with the strict criteria following the allocation of state-owned agricultural land. See the Report of the Technical Team of Staff and Consultants, The World Bank 2019, 8, 9.
[13] Diagrams from the Croatian Bureau of Statistics 2018, 259.
The data on state-owned agricultural land are taken from the World Bank 2019, 8.

of competitiveness and the strengthening of the social, welfare, economic and ecological role of family agricultural holdings."[14] According to the data on the website of the Paying Agency for Agriculture, Fisheries and Rural Development,[15] in the Farmers Register of 2019, of the total number of agricultural holdings, there were as many as 162,966 family agricultural holdings (95.5%).[16]

FAMILY AGRICULTURAL HOLDINGS	SELFSUPPLY AGRICULTURAL HOLDINGS	CRAFTS	OTHER LEGAL PERSONS	COMPANIES	COOPERATIVES	TOTAL
162.966	**2.032**	**2.251**	**205**	**2.846**	**362**	**170.662**
95,5 %						

Figure 4
Registered agricultural holdings in Farmers Register (2019)[17]

This paper presents two important aspects of the structural transformation of the agricultural sector of the Republic of Croatia. First, there is an analysis of the legal regulation of the acquisition of agricultural land by foreigners by which Croatia has aligned its rules on the acquisition of real property with EU law. In particular, attention is drawn to the differences in the legal position of foreigners depending on whether they are nationals or legal persons of EU Member States or from third countries, as well as on the grounds on which they acquire agricultural land in Croatia. Second, the author points to the new regulation of family agricultural holdings of 2018 (Family Agricultural Holdings Act)[18] and highlights the importance of the separate regulation of family agricultural holdings for the development of Croatian agriculture, particularly with regard to the existing structure of agricultural holdings and the structure of the farm labour force.

[14] Taken from the Final Draft of the Family Agricultural Holdings Act.
[15] For more, see the site Paying Agency for Agriculture, Fisheries and Rural Development 2020a.
[16] See the website of the Paying Agency for Agriculture, Fisheries and Rural Development 2020b.
[17] Data taken from the website of the Paying Agency for Agriculture, Fisheries and Rural Development 2020b, 20.
[18] OG Nos 29/2018, 32/2019.

2. Acquisition of agricultural land by foreigners

2.1. Agricultural land as a resource of interest to the Republic of Croatia

The Constitution of the Republic of Croatia sets forth that agricultural land is a resource of interest to the country and enjoys its special protection.[19] This constitutional proclamation is the legal basis for the regulation of a whole series of special obligations and restrictions for the owners of agricultural land laid down in the Agricultural Land Act.[20,21] For instance, there are obligations to maintain agricultural land in a good condition, to cultivate it by applying necessary agricultural-engineering measures, to pay a fee for a possible change of use of agricultural land for non-agricultural purposes, and the like.[22] If the owner does not fulfil these obligations of maintaining agricultural land, the competent public authority may institute a procedure of sequestration, i.e. seizing the agricultural land from the owner's possession and leasing it to another person.[23] Failure to meet the obligations of ownership of agricultural land is considered to be a misdemeanour for which fines may be imposed.[24] The act of proclaiming agricultural land as a resource of interest to the Republic of Croatia has also been the basis for the stipulation of the acquisition of ownership of agricultural land.

2.2. Acquisition of agricultural land

The general provisions of the Property Act on the acquisition of ownership apply to the private acquisition of ownership of agricultural land (by natural and legal persons). It may be acquired on the basis of a legal transaction, by succession, by a court decision or a decision of another competent authority, or by law (Art. 114/1 PA).

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[19] Article 52/1 of the Constitution of the Republic of Croatia lays down that "*the sea, seashore, islands, waters, air space, mineral resources, and other natural resources, land, forests, flora and fauna, other components of the natural environment, real estate and items of particular cultural, historical, economic or ecological significance which are specified by law to be of interest to the Republic of Croatia shall enjoy its special protection.*"

[20] Pursuant to Art. 52/1 of the Constitution, "*any asset of interest to the Republic of Croatia and the manner in which the resources may be used and exploited by holders of rights thereto and by their owners, as well as compensation for any restrictions as may be imposed thereon, shall be regulated by law.*" This means that the restriction of ownership, as a resource of interest to the Republic of Croatia, may not be prescribed by any administrative act or regulation but only by law. According to the Property Act, such restrictions of ownership are considered as particular statutory limitations of ownership (Art. 32).
For more see 2013, 42.

[21] Pursuant to Art. 52/1 of the Constitution, the Agricultural Land Act (OG Nos 20/2018, 115/2018, 98/2019) expressly provides that agricultural land, as a resource of interest to the Republic of Croatia, enjoys its special protection (Art. 2/1).

[22] See, for example, Arts 4,6,7,14,18, Agricultural Land Act.

[23] See Arts 14, 15 Agricultural Land Act, Art. 32/3-7, Property Act.

[24] See Arts 91–97 Agricultural Land Act.

For any of the listed legal titles, the prerequisites for acquisition are laid down in the Property Act.[25] Private ownership of agricultural land under any of these legal titles may be acquired by any domestic natural or legal person.

The general provisions on the dissolution of co-ownership on immovable property also apply to the division of the private co-ownership of agricultural land.[26] Indeed, when co-ownership of agricultural land is divided, a co-owner, having a particularly serious reason, may request that the whole immovable becomes his or her property and that he or she would pay off all other heirs for their co-owned shares. At the time of the dissolution of co-ownership, a co-owner of agricultural land engaged in an agricultural activity is thus considered to have a particularly serious reason to become a sole owner of agricultural land. Such a co-owner may request the court to carry out a civil partition by payment regarding agricultural land in order to become its sole owner by buying out other co-owners for their co-ownership shares. The rule set forth in the Inheritance Act[27] is based on the same concept according to which a co-owner, dealing with agricultural activity, may request, already in succession proceedings, that the entire inherited agricultural land becomes his or her property after all other heirs are bought out in accordance with their inherited shares (Art. 143/2 Inheritance Act).[28] To acquire this right, the heir who is a farmer does not even have to show in the succession proceedings the probability of a justified need for such a division of the inherited agricultural land. It is enough for him or her to prove the status of farmer in accordance with specific regulations on agricultural activities (e.g. by being listed in the Farmers Register).

However, separate rules are envisaged for the dissolution of co-ownership of agricultural land jointly owned by the Republic of Croatia and private persons (Arts 75,76 of the Agricultural Land Act). In such cases, whenever it is possible, dissolution is carried out by geometrical partition, i.e. by parcelling land whereby each co-owner acquires a particular plot created by partition. Such a division is allowed only if the cadastral units of agricultural land, created by division, are not smaller than 0.5 hectares. Only exceptionally may co-ownership be dissolved by a civil partition by payment, so that a person acquires ownership of the whole agricultural land. This is possible only if the share owned by the Republic of Croatia is smaller than 50% of the entire area of the agricultural cadastral unit. If the co-ownership share of the RoC is larger than 50% of the entire area, and it is not possible to carry out geometrical partition, the only way of dissolving co-ownership would be civil partition by payment in favour of the RoC. In that case, ownership of the entire cadastral unit of agricultural land is acquired by the RoC and the private person involved will be paid for the value of his or her co-ownership share.

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[25] For more see 2013, 90–92.

[26] See Arts 47–56 PA.
For more, see Josipović 2013, 78–80.

[27] OG Nos 148/2003, 163/2003, 35&2005, 127/2013, 33/2015, 14/2019.

[28] Until all other heirs have been paid for the value of their co-ownership shares of agricultural land, they hold lien over the agricultural land which an heir, who is a farmer, has inherited (Art. 143/3 Inheritance Act).

The acquisition of ownership of state-owned agricultural land is provided for by separate provisions of the Agricultural Land Act.[29] This Act expressly lays down the models of disposal of agricultural land depending on its purpose (e.g. leasing, temporary use, exchange, sale, sale by direct agreement, giving it for use based on direct agreement, dissolution of co-ownership, establishment of the right to build, establishment of the right of easement). Disposal of state owned agricultural land is also based on several very important rules: disposal must ensure the protection and the upgrading of economic, ecological and other interests of the Republic of Croatia and its citizens; it is carried out on the basis of the Programme of Disposal of Agricultural Land and Disposal by Public Tenders and only exceptionally on the basis of direct agreements; the longest lease of agricultural land is prescribed by law; the financial means acquired by disposal are divided according to the rules established by law between the State and the local self-government units in whose territory the respective agricultural land is located; the sale of state-owned agricultural land is allowed only for some specific categories of agricultural land. The Agricultural Land Act does not lay down any restrictions on disposals of state-owned agricultural land by domestic nationals or legal persons. It provides for disposals of state-owned agricultural land by Croatian nationals and legal persons on all legal grounds.[30] There are also no specific restrictions on disposals of state-owned agricultural land by foreigners when leases, the rights to build or easement are established on such land. Foreigners are then equated with domestic nationals. However, there are restrictions on the acquisition of ownership of agricultural land by foreigners regardless of whether such land in owned by a private person or by the State.

2.3. Prohibition for the acquisition of ownership of agricultural land

2.3.1. General

Foreign legal or natural persons may not acquire ownership of agricultural land unless it is otherwise provided for by a treaty or a separate regulation (Art. 2/2 of the Agricultural Land Act). This prohibition was laid down as early as in 1993 by the Act on Amendments to the Agricultural Land Act.[31] Since then, in any new act on agricultural land there has been an express provision on prohibiting foreigners from acquiring ownership of agricultural land.

[29] See Art 27–82, Agricultural Land Act.

[30] It is only important that it is a private person who has fulfilled all his or her previous obligations involving the use of state-owned agricultural land, such as the water fee for economic purposes and other public levies, and that no proceedings are conducted against such a person to return unlawfully possessed agricultural land to the owner's possession (Art. 63/1 in connection with Art. 35/1 of the Agricultural Land Act).

[31] OG 79/93.
It was laid down that foreign persons who had acquired ownership of agricultural land before that date (7/9/1993) would continue to be its owners (Art.15/1 of the Act on Amendments to the Agricultural Land Act/1993).

Under the Agricultural Land Act, foreign persons are banned from acquiring ownership of agricultural land on the basis of a contract, a court decision, a decision of other competent authorities or on the basis of law. Therefore, the provisions of the Ownership Act providing for special prerequisites for the acquisition of immovables by foreigners do not apply to the acquisition of ownership of agricultural land by foreigners. There is a general rule that foreigners may acquire ownership of immovables in the Republic of Croatia on the basis of a contract, a court decision or by law only under the condition of reciprocity and with the consent given by the Minister of Justice. Without such consent, a contract on the transfer of ownership of an immovable is null and void.[32] The rules on special prerequisites for the acquisition of immovables on the basis of a contract, a court decision, the decision of another competent authority or on the basis of law have been applied since 1 February 2009 only for nationals and legal persons of third countries but not for nationals and legal persons of EU Member States.[33]

Exceptionally, foreigners may acquire agricultural land by succession under the condition of reciprocity (Art. 2/3 of the Agricultural Land Act). A foreigner may acquire ownership of agricultural land by succession only if a Croatian national may also acquire ownership of agricultural land by succession in the foreign national's country. In addition, the special requirement of reciprocity referred to in the Succession Act must be met. Therefore, foreigners are equated with nationals of the Republic of Croatia when it comes to succession only when the condition of reciprocity is fulfilled (Art. 2/2 of the Inheritance Act).[34] A foreigner may thus acquire the legal status of heir only if a Croatian national may also be an heir in the country of which this foreign person is a national. When dealing with the succession of agricultural land by foreigners, this dual requirement of reciprocity must always be met: reciprocity for the acquisition of the legal position of heir (Art. 2/2 of the Inheritance Act) and reciprocity for the acquisition of agricultural land by succession (Art.2/3 of the Agricultural Land Act).

2.3.2. Acquisition of agricultural land by EU nationals and legal persons

In the process of accession to the European Union, the Republic of Croatia gradually aligned its legislation on the acquisition of ownership of immovables by EU nationals and EU legal persons with the law of the European Union. Croatia committed itself to harmonise its legislation on the acquisition and use of immovables with the law of the European Union by signing the Stabilisation and Association Agreement between Croatia and the European Communities and their Member States (hereinafter: SAA).[35]

[32] See Arts 355–357 PA. For more see Josipović 2013, 151, 152.
[33] For more see under 2.3.2.
[34] The reciprocity for succession is presumed until the opposite is established at the request of a person having legal interest (Art. 2/2 of the Inheritance Act).
[35] See the Implementation Act 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

The obligation consisted of the gradual liberalisation of legal transactions of immovables in conformity with the provisions on the prohibition of discrimination based on citizenship when exercising the European market freedoms (freedom to provide services, freedom of establishment, free movement of capital[36]) and the case law of the Court of Justice of the European Union (ECJ).[37] The aim was to remove from the Croatian legislation the provisions which discriminated EU foreigners in relation to Croatian citizens when acquiring and using immovables. At the time the SAA entered into force (1 February 2005), discriminatory rules existed in Croatian law for all foreigners acquiring ownership of immovables in Croatia. Beside the general prerequisites for the acquisition of ownership of immovables regulated by property law, some other conditions were also required (reciprocity, consent by the Minister of Foreign Affairs and a prior opinion given by the Minister of Justice).[38] At the same time, for some types of real property (natural resources, agricultural land, forests and forestry land), based on separate laws, there was a ban on the acquisition of ownership by foreigners.

For Croatia, the obligations of liberalisation of legal transactions of immovables, including agricultural land, arise from the provisions of the SAA on the right of establishment (Art. 48-55 SAA) and the provisions of the SAA on current payments and movement of capital.[39] Within the framework of the provisions on the right of establishment, Croatia bound itself to facilitate the setting-up of operations on its territory by EU companies and nationals. This commitment regarding the use and acquisition of immovables, included two main obligations for Croatia: the first was the establishment of subsidiaries and branches of EU companies from the entry into force

– International Agreements, 15/01). The Stabilisation and Association Agreement was signed on 29 October 2001 and it entered into force on 1 February 2005 (OG-International Agreements, 1/05).

[36] See Arts 49, 56, 63, Treaty on the Functioning of the European Union (TFEU).

[37] See, for example, judgment of 1 June 1999, Konle, C-302/97, ECLI:EU:C:1999:271; judgment of 23 September 2003., Ospelt, C-452/01, ECLI:EU:C:2003:493; judgement of 6 March 2018, SEGRO, joined cases C-52/16 and C-113/16, ECLI:EU:C:2018:157; judgment of 22 October 2013, Essent *et al.*, joined cases C-105/12 - C-107/12, ECLI:EU:C:2013:677: judgment of 18 June 1985, Steinhauser, C-197/84, ECLI:EU:C:1985:260; judgment of 5 March 2002, Reisch *et al.*, joined cases C-515/99, C-519/99 - C-524/99 and C-526/99 - C-540/99, ECLI:EU:C:2002:135; judgment of 15 May 2003, Salzmann, C-300/01, ECLI:EU:C:2003:283; judgment of 13 July 2000, Albore, C-423/98, ECLI:EU:C:2000:401 *et al.*

[38] See Art. 356 PA (version of 23/2/2000).

[39] The negotiations during the period of transition in the context of free movement of capital resulted from the fact that free movement of capital (Art. 63 TFEU) was considered to be the main market freedom when regulating cross-border real property investments. Justification of the limitation of the possibilities to acquire immovables is considered within the context of freedom of movement of capital. In EU law, the concept of the movement of capital is interpreted very broadly, encompassing also various real property transactions, direct real property investments, liens, buying immovables for profit or for personal use, the establishment of usufruct, and the like. It is important to emphasise that it involves cross-border movement of capital between different Member States or between an EU Member State and a third state. See Bernard 2019, 530, 531; Streiblyté & Tomkin 2019, 751; Bröhmer 2016, 1006.

of this Agreement (1 February 2005) and the right to use and rent immovables in Croatia (Art. 49/5/a SAA); the second involved the subsidiaries of EU companies whose rights to acquire and enjoy ownership rights on real property had to be recognised just as in the case of Croatian companies where these rights were necessary to carry out the economic activities for which they were established, excluding natural resources, agricultural land, forests and forestry land (Art. 49/5/b SAA).[40] In addition, the SAA laid down a four-year time limit upon the entry into force of the SAA, within which it was necessary to establish the modalities for extending the rights to acquire and enjoy ownership rights to previously excluded sectors, including agricultural land (Art. 49/5/b SAA). The same time limit was prescribed to examine the possibility of extending the right to acquire and enjoy ownership of real property for the branches of EU companies.

Under the provisions on the movement of capital, Croatia committed itself, from the entry into force of the SAA, to allow the acquisition of real property in Croatia by nationals of Member States of the European Union by making full and expedient use of its existing procedures, except for agricultural land and areas protected under the Environmental Protection Act (Art. 60/2 SAA, Annex VII to SAA). Within the context of free movement of capital, the ban on acquiring agricultural land continued to exist for EU nationals and legal persons. However, it was agreed under the SAA that within four years from its entry into force, Croatia would progressively adjust its legislation concerning the acquisition of real property by nationals of the Member States of the European Union to ensure the same treatment as that which exists for Croatian nationals (Art. 60/2 SAA). It was also agreed that at the end of the fourth year following the entry into force of the SAA, the modalities for the extension of the right to acquire ownership of agricultural land and natural resources (Art. 60/2 SAA) would again be examined.

To meet the obligations referred to in Art. 60/2 SAA, in 2006 Croatia first simplified and shortened the procedure of issuing consent for the acquisition of ownership of immovables. The competence for the issuance of consent was transferred to the Minister of Justice alone.[41] After that, in 2008, a new Article 358a was added to the Property Act (effective since 1 February 2009) by which EU nationals and legal persons were fully equated with Croatian nationals and legal persons when acquiring real property in the Republic of Croatia.[42]

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[40] Under Croatian Property Act, a legal person is considered to be a foreign legal person if its registered office is outside the territory of the Republic of Croatia (Art. 355/3 PA). As a result, the subsidiaries of EU companies whose registered offices were in Croatia, regardless of the fact that they had been registered by EU companies whose registered offices were in other Member States, were considered as being domestic companies. Therefore, the subsidiaries of EU companies registered in Croatia were allowed, regardless of Art. 49/5/b SAA, to acquire ownership of immovables in Croatia without any limitations.

[41] See Art. 3 of the Act on Amendments to the Ownership Act and Other Real Rights, OG 79/06.

[42] See Art. 3 of the Act on Amendments to the Ownership Act and Other Real Rights, OG 146/08.

Since 1 February 2009 (despite the fact that at that time Croatia was still not a Member State of the European Union), EU nationals and legal persons have been allowed to acquire ownership of immovables under the same prerequisites that apply to Croatian nationals and legal persons.

However, the provisions on the liberalisation of the rules on the acquisition of ownership by EU nationals and legal persons did not include agricultural land. Even following the amendments to the Property Act in 2008, by which the discrimination of EU nationals and EU legal persons when acquiring ownership of immovable was removed, agricultural land and natural resources were excluded from the application of the rule on equal treatment (Art. 358/2 PA). The then-valid Agricultural Land Act also expressly prohibited the acquisition of ownership of agricultural land by foreigners regardless of whether they were from the EU or any third countries.[43] Therefore, even after Croatia had fulfilled its obligations referred to in the SAA, the ban on the acquisition of agricultural land continued to exist for all foreigners, including nationals and legal persons of the EU.

This was why the legal regime of the acquisition of agricultural land by EU nationals and legal persons was the subject of special negotiations regarding the provisions on free movement of capital. In the Treaty of Accession of Croatia (2012),[44] within the transitional measures on the free movement of capital, a transitional period for agricultural land, i.e. the postponement of the abolishment of the ban on acquiring agricultural land by EU nationals and EU legal persons was laid down.[45] It was agreed that Croatia would maintain, for seven years from the date of accession (1 July 2013), the restrictions on the acquisition of agricultural land by nationals of another Member State, by the nationals of the States parties to the European Economic Area Agreement (EEAA), and by legal persons established in accordance with the laws of another Member State or an EEAA State.[46]

The effects of the transitional measures were that even after Croatia acceded to the European Union and regardless of the provisions of the Treaty on the Functioning of the European Union (TFEU) on free movement of capital (Art. 63 TFEU),[47]

[43] See Art. 2/2 of the former Agricultural Land Act (2008), OG 152/2008.
[44] OJ L 112, 24.4.2012, 10–110.
[45] See the Treaty of Accession of Croatia, Annex V, item 3, Free Movement of Capital.
[46] The main reasons for an agreement on the transitional period were the socio-economic conditions for agricultural activities following the introduction of the market economy and transition to the common agricultural policy, and in particular the impact on the agricultural sector of liberalisation of the acquisition of agricultural land. It was emphasised that significant differences in the prices of land and farmers' purchasing power in Croatia, compared with other Member States, were possible. A transitional period was meant to contribute to the process of privatisation and return of agricultural land, the organisation of the land register and cadaster, the organisation of property and ownership relations regarding agricultural land. See point 2 of the Preamble to Commission Decision (EU) 2020/787.
[47] Art. 63 TFEU on free movement of capital bans all restrictions on the movement of capital between Member States and between Member States and third countries. The ban includes the prohibition of discrimination in real property transactions between Member States and between Member States and third countries. In the law of the EU, cross-border acquisitions of

and until 30 June 2020, it was still possible to apply the provisions on the acquisition of agricultural land by EU nationals and legal persons. For a period of 7 years, the discriminatory status of EU nationals and legal persons was maintained when dealing with the acquisition of ownership of agricultural land. However, at the same time, new obligations for Croatia arose: the prohibition of less favourable treatment of EU nationals and legal persons in comparison with nationals and legal persons from third states. This prohibition also included a ban on Croatia implementing, after accession, some new and harsher discriminatory restrictions for the acquisition of agricultural land by EU nationals and EU legal persons. By the transitional measures, it was only possible to keep the *status quo,* i.e. the discriminatory regime regarding the acquisition of ownership of agricultural land that was in force on the date when the Treaty of Accession was signed. However, it was no longer allowed to introduce new restrictions by which EU nationals and legal persons, in respect of the acquisition of agricultural land, would be brought into a less favourable position than the one they had had on the date when the Treaty of Accession was signed. It was also not permitted for EU nationals and legal persons, when acquiring ownership of agricultural land, to be treated in any more restrictive way than nationals or legal persons of third countries.[48]

On the other hand, a transitional measure in connection with the ban on acquiring ownership of agricultural land by EU nationals or legal persons applies only when the acquisition of ownership of agricultural land occurs in the context of the cross-border movement of capital as referred to in Art. 63 TFEU. Namely, the transitional period was agreed in the context of the free movement of capital but not in the context of other market freedoms provided for in the TFEU. Therefore, in Annex V of the Treaty of Accession, it is expressly laid down that self-employed farmers, who are nationals of another Member State and who wish to establish themselves and reside in Croatia, when acquiring ownership of agricultural land in Croatia, are not subject to the transitional provisions, or to any discriminatory rules and procedures. In other words, when ownership of agricultural land in Croatia is acquired by EU nationals and legal persons, when exercising their right to the establishment of farms and the organisation of agricultural production, no discriminatory rules on the prohibition of the acquisition of ownership of agricultural land apply. In every concrete case, it is necessary to establish the reasons for the acquisition of agricultural land.

immovables are considered as movement of capital. For more see Bernard 2019, 530; Streiblyté & Tomkin 2019, 751; Bröhmer 2016, 1006.

See judgment of 8 May 2013, Libert and Others, joined cases C-197/11 and C-203/11, ECLI:EU:C:2013:288, 62.

See Directive 88/361/EEC*, Annex I – Nomenclature of the capital movements referred to in Article 1 of the Directive.*

[48] After accession to the EU, there was no obligation for Croatia to apply non-discriminatory treatment for the acquisition of ownership by nationals and legal persons of third countries. However, when nationals and legal persons of third countries are involved in real property transactions in Croatia, only the restrictions existing under Croatian law on 31 December 2002 are valid. In Croatia, there is a prohibition to implement new restrictions for nationals and legal persons of third countries for the acquisition of real property in Croatia that are different and more serious than those of 31 December 2002. Such an obligation for Croatia expressly arises from Art. 64/1 TFEU.

If the agricultural land is acquired by EU nationals or legal persons to start agricultural production in Croatia, they must not be discriminated against in any way because they are then exercising their right to establishment under Article 49 TFEU to which the transitional period does not apply.

In the Treaty of Accession, it is laid down that if after the extension of the transitional period there is still a serious disturbance, or a threat of a serious disturbance, of Croatia's agricultural land market, the European Commission may extend the transitional period for three years.[49] On Croatia's request, the European Commission, by its Decision of 16 June 2020, extended the transitional period concerning the acquisition of agricultural land until 30 June 2023.[50] There are several reasons for the extension of the transitional period: the prices of agricultural land in Croatia are among the lowest in the EU; they are very high in relation to the purchasing power of its citizens; small family farms and fragmented agricultural land holdings are predominant and there is a need for the consolidation of small farms;[51] low productivity of Croatian farmers has a negative impact on their competitiveness;[52] more time is needed for the implementation of projects to alleviate the acquisition of agricultural land, the registration of ownership, privatisation and restitution of agricultural land and the need to continue the process of demining agricultural land.[53]

The current situation regarding the acquisition of ownership of agricultural land by EU nationals and legal persons is determined by Commission Decision (EU) 2020/787 on the extension of the transitional period for the prohibition of the acquisition of ownership of agricultural land by EU nationals and legal persons within the framework of free movement of capital and is still valid until 30 June 2023. However, for the acquisition of ownership of agricultural land within the right to establishment, equal and non-discriminatory treatment must apply.

Further, the prohibitions connected with less favourable treatment of EU nationals and legal persons in comparison with foreigners from third countries continue to be valid for the introduction of new discriminatory restrictions for the acquisition of agricultural land. These prohibitions could be of particular importance today for the interpretation of the acquisition of agricultural land by succession in favour of EU nationals. After accession to the European Union, Croatia has liberalised the acquisition of agricultural land by inheritance for foreigners. The former Agricultural Land Act (2008) referred to in Annex V of the Treaty of Accession laid down the absolute prohibition of the acquisition of agricultural land by foreigners on all legal grounds, including inheritance (Art. 2/2). However, the now valid Agricultural Land Act expressly lays down that foreigners may acquire agricultural land by inheritance

[49] See the Treaty of Accession of Croatia, Annex V, point 3, Free Movement of Capital.

[50] See the Commission Decision (EU) 2020/787.

[51] In its Decision, the Commission states that "compared to the average farmer in the European Union, the average Croatian farmer uses a 30% smaller surface area of agricultural land, breeds only half the livestock units, and produces standard output that is by 56% lower." Taken from point 6 of the Commission Decision (EU) 2020/787.

[52] The Commission also emphasises that "*in relation to the average agricultural productivity of the European Union, the agricultural productivity of the Republic of Croatia in 2018 is lower by 70.2 %.*" Taken from point 7 of the Commission Decision (EU) 2020/787.

[53] See points 4–9 of the Commission Decision (EU) 2020/787.

(Art. 2/3). Indeed, under the Agricultural Land Act, the legal position of EU nationals is not in any way different from the legal position of nationals of third countries when the inheritance of agricultural land is involved. The new rule, compared to the former Agricultural Land Act of 2008, is less restrictive in this respect. Therefore, the provision allowing the acquisition of agricultural land by inheritance should apply in the same way to EU nationals and nationals of third countries, regardless of the fact that in the Treaty of Accession more restrictive provisions from the former Agricultural Land Act are mentioned. EU nationals, as heirs of agricultural land, should not be discriminated against compared with nationals of third countries. The application of the provision allowing the acquisition of agricultural land by inheritance only for nationals of third countries would constitute a violation of the prohibition against EU nationals being treated in a more restrictive way. Consequently, a conclusion can be drawn that despite the extension of the transitional period during which the possibility of acquiring agricultural land is excluded, EU nationals may already now acquire ownership of agricultural land by succession under the condition of reciprocity.

Following the expiry of the transitional period, the provision of the Agricultural Land Act prohibiting foreigners from acquiring agricultural land on any ground will no longer apply to EU nationals and legal persons and the possibility of extending the transitional period will no longer exist. The acquisition of agricultural land in favour of EU nationals and legal persons will be under the direct effects of the provisions of the TFEU on the right to establishment, the right to provide services and free movement of capital which prohibit any kind of discrimination based on citizenship when exercising these market freedoms.[54] On the other hand, the extension of the transitional period until 30 June 2023 will make it possible for Croatia to carry out the structural reforms of agricultural land holdings in the following three years, particularly when it comes to small family farms, adjusting their operations to the new trends of the European agricultural sector.[55]

3. Family agricultural holdings

3.1. General

Family agricultural holdings/FAH (*obiteljska poljoprivredna gospodarstva*/*OPG*) have for the first time been wholly stipulated in Croatian law in the Family Agricultural Holding Act/FAHA) of 2018.[56,57] The objective of the FAHA is to define the organisational form of agricultural holdings that will be recognised and accepted on the

[54] The realisation of market freedoms set forth in the TFEU also encompasses the right to equal and non-discriminatory treatment when acquiring immovables, including agricultural land when this is necessary to exercise market freedoms. See Korte 2016, 916; Jung 2019, 910; Kainer 2017, 883; Wojcik 2015, 2008; Streiblyté & Tomkin 2019, 749; Kotzur 2015, 398; Bernard 2019, 524.

[55] For more, see under 3.

[56] OG Nos 29/2018, 32/2019.

[57] Until then, individual rights and obligations within this industry were only partly provided for in the former Agricultural Act of 2015 (OG 30/2015, 118/2018).

market and will increase the competitiveness of individual farmers. Particular emphasis has been placed on the importance of the FAHA for the realisation of the principle of general food safety and the preservation of natural agricultural resources. The aim of the Act is to establish the basis for structural changes in the functioning of family agricultural holdings, to simplify the rules for agricultural operation and any linked activities, to eliminate administrative, bureaucratic and fiscal barriers and to establish an efficient system for their development. A special target group referred to in the Family Agricultural Holding Act are family agricultural holdings with younger holders who are encouraged and steered in the right direction to carry out their entrepreneurial activities in agriculture.[58, 59]

A family agricultural holding, as a strategically important form of Croatian agricultural organisation, is defined in the Family Agricultural Holding Act 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. Family agricultural holdings, in order to generate income or profit by producing and selling their products, or by offering services on the market, may independently carry out agricultural activities (Art. 9/1 FAHA). These holdings, their holders and members are entered in a public, online Register of Family Agricultural Holdings kept by the Paying Agency for Agriculture, Fisheries and Rural Development.[60]

They are specific organisational forms of farmers – natural persons not recognised as legal persons. Therefore, family agricultural holdings do not acquire any rights or obligations. The holder of their rights and obligations is always a farmer, i.e. a natural person (FAH holder). In the accomplishment of their farming activities, beside the FAH holder, their FAH members also participate in these activities. Members of a family agricultural holding may be persons of legal age who possess business capacity, as well as their household,[61] and/or their family members[62] (Art. 28/1 FAHA).

[58] See a Draft FAHA, October 2017, 1,3,4.

[59] At the time when the Act was adopted (31 December 2016), of 170,515 registered agricultural holdings, 97% were registered as family agricultural holdings (165,167). Only in 38% of registered family agricultural holdings were their holders younger than 56 years of age (62,128), while in only 10% of family agricultural holdings were their holders younger than 40 years of age. Of a total number of registered members of family agricultural holdings, as many as 63% were older than 56 years of age. Data taken from the Draft Act on Family Agricultural Holdings, October 2017, 3.

[60] For more, see Arts 31-33. FAHA. Detailed rules on entries in the Register of Family Agricultural Holdings are provided for in the Rules on the Register of Family Agricultural Holdings (OG, 62/2019).

[61] Members of family agricultural households may be spouses, unregistered partners, same-sex partners (formal/informal), their children, other persons who live in the same household, earn their income and spend it together with other members of the household (Art. 5/1/h FAHA).

[62] Family members: spouses, unregistered partners, same-sex partners; first line kinship (children, parents, grandparents, grandchildren) and their spouses, unregistered partners, same-

The most important role in the functioning of a family agricultural holding is played by its holder (FAH holder). The holder of a family agricultural holding may be a FAH member elected by the members of the family household.[63] The FAH holder has all the rights and obligations of the FAH, and is at the same time its manager and representative and he or she is responsible for all the holding's activities (Art. 5/1/i, Art. 29 FAHA). FAH holders are personally liable for the obligations arising from all their economic activities with their entire assets. A FAH holder must be at least 18 years of age and possess legal capacity in Croatia or in any other Member State of the European Union, or a State that is a party to the European Economic Area Agreement (EEAA), or to the Swiss Confederation, having the right to use agricultural assets in Croatia (Art. 9 FAHA).

3.2. Economic activities of family agricultural holdings

The legal organisation of a family agricultural holding is aligned with the goals that must be achieved by such an organisational form of agricultural activity within the agricultural sector. There are special rules on the performance of its activities, the employment of its members, the issues of inheritance of a family agricultural holding and liability for debts, or the termination of its operation. The main objective of these rules is to facilitate and ensure its continuous and successful operation.

The economic activities of agriculture and all other linked activities of a family agricultural holding are carried out by its holder, either independently, or in the role of an employer (Art. 23/1 FAHA). The holder and the members of a family agricultural holding, who carry out the economic activity of agriculture as their only or main occupation, exercise their health and pension insurance rights after having been entered in the Register of Family Agricultural Holdings (Art. 23/3,4, FAHA). Therefore a person may be the holder of only one family agricultural holding, and the members of a family household may establish only one family agricultural holding and become members of a single FAH only (Arts 28/3, 29/3 FAHA). The employees of a family agricultural holding exercise their health and pension insurance rights on the basis of their labour contracts with the FAH holder as their employer (Art. 24. FAHA). Family agricultural holdings, beside the economic activities of agriculture, may also provide services in agriculture, as well as other linked activities (e.g. tourist services, catering services, the sale of their own agricultural products, and the like).

sex partners; collateral line kinship (brothers and sisters, their descendants) and their spouses, unregistered partners, same-sex partners; affinity (spouse's parents, brothers and sisters) and their descendants and their spouses, unregistered partners, same-sex partners; adoptees, their descendants and their spouses, unregistered partners, same-sex partners, foster care beneficiaries (Art. 5/1/h. FAHA).

[63] FAH members may at any point in time decide to appoint a new holder of a family agricultural holding. When a holder is entitled to retirement, a new holder is appointed by the holder's linear and/or collateral kins. A new holder is appointed by a member of the family household or a family member (Art. 34/2 FAHA).

Due to the very specific connection between holders of family agricultural holdings and their members, the Family Agricultural Holding Act expressly lays down that upon the death of a FAH holder, the production resources of family agricultural holdings may be inherited. The provision on inheritance must be interpreted by taking into account that a family agricultural holding is not a legal person and that its operation is based on the use of own and/or leased resources (Art. 5/1/point a). In the case of the death of a 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. All labour contracts made by the deceased in the capacity of employer are transferred to the new holder. As for any agricultural resources used by the FAH prior to its holder's death, various rules apply depending on whether they were owned by the diseased holder or had been leased. Due to the fact that a family agricultural holding is not a legal person, the general rules on succession referred to in the Succession Act apply to the division of agricultural resources owned by the deceased.[64] As for the agricultural resources used by the FAH based on a Lease Contract entered into by the deceased, according to Art. 35 FAHA such contracts are transferred to the new holder. This also means that such contracts continue to be valid, so that family agricultural holdings may carry on their activities. The newly appointed holder then assumes the legal position of a lessee and he or she continues to use the leased agricultural resources together with the members of the relevant family agricultural holding.

Liability for any obligations of a family agricultural holding is also stipulated to ensure the continuation of its agricultural activity. In principle, the FAH holder is liable with all his or her property for the obligations arising from the holding's agricultural activities (Art. 41/1 FAHA). However, the Family Agricultural Holding Act lays down separate rules on exclusion from forced enforcement over particular movables or immovables, a limitation of enforcement over pecuniary assets and on mandatory preliminary mediation proceedings before the institution of enforcement proceedings (Art. 41). The aim of these rules is to ensure the continuation of the basic activities of a family agricultural holding and the housing needs of the holder and all FAH members. Agricultural resources that are necessary to carry out an economic activity that is the main source of the members' existence are excluded from enforcement for the payment of any FAH debts. The same is the case with things and rights over which, under general regulations, no enforcement would be possible even if the holder was not carrying out an agricultural activity (Art. 41/2 FAHA).[65] Any immovable owned by the

[64] The rules of the Inheritance Act apply accordingly to civil partitions by payment of agricultural land. For more, see 2.2 Acquisition of Agricultural Land.

[65] In this regard, the provisions of the Enforcement Act (OG, 112/2012, 25/2013, 93/2014, 55/2016, 73/2017, 131/2020) apply to restrictions and exclusions from enforcement. The provisions of the Enforcement Act on the exclusion from enforcement of agricultural land and farm buildings apply to enforcements against holders and FAH members in the scope that is necessary for their maintenance and the maintenance of their family members (Art. 91/1 EA), as well as the provisions on exclusion from enforcement of

holder or a FAH member, in which the enforcement debtor lives and whose surface area is essential to satisfy their basic housing needs and the needs of persons they are responsible to support by law (Art. 42/3 FAHA) must also be excluded from enforcement. When pecuniary resources are subject to enforcement, the resources necessary to buy cattle feed, medicaments and other items necessary to care for domestic animals owned by a family agricultural holding are also excluded (Art. 41/5 FAHA).[66] There is also a separate provision on obligatory mediation before the institution of enforcement proceedings over agricultural resources when the claim is below the amount of HRK 20.000 (approx. EUR 2.667). In relation to the Enforcement Act, all these provisions are considered as *lex specialis.* The Enforcement Act applies to enforcement for the recovery of debts owned by a family agricultural holding unless provided otherwise by the FAHA.

A FAH ceases to exist by the termination of its economic agricultural activities and its cancellation by the decision of the holder, or because of the failure to provide the necessary agricultural resources (Art. 43/1 FAHA), or by its removal from the Register of Family Agricultural Holdings. A family agricultural holding ceases to exist if, upon the holder's death, his or her heirs do not continue its agricultural activity, if consumer bankruptcy proceedings against the holder have been brought to an end, if it is established that the FAH is registered on the basis of inauthentic documents, or if the prerequisites for carrying out the linked activities no longer exist (Art. 43, 44 FAHA).

4. Conclusion

Separate rules on the acquisition of agricultural land by foreigners and the specific legal regulation of family agricultural holdings are aimed at the development of the Croatian agricultural sector, the country's rural development and the preservation of the country's natural agricultural resources. However, the present regulations of the acquisition of agricultural land by foreigners and family agricultural holdings cannot be considered as satisfactory contribution. It seems that the prohibition of acquiring ownership of agricultural land by foreigners, and the detailed and very specific legal regulation of family agricultural holdings, without other important structural changes, investments in agriculture and overall development of the Croatian economy, are not sufficient to enhance the development of the Croatia's agricultural sector. After the ban that has already lasted for several years on the acquisition of agricultural land by EU nationals and legal persons, the existing agricultural land prices in Croatia are still

immovables to repay a claim not exceeding HRK 40.000 (approx. EUR 5.333) (Art. 80b/1 EA). Excluded from enforcement are also livestock, the agricultural machinery a farmer needs for his agricultural activities and for his and his family's maintenance, as well as seeds and livestock feed (Art. 135/1/3. EA). There will be no enforcement over monetary resources normally excluded from enforcement, such as 2/3 of the average net salary (Art. 173/1 EA).

[66] An amount of money excluded from enforcement is deposited into a protected account. The amount is calculated based on what is needed on a monthly basis for livestock feed and medicaments for individual kinds of animals (Art. 41/5. FAHA).

among the lowest in the European Union.[67] The problems connected with purchasing power in Croatia and the low productivity of Croatian farmers cannot be solved by prohibiting the acquisition of agricultural land by foreigners. Likewise, specific legal regulations of family agricultural holdings, without additional national support measures and structural reform, cannot solve many existing problems, such as small farms because of the small size of utilised agricultural areas, the small economic size of farms, the small number of livestock units per holding, and the high percentage of FAH holders of old age. The data of the European Commission of June 2020 show that the Croatian average farm size is lower than the average size of farms in the rest of the European Union. According to the data of 2016, as many as 69.5% of holdings were using an agricultural area of less than 5 hectares and as many as 46% of holdings were of an economic value of less than EUR 4,000. More than 60% of holders of family agricultural holdings were older than 55 years of age.[68]

Croatia

6.1. FARM STRUCTURE

Structure of agricultural holdings

Holdings		2010		2016	
		Total	%	Total	%
By UAA (*)	< 5 ha	176 740	75.8%	93 430	69.5%
	5-10 ha	31 390	13.5%	20 080	14.9%
	10-20 ha	14 070	6.0%	9 470	7.0%
	20-30 ha	4 400	1.9%	3 160	2.4%
	30-50 ha	3 500	1.5%	3 160	2.4%
	50-100 ha	2 320	1.0%	3 540	2.6%
	> 100 ha	850	0.4%	1 620	1.2%
By economic size (**)	< 4 000 €	141 210	60.5%	61 880	46.0%
	< 8 000 €	41 470	17.8%	30 820	22.9%
	< 15 000 €	24 400	10.5%	18 670	13.9%
	< 25 000 €	11 840	5.1%	9 130	6.8%
	< 50 000 €	8 760	3.8%	8 100	6.0%
	< 100 000 €	3 860	1.7%	3 610	2.7%
	< 250 000 €	1 370	0.6%	1 480	1.1%
	< 500 000 €	200	0.1%	560	0.4%
	=/> 500 000 €	160	0.1%	210	0.2%
By LSU (***)	0	40 180	17.2%	46 330	34.5%
	0-5	157 490	67.5%	64 350	47.9%
	5-10	19 610	8.4%	11 780	8.8%
	10-15	6 360	2.7%	4 480	3.3%
	15-20	3 160	1.4%	2 060	1.5%
	20-50	4 870	2.1%	4 080	3.0%
	50-100	1 020	0.4%	600	0.4%
	100-500	510	0.2%	680	0.5%
	> 500	90	0.0%	100	0.1%
By age of holder	< 35 years	9 610	4.1%	6 890	5.1%
	35-44 years	28 020	12.0%	16 880	12.6%
	45-54 years	58 420	25.0%	29 280	21.8%
	55-64 years	63 570	27.3%	37 410	27.8%
	> 64 years	73 670	31.6%	43 980	32.7%
	not applicable	:	:	10	0.0%
Total		233 290	100%	134 450	100%
UAA in 1 000 ha		1 346		1 563	
UAA (ha) per holding		5.8		11.6	

Source: Eurostat, Farm Structure Survey   Updated: June 2020

Figure 5
Croatia – farm structure (2010-2016)[69]

[67] See Commission Decision (EU) 2020/787, point 4.
[68] Data obtained from: European Commission (2020b)
[69] Table from: Paying Agency for Agriculture, Fisheries and Rural Development (2020b) (*) UAA=Utilised Agriculture Area (**) Economic size (***) LSU = Livestock units.

The current development of the agricultural land market and the operation of family agricultural holdings show that there are many structural problems in the agricultural sector which require a complex approach and solution at the national level through the implementation of many policies and reforms (agricultural, demographic, economic, social, technological, digital, and the like). Therefore, further development of legal transactions involving agricultural land in the Republic of Croatia and the successful functioning of family agricultural holdings will depend on the overall development of agricultural activities in Croatia and on the implementation of the Croatian Rural Development Programmes within the framework of the Common Agricultural Policy and, in particular, on the successful implementation of national support measures by family agricultural holdings.[70]

[70] For the implementation of the Croatian Rural Development Programme for the period 2014-2020 adopted by the European Commission in 2015, EUR 2.3 billion of public money was allocated (EUR 2 billion from the EU and EUR 0.3 billion of national funding). It is planned for about 2,000 holdings to receive some investment support, more than 5,000 farmers start-up aid for the development of small farms and about 1,000 young farmers some support to launch their businesses. Of the total amount, 19.65% is allocated for farm/business development. See: Paying Agency for Agriculture, Fisheries and Rural Development 2020b.

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EU and domestic regulation on the production of renewable hydrogen, constitutional issues related to the domestic regulation**

Abstract

The purpose of the present article is to review the relevant, recently published EU and national strategy documents, the role of hydrogen set out in them, and some key regulatory elements concerning hydrogen in the field of energy, following the introduction of renewable hydrogen and its possible uses. The article also focuses on the principles of the Fundamental Law, which are related to hydrogen and its uptake, and shares the constitutional dilemmas that can be related to the currently limited domestic regulation concerning hydrogen. It should be emphasized that partial amendments are already being made to the relevant regulations of the European Union, and the development of the domestic regulation is expected to begin in the short term, thus contributing to the achievement of the 2050 carbon-neutrality goal and laying down the basics of the hydrogen economy.
Keywords: hydrogen, renewable hydrogen, Fundamental law, Hydrogen Europe, natural gas, National Energy Strategy.

Introduction

The production of renewable hydrogen is not a new topic in the energy sector, but in the second half of 2020 it was given particular attention at virtual conferences and forums in Hungary. It is being addressed by all key players and they intend to take substantive steps to mobilize its potential as soon as possible to achieve the 2050 goal of climate neutrality. But what is renewable hydrogen and to what extent does the legal environment of the European Union and Hungary enable the production and admission of renewable hydrogen, and to what extent is the domestic regulation in line with the Fundamental Law?

Attila Lengyel: EU and domestic regulation on the production of renewable hydrogen, constitutional issues related to the domestic regulation – A zöld hidrogén előállításának európai uniós és hazai szabályozása, a hazai szabályozással kapcsolatos alkotmányossági kérdések. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2021 Vol. XVI No. 30 pp. 123-154, https://doi.org/10.21029/JAEL.2021.30.123

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1. What is clean hydrogen?

Hydrogen is considered worldwide as one of the energy carriers that will be able to replace fossil fuels for the sustainable development of humanity. In case hydrogen is produced from renewable sources (renewable hydrogen), it can help the realization of the principle of carbon neutrality.[1]

Hydrogen, similar to electricity, is an energy carrier that cannot be 'mined' using conventional methods. Hydrogen and electricity are also similar in that as energy carriers they both require serious storage tasks.[2]

In general, hydrogen can be produced in two ways: by electrolysis and from fossil fuels. The majority is excited about the electrolysis, as this method decomposes water to hydrogen and oxygen by using electricity. If the electricity used for the electrolysis comes from renewable energy sources (e.g. solar cells, wind power plants), the process ensures a sustainable way of producing energy. That is why it is called renewable hydrogen.[3]

Alternatively, hydrogen can be produced from fossil fuels as well. The most popular and cost-effective method to do so is the steam reforming of methane, the basic substance of which is methane, which forms natural gas. The hydrogen produced this way is called grey hydrogen. When hydrogen is produced from fossil fuels, but it does not lead to greenhouse gas emissions, it is called blue hydrogen. Although blue hydrogen is unsustainable, it goes with low carbon emissions.[4]

The challenge of the production of renewable hydrogen is that a biological system, which is suitable for the task of water-decomposition (i.e., the production of oxygen and hydrogen gas) of the energy available in the form of solar energy, does not exist in nature. Consequently, one of the key challenges could be the artificial development of microorganisms with the methods of molecular biology, which are able to produce oxygen and hydrogen gas by water-decomposition. This is a challenge that requires a global collaboration in research and development.[5]

But what are the fields of use of renewable hydrogen? The best-known use is related to transport, where manufacturers have developed several hydrogen-powered vehicles that could be alternatives to electric vehicles in the coming years.

At the same time, global society is most in need of hydrogen in sectors that cannot be easily electrified. The most urgent is the industrial use, as the carbon intensity of our basic activities need to be reduced as soon as possible: from the production of steel, to cement. Electricity cannot be used to carry out these activities, but as hydrogen can also be used to generate heat without emission of greenhouse gases, it offers a suitable alternative in respect of fossil fuels. Its application is similar to natural gas in many respects, which allows it to be used as a fuel in industrial processes, in heat supply or even in the operation of generators for electricity production.[6]

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[1] Kovács, Fülöp, Herbel, Nyilasi & Rákhely 2010, 20–21.
[2] Ibid.
[3] Szabó 2020.
[4] Ibid.
[5] Kovács, Fülöp, Herbel, Nyilasi & Rákhely 2010, 20–21.
[6] Szabó 2020.

Another important option for use is energy storage. There are 'little' problems with electricity storage, such as the scarcity or weight of resources required to produce batteries, as well as its costs. However, these issues are obscured by an even more significant problem, namely that the popular forms of energy storage, such as lithium-ion batteries, can only store energy economically for 1-2 days at best. To make the current energy system carbon neutral, seasonal differences between demand and supply from renewables need to be overcome. To put it simply, popular renewables, such as solar cells, operate with significantly higher utilization in the summer, while the consumers' energy demand is generally higher in the winter (one only need to think of the demand for heating). Hydrogen can bridge this gap: energy produced during the summer season (from potentially renewable energy sources) could help to satisfy needs in the winter season.[7]

It is an important aspect, that transporting hydrogen is significantly cheaper than transporting electricity. The infrastructure necessary to transport the latter is 10 to 20 times more expensive than what the former one requires. Furthermore, existing natural gas infrastructure can facilitate the transport and distribution of hydrogen, which can further reduce costs and demand for raw materials, however, many questions may arise about exactly which infrastructure elements can be converted for this purpose, how, and at what cost.[8]

Finally, as the intensive research tasks and industrial use were mentioned, Hungarian researches on electrolysis technologies, which are the basis for renewable hydrogen production, have recently produced leading-edge results.

Researchers and their industrial partners in Szeged have developed an energy-efficient electrolysis technology using only water and carbon dioxide, which was the first in the world to exceed the dream limit of 1 ampere / square centimeter density in the production of carbon monoxide. The carbon monoxide produced this way can be utilized as a high-value product directly in the petrochemical value chain.[9]

2. The constitutional aspects of sustainable development and environmental protection

After learning what renewable hydrogen is and what kind of uses it has, I will first review the Fundamental Law as the basis for the regulatory environment for renewable hydrogen. The Fundamental Law sets out two main milestones to be raised concerning the topic of the present article:

The National Avowal states that *"[w]e bear responsibility for our descendants and therefore we shall protect the living conditions of future generations by making prudent use of our material, intellectual and natural resources."*[10]

[7] Ibid.
[8] Ibid.
[9] Szegedi Tudományegyetem Hírportál (2020) Az SZTE kutatói is segítik a hidrogén felhasználását a zöld gazdaságban
[10] The Fundamental Law of Hungary.

The above principle is explained more specifically in Article P) and Article XX. of the Fundamental Law. According to paragraph (1) of Article P) of the Fundamental Law: *'Natural resources, in particular arable land, forests and the reserves of water, biodiversity, in particular native plant and animal species and cultural values, 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.'*[11]

Furthermore, Article XX. of the Fundamental law states that: *"(1) Everyone shall have the right to physical and mental health. (2) Hungary shall promote the effective application of the right referred to in paragraph (1) through agriculture free of genetically modified organisms, by ensuring access to healthy food and drinking water, by organizing safety at work and healthcare provision and by supporting sports and regular physical exercise as well as by ensuring environmental protection.'*[12]

It can be seen from the cited provisions, that the Fundamental Law further developed the environmental values and approach of the Constitution and the Constitutional Court. Paragraph (1) of Article P) does not define exhaustively the range of natural assets to be protected, but it does define what the protection of the environment actually means as a public and civic duty: 1. protection, 2. sustenance, 3. preservation for future generations. Thus, the public obligation was independently regulated and emphasized in paragraph (1) of Article P) of the Fundamental Law. It is a significant progress of the Fundamental Law, that it extended the scope of subjects of such obligation. While in the Constitution only the public obligations were emphasized concerning environmental protection, the Fundamental Law speaks about the obligations of 'everyone', including civil society and each citizen.[13]

Therefore, on the one hand, the Fundamental Law describes the substantive elements of environmental protection as a public and civic obligation, in which preservation for future generations is also emphasized.

Furthermore, according to Article N) of the Fundamental Law, *'Hungary shall observe the principle of balanced, transparent and sustainable budget management.'*[14]

Consequently, the Fundamental Law considers the fact that the effectiveness of fundamental rights, the democratic and efficient functioning of the state, the security of persons living in Hungary as well as of the organizations operating here can only be adequately guaranteed if the country's social and economic balance is not endangered by serious public finance problems. Based on that, the balanced, transparent, and sustainable budgetary management appears in the Fundamental Law. Of these, balance serves predictable functioning of the state, transparency serves democratic public life involving informed and responsible citizens, and *sustainability* serves responsibility for the fate of future generations as well, in addition to the primary financial goals.[15]

[11] Ibid.
[12] Ibid.
[13] Gáva, Smuk & Téglási 2017, 35.
[14] The Fundamental Law of Hungary.
[15] Gáva, Smuk & Téglási 2017, 33–34.

So, on the other hand, sustainability, i.e. responsibility for the fate of future generations is also reflected by the Fundamental Law in state budgetary management. Development is sustainable if the development of the economy results in continuous social prosperity within the limits of ecological carrying capacity, preserving natural resources for future generations.[16]

This also means that from an environmental, environmental regulatory point of view, and during the use of budgetary resources, the possible use of all renewable energy sources must be examined and made possible, which can ensure the achievement of carbon neutrality as soon as possible, but by 2050 at the latest. These milestones set out in the Fundamental Law should be kept in mind when examining the current regulatory environment for renewable hydrogen.

3. The European Union Strategy and regulatory elements related to hydrogen

3.1. The European Union's Hydrogen Strategy

Before the overview of the Hungarian legislation, let us take a look at the European Union framework for the regulation of renewable hydrogen. On 8 July 2020, the European Commission's document, called 'A hydrogen strategy for a climate-neutral Europe' was published (hereinafter: EU Hydrogen Strategy).

According to the EU Hydrogen Strategy, hydrogen can be used as a feedstock, a fuel or an energy carrier and storage, and has many possible applications which would reduce greenhouse gas emissions across industry, transport, power and building sectors.[17]

The document outlines three steps on the path towards a European hydrogen eco-system: (1) 2020-2024 – support for the installation of at least 6 GW of renewable hydrogen electrolysers and the production of up to 1 million tonnes of renewable hydrogen in the EU. (2) 2025-2030 – hydrogen needs to become an intrinsic part of an integrated energy system with a strategic objective to install at least 40 GW of renewable hydrogen electrolysers by 2030 and the production of up to 10 million tonnes of renewable hydrogen in the EU. (3) as from 2030 – renewable hydrogen technologies will be deployed at a large scale across all hard-to-decarbonise sectors.[18]

The document mentions that renewable hydrogen is to be produced mainly from wind and solar energy in the long term, in line with the EU's climate neutrality objectives, but in the short and medium term, other forms of low-carbon hydrogen are needed as well, to rapidly reduce emissions from existing hydrogen production.

The document then presents how the situation of hydrogen can be facilitated in Europe. One of the regulatory elements of it is that *"clean hydrogen needs a supportive framework, well-functioning markets and clear rules, as well as a dedicated infrastructure and logistical network."*[19]

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[16] Ibid. 83.
[17] European Commission (2020) Factsheet on EU Hydrogen Strategy.
[18] Ibid.
[19] Ibid.

The above is further specified in the document, as it states that the European Commission will work to introduce a comprehensive terminology and certification system to define renewable hydrogen and other forms of hydrogen. It will be based on life-cycle carbon emissions, anchored in existing climate and energy legislation, and in line with the EU taxonomy for sustainable investments.[20] This strategy, through supporting investment in clean hydrogen, will be critical in the context of the recovery from the COVID-19 crisis by creating sustainable growth and jobs.[21]

In order to identify the EU energy/climate policy regulations to be amended/adopted in connection with this EU Hydrogen Strategy, I will review hereinafter the document which contains Hydrogen Europe's 10 key recommendations.

3.2. Hydrogen Europe's energy/climate policy proposals for amendment

Prior to the publication of the EU Hydrogen Strategy, on 22 June 2020, Hydrogen Europe published its document called 'Hydrogen Europe's Top 10 Key Recommendations.' Hydrogen Europe is a European association representing the interests of the hydrogen industry, involving all actors in the value chain from producer to end user, as well as all stakeholders. The association's mission is to promote clean hydrogen, and to ensure that the European regulatory environment reflects the role of hydrogen, which enables a zero-emission society.

In the introductory part of the document, Hydrogen Europe states the following: *"Meeting the EU's long-term climate and energy goals and realising the promise of the Green Deal means carbon free power, increased energy system efficiency and deep decarbonisation of industry, transport and buildings. Achieving all this will require both electrons and molecules, and more specifically: clean hydrogen (renewable and low carbon hydrogen) at large scale. Without it, the EU will not achieve its decarbonisation targets."*[22]

In the following, I will address some of Hydrogen Europe's key regulatory initiatives in the field of energy, set out in the above mentioned document.

The definition of hydrogen

In the current EU regulation, according to Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, 'renewable energy' means energy from renewable non-fossil sources, namely wind, solar (solar thermal and solar photovoltaic) and geothermal energy, ambient energy, tide, wave and other ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas, and biogas.[23]

It can be seen that the above comprehensive definition used by the 'Renewable Directive' does not refer to renewable hydrogen.

[20] Ibid.
[21] Ibid.
[22] Hydrogen Europe (2020) The EU Hydrogen Strategy: Hydrogen Europe's 10 key recommendations.
[23] Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources.

According to Hydrogen Europe, *"a rapid agreement on a comprehensive and science-based EU-wide terminology for renewable and low carbon hydrogen is necessary to adapt national legal definitions…"*[24] Furthermore, Hydrogen Europe highlights that the adoption of a methodology for the calculation of the life-cycle carbonic emissions is needed and should also be reflected in the EU-wide terminology to allow comparability between energy sources in terms of the emissions factors.[25]

An EU-wide, uniform definition of renewable hydrogen and low carbon hydrogen is therefore needed to ensure that member states and all industry players handle this energy source in a uniform manner in the regulation and in the emerging European hydrogen market. The short-term development of the definition can be deduced from the EU Hydrogen Strategy, so its EU implementation as soon as possible is a real expectation.

Guarantee of origin

In order to establish a hydrogen market and a competitive hydrogen economy, according to Hydrogen Europe, rules shall be developed in the short term for trading with guarantees of origin for hydrogen, while in the medium- and long-term they encourage tenders for the production of renewable hydrogen, the startup of a hydrogen trade exchange,[26] and it is also recommended to develop the underlying regulation beforehand.

The concept of a guarantee of origin is currently governed by the already referred Renewable Directive.

According to paragraph 2 of Article 19 of the Renewable Directive, *'Member States shall ensure that a guarantee of origin is issued in response to a request from a producer of energy from renewable sources, (…). Issuance of guarantees of origin may be made subject to a minimum capacity limit. The standard size of guarantee of origin is 1 MWh. No more than one guarantee of origin shall be issued in respect of each unit of energy produced.'*[27]

According to recital 55 of the Renewable Directive, *"guarantees of origin issued for the purposes of this Directive have the sole function of showing to a final customer that a given share or quantity of energy was produced from renewable sources. A guarantee of origin can be transferred, independently of the energy to which it relates, from one holder to another. However, with a view to ensuring that a unit of renewable energy is disclosed to a customer only once, double counting and double disclosure of guarantees of origin should be avoided."*[28]

Thus, a guarantee of origin can be subject of trade, therefore it is essential for the creation of a renewable hydrogen market.

[24] Hydrogen Europe (2020) The EU Hydrogen Strategy: Hydrogen Europe's 10 key recommendations.
[25] Ibid.
[26] Ibid.
[27] Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources.
[28] Ibid.

Recital 59 of the Renewable Directive already contains indication, that the system of guarantees of origin shall be extended to hydrogen as well: *"guarantees of origin which are currently in place for renewable electricity should be extended to cover renewable gas. (…) This would provide creditable means of proving to final customers the origin of renewable gas such as biomethane and would facilitate greater cross-border trade in such gas. It would also enable the creation of guarantees of origin for other renewable gas such as hydrogen."*[29]

Clearly, the intention to extend guarantees of origin to renewable gases has been present in the European Union for several years, and within that, the referred recital of the directive specifically mentions biomethane and hydrogen. Consequently, the short-term, EU-wide implementation of the extension of guarantees of origin to renewable gases is a real expectation, especially considering its already existing basis in the Renewable Directive.

Natural gas/Hydrogen infrastructure

In order to eliminate the regulatory elements that hinder the development and operation of hydrogen infrastructures, Hydrogen Europe also recommends amending Directive 2009/73/EC concerning common rules for the internal market in natural gas (hereinafter: Natural Gas Directive).

In this respect, the conceptual structure of the Natural Gas Directive needs to be reviewed. The subject of the Natural Gas Directive is defined in the second paragraph of Article 1 as follows: *"The rules established by this Directive for natural gas, including LNG, shall also apply in a non-discriminatory way to biogas and gas from biomass or other types of gas in so far as such gases can technically and safely be injected into, and transported through, the natural gas system."*[30]

Renewable hydrogen, as an 'other type of gas' can be included in the aforementioned scope of the Natural Gas Directive.

However, the requirement, that it must be able to be *"technically and safely injected into the natural gas network"* has to be reviewed in view of the chemical characteristics of renewable hydrogen gas, and in case of inapplicability, a different system of requirements has to be introduced for renewable hydrogen gas.

This line of reasoning is followed by recital 41 of the above Directive as well, which states that *"those technical rules and safety standards should ensure that those gases can technically and safely be injected into and transported through the natural gas system and should also address their chemical characteristics."*[31]

Furthermore, the Natural Gas Directive defines transmission and distribution as follows: (a) transmission: the transport of natural gas through a network, which mainly contains high-pressure pipelines, other than an upstream pipeline network and other than the part of high-pressure pipelines primarily used in the context of local distribution of natural gas, with a view to its delivery to customers;[32] (b) distribution:

[29] Ibid.
[30] Directive 2009/73/EC concerning common rules for the internal market in natural gas.
[31] Ibid.
[32] Ibid.

the transport of natural gas through local or regional pipeline networks with a view to its delivery to customers.[33]

The above definitions apply to natural gas networks, but as it was explained concerning the subject of the Natural Gas Directive, the rules laid down for natural gas can be applied to other types of gas, accordingly, to renewable hydrogen gas as well, if the requirements mentioned above are met. So, the current regulation could even cover the pipeline transmitting renewable hydrogen, but in case of renewable hydrogen gas, differences due to the chemical characteristics of hydrogen (different requirements for the pipeline) and elements arising from the different structure of the hydrogen industry in terms of the activities should be regulated.

Support for trans-European energy infrastructures

Hydrogen Europe proposes to amend Regulation (EU) 347/2013 concerning the trans-European energy infrastructure (hereinafter: TEN-E regulation). This regulation gives visibility to energy infrastructures – makes them of energy policy significance – and speeds up their authorization process. Under the TEN-E regulation, projects of common interest (hereinafter: PCI) will be selected based on the general and specific criteria set out therein, currently in the categories of electricity, natural gas, oil and carbon dioxide.

Hydrogen Europe initiates the following: (1) the eligibility of PCI status shall be extended to projects connected to renewable and low carbon gases, including hydrogen;[34] (2) the sustainability criterion for the selection of PCIs should be incorporated to the regulation taking into consideration the greenhouse gas emissions reduction potential;[35] (3) the retrofitting of existing cross border gas infrastructure to transport clean hydrogen as well as provisions that favour the development of new dedicated clean hydrogen infrastructure should be supported;[36] (4) as hydrogen will take up an important role in transport, it is imperative to create more synergies between the TEN-E regulation and the TEN-T regulation[37] to ensure that hydrogen transported through the TEN-E corridors can be accessed by the relevant refueling stations along the TEN-T corridor;[38] (5) 'clean hydrogen networks' should be introduced as a new thematic area under the TEN-E regulation; this shall include new hydrogen infrastructure projects as well as hydrogen transport solutions, intermediate storage and associated infrastructure projects;[39]

[33] Ibid.
[34] Hydrogen Europe (2020) The EU Hydrogen Strategy: Hydrogen Europe's 10 key recommendations.
[35] Ibid.
[36] Ibid.
[37] Regulation (EU) No. 1315/2013 on Union guidelines for the development of the trans-European transport network.
[38] Hydrogen Europe (2020) The EU Hydrogen Strategy: Hydrogen Europe's 10 key recommendations.
[39] Ibid.

During the preparation of the present article, the European Commission has published a new draft of the TEN-E Regulation. The objective of the proposal is to align regulations with the 2050 climate neutrality targets.

One of the key elements of the Commission's proposal is to exclude new traditional natural gas infrastructure and oil pipeline investments from PCIs after 2022. In terms of decarbonisation, it plans to introduce new infrastructure categories, such as smart gas grid, investments supporting the integration of renewable and decarbonised gases (biomethane, hydrogen, synthetic gases) into the grid and hydrogen infrastructure. In line with the EU Hydrogen Strategy, the draft foresees the support of hydrogen production based on renewable energy. The EU negotiations on the revision of the regulation begins in January 2021.[40]

4. Comments on the EU regulation

Based on the EU Hydrogen Strategy and the above review of the proposed regulatory changes, the following is recommended to be considered.

The first phase of the EU Hydrogen Strategy is until 2024. In order for the fundamentals of hydrogen economy to develop and the hydrogen economy to become an essential, then integral part of the energy system in the second and then the third phase as a subsystem, also, knowing the legislative process of the EU, a two-step legislative process can be effective.

This means that within a year or two, a package of hydrogen proposals containing quick-wins shall be adopted in the field of energy, which clarifies the basic definitions of the hydrogen subsystem, extends the guarantee of origin system to hydrogen, sets out basic requirements for the infrastructures to be transformed and for the new infrastructures, and at the same time, promotes and facilitates the significant uptake of hydrogen projects.

As a second step, legislation of strategic importance may take place connected to hydrogen economy, the decisive point of which could be from a legislative aspect if a separate hydrogen regulation / directive, or – taking into consideration the wide range of the possible uses of hydrogen – a comprehensive amendment package will be presented, in relation to several pieces of EU legislation.

5. The National Energy Strategy 2030 and the domestic regulatory elements related to renewable hydrogen

5.1. National Energy Strategy 2030, with an outlook until 2040

The examination of the domestic regulation shall also start with the review of a strategic document as policy document. National Energy Strategy 2030, with an outlook until 2040 (hereinafter: National Energy Strategy) refers to the possibilities of hydrogen utilization in the chapter on Gas and Electricity market as well, however, the strategic role of hydrogen energy is discussed in detail in chapter 9 called 'Energy Innovation and Economic Development'.

[40] Hungarian Energy and Public Utility Regulatory Authority, 2021.

The introduction to the chapter anticipates that *"within the framework of the energy innovation strategy, we aim to encourage the use of innovative solutions that, on the one hand, make the above outlined transformation of electricity markets smooth, and on the other hand, contribute to the goals connected to the increase of the freedom of choice of consumers and climate-friendly transformation of the energy sector."*[41]

The sub-chapter 'The role of hydrogen in the future energy system' is discussed within the above chapter, and says that within the strategic time horizon, hydrogen can play a significant role in integrating electricity generation, strengthening domestic security of supply, and achieving our decarbonisation goals. [42]

Subsequently, the different potential uses of hydrogen are outlined. First, the document refers to the use of hydrogen for storage purposes.

According to it, *"with the expansion of the use of renewable energy sources (…) the daily, weekly, or even seasonal storage of electricity, which cannot be solved with battery technologies, is becoming an increasingly critical issue. With the technology of electrolysis, it is possible to store the momentary electricity surplus in the form of hydrogen and to use it later, choosing from several options."* In its brief assessment, the National Energy Strategy indicates that *"the production of hydrogen is already one of the cheapest (…) technologies for the storage of the otherwise unusable energy"*[43] but *"the high investment cost and low efficiency of fuel cells used for the reconversion of hydrogen into electricity is still a barrier to the market based uptake of the technology, however, based on the recent forecasts, a considerable (even up to 90%) cost reduction and a significant improvement in efficiency is expected."*[44]

According to the strategy document, hydrogen produced from the surplus of renewable electricity production offers an alternative in the field of transport and it can also be used to produce electricity in units modelled on gas engines.[45]

The National Energy Strategy then discusses the industrial use of renewable hydrogen and its possible injection to the natural gas grid.

According to the document, the industrial use of renewable hydrogen *"is a solution to partially cover the hydrogen demand primarily in petroleum refining, fertilizer production and the pharmaceutical industry."*[46]

Furthermore, hydrogen, *"when blended into the gas network, could even contribute to satisfy household energy needs. This not only means the 'greening' of natural gas, but it also improves our security of supply through the reduction of import needs. By feeding hydrogen produced from electricity into the natural gas network, its storage can also be easily solved, which is a particularly important aspect considering the size of the domestic gas storage capacities. As for the technical possibilities of feeding hydrogen into the gas network, there are still many open questions, both in terms of the resistance of gas pipelines to corrosion and the performance of end-user's equipment; we will support the study of the above in the framework of pilot projects."*[47]

[41] Ministry of Innovation and Technology: National Energy Strategy 2030 – with an outlook until 2040.
[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] Ibid.
[46] Ibid.
[47] Ibid.

It is a recognition to be supported, that according to the National Energy Strategy, *"hydrogen can serve as a link between the electricity and natural gas sectors through its energy and industrial use and its storability."*[48] I endorse this, adding the thought, that a strategic revision of whole energy regulation may be necessary by the middle of this decade, that the regulation of the large energy sections (electricity, natural gas) will be made in a less categorized way.

Finally, with adequate foresight, in chapter 15 of the National Energy Strategy (Flagship Projects), the government considers the implementation of the following energy innovation project as priority: *"Development of optimal operation of storage and utilization of hydrogen produced from renewable electricity (storage of hydrogen within a weekly period, ensuring its use in the natural gas system, studying the direct use of natural gas storage facilities for blending and storing hydrogen, converting hydrogen back to electricity)."*[49]

Knowledge of the results of this strategic project could significantly contribute to the large-scale domestic mobilization of hydrogen and facilitate the implementation of the corresponding strategic legislation.

In connection with the above project, a European benchmark can also be mentioned, as it was published on 27 July 2020 that the electricity generation company Iberdrola, together with the fertilizer producer Fertiberia, intends to create so far the largest green hydrogen center on the continent, which will be launched in 2021 and it will produce hydrogen from renewable energy and store it.[50]

In its communication of 18 November 2020, the Hungarian Energy and Public Utility Regulatory Authority stated that in accordance with the national strategic direction, in order to promote developments, they will pay special attention to the creation of the regulatory environment in the field of the use of hydrogen-based storage technologies and the use of hydrogen as fuel. Therefore, a specific working group was established within their organization.[51]

5.2. Domestic legislation concerning hydrogen

Following the review of the Hungarian strategy document, the present chapter on the domestic legislation covers three of the topics discussed in the chapter on the European Union's regulation (chapter 3.2), indicating the possible parallelisms and differences.

The definition of hydrogen

According to point 45. of Article 3 of Act no. 86 of 2007 on electricity (hereinafter: EA) Renewable energy source is a non-fossil and non-nuclear energy source, from which solar-, wind-, aerothermal-, geothermal-, hydrothermal energy, hydropower, or energy from biomass – including the energy from biogas (combustible

[48] Ibid.
[49] Ibid.
[50] Rácz 2020.
[51] Hungarian Energy and Public Utility Regulatory Authority, 2020.

gas from landfills and sewage treatment plants or generated from other organic materials) – can be produced.[52]

The EA, just like the Renewable Directive, does not refer to renewable hydrogen. However, the domestic regulator shall strive to introduce terminologies concerning hydrogen, considering the principles indicated in the Fundamental Law and the obligations arisen from them. Furthermore, the effective Hungarian participation in the development of the content of the European Union's regulation to be adopted soon in this regard could be expedient, as leading the way in creating a new 'European industry' and laying out its framework may bring significant national benefits in the future.

Guarantee of origin

Pursuant to point 13a of Article 3 of the EA, a guarantee of origin is an electronic document that proves to the user based on objective, transparent and non-discriminatory criteria, that a certain amount of electricity generated by a given generation unit comes from renewable energy sources or high-efficiency cogeneration.[53]

According to the first paragraph of Article 12 of the EA, the supplier may only certify the amount of electricity produced from a renewable energy source or high-efficiency cogeneration for the user with a guarantee of origin.[54]

The detailed rules of the guarantee of origin, its issuance, registration, transfer, and the reporting and information obligation of producers selling energy produced this way are determined in Governmental decree no. 309/2013 (VIII.16.) (hereinafter: Decree). Pursuant to Article 2 of the Decree, the register of guarantees of origin is kept by the Hungarian Energy and Public Utility Regulatory Authority (hereinafter: Authority).[55] The Authority shall ensure that the issuance, transfer, use and cancellation of guarantees of origin are accurate and reliable. Pursuant to paragraph (4) of Article 5 of the Decree, a guarantee of origin shall be issued for a quantity of 1 megawatt hour (MWh).[56]

The content of the regulation is the same as the regulation of the European Union. With respect to the fact, that the legal definition of renewable energy source does not refer to renewable hydrogen, the domestic regulation concerning the guarantee of origin does not cover hydrogen either.

However, "*in Hungary, a very low proportion of guarantees of origin are used to prove the renewable origin of electricity compared to the gross national electricity consumption. Between 2014 and 2016, the share of electricity certified with a guarantee of origin did not reach 1% of the domestic consumption. In 2017, this rate was already slightly above 1%.*'[57]

[52] Act LXXXVI of 2007 on electricity (EA).
[53] Ibid.
[54] Ibid.
[55] Governmental decree no. 309/2013 (VIII.16.) on the certification of the origin of electricity produced from renewable energy sources and high-efficiency cogeneration.
[56] Ibid.
[57] Hungarian Energy and Public Utility Regulatory Authority, 2018.

Consequently, the already functioning system of guarantees of origin in Hungary is still not very active, so as a first step it may be expedient to promote and exploit the domestic potential of the system of guarantees of origin.

Natural gas/Hydrogen infrastructure

The scope of Act no. 40 of 2008 on the natural gas supply (NGA) in accordance with paragraph (1) of Article 2. § covers the transmission and distribution through pipelines, storage, trade, consumption, use and settlement of natural gas.[58]

According to point 23. of Article 3 of the NGA, the definition of natural gas shall also include the types of gases according to point 26 of Article 3. Pursuant to point 26 of Article 3, gases equivalent to natural gas from biomass and other non-mining sources are artificially produced gas mixtures that can be injected into (transmitted, distributed through and stored in) the cooperating natural gas system in a proper manner from environmental and technical safety aspect under the conditions specified in the governmental decree on the implementation of the provisions of the NGA, and they can be blended with natural gas, and when this gas mixture is injected into the natural gas system, such mixture meets the quality requirements, set out in the governmental decree on the implementation of the provisions of the NGA, concerning the quality of natural gas.[59]

The domestic regulation has the same content as the European Union regulation in terms of the requirement, that the given type of gas shall be injectable into the natural gas system from the point of view of environment and technical safety, however, these gases shall also comply with the quality requirements set out in Annex 11 of the governmental decree on the implementation of the act on natural gas supply (such as combustion characteristics, impurity content, other requirements).[60]

Ultimately, in connection with the injection of hydrogen into the natural gas system, based on the results of domestic and international pilot projects, it is necessary to determine the chemical characteristics of hydrogen, also taking into consideration what kind of pipeline conversions would be necessary for the execution of the injection.

6. Constitutional reflections on domestic regulatory elements

Renewable hydrogen, as a key factor in the transformation of energy systems, has been a topic in energy professional circles for many years. Considering the principles of environmental protection and sustainable budget indicated in the Fundamental Law, the regulation of renewable hydrogen as a renewable energy source and the preparation and adoption of further regulatory proposals concerning renewable hydrogen is a clear expectation of the current framework established by the Fundamental law, which has been implemented only to a limited extent up until today.

[58] Act XL of 2008 on the natural gas supply.

[59] Ibid.

[60] Governmental decree no. 19/2009 on the implementation of the provisions of Act XL of 2008 on the natural gas supply.

Although the regulation of the field of energy, and its direction has been determined by the European Union for several decades, this does not prevent the member states from introducing regulation in areas that are not regulated by EU law. Moreover, in the light of the principles of the Fundamental Law described above, the regulation of renewable hydrogen is essential, and its absence may mean a regulatory deficit. According to paragraphs (1)-(2) of Article 46 of Act no. 151 of 2011 on the constitutional court, *"in case in the exercise of their powers, the Constitutional Court establishes the existence of unconstitutionality caused by an omission by the legislature, they call – together with the indication of a time limit – the defaulting body to perform its duties. It shall be considered as a failure to perform a legislative task - inter alia – in case the relevant content of a regulation, which can be deduced from the Fundamental Law, is incomplete."*[61] However, *"based on point c) of the above mentioned paragraph (2) of Article 46, the regulation remains so open that the Constitutional Court can form the cases of application of this legal instrument to a wide extent."*[62] Given that Article P) and XX. of the Fundamental Law stipulates the protection of the environment, including the preservation for future generations, thus it shall presume the specification and regulation of all possible renewable sources as such, including renewable hydrogen. Otherwise, in case a constitutional complaint is filed, even the existence of unconstitutionality caused by omission could be established as described above.

The European Union has recently published a Hydrogen Strategy and started to prepare the relevant regulations. It would be expedient for Hungary to participate in this EU legislative process and to start the development of domestic regulations on hydrogen as soon as possible.

Preserving the environment for future generations, as a constitutional principle, obliges the state, and as a reflection of that, sustainable budgetary management and the definition of a 'sustainable financial source' can be important milestones for laying the foundations of the hydrogen economy and for the effective implementation of pilot projects.

Based on the above analysis, it can be declared concerning hydrogen that the future has started.

[61] Act CLI of 2011 on the Constitutional Court.
[62] Kovács & Pozsár-Szentmiklósy 2018.

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LENGYEL Attila*

A zöld hidrogén előállításának európai uniós és hazai szabályozása, a hazai szabályozással kapcsolatos alkotmányossági kérdések**

Bevezetés

A zöld hidrogén előállítása nem új keletű téma az energia szektorban, de 2020 második felében Magyarországon egyértelműen kiemelt figyelmet kapott a virtuális konferenciákon, fórumokon. Minden kulcs szereplő foglalkozik vele és érdemi lépéseket tervez megtenni azért, hogy a klímasemlegesség 2050-es céljának elérése érdekében mielőbb mobilizálja az abban rejlő lehetőségeket. De vajon mi is a zöld hidrogén és az Európai Uniós és a hazai jogi környezet mennyire teszi lehetővé a zöld hidrogén előállítását, befogadását és mennyiben van a hazai szabályozás összhangban az Alaptörvénnyel?

1. Mi is a zöld hidrogén?

A hidrogénre világszerte úgy tekintenek, mint az egyik olyan energiahordozóra, amely az emberiség fenntartható fejlődése érdekében képes lesz kiváltani a fosszilis energiahordozókat. Amennyiben a hidrogént megújuló forrásokból állítjuk elő (zöld hidrogén), ez elősegítheti a karbonsemlegesség elvének megvalósítását.[1]

A hidrogén az elektromos áramhoz hasonlóan olyan energiahordozó, amelyet nem lehet megszokott módszerekkel 'bányászni.' A hidrogén és az elektromos áram abban is hasonlít egymásra, hogy energiahordozóként mindkettő komoly tárolási feladatot igényel.[2]

Általánosságban véve a hidrogén előállítása kétféleképpen tehető meg: elektrolízissel, valamint fosszilis üzemanyagokból. A többséget az elektrolízis hozza lázba, mivel a módszer a vizet elektromos áram befektetésével hidrogénre és oxigénre bontja.

Attila Lengyel: EU and domestic regulation on the production of renewable hydrogen, constitutional issues related to the domestic regulation – A zöld hidrogén előállításának európai uniós és hazai szabályozása, a hazai szabályozással kapcsolatos alkotmányossági kérdések. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2021 Vol. XVI No. 30 pp. 123-154, https://doi.org/10.21029/JAEL.2021.30.123

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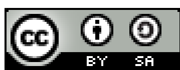
** *A tanulmány az Igazságügyi Minisztérium jogászképzés színvonalának emelését célzó programjai keretében valósult meg.*

[1] Kovács, Fülöp, Herbel, Nyilasi & Rákhely 2010, 20–21.

[2] Uo.



Amennyiben az ehhez felhasznált villamos energia megújuló energiaforrásokból (pl. napelemek, szélerőművek) származik, a folyamat fenntartható energiatermelési módot biztosít. Éppen ezért nevezik zöld hidrogénnek.[3]

Alternatív megoldásként a hidrogén fosszilis üzemanyagokból is előállítható. Ennek legnépszerűbb és legköltséghatékonyabb módja a metán vízgőzös reformálása, melynek alapanyagaként a földgázt alkotó metán szolgál. Az így előállított hidrogént nevezik szürke hidrogénnek. Ha a hidrogén fosszilis tüzelőanyagból áll elő, de nem vezet üvegházhatású-gázkibocsátáshoz, kék hidrogénnek nevezik. A kék hidrogén ugyan nem fenntartható, de alacsony karbonkibocsátással jár.[4]

A zöld hidrogén előállításának kihívása abban áll, hogy a napenergia formájában rendelkezésre álló energia vízbontásra, azaz oxigén és hidrogéngáz előállítására, mint feladat ellátására alkalmas biológiai rendszer a természetben nem létezik. Következésképpen az egyik kulcs feladat a vízbontással oxigént és hidrogéngázt termelő mikroorganizmusok mesterséges kifejlesztése, a molekuláris biológia módszereivel való létrehozása lehet. Ez egy globális kutatás-fejlesztési összefogást igénylő feladat.[5]

De milyen területeken lehet felhasználni a zöld hidrogént? A legismertebb alkalmazása a közlekedéshez köthető, ahol a gyártók számos olyan hidrogénüzemű járművet fejlesztettek, amelyek az elektromos járművek alternatívái lehetnek az elkövetkező években.

A globális társadalomnak ugyanakkor azokban a szektorokban van a hidrogénre a legnagyobb szüksége, amelyek nem villamosíthatók egykönnyen. Ipari alkalmazása a legsürgetőbb, mivel alapvető tevékenységeinket minél előbb alacsony karbonintenzitásúvá szükséges átalakítani: az acéltól a cement gyártásáig. Ezen tevékenységek végzéséhez ugyanis a villamos energia nem használható, de mivel a hidrogénből üvegház hatású gáz kibocsátása nélkül hő is nyerhető, így a fosszilis tüzelőanyagok helyettesítésére megfelelő alternatívát kínál. Alkalmazása sok szempontból hasonlít a földgázéhoz, ami lehetővé teszi üzemanyagként történő felhasználását ipari folyamatokban, a hőellátásban vagy akár generátorok üzemeltetésénél villamosenergia előállítása során.[6]

Másik fontos alkalmazási lehetősége az energiatárolás. A villamosenergia-tárolásnak vannak olyan 'apróbb' problémái, mint például az akkumulátorok gyártásához szükséges erőforrások szűkössége vagy súlya, valamint költségei. Ezeket azonban egy még nagyobb probléma homályosítja el, nevezetesen, hogy a népszerű energiatárolási formák, mint például a lítiumionos akkumulátorok, a legjobb esetben is csak 1-2 napig tudják gazdaságosan tárolni az energiát. Ahhoz, hogy a jelenlegi energiarendszert karbonsemlegessé alakítsuk, felül kell kerekedni a kereslet és a megújulókból származó kínálat között fennálló szezonális eltéréseken. Leegyszerűsítve: a népszerű megújulók, mint a napelemek, nyáron lényegesen magasabb kihasználtsággal működnek, míg a fogyasztók energiaigénye általában télen magasabb (gondoljunk csak a fűtési igényre).

[3] Szabó 2020.
[4] Uo.
[5] Kovács, Fülöp, Herbel, Nyilasi & Rákhely 2010, 20–21.
[6] Szabó 2020.

A hidrogén ezt a hiányosságot képes áthidalni: a nyár folyamán (potenciálisan megújuló energiaforrásokból) előállított energia segíthet a téli igények kielégítésében.[7]

Fontos szempont, hogy a hidrogén szállítása jelentősen olcsóbb, mint a villamos energiáé. Az utóbbi szállításához szükséges infrastruktúra 10-20-szor drágább, mint amit az előbbi igényel. Továbbá a már meglévő földgáz-infrastruktúra megkönnyítheti a hidrogén szállítását és elosztását, ami tovább csökkentheti a költségeket és a nyersanyagigényt, jóllehet sok kérdés merül fel azzal kapcsolatban, hogy pontosan mely infrastruktúra elemeket lehet erre a célra átalakítani, hogyan és milyen költséggel.[8]

Végül, ha már intenzív kutatási feladatokat és ipari célú felhasználást említettem, a zöld hidrogén előállításának alapját jelentő elektrolizáló technológiákkal kapcsolatban folyó magyar kutatások a közelmúltban élenjáró eredményeket hoztak.

Szegedi kutatók és ipari partnereik egy saját fejlesztésű, energiahatékony, kizárólag vizet és szén-dioxidot felhasználó elektrolizáló technológiát dolgoztak ki, amellyel a világon elsőként sikerült átlépniük az 1 amper/négyzetcentiméter áramsűrűségi álomhatárt a szén-monoxid előállítása során. Az előállított szén-monoxid pedig a petrolkémiai értékláncban közvetlenül felhasználható, nagy értékű termékként hasznosítható.[9]

2. Fenntartható fejlődés, környezetvédelem Alaptörvényi vonatkozásai

Miután megismertük, mi a zöld hidrogén és milyen felhasználási módjai vannak, áttekintem a zöld hidrogén szabályozási környezetének alapvetéseként először is az Alaptörvényt. Az Alaptörvény két fő mérföldkövet rögzít, amely a jelen cikk témája szempontjából felvetendő. A Nemzeti Hitvallásban rögzítésre kerül, hogy *„felelősséget viselünk utódainkért, ezért anyagi, szellemi és természeti erőforrásaink gondos használatával védelmezzük az utánunk jövő nemzedékek életfeltételeit.”*[10]

Az Alaptörvény P) cikkében és a XX. cikkben a fenti elv konkrétabban kerül kifejtésre. Az Alaptörvény P cikk (1) bekezdése szerint: *„A természeti erőforrások, különösen a termőföld, az erdők és a vízkészlet, a biológiai sokféleség, különösen a honos növény- és állatfajok, valamint a kulturális értékek a nemzet közös örökségét képezik, amelynek védelme, fenntartása és a jövő nemzedékek számára való megőrzése az állam és mindenki kötelessége.”*[11]

Az Alaptörvény XX. cikke továbbá rögzíti, hogy *„(1) Mindenkinek joga van a testi és lelki egészséghez. (2) Az (1) bekezdés szerinti jog érvényesülését Magyarország genetikailag módosított élőlényektől mentes mezőgazdasággal, az egészséges élelmiszerekhez és az ivóvízhez való hozzáférés biztosításával, a munkavédelem és az egészségügyi ellátás megszervezésével, a sportolás és a rendszeres testedzés támogatásával, valamint a környezet védelmének biztosításával segíti elő.”*[12]

[7] Uo.
[8] Uo.
[9] Szegedi Tudományegyetem Hírportál (2020) Az SZTE kutatói is segítik a hidrogén felhasználását a zöld gazdaságban.
[10] Magyarország Alaptörvénye (2011. április 25.).
[11] Uo.
[12] Uo.

Az idézett rendelkezések alapján látható, hogy az Alaptörvény az Alkotmány és az Alkotmánybíróság környezetvédelmi értékrendjét és szemléletét tovább fejlesztette. A P) cikk (1) bekezdése taxatíve nem határozza meg a védendő természeti értékek körét, ám azt igen, hogy valójában mit jelent a környezetvédelem, mint állami és állampolgári kötelezettség: 1. védelem, 2. fenntartás, 3. jövő nemzedékek számára történő megőrzés. Az állami kötelezettség tehát önálló szabályozást nyert és hangsúlyt kapott az Alaptörvény P) cikk (1) bekezdésében. Az Alaptörvény jelentős előrelépése a kötelezetti kör kiterjesztése. Míg az Alkotmány alapján a környezetvédelemben csak az állami kötelezettségek voltak hangsúlyosak, addig az Alaptörvény 'mindenki' – így a civil társadalom és minden egyes állampolgár – kötelezettségéről is beszél.[13]

Az Alaptörvény egyrészről tehát a környezetvédelem, mint állami, illetve állampolgári kötelezettség tekintetében fejti ki annak lényeges elemeit, melyben a jövő nemzedékek számára történő megőrzés is hangsúlyosan szerepel.

Továbbá, az Alaptörvény N) cikke szerint *„Magyarország a kiegyensúlyozott, átlátható és fenntartható költségvetési gazdálkodás elvét érvényesíti.”*[14]

Az Alaptörvény figyelembe veszi tehát azt a körülményt, hogy az alapvető jogok érvényesülése, az állam demokratikus és hatékony működése, a Magyarországon élő személyek és az itt tevékenykedő szervezetek biztonsága megfelelőképpen csak akkor garantálható, ha az ország társadalmi és gazdasági egyensúlyát komoly államháztartási problémák nem veszélyeztetik. Ennek alapján az Alaptörvényben megjelenik a kiegyensúlyozott, átlátható és fenntartható költségvetési gazdálkodás. Ezek közül a kiegyensúlyozottság a kiszámítható állami működést, az átláthatóság a tájékozott és felelős polgárok részvételével zajló demokratikus közéletet, a fenntarthatóság pedig a jövendő nemzedékek sorsáért való felelősségvállalást is szolgálja az elsődleges pénzügyi célok mellett.[15]

Az Alaptörvény másrészről tehát az állami költségvetési gazdálkodásban is megjeleníti a fenntarthatóságot, azaz a jövendő nemzedékek sorsáért való felelősségvállalást. Fenntartható a fejlődés akkor, ha a gazdaság fejlődése folyamatos szociális jobblétet eredményez az ökológiai eltartóképesség határain belül, megőrizve a természeti erőforrásokat a jövő generációi számára.[16]

Ez azt is jelenti, hogy környezetvédelmi, környezetvédelmi szabályozási szempontból, illetve a költségvetési források felhasználása során valamennyi lehetséges megújuló energiaforrás felhasználási lehetőséget meg kell vizsgálni és lehetővé kell tenni, amely a széndioxid semlegesség mielőbbi, de legkésőbb 2050-ig történő elérését biztosítja. Ezen, Alaptörvényben rögzített mérföldköveket szem előtt kell tartani, amikor a zöld hidrogén jelenlegi szabályozási környezetének vizsgálatát elvégezzük.

[13] Gáva, Smuk & Téglási 2017, 35.
[14] Magyarország Alaptörvénye (2011. április 25.).
[15] Gáva, Smuk & Téglási 2017, 33–34.
[16] Uo. 83.

3. A hidrogénnel kapcsolatos Európai Uniós Stratégia, illetve szabályozási elemek

3.1. Az Európai Unió Hidrogén Stratégiája

A hazai szabályozás áttekintése előtt nézzük meg a zöld hidrogén szabályozásának Európai Uniós kereteit. 2020. július 8-án megjelent az Európai Bizottság Hidrogén Stratégia egy klímasemleges Európáért dokumentuma (továbbiakban: EU Hidrogén Stratégia).

Az EU Hidrogén Stratégia szerint a hidrogén használható, mint nyersanyag, üzemanyag, mint energiahordozó és tároló és számos alkalmazási lehetősége van, ami csökkenti az üvegházhatású gázkibocsátást az iparban, a közlekedésben a villamos energia és építőipari szektorban.[17]

A dokumentum három lépcsőt vázol fel az európai hidrogén rendszer felé vezető úton: (1) 2020-2024-ig – 6 GW zöld hidrogénen alapuló elektrolizáló készülék bevezetésének és 1 millió tonna zöld hidrogén termelésének támogatása az Európai Unióban. (2) 2025-2030 – a hidrogén az integrált energia rendszer lényeges részévé kell váljon, legalább 40 GW zöld hidrogénen alapuló elektrolizáló készülék bevezetésével és 10 millió tonna zöld hidrogén termeléssel az Európai Unióban. (3) 2030-tól a zöld hidrogént nagy léptékben kell alkalmazni valamennyi nehezen dekarbonizálható szektorban.[18]

A dokumentum megemlíti, hogy a zöld hidrogént főként szél- és napenergia felhasználásával kívánják előállítani hosszú távon az EU klímasemlegességi célkitűzéseire tekintettel, de rövid- és középtávon más, alacsony karbonintenzitású formái is szükségesek, hogy gyorsan csökkentésre kerülhessen a kibocsátás a meglévő hidrogén előállításból eredően.

Ezt követően a dokumentum bemutatja, milyen módon lehet a hidrogén helyzetét előmozdítani Európában. Ennek immár egyik szabályozási eleme, miszerint *„a tiszta hidrogénnek támogató környezetre, jól működő piacra és egyértelmű szabályokra van szüksége, valamint dedikált infrastruktúrára és logisztikai hálózatra."*[19]

Ezt tovább konkretizálja a dokumentum, amikor rögzíti, hogy az Európai Bizottság be fog vezetni egy minden részletre kiterjedő terminológiát és igazolási rendszert, hogy meghatározza a zöld hidrogént és a hidrogén további formáit. Ez a karbon kibocsátási életcikluson alapszik és a jelenlegi klíma és energia szabályozásban kerül rögzítésre, összhangban a fenntartható beruházások Európai Unió általi osztályzásával.[20]

Ez a stratégia a zöld hidrogénre vonatkozó beruházások támogatása révén kritikus lesz a COVID 19 krízisből történő kilábalással összefüggésében, a fenntartható növekedés és fenntartható állások megteremtése útján.[21]

[17] Európai Bizottság (2020) Tájékoztató a hidrogénre vonatkozó uniós stratégiáról.
[18] Uo.
[19] Uo.
[20] Uo.
[21] Uo.

Ahhoz, hogy ezen EU Hidrogén Stratégia kapcsán a módosítandó/létrehozandó EU energia/klímapolitikai szabályozásokat azonosítani tudjuk, a következőkben áttekintem a Hydrogen Europe 10 lényeges javaslatát tartalmazó dokumentumot.

3.2. Hydrogen Europe energia/klimapolitikai módosítási javaslatai

Az EU Hidrogén Stratégiájának megjelenését megelőzően, 2020. június 22-én publikálta a Hydrogen Europe a Hydrogen Europe's Top 10 Key Recommendations c. dokumentumát. A Hydrogen Europe egy európai egyesület, amely a hidrogén iparág érdekeit képviseli, részt vesz benne az értéklánc valamennyi szereplője a termelőtől a végfelhasználóig továbbá valamennyi stakeholder. A szervezet missziója a tiszta hidrogén támogatása, annak biztosítása, hogy az európai szabályozási környezet megjelenítse a hidrogén szerepét, amely lehetővé teszi a zéró emissziójú társadalmat.

A Hydrogen Europe a dokumentum bevezetőjében az alábbiakat szögezi le: *„Az Európai Unió hosszú távú klímapolitikai és energia ágazati céljai és a Green Deal-ben foglaltak megvalósítása karbonmentes energiát, növekvő energia rendszer hatékonyságot és az ipar, közlekedés és épületek mélyreható dekarbonizációját jelenti. Mindennek az eléréshez szükség van elektronokra és molekulákra, nevezetesen a tiszta hidrogénre (megújuló alapú és alacsony karbonintenzitású hidrogénre) nagy léptékben. Enélkül az Európai Unió nem fogja elérni a dekarbonizációs céljait.'*[22]

A következőkben a Hydrogen Europe fenti dokumentumban szereplő néhány – az energetika területére eső – alapvető szabályozási kezdeményezésére térek ki.

A hidrogén fogalma

A jelenlegi EU szabályozásban, a megújuló energiaforrásokból előállított energia használatának előmozdításáról szóló 2018/2001 EU irányelv szerint 'megújuló energia' a nem fosszilis megújuló energiaforrásokból származó energia, nevezetesen szélenergia, napenergia (naphő és fotovoltaikus napenergia) és geotermikus energia, környezeti energia, árapály-, hullám- és az óceánból nyert egyéb energia, vízenergia, biomassza, hulladéklerakó helyeken és szennyvíztisztító telepeken keletkező gázok, továbbá biogázok energiája.[23]

Azaz a 'Megújuló Irányelv' fenti összefoglaló fogalma nem utal a megújuló hidrogénre.

A Hydrogen Europe szerint *„gyors megállapodásra van szükség az Európai Unióban egy átfogó, tudományos alapú megújuló hidrogén és alacsony karbon intenzitású hidrogén terminológia megalkotása érdekében, amely szükséges ahhoz, hogy a tagállamok jogszabályi definíciói elfogadásra kerülhessenek….'*[24]

[22] Hydrogen Europe (2020) The EU Hydrogen Strategy: Hydrogen Europe's 10 key recommendations.

[23] EU 2018/2001 irányelve a megújuló energiaforrásokból előállított energia használatának előmozdításáról

[24] Hydrogen Europe (2020), The EU Hydrogen Strategy: Hydrogen Europe's 10 key recommendations

Továbbá a Hydrogen Europe kiemeli, hogy szükség van a karbon kibocsátási életciklus számítási módszertanának elfogadására és azt az említett Európai Uniós terminológiában szükséges megjeleníteni, hogy összehasonlíthatók legyenek az energiaforrások a kibocsátási tényezők szempontjából.[25]

Az EU szintű, egységes megújuló hidrogén és alacsony karbon intenzitású hidrogén fogalom meghatározás tehát ahhoz szükséges, hogy a tagállamok, valamennyi iparági szereplő egységesen kezelje ezen energiaforrást a szabályozásban és a kialakításra kerülő európai hidrogén piacon. A fogalom meghatározás rövid távú megvalósítása az EU Hidrogén Stratégiájából levezethető, így ennek EU szintű mielőbbi végrehajtása valós elvárás**.**

Származási garancia

A hidrogén piac, a versenyképes hidrogén gazdaság kialakítása érdekében a Hydrogen Europe szerint rövid távon szabályozást szükséges bevezetni a hidrogénre vonatkozó származási garanciákkal történő kereskedés érdekében, míg közép- illetve hosszú távon tenderek kiírását szorgalmazzák megújuló hidrogén termelésre, illetve hidrogén tőzsde alapítását,[26] továbbá az annak alapját képező szabályozás előzetes létrehozása is javasolt.

A származási garancia intézményét jelenleg a már hivatkozott Megújuló Irányelv szabályozza.

A megújuló irányelv 19. cikk 2. bekezdése szerint *„a megújuló forrásokból előállított energia termelőjének kérésére a tagállamok biztosítják a származási garancia kiállítását (….). A származási garanciák kiadását a kapacitás minimális határértékéhez lehet kötni. A származási garancia szabványos mérete 1 MWh. A megtermelt energia minden egyes egységéről legfeljebb egy származási garancia állítható ki.”*[27]

A Megújuló Irányelv preambulumának 55. pontja szerint *„az ezen irányelv céljából kiadott származási garancia kizárólagos rendeltetése, hogy a végső fogyasztó felé bemutassa, hogy az energia egy meghatározott részarányát vagy mennyiségét megújuló forrásokból állították elő. A származási garanciát annak birtokosa átruházhatja másra, függetlenül attól az energiától, amelyre vonatkozik. Annak biztosítása érdekében azonban, hogy egy adott megújulóenergia-egységet csak egyszer lehessen egy fogyasztónak juttatni, el kell kerülni a kétszeres beszámítást és a származási garanciák kétszeres kiadását.”*[28]

A származási garancia tehát kereskedés tárgya lehet és éppen ezért lényeges a megújuló hidrogén piac kialakítása szempontjából.

A Megújuló Irányelv preambulumának 59. pontja már jelenleg is tartalmaz utalást arra, hogy a származási garanciák rendszerét a hidrogénre is ki kell terjeszteni: *„A megújuló villamos energia vonatkozásában jelenleg használatos származási garanciákat ki kell terjeszteni a megújuló gázra is. (…) Ez megbízható eszközt jelentene a megújuló gázok, például a biometán eredetének a végső fogyasztók felé történő bizonyítására, és megkönnyítené az ilyen gázok*

[25] Uo.
[26] Uo.
[27] Az Európai Parlament és a Tanács (EU) 2018/2001 irányelve (2018. december 11.) a megújuló energiaforrásokból előállított energia használatának előmozdításáról.
[28] Uo.

határokon átnyúló kereskedelmét is. Egyúttal lehetővé tenné az egyéb megújuló gázokra, például a hidrogénre vonatkozó származási garanciák létrehozását is."[29]

Azaz, az Európai Unióban már több éve meg van a szándék a származási garanciák megújuló gázokra történő kiterjesztésére, ezen belül az irányelv hivatkozott pontja a biometánt és a hidrogént konkrétan is megnevezi. A származási garanciák megújuló gázokra történő kiterjesztésének rövid távú EU szintű végrehajtása következésképpen, a már meglévő Megújuló Irányelvi alátámasztásra is tekintettel valós elvárás.

Földgáz/Hidrogén infrastruktúra

A hidrogén infrastruktúrák kialakításának, üzemeltetésének akadályát képező szabályozási elemek megszüntetése érdekében a Hydrogen Europe javasolja a földgáz belső piacára vonatkozó közös szabályokról szóló EK 2009/73 Irányelv (továbbiakban: Földgáz Irányelv) módosítását is.

E tekintetben a Földgáz Irányelv fogalmi rendszerét szükséges áttekinteni.

A Földgáz Irányelv tárgyát az alábbiak szerint határozza meg az 1. cikk 2. bekezdése: *„Az ezen irányelvben a földgázra megállapított szabályokat, beleértve a cseppfolyósított földgázt (LNG) is, megkülönböztetéstől mentesen kell alkalmazni a biogázból és a biomasszából származó gázok, valamint egyéb gázfajták esetében is, amennyiben ezek a gázfajták műszakilag megfelelő módon és biztonságosan a földgázhálózatba juttathatók és azon keresztül szállíthatók."*[30]

A Földgáz Irányelv tárgyába a megújuló hidrogén már most is beleérthető, mint egyéb gázfajta. Ugyanakkor a megújuló hidrogén gáz kémiai jellemzőire tekintettel szükséges felülvizsgálni a *„földgázhálózatba műszakilag megfelelő módon és biztonságosan betáplálhatóság"* követelményét és a megújuló hidrogén gázra ennek esetleges alkalmazhatatlansága esetére egy eltérő követelmény rendszer bevezetését.

Ezt a gondolatmenetet követi a fenti Irányelv preambulumának 41. pontja is, melyben rögzítésre került, hogy *„a vonatkozó műszaki szabályok és biztonsági szabványok biztosítják, hogy ezeket a gázfajtákat műszakilag megfelelő módon és biztonságosan juttathassák be a földgázhálózatba és szállíthassák a hálózaton keresztül, továbbá foglalkozniuk kell azok kémiai jellemzőivel is."*[31]

A Földgáz Irányelv továbbá a szállítás és az elosztás fogalmakat az alábbiak szerint határozza meg: (a) szállítás: a földgáz hálózaton, túlnyomórészt nagynyomású csővezetéken, de nem termelési csővezeték-hálózaton és nem az elsődlegesen a helyi földgázelosztás keretében használt nagynyomású vezetékeken történő szállítása a felhasználókhoz történő eljuttatás céljából,[32] (b) elosztás: a földgáz helyi, illetve regionális csővezeték-hálózatokon keresztül a felhasználókhoz történő szállítása.[33]

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[29] Uo.
[30] Az Európai Parlament és a Tanács 2009/73/EK irányelve (2009. július 13.) a földgáz belső piacára vonatkozó közös szabályokról és a 2003/55/EK irányelv hatályon kívül helyezéséről.
[31] Uo.
[32] Uo.
[33] Uo.

A fenti meghatározások földgáz hálózatokra vonatkoznak, de ahogy a Földgáz Irányelv tárgyánál kifejtettem, a földgázra megállapított szabályok az egyéb gázfajtákra, így a megújuló hidrogén gázra is alkalmazhatók, a fent meghatározott feltételek teljesülése esetén. Azaz a jelenlegi szabályozás akár a megújuló hidrogént szállító csővezetéket is magában foglalhatja, ugyanakkor a megújuló hidrogén gáz esetében a hidrogén kémiai sajátosságaiból eredő eltérések (eltérő követelmények rögzítése a csővezeték kapcsán), illetve a tevékenységeket tekintve a hidrogén ipar eltérő struktúrájából adódó elemek szabályozandók.

Transzeurópai energia-infrastruktúrák támogatása

A Hydrogen Europe javaslatot tesz a Transzeurópai energia-infrastruktúrákról szóló 347/2013 EU rendelet (továbbiakban: TEN-E rendelet) módosítására. Ez a rendelet az energia-infrastruktúrák ismertségét – energiapolitikai jelentőségűvé tételét – teszi lehetővé, engedélyezési eljárásukat gyorsítja. A TEN-E rendelet keretében közös érdekű projektek kiválasztására kerül sor az abban meghatározott általános és egyedi kritériumok alapján, jelenleg villamos energia, földgáz, olaj és szén-dioxid kategóriákban.

A Hydrogen Europe kezdeményezi, hogy (1) kerüljön kiterjesztésre a közös érdekű projekt a megújuló és alacsony karbon intenzitású gázokkal kapcsolatos projektekre, így a hidrogén projektekre;[34] (2) a közérdekű projektek kiválasztásánál szerepet játszó egyedi fenntarthatósági kritérium az üvegházhatású gáz kibocsátás csökkentési potenciál figyelembe vételével kerüljön beillesztésre a szabályozásba;[35] (3) támogassák a jelenlegi határkeresztező földgáz infrastruktúrák átalakítását, hogy tiszta hidrogént szállíthassanak, illetve olyan rendelkezéseket melyek új, dedikált tiszta hidrogén infrastruktúrát támogatnak;[36] (4) mivel a hidrogén jelentős szerepet játszik majd a közlekedésben, mindenképpen szükséges több szinergiát teremteni a TEN-E rendelet és a TEN-T rendelet[37] között, hogy biztosításra kerüljön, hogy azon hidrogén, melyet TEN-E folyosókon szállítanak hozzáférhető legyen a megfelelő töltőállomásokon a TEN-T folyosók mentén;[38] (5) a tiszta hidrogén hálózatok, mint új tematikus terület kerüljön beillesztésre a TEN-E rendeletbe; ez magában foglalja az új hidrogén infrastruktúra projekteket, a hidrogén szállítási megoldásokat, közbenső tárolási és kapcsolódó infrastruktúra projekteket.[39]

A jelen cikk elkészítése közben az Európai Bizottság közzétette a TEN-E rendelet új tervezetét. A tervezet célja, hogy hozzáigazítsák a szabályozást a 2050-re kitűzött klímasemlegesség célkitűzéseihez.

[34] Hydrogen Europe (2020) The EU Hydrogen Strategy: Hydrogen Europe's 10 key recommendations.
[35] Uo.
[36] Uo.
[37] Az Európai Parlament és a Tanács 1315/2013/EU rendelete (2013. december 11.) a transzeurópai közlekedési hálózat fejlesztésére vonatkozó uniós iránymutatásokról és a 661/2010/EU határozat hatályon kívül helyezéséről.
[38] Hydrogen Europe (2020) The EU Hydrogen Strategy: Hydrogen Europe's 10 key recommendations.
[39] Uo.

A bizottsági javaslat egyik legfontosabb eleme, hogy 2022 után kizárná a hagyományos új földgáz-infrastruktúra, valamint kőolajvezeték-beruházásokat az ún. Közös Érdekű Projektek (PCI) köréből. A dekarbonizáció jegyében új infrastruktúrakategóriák bevezetését tervezi, többek között: intelligens gázhálózat, a megújuló és dekarbonizált gázok (biometán, hidrogén, szintetikus gázok) hálózatba integrálását támogató beruházások és hidrogéninfrastruktúra. Az EU Hidrogén Stratégiájával összhangban a tervezet a megújuló energia alapú hidrogéntermelés támogatását irányozza elő. A rendelet felülvizsgálatának Európai Uniós tárgyalása 2021. januárban kezdődik el.[40]

4. Az Európai Uniós szabályozásra vonatkozó észrevételek

Az EU Hidrogén Stratégia és az ismertetett szabályozás módosítási javaslatok áttekintése alapján az alábbiakat javasolt megfontolni.

Az EU Hidrogén Stratégia első szakasza 2024-ig tart. Annak érdekében, hogy a hidrogén gazdaság alapjai kialakulhassanak, illetve a második, majd harmadik szakaszban az energiarendszer lényeges, majd szerves részévé válhasson a hidrogén gazdaság, mint alrendszer, valamint ismerve az EU jogalkotási folyamatát, két lépcsős jogalkotási folyamat lehet hatékony.

Ez azt jelenti, hogy egy-két éven belül egy quick-wineket tartalmazó hidrogén javaslat csomag elfogadása szükséges energetikai területen, mely tisztázza a hidrogén alrendszerrel kapcsolatos alapfogalmakat, tartalmazza a származási garancia rendszer hidrogénre kiterjesztését, az átalakításra kerülő és új infrastruktúrákkal kapcsolatos alapkövetelményeket rögzíti, egyúttal a hidrogén projektek jelentős elterjedését elősegíti, könnyíti.

A második lépcsőben egy stratégiai jelentőségű jogalkotásra kerülhet sor a hidrogén gazdaság szempontjából, melynek elágazási pontja lehet jogalkotás technikailag, hogy külön hidrogén rendelet/direktíva kerül megalkotásra vagy a hidrogén felhasználási lehetőségének számos terültre történő kiterjedésére tekintettel több Európai Uniós jogszabályra vonatkozó, átfogó módosító javaslat csomag kerül előterjesztésre.

5. A Nemzeti Energiastratégia 2030 és a zöld hidrogénnel kapcsolatos hazai szabályozási elemek

5.1. A Nemzeti Energia stratégia 2030, kitekintéssel 2040-ig

A hazai szabályozás megvizsgálása ugyancsak egy stratégiai dokumentum áttekintésével, mint policy dokumentummal kezdődik.

A Nemzeti Energia stratégia 2030, kitekintéssel 2040-ig (továbbiakban: Nemzeti Energia stratégia) a hidrogén hasznosítási lehetőségeire a Gázpiaci és Villamos energia piaci fejezetében is utal, ugyanakkor részletesen az 'Energetikai innováció és gazdaságfejlesztés' c. 9. fejezetében tér ki a hidrogén energia stratégiai szerepére.

[40] Magyar Energetikai és Közmű-szabályozási Hivatal, 2021.

A fejezet bevezetője előrebocsátja, hogy *„az energetikai innovációs stratégia keretében azoknak az újszerű megoldásoknak az alkalmazását kívánjuk ösztönözni, amelyek egyrészt zökkenőmentessé teszik a villamosenergia-piacok korábban felvázolt átalakulását, másrészt hozzájárulnak a fogyasztói választás szabadságának növelésével, az energiaszektor klímabarát átalakításával kapcsolatos célkitűzésekhez."*[41]

A fenti fejezeten belül kerül tárgyalásra 'A hidrogén szerepe a jövő energiarendszerében' alfejezet, mely szerint stratégiai időtávon jelentős szerephez juthat a hidrogén a villamos energia termelés integrálásában, a hazai ellátásbiztonság erősítésében és dekarbonizációs céljaink elérésében.[42]

Ezt követően a hidrogén különböző felhasználási lehetőségei kerülnek felvázolásra. Elsőként a hidrogén tárolási célú felhasználására utal a dokumentum.

Eszerint *„a megújuló energiaforrások használatának bővülésével (…) egyre kritikusabb kérdéssé válik a villamos energia – akkumulátoros technológiákkal nem megoldható – napi, heti, vagy akár szezonális tárolása. Az elektrolizálás technológiájával megoldható, hogy az adott pillanatban felesleges villamosenergia-termelést hidrogén formájában tároljuk, és később számos lehetőség közül választva felhasználjuk."* A Nemzeti Energiastratégia rövid értékelésében jelzi, hogy az *„egyébként nem hasznosítható energia tárolásának a hidrogén előállítása már ma is az egyik legolcsóbb (…) technológiája,"*[43] de *„a hidrogén villamos energiává történő visszaalakítására szolgáló tüzelőanyag cellák magas beruházási költsége és alacsony hatásfoka ma még gátja a technológia piaci alapú elterjedésének, ám az előrejelzések alapján számottevő (akár 90%-os) költségcsökkenés és jelentős hatásfok javulás várható."*[44]

A megújuló villamosenergia-termelés feleslegéből előállított hidrogén a közlekedés területén kínál alternatívát, valamint gázmotorok mintájára működő egységekben is felhasználható villamos energia termelésre a stratégiai dokumentum szerint.[45]

A Nemzeti Energiastratégia ezt követően a megújuló hidrogén ipari felhasználására és földgáz hálózatba betáplálhatóságára tér ki. A dokumentum szerint a megújuló hidrogén ipari felhasználása *„elsősorban a kőolajfinomításban, a műtrágya gyártásban és a gyógyszeriparban jelentkező hidrogén igény részbeni kielégítésére megoldás."*[46]

A hidrogén továbbá hozzájárulhat *„a gázhálózatba keverve akár a háztartások energiaigényének kielégítéséhez is. Ez nem csak a földgáz 'zöldítését' jelenti, hanem az importigény mérséklésén keresztül ellátásbiztonságunk javítását is. A villamos energiából előállított hidrogén földgázhálózatba táplálásával annak tárolása is könnyen megoldhatóvá válik, ami a hazai gáztárolói kapacitások nagyságára tekintettel különösen fontos szempont. A hidrogén gázhálózatba táplálásának műszaki lehetőségeit illetően – úgy a gázvezetékek korrózióval szembeni ellenállását, mint a végfogyasztói berendezések viselkedését tekintve – még sok a nyitott kérdés; ezeknek a vizsgálatát pilot projektek keretében fogjuk támogatni."*[47]

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[41] Innovációs és Technológiai Minisztérium: Nemzeti Energiastratégia 2030, kitekintéssel 2040-ig.
[42] Nemzeti Energiastratégia 2030, kitekintéssel 2040-ig
[43] Uo.
[44] Uo.
[45] Uo.
[46] Uo.
[47] Uo.

Támogatandó felismerés, hogy a Nemzeti Energiastratégia szerint *„a hidrogén – energetikai és ipari felhasználása, valamint tárolhatósága révén – kapocsként szolgálhat a villamosenergia- és a földgázszektor között.”*[48] Ehhez csatlakozom azzal a gondolattal, hogy a teljes energetikai szabályozás stratégiai újragondolására lehet szükség a 2020-as évtized közepéig annak érdekében, hogy a nagy energia rész területek (villamos energia, földgáz) szabályozására kevésbé kategorizáltan kerüljön sor.

Végül, megfelelő előrelátással a Nemzeti Energiastratégia 15. fejezetében (Zászlóshajó projektek) a kormány a következő energetikai innovációs projekt végrehajtását is prioritásnak tekinti:

A megújuló alapon termelt villamos energiával előállított hidrogén optimális tárolási és felhasználási üzemének kialakítása (hidrogén heti időszakon belüli tárolása, a földgázrendszerben való felhasználásának biztosítása, a földgáztárolók közvetlen használatának vizsgálata a hidrogén keverésére és tárolására, a hidrogén visszakonvertálása villamos energiává).[49]

Ezen stratégiai projekt eredményeinek ismerete jelentősen hozzájárulhat majd a hidrogén nagy léptékű hazai mobilizálhatóságához és az ennek megfelelő stratégiai jogalkotás végrehajtását segítheti elő.

A fenti projekt kapcsán európai benchmark is említhető, hiszen 2020. július 27-én publikálásra került, hogy az Iberdrola nevű áramtermelő vállalat a Fertiberia műtrágyagyártóval közösen a kontinens – egyelőre – legnagyobb zöldhidrogén-központját kívánja létrehozni, amely 2021-ben már beindításra kerül és megújuló energiából hidrogént állít elő, valamint azt tárol.[50]

A MEKH 2020. november 18-i közleményében tájékoztatást adott arról, hogy a nemzeti stratégiai iránynak megfelelően, a fejlesztések előmozdítása érdekében kiemelt figyelmet fordít a szabályozási környezet kialakítására a hidrogén alapú tárolási technológiák alkalmazása, valamint a hidrogén üzemanyagként történő hasznosításának területén. Ezért szervezetén belül külön munkacsoportot hozott létre.[51]

5.2. A hidrogénnel kapcsolatos hazai szabályozás

A hazai stratégiai dokumentum áttekintését követően az Európai Uniós szabályozási fejezetben (3.2. fejezetben) tárgyalt témakörök közül három témára tér ki a hazai szabályozási fejezet, jelezve az esetleges párhuzamosságokat, illetve eltéréseket.

A hidrogén fogalma

A villamos energiáról szóló 2007. évi LXXXVI. tv. (továbbiakban: Vet.) 3. § 45. pontja szerint: Megújuló energiaforrás: nem fosszilis és nem nukleáris energiaforrás, amelyből nap-, szél-, légtermikus, geotermikus, hidrotermikus energia, vízenergia, biomasszából nyert energia – beleértve a biogázból (hulladéklerakóból, illetve

[48] Uo.
[49] Uo.
[50] Rácz 2020.
[51] Magyar Energetikai és Közmű-szabályozási Hivatal, 2020.

szennyvízkezelő létesítményből származó, valamint az egyéb szerves anyagokból előállított éghető gázból) nyert energiát – állítható elő.[52]

A Vet. a Megújuló Irányelvhez hasonlóan nem utal zöld hidrogénre. Ugyanakkor a hazai szabályozónak törekedni kell a hidrogénre vonatkozó terminológiák bevezetésére figyelemmel az Alaptörvényben jelzett elvekre és azokban foglalt kötelezettségekre. Továbbá az Európai Unió ez irányú mielőbbi szabályozásának tartalma kapcsán is célszerű az abban történő hatékony magyar közreműködés, hiszen egy új 'európai iparág' kialakításában élen járni, annak kereteit kijelölni, jelentős nemzeti előnyökkel járhat a későbbiekben.

Származási garancia

A Vet. 3. § 13a pontja szerint a származási garancia olyan elektronikus okirat, amely objektív, átlátható és megkülönböztetéstől mentes kritériumok alapján igazolja a felhasználó felé, hogy az adott termelő egység által előállított villamos energia meghatározott mennyisége megújuló energiaforrásból vagy nagy hatékonyságú kapcsolt energiatermelésből származik.[53]

A Vet. 12 § (1) szerint a megújuló energiaforrásból vagy a nagy hatékonyságú kapcsolt energiatermelésből származó villamos energia mennyiségét az értékesítő kizárólag származási garanciával igazolhatja a felhasználó részére.[54]

A származási garanciára, annak kiadására, nyilvántartására, átruházására, az ilyen módon termelt energiát értékesítő termelők beszámolási és adatszolgáltatási kötelezettségére vonatkozó részletes szabályokat a 309/2013 (VIII.16.) Korm. rendelet (továbbiakban: Rendelet) tartalmazza. A Rendelet 2. §-a szerint a származási garancia-nyilvántartást a Magyar Energetikai és Közmű-szabályozási Hivatal (a továbbiakban: Hivatal) vezeti.[55] A Hivatal biztosítja, hogy a származási garanciák kiállítása, átruházása, felhasználása és törlése pontos és megbízható legyen. A Rendelet 5. § (4) bekezdése szerint származási garanciát 1 megawattóra (MWh) mennyiségre kell kiállítani.[56]

A szabályozás tartalmilag megegyezik az Európai Uniós szabályozással. Tekintettel arra, hogy a megújuló energiaforrás jogszabályi definíciója nem utal a zöld hidrogénre, így a hazai származási garancia szabályozás sem terjed ki a hidrogénre.

Ugyanakkor *„Magyarországon a bruttó villamosenergia-felhasználásához képest még nagyon alacsony arányban használnak származási garanciát a villamos energia megújuló eredetének igazolására. 2014 és 2016 között a származási garanciával igazolt villamos energia aránya nem érte el a hazai felhasználás 1%-át. 2017-ben ez az arány már valamivel 1% felett volt.'*[57] Következésképpen hazánkban a már működő származási garancia rendszer sem túl aktív, így első lépésként a származási garancia rendszerben rejlő hazai lehetőségek promotálása, kiaknázása lehet célszerű.

[52] A villamos energiáról szóló 2007. évi LXXXVI. törvény (Vet.).
[53] Uo.
[54] Uo.
[55] A megújuló energiaforrásból és a nagy hatásfokú kapcsolt energiatermelésből nyert villamos energia származásának igazolásáról szóló 309/2013. (VIII.16.) Korm. rendelet.
[56] Uo.
[57] Magyar Energetikai és Közmű-szabályozási Hivatal, 2018

Földgáz/Hidrogén infrastruktúra

A földgázellátásról szóló 2008. évi XL. tv. (Földgáz tv.) alkalmazási köre a 2. § (1) a) pont szerint kiterjed a földgáz vezetéken történő szállítására, elosztására, tárolására, kereskedelmére, fogyasztására, felhasználására, elszámolására.[58]

A földgáz fogalmába a Földgáz tv. 3. §. 23. pontja szerint a 3. § 26. pont szerinti gázfajták is beletartoznak. A 3. § 26. pont szerint földgáz minőségű, biomasszából és egyéb nem bányászati forrásból származó gázok: olyan mesterségesen előállított gázkeverékek, amelyek a földgázellátásról szóló törvény rendelkezéseinek végrehajtásáról szóló jogszabályban meghatározott feltételek mellett, környezetvédelmi és műszaki-biztonsági szempontból megfelelő módon az együttműködő földgázrendszerbe juttathatók (szállíthatók, eloszthatók és tárolhatók), a földgázzal keverhetők, és ez a keverék a földgázrendszerbe juttatáskor megfelel a földgáz minőségére vonatkozó a földgázellátásról szóló törvény rendelkezéseinek végrehajtásáról szóló kormányrendeletben meghatározott minőségi követelményeknek.[59]

A hazai szabályozás abból a szempontból, hogy az adott gázfajtának környezetvédelmi és műszaki biztonsági szempontból földgázrendszerbe juttathatónak kell lennie azonos tartalmú az európai uniós szabályozással, ugyanakkor ezen gázfajtáknak teljesíteniük kell a földgáz tv. végrehajtási rendelet 11. sz. mellékletében előírt minőségi követelményeket is (úgy mint, égési jellemzők, szennyezőanyag tartalom, egyéb követelmények)[60]

Végsősoron a hidrogén földgáz rendszerbe betáplálhatósága kapcsán a hazai és nemzetközi pilot projekt eredmények alapján a hidrogén kémiai jellemzőit rögzíteni szükséges, azt is figyelembe véve, hogy a földgázrendszerbe betáplálhatóság milyen csővezeték átalakítások esetén valósítható meg.

6. A hazai szabályozási elemekre vonatkozó alkotmányossági reflexiók

A zöld hidrogén, mint az energiarendszerek átalakításának egyik kulcs tényezője évek óta téma energia szakmai berkekben. Az Alaptörvényben jelzett, a környezet védelmére vonatkozó valamint a fenntartható költségvetésre vonatkozó alapelvek figyelembevételével a zöld hidrogén megújuló energiaforrásként történő szabályozása, valamint a zöld hidrogénre vonatkozó további szabályozási javaslatok előkészítése, elfogadása egyértelmű elvárása a jelenlegi Alaptörvény által kijelölt keretrendszernek, ami a mai napig korlátosan került megvalósításra.

Ugyan az energia területének szabályozását, annak irányát immár több évtizede az Európai Unió határozza meg, mindez ugyanakkor nem akadálya annak, hogy a tagállamok szabályozást vezessenek be olyan területen, amelyet az Európai Uniós joganyag nem szabályoz.

[58] A földgázellátásról szóló 2008. évi XL. törvény.

[59] Uo.

[60] A földgázellátásról szóló 2008. évi XL. törvény rendelkezéseinek végrehajtásáról szóló 19/2009. (I.30.) Korm. rendelet.

Sőt, az ismertetett Alaptörvényi elvek fényében a zöld hidrogén szabályozása elengedhetetlen, hiánya szabályozási deficitet jelenthet. Az alkotmánybíróságról szóló 2011. évi CLI. tv. 46. § (1)-(2) bekezdései szerint *„ha az Alkotmánybíróság hatáskörei gyakorlása során folytatott eljárásában a jogalkotó általi mulasztással előidézett alaptörvény-ellenesség fennállását állapítja meg, a mulasztást elkövető szervet – határidő megjelölésével – felhívja feladatának teljesítésére. A jogalkotói feladat elmulasztásának minősül – egyebek mellett – ha a jogi szabályozás Alaptörvényből levezethető lényeges tartalma hiányos.”*[61] A szabályozás ugyanakkor a fenti *„46. § (2) bekezdés c) pontjával olyan nyílt marad, hogy az Alkotmánybíróság széles körben alakíthatja a jogintézmény alkalmazásának eseteit.”*[62] Tekintve, hogy az Alaptörvény P) és XX. cikkei, melyek a környezet védelmét, ezen belül a jövő nemzedékek számára történő megőrzést rögzítik, ezáltal feltételezik valamennyi lehetséges megújuló forrás ekként történő nevesítését, szabályozását, így a zöld hidrogénét is. Ellenkező esetben, alkotmányjogi panasz előterjesztése esetén akár a mulasztással előidézett alkotmány-ellenesség fennállása is megállapítható a fentiek szerint.

Az Európai Unió a közelmúltban Hidrogén Stratégiát adott ki és elkezdte a vonatkozó szabályozások megalkotását. Magyarországnak is célszerű részt vennie ezen Uniós jogalkotási folyamatban, valamint mielőbb megkezdeni a hidrogénre vonatkozó hazai szabályozások kialakítását.

A környezet jövő nemzedékek számára történő megőrzése, mint alaptörvényi elv kötelezi az államot, ennek leképezése során a fenntartható költségvetési gazdálkodás, a ’fenntartható pénzügyi forrás’ meghatározása is fontos mérföldkő lehet a hidrogén gazdaság alapjainak lefektetése, a pilot projektek hatékony megvalósítása érdekében.

A fenti elemzés alapján a hidrogén kapcsán kijelenthető, hogy a jövő elkezdődött.

[61] Az Alkotmánybíróságról szóló 2011. évi CLI. törvény.

[62] Kovács & Pozsár-Szentmiklósy 2018.

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Emőd VERESS*

Sale of agricultural lands located outside built-up area in Romania: novelty elements introduced by Law no. 175/2020**

Abstract

Law no. 17/2014 on some measures to regulate the sale of agricultural land located outside the built-up area was adopted among other reasons 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. In this context, the importance of protecting agricultural land as a natural resource of central importance is a legitimate political goal. However, the methods used must be very carefully chosen in order to create a legal regime for the sale of agricultural land that respects, on the one hand, the requirements of European law and, on the other hand, fulfills the national interest as far as possible. The current legal regime, created by amending Law no. 17/2014 by Law no. 175/2020 for the amendment and completion of Law no. 17/2014, in force since 13 October 2020, creates a legal regime that raises more questions than it settles regarding the real challenges outlined above.
Keywords: Romania, agricultural land, preemption rights, prior authorisation of selling.

1. General aspects

Law no. 17/2014 on some measures to regulate the sale of agricultural land located outside the built-up area[1] was adopted to ensure food security and protect national interests in exploiting natural resources. To achieve this goal, the law establishes important measures to regulate agricultural land sales outside the built-up area. Agricultural land located inside built-up areas is not subject to this regulation; these sales are subject to general dispositions of the law.

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[1] Law no. 17/2014 regarding some measures to regulate the sale-purchase of agricultural lands located outside the built-up area and to amend Law 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.

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 Law no. 175/2020 for the amendment and completion of Law no. 17/2014, amendments that came into force starting on 13 October 2020.[2]

I intend to analyse 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 Law no. 175/2020. The legislation is recent, and in the context of the COVID-19 pandemic has not yet facilitated scientific opinions and illuminative jurisprudence.[3] However, even under these circumstances, it is worth examining this new, specific legal regime.

2. Personal scope of Law no. 17/2014

The provisions of Law no. 17/2014 apply to Romanian citizens, to the citizens of a Member State of the European Union, of the states that are party to the Agreement on the European Economic Area (ASEE), or of the Swiss Confederation, as well as to stateless persons domiciled in Romania, in a Member State of the European Union, in a state that is a party to the ASEE or in the Swiss Confederation, as well as to legal persons having Romanian nationality, of a Member State of the European Union, of the states that are part of the ASEE, or of the Swiss Confederation.[4]

A third-country national and a stateless person domiciled in a third state and legal persons with 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.[5] Consequently, if the legal norms recognise the citizens of third countries and to legal persons having headquarters in a third state, the right to acquire the right of ownership over the lands in general, then Law no. 17/2014 becomes applicable for the acquisition of agricultural lands located outside the built-up area and in the case of these persons as well.

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[2] Law no. 175/2020 for the amendment and completion of Law no. 17/2014 regarding some measures to regulate the sale-purchase of agricultural lands located outside the built-up area and to amend Law 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 14 August 2020.

[3] Some regulatory deficiencies have already been identified when Law no. 175/2020 was still in the project phase. See Jora & Ciochină-Barbu 2018, 9–18. By referring to European law, the provisions of this new regulation were analyzed by Prescure & Spîrchez 2020, 21–40., respectively by Durnescu (Prăjanu) 2020, 37–57.

[4] For a general assessment of the cross-border acquisition of agricultural land, see Szilágyi 2017, 214–250.

[5] According to art. 44 para. (2) of the Romanian Constitution, foreign citizens and stateless persons may acquire the right of private ownership over land only under the conditions resulting from Romania's accession to the European Union and other international treaties to which Romania is a party, based on reciprocity, in the conditions provided by an organic law, as well as by legal inheritance.

On the other hand, the law does not apply to the sales of agricultural lands located outside the built-up area that belong to the private domain of local or county interests of the administrative-territorial units.[6]

3. Special limitations: agricultural land located in the border area and adjacent to special objectives

Law no. 17/2014 introduced some special limitations for agricultural lands located outside the town at a depth of 30 km from the state border and the Black Sea coast, inland, as well as those located outside the town at a distance of up to 2,400 m from the special objectives. For the alienation of these lands by sale, the Ministry of National Defence's specific approval is required, issued following consultation with the state bodies with attributions in the field of national security.

However, these limitations do not apply to preemptors; that is, if the buyer is the holder of a preemption right, approval is no longer necessary. The law does not specify which preemptors are exempted. The right of preemption may be established by law or convention. If the owner has recognised the right of preemption through a contract in favour of a person who subsequently exercises this right of preemption of a conventional nature, is no specific opinion from the Ministry of National Defence required? In favour 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 can be removed. However, because the provisions of Law no. 17/2014 establish special norms that form a unitary whole, I think that the removal of the approval of the Ministry of National Defence refers only to the preemptors whose rights have their origin in the text of Law no. 17/2014. Consequently, the holder of a conventional right of preemption cannot invoke the fact that the approval established by Law no. 17/2014 is not necessary. In addition, a preemption right would be invoked based on another law other than Law no. 17/2014. Applying the argument of the unity of conception of the law would also require approval in the case of these preemptors. Instead, as the possible speculative element (namely the situation in which the cause of establishing the conventional right of preemption would be the removal of the approval on the sale by the Ministry of National Defence) in the case of a legal right of preemption is missing. In this context we could recognise that the contract between the seller and the preemptor can be validly concluded in the absence of approval in the case of any legal right of preemption. 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 have their origin in the law.

Approvals must be communicated within 20 working days of request registration by the seller. In the case of non-fulfillment of this obligation to issue the approval, it is considered favourable, that is, the law establishes a positive tacit approval procedure for non-compliance with the term of 20 working days.

[6] Article 20 para. (3) of Law no. of Law no. 17/2014, in the form established by Law no. 138/2014.

4. Special limitations: agricultural lands where there are archaeological sites

Agricultural lands located outside the built-up area, where there are archaeological sites in which areas with spotted archaeological patrimony or areas with accidentally highlighted archaeological potential have been established, can be alienated by sale only with the specific approval of the Ministry of Culture, respectively, of 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, approval shall be deemed favourable.

5. State intervention in the movement of agricultural land outside the built-up area

Undoubtedly, the new regulation is far from what is expected to solve the agricultural land movement. If the substantive issue, namely the creation of a special regime for the movement of agricultural land located outside the built-up area in accordance with the public interest, is correct and fair, the administrative impediments created are excessive. The intention is correct, but the chosen path must be criticised. Although European rules in this area have not yet been fully clarified, some new regime elements contradict European law.

The establishment of any right of preemption by law is undoubtedly a limitation of the contractual freedom and the prerogatives of the holder of the property right. These limitations must be justified and proportionate.

6. Holders of the right of preemption established by Law no. 17/2014, in the form amended by Law no. 175/2020

In the initial form of the law, the alienation, by sale, of the agricultural lands located outside the built-up area was allowed with the observance of the preemption rights of the co-owners, lessees, neighbouring owners, as well as of the Romanian state, through the State Domains Agency, in this order, on equal terms.

Law no. 175/2020 modifies and expands the scope of preemptors, creating seven categories of preemptors: (a) Preemptors of rank I: co-owners, first-degree relatives, spouses, relatives, and brothers-in-law up to and including the third degree; (b) Rank II preemptors: owners of agricultural investments to cultivate trees, vines, hops, exclusively private irrigation, and/or lessees. If on the lands subject to sale there are agricultural investments for tree crops, vines, hops, and for irrigation, the owners of these investments have priority in the purchase of these lands; (c) Rank III preemptors: The owners and/or lessees of the agricultural lands adjacent to the land subject to sale, in compliance with some requirements to be analysed 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-

development units in the fields of agriculture, forestry, and food industry,[7] as well as the educational institutions with 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 domiciles/residences located in the administrative-territorial units where the land is located or in the neighbouring administrative-territorial units;[8] (g) Preemptors of rank VII: the Romanian state, through the State Domains Agency.

7. Interpretation issues raised by current regulations

The first question that arises is 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 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. Law 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 Article 1734 of the Civil Code, which regulates the competition between preemptors.[9] The provisions of Article 1734 have mandatory character.[10]

According to this legal text, if several holders have exercised their preemption on the same good, 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 he competes 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 book when it competes with other holders of conventional preemption rights; and (d) if the good 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, we are not in the competition between a legal right holder and the holder of a conventional right of preemption. Thus, the hypothesis provided in let. (a) above does not demonstrate its applicability. Nor does let. (c) apply in the analysed situation because the norm resolves the conflict between the conventional preemption rights

[7] Organized and regulated by Law 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.

[8] We notice that this category of pre-emptors is vast. There is no difference between the persons who have their domicile in the administrative-territorial unit where the land for sale is located or in the neighboring administrative-territorial units.

[9] According to art. 8 of Law no. 17/2014, the legal provisions regarding the pre-emption right exercise are completed with the general law's provisions.

[10] Article 1734 para. (2) Civil Code establishes that any clause contrary to the regulations contained in this rule is considered unwritten.

holders, and we exclude let. (d) because it refers to the preemption exercised in the case of movable property. Thus, the only applicable norm is art. 1734 para. (1) let. (b), which establishes that in the case of a competition between legal preemptors (of the same rank), the seller is the one who has the (unilateral) right to choose between the holders of the legal preemption right. The seller in the situation shown can choose at his discretion the buyer, preferring, for example, the brother over his child, both preemptors of rank I., etc.[11]

The second issue refers to a legal text that remains unchanged by Law no. 175/2020. Article 20 para. (2) of Law no. 17/2014 establishes that "*the provisions of this law do not apply to alienations between co-owners, spouses, relatives and brothers-in-law up to and including the third degree.*" The law also stipulates that co-owners, first-degree relatives, spouses, relatives, and brothers-in-law 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? This is difficult to establish. If we interpret the two texts as conflicting, then we can say that art. 20 para. (2) of Law no. 17/2014 was implicitly repealed by Law no. 175/2020. I do not think that this is the right interpretation. I consider that the two texts refer to distinct situations, as follows: (a) In reality, the owner can sell freely under the conditions of art. 20 para. (2) of Law no. 17/2014 its agricultural land located outside the built-up area, if the buyer is a co-owner, husband, relative, or brother-in-law up to and including the third degree, without any obligation to submit to the special legal regime established by Law no. 17/2014. From this circle of buyers, the owner can freely choose the buyer because, in this context, the sale acquires *intuitu personae* character; the determining reason for the sale is not limited simply to obtaining a price. Thus, preserving the family property is encouraged and a correct intention is pursued by the legislator by establishing these legal provisions. Moreover, if the scope was to repeal art. 20 para. (2) of Law no. 17/2014, then Law no. 175/2020 could have proceeded to an express repeal, so we can presume that the legislator intended to keep this regulation.[12] (b) If the owner has not negotiated and concluded a contract with the persons provided above, but follows the specific procedure established by Law no. 17/2014, then the law recognises the status of the first-rank preemptor for co-owners, first-degree relatives, spouses, relatives, and brothers-in-law up to and including the third degree, protecting these persons even against the will of the owner and other potential buyers.

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[11] 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 his 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 Law no. 17/2014, published in the Official Gazette, Part I no. 127 of February 8, 2021 (hereinafter: Methodological Norms).

[12] 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."*

A third problem is the artificial creation of the right of preemption for a potential buyer agreed upon by the seller. The easiest method was the conclusion of an agricultural lease, in which case the quality of lessee offered the right of preemption of rank II to the potential buyer. However, the law, absolutely correct, through detailed rules makes the use of these fraudulent leases particularly difficult. There are several conditions imposed on the lessee in order to have a right of preemption on the leased land, soma conditions 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 one year before the date of posting the sale offer at the town hall. (b) In the case of natural person lessees, they must prove the domicile/residence located in the national territory for a period of five years prior to the registration of the offer for sale of agricultural lands located outside the built-up area. (c) In the case of lessees that are legal entities, the natural person members of such a legal person have to prove that their domicile/residence was located in the national territory for a period of five years before the registration of the offer for sale of agricultural lands located outside the built-up area. (d) In the case of lessees that are legal entities, having as a member another legal entity, the shareholders holding control of this second entity have to prove that the registered office/secondary office is located in the national territory and was established for a period of five years before the registration of the offer to sell agricultural land outside the built-up area.

Instead, a simulated sale could be orchestrated within a forced execution procedure because the provisions of Law no. 17/2014 do not apply in enforcement proceedings and sales contracts concluded as a result of the fulfilment of public tender formalities, as is the case of those carried out in the insolvency proceedings.[13] The situation of a simulated sale in the form of a donation also remains open, but the sanction applicable to these fraudulent contracts, as we will see, is that of nullity. Fraud can also be staged using an exchange contract. For example, if an agricultural land located outside the built-up area is changed to shares issued by a listed company, thus having maximum marketability, we are practically in the presence of an operation that is more like a sale than an exchange. Another possible method of circumventing legal provisions is to establish a unipersonal limited liability company, in which the owner provides the agricultural land. However, after the company's registration, the shares are alienated to the buyer, with respect to which the regime established by the law analysed here does not apply. In addition, a giving in payment (*datio in solutum*[14]) can be used to achieve the transfer of property: the owner contracts a loan (practically collects the price), and instead of repaying the loan, he gives in payment the agricultural land, extinguishing the debt. Given the severe restriction on agricultural land movement outside the built-up area (see also the following subchapters), such procedures will certainly increase.

[13] See art. 20 para. (3) of Law no. of Law no. 17/2014, in the form established by Law no. 138/2014.
[14] Discharge of debt by giving something different, in agreement with the creditor.

The fourth problem is that of neighbouring owners or neighbouring lessees and 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 preemptors, the normative text refers to the specific conditions under which the quality of lessee must be held: similarly to the rank II lessee. It is not very clear wheteher this reference rule applies only to lessees or neighbouring owners. If we accept the interpretation that this reference rule extends the legal requirements to neighbouring owners, then not every neighbouring owner or lessee has the right of preemption, but only the one who holds this quality for at least one year before the date of posting the sale offer at the town hall, and also meets the domicile/residence requirements set out above. I believe that the legislator did not want to extend these specific requirements to neighbouring 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 neighbouring agricultural lands (rank III preemptors).

What happens if several neighbours want to exercise their preemption rights at the same time? The law does not allow a free choice of the seller but imposes mandatory criteria that carry out abstract economic reasoning. Has priority to purchase (a) the owner of a neighbouring agricultural land that has a common border with the largest 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 large sides or all equal sides, priority has the owner of neighbouring agricultural land who is a young farmer,[15] who has his domicile/residence located in the national territory on a period of at least one year before the registration of the offer for sale of agricultural lands located outside the built-up area; (c) the owners of neighbouring agricultural land who have a common border with the land that is the object of the sale offer, in descending order of the length of the common border with the land in question; and (d) if the large side or one of the equal 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 has the owner of neighbouring agricultural land with domicile/residence within the administrative-territorial unit where the land is located.

I interpret this legal text in the sense that within the category of rank III preemptors, there is in practice a specific order of priority: the owner of the neighbouring land is preferred to the lessee of the neighbouring land. In this sense, however, constant clarifying jurisprudence would be welcome.

[15] If several young farmers exercise the right of preemption, the young farmer who carries out activities in animal husbandry has priority in the purchase of the land subject to sale, respecting the condition regarding the domicile/residence established on the national territory for a period of at least one year before registration of the offer for sale of agricultural land located outside the built-up area. See art. 4 para. (3) of Law no. 17/2014, in the form established by Law 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) lit. n) of Regulation (EU) no. 1,305 / 2013 on support for rural development provided by the European Agricultural Fund for Rural Development (EAFRD).

A final issue concerns the issue of conflict of laws in the case of agricultural lands located outside the built-up area on which classified archaeological sites are located. Which of the laws will have priority: Law no. 14/2014 or Law no. 422/2001 on historical monument protection? In this case, the conflict is resolved correctly: the preemption regulation in Law no. 422/2001 is applied.

8. Procedural rules on the exercise of the right of preemption

In its current form, the legal regime for exercising the right to preemption is as follows:[16] (a) The seller registers at the mayors' 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, in order to bring it to the notice of the preemptors. (b) The application shall be accompanied by an offer to sell agricultural land and supporting documents.[17] (c) Within five 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), respectively, 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 a list of preemptors, copies of the application for displaying the sale offer and the proving documents, and the minutes of displaying the offer, within five working days from the date of registration of the documentation. (e) For the purpose of extended transparency, within three working days from the registration of the file, the central structure, and the territorial structures, as the case may be, have an obligation to display on their own sites the sale offer, for 15 days. (f) Within 10 working days from the date of registration of the application, the mayor's office has an obligation to notify the holders of the preemption right, at their domicile, residence, or, as the case may be, their headquarters, the registration of the sale offer; if the holders of the preemption right cannot be contacted, the notification will be made by posting at the mayor's office or on the mayor's office website. If the area of land that is the subject of the sale intention is at the border of two administrative territories, the mayor's office will notify the local public authority with which it adjoins, 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 his 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 the case of non-observance of this term is forfeiture. [18] The mayor's office will display, including on its website, within three working days from the registration of the acceptance of the sale offer, the data from the offer and will send them for display on the website of the central structure or territorial structures, as appropriate. The communication of the acceptance of the seller's offer is registered at the mayor's office by the holder of the

[16] Art. 6–8 of Law no. 17/2014, in the form established by Law no. 175/2020.
[17] See art. 5 of the Methodological Norms.
[18] See art. 6 para. (1) of the Methodological Norms.

preemption right accompanied by the supporting documents.[19] (h) If, within 45 working days, several preemptors of different ranks express in writing their intention to purchase, at the same price and under the same conditions, the legally established order shall apply. (i) Within 45 working days, several preemptors of the same rank express their intention to purchase in writing, and no 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 him 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 fulfilment of the term of 45 working days previously analysed. (k) Within three 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, respectively, to the territorial structures, as the case may be, the identification data of the preemptors, potential buyers, in order to verify the legal conditions.

9. Modification of the sale offer and acceptance

The law contains rules derogating from the general rules relating to the offer to contract and the binding (irrevocable) nature of the offer. Under the conditions of Art. 1191 of the Civil Code, the offer is irrevocable as soon as its author maintains 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 the usages. The declaration of the revocation of an irrevocable offer has 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, analyse it, and send the acceptance. The offeror is liable for the 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 Law 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 sales offer already published. If within 45 working days provided for the exercise of the right of preemption, respectively, within 10 days provided for the resumed procedure, the seller changes the data entered in the sale offer, and resumes the registration procedure from scratch.

The seller also has the right to withdraw his offer to sell.[20] Before the fulfillment of the term of 45 working days 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 an application requesting the withdrawal of the offer.

[19] See art. art. 6 of the Methodological Norms.
[20] Art. 7 of Law no. 17/2014, in the form established by Law no. 175/2020.

In this case, the mayor's office will conclude a report cancelling the procedure provided by this law and will communicate a copy of it to the central structure or territorial structure, 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 only in the presence of an invitation to negotiate addressed to the preemptors.

Symmetrically, the law also allows the preemptor to waive his own acceptance of the offer before fulfilling the 45 working days 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 at the mayor's office, a request to waive the communication of acceptance, 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 for the buyers, and the contract will be born when the agreement of will takes, before the notary public, the authentic form.

10. Priority right to purchase: legal restrictions on the movement of agricultural land located outside the built-up area if the right of preemption has not been exercised

Law no. 175/2020 introduces other new restrictions on the legal movement of agricultural land, in addition to the new regulation of preemption rights, which become applicable if none of the holders of the preemption right would exercise their 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:[21] (a) the natural person concerned to have his domicile/residence located in the national territory for a period of at least five years before the registration of the sale offer; (b) to carry out agricultural activities on the national territory for a period of at least five years before the registration of this offer; and (c) to be registered by the Romanian fiscal authorities at least five 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 in the national territory for a period of at least five years before the registration of the sale offer; (b) to carry out agricultural activities on the national territory for a period of at least five years before the registration of the offer for sale of agricultural lands located outside the built-up area. (c) to present the documents showing that, from the total income of the last five fiscal years, at least 75% represents income from agricultural activities, as provided by Law no. 227/2015 on the Fiscal Code, with subsequent amendments and completions, classified according to the NACE (European Classification of Economic Activities) code by the order of the Minister of Agriculture and Rural Development. (d) the associate/shareholder who holds the control of the company shall have domicile located on the national territory

[21] Art. 4 of Law no. 17/2014, in the form established by Law no. 175/2020.

for a period of at least five 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 to prove the domicile located in the national territory for a period of at least five 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 legal holders, potential buyers can submit to the mayor's office a file containing the documents proving the fulfilment 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, respectively, to the territorial structures, as the case may be, within five working days from the date of registration of the documentation.

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 the existence of the situation *"in which the holders of the right of preemption do not express their intention to buy the land."* In my opinion, the correct interpretation of the legal texts is that the selling owner has the freedom to choose any bidder, whether natural or legal person, who meets the conditions analysed above.[22]

Unlike the right of preemption, the priority right to purchase is not a genuine option right. The establishment of this right seems to be only a restriction on contractual freedom. These provisions limit the owner to choose the buyer from a limited circle of people (favoured buyers) who meet certain criteria set by the legislator, which 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, in more advantageous conditions in favour of the buyer than those shown in this or with the non-observance of the legal conditions regarding the person of the buyer attracts nullity.[23]

11. Freedom to choose the buyer

In the procedure established by Law no. 17/2014, full freedom in choosing the buyer is regained only when neither the holders of the right of preemption nor the legally favoured buyers exercise their rights within the legal term. Thus, in the case of non-exercise of the right of preemption, and if none of the potential favoured buyers, within the legal term, meets the conditions to be able to buy the agricultural land located outside the built-up area, the sale can be made to any natural or legal person.

[22] This interpretation is also reflected in the Methodological Norms, which state that the seller chooses the buyer and communicates his/her name to the mayor's office in the case of competition between potential buyers. See art. 9 para. (2) of the Methodological Norms.

[23] Article 7 para. (8) of Law no. 17/2014, in the form established by Law no. 175/2020.

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.

12. Overtaxing of speculative sales

Another novelty element brought by Law no. 175/2020 is the overtaxation of speculative sales.[24] The owners of agricultural lands located outside the built-up area have an obligation to use them exclusively to carry out agricultural activities from the date of purchase. It is considered speculative to sell the land if that takes place within eight years of purchase. In this situation, the legislator operates with an absolute presumption of resale purchase, subject to overtaxation.

Thus, agricultural land located outside the built-up area can be alienated, by sale, eight years before the date of purchase, 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 grid in that period. Consequently, would the tax base not be determined based on the parties' contract price, but ratherbased on notarial estimates? Or do these rules apply only if the contract prices are lower than those in the notarial grids? I am in favour of the second interpretation.

In the case of direct or indirect alienation, before 8 years from the moment of purchase, of the control package of shares in the 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 reorganisation or reallocation of assets within the same group of companies.[25]

Interestingly, the law for these situations refers to the provisions of Article 16 of the law, that is, sanction the contracts in question with absolute nullity. It is not easy to determine when this sanction can be applied. Interestingly, the violation of some rules of fiscal law attracts civil nullity. The legislator probably thought that sales for which the tax is not paid would be null and void, given the situations in which the total disguise simulation method would be used (a publicly simulated secret sale is concluded as a donation) or the partial disguise simulation (declaration in the contract at a price lower than that actually agreed by the parties).

[24] Art. 4 of Law no. 17/2014, in the form established by Law no. 175/2020.
[25] Probably the legislator considered sales within a group of companies.

13. Application of an administrative law regime for the control of land movement and sanctioning the violation of the civil law norms

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 subordinate structures, as the case may be: (a) ensures the publication of sales offers on its website; (b) ensures the verification of the exercise of the preemption right; (c) verifies the fulfilment of the legal conditions of sale by the preemptor or potential buyer, provided by the present 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 up, updates, and administers the Single National Register on agricultural land movement and destinations located outside the built-up area.[26]

The contract for 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 inclusive, and for lands with an area of over 30 ha, by the central structure.[27] If the seller or preemptor dies before the conclusion of the contract of sale, approval is cancelled. Therefore, this approval is not transferable to heirs.

This approval is practically authorisation, but the administrative authority does not have its own assessment rights. The control is limited to verifying the fulfilment of legality conditions. If following the verifications by the central structure, respectively, 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 control, the administrative authority has a term of 10 working days from the expiration of the term of 45 working days 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, that is, the situation analysed above. In case of fulfilling the legal conditions, within five working days from the term's expiration for verification, the central structure, respectively, the territorial structures, as the case may be, will issue the approval/final approval necessary for concluding the sale contract.

If no preemptor has expressed its intention to purchase, the verification of the fulfilment of the conditions by the potential favoured buyers will be done by the central structure, respectively, by the territorial structures at the location of the land, within 10 working days upon transmission of the file by the mayor's office.

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[26] The register is maintained electronically. The local public administration authorities and the National Agency for Cadastre 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 para. (2)–(6) of Law no. 17/2014, in the form established by Law no. 175/2020.

[27] The rule also applies if the court rules the transfer of ownership based on a pre-contract.

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 sanctions. Thus, the following facts constitute contravention: [28] (a) the sale of agricultural lands located outside the built-up area, where there are archaeological sites, where areas with spotted archaeological patrimony or areas with archaeological potential accidentally highlighted have been established, without the specific approval of the Ministry of Culture, respectively of its deconcentrated public services, after case; (b) the sale of agricultural lands located outside the built-up area without the specific approval of the Ministry of National Defence, if this situation was noted in the land book at the date of requesting the land book extract for authentication; (c) the sale of agricultural lands located outside the built-up area without the approvals of the central structure, respectively, 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 favoured buyers; non-compliance with the norms regarding the special taxation of alienations of agricultural lands considered speculative; and (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 preemption rights holders, display of the offer acceptance, or communication to the central or territorial structure of the preemptor identification data, or potential buyers.

The contravention fine is currently for all the above contraventions between 100,000 and 200,000 lei: Law no. 175/2020 doubled these fines.

14. Civil law sanctions

The sale of agricultural lands located outside the built-up area without respecting the right of preemption or the rights of favoured buyers or obtaining the approvals analysed above is prohibited and sanctioned with nullity. Before the amendments introduced by Law no. 175/2020, the sanction was that the contracts concluded by the violation of the preemption rights were voidable, the sanction of nullity being reserved for the situation in which the preemption right was not exercised and the building 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 movement of agricultural land outside the built-up area has become a matter of public policy.

15. Instead of conclusions: is this legal regime in line with European law?

Law no. 175/2020 was subject to a constitutional review before promulgation. According to the Romanian Constitution, as a result of accession, the provisions of the European Union's constitutive treaties, 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 (Article 148 para. (2) of the constitution):

[28] See art. 14 of Law no. 17/2014, in the form established by Law no. 175/2020.

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."*[29]

The decision of the Romanian Constitutional Court (RCC) no. 586/2020 was adopted by a majority of votes. The constitutional judges who voted against formulated two separate opinions, in which they supported the unconstitutionality of this legislation.[30]

The majority opinion concluded that *"the criticised 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 criticised texts do not forbid or exclude the right of natural or legal persons from outside the national territory to buy such lands, with the fulfilment of the conditions provided by law, equally valid conditions regarding 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 work it effectively."*[31] 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 rather conditions that support the purpose of the law.[32]

Contrary to this majority 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."*[33] The other separate opinion states that *"the provisions criticised, 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."*[34]

[29] Point 18 of the RCC Decision no. 586/2020.
[30] The decision and the separate opinions were published in the Official Gazette, Part I no. 721 of 11 August 2020.
[31] Point 100 of the RCC Decision no. 586/2020.
[32] Point 101 of the RCC Decision no. 586/2020.
[33] Point 3.2.2. from the Separate Opinion formulated by Livia Doina Stanciu and Elena-Simina Tănăsescu.
[34] Point 2 of the Separate Opinion formulated by 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 case-law of the European Court of Justice (CJEU). On the one hand, this communication recognises the specific importance of agricultural land and considers that the special regulation of agricultural land movement is justified, including certain accepted restrictions. However, on the other hand, many restrictions are considered inconsistent with European Union law. [35] With regard to 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, respectively, Case C-370/05, Festersen, paragraphs 35 and 40, 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."*[36] Similarly, the 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."*[37] 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).

In the future, the compliance of this new Romanian regulation with European law will be verified. The separate opinions, a careful analysis of the European Commission's interpretative communication, foreshadow a solution of non-compliance of national with European law.

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 making 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

[35] 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.

[36] See Interpretative Communication, 15.

[37] 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.

movement of agricultural land, which cannot be regarded as mere goods whose freedom of movement is essential. This aspect should also be recognised and reflected in European law, both in its written form and in its form emanating from the European Court of Justice's case law.

In fact, in my opinion, this 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.[38]

[38] For example, see the articles published in the CEDR Journal of Rural Law no. 1/2017. For the experience of the Central and Eastern European Countries, see in the cited journal especially the following articles: Yancheva et al. 2017, 29–32.; Damborský & Snopková 2017, 38–42.; Raisz 2017, 68–74.; Budzinowski & Suchoń 2017, 94–97.; Banderlová, Lazíková & Palšová 2017, 98–103.

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Katarzyna ZOMBORY*

The agricultural land trade – Theory and practice**

Abstract

This paper aims to provide a report on the conference titled The agricultural land trade. Theory and Practice, which was held on 26 November 2020 by Adam Mickiewicz University (UAM) in Poznań. The conference report deals with the three sessions of the conference in separate chapters, and in the end, it contains concluding remarks. In parallel with the presentation of the sessions, legal literature is provided in connection with each issue.
Keywords: conference report, agricultural land, land trade, theory, practice.

1. Introduction

An online scientific conference entitled 'The agricultural land trade. Theory and Practice' was held on 26 November 2020 by Adam Mickiewicz University (UAM) in Poznań (Poland).[1] This one-day event was co-organised by the Department of Agricultural Law of Adam Mickiewicz University, Notarial Chamber in Poznań, Ministry of Agriculture and Rural Development, and National Support Centre for Agriculture[2] (hereinafter: Government Agency). The conference provided an excellent opportunity for experts and practitioners to share their experiences and seek solutions to the difficulties arising under the interpretation of the Act of 11 April 2003 on Formation of the Agricultural System, which constitutes the main legal act governing the trade of private farmland in Poland (hereinafter: AAS).[3]

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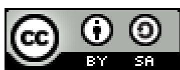
** Conference report (selected papers), Poznań, 26 November 2020
[1] The original title of the conference: *Obrót nieruchomościami rolnymi. Teoria i praktyka.*
[2] A state institution whose main tasks include managing agricultural property of the State Treasury (sale and lease), the free transfer of land and non-returnable financial assistance, supervision of companies of special importance for the national economy, issuing decisions regarding consent to private turnover land, promoting Polish agri-food products in the country and abroad, and developing and disseminating information related to the implementation of active agricultural policy mechanisms on the markets of agricultural and food products.
[3] Ustawa z dnia 11 kwietnia 2003 r. o kształtowaniu ustroju rolnego (Act of 11th April 2003 on Formation of Agricultural System), published in *Dziennik Ustaw* (Journal of Laws) of 2003 No. 64, item 592 as amended. For a more detailed work on the Polish framework for the agricultural land trade, see: Kubaj 2020; Stacherzak, Hełdak, Hájek & Przybyła 2019; Źróbek-Różańska & Zielińska-Szczepkowska 2019; Kalinowski 2017. For Hungarian framework for the agricultural



The conference was divided into 3 sessions, during which 14 presentations were made. This report focuses on the key issues addressed at the conference, contributing to the discussion on restricting agricultural land trade, which is a subject of great concern both in Poland and Hungary.

The conference was opened by *Prof. dr hab. Bogumiła Kaniewska*, the rector of UAM. Thereafter, the participants were welcomed by the representatives of all four organisers. *Prof dr hab. Roman Budzinowski*, chairman of the Polish Association of Agrarian Lawyers, delivered the opening lecture, during which he reminded the audience that the tradition of joining efforts by scholars and practitioners in the field of agricultural law dated back exactly 20 years. The first conference of this kind was held in 2000 in Rydzyna, and was followed by several meetings and scientific conferences countrywide.

2. First Session

During the first session, *Prof. dr hab. Paweł Czechowski* and *dr hab. Konrad Marciniuk* (University of Warsaw, Warsaw)[4] delivered the keynote address, providing a brief overview of the main concepts underlying the regulation of the agricultural real estate market in Poland. They explained that the restrictions imposed on the free trade of real estate during the communist regime were liberalised after the political transformation in 1989. However, since the adoption of the AAS in 2003, state interventionism in the agricultural real estate market has reappeared, significantly restricting the free enjoyment of ownership rights. The latter, according to the classic approach in civil law, includes the rights to possession, to use and derive income, and to disposition. In Poland, restrictions on ownership rights with regard to agricultural property are twofold. First, such restrictions have been introduced through the adoption of regulations that are *lex specialis* to the Polish Civil Code[5], for example, the AAS and Act of 19 October 1991 on the management of the agricultural property of the State Treasury.[6] Consequently, the Civil Code framework for sale and purchase, lease, or donation agreements has been significantly modified in case the aforementioned agreements are concluded with respect to agricultural real property. Second, state control over the agricultural real estate market is exercised through the application of pre-emptive rights or provisions allowing the State Treasury to acquire shares in companies that own farmland or hold the right of perpetual usufruct.

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land trade see: Csák 2010; Csák, Kocsis & Raisz 2015; Olajos 2017; Raisz 2017; Szilágyi 2016; Szilágyi, Csák, Olajos & Orosz 2019.

[4] Title of presentation: *Współczesne uwarunkowania prawne rynku nieruchomości rolnych* (*Contemporary legal framework of the agricultural real estate market in Poland*). Authors' other works include: Czechowski & Niewiadomski 2016; Czechowski & Niewiadomski 2015; Czechowski & Niewiadomski 2013; Czechowski & Wieczorkiewicz 2006; Marciniuk 2020; Marciniuk 2017 .

[5] Ustawa z dnia 23 kwietnia 1964 r. - Kodeks cywilny (Act of 23rd April 1964 on the Civil Code), published in *Dziennik Ustaw* (Journal of Laws) of 1964 No. 16, item 93 as amended.

[6] Ustawa z dnia 19 października 1991 r. o gospodarowaniu nieruchomościami rolnymi Skarbu Państwa (Act of 19th October 1991 on the management of agricultural property of the State Treasury), published in *Dziennik Ustaw* (Journal of Laws) of 1991 No. 107, item 464 as amended.

The privileged position of the Government Agency in the agricultural real estate market in Poland is another prime example of state interventionism. Czechowski and Marciniuk emphasised that the Polish legal framework applicable to agricultural land transactions was tantamount to introducing serious restrictions on ownership rights, which negatively affects legal certainty. In their opinion, the choice of subjects for the conference exposed the shortcomings and deficiencies of the Polish regulations governing the agricultural real estate market.

In her address, *dr Joanna Mikołajczyk* (University of Łódź, Łódź)[7] identified several legal gaps that render the interpretation of the notion of 'agricultural real property' highly difficult in practice. A legal professional herself, she highlighted the importance of classifying a real property as agricultural real property to properly determine the scope of application of the AAS. According to Article 46^1 of the Civil Code, agricultural real property shall be understood as immovable property, which is or may be used for carrying out agricultural production activity within the scope of plant and animal production, not excluding gardening, horticulture, and fishery production. For the purposes of the application of the AAS, agricultural real property shall be understood as the agricultural real property within the meaning of the Civil Code, excluding the properties located in areas designated in the local zoning plan for purposes other than agricultural (Article 2 point 1). First, a question arises as to the application of the AAS with respect to agricultural real properties situated in areas without local zoning plans. The practical importance of this inaccuracy is due to the fact that only 1/4 of the territory of Poland is regulated by local zoning plans. Therefore, she suggested aligning the provisions of AAS with those of the zoning law. Another issue of concern Mikołajczyk addressed was related to the evolution of the definition of agricultural property. The notion of agricultural real property was introduced into the Polish Civil Code in 1990 during the regime transformation with the view of liberalising the market, and has remained unchanged for years. She expressed her concern that the definition under Article 46^1 of the Civil Code, to which the AAS refers directly, might not be compatible with the principles underlying the AAS, namely the restriction of farmland trade. She pointed out that the range of agricultural real properties entering the scope of application of the AAS had been constantly changing because of frequent amendments, which further limited its scope of application as new exemptions were introduced.[8] For this reason, Mikołajczyk suggested that the conceptual and linguistic framework for the definition of agricultural real property under the Civil Code and AAS be reviewed.

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[7] Title of presentation: *Problem kwalifikowania nieruchomości jako rolnej - studium przypadku* (*The issue of classifying a real property as an agricultural real property – case study*). Author's other works include: Mikołajczyk 2014; Mikołajczyk 2016.

[8] The AAS does not apply *inter alia* to agricultural real properties (a) smaller than 0,3 ha, (b) which belong to the State Treasury's Agricultural Property Stock, (c) which are internal roads, (d) which have been sold to former tenants in a special procedure (Act of 19 October, 1991 on the management of agricultural property of the State Treasury, Journal of Laws of 2020, item 396, as amended), and (e) which are covered with ponds over more than 70% (Article 1a of AAS, see also Article 1b and 1c of the AAS).

Prof. UAM dr hab. Aneta Suchoń (Adam Mickiewicz University, Poznań)[9] explored the subject of the acquisition of agricultural real property by a lessee. In her opening remarks, she reminded the audience that lease was a very common form of land management in Western European countries (e.g. France or Italy).

In these countries, lease is a safe and stable institution, unlike in Poland, where it is a short-term legal arrangement that lacks stability. However, it has been observed that lease is becoming increasingly popular in Poland despite its uncertain legal environment. This can be explained by the fact that the requirement laid down in the AAS, according to which the ownership of agricultural real property can be acquired by individual farmers only, does not apply to lessors. Consequently, a natural person who does not meet the requirements to be considered an individual farmer as well as any legal person may become a lessor of agricultural real property. One main point Suchoń highlighted addressed the uncertainties related to the transfer of agricultural property in leases. It should be considered whether it is possible under the AAS to transfer the ownership of farmland that has been leased. Under Article 2b para. 1 of the AAS, the acquirer of agricultural real property is required to run the agricultural holding the agricultural real property became part of for a period of at least five years. If the acquirer is a natural person, agricultural activity shall be conducted personally. Suchoń expressed her concern that it would not be possible for the new owner of the agricultural land to run the agricultural holding personally as long as the land was in lease. As long as the lease agreement remains in force, the agricultural activity on the farmland concerned is to be carried out by the lessee. She suggested a possible amendment to the AAS that would provide for a new legal arrangement applicable to the transfer of farmland in lease. The Government Agency should be able to issue a permit allowing the owner of the agricultural real property to transfer the ownership of the land, and at the same time, allowing the lease to be continued until the expiry of the term, thus exempting the new owner from the obligation to personally carry out agricultural activity on the acquired farmland. In that case, agricultural activity would be carried out by the lessee until the end of the lease agreement. During the discussion that followed the presentation, representatives of the Government Agency and Ministry of Agriculture and Rural Development commented on the proposed amendment. They confirmed that in accordance with the provisions of law, a transfer of the ownership of agricultural real property in lease was not legally possible based on the obligation laid down in Article 2b para. 1 of the AAS (i.e. the obligation to personally run an agricultural holding on the acquired land). This obligation applies to the acquirer of the agricultural real property regardless of whether or not the acquirer is a relative of the previous owner. Before the 2019 amendment, the obligations under Article 2b para. 1 did not apply to acquirers of the agricultural property who were relatives of the previous owner. The need to adopt new regulations that would solve the issues addressed by Aneta Suchoń was acknowledged.

[9] Title of presentation: *Nabywanie własności nieruchomości rolnych przez dzierżawców – nieruchomości prywatne, z Zasobu Własności Rolnej Skarbu Państwa i jednostek samorządu terytorialnego* (*The acquisition of the ownership of agricultural real properties by a lessee – in the case of private agricultural lands, lands owned by the State Treasury and local government units*). Author's other works include: Suchoń 2017; Suchoń 2016; Suchoń 2018; Suchoń 2019; Suchoń 2012a; Suchoń 2012b; Suchoń 2014.

Prof. UwB dr hab. Jerzy Bieluk (University of Białystok, Białystok)[10] devoted his presentation to the obligations of a company owning agricultural real property in the case of a transfer of shares. Pursuant to Article 3a para. 1 of the AAS, the Government Agency acting on behalf of the State Treasury has a pre-emption right to purchase shares in the case of the transfer of shares in a company that owns agricultural real property or holds the right of perpetual usufruct, providing that the surface area of the real property is at least 5 ha. Bieluk examined the respective provisions of the AAS to examine the scope of obligations imposed upon the company whose shares were to be transferred. Article 3a para. 4 of the AAS suggests *prima facie* that the company should notify the Government Agency about the content of the sale contract.[11] However, the company is a third party to the transaction of the transfer of shares; therefore, according to Bieluk, this obligation cannot be clearly deducted from the provisions of the AAS. Note that the AAS provides for several documents that shall be submitted while notifying the Government Agency (certificate from the land registry, extract of land and building registration, balance sheet and profit and loss account, list of shareholders, statement of the board of directors on the value of contingent liabilities). Bieluk pointed out that in addition to the fact that some requirements were inconsistent with other provisions of law (e.g. the Accounting Act), obtaining some of the documents might be expensive (certificate from the land registry) or difficult (list of shareholders, value of contingent liabilities). He concluded that the 2019 amendment to the AAS had introduced into Polish law a new kind of company, to which he referred as an 'agrarian company'. The shares in companies owning agricultural real property over 5 ha or holding the right of perpetual usufruct could be transferred only if the board of directors was willing to apply for or issue all necessary documents to comply with the company's obligation to notify the Government Agency; otherwise, the share deal agreement would be null and void.

3. Second Session

During the second session, *dr hab. Paweł Blajer* (Jagiellonian University, Cracow)[12] spoke about the obligations imposed by the AAS on the acquirer of an agricultural real property. The subject matter of his address constitutes the crux of the AAS regulation,

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[10] Title of presentation: *Zbycie akcji lub udziałów w spółkach będących właścicielami nieruchomości rolnych - wybrane problemy* (*The alienation of shares in companies owning agricultural real estate – selected issues*). Author's other works include: Bieluk 2018; Bieluk 2020; Bieluk 2016.

[11] Article 3a para. 4 of the AAS stipulates that to the right of pre-emption of shares referred to in Article 3a para. 1, Article 3 paras. 8, 8a, 10, 11, and the provisions of the Civil Code relating to the right of pre-emption of real estate shall apply accordingly, except that the declaration on the exercise of the right of pre-emption shall be made within two months from the day of receipt by the National Centre [National Support Centre for Agriculture] of the notification from the company referred to in Article 3a para. 1., whose shares constitute the object of the conditional contract of sale.

[12] Title of presentation: *Praktyczne aspekty stosowania art. 2b ustawy o kształtowaniu ustroju rolnego po nowelizacji z 2019 roku* (*Practical aspects of the application of Article 2b of the AAS after the 2019 amendment*). Author's other works include: Blajer 2018; Blajer 2013; Blajer 2016a; Blajer 2007; Blajer 2016b; Blajer & Kokoszka 2011.

being one of its most sensitive and problematic issues nowadays. Under Article 2b paras. 1 and 2 of the AAS, the acquirer of an agricultural real property has a twofold obligation. The obligation of a positive nature requires the acquirer to run the agricultural holding that the agricultural real property became a part of for a period of at least five years. If the acquirer is a natural person, the agricultural activity shall be conducted personally. On the other hand, the negative obligation imposed on the acquirer requires them to refrain from selling the agricultural real property or transferring its possession for a period of at least five years. However, neither of these restrictions is absolute in nature or definitive. The general director of the Government Agency may exempt an acquirer from the negative obligation to refrain from selling farmland within the prescribed five-year period. The exemption is granted by means of an administrative decision issued upon the request of the acquirer if such a request is justified by the acquirer's important interest or by public interest. The obligations at issue were introduced into the AAS with effect as of 30 April 2016.[13] Since then, the number of requests for exemption has been constantly growing. Nevertheless, the AAS also provides for several exemptions when the obligations stipulated in Article 2b paras. 1 and 2 do not apply. The exemptions provided for under Article 2b para. 4 refer to the acquirer himself (e.g. a relative), to the type of acquisition (e.g. by inheritance), or to the location of the agricultural real property (e.g. in the city, if the area of the real property is less than 1 ha). Blajer expressed his concern that the presented legal arrangement might pose considerable problems in practice. He pointed out, *inter alia*, the vague wording of the acquirer's obligation to refrain from selling an agricultural real property or transferring its possession within five years from the day of acquisition. He illustrated this with the case of the owner of a farmland in lease, who donated the land in lease to one of his descendants, who in turn granted usufruct rights to the donor. The question arises as to who shall perform the responsibilities set out in Article 2b para. 1, since in each case (ownership, lease, usufruct), a different person might be obliged to run the agricultural holding, and equally in each case, it might be the owner upon whom rests the obligation to perform the agricultural activity on the farmland concerned. Blajer continued his consideration of the subject matter during the discussion following the conference. To understand why so many controversies have arisen in Poland over the obligation of running agricultural activity, one must look at a broader perspective. Unlike other trade-restrictive measures such as pre-emptive rights or governmental permits, the obligation to conduct agricultural activity on farmland after its acquisition is not common in other European countries. It was introduced in Switzerland and adopted in Hungary in 2013. From Hungary, the Polish legislator took over the idea of introducing the obligation to run agricultural activity after the acquisition of farmland. While creating the AAS, the Polish legislator referred to the Hungarian legal arrangements. However, the outcome differed significantly from that of the original Hungarian framework. In Hungary, the obligation to run the agricultural holding is justified and makes sense, because only individual farmers are supposed to acquire agricultural property, and neither a company nor other entity is allowed to purchase farmland.

[13] I.e. on the last day of the transitional period provided for Poland in the accession treaty to the EU.

The only exception relates to relatives, who according to Hungarian law, can acquire agricultural real property even if they are not individual farmers. They are also exempted from the obligations to run agricultural holdings on acquired farmland and from refraining from selling it. However, the general principle is that only a farmer may acquire agricultural property, which seems a coherent regulation according to Blajer. In Poland, the AAS formally declares in Article 2a that only an individual farmer can acquire agricultural real property, although this is actually untrue: Agricultural real properties with an area of less than 1 ha can be acquired by anyone without any restrictions, while agricultural real properties with an area of more than 1 ha can be acquired by persons that are not individual farmers if they have permission from the Government Agency. Here, we face the problem of the obligation to conduct agricultural holding by persons and entities that are not farmers. This is unavoidable unless Article 2b of the AAS and the definition of agricultural real property are reviewed and improved.

Dr Małgorzata Szymańska (Maria Curie-Skłodowska University, Lublin)[14] in her address looked at the regulatory objectives underlying the obligations set out in Article 2b of the AAS to identify the *ratio legis* behind the trade-restrictive regulation and exceptions therefrom. She attempted to determine the meaning of conducting agricultural activities. Even though the AAS does not define conducting agricultural holding, the case law of Polish courts gives some indication as to the scope and meaning of this expression. In its judgement on 24 April 2014, the Voivodship Administrative Court in Poznań (Case II SA/PO 93/14) stated that the sole possession or ownership of an agricultural holding did not qualify as running it if no agricultural activity was being performed with relation to it, including decision-making regarding farming activity. The notion of running an agricultural holding may encompass the farmer's personal engagement in plant production and livestock farming, management of the work of persons employed on the farm, decision-making regarding what plants and livestock are to be produced, concluding contracts on the sale of crops, decision-making related to the purchase and sale of agricultural machinery, decisions regarding the use of fertilisers, and so on depending on the economic profile of an agricultural holding. The reasons for adopting the restrictive obligations set out in Article 2b paras. 1 and 2 AAS include ensuring the food security of Polish citizens and preventing the speculative turnover of farmland that could undermine the structure of the Polish agricultural system. The latter, according to the Polish Constitution, is based on family farming. Szymańska provided a detailed, word-for-word analysis of the provisions laying down exemptions from the obligations set out in Article 2b paras. 1 and 2 of the AAS. She explained that the extensive, albeit closed catalogue of exemptions served various purposes and reflected several different motives, among which she highlighted the protection of family connections and inheritance, reasons for public interest, the need to guarantee proper socio-economic use of the agricultural real property, and importance of supporting the use of EU funds.

[14] Title of presentation: *Wyłączenia obowiązków nabywcy nieruchomości rolnych i ich znaczenie dla kształtowania ustroju rolnego (Exemptions from the obligations imposed upon the acquirer of agricultural real estate, and their importance for the shaping of agricultural system).* Author's other works include: Szymańska 2018; Szymańska 2020a; Szymańska 2020b; Szymańska 2020c.

Dr hab. Przemysław Litwiniuk (Warsaw University of Life Sciences (SGGW), Warsaw)[15] explored the subject of the exercise of pre-emptive rights by the Government Agency. He emphasised that the regulations allowing for the pre-emption right constituted a limitation to the protection of ownership enshrined in Article 21 and Article 64 of the Polish Constitution.[16] According to the general limitation clause in Article 31 para. 3 of the Constitution, any limitation on the exercise of constitutional freedoms and rights may be imposed only by statute and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health, or public morals, or the freedoms and rights of other persons. Such limitations do not violate the essence of freedom and rights. Article 64 para. 3 provides for a limitation clause relating specifically to the protection of ownership, pursuant to which the right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right. Litwiniuk expressed his concern that while the provision allowing the Government Agency to exercise pre-emption rights did not violate the essence of the right to ownership, the purpose justifying the limitation of this right was not specific enough. Bearing in mind the case law of the Polish Constitutional Court (judgement of 18 March 2010 Case K8/08), it might be doubtful whether the current arrangement would stand the proportionality test. Equally, a lack of normative clarity remains about the preconditions that allow the Government Agency to exercise pre-emptive rights in a given case. For example, under the existing framework, it is not possible to determine whether the Government Agency is allowed to exercise pre-emptive rights in pursuit of a business goal, for example, to purchase real property at an advantageous price and sell it for profit. Furthermore, Litwiniuk reminded the audience that under the provisions of the AAS, the legal arrangement for the pre-emption right in favour of the Government Agency was that of a fiduciary legal relationship. Pursuant to Article 3 para. 4 of the AAS, while exercising pre-emptive rights, the Government Agency is acting in its own name but on behalf of the State Treasury. However, note that the practical application of this provision differs greatly from one notary public to another. It is not uncommon to indicate in the notarial act certifying the exercise of the right of pre-emption that it is the territorially competent Government Agency that exercises the pre-emptive rights on its own behalf, thus omitting the State Treasury and being contrary to the letter of the law. He also referred to the sequence of obligations related to the exercise of pre-emptive rights by the Government Agency under the AAS. Pursuant to the provisions of the AAS, the Government Agency is supposed to first send to the party obliged on account of the right of pre-emption the notarial act

[15] 15 Title of presentation: *Przesłanki i sposób wykonania prawa pierwokupu nieruchomości rolnej przez Krajowy Ośrodek Wsparcia Rolnictwa* (*Prerequisites for the exercise of pre-emption right by the National Support Centre for Agriculture and the rules governing the exercise thereof*). Author's other works include: Litwiniuk 2020; Litwiniuk 2018a; Litwiniuk 2018b; Litwiniuk 2017.

[16] Pursuant to Article 21 para. 1 of the Polish Constitution, the Republic of Poland shall protect ownership and the right of succession, while pursuant to Article 64 para. 1 everyone shall have the right to ownership, other property rights, and the right of succession. Article 64 para. 2 states that everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights, and the right of succession.

certifying the exercise of the right of pre-emption by a registered letter against confirmation of receipt. Only having complied with this obligation, is the Government Agency allowed to publish the notification on its website. If this order has not been respected, that is, a notification on the website was published prior to sending it by registered mail, then according to Litwiniuk, such exercise of right by the Government Agency shall be of no force and effect.

Dr Rafał Michałowski (University of Białystok, Białystok)[17] in his address referred to the issue of the legal consequences of non-compliance with the provisions of the AAS, more specifically to the grounds of invalidity laid down in Article 9 para 1. While it might seem that the sanction on invalidity is a relatively easy way to ensure compliance with the provisions of law, the misapplication of this sanction might have the opposite effect, creating various problems rather than solving them. According to Article 9 para. 1 of the AAS, the acquisition of an agricultural real property or of a share in the co-ownership of an agricultural real property, as well as the acquisition of the right of perpetual usufruct and the acquisition of shares in a company that owns agricultural real property with an area of at least 5 ha, shall be invalid if carried out contrary to the provisions of the AAS. In particular, failure to comply with the obligation to notify the person entitled to pre-emption or to inform the Government Agency in cases specified by the AAS (Article 3b and Article 4 para. 1) will result in the invalidity of the respective legal transaction. Michałowski emphasised that these two cases, although both included in the same provision of the AAS, constituted two separate grounds for invalidity, and thus should be considered separately. While it is widely accepted that the sale of agricultural real property results in invalidity if performed unconditionally, without the party entitled to pre-emption being notified, it is questionable whether the other case of non-compliance results in the same effect. He stressed the difference between the breach of the obligation to notify the party entitled to pre-emption and non-compliance with the obligation to inform the Government Agency in cases specified in Article 3b and Article 4 para. 1 of the AAS.[18] According to Michałowski, the latter refers to an obligation that is subsequent to the legal transaction resulting in acquisition, which does not constitute one of its elements. Therefore, he suggested that an acquisition should not be considered invalid *ab initio* and *ipso jure* if the Government Agency had not been properly informed about the transaction. Instead, it should be assumed that after obtaining knowledge from any source that the acquisition has taken place, the Government Agency could still exercise its rights under Article 3b and Article 4 para. 1. within one month.

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[17] Title of presentation: *Naruszenie regulacji ustawy o kształtowaniu ustroju rolnego w kontekście sankcji nieważności* (*Non-compliance with the provisions of the Act on Shaping of the Agricultural System in the context of the sanction of invalidity*). Author's other works include: Michałowski 2020.

[18] Article 3b of the AAS provides for the right of the Government Agency to acquire an agricultural real property with an area of at least 5 ha at a price corresponding to its market value in the case of a change of partners in a partnership owning agricultural real property or holding the right to perpetual usufruct with respect to this agricultural real property. Article 4 para. 1 of the AAS lays down the right of the Government Agency to acquire an agricultural real property in the case that the acquisition of property rights is not a result of a sale-purchase agreement, for example, in the case of a donation or an acquisition by prescription.

Mgr Patryk Bender (Jagiellonian University, Cracow)[19] delivered a speech on the alienation of inheritance comprising an agricultural real property. He devoted the main part of his presentation to the relation between the general rules of inheritance under the Polish Civil Code and the provisions of the AAS governing the acquisition of farmland. Pursuant to Article 1051 of the Civil Code, an heir who has accepted the inheritance may alienate the entire estate or part of it. According to the rule of universal succession laid down in Article 1053 of the Civil Code, the party that acquires the estate shall assume the rights and obligations of an heir. Therefore, the acquirer assumes liability for the totality of the transferred estate, not to specific items of property. Article 1070[1] of the Civil Code refers specifically to the alienation of an inheritance comprising an agricultural holding. It states that where alienating an estate or part of an estate or a share in the estate comprising an agricultural farm or an agricultural real property within the meaning of the AAS, the provisions of the AAS on the alienation of agricultural real property shall apply. Bender explained that Article 1070[1] was introduced into the Civil Code in 2003 and amended in 2016. During the period 2003-2016, the then legal framework provided specifically that in case of the alienation of an inheritance comprising an agricultural holding, the right of pre-emption set out in Article 3 and right of acquisition by the Government Agency in Article 4 of the AAS applied. The 2016 Civil Code amendment moved from the specific reference to Articles 3 and 4 of the AAS toward a general reference to the AAS as a whole. According to Bender, the reason behind the amendment was to extend the scope of application of the AAS beyond Article 3 and Article 4 in the case of the alienation of an inheritance comprising an agricultural real property. Consequently, the general restrictions provided for by virtue of Article 2a para. 1 of the AAS, according to which only individual farmers may acquire agricultural real property, shall equally apply to the alienation of inheritance. The year 2016 also witnessed a substantial amendment of the AAS itself, as a result of which all types and means of acquisition of agricultural real property now fall into its scope of application. The AAS, as amended in 2016, lays down in Article 2 a very broad definition of farmland acquisition, encompassing acquisition by legal transaction or other event of legal significance, as well as acquisition by virtue of a court ruling or an administrative decision. Such a broad understanding of 'acquisition' leads to the conclusion that the statutory restrictions provided for in the AAS apply *inter alia* to the acquisition by means of sale and purchase agreement, by donation, by prescription, and by court ruling. Therefore, it can be assumed that they equally apply to the acquisition of farmland by inheritance. Under these circumstances, Article 1070[1] of the Civil Code is redundant and superfluous, as it repeats the regulation already covered by the AAS and as such shall be repealed. The other point addressed by Bender was the legal consequences of non-compliance with the AAS in the specific context of the alienation of inheritance comprising an agricultural real property. In case of non-compliance with the provisions of the AAS, the entire acquisition of inheritance is deemed invalid, even if the agricultural property constitutes only a small part of the whole inheritance mass. Bender reflected on whether it would be possible to limit the legal consequences of non-compliance, that is, the invalidity of acquisition, only to the

[19] Title of presentation: *Zbycie spadku obejmującego gospodarstwo rolne lub nieruchomość rolną* (*Alienation of inheritance comprising an agricultural holding or an agricultural real property*).

agricultural real property, even though it would not be consistent with the rule of universal succession. He pointed out that in Germany and the Czech Republic, the provisions providing for universal succession in case of the alienation of inheritance were dispositive in nature, which allowed excluding certain items of property within the inheritance mass from the transfer of property. While this is not the case in Poland, it can nevertheless be argued that several provisions of law provide for the possibility of distinguishing a particular article from the inheritance mass as a whole (e.g. Article 981[1] of the Civil Code relating to specific bequest or Article 1054 of the Civil Code). For this reason, Bender suggested that the general rule of universal succession applicable to the alienation of inheritance could be overcome by introducing an additional contractual clause allowing for the exclusion of the agricultural real property from within the entire inheritance mass. It shall be possible for the parties to the contract to indicate that they have no knowledge as to whether the inheritance comprises an agricultural real property; however, shall that be the case, they wish to exclude it from the transfer of the inheritance mass. The application of such clauses would reduce the risks associated with the transfer of an entire estate under universal succession. Further, it would allow the preservation of the validity of the acquisition as a whole by limiting the scope of possible legal consequences of non-compliance with the AAS solely to the invalidity of the transfer of farmland.

4. Third Session

The third session was devoted to food law-related aspects of the legal framework governing agricultural land trade in Poland. The keynote address was provided by *Prof. UW dr hab. Paweł Wojciechowski* (University of Warsaw, Warsaw), who spoke about the restrictions on trade in agricultural property in relation to food security.[20] Under Polish law, a the principle of food security and notion of food safety is distinguished. The principle of food security aims to ensure the availability of food, which encompasses four essential elements: the physical existence of food, its economic availability (i.e. at an affordable price), the adequacy of food, and stability of food supplies. During the outbreak of the COVID-19 pandemic, we had a sample of what could happen if the stability of food supplies became an issue. While addressing the question of constitutional background, he noted that the Polish Constitution did not explicitly refer to food security. However, it should be kept in mind that food security is a means of ensuring the right to adequate food. The latter, although not guaranteed directly by Polish law, can be derived from other rights laid down in the Constitution, for example, from the right to the protection of life and health. Furthermore, it is guaranteed by several international human rights instruments, notably the UN Universal Declaration of Human Rights and International Covenant on Economic, Social, and Cultural Rights (ICESCR). The ICESCR recognises that the right to adequate food is protected under the right of an adequate standard of living, and it goes

[20] Title of presentation: *Bezpieczeństwo żywnościowe a ograniczenia w obrocie nieruchomościami rolnymi* (*Food security and restrictions on the free trade of agricultural real estate*). Author's other works include: Wojciechowski 2018; Korzycka & Wojciechowski 2017; Wojciechowski 2016; Korzycka & Wojciechowski 2014; Wojciechowski 2010.

further by recognising the fundamental right of everyone to be free from hunger. Therefore, the principle of food security is anchored in the Polish Constitution, regardless of the fact that it contains no specific reference to the notion of food security. Wojciechowski reminded the audience that the idea of food security was also closely related to the 2030 Agenda for Sustainable Development. While the 17 goals were defined by UN member states in relation to sustainable development, goal no. 2 aims to end hunger, achieve food security and improved nutrition, and promote sustainable agriculture. A close relationship is evident between ensuring food security and the idea of sustainable agriculture, which also requires equal access to farmland and other natural resources. The guidelines provided for in the 2030 Agenda with regard to the implementation of goal no. 2 include doubling the agricultural productivity and incomes of small-scale food producers. This conforms to the fundamental principle underlying the entire Polish agricultural system, which shall be based on family farming according to the Polish Constitution and AAS. The implementation of the principle of food security included in the preamble to the AAS requires proper regulation of the agricultural land market. The European Parliament and European Commission have both declared that within their farmland policy, the EU member states ensure access to agricultural land for farmers, who are supposed to carry out agricultural production. In Wojciechowski's opinion, the measures adopted by the Polish legislator (e.g. the acquisition of farmland by individual farmers, ban on alienating farmland within five years, obligation to carry out agricultural activity, pre-emption rights) are insufficient to fully meet this goal. Nevertheless, they contribute to the overall aim of avoiding the excessive concentration of land and in supporting farmers running small family holdings. Although these measures place a significant burden on the trade of agricultural land, they are entirely justified in the context of food security.

Prof. UW dr hab. Adam Niewiadomski (University of Warsaw, Warsaw)[21] in his speech looked at the impact of the AAS regulation on environmental protection. He argued that although the preamble to the AAS referred to the need for environmental protection in explicit terms, its provisions were irrelevant with respect to the protection of the environment. The AAS was designed to protect the interests of the state to prevent the excessive concentration and speculative acquisition of farmland, and it does not provide for instruments specifically dedicated to environmental protection. Neither the requirement imposed upon individual farmers to have agricultural qualifications nor the 300 ha threshold on the area of acquired farmland can be considered environment-related provisions. Niewiadomski raised doubts as to whether the AAS, whose title directly refers to the 'shaping of the agricultural system', was indeed able to shape the Polish agricultural system. How is it possible to shape the agricultural system without any concern as to matters pertaining to environmental protection?

[21] Title of presentation: *Obrót nieruchomościami rolnymi a wyzwania ochrony przyrody* (*The turnover of agricultural real estate and challenges of environmental protection*). Author's other works include: Czechowski & Niewiadomski 2013; Czechowski & Niewiadomski 2015; Niewiadomski & Czechowski 2016; Niewiadomski 2011; Niewiadomski 2012; Niewiadomski 2013; Niewiadomski 2014a; Niewiadomski 2014b; Niewiadomski 2016a; Niewiadomski 2016b; Niewiadomska & Niewiadomski 2012;

5. Concluding remarks

During the 17 years that have passed since its adoption and entry into force, the Act of 11 April 2003 on the Formation of the Agricultural System (AAS) has given rise to many questions both in terms of its fundamental principles and its implementation in practice. The 2016 amendment to the AAS, adopted at the end of the transitional period provided for in the European Union accession treaty, has put new restrictions on farmland trade, substantially changing the existing legal framework. The choice of subjects for the conference reflected the challenges posed by the current regulations governing the agricultural real estate market in Poland. In particular, the difficulties in determining the meaning of 'agricultural real property' and establishing the scope of application of the AAS (Mikołajczyk) were referred to. The statutory formulation of the principle according to which only individual farmers can acquire farmland is not fully consistent with the desired aim of the legislator, and gives rise to practical difficulties, especially in relation to the obligation to carry out agricultural activity on the acquired farmland (Blajer). Several uncertainties were pointed out in connection with the legal consequences of non-compliance with the AAS (Michałowski), with special regard to the issue of the alienation of inheritance comprising an agricultural holding (Bender). The coherence and practical application of the provisions imposing upon a company owning agricultural real property the obligation to notify the Government Agency in case of a transfer of shares was questioned (Bieluk). Furthermore, reference was made to a legal gap that makes it impossible for the owner of a farmland in lease to transfer the ownership of such land based on the obligation to run the agricultural activity personally (Suchoń). General concern was expressed about the casuistic and highly restrictive character of the AAS, which in addition to its frequent amendments, runs afoul of the rule of legal certainty (Czechowski, Marciniuk). While the overall impact of the AAS on food security is positive (Wojciechowski, Szymańska), the issue of environmental protection is not adequately addressed in the AAS (Niewiadomski). The conference participants expressed their hope that further amendments of the AAS would bring solutions to the issues of concern.

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