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Aspects regarding the sale of agricultural land located outside the built-up area
boundary in Romania, by reference to the Romanian Constitution and the
European Union Law**

Abstract

The aim of this study is to present and evaluate the possible impact of the most recent legislative amendments from Romania that include important regulations regarding the sale and purchase of agricultural land located outside the built-up area boundary. At the same time, our aim is to study the compliance of the adopted legal norms with the requirements of EU law in this field, with reference to the case-law of the European Court of Justice and of the Constitutional Court of Romania.

Keywords: Constitutional Court of Romania, case-law of the European Court of Justice, agricultural land located outside the built-up area boundary, economic freedom, free movement, equal rights, pre-emption right, the principle of proportionality, free movement of capital.

1. Introduction

This study aims to analyse whether the legal framework on the sale of agricultural land located outside the built-up area boundary in Romania is compatible with European Union law, taking into consideration that Law no. 175/2020¹ has been subjected to constitutional control before its promulgation. According to the Romanian Constitution, the provisions of the founding treaties of the European Union, as well as other mandatory Community regulations prevail over conflicting national legislation, in compliance with the provision of the Act of accession.²

Before turning to the exhaustive presentation of this topic, it is appropriate to specify that according to some opinions already expressed in the specialty literature there is a potential infringement of several fundamental rights and freedoms guaranteed both by the fundamental law and by European Union treaties – equal rights, freedom of movement, right to private property, economic freedom, the fairness of fiscal burdens – which are likely to significantly change the legal regime applicable to the sale

Szilárd Sztranyiczki: Aspects regarding the sale of agricultural land located outside the built-up area boundary in Romania, by reference to the Romanian Constitution and the European Union Law. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2022 Vol. XVII No. 32 pp. 144-156, <https://doi.org/10.21029/JAEL.2022.32.144>

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** *This study has been written as part of the Ministry of Justice programme aiming to raise the standard of law education.*

¹ Published in the Official Journal of Romania no. 741/14.08.2020.

² According to the provisions of Article 148 (2) of the Romanian Constitution.



<https://doi.org/10.21029/JAEL.2022.32.144>

of agricultural land located outside the built-up area boundary.³

Essentially, the authors of the exception of unconstitutionality claimed that the law *“is indirectly aimed at restricting the right of citizens of EU Member States and citizens of Member States to the Agreement on the European Economic Area (AEEA) to acquire ownership of agricultural land located outside the built-up area boundary.”*⁴

Decision no. 586/2020 of the Constitutional Court was adopted with the majority of votes, while the judges who voted against delivered two separate opinions sustaining the unconstitutionality of the regulation.⁵

We anticipate that the object of our study is of interest, particularly because one of these two separate opinions⁶ has pointed out – by reference to Article 148 (4) of the Romanian Constitution – that, among others, the judicial authority guarantees the implementation of obligations born from the act of accessions and the provisions of Article 148 (2) of the fundamental law, and therefore *“European Union nationals who, based on the provisions of the Law submitted to constitutional control in the case herein, encounter difficulties in acquiring agricultural land located outside the built-up area boundary in Romania may turn to the courts of law, which can either exclude from application the relevant provisions of the Law, or they may address a preliminary question to the Court of Justice of the European Union in order to clarify the meaning of Article 63 and 65 of the TFEU⁷ corroborated with Annex VII, point 3 of the Treaty on the accession of the Republic of Bulgaria and Romania to the European Union.”*

A further argument for a more thorough examination of these legal problems is represented by the fact that *“Article 148 (2) of the Romanian Constitution gives systematic and unconditional priority to the provisions of the founding treaties of the European Union over any conflicting national provision. This means that if the Romanian Parliament were to adopt a legal provision which is contrary to Article 63 of the TFEU, this would be ab initio inapplicable. Consequently, since they are contrary to Article 63 of the TFEU and Annex VII, point 3 of the Treaty on the accession of the Republic of Bulgaria and Romania to the European Union, the provisions of the Law are also ab initio invalid in relation to Article 148 (2) of the Romanian Constitution.”*

Thus, we shall have in view the arguments behind the exceptions of unconstitutionality concerning Law no. 175/2020 on the amendment of Law no. 17/2014 on certain measures for the regulation of the sales and purchase of

³ Prescure & Schiau 2016, 28–29; Popescu 2020, 135–136; Jora 2016, 10; Papuc 2019, 125;

⁴ According to point 18 of Decision no 586/2020 of the Constitutional Court of Romania. This decision was published in the Official Journal of Romania no. 721/11 August 2020, Constitutional Court of Romania.

⁵ The decision on the exception of unconstitutionality regarding the provisions of the Law on the amendment of Law no. 17/2014 on certain measures for the regulation of the sales and purchase of agricultural land located outside the built-up area boundary, published in the Official Journal of Romania no. 721/11.08.2020. One of the two separate opinions we refer to was written by judges Livia Doina Stanciu and Elena-Simina Tănăsescu, and the other one by Mona-Maria Pivniceru.

⁶ The separate opinion of Livia Doina Stanciu and Elena-Simina Tănăsescu, Decision no. 586/2020 of the Constitutional Court of Romania 32–33.

⁷ The Treaty on the Functioning of the European Union, Official Journal of the European Union 2012.

agricultural land located outside the built-up area boundary, as well as those stated in the reasoning of Decision no. 586/2020 of the Romanian Constitutional Court, particularly those aspects that are the object of our study and continuing with the argumentation of the applicability of Community law, with reference to the infringement of one of the fundamental freedoms, i.e. the free movement of capital, by indicating the relevant case-law of the Luxembourg Court, while the final part is obviously reserved to conclusions.

2. The application of Law no. 17/2014 to persons

The provisions of Law no. 17/2014 apply to Romanian citizens, to citizens of European Union Member States, of Members States to the Agreement on the European Economic Area (AEEA) and of the Swiss Confederation, to stateless persons domiciled in Romania, in a European Union Member State, in a Member State to the AEEA or in the Swiss Confederation, as well as to Romanian legal entities and legal entities that have the nationality of an EU Member State, an AEEA Member State or of the Swiss Confederation.

Third-country nationals and stateless persons domiciled in a third country, as well as third-country legal entities may acquire ownership of agricultural land located outside the built-up area boundary under the conditions set in international treaties, on a reciprocal basis, as regulated by Law no. 17/2014.⁸ Consequently, if the legal provisions recognise the right of third-country nationals and stateless persons to acquire ownership of land in general, Law no. 17/2014 becomes applicable to acquiring agricultural land located outside the built-up area boundary for these persons as well.

This law, however, does not apply to the sale of agricultural land located outside the built-up area boundary that belong to the private property – of local or country interest – of administrative-territorial units.⁹

According to the initial form of the law, the alienation of agricultural land located outside the built-up area boundary by sale shall respect the pre-emption right of co-owners, lessees, neighbouring owners, as well as of the Romanian state (through the State Property Agency), in this order, and it shall be carried out at the same price and under equal conditions.

Law no. 175/2020 modifies and enlarges the sphere of pre-emptors: (a) 1st rank pre-emptors: co-owners, 1st degree relatives, spouses, relatives and relatives in-law up to the 3rd degree, inclusively; (b) 2nd rank pre-emptors: the owners of agricultural investments in fruit trees, vineyards, hops, irrigations excluding private irrigations and/or the lessees. If on the land for sale there are agricultural investments in fruit trees, vineyards, hops or irrigations, the owners of such investments have priority in purchasing this land; (c) 3rd rank pre-emptors: owners and/or lessees of agricultural land

⁸ According to Article 44 (2), 2nd thesis of the Constitution, foreign nationals and stateless persons may only acquire ownership of land under the conditions resulting from Romania's accession to the European Union and from other international treaties that Romanian is a party to, on a reciprocal basis, as provided by organic law, as well as by way of legal inheritance.

⁹ Article 20 (3) of Law no. 17/2014, as amended by Law no. 138/2014.

neighbouring the land on sale; (d) 4th rank pre-emptors: young farmers; (e) 5th rank pre-emptors: the Gheorghe Ionescu-Șișești Academy of Agricultural and Forestry Sciences, research and development facilities in the field of agriculture, forestry and the food industry regulated by Law no. 45/2009 on the organisation and functioning of the Gheorghe Ionescu-Șișești Academy of Agricultural and Forestry Sciences and of the research and development system in the field of agriculture, forestry and the food industry, as subsequently amended, as well as agricultural educational establishments for the aim of purchasing agricultural land located outside the built-up area boundary with the destination strictly necessary to agricultural research, located in the vicinity of existing plots in their patrimony; (f) 6th rank pre-emptors: natural persons domiciled/residing in administrative-territorial units where the land is located or in neighbouring administrative-territorial units; (g) 7th rank pre-emptors: the Romanian state, through the State Property Agency.

Law no. 175/2020 also introduces other limitations on the legal circulation of agricultural land, which become applicable if none of the holders of the pre-emption right exercises his/her right. In this case, the agricultural land may only be sold to natural persons or legal entities that comply with certain requirements set by law.

In the case of natural persons, these cumulative requirements are the following:¹⁰ (a) the domicile/residence of the natural persons in question should be situated on the national territory for at least 5 years prior to the registration of the offer to sell; (b) to carry out agricultural activities on the national territory for at least 5 years prior to the registration of this offer; (c) to be registered with the Romanian fiscal authorities for at least 5 years prior to the registration of the offer to sell agricultural land located outside the built-up area boundary.

In the case of legal entities, the cumulative legal requirements are more complicated: (a) the main seat and/or secondary seat of legal entity in question should be situated on the national territory for at least 5 years prior to the registration of the offer to sell; (b) it should carry out agricultural activities on the national territory for at least 5 years prior to the registration of the offer to sell agricultural land located outside the built-up area boundary; (c) to present the documents which show that at least 75% of the total revenues for the last 5 fiscal years come from agricultural activities as provided for in Law no. 227/2015 on the Fiscal Code, as subsequently amended, classified according to NACE codes through order of the Minister of agriculture and rural development; (d) the domicile of the partner/shareholder who controls the company should be situated on the national territory for at least 5 years prior to the registration of the offer to sell agricultural land located outside the built-up area boundary; (e) if the structure of legal entities, partners/shareholders that control the company comprises other legal entities, the partners/shareholders controlling the company should prove that their domicile is situated on the national territory for at least 5 years prior to the registration of the offer to sell agricultural land located outside the built-up area boundary.

¹⁰ Article 4 of Law no. 17/2014, as amended by Law no. 175/2020.

Thus, the priority right to purchase is not a veritable potestative right. It seems that imposing this right is only a limitation on the freedom of contract: owners are limited by these provisions to choose their buyers from a limited circle of persons who fulfill certain requirements established by the law-maker who thus wishes to direct ownership transfers of agricultural land located outside the built-up area boundary in a certain direction.

The sale of land at a price smaller than the price asked in the initial offer to sell, under more advantageous conditions for the buyer than those comprised in the offer or breaching the legal conditions that apply to buyers entails absolute nullity.¹¹

3. Decision no. 586/2020 of the Constitutional Court. A special look at the compliance of Law no. 175/2020 with European law

The draft law for the amendment of Law no. 17/2014 was examined by the Romanian Constitutional Court, which was vested to decide upon both intrinsic and extrinsic unconstitutionality criticisms. In the following, we shall turn our attention to aspects related to compliance with European Union law, as reflected in the reasons of Decision no. 586/2020, but also in the two separate, dissenting opinions.

Thus, the claim of unconstitutionality argues that *“acquiring ownership under restrictive conditions, restricting disposition to certain categories of potential buyer, imposing the fulfillment of certain conditions by the buyer, such as residence/domicile/seat on the national territory for at least 5 years prior to the registration of the offer to sell, carrying out agricultural activities on the national territory for a period of at least 5 years prior to the registration of the offer to sell, a certain percentage of the revenues generated from agricultural activities for a period of at least 5 years prior to this moment (for legal entities), lead to a change in the legal regime of ownership of agricultural land and they may be qualified as measures restricting the exercise of certain rights and freedoms, contrary to Article 53 of the Constitution.”*

At the same time, the authors of this claim argue that the new conditions imposed on acquirers of agricultural land located outside the built-up area boundary may not be *“justified from the perspective of non-discriminatory treatment, the protection of certain general interest objectives and proportionality”*, indirectly causing the restriction of the right of European Union citizens and European Economic Area citizens to acquire ownership of agricultural land, and thereby infringing the provisions of Article 148 of the Romanian Constitution which refer to the implications of integration into the European Union, claiming at the same time that the provisions of the Treaty on the accession of Romania to the European Union were also infringed.

Dwelling on this criticism, most judges of the Constitutional Court consider that the legal texts in question *“do not regulate any restriction or exclusion of natural persons or legal entities from Member States to purchase agricultural land, but they impose certain conditions for achieving the aim of the law, i.e. capitalising land ownership. All these conditions are common to natural persons and legal entities from EU Member States, and there is no different legal treatment between them inasmuch as the right to purchase agricultural land located outside the built-up area boundary is concerned. The criticised texts do not prohibit and they neither exclude the right of natural*

¹¹ Article 7 (8) of Law no. 17/2014, as amended by Law no. 175/2020.

persons and legal entities from outside the national territory to purchase such land if the conditions stipulated in the law – which are valid for Romanian natural persons and legal entities as well – are fulfilled. Therefore, those stated above demonstrate that the law-maker did not operate with the criterion of citizenship/nationality, but with a set of objective criteria aimed at the ability of the buyer to keep the category of use of the agricultural land located outside the built-up area boundary and to work it effectively.” The conclusion of a sale contract as buyer requires a solid and well defined material base on the national territory, as well as relevant work experience under the pedoclimatic conditions characteristic to Romania. It follows that the law does not set arbitrary conditions for purchasing agricultural land located outside the built-up area boundary but rather conditions that support the purpose of the law.¹²

Contrary to this majority opinion, the first separate opinion argues that conditioning “the acquisition of agricultural land located outside the built-up area boundary on acquirers establishing their domicile/residence on the national territory by a law adopted in 2020 (...) amounts to a restrictive measure for potential acquirers, who although being European Union nationals, do not have their domicile/residence on the national territory, i.e. it violates the commitments made by Romania towards accession to the European Union as they result from point 3, Annex VII to the Treaty on the accession of the Republic of Bulgaria and Romania to the European Union.”¹³ According to the other separate opinion “the criticised provisions, although they do not regulate an express and direct exclusion of natural or legal persons from the Member States from purchasing agricultural land located outside the built-up area boundary, impose certain conditions that may be classified as having equivalent effect.”¹⁴

In sustaining the principal argument it has been pointed out that the legislative project does not set arbitrary conditions in the field of purchasing agricultural land located outside the built-up area boundary, but rather they are justified in the light of achieving the purpose of the law, being intended to “demonstrate the ability of natural/legal persons to carry out agricultural activity on the land purchased.”

As for reference to the case-law of the Court of Justice of the European Union, the majority of the judges of the Constitutional Court consider that the draft law under examination does not concern and discuss the freedom of establishment of persons or the free movement of capital, therefore in principle it does not meet the requirements to turn into a restriction of these rights.

Consequently, these reasons that imply the examination of European Law elements were also of such nature as to substantiate the solution – adopted with a majority of votes – of dismissing as unfounded the exception of unconstitutionality against the draft law for the amendment of Law no. 17/2014.

We may not however disregard the two separate opinions which outline a direction of analysis diametrically opposed to those stated above and support a debate that has to gravitate around the applicable EU law.

Thus, in their separate opinion, judges Livia Doina Stanciu and Elena Simina Tănăsescu argue that “by regulating certain measures that are equivalent to restricting the free

¹² Point 101 of Decision no. 586/2020 of the Constitutional Court of Romania.

¹³ Point 3.2.2. of the Separate opinion formulated by Livia Doina Stanciu and Elena-Simina Tănăsescu.

¹⁴ Point 2 of the Separate opinion formulated by Mona-Maria Pivniceru.

movement of agricultural land within the framework of the European Union, the Law entails a failure of Romania to fulfill its commitments based on EU treaties and breaches Article 148 of the Constitution.”

We would like to highlight the following aspects from the legal reasoning of this separate opinion: (1) legislative measures of the type at issue are within the margin of appreciation of national legislators but they have to fulfill two requirements, i.e. they should not constitute in fact obstacles to the free movement of land and they have to be adopted according to the fundamental law; (2) according to the opinion of the two judges the draft law examined does not fulfill these rigours because, on the one hand, the principle of bicameralism is violated as *“important provisions of the Law (the regulation of new pre-emptors, giving preference to national buyers, prohibitive taxation of land movement, exempting only certain operations in a discriminative manner etc.) have not been known to or debated by the first Chamber seized and it is exactly these provisions that render a significantly different content to the Law than that envisaged by both its initiator and the first Chamber seized.”* On the other hand, according to a further argument *“these provisions, adopted exclusively by the decisional Chamber, also determine the effects contrary to European Union law, as although by themselves they do not directly hinder the free movement of capital – i.e. agricultural land in Romania – within the European Union, in fact they impose measures of equivalent effect stipulated in the founding treaties of the European Union and the case-law of the Court of Justice”*; (3) the conclusion is that the new legislative amendments give priority to Romanian nationals, entailing violations of both the commitments made by our country in view of accession to the European Union and of certain provisions of the primary EU law – in this case Article 63 of the Treaty on the Functioning of the European Union¹⁵ –, which means that Article 148 of the Romanian Constitution is infringed.

In the second separate opinion as well – that of judge Mona-Maria Pivniceru – the conditions imposed through the new legislative amendments represent equivalent measures to restricting the free movement of capital even if they do not expressly and directly exclude natural and legal persons from Member States from purchasing agricultural land located outside the built-up area boundary. By reference to the decisions of the European Court of Justice, such as the one in case no. C-370/05, the above mentioned judge notes that *“when exercised, the right to acquire, exploit and alienate*

¹⁵ Article 63 (1) of the Treaty on the Functioning of the European Union has the following normative content: *“Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.”* Article 65, especially paragraphs (1) and (2) of the Treaty on the Functioning of the European Union allow for derogations from the free movement of capital, recongising the right of Member States: *“(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested; (b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.”* It is important to note that in order to be considered derogations allowed under the above cited conditions, the measures and procedures imposed shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63.

immovable property on the territory of another Member State, which represents a necessary complementation of the freedom of establishment, generates movements of capital that comprise operations by which non-residents make investments on the territory of a Member State”, and therefore falls within the remit of EU law.

After reviewing the case-law of the Court of Justice of the European Union, which in time has recognised the public policy objectives that may justify restrictions of investments in farmland,¹⁶ the above mentioned judge reaches the conclusion that the criticised legislative measures “*impose a restriction that may not be admitted from the perspective of European Union law as it does not pursue an objective of general interest, therefore it is not necessary to analyse it from the perspective of the principle of proportionality, which evaluates the attainment of the objective set by means that do not exceed what is necessary for its attainment.*”

4. Classification of the issue of agricultural land sale within the remit of EU law. Main directions in the case-law

The 2017 document entitled “*Commission Interpretative Communication on the Acquisition of Farmland and the European Union Law*,”¹⁷ specifies that the acquisition of farmland falls within the remit of European Union law, namely “*the right to acquire, use or dispose of agricultural land falls under the free movement of capital principles set out in Articles 63 et seq. of the Treaty on the Functioning of the European Union.*”¹⁸

Thus, although there is no secondary legislation on the acquisition of land at the European level, the prerogative/margin of appreciation of Member States to decide the regulation of their land market is recognised, but they are obliged to comply with the principles of the primary European law, especially with those pertaining to fundamental freedoms and the principle of non-discrimination. As for the latter one, it should be taken into account that certain provisions are likely to “*discriminate, not formally but in their practical effects, against nationals from other EU countries or impose other disproportionate restrictions that would negatively affect investment.*”¹⁹ In this regard, the legal specialty literature considers that measures that do not explicitly discriminate between persons according to their

¹⁶ Curia Europa, cases such as: C-182 83, C-302 97, C-423 98, C-452 98, C-370 05.

¹⁷ The usefulness of reference to this document is highlighted by its content. Thus, this communication that sets guidelines to be followed in this field, providing support to Member States that are in the process of adapting their internal legislation, refers to the “*advantages and challenges implied by foreign investments in agricultural land. Moreover, the communication specifies the applicable EU law and the case-law of the CJEU. Finally, this communication draws certain general conclusions from the case-law on the way legitimate public interests may be addressed in compliance with EU law*”, case C-370 05.

¹⁸ Although the notion of movement of capital is not defined in EU law, by reference to the case-law of the Court of Justice in the specialty literature it has been noted that this freedom “*designates financial operations essentially aimed at the placement or investment of sums, and not remuneration for a service provided. The movement of capital represents an autonomous transaction, not an operation resulting from another one. Within the framework of achieving the European financial space, it is favoured by the freedom of establishment and by the freedom of financial institutions to provide services, especially of those performing banking activities*”, Groza 2014, 106.

¹⁹ Commission Interpretative Communication on the Acquisition of Farmland and the European Union Law.

nationality, residence or the origin of capital amount to indirect discrimination if the incriminated measure has negative effects on the movement of capital.

Classification within the remit of European law may be explained in light of the fact that agriculture is also part of the internal market, and the fundamental freedoms of EU investors, especially those related to the free movement of capital and the freedom of establishment are recognised as forming an integral part of the internal market.

Nevertheless, EU law allows exceptions even in the case of fundamental freedoms, certainly only as long as they do not constitute “a means of arbitrary discrimination or a dissimulated restriction of the free movement of capital and payments.”²⁰ Furthermore, as is well-known and also in line with the general principles of law, any derogation from fundamental freedoms shall be interpreted and applied in a restrictive manner, and the general standard used during judicial review of these restrictions is provided by the principle of proportionality,²¹ which is of such nature as to allow the verification of a just balance – in our case between the need to attract capital to rural areas in view of sustainable and durable development and ensuring legitimate agrarian policy objectives.

When applying the proportionality test, the first condition is that of the legitimate objective pursued through the adoption of national measures. In this regard, we shall indicate the agricultural policy objectives that may justify limitations on fundamental freedoms, as centralized in the Commission Interpretative Communication on the Acquisition of Farmland and European Union Law, by reference to the relevant case-law of the CJUE: “(a) to increase the size of land holdings so that they can be exploited on an economic basis, to prevent land speculation; (b) to preserve agricultural communities, maintain a distribution of land ownership which allows the development of viable farms and management of green spaces and the countryside, encourage a reasonable use of the available land by resisting pressure on

²⁰ Groza 2014, 103.

²¹ This principle is regulated at EU level by Article 5 of the Treaty on European Union which in paragraph (4) provides as follows: “Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.” Moreover, according to Article 52 (1) of the Charter of Fundamental Rights of the European Union “any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.” Furthermore, we would like to mention that the principle of proportionality is also enshrined at the constitutional level, and here we shall refer to the Romanian Constitution, which in Article 53 provides that any limitation on the exercise of the rights and freedoms must be provided for by law and respect the conditions set in the same constitutional text – the attainment of legitimate objectives/aims such as as those listed in Article 53 (1), while limitations may only be made if they are necessary in a democratic society, they are proportionate to the situation which determined it, they shall be applied in a non-discriminatory manner and without affecting the existence of the right or freedoms. For a specialty paper dedicated to this principle see Papuc 2019.

land, prevent natural disasters, and sustain and develop viable agriculture on the basis of social and land planning considerations (which entails keeping land intended for agriculture in such use and continuing to make use of it under appropriate conditions); (c) to preserve a traditional form of farming of agricultural land by means of owner-occupancy and ensure that agricultural property be occupied and farmed predominantly by the owners, preserve a permanent agricultural community, and encourage a reasonable use of the available land by resisting pressure on land; (d) to maintain, for town and country planning or regional planning purposes and in the general interest, a permanent population and an economic activity independent of the tourist sector in certain regions; (e) to preserve the national territory within the areas designated as being of military importance and protect military interests from being exposed to real, specific and serious risks”.

Once the legitimate character of the aim stated by the legislator is argued and accepted, a further challenge may be posed by justifying that the limitation is necessary and adequate to achieve the objective invoked, i.e. that it is adequate to lead to the fulfillment of the aim pursued.²² Thus, whether the measures recently adopted by the national legislator exceed what is necessary to achieve the objective undertaken and already indicated in the statement of reasons is a legitimate question.

From the constant case-law of the Court of Justice we note that a national measure limiting the free movement of capital, through an indirect discriminatory effect *“is permissible only if it is justified, based on objective criteria that are independent from the origin of the capital concerned, by overriding reasons in the public interest and observes the principle of proportionality, a condition that requires the measure to be appropriate for ensuring the attainment of the objective legitimately pursued and not to go beyond what is necessary in order for it to be attained.”*²³

This means that judicial assessment shall verify if national measures are adequate and necessary for the attainment of the legitimate objective relied on – if they genuinely reflect a concern to attain that objective in a consistent and systematic manner²⁴ and, moreover, it shall be verified if other measures capable, in some circumstances, of being less detrimental to the free movement of capital have been considered²⁵.

For example, in the case we refer to-Festern, C-370/05, the Court considers that the obligation to establish one’s residence on a national territory in itself does not ensure the attainment of the objective pursued by the legislator – preserving the traditional, owner-occupancy form of farming – also affecting the right of the acquirer to choose his place of residence freely, therefore with implications on the guarantees granted by Article 2 (1) of Protocol no. 4 to the European Convention on Human Rights as well. Moreover, it is noted that associating a temporal condition to such an obligation goes beyond what could be regarded necessary, resulting in a long-term suspension of the exercise of a fundamental freedom.

²² Boar 2014, 38.

²³ Curia Europa, Judgement of the CJUE of 6 March 2018, Segro and Horvath, C-52/16 and C-113/16, paragraph 76. The same conclusions may be drawn from the Judgement of the Court of 21 May 2019, the European Commission against Hungary, C-235/17, paragraph 59.

²⁴ Curia Europa 2019. Judgement of the Court of 21 May 2019, the European Commission against Hungary, C-235/17, paragraph 61.

²⁵ Curia Europa. Judgement of the CJUE of 25 January 2007, Festersen, C-370/05.

The conclusion stating that *“the reasons which may be invoked by a Member State by way of justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State, and specific evidence substantiating its arguments.”*²⁶ The case-law that we refer to notes that *“if a Member State wishes to rely on an objective capable of justifying an obstacle to the freedom to provide services arising from a national restrictive measure, it is under a duty to supply the court called upon to rule on that question with all the evidence of such a kind as to enable the latter to be satisfied that the said measure does indeed fulfil the requirements arising from the principle of proportionality,”*²⁷ therefore it shall provide *“specific evidence substantiating its arguments.”*²⁸

At present, the position of the European Union is not definitely clarified. The European Commission issued an interpretative communication which is based exclusively on the current state of the case-law of the CJEU. On the one hand, this communication recognises the specific importance of farmland, considering that the special regulation of agricultural land sale is justified, and on the other hand it is considered that many restrictions do not comply with European Union law.²⁹ Furthermore, according to the CJEU, *“national rules under which a distinction is drawn on the basis of residence in that non-residents are denied certain benefits which are, conversely, granted to persons residing within 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.”*³⁰

In the future, the compliance of this new Romanian regulation with EU law shall be verified, while the cited separate opinions and a careful analysis of the Commission interpretative communication foreshadow a solution of non-compliance of national law with EU law. However, it is undeniable that requirements of public order, such as food security, the exploitation of agricultural natural resources according to national interests, making available these resources to those working effectively in agriculture and who do not use the transfer of agricultural land ownership for speculative investment purposes require the adoption of serious restrictions on agricultural land sale as agricultural land may not be regarded as a simple good whose free movement is essential. This aspect should be recognised and reflected by EU law inclusively, both in its written form and in its form originating from the case-law of the European Court of Justice.

²⁶ Curia Europa. Judgement of the CJUE of 6 March 2018, Segro and Horvath, C-52/16 and C-113/16, paragraph 85, but also the Judgement of 23 December 2015, Scotch Whisky Association and others, C-333/14, paragraph 54.

²⁷ Curia Europa. The Judgement of 8 September 2010, Stoß and others, C-316/07, C-358/07, C-360/07, C-409/07 and C-410/07, paragraph 71 is also cited, through analogy.

²⁸ Curia Europa. Judgement of the Court of 21 May 2019, the European Commission against Hungary, C-235/17, paragraph 94, and in the same vein the Judgement of 26 May 2016, Commission/Greece, C-244/15, paragraph 42.

²⁹ Commission Interpretative Communication on the Acquisition of Farmland and European Union law, published in the Official Journal of the European Union C-350 of 18.10.2017.

³⁰ Curia Europa. Cases C-279/93, Finanzamt Köln-Altstadt/Schumacker, point 28; C-513/03, van Hilten-van der Heijden, point 44; C-370/05, Eckelkamp, point 46.

5. Conclusions

Our study did not propose to formulate definite, indubitable conclusions regarding the possible impact of the new rules inserted by Law no. 175/2020 in Law no. 17/2014. As for the reasons of unconstitutionality dealt with by the Constitutional Court in Decision no. 586/2020, even before the entry into force of the new rules, the provisions analysed by the Court enjoy a strong presumption and even guarantee of compliance with the Constitution. However, starting from the sound arguments invoked in the reasoning of the separate opinions cited above, we consider that the debate remains open, both at the academic and judicial level.

Furthermore, it is our opinion that, inasmuch as the relatively detailed regulation of the conditions and procedure for the acquisition and sale of agricultural land to third persons who are residents of EU Member States is concerned, this regulation enjoys the appearance of a legitimate legal instrument adequate to the promotion of certain general interests of the Romanian nation until a court finds that prohibitive and/or discriminatory criteria and conditions have been imposed which constitute by themselves unjustified limitations/restrictions of certain rights and fundamental freedoms. We may not however deny the sovereign attribute of the Romanian legislator to establish the limits for the exercise of certain rights concerning categories of goods of particular economic and social importance, as well as its prerogative to impose rational and necessary conditions and requirements for the promotion and protection of general interests, certainly in compliance with the principles that EU law is based on.

On the other hand, taking into consideration the opinions and theoretical controversies which have already emerged, it is possible or even probable that in certain actual disputes the interested parties would be tempted to request Romanian national courts to find that certain provisions of Law no. 17/2014, as amended by Law no. 175/2020, are contrary to EU principles and, consequently, their application be ceased if it is found that they are contrary to EU law. Moreover, it may not be excluded that the national courts would request the CJEU to give a preliminary ruling on the legal provisions concerned. Until then, however, the new regulation shall be applied in a rigorous and consequent manner in order to attain the aims pursued by the legislator.

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