

Free sale of farmland in Romania: a form without substance or a substance without form?

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Under law no. 17/2014 regarding certain measures concerning the sale and purchase of agricultural land located outside the city limits, and the amendment of Law No. 268/2001 on the privatisation of companies that hold public and private agricultural lands owned by the state under management, and the establishment of the State Property Agency, as subsequently amended and supplemented (the "**Law 17/2014**"), the sale of agricultural land located outside the city limits – *extra muros* – (the "**Farmland**") is subject to a legal pre-emption right.

Stages of the legal pre-emption procedure

In the initial phase of the procedure regulated under Law 17/2014 (which we shall refer to as **Stage 1**), Farmland can be offered for sale to seven categories of legal pre-emptors, in a specified order, as stipulated by the legal provisions. Should none of these legal pre-emptors express their intention to purchase the Farmland, then a second phase of the procedure is to be followed (which we shall refer to as **Stage 2**), where Farmland may be sold to so called „potential buyers” who meet the conditions outlined in Law 17/2014.

Subsequently, if both stages mentioned above are completed without identifying an eligible buyer, as regulated under the law (i.e., either a legal pre-emptor, or a "potential buyer" in the sense of Law 17/2014), who expresses his/her/its intention to accept the sale offer published by the landowner of the respective Farmland, Article 4¹ para. (5) of Law 17/2014 provides that the sale of the Farmland can be made to any natural or legal person, under the conditions of this law. This would be the third phase of the procedure stipulated by Law 17/2014, which we shall refer to as **Stage 3**. Stage 3 would normally mean that the Farmland that reached this phase can be freely sold to any natural or legal person, basically making it a "free" sale.

Free Sale: allowed or restricted?

If, after finalising Stages 1 and 2 of the procedure, no purchase offer was registered by either the legal pre-emptors or by the potential buyers within the legal deadlines, the local Municipality issues the **minutes of completion of the procedure**, after which the sale of the Farmland can be made to any natural or legal person.

Nonetheless, this phrase of Article 4¹ para. (5) of Law 17/2014 mentioned above: "under the conditions of this law" (i.e., of Law 17/2014) is construed by the authorities (i.e., by the Ministry of National Defence and the Ministry of Agriculture) **not** as an unrestricted/"free" sale, but as once again triggering the launch of the whole legal pre-emption process from the making it necessary to follow the two aforementioned Stages (1 and 2) of the procedure (the former with seven classes of legal pre-emptors and the latter with "potential buyers" defined by Law 17/2014).

The minutes of completion of the procedure issued by the Municipality are communicated to the "**central structure**" (i.e., the Ministry of Agriculture, in case the Farmland published for sale exceeds an area of 30 ha), and/or to the

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"**territorial structures**" (i.e., the County Departments for Agriculture, in case the respective Farmland has an area of up to 30 ha), as the case may be; whereas Law 17/2014 does not provide for these authorities to issue any further endorsements. In this specific case, the procedure is finalised with the issuance of these minutes of completion of the procedure by the Municipal Government and notaries (used to) notarise the sale purchase agreements with Farmland based on this final document.

The above-mentioned interpretation of the central authorities is incorrect in our view, as one cannot allow something (the sale of Farmland to **any natural or legal person**) and then restrict what was allowed in the first place (i.e., no longer allow the sale to any natural or legal person, but solely a sale to legal pre-emptors or potential buyers).

On the contrary, the phrase "under the conditions of this law", particularly as it is placed following a comma, could be replaced at the beginning of the sentence, and would read as follows (this being a grammatical interpretation of the law):

"Under the conditions of this law, in case of non-exercise of the right of pre-emption, if none of the potential buyers, within the legal term, fulfils the conditions to be able to buy the agricultural land located in the extra-village, its disposal by sale may be made to any natural or legal person".

In this manner, the legal text is clearly equivalent to a free sale, without imposing any other conditions regarding the status of the buyer (legal pre-emptor or potential buyer).

In our view, the rationale for this provision in Art. 4¹ para. (5) of Law 17/2014, in conjunction with the rest of the provisions of this law, was to establish a legal pre-emption procedure that must be complied with **before** a free sale is possible, in order to protect agriculture and not to regulate a prohibition of selling Farmland, respectively a sale ban of Farmland if legal pre-emptors or potential buyers do not make use of their legal pre-emption right. To interpret it differently would mean blocking the civil circuit in respect of Farmland for which no legal pre-emptor or potential buyer has expressed a wish to buy.

The case of Farmland falling under the scope of Art. 3 para. (1) of Law 17/2017 (i.e., agricultural land located outside the city limits, either within 30 km inland from the state border and the Black Sea shore or within a radius of 2,400 meters from special (military) objectives)

According to Law 17/2017, the sale of this particular type of Farmland, located either within 30 km inland from the state border and the Black Sea shore or within a radius of 2,400 meters from special (military) objectives, requires an additional specific endorsement from the Ministry of National Defence, which is to be obtained within the legal pre-emption procedure.

According to the methodological norms approved for the applicability of Law 17/2014, such an endorsement is issued based on a prior endorsement, which is to be issued by the Ministry of Agriculture (central structure) or the local County Departments for Agriculture (territorial structure), as the case may be, **attesting to the fulfilment of the legal conditions either by the legal pre-emptors, or by the potential buyers**. This means that the methodological norms require this prior endorsement only in cases where the Farmland is being sold within Stage 1 or Stage 2 of the legal pre-emption procedure, given that in said case the central or territorial structure need to verify that the legal pre-emptors or the potential buyers fulfil the legal conditions, in order for them to be able to purchase the Farmland.

In cases of Stage 3 of the procedure, such prior endorsements from the central and/or territorial structures are not necessary for the issuance of the endorsement by the Ministry of Defence and requested by the latter, as Law 17/2014 provides that in this case the sale is made **to any natural or legal person**. As such, the law does not require this endorsement in such cases, due to the fact that when the sale is made to **any** person, there are no conditions to be met by said buyers or to be verified by the authorities. Yet, the defective wording of the methodological norms (which do not regulate the documents needed in Stage 3 of the procedure separately) gives

room for a different/contradictory interpretation, which seems to be embraced by the authorities and thus blocks the sale of Farmland.

In our experience, the Ministry of National Defence refuses to issue such endorsements, if the submitted documentation does not include the prior endorsement of the Ministry of Agriculture, even if the procedure is in the final Stage 3 of the legal pre-emption procedure. In turn, the Ministry of Agriculture issues said endorsements only to the legal pre-emptors or to the potential buyers (namely in Stage 1 and Stage 2 of the procedure only). According to their interpretation of Law 17/2014, the sale of Farmland can only be made to these two categories of purchasers.

Blocking of the civil circuit

Consequently, although there is a legal basis for the unrestricted sale of Farmland after going through the legal procedures and formalities described as Stage 1 and Stage 2 in Law 17/2014, this legal basis (i.e., Article 4¹ para (5) of Law 17/2014) is currently ineffective, due to the incorrect interpretation by the authorities outside the letter and spirit of Law 17/2014, which is solely based on a provision in the methodological norms and is not very clear. Needless to say, according to the principles of legislative technics, a special main law regulating a specific domain of law (in this case the sale of Farmland) cannot be amended by a subordinate piece of law of inferior rank (in this case the methodological norms), as such inferior norms are only allowed to detail the applicability of the main law, and not to significantly amend it.

We note that this interpretation by the central authorities causes a new blocking of the civil circuit in respect of transactions involving Farmland, practically establishing a ban on such land plots, forcing them to remain in the hands of the current landowners who, although they have expressed their intention to sell and have gone through the burdensome and lengthy administrative legal pre-emption procedure, find themselves in the situation of being unable to capitalise on their private patrimony for which the legal pre-emptors and potential buyers show no interest.

According to the general legal principles guaranteed by the Romanian Constitution, the measure to restrict any right can only be taken if it serves an overriding interest, is proportionate, limited, and duly compensated. Even in the case of property acquired under special laws (such as Land Law No. 18/1991, or Law No. 112/1995 regulating the legal status of certain buildings used as dwellings, which have become State property), where the legislator has taken into account the security of the civil circuit, the right of disposal has only been restricted for a limited period of time (i.e., 10 years after acquiring such properties).

The current official interpretation of the discussed wording of Law 17/2014, in practice, results in an unreasonable impossibility for landowners to alienate their property right for an unlimited period of time, while the owner's loss remains in any case uncompensated.

Our view is that, in the absence of an official clarification (e.g., drafting and approving of a clear and unequivocal law amending Law 17/2014), only the courts of law currently have the ability to shed light on the matter. Various landowners have already filed court proceedings against the Ministry of Defence's refusal to issue the required endorsement in the situation analysed above. Unfortunately, as at the date of this article, there is still no relevant case law.

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