| Chapter 9 |

Serbia: Strict Laws, Liberal Practice

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ABSTRACT

The issue of cross-border acquisition of agricultural land is regulated in an inconsistent manner in Serbian law: on the one hand, constitutional provisions are very liberal and impose minimal restrictions to the ownership acquisition of such land by foreign nationals; on the other hand, statutory provisions are extremely restrictive and seem to exclude not only acquisition of ownership of agricultural land by foreign nationals but also the very capacity of non-Serbian nationals to own agricultural land. Given that the Stabilization and Association Agreement between Serbia and EU and its member states, which came into force in 2013, foresaw a 4-year deadline for Serbia to equalize the legal position of EU member states nationals with Serbian nationals in respect of the conditions for the acquisition of ownership of agricultural land, the statutory provisions were altered in 2017. However, these amendments not only failed in the abovementioned objective, but they contained such complex conditions for EU member state nationals to acquire agricultural land in Serbia that it made it impossible at least until 2027 and practically impossible even after that year. This is confirmed when the existing conditions are analyzed from the point of view of the 2017 Commission Interpretative Communication on the Acquisition of Farmland and EU law. This Communication analyzed the restrictions imposed by EU countries to the acquisition of agricultural land by both domestic and EU member state nationals from the point of view of EU law. Many of the conditions that exist in Serbia only for EU member states nationals would not adhere to EU law even if they applied to Serbian and EU member states nationals equally. This is reflected in the recent annual reports of the European Commission on the state of relations between Serbia and the EU, where it is noted that the obligation to equalize the position of domestic and EU member state nationals in respect of the acquisition of agricultural land contained in the SAA is not fulfilled. All this is in sharp contrast with the fact that, in practice, foreign nationals may acquire the ownership of agricultural land in Serbia indirectly, by establishing a legal entity in Serbia, or even directly, if such right is provided in an international treaty. Such inconsistent regulation and commercial practice are highly likely to cause further friction and political debate in Serbia in the coming years.

KEYWORDS

ownership acquisition, agricultural land, right of foreigners

1. Theoretical backgrounds and summary of the affected national regime

The first and highest legal source pertaining to the rules of the acquisition of land in Serbia is the 2006 Constitution of the Republic of Serbia (*Ustav Republike Srbije,*

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hereinafter: the Constitution).[1] The Constitution came after the 1990 Constitution of the Republic of Serbia,[2] which was adopted at the time Serbia was still a part of Yugoslav Federation and which, in fact, did not completely abandon the socialist ideas from the previous period. Therefore, the Constitution is, in fact, the first genuinely transitional constitution in Serbia, which was adopted once the last of the former socialist republics of Yugoslavia, Montenegro, declared its independence from FR Yugoslavia, leaving Serbia also independent. The Constitution contains several provisions relevant for the system of ownership acquisition and the position of foreigners in that respect, as well as on agricultural land. Status of foreign nationals is defined in Art. 17 of the Constitution in the following manner:

> "Pursuant to international treaties, foreign nationals in the Republic of Serbia shall have all rights guaranteed by the Constitution and law with the exception of rights to which only the citizens of the Republic of Serbia are entitled under the Constitution and law."

The possibility of foreigners to acquire real property is regulated in Art. 85 of the Constitution, which reads:

> "Foreign natural and legal entities may obtain real estate property, in compliance with the law or international treaty. Foreigners may obtain a right of concession over natural resources and goods of common interest, as well as other rights stipulated by the law."

As for the legal regime of the land, the Constitution is also relatively liberal, providing in its Art. 88 as follows:

> "The use and disposal of agricultural land, forest land and city construction land in private ownership is free. The law may restrict the models of use and disposal, respectively stipulate terms of use and disposal, in order to eliminate the danger of causing damage to the environment or prevent the violation of rights and legally based interests of others."

Thus, under the Constitution, the freedom of use and disposal of land, including agricultural land, may be limited for ecological reasons and for the reasons of protection of the rights of others. These two grounds for restriction of said freedom are interpreted widely by the legislators, and the freedom of use and disposal of agricultural land has significant limitations both in Serbian legislation

1 Official gazette of the RS No. 98/2006, 115/2021 (16/2022). The amendments were promulgated on February 9, 2022 and would thus not be taken into consideration even if they were relevant for the topic of the paper.
2 Official gazette of the RS No. 1/1990.

and in practice. The last important feature of the Constitution of relevance for the topic of our paper is the provision on a hierarchy of legal sources under which confirmed international treaties have a higher position than national laws and which must be in accordance only to the Constitution.[3] This means that any and all restrictions provided in national laws but not directly in the Constitution may be bypassed via an adequate international treaty confirmed (ratified) by the lawmaker in Serbia.

The general rules of acquisition of ownership are contained in the 1980 Law on Basic Ownership Relations (*Zakon o osnovama svojinsko-pravnih odnosa*, hereinafter: the ZOSPO),[4] a socialist era codification of property law that was rump even at the time it was passed and was significantly reduced after the amendments of 1990, 1996, and 2005, when the hypothec was carved out of the codification and received its special law. The 1990 amendments were of importance for the right of foreign nationals to acquire ownership, which was introduced then and finetuned by the 1996 amendments, which are still in force. The codification was partly purged from its "socialist" elements in 1990 and completely in 1996, but it is still essentially insufficient for a comprehensive regulation of property law (*stvarno pravo, Sachenrecht*) in a modern European country. Therefore, it is usually concluded that the biggest issue in Serbian private law—at least at the normative level—is the lack of a comprehensive and modern codification of ownership and other *in rem* rights. Be it as it is, the ZOSPO generally accepted the Roman doctrine of acquiring ownership by contract, as receipted from Austrian law in the XIX century, which requires *iustus titulus* and *modus acquirendi* for acquiring ownership from the owner of a thing, land included. In case of immovable property, *modus acquirendi* is registration in the land registry or other appropriate manner provided by the law.[5] The registration is, thus, constitutive for acquiring ownership of land by contract, even though there are significant departures from this rule in the recent case law of Serbian courts.[6] As for the rights of foreign nationals, the current text of ZOSPO provides for different rules for acquiring movable and immovable property, on the one hand, and acquiring by legal transaction *inter vivos* or by inheritance, on the other hand. As for the movable property (chattels), foreigners are fully equalized with domestic nationals.[7] For the immovable property, ZOSPO provides that foreign natural persons may

3 Art. 16 Para. 2 and Art. 194 of the Constitution.

4 Official gazette of SFRY Nos. 6/1980 and 36/1990, Official gazette of FRY No. 29/1996, and Official gazette of RS No. 115/2005.

5 Art. 33 ZOSPO reads: "On the basis of a legal transaction, the right of ownership over immovable property is acquired by registration in a public book or in other appropriate manner provided by law." This other "appropriate manner provided by law" referred to the territory not covered by land books, in which the deed system was in place and where the transfer of deed was the *modus acquirendi*. See Živković, 2004, pp. 90–91.

6 See Živković, 2015, pp. 118–124.

7 Art. 82 ZOSPO.

acquire it by inheritance, under condition of reciprocity,[8] or by legal transaction *inter vivos* (contract). In the latter case, performing of business activities in Serbia is of importance for the possibility of foreign national to acquire ownership over immovable property by contract *inter vivos*. Therefore, a foreign natural person or legal entity that performs business in Serbia can, under conditions of reciprocity, acquire ownership of immovable property in Serbia in case it is necessary for their business activity in Serbia[9] (the opinion on the "necessity" of the type of real property to be acquired is provided by the ministry competent for trade).[10] Foreign natural persons that do not perform business activity in Serbia can acquire ownership of apartments or apartment buildings under condition of reciprocity.[11] Last but not least, ZOSPO explicitly provides the possibility that, as an exception, the acquisition of immovable property located in determined territories of Serbia can be excluded for foreign natural persons or legal entities altogether by provision of a special law.[12] As for the condition of reciprocity, factual reciprocity suffices, and in case of doubt, the ministry competent for justice issues an opinion on whether it exists in a concrete case (i.e., with the concrete foreign country).[13]

The general regime of the acquisition of immovable property by contract is completed by the Law on Transfer of Immovable Property (*Zakon o prometu nepokretnosti*, hereinafter: the ZPN).[14] The transfer of immovable property is defined as the transfer of ownership right over an immovable, with or without consideration,[15] and it is declared that the transfer of immovable property is free, unless otherwise provided by law. Immovable property is defined as land (agricultural land is explicitly included), buildings, and other construction objects and special parts of buildings that can be separately owned.[16] ZPN requires solemnization (*javnobeležnička potvrda, solemnizacija*) of a contract on transfer of immovable by a competent public notary as statutory form, sanctioned by nullity in case it is not respected.[17] This in fact means that the form of notarial deed (*javnobeležnički zapis*) is also possible if contracted by the parties. The ZPN also contains provisions on the statutory preemption right, in

8 Art. 82b ZOSPO. Even though this provision is restricted to foreign natural persons and does not explicitly pertain to foreign legal persons, Art. 85b ZOSPO provides that, unless specifically regulated in other law, the provisions of ZOSPO shall apply to both foreign natural persons and foreign legal entities, which could create confusion in respect of foreign legal entities as heirs. However, since this situation is quite rare, it did not cause any practical problems. The intended purpose of Art. 85b ZOSPO, in fact, is that the legal regime provided by ZOSPO; it pertains to domestic natural persons and legal entities and applies to foreign ones as well, but it was not precisely defined.

9 Art. 82a Para. 1 ZOSPO.

10 Art. 82v Para. 4 ZOSPO.

11 Art. 82a Para. 2 ZOSPO.

12 Art. 82a Para. 3 ZOSPO.

13 Art. 82v Paras. 2 and 3 ZOSPO.

14 Official gazette of RS Nos. 93/2014, 121/2014 and 6/2015.

15 Art. 2 Para 1 ZPN.

16 Art. 1 ZPN.

17 Art. 4 ZPN.

case of co-ownership in favor of all co-owners when one of the ideal parts is being sold, and in case of agricultural land, in favor of owners of the adjoining agricultural land.[18] The law provides that the owner of the adjoining agricultural land that predominantly borders with the land to be sold has priority in the realization of the preemption right; moreover, if more such adjoining lands exist, and the borderlines are of the same length, the owner of the adjoining land with the biggest surface shall have the priority in the realization of preemption right. If a co-ownership stake of the adjoining agricultural land is for sale, the preemption right of the owner of the adjoining agricultural land ranks, in priority, behind that of other co-owners. The preemption right itself and the manner of its realization are also regulated in the ZPN[19]: the offer, containing all conditions of sale, must be delivered to all bearers of the preemption right simultaneously, in written form; they then have 15 days to accept, also in written form; if no one accepts, the seller has a year to sell the immovable but not under more favorable conditions for the buyer; after a year, a new cycle of sending offers is required. In case the immovable is sold in breach of the preemption right (without making an offer or under conditions more favorable than the ones in the offer), the bearer of the preemption right may, within 30 days from the day they became aware of the sale and not longer than 2 years after the sale, file an action and thus initiate court proceedings in which they may request that the sale contract is declared without effects toward them and that the immovable be sold to them under the same terms and conditions stipulated in that contract. Simultaneously with filing the action, the plaintiff must deposit to the court the amount equaling the market value of the contested immovable on the day of filing. In practice, until September 2014, when the courts were verifying signatures of parties to the immovable transfer contract, the preemption right could not actually be breached because the courts denied signature verification if the seller did not make an offer to the bearer of the preemption right or was selling under terms and conditions more favorable to the buyer than the ones contained in the offer (dealing with the preemption right in advance was condition for concluding the legally enforceable contract on the sale of an immovable). Since September 2014, when public notaries of Latin type were introduced in Serbia, the conclusion of the contract of sale of an immovable without dealing with the preemption right in advance has been possible in practice but is still quite rare because the notary would have to put a warning in the solemnization clause that the preemption right is breached, and most buyers do not want such a warning in their contract. Therefore, court cases involving breaches of preemption right in immovable property transactions are fairly rare. As for the purpose of introducing the preemption right in favor of the owner of the adjoining agricultural land in case a piece of agricultural land is being sold, it is rather obvious and serves the interest of increasing the surface of agricultural land of one owner (land concentration and consolidation).

18 Art. 6 ZPN.
19 Arts. 7-10 ZPN.

As for the general regime of inheritance, one should note that it is based upon the principle of universality of inheritance,[20] which means that no special rules exist depending on who is inheriting or what is being inherited. Only one provision of the 1995 Law on Inheritance (*Zakon o nasleđivanju*, hereinafter: the ZON)[21] refers to the situation where agricultural land is a part of inheritance (bequest), and that is Art. 233. This provision instructs the court to warn the heir who is a farmer and who lived or worked together with the deceased (bequeather) of the right to request from the court that some assets from the bequest be left to them in kind, whereas they would compensate the other heirs by payment of money,[22] in case agricultural land is a part of inheritance (bequest). This demonstrates the lawmakers' intention to apply this rule in cases where agricultural land is being inherited, and not all heirs are farmers who lived with the deceased. The court shall decide on such request by taking into consideration the "justified need" of the heir to have these items in kind. In other words, the court has a relatively wide margin to grant such request and not many precise criteria for deciding provided by the law.

With regard to the special rules on agricultural land and acquisition of ownership thereof, agricultural land in Serbia is subject of a "special regime" (i.e., special rules on scope of ownership right) differing from the general regime provided in the ZOSPO. The main legal source in this area is the 2006 Law on Agricultural Land (*Zakon o poljoprivrednom zemljištu*, hereinafter: the ZPZ),[23] which sets out the "special regime" for this type of immovable property. Under the ZPZ, agricultural land is defined as land that is used for agricultural production (fields, gardens, orchards, vineyards, meadows, grasslands, fishponds, bulrushes, and swamps) as well as land that could be brought to the purpose of agricultural production. Agricultural land may be arable and non-arable. The ZPZ defines arable agricultural land as fields, gardens, orchards, vineyards, and meadows.[24] Forests and woodlands are not deemed agricultural land, and they are subject to their own "special regime" contained in other special legislation,[25] according to which state-owned forests and woodlands may not be sold or disposed of (there are very limited exceptions of possibility of exchange); state-owned forests may not be leased and state-owned woodland can, but to a limited extent; and the government may grant and revoke the right of use of state-owned forests.[26] In addition, nature preservation areas are not interlinked with the notion of agricultural land in Serbian law (though there are implications for agriculture deriving from legislation on the preservation of nature[27]). The ZPZ, in its Art. 4, contains the provision

20 See Đurđević, 2020, pp. 30–31.
21 Official gazette of RS Nos. 46/1995, 101/2003 – Constitutional Court Decision and 6/2015.
22 This right is provided in Art. 232 ZON.
23 Official gazette of RS Nos. 62/2006, 65/2008, 41/2009, 112/2015, 80/2017, and 95/2018.
24 Art. 2 of the ZPZ.
25 See Law on Woods (*Zakon o šumama*), Official gazette of RS Nos. 30/2010, 93/2012, 89/2015, and 95/2018.
26 Arts. 98–99a of the Law on Woods.
27 See Law on Preservation of Nature (*Zakon o zaštiti prirode*), Official gazette of RS Nos. 36/2009, 88/2010, 91/2010 – correction, 14/2016, 95/2018, and 71/2021.

that it also applies to agricultural land in protected areas, except if special legislation provides otherwise. The ZPZ regulates the planning, protection, regulation, and use of agricultural land; supervision over implementation of the law; and other issues of relevance for the protection, regulation, and use of agricultural land as a good of common interest. As this includes agricultural holdings, no special legislation on agricultural holdings exists in Serbia. Other laws are relevant for agriculture, such as the Law on Agriculture and Rural Development (*Zakon o poljoprivredi i ruralnom razvoju*, hereinafter: the ZPRR), which, however, deals with agricultural policy and policy of rural development and not with property relations in respect of agricultural land.[28] As for the rules of the acquisition of ownership over agricultural land by contract, the ZPZ contains special provisions on the acquisition of state-owned agricultural land and on the acquisition of agricultural land by nationals of EU countries. We shall first present the rules on acquisition of agricultural land by foreigners and then the rules on acquisition of agricultural land from the state (acquisition of state-owned land by contract), while the acquisition of privately owned land by domestic nationals falls within the general regime.

In the first article, the original 2006 text of the ZPZ contained a provision that foreign natural person or legal entity cannot own agricultural land in Serbia.[29] This provision was noteworthy because it, taken verbatim, did not only prohibit foreigners to acquire agricultural land but rather prohibited foreigners to own it. Therefore, it was highly problematic from the point of view of Serbian diaspora and the right of its members to inherit (in case they were not Serbian nationals but had ancestors in Serbia). It also created trouble in respect of the restitution of agricultural land if the heirs of the former owners were foreign nationals. Lastly, it created problems with the existing rights (acquired rights) if the owner ceased to be a Serbian national. Therefore, this provision is usually interpreted to mean that a foreign national cannot acquire agricultural land in Serbia. The situation became even more complicated when the Stabilization and Association Agreement between Serbia and the EU and its member states came into force in late August 2013; its Article 53 Section 5 (b) provided that

> "subsidiaries of Community companies shall, from the entry into force of this Agreement, have the right to acquire and enjoy ownership rights over real property as Serbian companies and as regards public goods/goods of common interest, the same rights as enjoyed by Serbian companies respectively where these rights are necessary for the conduct of the economic activities for which they are established,"

28 It, for example, defines the notion of agricultural holding or agricultural farm, see Dudás (2021), 60. This notion is, on the other hand, relevant for the possibility of acquisition of agricultural land by nationals of an EU member state.

29 Art. 1, Para. 3 of the original ZPZ text from 2006.

and its Article 63 Section 3 provided that

> "as from the entry into force of this Agreement, Serbia shall authorise, by making full and expedient use of its existing procedures, the acquisition of real estate in Serbia by nationals of Member States of the European Union. Within four years from the entry into force of this Agreement, Serbia shall progressively adjust its legislation concerning the acquisition of real estate in its territory by nationals of the Member States of the European Union to ensure the same treatment as compared to its own nationals."

This made the Serbian lawmaker rephrase the article of the ZPZ that simply prohibited foreigners to own agricultural land in Serbia, by introducing an exception to the rule:

> "...unless otherwise provided in this law, in accordance with the Stabilization and Association Agreement between the EU and its Member States, on the one side, and Republic of Serbia, on the other."

This was done in August 2017 before the expiry of the 4-year deadline and came into force on September 1, 2017. Along with the amendments to Article 1, Article 72đ, labeled "Conditions for Transfer of Privately Owned Agricultural Land," was introduced. This article, in fact, deals with the conditions that nationals of EU member states must fulfill to be able to acquire agricultural land in Serbia, and these conditions are quite complex. First, the acquisition is possible not only by contracts with consideration but also by gratuitous contracts. However, an EU member state national must meet four requirements to be able to acquire agricultural land in private ownership: (1) if they have had permanent residence in the municipality in which the transfer is made for at least 10 years, counting from the day the amendments came into force (that is, from 2017); (2) if they cultivated the subject agricultural land for at least 3 years; (3) if they have registered agricultural economy (farm) in active status as bearer of the family agricultural economy (farm), in accordance with the law regulating agriculture and rural development, for at least 10 years without interruption[30]; (4) if they own machinery and equipment for performing agricultural production. Meeting these requirements is not only postponed to at least 2027, but it is almost impossible for a foreign national in real life. In addition, some lands were explicitly excluded from the possibility to be acquired by a national of EU member state (1) if these are agricultural land determined as construction land, in accordance with special law; (2) if they are within a nature preservation area; (3) if they are part of a military installation or complex or bordering such installations or complexes, or if they are part of a protected zone around military installations, complexes, constructions, or constructions of military

30 See Dudás, 2021, p. 60.

infrastructure, or part or bordering the land security zone[31]; (4) if they are within 10 kilometers of the national borders of the Republic of Serbia. Moreover, EU member state nationals have a quantitative limitation because, even if all the above conditions are fulfilled, not more than 2 hectares of agricultural land can be acquired. Lastly, the Republic of Serbia has preemption right in case agricultural land is to be sold to a national of an EU member state. This preemption right is regulated rather vaguely, as if its content is purposefully left to be determined by the competent ministries. If the contract is concluded in breach of any of those conditions, the ZPZ explicitly declares it to be null and void. It is rather obvious that Serbia did not meet its obligation under the Stabilization and Association Agreement to change its legislation within 4 years of that Agreement coming into force so as to equalize the position of nationals of EU member states to Serbian nationals for the acquisition of real property.[32] EU member state nationals must fulfill a heavy burden of conditions to be able to acquire agricultural land in Serbia, and none of these conditions apply to domestic persons. In addition, it has been noted that the legal entities are completely left out from these provisions since they cannot fulfill some of the conditions even in theory.[33]

As for the rules of acquiring agricultural land from the state, this acquisition also used to be completely prohibited,[34] but it was subsequently allowed under certain conditions,[35] one of which is that the buyer be a national of Serbia.[36] Therefore, these rules do not apply to the cross-border acquisition of agricultural land and shall not be presented in any more detail.

However, all these restrictions to foreign nationals can be circumvented easily and simply in Serbian law by establishing a legal entity (e.g., a limited liability company). A company established by a foreign natural person or legal entity in Serbia is deemed to have Serbian nationality,[37] and therefore, none of the restrictions applicable for foreign nationals and legal entities apply. The only thing that a foreigner needs to do to acquire agricultural land in Serbia is to establish a legal entity through which the acquisition of agricultural land will be possible without burdensome conditions. In other words, no national rules exist on the special conditions for acquiring a share

31 The Land Security Zone (*Kopnena zona bezbednosti*) is a perimeter around the administrative border between Kosovo and Metohija and the rest of the Republic of Serbia.

32 This is the conclusion of Baturan and Dudás, 2019, pp. 67–68; see also Nikolić Popadić, 2020, p. 227. Baturan and Dudás also point out that this provision is unconstitutional (Baturan and Dudás, 2019, p. 69, but it seems their argumentation, in this respect, remained not fully developed).

33 Dudás, 2021, pp. 68–69.

34 Art. 72 of the original ZPZ text from 2006.

35 The conditions are, among other, registered agricultural economy for at least 3 years; residence; having means/machinery/equipment for agricultural production; etc.

36 Art. 72a Para. 2 Item 1) of the ZPZ.

37 Art. 3 of the Law on Foreign Trade, Official gazette of RS Nos. 36/2009, 36/2011, 88/2011 and 89/2015. Even though this law is explicit in defining subsidiaries of foreign legal entities and companies established in Serbia by foreign nationals as domestic persons only for the purposes of that law, it is universally accepted that the same qualification applies while acquiring agricultural land, and this is verified in practice. See Baturan, 2013, p. 487; Nikolić Popadić, 2020, p. 228.

or a stake in a legal entity that owns agricultural land in Serbia. In practice, many investment funds and foreign companies indeed purchased shares in Serbian companies that own agricultural land and did not have any troubles or issues because of that. Moreover, if an international treaty enables the acquisition of ownership of agricultural land to foreign nationals, it makes the situation even more legally secure and certain because it can derogate all conditions set forth in national legislation, save the Constitution—and, as we have seen, the Constitution itself is rather liberal in this respect.

As has been said, the general rule of Serbian law for acquiring ownership over real property by a foreign national by inheritance is reciprocity. Now, this general rule is derogated by a special rule of the ZPZ, which in principle prohibits foreigners not only to acquire but to be owners of agricultural land in Serbia. This rule of ZPZ is most often being interpreted as prohibiting the acquisition of real property by foreigners irrespective of reciprocity even in case of inheritance.[38] Usually, when a foreign national is among the heirs, the division of inheritance is made in a way that the foreigner does not inherit the agricultural land in kind but rather other assets from the bequest.

Apart from ownership right, farmers often use agricultural land based upon a lease (especially of state-owned agricultural land) or some forms of joint farming (in case of privately owned agricultural land). The use of personal servitudes, such as usufruct, is not common in Serbia, mostly because personal servitudes are not regulated by existing laws but rather by rules of the 1844 Civil Code of Serbia, which apply as a type of "soft law."[39] That, in fact, means less legal certainty in respect of personal servitudes compared to some other ways of using agricultural land, and they are thus avoided. As for the lease, the ZPZ regulates the lease of state-owned agricultural land in much detail,[40] leaving the lease of privately owned agricultural land to the (much more liberal) general regime of civil law. State-owned land is leased for a period between 1 and 30 years (40 years for fishponds and vineyards) to natural persons or legal entities. Among the highly complex conditions that a lessor must fulfill, nationality is not mentioned; thus, foreign nationals are not excluded as such. However, after a closer examination, one might conclude that foreign natural persons cannot practically fulfill the conditions for participation in public tender and getting the lease but they could, if they are already operating in agriculture, acquire the lease over state-owned land. As for privately owned agricultural land, in addition to lease, it can be subject to sharecropping (Serbian: *napolica*, usually shares are 50–50),[41] and it can be used through agricultural cooperatives and by cooperation agreements (contract farming, credit financing of agricultural production).[42] In practice, however, foreign nationals usually use the agricultural land by establishing a local legal entity

38 Stanivuković, 2012, p. 551.
39 More details on that in Živković, 2017, p. 355.
40 Arts. 62 to 71 ZPZ, whereas Art. 64a has 27 paragraphs (i.e., is a "statute within a statute.")
41 Nikolić Popadić, 2020, p. 149.
42 Nikolić Popadić, 2020, pp. 151–156.

that either owns or leases agricultural land, or they bypass the statutory limitations by an international treaty that provides them special status in respect of the possibilities to use agricultural land.

2. Land regulation in the Constitution and in the legal practice of Constitutional Court

As it could be seen in the previous chapter, the Constitution is rather liberal when it comes to the legal regime of (privately owned) agricultural land: its use and disposal is, in principle, free and may be restricted for the protection of environment and for the protection of the rights of others. The highly conservative regime contained in the ZPZ, which significantly limits the use and disposal of agricultural land even when it is privately owned, appears to be in sharp contrast with the Constitution. Therefore, it is quite unexpected that only three cases of the Constitutional Court dealing with the constitutionality of the PZP exist; in all three, the motions were dismissed.[43]

The first case, No. IU-175/2006, decided on September 17, 2009, dealt with Art. 27 Para. 1 of the ZPZ, which reads: "Arable agricultural land cannot be divided to parcels the surface of which is less than half a hectare." The Constitutional Court dismissed the case, finding that the cited provision is in adherence to the Constitution and that the limitation of the ownership right is made "in a manner allowed by the Constitution and within the constitutional authorities of the legislator" ("*na Ustavom dopušten način i u granicama ustavnog ovlašćenja zakonodavca*"). In its reasoning, the Constitutional Court did mention Art. 88 Para. 2 of the Constitution but did not cite it in its entirety; rather, it cited only the part that allows restricting the models of use and disposal stipulating the terms of use and disposal of agricultural land, respectively, without referring to the part that defines the grounds for such limitations (ecology and rights of others). The Constitutional Court than found that, given the possibility of limitation in Art. 88 Para. 2, "the state is authorised to determine the conditions of use of agricultural land in accordance with the common interest of all citizens." Therefore, the Constitutional Court has bent an "overly liberal" constitutional provision toward enabling more significant limitations by law, provided that they are "in interest of all citizens" (common interest of society).

The second case, No. IU-82/2007, decided on September 10, 2009, dealt with the procedure of leasing state-owned agricultural land (Art. 64 Para. 3 ZPZ and its amendments from 2009). The Constitutional Court also dismissed this case, which dealt with the procedural issues (i.e., the commencement of the deadline for filing a complaint), and is thus of no particular relevance for this paper.

The third case No. IUz-280/2009, decided on March 24, 2011, dealt with Art. 3 of the ZPZ, which provides that the agricultural land that has changed purpose to

43 The cases are accessible online in Serbian language at the web address of the Constitutional Court, case law. Available at http://www.ustavni.sud.rs/page/jurisprudence/35/.

construction land according to a special law shall continue to be used for agricultural production until it is "brought to its planned purpose" (this means until actual construction on that land commences). The Constitutional Court dismissed this case as well, explaining that the provision that declares that agricultural land shall be used as such even after a planning document provided it shall become construction land, until the construction actually takes place, does not change any proprietary relations in respect of the land but rather provides its continued use in the same manner and therefore does not breach constitutional guarantees of ownership protection.

Interestingly, no cases dealt with the issue of acquisition of agricultural land by foreign nationals, before or after the 2017 amendments of the ZPZ that were inspired by the expiration of the deadline of the Stabilization and Association Agreement between EU and its member states, on the one side, and the Republic of Serbia (hereinafter: SAA), on the other. In addition, no cases arose from the fact that the mentioned 2017 amendments of the ZPZ apparently did not meet the obligations provided in the SAA, which, as an international treaty, has a higher ranking in the hierarchy of legal sources than the ZPZ under the Constitution.

3. Land law of the country and its possible control by the Commission or the Court of Justice of the EU

Not being a member state of the EU, but rather a candidate, Serbia is in a specific position in respect of the issues covered in this chapter. Given the fact the relations of Serbia and the EU in respect of Serbia's accession are currently regulated by the SAA, we shall revert to its provisions on the control and supervision of its implementation and eventual practice in that respect.

In its article 8, the SAA provided for a mechanism of supervision to be conducted by the Council for Stabilization and Association, established by Articles 119 *et seq*. SAA. This mechanism provides for periodical reports and dispute settlement arrangements (Article 130 SAA), including the arbitration proceedings (Protocol 7). However, things related to Serbia's path to EU membership have changed over time, and in 2020, the methodology of accession was amended, which Serbia accepted.

Be that as it may, the main source of determining the state of relations between the EU and Serbia is still the annual report prepared by the European Commission. The issue of agricultural land ownership or use has not been specially highlighted in recent EC reports as problematic in respect of the *acquis*, nor have there been any formal or political disputes in that respect. The 2018 report mentions agricultural land in the context of restitution,[44] but it also notes that the SAA obligation to equalize the position of nationals of EU member states and Serbian nationals in respect

44 See EC Commission Staff Working Document *Serbia 2018 Report*, p. 27. Available at https://www.mei.gov.rs/upload/documents/eu_dokumenta/godisnji_izvestaji_ek_o_napretku/ec_progress_report_18.pdf (Accessed: April 15, 2022).

of conditions for acquiring agricultural land has not been fulfilled by the 2017 ZPZ amendments.[45] The 2019 report contains the same note[46] and adds, in the section on privatization of socially owned enterprises, that "non-EU investors acquired some of the largest firms in mining, metallurgy, and agriculture."[47] Both these claims are also to be found in the 2020 report[48] and in the last published report for 2021 (dated 10/19/2021).[49] Therefore, it is fair to argue that, even though the EC is aware of the fact that the ZPZ does not comply with the SAA when it comes to acquisition of ownership over agricultural land by nationals of EU member states and that non-EU nationals acquired agricultural companies through privatization, these issues have not been politically raised in accession negotiations (at least not yet). Because they have to do with the obligations of Serbia deriving from the SAA, the forum to raise these issues legally is the Council for Stabilization and Association. It might be worth mentioning that Protocol 7 of the SAA excludes the arbitrability in respect of the obligation of Serbia to, within 4 years from the year the SAA comes to force, progressively adjust its legislation concerning the acquisition of real estate in its territory by nationals of the member states of the European Union to ensure the same treatment as compared to its own nationals.[50]

1.4. National legal instruments in the context of the Commission's Interpretative Communication

This chapter is dedicated to the presentation of national instruments that aim to restrict the possibilities of foreign nationals to acquire ownership over agricultural land, in the context of the Commission's Interpretative Communication on Farmland and EU Law from October 18, 2017 (the Communication). The Communication was prepared by the Commission to analyze the existing national instruments that restrict other EU member nationals from acquiring agricultural land in an EU member state in the context of their compliance to EU law, based on the existing case law of the Court of Justice of the European Union (CJEU). The main purpose of the Communication was "to publish guidance on how to regulate agricultural land markets in conformity to the EU law." The exiting national measures of

45 See EC Commission Staff Working Document *Serbia 2018 Report*, pp. 56 and 90. Available at https://www.mei.gov.rs/upload/documents/eu_dokumenta/godisnji_izvestaji_ek_o_napretku/ec_progress_report_18.pdf (Accessed: April 15, 2022).
46 EC Commission Staff Working Document *Serbia 2019 Report*, p. 59. Available at https://www.mei.gov.rs/upload/documents/eu_dokumenta/godisnji_izvestaji_ek_o_napretku/Serbia_2019_Report.pdf (Accessed: April 15, 2022).
47 EC Commission Staff Working Document *Serbia 2019 Report*, p. 48, available at https://www.mei.gov.rs/upload/documents/eu_dokumenta/godisnji_izvestaji_ek_o_napretku/Serbia_2019_Report.pdf (Accessed: April 15, 2022).
48 EC Commission Staff Working Document *Serbia 2020 Report*, pp. 58 and 71. Available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/serbia_report_2020.pdf (Accessed: April 15, 2022).
49 EC Commission Staff Working Document *Serbia 2021 Report*, pp. 62 and 84. Available at: https://europa.rs/wp-content/uploads/2021/10/Serbia-Report-2021.pdf (Accessed: April 15, 2022).
50 See Art. 2 of Protocol 7 to the SAA.

EU member states were discussed in part 4 of the Communication, and we shall present Serbian measures according to the list contained in the Communication. Lastly, we shall examine whether Serbia has national instruments that restrict foreign ownership of agricultural land that were not analyzed by the Commission in its Communication.

a) prior authorization

Prior authorization is the first instrument analyzed in the Communication. It was concluded that prior authorization as such is not in breach of EU law and might even increase the level of legal certainty compared to some alternative instruments; however, it is important not to allow too much discretion to the body deciding on authorization and too vague and imprecise criteria for granting authorization. Serbian law does not contain provisions on the prior authorization of the sale of agricultural land to foreigners, including EU member states nationals.

b) preemption right (rights of first refusal) in favor of farmers

The Communication contains a relatively positive analysis of this instrument, favoring it in comparison to the ban on non-farmers to acquire ownership over agricultural land. Even though Serbia does recognize preemption rights both within the general regime and in the context of acquisition by an EU member national (as explained in Chapter 1 above), it does not recognize this type of preemption right (i.e., this right in favor of farmers). In other words, preemption rights in respect of agricultural land in Serbian law do not exist in favor of farmers (i.e., persons engaged in agriculture) but rather in favor of other persons who may but need not be farmers by vocation. The idea behind this type of preemption right is that the agricultural land continues to be in agricultural use (and, eventually, maintain a viable farming community). This idea is not behind any of the preemption rights over agricultural land existing in Serbian law.

c) price controls

The price control of the agricultural land is assessed as compliant with EU law in cases in which it is used to prevent excessive speculation with the land and maintain the viability of existing farmers, provided that it is based upon transparent and clear criteria. The case law dealt mostly with sales of state-owned land and the need for its price to be as close to the genuine market price as possible. Serbian law does not recognize price controls in the context of foreign nationals acquiring ownership of agricultural land because foreigners cannot acquire ownership of agricultural land from the state (they are explicitly excluded), and there are no price regulations related to transactions with privately owned agricultural land.

d) self-farming obligation

The Communication is clear in identifying the condition of self-farming as being too restrictive and thus in breach of EU law. The idea behind this condition is to keep the land in agricultural use, which can be achieved by more proportional measures. Serbian law, however, contains this very condition for the possibility of an EU member state national to acquire ownership of agricultural land in Serbia.[51] Namely, one of the "general conditions" for an EU member state national to acquire ownership of agricultural land in Serbia is that they farm the agricultural land that is being acquired for at least 3 years, with or without compensation. Moreover, the 3-year deadline is calculated from the day the amendments of the ZPZ came into force, namely from September 1, 2017.[52] This, in principle, excludes legal entities, but even if one allowed legal entities to fulfill this condition through their employees, it still has a clear purpose to be restrictive toward foreign ownership and not to pursue legitimate policy goals, which would make such a restriction compliant with EU law.

e) qualifications in farming

This condition, given the fact farming is not a regulated profession that requires special skills, was deemed doubtful by the Communication, even though it was not a definite breach of EU law. Serbian law, however, does not have this type of condition for an EU member state national to acquire agricultural land in Serbia (it has something similar but different enough, as shall be seen later.)

f) residence requirements

The Communication has labeled residence requirements highly likely in breach of EU law because they do not serve any legitimate purpose that would justify restricting the possibility to acquire ownership of agricultural land. However, Serbian law contains this very conditions as one of the "general conditions" for a EU member state national to acquire ownership of agricultural land in Serbia; they must have permanent residence in the municipality where the land is satiated for at least 10 years[53]; moreover, these 10 years are being calculated from the day that the legal amendments to the ZPZ came to force,[54] namely from September 1, 2017, meaning that until then, no EU member national can acquire ownership of agricultural land in Serbia.

51 Art. 72đ, Para. 2 Item 2 of the ZPZ.
52 Art. 72đ, Para. 8 of the ZPZ.
53 Art. 72đ, Para. 2 Item 1 of the ZPZ.
54 Art. 72đ, Para. 8 of the ZPZ.

g) prohibition on selling to legal persons

The Communication clearly stated that such a restriction can hardly be justified. Serbian law does not contain such restriction explicitly but does so implicitly through the condition of self-farming and having a registered agricultural economy (farm) for 10 years, counting from September 1, 2017.[55]

h) acquisition caps

The Communication explains the possible legitimate reasons to introduce an acquisition cap (i.e., the maximum quantity of agricultural land a person may acquire). Serbian law contains an acquisition cap for EU member nationals who fulfill the conditions to acquire ownership of agricultural land in Serbia, which is set to a modest 2 hectares.[56]

i) privileges for local acquirers

The Communication analyzes some of the typical instruments that, in fact, privileges national buyers of land in comparison to foreigners, based mostly on the *Libert* case of the CJEU. The only instrument that is contained in the Communication and that really exists as a condition to all acquirers, not only foreigners, is the preemption right of the owner of the neighboring agricultural land because it applies irrespective of whether the acquirer is Serbian or foreign national (all the other restrictions explicitly apply only to foreigners, i.e., EU member state nationals, who are the only foreigners capable of acquiring agricultural land in Serbia; such application is in obvious breach of both Serbia's SAA and EU law). The purpose of this preemption right, introduced in 1998, is to enable the formation of bigger parcels of agricultural land ("increasing the size of land holdings") to develop viable farms in local communities or preserve a permanent agricultural community. As for other such privileges, the state has preemption right if agricultural land is being sold to a foreigner,[57] which is particularly difficult to reconcile with the fundamental freedoms of EU law because its purpose of preventing foreign ownership of agricultural land is rather obvious.

j) condition of reciprocity

This condition is, understandably, irreconcilable with the EU law, as shortly explained in the Communication. It can apply only to foreigners and not to domestic nationals and is thus discriminatory from the point of view of internal EU law. Serbian rules on the acquisition of agricultural land do not explicitly mention reciprocity; thus, even if

55 Art. 72đ, Para. 2 Item 3 of the ZPZ.
56 Art. 72đ, Para. 5 of the ZPZ.
57 Art. 72đ, Para. 9 of the ZPZ.

the general regime of acquiring real property by contract requires reciprocity, it is in fact not required in the special case of acquiring agricultural land.

k) instruments not mentioned in the Communication

First, one needs to take note of the fact that the Serbian legislator clearly misunderstood the requirements of the SAA and provided for special rules for EU member state nationals in respect of acquiring ownership of agricultural land. The instruments mentioned in the Communication are, mostly, of a different nature: they are applicable to all acquirers, which actually restricts the possibility of a national of another EU member state to acquire agricultural land. In Serbia, laws still imply special rules for foreign nationals—EU member state nationals included—and do it quite openly. Therefore, foreigners are explicitly excluded from the possibility to acquire agricultural land from the state[58]; they are excluded from acquiring agricultural land in some territories[59] in which Serbian nationals are not excluded, and some conditions apply only to them and not to Serbian nationals (self-farming, residence, acquisition cap... foreigner/EU member state nationals must even prove to own agricultural machines and equipment to be able to acquire agricultural land in Serbia[60]). Therefore, speaking of some instruments not tackled by the Communication is in fact erroneous as Serbia explicitly disadvantages foreigners from acquiring agricultural land, practically excluding such possibility, and does not realize the necessity to do that in a less explicit way that is justified by legitimate reasons (agricultural land is not high on the political agenda between the EU and Serbia).

Thus, one might conclude that Serbia is still in the early phase of dealing with the EU accession because many questions that are begging to be asked have not yet been asked. For the time being, Serbia is in open breach of the SAA because it did not make equal EU member state nationals with Serbian nationals in respect of the acquisition of ownership of agricultural land within the agreed period. Some special conditions and limitations apply only to foreign nationals—EU member states nationals included (as explained in Chapter 1 above)—and it is beyond doubt that foreigners are discriminated in that sense. It remains to be seen how this relation shall develop in the future and whether Serbia will adhere to EU law or whether this will become more lenient to member states and candidates introducing rules that limit or exclude foreign ownership of agricultural land.

58 Art. 72a, Para. 2 Item 1 of the ZPZ.
59 Art. 72đ, Paras. 3 and 4 of the ZPZ. See details in Chapter 1 above.
60 Art. 72đ, Para. 2 Item 4 of the ZPZ.

References

Baturan, L. (2013) 'Economic analysis of the ban on foreigners acquiring property rights on agricultural land in Serbia', *Economics of Agriculture*, 60(3), pp. 479–491.

Baturan, L., Dudás, A. (2019) 'Legal Regime of Agricultural Land in Serbia with Special Regard to the Right of Foreigners to Acquire Ownership', *CEDR Journal of Rural Law*, 5(1), pp. 63–71.

Dudás, A. (2021) 'Legal Frame of Agricultural Land Succession and Acquisition by Legal Persons in Serbia', *Journal of Agricultural and Environmental Law* XVI(30), pp. 59–73. https://doi.org/10.21029/JAEL.2021.30.59

Đurđević, D. (2020) *Institucije naslednog prava* [*Institutions of the Law of Inheritance*]. Beograd: Pravni fakultet.

Nikolić Popadić, S. (2020) *Pravo svojine na poljoprivrednom zemljištu* [Right of Ownership over Agricultural Land]. doktorska disertacija. Beograd: Pravni fakultet.

Stanivuković, M. (2012) 'Stranac kao sticalac prava svojine na nekretninama u Srbiji [*Foreigner as Acquiror of the Right of Ownership over Real Property in Serbia*]', *Pravni život,* 10/2012, pp. 545–561.

Živković, M. (2004) 'Acquisition of Right of Property (with special emphasis on Immovable Property', in *Property Law Amendments in Serbia*. Belgrade: Institute for Comparative Law (bilingual edition in Serbian and English). pp. 83–102.

Živković, M. (2015) 'Acquisition of Ownership of Real Property by Contract in Serbian Law – Departing From the Titulus-Modus System?', *Annals of the Faculty of Law in Belgrade – Belgrade Law Review*, 63(3), pp. 112–126.

Živković, M. (2017) 'Proof of Real Estate Ownership in Serbian Law', in Saint-Didier, C. (ed.) *La preuve de la propriété immobilière*. Paris: mare & martin. pp. 349–378.