Chapter 11

Slovenia: In Search of a Sensitive Balance Between Economic, Social, and Ecological Functions of Agricultural Land and Rural Areas

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ABSTRACT

The Slovenian Constitution guarantees the right to private property and inheritance; emphasizes the economic, social, and environmental functions of property and grants special protection to agricultural land. According to these provisions, middle-sized family farms are protected against division so that they are, in principle, inherited by a single testamentary or intestate heir, while the number of other heirs and their inheritance shares are reduced. The legal transfer of agricultural land, forests, and farms is subject to several substantial restrictions and prior administrative control. After a general prohibition to divide the protected farms *inter vivos* was lifted in spring 2022, the disposal of protected farms has been less restricted, but the number of protected farms is expected to decrease. The legislation on agricultural land, protected farms, forests, and agricultural communities, as well as on nature conservation, water, cultural heritage protection, and spatial planning, regulate several preemption rights, of which two or more concur in many a case. To prevent the circumvention of statutory preemption rights, conclusion donation contracts are also restricted. In certain cases, the physical division of agricultural and forest plots is prohibited by the law. Lease contracts of agricultural land are also regulated by some special provisions (relating to prelease rights, minimum lease period, and so on) and subject to prior administrative control. The current legislation and international treaties allow citizens and legal persons of certain states (e.g., the EU member states) as well as persons with the status of a Slovene without Slovene citizenship to acquire agricultural land, so that reciprocity is not required. Citizens and legal persons of certain other states may acquire agricultural land based on a legal transaction, inheritance, or a state body's decision under condition of reciprocity, while citizens and legal persons of all other states may acquire agricultural land only on the basis of inheritance and under a condition of reciprocity. The statutory provisions on the legal transfer of agricultural land and holdings have been assessed several times by the Constitutional Court from the standpoint of constitutional right to private property and inheritance; economic, social, and environmental function of property; free economic initiative; rule of law; and the principles of legal certainty and proportionality.

KEYWORDS

agricultural land, farms, legal transfer, Slovenia

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1. Theoretical backgrounds

1.1. Definitions and agricultural land legislation

The Agricultural Land Act (ALA)[1] defines agricultural land as land that is (1) suitable for agricultural production and (2) designated as agricultural land by the spatial planning documents of local communities (art. 2). Weighing both requirements, the Slovenian Supreme Court ruled that, in the case of usurpation of agricultural land, the formal condition prevails in assessing whether the land is agricultural land. The material criterion (suitability for agricultural production) comes into play only if the land was already barren before its usurpation according to its actual intended use, and the establishment of such barren land into fertile agricultural land would be associated with disproportionate costs.[2]

The ALA regulates the protection and management of agricultural land by laying down its classification, use and cultivation, legal transfer of agricultural land, agricultural land lease contracts, and agricultural operations.

The ALA provisions pursue three main goals: (1) to preserve and improve production potential and increase agricultural land area intended for food production; (2) to foster the sustainable management of fertile soil; (3) to foster landscape preservation and to preserve and develop rural areas (art. 1a).

The inheritance of agricultural land and agricultural holdings is regulated by the general provisions of the Inheritance Act (IA),[3] while middle-sized agricultural holdings belonging to one individual, spouses, or ancestor and descendant (protected farms) are inherited in accordance with special provisions of the Inheritance of Agricultural Holdings Act (IAHA).[4]

The agricultural land and forests in the former social ownership were, during the ownership transformation, excluded from the privatization of enterprises and transferred to the state in accordance with the National Agricultural Land and Forest Fund Act (NALFFA).[5]

The Forest Act (FA)[6] distinguishes forest and wooden land as a wider notion that includes forests and other wooden land. A forest is defined as (1) land covered with forest trees in the form of a stand that can reach at least 5 meters in height and spanning at least 0.25 hectares; (2) land under the process of tree colonization spanning at least 0.25 hectares, which has not been used for agricultural purposes over the last 20 years and on which forest trees can reach a height of at least 5 meters and tree crown density has reached 75%; (3) riparian zones and windbreaks wider than the height of adult trees, spanning at least 0.25 hectares.

1 Zakon o kmetijskih zemljiščih (1996).
2 VSRS, Sklep X Ips 297/2015 z dne 23. 3. 2016.
3 Zakon o dedovanju (1976).
4 Zakon o dedovanju kmetijskih gospodarstev (1995).
5 Zakon o Skladu kmetijskih zemljišč in gozdov Republike Slovenije (1993).
6 Zakon o gozdovih (1993).

Other wooded land includes land covered with forest trees or other forest vegetation, covering at least 0.25 hectares, which is not forest and has not been used for agricultural purposes over the last 20 years; pens in forests used for raising game; and areas within forests spanning at least 0.25 hectares that lie beneath overhead electrical power lines (art. 2 FA).

According to a special act (Management of State Forests Act, MSFA),[7] on July 1, 2016, the management of state forests was transferred from the National Agricultural Land and Forest Fund to a limited liability company named Slovenski državni gozdovi (Slovenian State Forests Ltd). Since then, this company has performed tasks of disposing, managing, and acquiring state forests.

A special act (Agricultural Communities Act, ACA)[8] regulates agricultural communities organized by members (individuals and legal persons) who are co-owners or common owners of certain agricultural land and forests to ensure the management of the common immovables. Agricultural community is not a legal entity, but it has the ability to be a party in judicial, administrative, and other proceedings, excluding tax proceeding with regard to the community's activities. According to the amendments of the ACA from 2022, the ACA is also applicable to agricultural communities that are entered in the land register as owners of the common agricultural land and other immovables, so that the rules on common ownership in the agricultural communities apply to such communities (art. 4a). In comparison with general regulation on co-ownership or common ownership, the provisions on agricultural communities simplify and facilitate the members' decision making on matters of common interest. The management of common immovables is entrusted to bodies of agricultural community (general meeting and administrative committee), while members may individually dispose of their ownership shares.

The chapter on land law in Slovenia is structured in four sections. After listing the main pieces of the agricultural land legislation in Slovenia and basic definitions (in this subsection – 1.1), general provisions of the property law (with regard to notion of immovables, ownership, and other rights in rem) are presented (1.2.). As ownership and other inheritable rights are transferred from one individual to others at the latest after death of their holder, general and special inheritance rules in agriculture are dealt with before other legal bases for acquiring agricultural land and agricultural holdings (1.3.). The next subsection (1.4.) explains the notion of legal transfer of agricultural land, forests, and farms outside inheritance as well as provisions on preventive administrative control over such transfer (1.4.1.). The statutory restrictions on legal transfer are classified as those that refer to legal transactions of at least two or more types (for instance sale, donations, etc., 1.4.2.) or to sale contracts (where contractual freedom is restricted by the statutory preemption rights by several acts, 1.4.3.) and donation contracts (1.4.4.). The owner's entitlement of disposal is also restricted by statutory provisions, which prohibit the division of certain agricultural

7 Zakon o gospodarjenju z gozdovi v lasti Republike Slovenije (2016).
8 Zakon o agrarnih skupnostih (2015).

land and forest plots unless certain conditions are fulfilled (1.5.). Since the notion of legal transfer of agricultural land and forest does not include the lease of agricultural land, special provisions on such lease are systematized in a special chapter of the ALA, what justifies a separate analysis of this issue (subsection 1.6.). At the end of the first section, conditions under which foreign individuals and legal persons may acquire ownership right on immovables in Slovenia are dealt with (1.7.).

The second section analyses the provisions on agricultural land in the Constitution and their interpretation in the case law of the Slovenian Constitutional Court.

The third section highlights the relationship between Slovenian agricultural land law and EU legal system, particularly in light of possible proceedings by the Commission or the Court of Justice of the EU.

The fourth section evaluates legal instruments in Slovenia from the standpoint of the Commission Interpretative Communication on the Acquisition of Farmland and European Union Law (2017).

The fifth section highlights some of the characteristics of Slovenian agriculture that have influenced the legal regulation of agricultural land and emphasizes the need to constantly monitor, analyze, and evaluate the effects of this regulation. The survey outlines the legal regulation of the acquirement of agricultural land and holdings in Slovenia as of February 1, 2022. To keep the survey up to date as much as possible, the novelties introduced by the amendments of the ALA, the ACA, and the Agriculture Act (AA),[9] all adopted on March 16, 2022, are included and denoted as such.

1.2. Property law

From the viewpoint of property law, agricultural land and forest are immovables. The Real Estates Cadastre Act (RECA)[10] defines immovable as parcel (plot), building, part of a building, or land.

A parcel or plot is a spatially measured land located in one cadastral municipality and is entered in the real estate cadastre with a border and marked with a parcel number (art. 3 pt. 21), which consists of a cadastral municipality code and a number determined within the cadastral municipality and may have subdivisions (art. 12[1] of the RECA).

A building is edifice and other covered construction that may be entered, is intended for residence, activities, or protection, and cannot be relocated without harm to its substance (art. 10[1], [3]). The building number consists of the cadastral municipality code and the number determined within the cadastral municipality (art. 12[2] of the RECA).

Part of the building is a functional set of rooms suitable for independent use. An individual part of the building may be object of divided co-ownership which means ownership of individual unit and co-ownership of the common parts of the building (art. 3 pt. 5 of the RECA). The part of a building has a number consisting of the building

9 Zakon o kmetijstvu (2008).
10 Zakon o katastru nepremičnin (2021).

number and the current number determined for each part within the building (art. 12[3] of the RECA).

Land is area of one or more parcels, part of one parcel, or parts of several parcels (art. 3 pt. 36).

General provisions on property rights (rights *in rem*) as well on acquisition of ownership and other property rights on immovables are prescribed by the Property Law Code (PLC).[11]

The Property Law Code enumerates five property rights (rights *in rem*): ownership right, mortgage, easement, right of encumbrance, right of superficies, and land debt (art. 2 of the PLC).

The right of ownership is the right (1) to have a thing in possession, (2) to use and (3) enjoy it in the most extensive manner, and (4) to dispose of it. The use, enjoyment, and disposal of a thing's ownership right may only be restricted by an act (art. 37 of the PLC).

The theory holds that possession, use, and enjoyment represent a single entitlement that comprises three aspects of use: possession is a precondition for use, while enjoyment designates such form of use that enables the owner to obtain natural fruits from a thing.[12]

As the most extensive property right on an individualized thing, the ownership right includes also the legal protection claim, which is an entitlement of the owner to obtain a legal protection of the ownership right from the court.[13]

The entitlement to dispose of an immovable enables the owner (1) to transfer the ownership right to other person, (2) to limit the ownership right by establishing a derived right, and (3) to transform it (e. g., through division or merger of immovables).[14]

Ownership right may be acquired based on a legal transaction, inheritance, a statutory provision, or a decision issued by a state authority (art. 39 of the PLC).

Two or more persons who own the same (undivided) thing may be co-owners or common owners. Co-ownership is based on co-owners' shares, which are, for each co-owner, determined as a proportion of the whole, while the shares of common owners are not determined in advance (art. 71 and 72 of the PLC).

A mortgage is the right of a pledgee to be repaid together with interest and costs in the event of non-payment of a secured claim, which has fallen due from the value of the pledged property ahead of all other creditors of the pledger (art. 128[1] of the PLC).

An easement is the right to use another's thing or to demand from the owner of a thing to refrain from actions that the owner would otherwise have the right to perform on the thing concerned (servient estate, art. 210 of the PLC). Easement may be constituted for the benefit of owner(s) of a certain thing (real easement) or for the benefit of

11 Stvarnopravni zakonik (2002).
12 Plavšak, 2020b, p. 194.
13 Plavšak, 2020b, p. 197.
14 Plavšak, 2020, p. 455.

certain person (personal easement), but the real estate easement may be established also for the benefit of a certain person (quasi-real easement, art. 226 of the PLC).

Encumbrance is a right based on which the owner of an encumbered immovable is bound to a future charge or service (art. 249 of the PLC).

The right of superficies is the right to own a built structure above or beneath the immovable property of another person (art. 256[1] of the PLC).

The PLC from 2002 also introduced, in the Slovenian legal system, land debt as a new property right. Land debt was defined as a right to demand repayment of a certain amount of money from the value of an immovable ahead of all creditors with lower-tiered claims (see previous art. 192 of the PLC). In 2013, the amendment to the PLC stipulated that new land debts may no longer be established, but the existing land debts may continue to exist until their expiration.[15]

The PLC does not explicitly state necessary prerequisites for the derivative transfer of ownership right *inter vivos*, but it requires a valid legal transaction from which the obligation to transfer the ownership right derives and the fulfillment of other conditions is determined by an act (art. 40). Legal scholars enumerate four general prerequisites for the transfer of ownership right on immovable with full legal effects: (1) a valid legal transaction instituting the obligation to transfer the right of ownership; (2) a valid real transaction between the transferor and transferee; in the case that the ownership right on an immovable is transferred, the accord of the transferor to the registration of the transferee in the land register must be expressed in the form of an unconditional written statement where the signature of the transferor is attested by the notary (*clausula intabulandi* or land registry permission), while a special form for a transferee to declare their intention to conclude such contract is not prescribed[16]; (3) the registration of the acquirer as owner of the immovable concerned in the land register; (4) the entitlement to dispose.[17]

According to a ruling of the Constitutional Court from 2010, the current land registry owner of an immovable enjoys no more protection against the acquirer of the same immovable as soon as the judgment that replaces the binding and dispositional

15 The land debt could be established by a legal transaction of owner or mortagagee in agreement with the owner of an immovable. The legal transaction establishing the land debt had to be made in the form of a notarial protocol. After the land debt was entered into the land register, the court issued the land letter to the founder of the land debt. The land letter was a negotiable instrument; thus, the land debt could be transferred out-of-register (Kramberger Škerl and Vlahek, 2020, p. 106.), and the owner of the encumbered immovable was obliged to pay the land debt on maturity to the entitled holder of the land letter. The legislator's decision to cancel the whole chapter on land debt within the LPC in 2013 was motivated by some abusive practices where individuals facing damage claims or criminal charges had established fictional land debts on their immovables to protect their property from creditors. For a critical view on this legislator's intervention and possible alternative solutions, see Kramberger Škerl and Vlahek, 2020, pp. 103. and 104.

16 According to the Obligation Code (Obligacijski zakonik, 2001), "the intention to conclude a contract may be declared verbally, through customary signs or through any other action from which it may reliably be concluded that the intention exists" (art. 18). The acquirer's consent with the land registry permission is usually expressed by taking over the document containing the land registry permission (Plavšak and Vrenčur, 2020, p. 257).

17 Kramberger Škerl and Vlahek, 2020, p. 165.; Plavšak and Vrenčur, 2019, p. 230.

legal transaction with the acquirer for the immovable becomes final, although the acquirer's ownership right on the immovable is not (yet) registered in the land register. Otherwise, the constitutional right to private property would be violated.[18] According to this decision, the theory holds that the transfer of ownership right is *inter partes* (in relation between the transferor and the acquirer) effective as soon as legal transaction instituting the obligation to transfer ownership right (e.g., a sale contract) and real transaction (issuance of land registry permission with a transferor's signature being attested by the notary) come into existence, since the acquisition of the ownership right in the full extent depends exclusively on the acquirer's submission of a proposal by which they are registered as owner of the immovable in the land register.[19]

1.3. Inheritance law

1.3.1. General rules of the Inheritance Act

The IA outlines the general succession rules applicable to the inheritance of estates that are not protected farms (including unprotected farms).

The inheritance of protected farms is regulated by special rules of the IAHA. As far as the special rules do not regulate the succession of protected farms, general succession rules are applicable.

The ACA prescribes special rules for intestate or testamentary inheritance of ownership shares in agricultural communities (as far as these shares are not a constitutive part of a protected farm)—these rules being very similar to those from the IAHA.

The inheritance of protected farms and other estates is based on the will (testamentary succession), or, if the will was not made or is not valid, on the law (intestate succession).

In Slovenian succession law, men, women, and children born in or outside marriage have equal inheritance rights (art. 4 of the IA). Adoptive children and their descendants have equal succession rights with regard to their adoptive parents and their relatives as the adoptive parents' blood children and their descendants, while the adoptive parents and their relatives are intestate heirs of the adoptive child (art. 21 od the IA).

The deceased's partner in cohabitation (long-term domestic community of a man and a woman, who are not married, if there are no reasons for a marriage between them to be invalid), as well as the deceased's partner in a registered or an informal civil union, have the same rights of succession as a deceased's spouse (art. 11 of the IA, art. 2 and 3 of the Civil Union Act, CUA[20]).

The intestate heirs are classified into three succession orders. The intestate heirs of a lower succession order exclude from inheritance intestate heirs from a higher succession order. Intestate heirs of the first succession order are the deceased's spouse and descendants, who inherit equal shares. If a child or adoptive child died before the

18 USRS, Odločba Up 591/10 z dne 2. 12. 2010.
19 Škerl Kramberger and Vlahek, 2020, p. 166.; Tratnik, 2020, p. 163.; Plavšak and Vrenčur, 2020, p. 257.
20 Zakon o partnerski zvezi (2016).

deceased, their children and adoptive children (grandchildren of the deceased) step in the place of their parents and inherit their parent's share in equal shares, and so forth (*ius representationis*, the right of representation).

Intestate heirs of the second succession order are the deceased's spouse and the deceased's parents, who inherit the estate if the deceased did not leave any descendants (natural and adoptive children or grandchildren and so forth). The spouse inherits one half of the estate, and the parents inherit the other half. If the deceased left neither parents nor descendants, the spouse inherits the entire estate. If the spouse died before the deceased, the entire estate is inherited by the deceased's parents. When one or both parents died before the deceased, the estate is inherited by the descendants of the deceased parent(s).

The heirs of the third (last) succession order are the grandparents of the deceased and their descendants, who inherit the estate if the deceased left no spouse, descendants, parents, and descendants of parents. According to the law, the grandfather and grandmother on the father's side, as well as the grandfather and grandmother on the mother's side, inherit one half (each one of them one quarter) of the estate. If one of the grandparents from the father's or the mother's side died before the deceased, their share is inherited by their descendants by the right of representation. Where one grandparent has no descendants, the share of the deceased grandparent falls to the other grandparent. If both grandparents from one side died before the deceased without leaving descendants, the grandparents from the other side or their descendants inherit the estate alone.

The testamentary succession has priority before the intestate succession. However, the freedom of the testator to dispose of the estate is restricted by provisions, according to which some persons who are close to the deceased (the forced heirs) have the right to a certain part of the estate (compulsory share). In Slovenian general succession law, forced heirs are the deceased's spouse, children, and adopted children and their descendants, parents, grandparents, brothers, and sisters, if they were entitled, in case of intestate inheritance, to inherit the deceased's estate according to their succession order. Grandparents, brothers, and sisters of the deceased are forced heirs under additional conditions, namely if they are permanently incapable of work and do not have the necessary means of subsistence (art. 25 of the IA).

The compulsory share for the descendants, adoptees, and their descendants and the spouse is one half, while the compulsory share for the other forced heirs is one third of the share that would go to each of them according to the rules on intestacy succession (art. 26 of the IA). If the compulsory share is deprived, testamentary dispositions are reduced proportionally, as much as necessary, to supplement the compulsory share. If the compulsory share is not yet covered, the gifts are returned in the reverse chronological order in which they were given (art. 35 and 38 of the IA).

Through will, the testator may give a material benefit to another person without appointing them as an heir (legacy).

The IA exhaustively lists grounds on which a testator may deprive a forced heir of their compulsory share (disinheritance, art. 42 of the IA) as well as grounds on

which any person is *ex lege* unworthy to inherit based on the Act or a will or to obtain anything according to the will (unworthiness of inheritance, art. 126 of the IA).

1.3.2. Special rules on the inheritance of protected farms (Inheritance of Agricultural Holdings Act)

Agricultural holdings of middle size (comprising between 5 hectares and 100 hectares of comparable agricultural land[21]) and belonging to one individual, to spouses, cohabiting partners or civil union partners, and to an ancestor and descendant are protected farms.

A protected farm may be inherited, in principle, only by one intestate or one testamentary heir with certain exceptions.

If the deceased left no will, the IAHA prescribes several rules according to which the court determines the intestate heir of the protected farm.

If a protected farm belonged only to the decedent, according to general succession rules, it is taken over by that intestate heir who intends to cultivate agricultural land and is chosen by a mutual agreement of all intestate heirs.

If the mutual agreement is not achieved, subsidiary criteria are prescribed (training for agricultural or forestry activity, growing up on the farm, and contributing to its maintenance and development through work and earnings, and so on). Under the same conditions, the spouse has priority in inheriting the protected farm of the decedent.

If the protected farm is owned, co-owned, or jointly owned by spouses, cohabiting partners, or civil union partners, the heir of the farm is the surviving spouse or partner (art. 8).

If the protected farm was co-owned by an ancestor and a descendant, the heir of the deceased co-owner is the surviving co-owner if they are the intestate heir. If the survivor is not an intestate heir, the heir of the deceased co-owner is determined in accordance with criteria relating to a protected farm belonging to one individual (art. 9).

The Act also contains some additional priority and excluding criteria to determine the heir of a protected farm (art. 7 and 11).

To alleviate the takeover of the protected farm, the circle of intestate heirs who are entitled to hereditary shares and their rights are reduced: the spouse, the decedent's parents, the decedent's children and adopted children, and their descendants who do not inherit the protected farm are entitled to a monetary value of the compulsory share

21 To make different agricultural land comparable, the IAHA states that 1 ha of the comparable agricultural area is equal to (a) 1 ha of land that has a land rating from 50 to 100 in accordance with the regulations governing the registration of real estate; (b) 2 ha of land with a land rating of 1 to 49, or (c) 8 ha of forest land. Farms that meet the conditions but mainly consist of forests are protected farms only if they have at least 2 ha of comparable agricultural land registered as agricultural land in the real estate cadastre (Art. 2[2 and 3] of the IAHA). According to some authors, the criteria for determination of protected farms that classify all agricultural land in only two categories are not precise enough to measure the real economic potential of agricultural land and of a farm as a whole (cf. Drobež, 2017, p. 1457; Avsec, 2021, p. 31).

in accordance with general rules on inheritance, provided that they would be intestate heirs according to their succession order. The hereditary shares of these heirs must be paid in cash by the heir who inherited the protected farm in a deadline set by the court, taking into account of the economic capacity of the protected farm and the social situation of the heirs (5 years or, in exceptional cases, 10 years at the longest).

Exceptionally, for justified reasons, the heir who does not take over the protected farm may also inherit land or other immovable or movable property if this property is not important for the protected farm, but up to the amount of their intestacy share (art. 15 of the IAHA).

If no intestate heir fulfills the conditions to take over the protected farm, this may be inherited according to general succession rules and divided physically (art. 13 of the IAHA).

The testator can leave the protected farm by will to only one heir, which must be an individual (natural person). Exceptionally, the testator may leave the protected farm to two heirs if these heirs are spouses, cohabitants, or civil union partners or one parent and their descendant; in both cases, however, the protected farm may not be divided into physical parts.

If the testator disposes of a protected farm in contravention of the IAHA, this is inherited according to rules on intestacy succession.

Granting a legacy must not significantly affect the economic viability of the protected farm. At the request of a testamentary heir, the court may reduce the legacies that would overburden the heir of the protected farm. In doing so, the court must ensure that other entitled heirs are not deprived of their compulsory shares.[22]

A heir who disposes of the inherited protected farm or a significant part of it before the expiration of 10 years after the takeover and neither acquires another farm, agricultural land, or forest nor invests the funds so obtained in the protected farm within 1 year after the alienation may be faced with claims of certain heirs, as if the farm had not been protected: (1) in case of intestacy succession, all intestate heirs who would have been called to inheritance according to general provisions may claim (a) either the payment of a difference between intestate hereditary shares they would have been entitled to according to general succession rules and lower intestate hereditary shares according to special succession rules on protected farms, or (b) payment of the full hereditary share if they were not intestate heirs according to special provisions on protected farms but would have been entitled to intestate share according to general inheritance rules; (2) in case of testamentary succession, all forced heirs according to general provisions (these are not only forced heirs according to special provisions—spouse, descendants, and parents of the deceased—but also siblings and grandparents who would have no means of sustenance and would be unable to work

22 The Act allows legacies, if their object is forest land or agricultural land with a credit rating lower than 40, building land, other things, or rights belonging to a protected farm; if an individual legacy does not exceed 2%; and if all legacies together do not exceed 10% of the total value of the estate (art. 22 of the IAHA).

if inheriting the estate on intestacy) are entitled to be paid a compulsory hereditary share (art. 19 of the IAHA).[23]

1.3.3. Inheritance of ownership shares in agricultural communities

The IAHA explicitly considers rights on land in agricultural communities as a part of a protected farm subject to special provisions of the IAHA.

The member ownership shares in agricultural communities that are not part of a protected farm are subject to special inheritance rules prescribed by the ACA.

Like IAHA, the ACA also lays down the principle that a member's share may be inherited only by one heir.

If there are several intestate heirs of the same inheritance order, the person who inherits the share of the deceased member is determined in the following order: (1) an intestate heir who shows an interest in participating in the agricultural community and is chosen by agreement of all heirs; (2) an intestate heir who has a permanent residence in the area of the municipality where the agricultural community lies. If there are several, a heir from the local community (subdivision of a municipality) where the agricultural community is located has priority. If there are still several heirs enjoying priority, an heir from the nearer knee is preferred. Under the same conditions, the one chosen by the board of directors of the agricultural community shall prevail; (3) an intestate heir who is appointed by the court. In determining the heir, the court takes into account the distance of an intestate heirs' permanent residence from the municipality where the agricultural community lies, the fact that the heir is a transferee of the protected farm, the competence in performing agricultural and forestry activities, and the opinion of the agricultural community's administrative committee.

An estate without heirs becomes the property of the municipality where the agricultural community has its seat.

The heir must pay compulsory shares to persons who are entitled to such share according to general inheritance rules. The time limit for the payment of the compulsory share is determined by the court according to the heir's economic capacity and social conditions and may not be shorter than 1 year and not longer than 10 years (art. 52 of the ACA).

The same principle is also applicable to testamentary inheritance: a testator may leave the share on agricultural land in the agricultural community by will only to one heir. If the testator disposes of property contrary to the law, the co-ownership or common ownership share of the deceased is inherited based on the law.

1.4. Legal transfer of agricultural land, forests, and farms inter vivos

1.4.1. Definitions and administrative control

The ALA contains several provisions that restrict the legal transfer of agricultural land, forest, or farm (in Slovenian, *kmetija*). The legal transfer is defined as the

23 Zupančič, 2005, p. 145; Zupančič and Žnidaršič Skubic, 2009, p. 306.

acquisition of the ownership right through legal transactions between living partners and "in other events, specified by the Act." Although this definition is not entirely explicit and refers to unnominated provisions of the Act, it is important that the legal transfer according to the ALA encompasses only legal transactions instituting transfer of the ownership right but not the establishment and/or transfer of derived rights *in rem* (e.g., mortgage, easement, or right of usufruct on agricultural land). The legal transfer, as regulated in Chapter III of the ALA, covers neither lease contracts transferring the owner's entitlement of use to another person, although the contract on the lease of agricultural land is separately regulated within Chapter IV of the ALA and is subject to prior administrative control, such as legal transactions implying the transfer of ownership right.

The ALA does not contain a general definition of farm or agricultural holding. According to the AA, a farm is one organizational form of agricultural holding where the holder, members of the farm (individuals of at least 15 years of age residing at the same address as the holder, and closer relatives of the holder residing in Slovenia if they agree to be entered in the register of agricultural holdings as members) and employees are engaged in agricultural activity (art. 4 and 5 of the AA).

The AA has defined the agricultural holding as an organizational and operational economic entity comprising one or several production units; dealing with agricultural or agricultural and forestry activity; and having a uniform management, address, or head office, as well as a name or corporate name. The amendments to the AA from March 16, 2022 simplified the definition, bringing it in line with the Regulation 2021/2115/EU, so that "agricultural holding" covers all units used for agricultural activities, managed by the holder and located in the territory of the Republic of Slovenia. The holder of an agricultural holding may be (1) an individual, (2) a legal entity, (3) an agricultural community, or (6) a grazing community (art. 3).

Compliance with special provisions on the legal transfer of agricultural land, forests, and holdings is ensured through extensive administrative control. The ALA stipulates that the notarial attestation of the alienator's signature on the "land registry permission" (registration clause) is not allowed without the approval of the competent administrative body or a decision issued by the same body that the legal transaction meets the requirements according to which approval is not necessary (e.g., if a legal transaction is concluded by all co-owners of agricultural land, etc., see art. 19 of the ALA). As the notarial attestation of the alienator's signature is a condition *sine qua non* for the transfer of ownership right on the new acquirer, such provisions prevent violations of special provisions on the legal transfer of agricultural land.

The ALA provides for various restrictions with regard to the legal transfer of agricultural land, forests, and farms. These restrictions may be classified into formal and substantial. Formal restrictions originate from the preventive administrative control requiring that legal transactions with agricultural land, forest, and farms may have full effects only if the administrative authority issues a decision that the legal transaction is approved or that the approval is not necessary.

Substantial restrictions limit the substance of disposal entitlement with regard to the object, subjects, and legal effects of a legal transaction.

Certain substantial restrictions do not refer to a certain type of legal transaction (e.g., sales contract) but to legal transactions generally or at least to legal transactions of two or more types (e.g., prohibition to divide protected farms).

Other substantial restrictions refer to sales contracts and donation contracts.

1.4.2. Restrictions relating to legal transactions of two or more types

1.4.2.1. Restricted division of protected farms

The ALA prohibited protected farms to be divided by legal transfer (e.g., legal transactions *inter vivos* and donations *mortis causa*) but laid down some exceptions from this prohibition. A protected farm was allowed to be divided by legal transactions in the following cases: (1) when an existing protected farm was expanded or territorially consolidated or when a new protected farm was formed; (2) when another farm was expanded or territorially consolidated or when agricultural land owned by an agricultural organization or an individual entrepreneur was expanded or territorially consolidated; (3) when building land was alienated; (4) when land that was allowed to be disposed of by a will pursuant to rules on inheritance of protected farms was alienated; (5) when the ownership right to a protected farm was obtained by the Republic of Slovenia or a municipality; (6) when the owner increased or established a co-ownership share relating to a protected farm to the benefit of a co-owner, spouse or cohabiting partner, descendant, or adoptee in such a manner that the protected farm still met the conditions for protected farms (art. 18 of the ALA).[24]

This prohibition was abolished by the amendments of the ALA from 2022.

However, these amendments did not abrogate a special prohibition according to which a holder of a protected farm may not dispose of protected farm contrary to provisions of the IAHA by concluding a contract on delivery and distribution of property, a contract for annuity for life or a donation contract *mortis causa* (art. 24 of the

24 The Supreme Court of Slovenia (VSRS, Sodba II Ips 90/2015 z dne 8. 9. 2016) classified the exceptions from the prohibition to divide a protected farm into two groups: "In order to prevent the division or fragmentation of medium-sized farms (only these are subject to protection), the legislator restricted legal transfer according to two criteria: (1) with regard to assets (by allowing physical division in the form of alienation of certain immovable from the protected farm if such immovable becomes part of another protected farm or farm or agricultural land owned by an agricultural organization or individual entreprenur; if building land or land which may be, in accordance with the provisions on inheritance of protected farms, transferred through will to a person who is not the heir of the protected farm is disposed of (and) (2) with regard to the acquirer, the owner may alienate the protected farm in favor of one of the acquirers determined by law. In both cases, there is an additional restriction that the protected farm must continue to meet the conditions under the regulations on the inheritance of protected farms (minimum 5 ha and maximum 100 ha of comparable agricultural land and the condition relating to holders of a protected farm: one natural person or two persons only if they are spouses, cohabitants or civil partners, or ancestor and descendant)."

IAHA).[25] This prohibition does not include other contracts (donation contracts *inter vivos*, sales contracts, etc.) which may result in the physical division or fragmentation of protected farms.[26]

Nevertheless, the regulatory change with regard to legal transactions resulting in division of protected farms from 2022 will have a double-edged effect. On one side, the disposal of agricultural land will be less restrictive for holders of protected farms; on the other hand, the holder of a protected farm may now, through legal transactions *inter vivos*, alienate so much agricultural land that the farm no longer meets the requirements for a protected farm and will not be subject to special inheritance rules.

1.4.2.2. Restricted disposal of agricultural land in agricultural communities

Immovables in co-ownership or common ownership of members in agricultural community may be, as a whole, object of a transfer for consideration only in the following cases: (1) sale of building land; (2) sale of agricultural land that has no physical contact with other immovable property of members and whose area does not exceed 0.5 hectare; (3) sale of forest land that has no physical contact with other immovables of members and whose area does not exceed 1 hectare; (4) sale of land for the purpose of construction of facilities for which an expropriation procedure may be initiated; (5) sale of all land in case of termination of the agricultural community; (6) transfer of ownership rights in the process of agricultural operations; (7) sale of immovables on which public infrastructure facilities or facilities of public importance stand; (8) sale on the basis of a final court decision or a final decision of another state authority; (9) transfer of ownership on the basis of an exchange contract provided that another immovable subject to the exchange contract has the same actual use.

In cases referred to by points 2, 3, 5, 6, 8, and 9, the sale is subject to provisions on the transfer of agricultural land and forests, including the preemption right (art. 41 of the ACA).

1.4.2.3. Restrictions with regard to establishing new co-ownership shares on agricultural land, forest, or farm

The conclusion of sale contracts transferring the ownership right on agricultural land, forest, or farm is restricted through the statutory preemption right of certain persons (see *infra*, Section 1.4.3.). As co-owners enjoy the statutory preemption right

25 According to the standpoint of the Slovenian Supreme Court, the purpose of this provision is to preserve the unity of a protected farm. The court emphasizes that the holder of a protected farm, when choosing the other party to conclude one of the mentioned contracts, is not bound by statutory criteria for determination of the intestate heir: "the responsibility for selecting the appropriate transferee of the protected farm, who will continue to manage the farm, is left to the owner" (VSRS, Sklep II Ips 88/2013 z dne 11. 12. 2014, pt. 9).

26 Cf. Zupančič and Žnidaršič Skubic, 2009, p. 313. The authors consider that the prohibition should also be applicable to contract of subsistence and statutorily unregulated delivery contracts if concluded with a view to circumventing the regime of the IAHA.

of first priority (in order to decrease the number of co-owners or abolish co-ownership and make the management of the immovable simpler and easier), some individuals acquired, through contracts of various types (e.g., donation), a co-ownership share on the agricultural land just with a view to be able to purchase shares of other co-owner(s) as holders of the best preemption right. The amendment of the ALA from 2011 allowed only the entire ownership right or entire existing co-ownership share on agricultural land, forest, or farm to be sold. [27]

The same amendment of the ALA in 2011 introduced restrictions with regard to donation contract limiting the free choice of donors. A farm holder who has become the young transferee of a farm in the last 5 years and obtained funds from the rural development program or through a sales contract is also among the potential donors (Art. 17.a[2] of the ALA), but in such a case, only the whole ownership right or co-ownership share of the agricultural land, forest, or farm may be transferred by a donation contract. As far as other potential donors (e.g., spouse and closest relatives of the donor, the state, and the municipality) are concerned, this restriction does not apply.

It should also be considered that establishing a new co-ownership share is not necessarily a consequence of legal transaction for the transfer of the ownership right. The co-ownership share may be established through disposal which results in restriction of the ownership right through establishing a derived right *in rem* on the immovable (e. g., mortgage on ½ co-ownership share of the immovable, where the ownership right was neither entirely nor partially transferred and the immovable is not co-owned, being still owned by one person).[28]

1.4.2.4. Prohibited division of ownership shares on immovables in agricultural communities

Each member of an agricultural community disposes freely of the co-ownership share, unless otherwise provided in the ACA. The ACA sets the principle that only the entire co-ownership share *on all land plots* within the agricultural community may be disposed of art. 37[2] of the ACA, but this requirement was attenuated, to a certain extent, by the amendments of the ACA from 2022.[29]

As far as common ownership in agricultural communities is concerned, it is presumed that, for purpose of the ACA, member shares in the common property are equal, unless otherwise determined by the basic act of the agricultural community.

27 Ibid.

28 Plavšak, 2020, p. 197.

29 The amendments allow division of co-ownership share into as many parts as there are different legal titles on the basis of which the co-ownership share was acquired, if the law does not specify otherwise. The provision was explained with the following example: "In the case where person acquired a co-ownership share from three other members, this co-ownership share may be further divided into three parts" (Predlog Zakona o spremembah in dopolnitvah Zakona o agrarnih skupnostih, 2021). On the other hand, the amendments to ALA from 2022 emphasize the obligatory integral transfer of existing co-ownership share by contract on delivery and distribution of property and contract of lifelong maintenance (art. 43a and 43b of the ACA).

Therefore, the provisions of the ACA on co-ownership apply, *mutatis mutandis*, to common ownership, unless otherwise provided by this Act (art. 4). The ACA explicitly allows members of agricultural communities to dispose of their undetermined shares in common ownership analogously to provisions on co-ownership shares (art. 44).

1.4.3. Restrictions with regard to sale contracts: Statutory preemption rights

1.4.3.1. General provisions on statutory preemption rights on agricultural land, forest, and farms

The ALA regulates the general rules on the statutory preemptive right on agricultural land, forest, or farms, which are applicable unless another an act provides otherwise.

If agricultural land, forest, or farm is offered for sale, certain persons have statutory preemption right in the following order: (1) co-owner(s); (2) farmers who own the agricultural land bordering that offered for sale; (3) lessee of the agricultural land offered for sale; (4) other farmers; (5) agricultural organizations or individual entrepreneurs who need land or farm to conduct agricultural or forestry activity; and (6) the National Agricultural Land and Forest Fund of the Republic of Slovenia (art. 23[1] of the ALA).

According to the ALA, a farmer is an individual who cultivates agricultural land as its owner, lessee, or other user; is adequately qualified for this cultivation; and obtains a significant part of the income (at least 2/3 of the average salary in Slovenia in the past year) from agricultural activity. The status of being a farmer is retained by an individual who cultivated agricultural land and no longer conducts agricultural activity due to disability or age but takes care of the land cultivation. Individuals who do not conduct agricultural activity yet but intend to do so may obtain the status of a farmer by stating before the administrative authority the intent to cultivate the agricultural land on their own or with the help of others, providing evidence on acquiring the agricultural land, possessing necessary professional qualifications, and the significant future foreseen income from agricultural activity (new entrants, art. 24[1] of the ALA).

An individual entrepreneur (natural person) or agricultural organization (legal person) are statutory preemptors if they have notified (individual entrepreneur) or registered (legal person) agricultural activity and generate more than 50% of the revenue from an agricultural activity, including revenue from agricultural policy measures and state aid, which must be evident from the most recent verified balance sheet and income statement (art. 24[4]–[5] of the ALA).

The ALA prescribes specific procedures for the enforcement of the preemption right. An owner who intends to sell agricultural land, a forest, or a farm must submit the sale offer to the competent administrative body ("administrative unit") in the area where the agricultural land, forest, or farm is located. By submitting the offer to the administrative unit, the owner is deemed to have authorized the administrative unit to receive a written statement of the offer's acceptance.

The administrative authority must immediately publish the offer on its notice board and on the unified state portal of the "E-government." The deadline for acceptance of the offer is 30 days from the day when the offer is published on the notice board of the administrative unit. If no one accepts the offer within the time limit, the seller who still wishes to sell the agricultural land, forest, or farm must repeat the offer.

If two or more farmers within the same priority class (e.g., two farmers owning land bordering to that offered for sale) enforce their priority rights by accepting the offer, the buyer is determined in the following order of priority: (1) a farmer who conducts an agricultural activity as their only or main activity; (2) a farmer who cultivates land on their own; (3) a farmer appointed by the seller, except in the case of the sale of agricultural land, a forest, or a farm that is real property of the state, and the seller must appoint a buyer applying the method of public auction (art. 23[2] of the ALA).

According to amendments of the ALA in 2022, a lessee who took on the lease of agricultural land owned by natural and legal persons of private law may enforce the statutory preemption right with regard to the leased agricultural land only if they have—at least during the previous 3 years—applied for agricultural subsidies according to executive regulations (art. 23a[3] of the ALA).

The same amendments introduced a new statutory preemption right for a person who sold agricultural land necessary to implement the development projects of national importance or whose agricultural land has been expropriated for such purpose. The statutory preemption right of such person has priority before all other statutory preemptors, except the co-owner (art. 25a of the ALA).[30]

1.4.3.2. Statutory preemption right on forests

The FA contains several special provisions on preemption rights with regard to forests.

For the purchase of forest complexes with an area spanning over 30 hectares, the statutory preemption right of the highest priority belongs to the Republic of Slovenia or a legal entity managing state forests. If the forest is located within protected areas under the regulations on nature conservation, such legal entity must obtain the opinion of the minister responsible for nature conservation.

In other cases, the Republic of Slovenia has statutory preemption right to purchase forests declared as protective forests (forests with a particularly important ecological functions) and forests designated as forests with a special purpose (e.g., forests with an especially emphasized research function or those protecting natural values or cultural heritage), unless the special emphasis on the functions for which the forest was

30 Two draft bills foreseeing important changes of the provisions on the statutory preemptors of agricultural land had been launched in public discussion in 2019 and 2020 (see, Avsec, 2020 and 2021), but the amendments to the ALA adopted on March 16, 2022 essentially maintained the existing regulation.

designated as a forest with a special purpose is in the interest of the local community. In the latter case, the local community in which a designated forests with special purpose are situated has a statutory preemption right on the forest concerned.

In cases where forests from the preceding paragraphs are offered for sale, the administrative unit notifies a legal entity managing state forests or a local community of its preemption right, which is exercised in such a way that the beneficiary notifies the forest's owner and the administrative unit, in writing, about the offer's acceptance within 30 days after having been notified by the administrative unit. If a legal entity managing state forests or a local community exercises its preemption right, the publication of the offer on the notice board of the administrative unit and on the "E-government" national portal according to the ALA is not necessary.

In cases where a forest is offered for sale and the state, legal person managing state-owned forests, and local community do not exercise their preemption rights or, given the status of the concerned forest, do not possess the statutory preemption rights according to the mentioned provisions, the owner whose forest borders the forest offered for sale may enforce the statutory preemption right. If this owner does not exercise the priority right, another owner whose forest is the nearest to the forest that is being sold has statutory priority right to purchase the forest (art. 47 of the FA).

The amendments of the ALA brought more precise rules on the preemption right in cases where the land concerned is, according to its intended use, partly agricultural land and partly forest.[31]

1.4.3.3. Preemption rights on a protected farm or part thereof

If an heir of a protected farm within 10 years after inheritance ceases to cultivate the protected farm by disposing or leasing the protected farm or a substantial part of it without acquiring other agricultural land, forest or without investing the funds obtained in the protected farm in one year after alienation, or ceases to use the protected farm in other ways, other co-heirs have priority right to purchase or to take on lease the protected farm or part of it (art. 19[2] of the IAHA).

The literature interprets this provision that the coheirs have a statutory priority right to purchase or to take on lease the protected farm or part of it before expiration of 10 years after the takeover of the protected farm. With regard to enforcement modalities of this preemption right, an interpretation can be found according to which the coheirs as statutory preemptors would be placed immediately after the co-owner(s) who enjoy preemption right of the highest priority. Such interpretation

31 If the sale offer refers to a plot of land with the agricultural and forest intended use where the agricultural intended use prevails over the forest one, the statutory preemption right is exercised according to the ALA, unless the state has a preemption right under a special law. Similarly, in case where several plots of land as a whole are sold together—some of which are, according to the intended use, agricultural land plots and other forest plots—and the share of agricultural intended use represents at least 20% of the plots' total surface, the ALA is applicable to the purchase, unless the Republic of Slovenia has a preemption right under a special law (art. 23a[2]–[3] of the ALA).

leans on the provision that the ALA provisions on preemption right apply to all sales of agricultural land if special provisions in other acts do not provide otherwise, while co-owners of an immovable have a statutory preemption right according to the ALA as well as to PLC (art. 66[3]).[32]

1.4.3.4. Preemption right on the ownership share on agricultural land in agricultural communities

If a member ownership share on immovable in agricultural community is offered for sale, the preemption right of certain subjects may be enforced in the following priority order: (1) an agricultural community of which the seller is a member, if such a decision is taken by the general meeting by a two-thirds majority of all members; (2) a member of the agricultural community of which the seller is a member (if the preemption right is exercised by several members, the buyer is selected by the seller); (3) an accession member of the agricultural community of which the seller is a member (if so provided by the founding act, general meeting of agricultural community may nominate accession members who have preemption right if an ownership share is offered for sale; through acquiring the ownership share, an accession member becomes ordinary member of the agricultural community); (4) an individual who has a permanent residence in the municipality where the immovable subject to sale is located.

The amendments of the ACA from 2022 determined stricter conditions with regard to the fourth priority class, stating that only individuals with residence in the cadastral municipality or nearest to cadastral municipality[33] where the agricultural community has most of its land are eligible. If two or more of preemptors of the fourth priority class enforce the preemption right, the priority is given to that one who is a holder of the agricultural holding in accordance with the law governing agriculture, or subsidiarily, to that one chosen by the seller.

When the immovable is sold to the agricultural community, the purchase price is paid provided in full from the agricultural community's account, and the ownership shares of all members are proportionally increased.

The preemption right is enforced in procedure, deadlines, and manner as prescribed by the provisions on legal transfer of agricultural land and forests (art. 42 of the ACA).

32 Vrenčur, 2020, p. 932. According to Plavšak, 2020, p. 912., the statutory preemption right of co-owners has priority before statutory preemption rights in the public interest also in cases where such priority is not determined explicitly by the law.

33 Slovenia counts 212 municipalities as local, self-governing communities and 2,696 of cadastral municipalities as territorial units on which the land cadaster and land register are based. The average of cadastral municipalities is more than 10 times smaller than the average municipality [cf. Establishment of Municipalities and Municipal Boundaries Act (Zakon o ustanovitvi občin ter o določitvi njihovih območij), 1994 and Pravilnik o območjih in imenih katastrskih občin (Rules on the areas and names of cadastral communities), 2006].

1.4.3.5. Concurrence of several statutory preemption rights according to the ALA and other Acts

The statutory preemption rights on agricultural land are determined not only by the agricultural land legislation but also by some other acts.

The Nature Conservation Act (NCA)[34] regulates the statutory preemption right on immovables on the protected areas in favor of the state or local community that adopted the legal instrument on protection. This preemption right has priority before preemption rights according to agricultural land, forest, water, and building land legislation. If the state or local community does not exercise their first preemption right, the preemption rights laid down by the agricultural land, forest, water, and land building legislation may be exercised so that within the same category of preemptors, priority is given to those who already own immovables of the same type located in the protected area (art. 84). This rule modifies the priority order established in the ALA.

According to the Water Act (WA),[35] the local community that is going to proclaim costal land or part of it as a natural aquatic public good has the best preemption right on such coastal land of inland waters (art. 16), while the state has the best preemption right relating to other coastal land of inland waters (art. 22). In both cases, the best priority right may be exercised regardless of provisions on the priority order of preemptors in other legislation.

The Cultural Heritage Protection Act (CHPA)[36] regulates the priority right of the state or local community to purchase a monument of national or local importance or immovable in an area of influence with an immovable monument of such importance, if so foreseen by the legal act proclaiming the monument. If the state does not exercise its preemption right on the immovable concerned, this right may be exercised by the local community (art. 62).

The Spatial Management Act (SMA[37]) from 2021 introduced a special preemption right of the state or local community on land, which meets certain requirements and is determined by the state or local community (e.g., agricultural land in area where constructing public utility infrastructure and facilities used for protection against natural and other disasters is planned). This preemption right does not apply in some cases (e.g., in a sales contract between spouses or close lineal relatives), but it has priority before the preemption right determined by the ALA. The seller must repeat the offer to the state or local community if 3 months have passed since the previous offer, although the price and other terms of sale remain unchanged (art. 199–201).

According to theory, the statutory preemption rights may be ranked in the following priority order: (1) preemption right of co-owner, (2) preemption right according to the NCA, (3) preemption right according to the WA, (4) preemption right according to

34 Zakon o ohranjanju narave (2004).
35 Zakon o vodah (2002).
36 Zakon o varstvu kulturne dediščine (2008).
37 Zakon o urejanju prostora (2021).

the CHPA, (5) preemption right according to the SMA, (6) preemption right according to the FA, the IAHA, and the ALA.[38]

1.4.4. Restrictions of donation contracts

1.4.4.1. Restricted donation of agricultural land and co-ownership shares

The ALA restricts the conclusion of donation contracts the object of which is agricultural land, forest, or a farm, with regard to persons who may be donees. An owner may donate agricultural land, a forest, or a farm only to (a) a spouse or cohabiting partner, children, or adopted children; parents or adoptive parents; siblings; nephews or nieces; and grandchildren; (b) a son-in-law, daughter-in-law, or a child's or adoptive child's cohabiting partner, provided they are members of the same farm; (c) an individual who is a farm holder in accordance with the Act regulating agriculture and has obtained funds from the rural development program as a young transferee of a farm, if no more than 5 years have passed since the transfer of the farm; (d) a local community or the state (art. 17a of the ALA).

This provision was adopted to restrict circumvention of the statutory preemption right through the conclusion of donation contracts.[39]

1.4.4.2. Restricted donations of immovables and ownership shares in agricultural communities

The immovable that is object of co-ownership or common ownership of members in an agricultural community may be the subject of a donation contract if it is transferred to the municipality or the Republic of Slovenia.

The disposal of ownership shares in agricultural communities is also restricted. Members of the agricultural community may conclude donation contracts for transfer of the ownership shares only with their spouses, cohabitants or civil partners, children or adoptive children, parents or adoptive parents, siblings, nieces and nephews and grandchildren; or with the agricultural community, whereby the share that is the object of the transfer is acquired by all other members in proportion to their shares (art. 43 of the ACA).

1.5. Other restrictions of the entitlement to use and dispose of agricultural land, forest, or farm

While the notion of legal transfer of agricultural land, forest, and farm in the ALA covers only legal transactions transferring the ownership right, the disposal entitlement may be restricted also with regard to the transformation of ownership right.[40] Some statutory provisions established the conditions under which the division of agricultural land and forest plots (parcels) is prohibited.

38 Vrenčur, 2020a, pp. 74–75.; Vrenčur, 2020, p. 941.
39 Predlog Zakona o spremembah in dopolnitvah Zakona o kmetijskih zemljiščih, 25. 1. 2011.
40 Plavšak, 2020, p. 456.

Among the agricultural operations, the ALA also regulates land consolidation as a procedure through which land within a certain area is assembled and redistributed among the previous owners so that each is allotted land that is territorially compact to the highest extent possible (art. 55). Land plots that have been consolidated can be divided only when the plot structure achieved by the land consolidation does not deteriorate as a result of such division (art. 75 of the ALA).

According to the FA, land plots that constitute a forest and are smaller than 5 ha may only be divided (a) if the land use on such parcels or parts thereof is not specified as forest in spatial planning documents, (b) if a division is necessary due to the construction of public infrastructure, or (c) if they are co-owned by the Republic of Slovenia or a local community (art. 47[6]).

An owner may also dispose of an immovable or movable through establishing derived property rights.[41] In this regard, the ALA provisions on the legal transfer of agricultural land foresee no explicit special restrictions for establishment of derived property rights on agricultural land, forests, and farms, but the extent of certain derived property rights (e.g., usufruct or encumbrance) may be restricted by special provisions of the IAHA (cf. art. 17 and 22 of the IAHA).

1.6. Lease of agricultural land

The lease contract is regulated by the Obligation Code (OC).[42] The ALA contains some special provisions on the lease of agricultural land, which relate to statutory prelease rights, the content and written form of the lease contract, the minimum lease period, and the lessee's duties to cultivate and use land with due diligence. A lessee who grew permanent crops on the leased land has the right to be reimbursed the market value of permanent crops after the termination of the contract if such investments were made with the lessor's consent.

A lease contract must include the land register and real estate cadastre data of the leased land; the description and unamortized value of equipment, facilities, and permanent crops; the depreciation period of permanent crops; the rent amount; the purpose and period of the lease; and a provision as to whether the leasehold right shall be inheritable or not. A lease relationship must also be entered in the land register and the real estate cadastre.

The ALA regulates the priority to take agricultural land, forests, or agricultural holdings on lease. Several persons may exercise these priority rights in the following order of priority: (1) the present lessee (if the contract was not terminated with this person due to breach of their duties); (2) a lessee of land bordering the land that is being leased and a farmer who owns the land bordering the land that is being leased; and (3) another farmer, agricultural organization, or individual entrepreneur who needs the land or the farm that is being leased to conduct an agricultural activity (art. 27 of the ALA).

41 Ibid.
42 Obligacijski zakonik (2001).

The lease period must correspond to the purpose of the use of the leased land and may not be, in principle, shorter than 25 years for the establishment of vineyards, orchards, or hop fields; 15 years for the establishment of plantations of fast-growing deciduous trees; and 10 years for other purposes. If a special act allows so—or if the lessor, after the announcement of a lease offer, is unable to conclude a lease contract for the prescribed minimum period—the lease contract may be concluded for a shorter period. Where permanent crops already exist on leased land, a lease relationship may be concluded for a period necessary for the full amortization of the lessee's investments in these crops.

The provisions on the right of prelease, entry of the lease contract in the land register and real estate cadastre, and procedures for enforcing the right of prelease and getting the lease contract approved by the administrative authority were strictly complied with, in practice, only by the National Agricultural Land and Forests Fund and far less by individuals and other legal entities.[43] That is the reason why special provisions on agricultural leases in the ALA are, according to amendments from 2022, applicable only to agricultural land leased by the National Agricultural Land and Forests Fund and municipalities (art. 23a of the ALA). On the other hand, contracts on the lease of agricultural land concluded by other lessors are regulated only by the general provisions of the OC.

1.7. Ownership right of aliens (including legal persons) on agricultural land

The Slovenian Constitution ensures aliens to enjoy all constitutionally and statutorily guaranteed rights, except for those rights that, pursuant to the Constitution or law, only citizens of Slovenia enjoy (art. 13). In this regard, the constitutional theory distinguishes general rights (enjoyed by all individuals regardless of their citizenship), reserved rights (which may be enjoyed by aliens only under certain conditions), and absolutely reserved rights (guaranteed only to citizens). The right of ownership on immovable is one of the reserved rights since art. 68 of the Constitution determines that "aliens may acquire ownership rights to immovables under conditions provided by law or a treaty ratified by the National Assembly."

With regard to the acquisition of ownership right on immovables, three categories of aliens can be distinguished.

According to international treaties and internal legislation currently in force, individuals and legal persons meeting certain requirements may acquire the ownership of immovables without a decision establishing reciprocity, namely (a) citizens and legal entities of EU member states[44]; (b) citizens and legal entities of OECD member countries[45];

43 Kunc et al., 2018, p. 189.

44 Treaty on the Functioning of the European Union (Consolidated version), 2022, art. 63[1].

45 Act ratifying the Agreement on the Terms of Accession of the Republic of Slovenia to the Convention on the Organisation for Economic Co-Operation and Development, Annex 1 and Annex 2 to the Agreement.

(c) citizens and legal persons of EFTA states[46]; (d) individuals having the status of a Slovene without Slovene citizenship[47]; (e) foreign intestate heirs and foreign testamentary heirs, who would be heirs even in the case of intestate inheritance, when they acquire the right of ownership on immovable by inheritance[48]; (f) aliens from the former republics of the Socialistic Federative Republic of Yugoslavia who met all the conditions for registration before December 31, 1990, but whose registration was not realized or the registration procedure not started.[49]

Natural and legal persons of EU candidate countries may acquire the right of ownership on agricultural land and other immovables on the basis of a legal transaction, inheritance, or decision of a state body if reciprocity is established.[50] Natural persons of EU candidate countries are citizens of those countries, while legal persons of EU candidate countries are legal persons established in those countries. The reciprocity is established in accordance with a Reciprocity Establishing Act (REA[51]).

The third category are citizens and legal persons of other states who may inherit agricultural land, forest, and agricultural holdings under certain conditions. The IA places aliens (literally "foreign citizens" and *tuji državljani* in Slovenian) in the same position as citizens of Slovenia with regard to inheritance, stating that foreign citizens have succession rights equal to those of citizens of the Republic of Slovenia, provided that the principle of reciprocity applies (art. 6 of the IA) and reciprocity is established (art. 4[1] of the REA). As mentioned above, if the alien is an intestate heir or a testamentary heir who would be heir also in a case of intestate inheritance, reciprocity is presumed until proven otherwise. In all other cases, the alien as an heir may acquire ownership right on immovable only if material reciprocity is established (art. 4[2] of the REA).

Although the IA allows foreign citizens to inherit immovable under condition of reciprocity, legal theory also applies this rule by analogy to legal persons.[52] An addi-

46 Zakon ratifikaciji Sporazuma o udeležbi Češke republike, Republike Estonije, Republike Ciper, Republike Latvije, Republike Litve, Republike Madžarske, Republike Malte, Republike Poljske, Republike Slovenije in Slovaške republike v Evropskem gospodarskem prostoru s sklepno listino (Act ratifying the Agreement on the participation of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic in the European economic area with the final act), art. 40 of the Agreement.

47 Zakon o odnosih Republike Slovenije s Slovenci zunaj njenih meja (Act Regulating Relations between the Republic of Slovenia and Slovenians Abroad), 2006, art. 66[1].

48 Zakon o ugotavljanju vzajemnosti (Reciprocity Establishing Act), 2017, art. 4[1].

49 Zakon o ratifikaciji sporazuma o vprašanjih nasledstva (Act on Ratification of the Agreement on Succession Issues), 2002, Annex G, art. 2.

50 Zakon o pogojih za pridobitev lastninske pravice fizičnih in pravnih oseb držav kandidatk za članstvo v Evropski uniji na nepremičninah (Act Governing Conditions for the Acquisition of Title to Property by Natural Persons and Legal Entities of European Union Candidate Countries), 2006.

51 Zakon o ugotavljanju vzajemnosti (2017).

52 Zupančič and Žnidaršič Skubic, 2009, p. 63. and 64. (with regard to art. 2 of the former Reciprocity Establishing Act, which is identical to the art. 2 of the omonimous act currently in force).

tional argument for such interpretation is the legal approach in the REA, according to which the notion of "alien" designates individuals not having Slovenian citizenship as well as legal persons with a registered office outside of Slovenia.[53] Because legal persons may only be testamentary (and never intestate) heirs, reciprocity must be always established by a special decision before a legal person acquires the right of ownership on the immovable.

According to the REA, material reciprocity exists if citizens of the Republic of Slovenia or a legal person established in the Republic of Slovenia may acquire ownership of immovable in the alien's country under the same or similar conditions under which the alien may acquire ownership of an immovable in the Republic of Slovenia, and the fulfillment of these conditions is not significantly more difficult for a citizen of the Republic of Slovenia or a legal entity with a registered office in the Republic of Slovenia than that of conditions which are prescribed for the alien by the legal order of the Republic of Slovenia (material reciprocity, art. 7[1] of the REA).

Reciprocity is determined for each immovable separately (Article 2 of the REA). Depending on the legal regime for agricultural land and other immovables in the alien's country, it is possible that reciprocity may exist for building land but not for agricultural land or vice-versa.

In principle, there are no special requirements for acquiring a share in a legal person owning agricultural land in Slovenia. An exception from this principle is the mechanism of preliminary review of foreign direct investments, which was introduced at the EU level by the Regulation 2019/452/EU and in Slovenia by the Act Determining the Intervention Measures to Mitigate and Remedy the Consequences of the COVID-19 Epidemic.[54] If a foreign investor acquires at least 10% of the share capital or voting rights in a Slovenian company (foreign direct investment), and the activity of the target company refers to one of the risk factors enumerated by the Regulation and the Act, the foreign direct investment must be notified to the ministry of economy. The risk factors may refer, *inter alia*, (a) to land and other immovables, which are essential for the use of critical infrastructure, land, and immovables located in the vicinity of such infrastructure or (b) to the supply of critical resources, including food security, so that agricultural land may also be involved. If a review procedure is initiated, and it is established that the foreign direct investment affects the security and public order of the Republic of Slovenia, the procedure may be prohibited or revoked, or the conditions for its implementation may be determined.[55]

53 Zupančič and Žnidaršič Skubic, 2009, pp. 63. and 64.

54 Zakon o interventnih ukrepih za omilitev in odpravo posledic epidemije COVID-19 (2020), art. 60–75.

55 The theory criticizes the respective provisions (which apply until June 30, 2023) for the lack of precision and unsufficient elaboration of criteria, laid down by the relevant EU Regulation (Peček, 2021, p. 40).

2. Land regulation in the Constitution and the case law of the Constitutional Court

Agricultural land as such is *verbis expressis* addressed by the art. 71 Slovenian Constitution. The first paragraph of this article authorizes the legislator to establish special conditions for land utilization to ensure its proper use, while the second one grants "special protection of agricultural land which is provided by law."

According to the case law of the Slovenian Constitutional Court, space is natural wealth and an irreplaceable good; therefore, the state has powers to assure such conditions for using space, which would preserve it not only from the viewpoint of environmental protection but also from the viewpoint of its regional and urban appearance.[56]

The special protection of agricultural land is ensured by the ALA, the SMA, and other spatial planning legislation.

According to general provisions on spatial planning, the planned use of space is determined by considering sectoral regulations with regard to the physical characteristics of the space and its intended use. Areas of land use are areas of building, agricultural, forest, water, and other land (art. 37 of the SMA).

Agricultural land is determined by the spatial planning documents of local communities as areas of agricultural land in accordance with the law and executive regulations. It is classified as either areas of permanently protected agricultural land or areas of other agricultural land (art. 2[2] of the ALA).

In principle, spatial developments may take place first on land designated for non-agricultural use; if this is not possible, on other agricultural land and—only exceptionally, in the last line—on permanently protected agricultural land, where developments may first take place on agricultural land with a lower land rating (art. 3b of the ALA).

Agricultural land is also specially protected by provisions on special parafiscal duty, which is named compensation on conversion of agricultural land for non-agricultural purposes. The ALA also protects fertile soil. As outlined in Section 1, legislation on agricultural land imposes several restrictions on the inheritance of and legal transactions with agricultural land, forests, and protected farms. In addition, the ALA prescribes the user's duties to cultivate agricultural land with due diligence, to prevent the overgrowing of agricultural land and to apply appropriate farming methods. To improve agricultural land in the public interest, the ALA prescribes the prerequisites and procedures for the following agricultural operations: exchange of agricultural land, rounding off, commassation, land improvement operations, and, since the amendments from 2022, the division of agricultural land co-owned by the state if co-ownership was established after the final decision on denationalization and some other requirements are met.

56 USRS, Odločba U-I-227/00-14 z dne 19. 10. 2000, pt. 19.

The Slovenian Constitution guarantees, *inter alia*, the "right to private property and inheritance" (art. 33).

The notion of private property is interpreted widely in the case law as well as in theory. The Constitutional Court stated that the provisions of art. 33 of the Constitution or art. 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms extends to all legal positions, which have a property value for the individual in a similar way as the right to ownership and which enable an individual to act freely in the field of property and thus shape their own destiny freely and responsibly.[57]

In numerous decisions, the Constitutional Court has ruled that the guaranteed private property encompasses not only the right of ownership[58] but also mortgage[59] and other rights *in rem*, rights of obligation law (rights *in personam*),[60] corporate rights,[61] justified expectation of acquiring a property right,[62] licenses or prohibitions of conducting certain activities,[63] and also pension rights.[64]

The Constitutional Court holds that the constitutional guarantee of property contributes to the provision and realization of individual freedoms, including property freedom, which encompasses four elements: (1) freedom to acquire property, (2) enjoyment of property, (3) right to transfer property, and (4) confidence in acquired rights.[65]

The constitutionally guaranteed right to property and inheritance is inextricably linked to the provision in Chapter 4 ("Economic and Social Relations") of the Constitution, according to which "the manner in which property is acquired and enjoyed shall be established by law so as to ensure its economic, social, and environmental function" (art. 67).

The Constitutional Court holds that legislative regulation that assures the economic, social, and environmental function of property is based on constitutional empowerment and may be qualified not as violation but as definition of the right to property. However, according to art. 67 of the Constitution, the legislator's powers are not unlimited. Statutory provisions that go beyond the limits of this power no longer determine the manner of acquiring and enjoying property but encroach on the right to private property.[66] Drawing the line between the constitutionally conforming manner of acquiring and enjoyment of property, on one side, and the encroachment on the right to private property, on the other, depends not only on the nature of the property but also on the obligations imposed by the legislature on the owner in

57 USRS, Odločba U-I-47/15-8 z dne 24. 9. 2015, pt. 10.
58 USRS, Odločba U-I-122/91 z dne 10. 9. 1992.
59 USRS, Odločba U-I-47/15-8 z dne 24. 9. 2015, pt. 11.
60 USRS, Odločba U-I-267/06-41 z dne 15. 3. 2007, pt. 24.
61 USRS, Odločba U-I-165/08-10, Up-1772/08-14 and Up-379/09-8 z dne 1. 10. 2009, pt. 16.
62 USRS, Odločba Up-77/04-43 z dne 11. 10. 2006, pt. 9.
63 USRS, Odločba U-I-63/00-8 z dne 7. 3. 2002, pt.15.
64 USRS, Odločba Up-770/06-18 z dne 27. 5. 2009, pt. 4 and 5.
65 USRS, Odločba U-I-47/15-8 z dne 24. 9. 2015, pt. 10.
66 USRS, Odločba U-I-70/04-18 from 15. 2. 2007, pt. 6.

determining the manner in which the property is to be enjoyed as well as on other relevant circumstances.[67]

From the Constitutional Court case law, three steps in assessing whether statutory provisions encroach on the right to private property may be distinguished.[68]

If the Constitutional Court ascertains that the challenged measure determines the manner of acquisition and enjoyment of private property and may not be qualified as an encroachment upon the right to private property, only the reasonableness of the measure is assessed. According to an alternative opinion of legal theory, a more appropriate approach would be "to consider the economic, social and environmental determinants as a legitimate, constitutionally determined restrictions of right to private property what does not exclude, *a priori*, the proportionality test."[69]

In the second step, the Constitutional Court verifies whether the challenged measures infringe the constitutionally protected substance (core) of the right to private property. If the substance of the right is not affected and a reasonable ground for the challenged measure exists (soft test of reasonableness), the measure is in conformity with the Constitution.[70]

Statutory provisions that encroach upon the substance of the right to private property are in conformity with the Constitution only so far as they pursue a legitimate goal and the encroachment on the ownership right passes the strict test of proportionality.[71]

The Constitutional Court has extensively dealt with statutory provisions that restricted the inheritance and legal transfer of agricultural land and agricultural holdings, not seldom annulling entire act or entire chapter of an act. Such were decisions on annulling the entire previous Agricultural Land and Private Agricultural Holdings (Farms) Inheritance Act,[72] the entire previous Agricultural Land Act,[73] and the whole Chapter 3 (regulating legal transactions with agricultural land) of the Agricultural Land Act from 1996, which was adopted to replace the previous homonymous Act.[74]

All the three decisions of the Constitutional Court have some general common grounds. Referring to principle of the state governed by the rule of law (art. 2 of the Constitution), the Constitutional Court holds that the statutory provisions must be sufficiently definite and precise, consistent with the requirements of legal certainty; otherwise, they allow the arbitrary conduct of authorities and are incompatible with the rule of law.[75] In addition, statutory restrictions encroaching on entitlements to dispose of agricultural land, forest, and agricultural holding may be in accordance

67 Ibid.
68 Zobec, 2019, p. 322 and 323.
69 Ibid., p. 329.
70 Ibid., p. 323.
71 Ibid.
72 USRS, Odločba U-I-57/92 z dne 3.11.1994.
73 USRS, Odločba U-I-184/94-9 z dne 14.9.1995.
74 USRS, Odločba U-I-266/98 z dne 28.2.2002.
75 USRS, Odločba U-I-57/92 z dne 3.11.1994, pt. 4; USRS, Odločba U-I-184/94-9 z dne 14.9.1995, pt. 11; USRS, Odločba U-I-266/98 z dne 28.2.2002, pt. 14 and 31.

with the Constitution only if and to the extent these measures are justified by the protection of the rights of others (art. 15[3] of the Constitution) directly or through the public interest, provided that they are necessary, appropriate, and proportionate.[76]

The restriction relating to the owner of a protected farm to conclude a contract for annuity for life was found to be not in line with the principles of the social state (art. 2 of the Constitution) because it prevented the holders of protected farms from solving their own social hardship while the legislator had not envisaged and prepared another equivalent solution for them.[77]

The Constitutional Court considered that a broad statutory preemption right on agricultural land considerably restricts the disposal of owners who want to sell their agricultural land, while restrictions with regard to selling and buying agricultural land represent an interference with the right of ownership on agricultural land, for which the legislator does not have a special, explicit authorization in the Constitution. According to the assessment of the Constitutional Court, such interference cannot be justified by the first paragraph of art. 67 of the Constitution, which authorizes legislation to establish the manner of acquiring property in conformity with its economic, social, and ecological function. However, as the statutory preemption right on agricultural land as such was not challenged, the Constitutional Court assessed the relevant provisions only from the standpoint if a weaker preemption right of agricultural organizations (legal persons) in comparison with preemption right of farmers according to the ALA was in conformity with the Constitution. The Constitutional Court ruled that agricultural organizations still enjoyed a statutory preemption right and that the interest of strengthening and rounding off small- and medium-sized (family) farms was a sufficient reason for giving priority to farmers before agricultural organizations.[78]

The Constitutional Court found that statutory provisions, which, in a general way, restricted or denied the right of ownership over agricultural land, were not in conformity with constitutionally guaranteed rights to private property and to inheritance. Such was the case with the maximum of agricultural land that was allowed to be owned by a private agricultural holding according to the previous ALA from 1973[79] or by one natural or legal person according to original text of the present ALA from 1996. Assessing the latter Act, the Constitutional Court ruled that provisions on agricultural

76 USRS, Odločba U-I-57/92 z dne 3.11.1994, pt. 4; USRS, Odločba U-I-184/94-9 z dne 14.9.1995, pt. 11; USRS, Odločba U-I-266/98 z dne 28.2.2002, pt. 21.

77 USRS, Odločba U-I-266/98 z dne 28.2.2002, pt. 29.

78 Odločba U-I-266/98 z dne 28.2.2002, pt. 36. However, after the abrogation of land maximums for private ownership, no threshold is prescribed over which a holder of a (family) farm would be obliged to register as an individual entrepreneur or to establish a legal person (an agricultural organization). Thus, the hypothesis that all family farms are small- or medium-sized, is not correct. On the other hand, agricultural individual entrepreneurs and agricultural organizations dealing with agriculture may also be micro-, small-, or middle-sized enterprises. Agricultural individual entrepreneurs have statutory preemption right of the same priority as agricultural organizations (cf. Avsec, 2020, p. 22).

79 USRS, Odločba U-I-122/91 z dne 10. 9. 1992.

land maximum were inconsistent with the constitutional provisions on free economic initiative and unrestricting of competition (art. 74 of the Constitution).[80]

Assessing the previous Agricultural Land and Private Agricultural Holdings (Farms) Inheritance Act, the Constitutional Court held that special rules concerning the inheritance of agricultural land and private farms were not contrary to the Constitution, for thereby the commitment of Slovenia to the social state (art. 2 of the Constitution) was observed. Restrictions on a testator's freedom and on a heir's right to inherit agricultural land did not infringe the principle of equality before the law (art. 14 of the Constitution) because the differentiation was introduced by statute based on generally acknowledged specificities. However, the legal restriction of property rights on agricultural land to limit the transfer of agricultural land to those who do not cultivate the land exceeded the scope of art. 67[2] of the Constitution as it completely deprived a certain category of citizens of the possibility to inherit agricultural land or farms.[81]

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

The Treaty on the Functioning of the European Union (TFEU) enumerates four freedoms on which the internal market is based, namely free movement of goods, persons, services, and capital (art. 26[2]). According to the Council Directive 88/361/EEC, the free movement of capital also covers investment in real estate through the purchase of buildings and land, the construction of buildings of private persons for gain or personal use, and the acquisition of usufruct, easements, and building rights (Annex I). The provisions on the free movement of capital and payments of the TFEU (art. 63–66) can usually be relatively easily distinguished from the free movement of goods, but in some situations, they are also closely linked to other freedoms, such as the right to establishment (art. 49–55 of the TFEU), free movement of workers (art. 45–48 of the TFEU) and free movement of services (art. 56–62 of the TFEU).

Slovenia became a member of the European Union on May 1, 2004. Unlike some other countries that acceded to the EU at the same time and were allowed to maintain, during a transition period, certain derogations from the free movement of capital with regard to agricultural land, Slovenia had already made important steps to adapt its legal regime to *acquis communautaire* in this area before the accession. Due to international reasons, the constitutional provisions on conditions under which the aliens may obtain ownership right on immovables had been adapted to *acquis communautaire* in two steps before Slovenia's accession to the EU in 2004.[82]

80 USRS, Odločba U-I-266/98 z dne 28. 2. 2002, pt. 33.
81 USRS, Odločba U-I-57/92 z dne 3. 11. 1994, pt. 2.
82 Fikfak, 2019a, p. 549.

The first provisions of the Slovenian Constitution, adopted in 1991, established very strict conditions under which aliens may acquire ownership right on land and other immovables.

The working draft of the Constitution from August 31, 1990 foresaw that conditions under which aliens could acquire ownership right on immovables would be outlined by constitutional act or, according to a variant proposal, by an ordinary act (art. 66[2]).[83] After a public discussion, the Draft Constitution from October 12, 1991 added a more restrictive third option to the two already mentioned, namely that only citizens of the Republic of Slovenia could hold ownership right on land (art. 66[2]).[84]

The final proposal of Constitution of the Republic of Slovenia (dated December 12, 1991) contained a compromise solution between the three options. It foresaw that aliens might acquire ownership right on immovable under conditions established by the Act, adding that they were allowed to acquire ownership right on land only by inheritance under a condition of reciprocity.[85] This provision was, with a small linguistic improvement, taken over in the original text of art. 68 of the Constitution adopted on December 23, 1991: "Aliens may acquire ownership rights to real estate under conditions provided by law. Aliens may not acquire title to land except by inheritance, under the condition of reciprocity."[86]

In the final proposal for the Constitution, the following grounds were officially stated for extremely strict conditions under which aliens were allowed to acquire the ownership rights on agricultural and other land:

> "Commission on Constitutional Affairs has assessed that, taking into account the geographical and economic position of Slovenia and economic power of its citizens, it would not be appropriate to allow foreigners to acquire ownership right on immovables too widely. Especially the land must be protected against the 'selling off' to foreigners. Of course, European regulation and European standards on the ownership right of aliens on immovables must also be taken into account."[87]

A similar view could also be found in one of the first commentaries to the Constitution, namely that "the geopolitical position of Slovenia and its size (as a matter of fact, smallness) requires a permanent constitutional restriction of ownership right on immovable or, respectively, exclusion of ownership right on land."[88] The literature of that time claimed that a completely liberalized land market would lead to undesirable

83 Delovni osnutek Ustave Republike Slovenije, 2001, p. 82.
84 Osnutek Ustave Republike Slovenije, 2001, p. 117.
85 Predlog Ustave Republike Slovenije, 1991, art. 68.
86 Ustava Republike Slovenije, 1991, art. 68. (English translation)
87 Predlog Ustave Republike Slovenije, 1991, p. 15.
88 Ude, 1992, p. 53.

social consequences with regard to an unfavorable economic situation immediately after Slovenia gained independence.[89]

The negotiations on Europe Association Agreement between Slovenia and the then European Communities ended in 1996 with the Spanish compromise, where Slovenia confirmed two commitments, namely (1) to allow those citizens of EU member states who had permanently resided on the territory of the Republic of Slovenia for a period of 3 years, on a reciprocal basis, the right to purchase property from the entry into force of the Association Agreement, while (2) other citizens of EU member states would be allowed, on a reciprocal basis, the right to purchase property in Slovenia on a nondiscriminatory basis by the end of the fourth year from the entry into force of the Association Agreement.[90]

Before Slovenia ratified of the Europe Association Agreement, art. 68 the Constitution had been amended in 1997, so that the conditions under which aliens were allowed to acquire ownership rights to real estate had to be established by the law or ratified treaty adopted by a two-thirds majority of all deputies:

> "Aliens may acquire ownership rights to real estate under conditions provided by law or if so, provided by a treaty ratified by the National Assembly, under the condition of reciprocity. Such law and treaty from the preceding paragraph shall be adopted by the National Assembly by a two-thirds majority vote of all deputies."[91]

After the Europe Association Agreement entered into force on February 1, 1999,[92] aliens were allowed to acquire ownership right on immovables if they were citizens of a EU member state, if they had resided for at least 3 years on the territory of Slovenia, and if reciprocity existed between Slovenia and the alien's member state. According to the first Reciprocity Establishing Act from 1997, a material reciprocity was necessary.[93]

The Europe Association Agreement did not allow community legal persons to acquire the ownership right on immovables in Slovenia, but their subsidiaries established there could acquire and sell real property and enjoy, as regards natural resources, agricultural land, and forest, the same rights as Slovenian nationals and companies, if these rights were necessary for the conduct of the economic activities for which they were established.[94]

89 Vlahek, 2008, p. 8.
90 Zakon o ratifikaciji Evropskega sporazuma o pridružitvi med Republiko Slovenijo na eni strani in Evropskimi skupnostmi ..., 1997, Annex XIII.
91 Ustava Republike Slovenije, 1991, art. 68 (English translation).
92 Obvestilo o začetku veljavnosti nekaterih sporazumov Republike Slovenije z Evropskimi skupnostmi, 1999.
93 Zakon o ugotavljanju vzajemnosti, 1999.
94 Europe Agreement establishing an association between the European Communities ..., 1999, Art. 45[7][b].

The Treaty of Commerce between the USA and the Kingdom of Serbia from 1881 foresaw that the citizens of each contracting party were entitled to acquire the ownership right on immovable located in the other contracting party under the most favored conditions established by the latter contracting party for citizens of any foreign state (most favored nation clause).[95] The Treaty was succeeded by the Kingdom of Serbs, Croats, and Slovenes (1918); the Kingdom of Yugoslavia (1929); the Democratic Federative Yugoslavia (1945); the Federative People's Republic of Yugoslavia (1946); the Socialistic Federative Republic of Yugoslavia (1963); and the Republic of Slovenia (1991).[96] According to the most favored nation clause from this Treaty, USA citizens could acquire ownership rights on immovable in Slovenia under the same conditions as EU citizens after the Europe Association Agreement entered into force.

Before accession to the EU, Slovenia concluded treaties on property issues with Croatia[97] and Macedonia.[98] Each treaty allowed natural and legal persons of the other contracting party to acquire ownership right and other property rights on immovables and to apply for their entry in the land register on the territory of Slovenia if the valid legal basis of the acquisition had arisen before the independence of the contracting party on the territory of which the immovable was located.[99]

The citizens of other states, however, could acquire ownership right on immovables only according to the IA based on inheritance and under condition of reciprocity (art. 6 of the IA).

Starting from February 1, 2003, the Europe Association Agreement allowed all EU citizens to acquire ownership right on agricultural land, forests, and other immovables in Slovenia under the same conditions as Slovene citizens if the immovable concerned was necessary for conducting economic activity.

To enable the full legal effects of the new legal regime for EU citizens from February 1, 2003, the ALA was amended in 2002, so that the status of farmer was no longer reserved only for local residents (Slovenian: *občani*, residents of municipalities), but it became open for those individuals who were entitled to have the same position as Slovenian citizens acquiring ownership right on agricultural land. The equal position also included the statutory preemption right of farmers.

95 Treaty of Commerce between the United States of America and Serbia, 1881.

96 Akt o notifikaciji nasledstva sporazumov nekdanje Jugoslavije z Združenimi državami Amerike, ki ostajajo v veljavi med Republiko Slovenijo in Združenimi državami Amerike (Act on succession to agreements between the former Yugoslavia and the United States of America that shall remain in force between the Republic of Slovenia and the United States of America), 2020.

97 Zakon o ratifikaciji Pogodbe med Republiko Slovenijo in Republiko Hrvaško o ureditvi premoženjskopravnih razmerij (Act on the Ratification of the Treaty between the Republic of Slovenia and the Republic of Croatia on the Regulation of Property Relations), 1999.

98 Zakon o ratifikaciji Pogodbe med Republiko Slovenijo in Republiko Makedonijo o ureditvi medsebojnih premoženjskopravnih razmerij (Act on the Ratification of the Treaty between the Republic of Slovenia and the Republic of Macedonia on the Regulation of Property Relations), 1999.

99 See the text of the Treaty with Croatia (Art. 4[1]) and the Treaty with Macedonia (Art. 4[1])

In 2003, art. 68 of the Constitution was amended for the second time, and the new wording was shorter than previous formulations: "Aliens may acquire ownership rights to real estate under conditions provided by law or a treaty ratified by the National Assembly."[100]

According to the Act concerning the Conditions of Accession (2003), seven acceding member states (Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, and Slovakia) were each granted a transitional period for maintaining existing legislation that restricted the acquisition of agricultural land and forest by citizens of other member states. With regard to the free movement of capital, Slovenia was not granted such transitional measure, but it was allowed to resort to the general safeguard clause for a period of up to a maximum of 7 years after the date of accession.[101]

Since 2004, EU citizens and legal persons of EU member states may acquire ownership rights on immovables on all legal bases without the requirement of reciprocity.[102]

According to publicly accessible information, the European Commission has so far initiated no infringement procedure against Slovenia with regard to the acquisition of agricultural land in the country,[103] and no judgment or decision of the Court of Justice of the European Union was found either.

The Court of Justice of the European Union has an important role in interpreting measures that may depart from the free movement of capital. Exceptions may be either discriminatory measures based on explicit exceptions provided by the TFEU (certain provisions of the tax law and measures for prevention of infringement of national law and regulations, (art. 65[1] of the TFEU) or indistinctly applied measures based on exceptions explicitly allowed by the same provision of the TFEU) or adopted in the overriding public interest, provided that they are suited to attaining the objective sought, do not go beyond what is necessary to achieve that objective and cannot be replaced by less restrictive alternative means (principle of proportionality).[104] Some judgments the EU Court of Justice adopted in this field will be briefly referred to in the next chapter dealing with the national legal instruments mentioned in the Commission Interpretative Communication on the Acquisition of Farmland and European Union Law (2017).

100 Ustava Republike Slovenije, 1991, art. 68. (English translation).

101 Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, Annex XIII, List referred to in Article 24 of the Act of Accession: Slovenia, 4. Free movement of capital, 2003.

102 Tratnik and Vrenčur, 2015, p. 1456; Štemberger, 2020, p. 31.

103 European Commission at work, 2022.

104 Commission Interpretative Communication on the Acquisition of Farmland and European Union Law, 2017, pt. 2(b).

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

4.1. Prior authorization

In Slovenia, compliance with special provisions on the legal transfer of agricultural land, forests, and farms is ensured through preventive administrative control (see subsection 1.4.1.).

As the notarial attestation of the alienator's signature is a condition *sine qua non* for the transfer of ownership rights on the new acquirer, prior administrative control prevents violation of the special provisions on legal transfer of agricultural land and also protects the interests of contractual parties.[105] The Court of European Communities ruled that the provisions of the founding treaties did not preclude the acquisition of agricultural land being made subject to the grant of prior authorization if the measure pursued an objective in the public interest in a nondiscriminatory way, was appropriate for ensuring that the pursued aim is achieved, and did not go beyond what is necessary for that purpose.[106] In 2002, the Constitutional Court of Slovenia annulled the entire Chapter 3 in the original version of ALA, stating, *inter alia*, that statutory provisions were not in accordance with the principles of the rule of law, being too vague in terms of content, making arbitrary decisions of administrative authorities possible and leaving those interested in too much legal uncertainty as to whether the already concluded transaction on the sale or purchase of agricultural land would be valid.[107]

4.2. Preemption rights

The priority right to buy agricultural land, forest, and farm is stated by the ALA and other legislation which pursues public interest in the field of agricultural policy and other (spatial planning, water, nature conservation, etc.) policies (see subsection 1.4.3.).

The Commission's Interpretative Communication explicitly states that preemption right for farmers and tenants "could be considered as proportional restriction" since it is less restrictive than the prohibition of acquisition of agricultural land by non-farmers.[108] The same could be said for preemption right of agricultural organizations. The co-owner's statutory preemption right is laid down to make decisions on cultivation and the use of agricultural land easier, which is not only in the interest

105 Toplak Bohinc, 2013, p. 60.

106 Court of Justice of the European Communities, Judgment 23 September 2003, Case C-452/01, Margarethe Ospelt and Schlössle Weissenberg Familienstiftung, pt. 34.

107 USRS, Odločba U-I-266/98 z dne 28. 2. 2002, pt. 31.

108 Commission Interpretative Communication on the Acquisition of Farmland and European Union Law, Sect. 4, pt. b). The statutory preemption right of neighbouring farmer(s) with a higher priority than that of other farmer(s) directly pursues the goals of rounding off of agricultural land and more rational cultivation (see also Hafner, 2017, p. 22).

of other co-owners but also in the public interest.[109] The National Agricultural Land and Forest Fund, as the statutory preemptor in the last place, fulfills public interest by "taking care of the sustainable management of agricultural land and farms in a way which pursues the goals of adapting to climate change, preserving nature and maintaining good water status" (art. 4[1] [1]of the NALFFA).

4.3. Price controls

The price control in the legal transfer of agricultural land through sales contracts was foreseen by the original version of the ALA from 1996. The provisions on pre-emption right with regard to agricultural land gave any prospective buyer the option to initiate a procedure before the administrative authority to establish the value of the offered land according to the prescribed methodology within 30 days after the offer was filed on the notice board. The seller (offeror) who did not withdraw the offer within 15 days after having learned of the established value was obliged to sell this land at a price equal to the established value. In such case, the price in the seller's offer was adjusted to the established value, and buyers could accept the new offer in writing within 15 days after the amended offer had been filed on the notice board of the administrative authority. If the value was not determined within 30 days after the deadline for the acceptance of the original offer expired, the seller was allowed to sell the land at the originally offered price (art. 15[2] of the ALA from 1996).

Annulling all provisions in Chapter 3 of the ALA in 2002, the Constitutional Court held the official setting of a sale price of agricultural land to be inconsistent with the right to private property and free economic initiative in so far as it did not concern the statutory preemptors.[110] Although such decision does not entirely exclude price control in the legal transfer of agricultural land, the legislator, while adopting new provisions in 2003, did not regulate price control for sale of agricultural land, forests, and agricultural holdings.

Taking into account the relatively high prices of agricultural land in some regions of Slovenia compared with other EU member states (published by Eurostat on November 30, 2021[111]), the issue of relationship between the price and value of agricultural land is important as excessively high sale prices may actually circumvent and completely water down the purpose of the statutory preemption right.

4.4. Self-farming obligation

According to a decision of the Constitutional Court, the restriction of transfer of agricultural land for those who do not cultivate the land exceeds the scope of the legislative regulation of inheritance (art. 67[2] of the Constitution) as such regulation

109 See also Hafner, 2017, p. 22.
110 USRS, Odločba št. U-I-266/98 z dne 28. 2. 2002.
111 Agricultural land prices: huge variation across the EU, 2021.

completely deprives certain categories of citizens of the opportunity to inherit agricultural land or farms.[112]

4.5. Qualifications in farming

The original text of the ALA from 1996 prescribed that the administrative authority should deny the approval of legal act for transfer of ownership right on agricultural land "if the acquirer was not qualified for farming or it was otherwise evident that the acquirer would not cultivate the agricultural land in accordance with the statutory provisions" (art. 19[3][4]). The Constitutional Court ruled that this requirement was formulated too vaguely, making arbitrary decisions of the administrative authority possible. The Constitutional Court did not exclude the qualification requirement *a priori* if the legislator could provide firm reasons and evidence for such a rule. According to the reasoning of the Court of the European Communities, the qualification requirement could be replaced by the acquirer's obligatory assurances that the land will be properly farmed.[113]

4.6. Residence requirements

The Slovenian law does not require the acquirer of agricultural land, forest, or agricultural holding to reside on or near the land in question. The Court of European Communities ruled that the requirement of fixed residence of the acquirer on the agricultural property is not compatible with provisions on the free movement of capital.[114]

4.7. Prohibition on selling to legal persons

The law contains no prohibition of selling agricultural land to a legal person. Legal persons who satisfy conditions to be considered agricultural organizations have a statutory preemption right—albeit on the second-to-last place. As protected farms may belong only to individuals, the IAHA prohibits legal persons from inheriting the protected farms as testamentary heirs (arg. *a contrario*, art. 21[2]). The Administrative Court ruled that a protected farm may not be in-kind contribution in a newly established legal entity as it would lose its status and the prohibition of fragmentation and division of farm would be circumvented.[115]

4.8. Acquisition caps

The Constitutional Court has ruled twice against the acquisition cap, annulling first (in 1992) the then-existing maximum of agricultural land and forest for natural persons established by the ALA from 1973, and second, in 2002, the provision on the

112 USRS, Odločba št. U-I-57/92 z dne 3. 11. 1994.
113 Court of Justice of the European Communities, Judgment 23 September 2003, Case C-452/01, Margarethe Ospelt and Schlössle Weissenberg Familienstiftung, pt. 52.
114 Court of Justice of the European Communities, Judgment 25 january 2005, Case C-370/05, Uwe Kay Festersen, pt. 48.
115 UprSRS, Sodba št. U 1271/2008 z dne 20. 4. 2010.

maximum surface that should not be exceeded by future acquisitions of agricultural land, which was introduced by the ALA in 1996. The European Commission considers that the acquisition cap may be compatible with EU law if it pursues a legitimate goal of public interest (e.g., a more balanced ownership structure) and does not infringe EU fundamental rights and general principles of EU law, such as those of non-discrimination and proportionality.[116]

4.9. Privileges in favor of local acquirers

The provisions on the statutory preemption rights on agricultural land, forest, and agricultural holding are indistinctly applicable to local and other acquirers, domestic and foreign citizens, and legal persons. Although some persons holding statutory preemption rights are more likely to be domestic citizens and domestic legal persons (e.g., a co-owner or a farmer owning agricultural land bordering that offered for sale), the preemption right of these persons pursues a legitimate objective in public interest (to make decisions on cultivating the agricultural land by reducing the number of co-owners easier or to develop viable farms by increasing their size and rounding off their land[117]), and it seems to be proportional as it does not exclude sale to non-local acquirers, which may, as co-owners, neighboring or other farmers, and agricultural organizations, enjoy a statutory preemption right of the same or a subsequent priority order.

4.10. Condition of reciprocity

From the standpoint of condition of reciprocity for the acquisition of agricultural land by alien persons, three categories of individuals and legal persons may be distinguished. Individuals and legal persons who are entitled to inherit or to acquire agricultural land through legal transactions without condition of reciprocity (e.g., citizens and legal persons of the European union) belong to the first category; those who may acquire agricultural land on the basis of inheritance, legal transaction, or decision of the state authority but on condition of reciprocity belong to the second category; while the third category includes individuals and legal persons who may acquire agricultural land only by inheritance and on the condition of reciprocity (for more details, see subsection 1.7.).

Conclusion

The special protection of agricultural land in article 71[2] of the Slovenian Constitution could be explained by the relative scarcity of agricultural land in Slovenia. In comparison with other countries, the share of cropland in the total surface of Slovenia

116 Commission Interpretative Communication on the Acquisition of Farmland and European Union Law, 2017, p. 16.
117 Ibid., p. 17; Hafner, 2017, p. 22.

represents only 11.0% (24.2% in the EU as a whole), that of grassland 17.8% (17.4% in the EU), while the largest share of the total surface is occupied by woodland and shrubland (65.8% in Slovenia and 46.8% in the EU).[118] A major part of the utilized agricultural land in Slovenia is situated in areas with natural constraints for agricultural production (76% in 2020).[119] This situation is addressed by a Constitutional provision, by which "[t]he state shall promote the economic, cultural, and social advancement of the population living in mountain and hill areas" (art. 71[3]). Together with forestry and fisheries, agriculture contributed 2.3% to total value added and 6.9% to total employment in Slovenia (data for 2020).[120] In the last decades, the environmental role of agriculture has become more important. As Slovenia is rich in terms of biodiversity, almost one fourth (24.7%) of all utilized agricultural land is situated in the Natura 2000 areas,[121] and 11.4% of agricultural land lies in the protected areas of national, regional, and landscape parks.[122]

As the agricultural land is highly fragmented (the average surface of agricultural land per agricultural holding was only 7.1 hectares in 2020[123]), special provisions regulate inheritance and legal transactions for the transfer of ownership right on agricultural land and forest as well as agricultural lease contracts with a view to preventing deterioration and stimulating the improvement of parcel and farm structure.

From the standpoint of agricultural land policy goals, a drawback of the current, quite extensive special provisions on legal transactions with agricultural land is a rather casuistic approach that is, to a great extent, linked to certain types of legal transactions (e.g., sale and donation). Namely, the contractual freedom allows interested parties to conclude not only other statutorily regulated types of contracts but even innominate and mixed contracts that have the same impact on the structure of agricultural land plots and agricultural holdings as the type of legal transaction to which the statutory provisions explicitly refer. Therefore, agricultural land legislation should be more focused on the effects of legal transactions in terms of preservation and improvement of production potential than to the legal form (type) of transaction.

The Constitutional Court has assessed various statutory provisions on the inheritance of and legal transactions with agricultural land and agricultural holdings several times. Interpreting the constitutional authorization of the legislator to establish the manner for acquiring and enjoying property so that the economic, social, and environmental functions of property are ensured (art. 67), the Constitutional Court holds that the legislator may, through statutory provisions on property rights on agricultural land, define the manner of acquirement and enjoyment of property without encroaching on the right to private property in more detail (art. 33 of the

118 Land cover statistics, 2022.
119 Bedrač et al., 2021, p. 108.
120 Slovenain Agriculture in Numbers 2021, 2022, p. 3.
121 Bedrač et al., 2021, p. 109.
122 Ibid., p. 110.
123 Slovenian Agriculture in Numbers 2021, 2022, p. 3.

Constitution). The constitutional right to private property and to inheritance may be restricted only to achieve a legitimate goal (protecting rights of others or ensuring the public interest) under the condition that the restriction is adequate, necessary, and proportional.[124] It is interesting that the Constitutional Court, when adopting the decision on annulling provisions on the legal transfer of agricultural land (2002), stated that the legislator (State Assembly) as opposing party "did no demonstrate that stricter substantive and procedural restrictions of legal transactions with agricultural land, beside the special legal protection of 'protected' farms and enacted preemption rights, were essential, adequate and proportional."[125] This means that draft bills containing special provisions on the legal transfer of agricultural land and agricultural holdings should be based on a comprehensive analysis of developments in this area and on the evaluation of policy options. The amendments to the ALA from March 16, 2022 (nearly 50 years after Slovenia adopted its first Agricultural Land Act in 1973), provide for the systematic gathering and evidence of data relating to the legal transfer of agricultural land, which must be, after a statistical procession, published in periodical reports on agriculture and agricultural land by the competent ministry (amended art. 1c).

124 For right to private property, cf. USRS, Odločba U-I-266/98 z dne 28.2.2002, pt. 21; for right to inheritance, cf. Dežman, 2019, p. 331.
125 USRS, Odločba U-I-266/98 z dne 28.2.2002, pt. 26.

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