

# Acquisition of Agricultural Land by Domestic and Foreign Legal Entities: Legal Prospects for Ukraine and other Countries

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## Abstract

The aim of the research was to assess the legal framework for the acquisition of agricultural land by domestic and foreign legal entities, using the rules and regulations on the agricultural land market in Ukraine as an example of a system with ill-founded restrictions in this area. To accomplish this task, the authors resort to a set of scientific methods, including comparative review, systematic review and standard techniques of text analysis. The main result of the research was that it is imperative for Ukraine, taking into account that European integration is a key and unalterable priority of its foreign policy, to grant a general permission for foreign natural and legal persons to acquire agricultural land, as well as to introduce flexible approaches to setting acquisition limits. It is concluded that, the attention of policy makers should also focus on the need to deploy legal and institutional mechanisms that can respond to the challenges and risks associated with a significant degree of freedom of movement of agricultural land. This could include establishing in contracts for the alienation of agricultural land the obligations of buyers in relation to its rational use.

**Keywords:** agricultural enterprises; land; agricultural policy; land use; comparative law.

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## Adquisición de tierras agrícolas por entidades jurídicas nacionales y extranjeras: perspectivas jurídicas para Ucrania y otros países

### Resumen

El objetivo de la investigación fue evaluar el marco jurídico para la adquisición de tierras agrícolas por parte de personas jurídicas nacionales y extranjeras, utilizando las normas y reglamentos sobre el mercado de tierras agrícolas en Ucrania, como ejemplo de un sistema con restricciones mal fundadas en este ámbito. Para llevar a cabo esa tarea, los autores recurren a un conjunto de métodos científicos, que incluyen revisión comparativa, revisión sistemática y técnicas estándar de análisis de textos. El principal resultado de la investigación fue que es imperativo que Ucrania, teniendo en cuenta que la integración europea es una prioridad clave e inalterable de su política exterior, conceda un permiso general para que las personas físicas y jurídicas extranjeras adquieran tierras agrícolas, así como que introduzca enfoques flexibles para fijar los límites de adquisición. Se concluye que, la atención de los responsables políticos también debería centrarse en la necesidad de desplegar mecanismos jurídicos e institucionales que puedan responder a los retos y riesgos asociados a un grado significativo de libertad de circulación de tierras agrícolas. Ello podría incluir el establecimiento en los contratos de enajenación de tierras agrícolas de las obligaciones de los compradores en relación con su uso racional.

**Palabras clave:** empresas agrícolas; tierras; política agrícola; uso de la tierra; derecho comparado.

### Introduction

Providing broad segments of the population with a sufficient quantity and assortment of safe and quality food while simultaneously strengthening economic incentives for agricultural producers to develop their material and technical base and hire more well-qualified personnel require proper legislative regulation of the agricultural land market and effective institutional support for its proper functioning.

The circulation of agricultural land is an area with significant sensitivity to a wide range of national political and economic factors, due to which there are no unified reference models of legal and institutional mechanisms for regulating this process at the international level. However, policy-makers responsible for the infrastructure of agricultural land markets could rely on the experience of many countries with a well-established land market infrastructure giving due weight to current trends in their development.

This is especially important for the agricultural land market of Ukraine, which was formed in an extremely unfavorable political and economic context and which, due to typical fears related to the risk of abuse of Ukraine's greatest national wealth, was burdened with numerous unjustified restrictions. First of all, they are related to the conditions of acquisition of ownership rights to agricultural land by legal entities, acquisition caps and the impossibility of acquisition of ownership rights to land by foreigners.

Comparative analysis of legislative framework for the functioning of the agricultural land market, as well as review of program documents of authoritative international organizations on this issue indicate that there are absolute restrictions on the circulation of agricultural land, which are in most cases unjustified and reduce the potential of agricultural land markets. Instead, it is recommended to introduce tools to prevent and counter abuse by owners of agricultural land. This recommendation is also supported by a significant number of scientific studies, including the European Commission's Joint Research Center study entitled 'Agricultural land market regulations in the EU Member States' and other research materials of the European Commission as well as spot studies by Deininger, Yan and other researchers.

Thus, the purpose of this article is to assess the legal framework for the acquisition of agricultural land by domestic and foreign legal entities using the rules and regulations on the agricultural land market in Ukraine as an example of a system with ill-founded restrictions in this area. Accomplishing that task one should resort to a special set of scientific methods, including comparative review methods as well as systematic review methods and standard techniques of text analysis.

## Development

### **The general significance and certain peculiarities of the legal framework for the circulation of farmland in Ukraine**

First of all, in order to form a sufficient research background, we will briefly provide key economic and historical information regarding Ukrainian agricultural lands.

It is common knowledge that:

Ukraine is the ninth richest in arable land. Of its 32.5 million hectares, some 13 million hectares of farmland contain a rare treasure – the extremely fertile *chernozem* ("black soil," humus-rich grassland soil). The country is Europe's largest stock of such soils, and its capacity as a farm goods producer and exporter is unquestionable. However, a quarter of these riches belongs to the state. Since Ukraine's independence, much of the country's farmland has been divided

into small plots and is being cultivated by about 7 million farmers and part-time farmers who cannot sell their fields. For nearly two decades, a ban on all commercial turnover of land has been in effect. Ukraine holds nearly 40 percent of the world's stock of "black soil," the most valuable type of farmland. According to the government, it covers more than half of the country's surface (Kowal, 2022: 12).

The importance of deploying an effective, transparent and fair market mechanism for the circulation of agricultural land for Ukraine stems from the general laws of influence of the possibility and principles of the circulation of land as a means of production on the level of economic well-being of society.

There is overwhelming evidence for the notion that well-functioning land markets can, in principle, contribute to broad-based rural development in several ways:

first, where the ownership distribution of land differs from the optimum operational structure, land markets can transfer land from less to more productive producers and thus increase productivity. Second, transferable land rights make it less costly for rural residents to take jobs in the non-farm economy, something that is likely to boost the off-farm sector. In other words, the land is a store of wealth and a financial asset, and is used to hedge against inflation, which makes it attractive for investors who lack the skills and/or interest to farm. Third, transferability of land increases investment incentives because those who make such an investment can enjoy the benefits even if they are no longer able to personally use the land. Finally, the ability to transfer land at low cost will reduce the transaction cost of accessing credit and can, if there is effective demand for credit, increase credit supply as land is often used as collateral (Deininger, 2003: 1017).

Conversely, an absence of well-defined or adequately enforced land property rights in land hampers the functioning of both land sales and rental markets and leads to inefficient outcomes (European Commission's Joint Research Centre, 2021: 8). Even if well implemented, such restrictions on land sales have almost invariably ended up weakening property rights, increasing the cost of land transfers, and driving transactions into informality. As the benefits from transferring land will become more relevant with economic development and specialization, the cost of such restrictions is likely to increase over time. Providing other safety nets may be a cheaper option to ward off distress sales and destitution than outlawing land sales (Deininger, 2003: 1020).

Having reached the understanding that in order to realize the exceptional potential of Ukrainian agricultural lands as fully as possible, it is necessary to integrate them into the market circulation of goods, the legislators introduced the rules of circulation of agricultural lands of Ukraine. When clarifying the specifics of the conditions for acquiring land of this category it seems advisable to refer to the relevant legislative provisions.

In particular, Article 130 § 1 of the Land Code of Ukraine of 2001 prescribes that, along with citizens of Ukraine, Ukrainian territorial communities and the state of Ukraine itself, from January 1, 2024, Ukrainian legal entities, created and registered under the legislation of Ukraine, participants (shareholders, members) of which are only citizens of Ukraine and/or the state of Ukraine and/or Ukrainian territorial communities may acquire agricultural land. At the same time, foreign individuals and legal entities are prohibited from acquiring shares or membership in legal entities (except for the statutory capital of banks) that are owners of agricultural land.

This prohibition shall be lifted on the condition and from the date of approval of the respective decision in an all-Ukrainian referendum, with the exception of certain special restrictions related to agricultural land plots located closer than 50 kilometers from the state border of Ukraine, or land sales market operations by individuals and legal entities, in respect of which the special economic and other restrictive measures (sanctions) were imposed and some other special situations (Land Code of Ukraine, 2001: Article 130).

In addition, it is worth mentioning that the legislative provisions of Article 130 § 2 of the Land Code of Ukraine of 2001 determine that the total area of agricultural land owned by a citizen of Ukraine cannot exceed 10,000 hectares. The total area of agricultural land owned by a legal entity (except banks) may not exceed the total area of agricultural land owned by all its participants (members, shareholders), but not more than 10,000 hectares. Violation of these requirements is grounds for invalidating the deed by which ownership of the land plot is obtained, as well as for confiscation of the land plot (Land Code of Ukraine, 2001: Article 130).

At the same time, according to Article 130 § 7 of the Land Code of Ukraine of 2001, the sale of state and municipal agricultural land is prohibited (Land Code of Ukraine, 2001: Article 130). At the same time, the opening of the land sales market does not imply the cancellation of privatization of state and municipal land. As the law prescribes:

Citizens of Ukraine shall have the right to free transfer of land plots from state-owned or municipal lands in the following sizes: a) for farming enterprise, in the size of land share, determined for members of agricultural enterprises located on the territory of the village, settlement, city council, where the farm is located. If there are several agricultural enterprises on the territory of a village, settlement or city council, the size of the land share shall be determined as the average for these enterprises. In the absence of agricultural enterprises on the territory of the relevant council, the size of the land share shall be determined as the average for the district; b) for individual farming, not more than 2.0 hectares; c) for gardening – not more than 0.12 hectares; d) for the construction and maintenance of a residential house, farm buildings and structures (homestead) in villages, not more than 0.25 hectares; in settlements, not more than 0.15 hectares; in cities, not more than 0.10 hectares; e) for individual country house construction, not more than

0.10 hectares; f) for individual garage construction, not more than 0.01 hectares. Free transfer of land plots to the ownership of citizens is allowed once for each type of use (Interfax Ukraine, in: <https://www.census.gov/popclock>, 2021).

The purchase and sale of a plot of land is carried out in compliance with the pre-emptive right to purchase it. It is set in favour of tenants of land plots, as well as, with some exceptions, in favour of a person who has a special permit to extract minerals of national importance within the boundaries of the subsoil plot granted to such a person for use. The pre-emptive right can be transferred to another person with a written notification of the owner of respective plot of land. Privately owned agricultural land can be alienated only under contracts of sale, gift, lifetime care, inheritance contract, barter or via its adding to the statutory capital or through it being charged to repay the debt (Land Code of Ukraine, 2001: Article 130).

The details of agreements for acquisition of agricultural land are the subject of negotiations between its participants, while the law prohibits until 2030 the sale of land for less than its normative monetary value. This indicator is used to determine the amount of land tax, rent for land plots of state and municipal property, the amount of duty for barter, inheritance and donation of land plots.

In 2018, the Verkhovna Rada of Ukraine extended until 2023 the period during which indexation of the normative monetary valuation of agricultural land will not be carried out in order to save money for farmers. Participants in the land acquisition agreement will have to pay a 5% personal income tax and 1.5% military levy; taxes and fees will be calculated from the value of the plot specified in the land acquisition agreement, which cannot be lower than its normative monetary value, calculated by the authorized body (Interfax Ukraine, in: <https://www.census.gov/popclock>, 2021).

Analyzing in the light of the task of this research the rules for the circulation of agricultural land provided by the law of Ukraine, it seems fair to state that the peculiarities of these rules are that they set forth the absolute prohibition of acquiring agricultural land by foreign legal entities and individuals directly or through participation in Ukrainian legal entities, until the approval of the contrary decision in the all-Ukrainian referendum. In addition, it is noteworthy the acquisition cap for a legal entity is 10,000 hectares.

Moreover, by law, in most cases, tenants of land plots have a pre-emptive right to purchase them or transfer this right once to another person. The main legal document that can formalize the alienation of agricultural land plots is the sales contract. All methods of alienation of agricultural land must meet the general requirements for the relevant civil law agreements, as well as some special requirements. In particular, until 2030, the law prohibits selling land for less than its normative monetary value. Regarding the tax

burden, it should be taken into account that the parties to agreements regarding agricultural land plots must pay 5% personal income tax and 1.5% military levy.

Comparing the Ukrainian approach to the organization of the circulation of agricultural land with relevant foreign experience and recommendations of the international community regarding the trends and directions of further development of the agricultural land market, it could be noticed that, with a few exceptions, developed countries and authoritative supranational institutions recognize the minimization of restrictions on the participation of national and foreign capital in the circulation of agricultural lands to be the optimal solution. This concerns not only the general permission for foreign legal entities to acquire agricultural land, but also the introduction of flexible and proportional approaches to prevent its excessive concentration, instead of an arbitrarily determined acquisition cap.

At the same time, attention is focused on the need to deploy legal and institutional mechanisms that can respond to the challenges and risks associated with a significant degree of freedom of movement of agricultural land. In particular, along with the overriding right to purchase agricultural lands by their tenants, in foreign countries that can potentially serve as an example for Ukraine to follow, the overriding right of local farms and other participants in agricultural product markets, whose support is determined as a state priority, is established.

In addition, effective regulatory tools for balancing the goals of government policy in the fields of agriculture and food security and the development of rural settlements with benefits from the use of agricultural land as an investment asset are, in particular, the requirements to establish in contracts for the alienation of agricultural land the obligations of buyers regarding the rational use, reproduction and increase of soil fertility, other useful properties of land, preservation of ecological functions of soil cover and environmental protection.

## **1. European experience and vision of prospects for the development of the agricultural land market**

First of all, getting acquainted with the basic principles of regulation and administration of the agricultural land market, it is reasonable to refer to the *European Commission Interpretative Communication on the Acquisition of Farmland and European Union Law*, which is a complete document dedicated to conditions and restrictions related to acquisition of agricultural land.

At the beginning of that document, the European Commission admits that:

Regulations on land sales generally aim to curb land concentration and speculation, to keep farmland in good and efficient agricultural use, to preserve a rural population, to address land fragmentation or to promote viable, medium-sized farms. To this end, the laws in question subject the acquisition of land to certain conditions. These include prior administrative approval and, in particular, requirements such as the acquirer of agricultural land farms the land himself, holds qualifications in farming, and has been residing or doing business in the given country. Furthermore, the new laws favour certain categories of acquirers (such as tenants, neighbouring farmers or locals) or prohibit selling to legal persons. The Commission recognises the validity of the above-mentioned objectives as such. Having examined the new laws, however, it was concerned that some of their provisions infringe fundamental EU principles, namely the free movement of capital. In particular, in the Commission's view they discriminate, not formally but in their practical effects, against nationals from other EU countries or impose other disproportionate restrictions that would negatively affect investment. A restrictive measure is not proportionate if there is a possible alternative measure that could pursue the public interest at stake in a manner that is less restrictive to the free movement of capital or the freedom of establishment (European Commission, 2017).

Shedding light on the approaches applied by European countries to regulation of organizational and legal aspects of the agricultural land market with taking due notice of the above-mentioned principles, the study by European Commission's Joint Research Centre dedicated to agricultural land market regulations in the EU Member States.

The foregoing considerations of European Commission's Joint Research Centre perfectly align with the jurisprudence of the Court of Justice of the European Union. It suggests that pre-emption rights in favour of certain categories of buyers (such as tenant farmers) can under certain circumstances be justified on the grounds of agricultural policy objectives. In the *Ospelt* case, the CJEU examined a scheme of prior authorisation of the acquisition of farmland.

The CJEU examined the proportionality of measures prohibiting the acquisition by non-farmers with the objective of maintaining a viable farming community and keeping the land in agricultural use. Therefore, if the objective is to promote the acquisition of land by farmers, pre-emption rights in favour of tenant farmers or farmers more generally could be considered as a proportionate restriction on free movement of capital in as far as they are less restrictive than a prohibition of acquisition by non-farmers (Court of Justice of the European Union, 23-9-2003). However, the European Commission is of the view that:

Subjecting the acquisition to the condition that the acquirer possesses specific qualifications in agriculture constitutes a restriction, which raises doubts as to its proportionality. First, it does not appear necessary that the acquirer himself possess appropriate qualifications as long as he can give assurances that the land will be properly farmed. Second and more importantly, it appears that the qualification

requirement in general goes beyond what is necessary to ensure proper cultivation of the land or high agricultural productivity and quality (European Commission, 2017: 22).

As regards the legal standing of legal entities as agricultural land sales market participants, it should be noted that some states, such as Estonia, Poland and Sweden, generally authorise only individuals, and not legal entities, to acquire agricultural land of a certain size and subject acquisition by legal entities to additional conditions, such as the need to obtain a permit. The Joint Research Centre of the European Commission discovered in this context that in Estonia legal persons have the right to acquire 10 ha of agricultural land without restrictions. For the acquisition of a larger area, additional requirements apply.

The legal person has to be engaged in the production of agricultural products or forest management for 3 years preceding the year of land acquisition (European Commission's Joint Research Centre, 2021: 40). In Spain at least 50 % of the members of a legal entity need to be professional farmers. A professional farmer is a natural person, the owner of agricultural land, who receives at least 50 % of his/her income from agricultural activities or other complementary activities (e.g., management, processing of farm products, direct sale, institutional representation), and at least 25 % of the income is directly linked to agriculture, and who devotes at least half a unit of agricultural labour to agricultural and complementary activities. Moreover, in general in Spain, there are no restrictions on the nationality of a buyer when acquiring land (European Commission's Joint Research Centre, 2021: 43).

It seems noteworthy in this context that according to the European Commission Upper limits on the size of land that can be acquired or held are restrictions to the free movement of capital as they limit investors' decisions to acquire agricultural land. Nevertheless, if justified by a legitimate reason of public interest (such as the aim to achieve a more balanced ownership structure) and compliant with EU fundamental rights and general principles of EU law such as non-discrimination and proportionality, national acquisition caps might be considered compatible with EU law (European Commission, 2017).

Recognizing the existence in European countries of a wide variety of approaches to settling the issue of the opportunity for foreigners to acquire agricultural land, which include absolutely polar views of law-makers on this acute issue, international expert community represented by the European Commission's Joint Research Centre admits that:

The acquisition of agricultural land by foreigners is an issue of particular concern because of the fear of land concentration and excessive land speculation. Nevertheless, it is assumed foreign investments can have beneficial effects as they can contribute capital, technology and know-how, thereby improving the

productivity of the agricultural sector. However, the predominant standpoint is that acquisition of land by (foreign) investors yields benefits only when information is evenly accessible and when markets are competitive (e.g., when property rights are clear and enforceable). Asymmetric information can be a source of speculation. Individuals often have a disadvantage in transfers with corporations, as the latter often have better access to information and a wider (political) network. The solution proposed is that rather than prohibiting certain transactions, it might be more desirable to focus policy attention on eliminating the sources of asymmetric information or on creating national institutions and rules that give proper incentives to all market players (domestic and foreign buyers, tenants, landlords and owner-cultivators) so that multiple benefits (access to capital, know-how and technology; productivity gains; access to land use; and tenure security) can be realized (European Commission's Joint Research Centre, 2021: 9).

## **Conclusions**

The above considerations and observations allow us to conclude that the European Commission and the European scientific community define ensuring the proportionality of restrictive measures and preferences in the agricultural land market as the central direction of further development of the legal basis for the circulation of agricultural land. The key well-established proposition is that a restrictive measure is not proportionate if there is a possible alternative measure that could pursue the public interest at stake in a manner that is less restrictive to the free movement of capital or the freedom of establishment.

The absolute ban on the participation of certain categories of national and foreign individuals and legal persons is considered justified only in exceptional cases, when there is no legislative and practical solution that could mitigate the risk of negative consequences for the beneficial properties of the land, as well as for the proper implementation of government policy in the fields of agriculture and food security.

In particular, instead of unconditionally preventing the acquisition of agricultural land by foreign legal entities, it is recommended to introduce a system of regulatory and institutional mechanisms that, by establishing appropriate requirements and restrictions related to the use and disposal of land, as well as by monitoring the proper implementation of these requirements and restrictions, would be able to mitigate the fear of land concentration and excessive land speculation originating from acquisition of agricultural land by foreigners.

However, Ukrainian laws and regulations set forth the absolute prohibition of acquiring agricultural land by foreign legal entities and individuals directly or through participation in Ukrainian legal entities, until the approval of the contrary decision in the all-Ukrainian referendum.

In addition, it is noteworthy the acquisition cap for a legal entity is 10,000 hectares. Therefore, it is imperative for Ukraine, bearing in mind that European integration is a key and unchanging foreign policy priority of Ukraine, to provide a general permission for foreign individuals and legal entities to acquire agricultural land as well as to introduce flexible and proportional approaches to setting acquisition caps.

Attention of the policy-makers should be focused on the need to deploy legal and institutional mechanisms that can respond to the challenges and risks associated with a significant degree of freedom of movement of agricultural land. Effective regulatory tools for balancing the goals of government policy in the fields of agriculture and food security and the development of rural settlements with benefits from the use of agricultural land as an investment asset are, in particular, the requirements to establish in contracts for the alienation of agricultural land the obligations of buyers regarding the rational use, reproduction and increase of soil fertility, other useful properties of land, preservation of ecological functions of soil cover and environmental protection.

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