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OWNERSHIP AND USE OF AGRICULTURAL LAND IN THE NETHERLANDS: LAND-USE PLANNING AND TENANCY

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1. Introduction

1.1. Agricultural policy, land and land use

Dutch agricultural policy is directed at intensification of market orientation, increase of competitive strength and stimulation of sustainable development and innovation.[2] These policy objectives impact the production size of farms. In the crop and dairy farming sectors, both of which are closely tied to land, production can be increased through intensification of land use and expansion of the area available for farming.[3]

The demand for land for agricultural use is growing as a response to these factors. However, the acreage that is available for agricultural use has been declining for years. The rising demand in connection with housing construction, infrastructural projects, industry and also nature and recreation leads to agricultural land steadily being withdrawn from farming.[4]

Each year between 20,000 and 30,000 hectares of land change owner. This represents 1.0 to 1.5% of total farm land.[5] However, the demand for land is actually expected to increase due to the growing world population and the consequent demand for foodstuffs. It should be noted that agricultural products are also used for other purposes, such as biodiesel, digestion plants, etc. Environmental requirements (manure placement) and the Common Agricultural Policy (crop diversification and nature purposes) will also continue to stimulate the demand for agricultural land.

1.2 Increase of scale

The number of farming businesses is experiencing a steady decline. Since 1980 the number of land-based businesses has dropped by 50%, while the size of businesses in the land-based sector has increased by 75%. Especially in the dairy farming industry the size increase has been considerable, with threefold growth since 1980, while the increase in crop farm size during this same period was approximately 25%. The intensity of land use, on the other hand, has not grown since 1980, which points to the use reaching its limit. In particular environmental requirements may be mentioned in this regard. All this has led the Agricultural Economics Institute to conclude that the increase of scale in the land-based agricultural sectors is considerable. In 1980 the average farm size was 18 hectares, by 2010 it had grown to 32 hectares, and by 2020 it is expected to reach at least 37 hectares. The

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[2] H.A.B. van der Meulen, C.J.A.M. de Bont, H.J. Agricola, P.J.M. van Horne, R. van der Hoste, A. van der Knijff, F.R. Leenstra, R.W. van der Meer and A. de Smet, *Schaalvergroting in de land- en tuinbouw; Effecten bij veehouderij en glastuinbouw*, LEI WUR, 2010.

[3] Derived from: D.W. Bruil, *Evaluatie pachtregelgeving*, IAR Wageningen, March 2014.

[4] For the development of agricultural area in the Netherlands, see the figures published by Statistics Netherlands: https://www.cbs.nl/nl-nl/economie/landbouw.

[5] In the first quarter of 2017, 8,900 hectares of land changed owner, according to the Q1 2017 quarterly report *Agrarische grondmarkt* by Wageningen Economic Research and Land Register.

institute also notes that the scale increase is slower in land-based agriculture compared to the agricultural sectors that are not related to land farming.[6]

Increase of scale in sectors that are related to land farming necessitates land. This requires land being available in the vicinity of the farm. Farms that wish to expand can do so either by buying additional land, or by acquiring the use of land for a specified period through tenancy or ground lease. Acquisition by means of allotment via parcel exchange is also a possibility. For a farm that wishes to expand it is important that there is sufficient land in the direct vicinity. This means that neighbouring farms must terminate their business or at least reduce the size of their farming tracts. Until now discontinuation of agricultural activity has not led to land being left unused. Instead, this land is always taken into use by another farming business. However, for agricultural buildings the situation is different: the vacancy of what were once agricultural structures is a growing problem in the Netherlands.

1.3 Approach and scope of this paper

In this paper we will discuss and analyse the legal aspects of Dutch agricultural policy, in particular the legislation applying to the agricultural sector. In line with the assignment given to this Committee II, the focus will be on the competitiveness of the Dutch agricultural sector. From the very broad spectrum, two specific subjects will be highlighted: the legislative regulations pertaining to land-use planning and Dutch agricultural tenancy law. Based on these two themes we will examine which civil and fiscal law factors stimulate or rather impede the competitive strength of the sector. The structure of this paper will be same for each of the two themes. After a brief introduction to the subject, we will examine the current situation. This is followed by a look at future legislation. In this context, we will consider how current and future legislation favours or rather hinders the sector's competitive strength and the increase of scale that is vital for this sector.[7]

2. Land ownership: land-use planning

2.1. Land-use planning – general aspects

Effective and efficient use of rural areas was and continues to be necessary. This is an established fact.[8] As such, to ensure the quality and competitiveness of the Dutch agricultural sector, both in the Dutch and the international setting, good parcelling of agricultural land is a precondition. The fact that the Dutch government is also convinced of this is evidenced by what Gerrit Braks, Minister of Agriculture in the 1980s, said during the parliamentary debate on the Land Use Act (in Dutch: *Landinrichtingswet*):

'Effective production and improved working conditions have been realised in the Netherlands in particular through land consolidation. You realise this all the more when you go to parts of the world where this instrument is absent.'[9]

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[6] J. Luijt and M. Voskuilen, *Grond voor schaalvergroting, Achtergronddocument LEI WUR*, November 2011. See also Province of Groningen, *Tussentijds evaluatieonderzoek agrarische schaalvergroting en landschap*, Groningen 2009.

[7] See https://vng.nl/onderwerpenindex/ruimte-en-wonen/landelijk-gebied/vrijkomende-agrarische-bebouwing.

[8] See, amongst others, J. Bieleman, *De cultuurtechnische verbouwing van Nederland. Veranderend boerenland – inleiding*, in: J.W. Schot, H.W. Lintsen, A. Rip, A.A. Albert de la Bruhèze (eds.), *Techniek in Nederland in de twintigste eeuw, Deel 3 – landbouw en voeding*, Zutphen 2000, pp. 23-25.

[9] *Parliamentary Papers II* 1983/1984, 15907, p. 3482 (oral debate on legislative proposal of the Land Use Act).

Good and effective parcelling of rural land is therefore vital for the continued viability of a farming business. As many farmers discontinue their business[10], a lot of agricultural land comes available. The remaining farmers need this land that is freed up to ensure a better parcel division and/or the necessary increase of scale[11] of their own businesses.

In addition, there is the problem of the fragmentation of farm land, meaning that parcels belonging to a single owner are disconnected from each other. In the literature[12] we find that the system known as 'Realerbteilung'[13] that is used in some Western European regions is the principal cause of this fragmentation. This is a method of inheritance whereby each child inherited an equal part of the agricultural land, with not the area but the value of the land serving as the basis for the division. Since this practice continued for many generations, a complex situation could arise over time.[14] This poor parcelling method led to all sorts of disadvantages, such as loss of time, serious hindrance in the use of machinery due to small and irregularly shaped parcels, land loss (due to fragmentation, considerable land was lost in the form of ditches, trenches and fences) and border disputes between land owners.[15] It is hardly surprising that all this acted as an obstacle to international competitiveness. The fragmentation of farmland is also disadvantageous in financial terms. The Service for Land and Water Management (*Dienst Landelijk Gebied*) came to the conclusion in 2012 that fragmentation in the dairy industry meant an annual loss on average of €200 to €300 per hectare. This comes down to €160 to €250 million per year.[16]

In addition to the need for good parcelling and reversal of the history of fragmentation, it should be noted that high land mobility is vital within the Dutch agricultural sector; this means the extent to which land changes owner or tenant during a given period in the free market (thus excluding ownership changes within the family).[17] To stimulate this land mobility and to prevent ineffective parcelling in rural areas, it is absolutely necessary to have substantively correct and practical legislation, combined with exemption from transfer tax[18], in the field of land-use planning in general and reallotment and/or parcel exchange in particular. This would create the necessary enabling conditions for a future-proof and – in terms of competitiveness – robust and resilient agricultural sector in the Netherlands.

2.2. Reallotment

The Rural Areas (Planning) Act (in Dutch: *Wet inrichting landelijk gebied*) sets out that the government may restructure a land area, both in fact – through measures and provisions – and in legal terms – through land consolidation (*ruilverkaveling*, altered in 2007 by the term *herverkaveling*

[10] According to the Economic Institute paper cited above, five farms end their operations each day. For details on the number of Dutch farms since 1904, see the *Rapport Grondmobiliteit* by InnovatieNetwerk Groene Ruimte and Agrocluster Utrecht 2005, p. 22.

[11] See in this context the report by the Province of Groningen entitled *Tussentijds evaluatieonderzoek agrarische schaalvergroting en landschap*, Groningen 2009, pp. 9 ff.

[12] Amongst others in J.A.J. Vervloet, *Inleiding tot de historische geografie van de Nederlandse cultuurlandschappen*, Wageningen: Pudoc 1984, pp. 11-12.

[13] See also http://www.ge-li.de/breitscheid/realerbteilung-1.htm, as well as H. Gamperl, *Die Flurbereinigung im westlichen Europa*, Munich 1955. Page 33 speaks in this context of 'Realteilungsrecht'.

[14] According to S. van den Bergh, *Verdeeld land. Geschiedenis van de ruilverkaveling in Nederland vanuit een lokaal perspectief*, 1890-1985, p. 37.

[15] See L.H. Bouwman, *Ruilverkaveling. Praktijkuitgave*, Zwolle: Tjeenk Willink 1958, p. 28.

[16] See http://www.dienstlandelijkgebied.nl/actueel/nieuwsitem/nieuwsbericht/2021321/melkveehouderij-kan-miljoenen-besparen-met-betere-verkaveling.

[17] See in this context *Rapport Grondmobiliteit* by InnovatieNetwerk Groene Ruimte and Agrocluster Utrecht 2005. See also https://www.kadaster.nl/-/kavelruil-draagt-flink-bij-aan-grondmobiliteit.

[18] See sections 2.2.2 and 2.2.3.

or reallotment), meaning the redivision of land use. The first land consolidation in the Netherlands took place towards the end of the nineteenth century. Since that time several laws have been passed (1886, 1924, 1938, 1954 and 1985) that established the legal framework for Dutch land-use planning. The current law has been in force since 2007.

2.2.1. The reallotment process

Reallotment involves 'combination, parcelling and division of immovable property'.[19] What this means here in short is that, in a certain area (a 'block'), all immovable property is added up, and the total property is then reallocated among the various contributors. In more detail, this means the following. First an exchange plan is prepared. This plan consists of a list of titleholders and a draft allocation plan. In this allocation plan the most important criterion is that each titleholder is entitled to an identical surface area[20] and allocation of a right of identical nature,[21] capacity and intended use as originally contributed. Titleholders are given the opportunity to state their wishes regarding allocation during a preference hearing. The Provincial Executive adopts the draft exchange plan and makes it available for inspection. Each titleholder may raise objections against the list and, if necessary, lodge an appeal with the district court. After the exchange plan has become final, an exchange deed is drawn up by a civil-law notary and entered in the public registers. The new situation under property law is then a fact. For purposes of financial compensation and settlement of the costs of reallotment a 'list of monetary arrangements' (in Dutch: *lijst der geldelijke regelingen*) is then prepared. A draft version of this list is published and made available for inspection.[22] Objections may be raised against the list[23], and the objecting party may lodge an appeal with the district court. Once the list has become final, the land-use planning costs are charged to the titleholders insofar as these are not financed by other parties.[24]

2.2.2. Tax implications

The tax treatment of reallotments is in principle relatively simple. Article 15, section 1, subsection I of the Legal Transactions (Taxation) Act (in Dutch: *Wet op belastingen van rechtsverkeer*) states that all acquisitions under the Rural Areas (Planning) Act are exempted from transfer tax, without further conditions. In the case of an acquisition on the basis of a reallotment as referred to in Title 3 of the latter act, the exemption under the Legal Transactions (Taxation) Act can be invoked by the acquiring parties. This appeal is effected in practice by the civil-law notary through the appeal to exemption in the deed under Article 15, section 1, subsection I of the Legal Transactions (Taxation) Act.

2.2.3. The function of reallotment

As a traditional land-use planning instrument, reallotment seems to have had its heyday, as it is not used much anymore these days. In the past, in particular in the post-World War II period and in the 1960s and 1970s,[25] land consolidation was a frequent phenomenon. The drive behind this instrument was agricultural structure policy, which often involved the aim of achieving better land parcelling for agricultural enterprises and improvement of the cultural situation of agricultural land (e.g. better accessibility and drainage). The purpose of agricultural structure policy was traditionally strictly to improve the competitive strength and position of the Dutch agricultural sector. Other objectives came later, such as development of the natural environment, recreation and infrastructure. The

[19] See Art. 1, section 1 and Title 3 (Art. 42 ff.) of the Rural Areas (Planning) Act.
[20] Art. 56, section 2 of the Rural Areas (Planning) Act.
[21] Art. 52 of the Rural Areas (Planning) Act.
[22] Art. 62 of the Rural Areas (Planning) Act.
[23] Art. 69 of the Rural Areas (Planning) Act.
[24] Art. 90, section 2 of the Rural Areas (Planning) Act.
[25] For details see G.M. Andela: *Kneedbaar landschap, kneedbaar volk. De heroïsche jaren van de ruilverkaveling in Nederland*, Bussum: Thoth 2000.

Dutch national government played an important role in the funding of land restructuring, but also in the planning and execution of projects. After the transfer of national government tasks to the individual provinces, resulting from the replacement of the Land Use Act by the Rural Areas (Planning) Act in 2007, the reallotment instrument came to be used less and less often. Since 2007 only a few projects have been carried out,[26] and for the near future none of the provinces have plans to reintroduce this instrument. Land-use planning is associated by many government administrators with time-consuming, complicated and expensive processes. In addition, they are deterred by the mandatory elements of the reallotment instrument. The lack of support from the agricultural sector for this instrument contributes to this attitude. Also the changing role of the province, as facilitator or partner, does not sit well with the use of a mandatory instrument. The perception of the nature of land restructuring tasks also plays a role here: some provinces regard reallocation as an unnecessarily wieldy instrument for the remaining restructuring tasks in rural areas. Nonetheless, most provinces want to keep the reallotment instrument in reserve, for possible projects in rural areas where overriding authority may still be needed.[27]

2.3. Parcel exchange

Parcel exchange (*kavelruil)* is a land-use planning instrument whereby agricultural land and buildings can be reallotted quickly and easily, but on a voluntary basis so that farmers can operate more effectively and efficiently, also in term of costs. It is intended to enhance the competitive strength of the Dutch agricultural sector.

In addition, parcel exchange also involves considerable financial and tax benefits for the participants. In particular, if the province where the land to be exchanged is located approves the parcel exchange, then the transaction costs (civil-law notary and land registry fees) are fully or partly (this differs by province) subsidised. Land obtained by the participants via parcel exchange is also exempt from transfer tax, so that the parcel exchange takes place without any tax consequences.

While reallotment is nowadays only applied sporadically, parcel exchange has significantly increased in popularity, especially since 2007. During the 2012-2017 period an average of 7,100 hectares of agricultural land changed owner via this instrument per year. Parcel exchanges now account for on average 18% of all land ownership transfers. The contribution of parcel exchange to the mobility of land, a basic condition for the competitiveness of Dutch agriculture, is therefore substantial.[28]

For a good understanding of parcel exchange, those elements of the Land Use Act and the Rural Areas (Planning) Act that are relevant for this instrument are discussed briefly below.

2.3.1. Land Use Act (1985-2007)

Until the end of 2006, the parcel exchange instrument was regulated by the Land Use Act. Only a few articles covered the subject of parcel exchange, namely article 17 and articles 119 to 123. There was also a Parcel Exchange Regulation which, in addition to several civil law aspects covering parcel exchange, allowed the Minister of (at the time) Agriculture, Nature and Food Quality to subsidise all or part of the land registry and civil-law notary fees that were due in connection with parcel exchanges.[29] Obviously this subsidy was not granted automatically; article 1, section 2 of the Regulation established that only parcel exchange agreements approved by the Director of the Service for Land and Water Management were entitled to subsidy.

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[26] For details see F.G. Boonstra, D.W. Bruil, R.J. Fontein and W. de Haas, *Evaluatie landinrichtings-instrumentarium Wet inrichting landelijk gebied*, Wageningen: Alterra Wageningen UR, 2014.

[27] See footnote 26.

[28] As stated in the report '*Kavelruil draagt flink bij aan grondmobiliteit*'.

[29] According to art. 2, section 3 of the Regulation.

In addition to the Land Use Act and the Parcel Exchange Regulation, there was also the Parcel Exchange Instruction.[30] This instruction, never published officially and primarily intended as an internal policy guideline for the Ministry of Agriculture, was applied by the Minister for the evaluation of parcel exchange agreements in connection with requests by the parties involved for approval of such agreements. The most important element in the instruction was that, for a parcel exchange agreement to be approved (and therefore be entitled to subsidy), the new parcelling that was intended with the parcel exchange had to be to the benefit of agriculture, nature and/or landscape. This involved determining whether the parcel exchange would lead to an objective improvement to the planning of rural areas. This 'objective improvement requirement' was based on article 14 of the Land Use Act. As such, to gain approval, not only the requirements of article 17 but also the objective improvement requirement of article 4 had to be met.

2.3.2. Rural Areas (Planning) Act (since 2007)

On 1 January 2007 the Rural Areas (Planning) Act took effect, replacing the Land Use Act.[31] The Parcel Exchange Regulation and Instruction also ceased to apply from that date. Parcel exchange (referred to in the law, as in all previous regulations, as 'land consolidation by agreement' (*ruilverkaveling bij overeenkomst*), is now covered in articles 85-88 of the Rural Areas (Planning) Act and article 31a of the Rural Areas (Planning) Decree, the order in council for implementation of article 88 of the Act.

Decentralisation is a central theme in the Rural Areas (Planning) Act: in the development, consolidation and management of rural areas, the leading role has shifted from the national government to the individual provinces. The provinces are entirely free to subsidise, with co-funding by the EU, all or part of the costs of the various land exchange projects within their provincial borders. In addition to determining the subsidy amount, the provinces may also set additional requirements (whether or not based on the legal or other criteria for parcel exchange) for the parcel exchange transactions to be subsidised. This discretionary power on the part of the provinces has led to a great diversity in provincial subsidy regulations.

In the same way as article 4 of the Land Use Act, the Rural Areas (Planning) Act also contains a description of purpose. Article 16 of this Act establishes that land use is intended to improve the structure of rural areas. Contrary to what was set out in the Instruction regarding parcel exchange under the Land Use Act, parcel exchanges no longer need to be separately checked against this objective under the Rural Areas (Planning) Act. This was clarified in a letter by the Minister of Agriculture dated 8 September 2006,[32] which indicates that the objective described in article 16 of the Rural Areas (Planning) Act does not involve an extra requirement that parcel exchanges have to meet. This observation is an important consideration for the use of the parcel exchange instrument in rural areas: as the hurdle of article 16 of the Act no longer needs to be jumped, a parcel exchange project can be set up and executed in a simpler and quicker way and therefore more efficiently. This contributes to making the Dutch agricultural sector more decisive and internationally competitive.

From the definition contained in Article 85, section 1 of the Rural Areas (Planning) Act a number of conditions can be identified that must be met for an 'ordinary' exchange of land to be recognised as a parcel exchange within the meaning of the Act:

[30] Instruction for parcel exchange projects based on Chapter V of the Land Use Act, last amended on 12 November 1992. Several versions of this Instruction circulated at the same time, sometimes causing confusion.

[31] See art. 95, section 1 of the Rural Areas (Planning) Act.

[32] *Parliamentary Papers II* 2005/06, 30 509, no. 21.

a. there must be at least three owners who bind themselves by written agreement that is entered in the public registers[33];
b. certain immovable properties that belong to them must be combined;
c. the combined property must be parcelled out or exchanged;
d. this property must be divided between them by a notarial deed.[34]

As from 1 January 2010, in addition to the above conditions, various types of immovable property that cannot be included in a parcel exchange are listed in article 31a of the Rural Areas (Planning) Act. This involves the following types of immovable property:

a. parcels that are located in built-up areas;
b. parcels that are part of a geographically contiguous or functionally linked group of parcels that:
    1. is used for housing construction, including recreational homes, or for businesses with a non-agricultural purpose;
    2. is intended for such use pursuant to plans or decrees by virtue of the Spatial Planning Act (*in Dutch: Wet ruimtelijke ordening*);
    3. will be intended for such purpose as evidenced by published drawings for such plans or decrees:
c. parcels involving earth removal, unless, pursuant to the conditions which the competent authorities have attached to the earth removal permit, the designated use of agriculture or development of nature or small-scale recreation is given after the earth removal; or
d. the parcels, referred to in sections a to c, which have limited rights.[35]

2.3.3. Tax aspects

The exemption of transfer tax in accordance with Article 15, section 1, subsection I of the Legal Transactions (Taxation) Act also applies to parcel exchange, in the same way as for reallotment[36]. For each parcel exchange that meets the criteria of articles 85 to 88 of the Rural Areas (Planning) Act and article 31a of the related decree, this exemption can be appealed to in the notarial deed for the parcel exchange. In the same way as with reallotment, the exemption is not tied to further conditions: the exemption applies for every parcel exchange as intended in chapter 9 of the Rural Areas (Planning) Act.

2.3.3.1 Until 12 November 2004: approval by Land and Water Management Service = approval by tax authorities = tax exemption

According to § 34, section 2 of the Notes to the Legal Transactions (Taxation) Act[37], approval was given to apply the exemption of transfer tax for acquisitions under the Land Use Act also to acquisitions by virtue of parcel exchange. However, this exemption only applied to acquisitions by virtue of a parcel exchange approved by the Land and Water Management Service on behalf of the Minister of Agriculture. This approval was therefore an essential requirement, resulting in not only full subsidy of the civil-law notary and land registry fees but also exemption from transfer tax. The

[33] According to article 85, section 5 of Legal Transactions (Taxation) Decree.
[34] For details regarding this, see J.W.A. Rheinfeld, *Kavelruil, civiel en fiscaal: waar lopen de grenzen?, Publicaties vanwege het Centrum voor Notarieel recht*, part X, Deventer: Kluwer, 2014.
[35] For a discussion of these specific requirements, see J.W.A. Rheinfeld, '*Kavelruil anno 2013: de stand van zaken*', in: Tijdschrift voor Agrarisch Recht 2013/7-8.
[36] See section 2.2.2 of this paper.
[37] Resolution of 16 December 1971, no. B71/23 037, RBR-6.

Dutch tax authorities in fact followed the assessment by the Land and Water Management Service and there was no independent review by the tax authorities.[38]

2.3.3.2 From 12 November 2004 to 1 January 2007: approval by Land and Water Management Service is only indicative

By decision dated 12 November 2004[39] the State Secretary for Finance answered various questions regarding the exemption of transfer tax for parcel exchanges. This decision also involved repeal of § 34 of the Notes. Regarding approval by the Land and Water Management Service, the state secretary stated that, when it comes to applying Article 15, section 1, subsection I of the Legal Transactions (Taxation) Act, the approval is '*indicative*'. This remark led in practice to considerable lack of clarity. The indicative review by the Service was no longer sufficient as from 12 November 2004 since the tax authorities needed to review each parcel exchange as well. In a number of parcel exchange situations this led to additional transfer tax assessments and consequently to various legal actions. Legal uncertainty reigned supreme. When it came to the practical application of the parcel exchange instrument (and therefore from the perspective of international competitiveness), this was an extremely undesirable situation.

2.3.3.3 From 1 January 2007 to the present day: compliance with Legal Transactions (Taxation) Decree = tax exemption

By letter dated 8 September 2006, the Minister of Agriculture, Nature and Food Quality sought, in the context of the parliamentary debate on the Rural Areas (Planning) Act, to bring some clarity to practical (including tax) situations by stating that, when a parcel exchange meets the civil law requirements of articles 85-88 of the Rural Areas (Planning) Act and article 31a of the corresponding Decree, this means entitlement to exemption from transfer tax.[40] In other words, as soon as a parcel exchange meets the civil law requirements, then the way to Article 15, section 1, subsection I of the Legal Transactions (Taxation) Act is free. The tax authorities do need to judge the applicability of the exemption in concrete cases, but this will be no more than a formality: the tax authorities only need to tick off the requirements of articles 85-88 of the Rural Areas (Planning) Act and article 31a of the corresponding Decree. In practice this has led to a workable and, when it comes to international competitiveness, stimulating tax treatment of parcel exchanges. The tax status is no longer an impediment, but rather a driver for applying this land-use planning instrument.

2.4. Land-use planning in the future

The Rural Areas (Planning) Act will be incorporated in due course in the Environment and Planning Act (in Dutch: *Omgevingswet*).[41] By means of the Land Ownership Supplementary Act (in Dutch: *Aanvullingswet grondeigendom*) various instruments for land ownership, namely expropriation, right of first refusal, reallotment and parcel exchange in rural and urban areas, will be added to the Environment and Planning Act. This has been provided for in the consultation version of the Land Ownership Supplementary Act[42].

It is notable here that the term 'land-use planning' (*landinrichting*) will disappear because the more neutral term 'planning' (*inrichting*) fits better within the context of the Environment and Planning

[38] See D.W. Bruil and A. Verduijn, '*Herverkaveling en kavelruil: katalysatoren voor de inrichting van het landelijk gebied*', in: Tijdschrift voor Omgevingsrecht 2008, no. 2.
[39] Ministry of Finance, 12 November 2004, CPP2004/1679M.
[40] *Parliamentary Papers II*, 2005-2006, 30 509, no. 21.
[41] For details see M. van Dalen-Distelblom, '*Wordt de Omgevingswet civielrechtelijk een succes?*', in: NJB 2017/13.
[42] To be consulted at https://www.internetconsultatie.nl/omgevingswet_grondeigendom.

Act. The changes in the legislative proposal versus the Rural Areas (Planning) Act are listed in the Explanatory Memorandum.

As to reallotment, the Environment and Planning Act introduces several strictly legal changes, which we will not discuss in the context of this paper.[43] When considering the land-use planning instrument 'parcel exchange' in the legislative proposal, it immediately becomes clear that the drafters of the Environment and Planning Act have finally come up with terms that are very clear: the practical term 'parcel exchange' (*kavelruil*) replaces 'land consolidation by agreement' (*ruilverkaveling bij overeenkomst*), a term used since 1938 when the Land Consolidation Act was introduced, but which is no longer appropriate, both in a practical and a legal sense. We wish to remark here, however, that the term 'reallotment by agreement" (*herverkaveling bij overeenkomst*) would, in a legal sense, have been even more accurate.

Parcel exchange (voluntary or otherwise) in rural areas finds its legal basis in section 12.5.1 (articles 12.38 to 12.40) of the legislative proposal for the Environment and Planning Act. A new branch of the planning tree, that of parcel exchange in urban areas (a new instrument that is not discussed in the context of this article), is included in section 12.5.2 (articles 12.41 to 12.43). It should be noted that the legal texts of these two 'sisters' are identical in substance. The only difference between the two instruments is the concept of 'built-up area' (*bebouwde kom*), as defined in article 12.1 of the legislative proposal: urban parcel exchange relates to immovable property *within* built-up areas, while parcel exchange in rural areas occurs strictly *outside* built-up areas.

In studying the legislative proposal further, we note several further minor changes as compared with the current regulation in the Rural Areas (Planning) Act. However, these (civil law) changes are not discussed further in this paper.

The proposed transition of reallotment and parcel exchange to the Environment and Planning Act therefore mainly involves a practically seamless conversion of the Rural Areas (Planning) Act into the Environment and Planning Act. The same applies when it comes to taxation. The main difference between the two regulations lies with regard to parcel exchange (reallotment continues to be fully facilitated taxwise), as discussed above, in the fact that a boundary is established between the new instrument urban parcel exchange (within built-up areas) and the current parcel exchange in rural areas (outside built-up areas). This geographic demarcation has mainly tax consequences: urban parcel exchanges are, contrary to their rural counterparts, not (yet) exempted from transfer tax. This is a shortcoming, as should be clear from the flourishing parcel exchange practice in rural settings.

For parcel exchanges in rural areas, the transfer tax situation under the Environment and Planning Act is therefore identical to what is currently the case under the Rural Areas (Planning) Act. For rural area parcel exchanges this is a favourable development for the future. Tax exemption, an important factor in support of parcel exchange, is therefore maintained so that its role in promoting the land consolidation process continues. With a view to maintaining and enhancing the competitive strength of the Dutch agricultural sector, this fiscal stability is a highly desirable element. In this context it should be noted that a policy evaluation was recently conducted of six tax exemptions in the field of forestry and nature, including the exemption from transfer tax of Article 15, section 1, subsection I of the Legal Transactions (Taxation) Act.[44] At this time it is still uncertain whether the results of this evaluation will have consequences for the contents and application of the exemption from transfer tax for acquisitions by virtue of reallotment and, in particular, parcel exchange. In my opinion, a curtailment of the exemption would be unwise as it would seriously impede successful application of

[43] For a detailed description see J.W.A. Rheinfeld and D.W. Bruil, '*Landinrichting in de Omgevingswet*', in: Tijdschrift voor Bouwrecht 2017/3.

[44] H. Silvis and H. van der Meulen, '*Evaluatie fiscale vrijstellingen bos en natuur*', Wageningen Economic Research, October 2016.

parcel exchanges. It would unnecessarily slow down the development and planning of rural areas and therefore be of no benefit to the competitive strength of the Dutch agricultural sector.

3. Land use: agricultural tenancy

3.1. Tenancy law in general

Tenancy is traditionally an important *financing instrument* in agriculture. It allows farmers to carry out their business operations without them having to own the operating assets such as land and buildings. Purchase of the land needed for the exploitation of a farming business normally involves substantial financial liabilities, which many farmers can hardly afford or cannot afford at all. Based on this premise, tenancy regulations significantly protect the position of the tenant, which is comparable with the protection of the lessee who rents a house.

In addition, there is a growing need in the Netherlands for flexibility in the use of land. Since many crop farmers and horticulturists specialise in specific crops, while it is necessary to apply crop rotation schedules, there is an ever growing demand for parcels that are used only temporarily. Flower bulbs and seed potatoes are the frontrunners in this trend. The result is that in many places land exchange takes place per growth season to enable continued cultivation. Here too, tenancy can play a role. However, the mutual exchange of land among farmers often takes place without any tenancy agreement. Instead, the old land user statement is still encountered regularly, but verbal agreements on land use also still occur.[45]

Dutch tenancy law is incorporated in Title 7.5 of the Civil Code. This regulation replaced the Agricultural Tenancies Act of 1958 (In Dutch: *Pachtwet*) on 1 September 2007. This act was not the first one to establish regulations governing agricultural tenancy in the Netherlands. The first cautious steps in the area of tenancy law were taken in the Civil Code of 1838, which contained a regulation 'specifically governing the rental of farmland'. The contents of this were, however, very summary. A century later, on 1 November 1938, the first formal act took effect that contained a full, partly mandatory regulation of tenancy agreements: the Agricultural Tenancies Act 1937. In 1941, as a result of World War II and the German occupation of the Netherlands, the Agricultural Tenancies Decree took effect, rendering the Agricultural Tenancies Act inoperative. On 1 May 1958 the Agricultural Tenancies Act 1958 came into force.[46]

By means of the statutory regulation of agricultural tenancy agreements, the Dutch legislature sought to unify two interrelated objectives. In the first place, tenancy is intended, as stated above, to serve as a financing instrument for the agricultural sector. In addition, the regulation seeks to protect the tenant, as the weaker party in the tenancy agreement, by establishing mandatory provisions. In order to achieve this protection, Title 7.5 of the Civil Code has been given a strongly mandatory character, meaning that the agricultural tenancy regulation mainly contains provisions that the parties involved may not deviate from. As such, there is a mandatory system of price review, renewal, substitution and a tenant's right of first refusal in the case of purchase, which, in the 'standard' form of agricultural tenancy, may not be deviated from to the detriment of the tenant.[47]

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[45] According to D.W. Bruil, *Evaluatie pachtregelgeving*, March 2014, *Parliamentary Papers I*, 2013/2014, no. 30448, G.

[46] For details see P. de Haan, *Pachtrecht, commentaar op wet en jurisprudentie*, Zwolle: Tjeenk Willink 1969, pp. 4-53, as well as G.M.F. Snijders & W.L. Valk, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 7. Bijzondere overeenkomsten. Deel III. Pacht*, Deventer: Wolters Kluwer 2016, pp. 1-6. Referred to hereinafter as Asser/Snijders & Valk 7-III 2016.

[47] See art. 7:399 of the Civil Code.

It is obvious that, in realising the two objectives, there is the danger of the interests of the owner or lessor being compromised. Simply the fact that it becomes less attractive for owners of land and buildings to lease out their property as the protection of tenants grows forces legislators to seek a balance between the interests of the two parties. This clash of interests is referred to in the literature on tenancy law[48] as 'the tenancy dilemma'. There may therefore be reason to limit the legal protection of tenants so that they can continue to lease land also in the future.[49] In other words, the protection of the tenant 'bites its own tail'.[50] Failure to resolve the tenancy dilemma will lead to further reduction of the land available for tenancy. This would be a problem for both current and future tenants, with a negative impact on the competitive position of the Dutch agricultural sector.

During the nearly fifty years that the current Agricultural Tenancies Act has been in place, various studies have been conducted into how the act should be amended to put a brake on the steady reduction of Dutch land area available for tenancy, which inevitably has adverse consequences for the competitive strength of the Dutch agricultural sector.

A first initiative to this effect was made in 1995. This involved the introduction of various special forms of tenancy, which key provisions of the Agricultural Tenancies Act do not apply to, such as rent review and extension, that differ from regulated tenancy[51]. The Agricultural Rents Decree (in Dutch: *Pachtnormenbesluit*) was also amended so that landlords can obtain a higher return from leasing their land.

A committee set up in 1999 by the State Secretary for Agriculture at the time[52] concluded on 26 January 2000 in its opinion document 'Room for agricultural tenancy'[53] (*Ruimte voor pacht)* that tenancy can only be upheld as a financing instrument if tenancy law is drastically deregulated. According to the committee, tenants are so heavily protected that it is hardly interesting or not interesting at all for potential landlords to lease out their lands. Because of the high pressure on agricultural tenancy, meaning the difference in the value of land in tenanted and untenanted state, the concept of agricultural tenancy will marginalise over time. Without intervention in the protection that the current Agricultural Tenancies Act offers tenants, this trend will be impossible to counter. In addition, as the committee pointed out, reconsideration of the high level of protection is justified since tenants are nowadays well-educated and professional entrepreneurs, who take a quite different position in relation to landlords than was the case when the Agricultural Tenancies Act was originally introduced.

In 2001 the Dutch government published a position paper that largely followed the advice of the commission.[54] In June 2004 the text of a preliminary draft for a new agricultural tenancy regulation was announced.[55] This involved drastic amendment of the Agricultural Tenancies Act, among other things with a system for the introduction of business tenancy. This proposal met with great opposition from both tenant and landlord organisations. Seven tenant and landlord organisations subsequently joined forces and submitted a joint proposal to the Ministers of Justice and Agriculture

[48] See, amongst others, Asser/Snijders & Valk 7-III 2016, no. 5.

[49] See A.H.T. Heisterkamp, *Het dilemma van de pacht*, Arnhem: Gouda Quint BV, 1988.

[50] See G.M.F. Snijders, *De paradox van de pacht: kanttekeningen bij het rapport Ruimte voor Pacht*, Tijdschrift voor Agrarisch Recht 2000, pp. 431 ff.

[51] Seasonal tenancy and one-time tenancy, see art. 70f Agricultural Tenancies Act.

[52] Government Gazette 19 March 1999, no. 55.

[53] Reference TRCJZ/2000/906.

[54] *Parliamentary Papers II* 2000/2001, 27924, no. 1.

[55] *Parliamentary Papers II* 2001/2002, 27924, no. 9. For details see G.M.F. Snijders, *Het voorontwerp Pacht; een nieuwe titel in het BW*, WPNR 2004, 6589.

for amendment of various elements of the Agricultural Tenancies Act. This proposal was adopted by the two cabinet members and led to a new legislative bill, which was announced on 3 February 2006 as Title 7.5 of the Civil Code.[56] Following a brief debate in parliament, this new Civil Code title took effect, as stated, on 1 September 2007.

Because of the lack of support among tenant and landlord organisations, the agricultural regulation as set out in Title 7.5 of the Civil Code did not represent a drastic change as compared with the Agricultural Tenancies Act. The essence of the Act was basically maintained. Sitting tenants are still largely protected in the same way as under the Agricultural Tenancies Act of 1958. The Act contains a number of technical adjustments and several new sections. A new aspect is a system of deregulated tenancy agreements for loose land, for which hardly any protection applies.[57] The aim of this deregulation is to keep the mobility of land at an appropriate level; this is necessary to ensure a further increase of scale within the Dutch agricultural sectors that require land.

3.2. Current situation and practical problems

Despite the fact that the new agricultural tenancy law did not involve a fundamental revision (and therefore no solution for the tenancy dilemma) and that regulated tenancy (including full protection of the tenant) remains the starting premise for the law, actual agricultural tenancy practice has continued to move in a different direction since 1 September 2007. Deregulated tenancy, i.e. the tenancy form introduced with Title 7.5 of the Civil Code, which provides hardly any protection for the tenant, has in practice become the guiding principle for newly concluded tenancy agreements. Regulated tenancy therefore risks degenerating into a reserve of old cases: the number of regulated agricultural tenancy agreements is falling steadily because regulated tenancy agreements expire, without new ones being concluded.[58]

This has resulted in a major imbalance in the regulation of agricultural tenancy. The various tenancy forms are not in line with each other. Regulated tenancy only has disadvantages for the landlord, while deregulated tenancy for six years or less only has benefits for the landlord. In view of the scarcity of land and the consequent economic dominance of land owners versus tenants, regulated tenancy is not considered at all under current law, not even in cases where the tenant would benefit from regulated tenancy and would be willing to pay a higher price.[59]

Current Dutch agricultural tenancy law, which in essence largely represents a continuation of the Agricultural Tenancy Act of 1958, can be regarded nearly sixty years later as problematic: the tenancy dilemma is still very real. In addition, an imbalance has grown between regulated and deregulated tenancy. It will not be possible to escape from this 'tenancy quagmire', and enhance the competitiveness of the Dutch agricultural sector and ensure its future, without drastic revision of the current regulatory situation, which continues to be based on the Agricultural Tenancies Act of 1958.

3.3. The future of agricultural tenancy law

In 2014 Professor D.W. Bruil, LLM was commissioned to evaluate the new agricultural tenancy law by the State Secretary for Economic Affairs.[60] His evaluation highlighted several bottlenecks and

[56] *Parliamentary Papers II* 2005/2006, 30448, no. 1.

[57] Art. 7:397 Civil Code.

[58] See W.L. Valk, *Waarom moet er wat gebeuren?*, Tijdschrift voor Agrarisch Recht 2012, pp. 210 ff. See also W.L. Valk, *Het reservaat van de pacht*, Ars Aequi December 2012.

[59] Asser/Snijders & Valk 7-III 2016, no. 24.

[60] D.W. Bruil, *Evaluatie pachtregelgeving*, March 2014, *Parliamentary Papers I*, 2013/2014, no. 30448, G. Originally, the evaluation of the new tenancy law was to take place around 2011, but in a later phase this was moved to the future. See in this regard *Parliamentary Papers II* 2011/2012, 27924, no. 56.

emphasised the importance of sustainability of land use. Bruil also made recommendations for renewal of tenancy law. However, his evaluation elicited a critical response from interest groups and in the professional literature.[61] In response to this criticism (plus the fact that history makes clear that acceptance by tenant and landlord organisations is a precondition for successful revision of agricultural tenancy law), agreement was reached in the summer of 2014 between representatives of the interest groups of tenants and landlords, under the guidance of W.L. Valk, G.M.F. Snijders and H.A. Verbakel-van Bommel, all LLM, regarding partial renewal of tenancy law. This arrangement, referred to as the Spelderholt Agreement[62], entails, among other things, the repeal of price regulation for newly concluded regulated agricultural tenancy agreements and the replacement of deregulated tenancy by flexible tenancy, a form of tenancy in which the price is in fact subject to assessment. After an initially positive response, support for the agreement soon started to erode. In April 2016 most interest groups however came to a full agreement: the Final Spelderholt Agreement.[63] Two tenant organisations ultimately voted against this final agreement. As such, no arrangement has been achieved that has the full support of all tenant and landlord organisations. The final agreement was presented to the State Secretary for Economic Affairs on 20 April 2016, even though it was not endorsed by all parties involved.[64] The ball regarding tenancy law now lies with parliament. As a result of the lack of consensus on the agreement, Dutch landlords and tenants are dependent on political choices in the tenancy dossier. However, it is expected, when it comes to a decision regarding a revised tenancy system, that the politicians involved will want to ensure beforehand that there is sufficient support within tenancy practice. The past (both recent and more distant) has made it very clear that, without sufficient support by both tenants and landlords, new agricultural tenancy legislation is almost certain to fail. To break the current deadlock, on 9 December 2016 the (current caretaker) State Secretary for Economic Affairs appointed a mediator, entirely in accordance with the well-known Dutch polder model.[65] This mediator is currently investigating the willingness of the various parties to resolve the issue. As soon as the mediator reports on his efforts to the state secretary, the latter will – as he recently announced – formulate a policy response.[66]

It is clear that Dutch agricultural tenancy law is currently at a crossroads. The choices – political and otherwise – made in the coming years in the emotionally charged tenancy dossier will directly impact the competitive strength of the Dutch agricultural sector. A balanced and future-proof system of agricultural tenancy law, which supports the interests of both land user and land owner, would serve as a foundation for the competitive strength of the Netherlands in the international scene. The future of agricultural tenancy law will determine how solid this foundation is. An excessively deregulated tenancy law system is quite likely to have a negative effect on the nation's competitive strength, while a tenancy system that excessively favours the tenant will, in the absence of available landowners, serve as a barrier to a competitive Dutch agricultural sector. It will therefore be necessary to find a legal and political middle ground that does justice to the interests of both landowners and tenants. But there is no easy solution.

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[61] See amongst others G.M.F. Snijders, *Sleutelen aan de pacht; een gemiste kans*, Tijdschrift voor Agrarisch Recht 2014, pp. 169-170.

[62] W.L. Valk, G.M.F. Snijders, H.A. Verbakel-van Bommel, *Het Akkoord van Spelderholt*, Tijdschrift voor Agrarisch Recht 2014, pp. 307 ff.

[63] W.L. Valk, G.M.F. Snijders, H.A. Verbakel-van Bommel, *Het Eindakkoord van Spelderholt*, Tijdschrift voor Agrarisch Recht 2016, pp. 230 ff.

[64] Letter dated 20 April 2016, included in Tijdschrift voor Agrarisch Recht 2016, pp. 237-238.

[65] *Parliamentary Papers II*, 2016/2017, 27924, no. 68.

[66] Letter by State Secretary for Economic Affairs dated 31 March 2017, DGAN-ELVV/17045819.

4. Conclusion

To maintain and consolidate its competitive strength, the Dutch agricultural sector requires a decisive and future-proof agricultural policy. A solid and at the same time sufficiently flexible legal framework as the legal basis of this policy, supported by appropriate tax benefits and incentives, is a precondition for stimulation of land mobility; this mobility is required to improve the agricultural structure and to strengthen the economic structure of the agricultural sector and is the aim of Dutch legislation. Increase of scale, which is necessary for this sector to maintain its international competitive position, requires good land mobility. High land mobility also prevents further fragmentation of agricultural land.

Land management legislation can fulfil a key role in this context. With an easily manageable and effective legal framework, together with national and provincial subsidies and tax incentives, sufficient land mobility can be achieved and, with a view to the future, be consolidated and even increased. The role of reallotment, both mandatory and voluntary, appears to be decreasing due to its rigid and bureaucratic character, in favour of parcel exchange (usually voluntary). However, the subtle combination of reallotment and parcel exchange, where reallotment hovers above the heads of the participants in a parcel exchange transaction like the sword of Damocles, is a good argument for maintaining this land-use planning instrument.

As to the future of legislation for Dutch land-use planning, in which the Environment and Planning Act will create the new playing field, maintaining the current effectiveness of parcel exchange in particular is an absolute must. The lessons in land-use planning learned in agricultural regions can serve here as a learning tool and guideline for urban environments.

We will need to wait and see what political choices will be made in this area. We must not lose sight of tax incentives: the maintenance and consolidation of the competitive strength of the Dutch agricultural sector should also be stimulated by tax policy.

In addition to legislation relating to land-use planning, the Dutch tenancy system needs to provide the conditions and framework to ensure an effective and high-quality Dutch agricultural sector. Unfortunately, the current legal framework must be regarded as imbalanced, ineffective and unsatisfactory because of the unresolved tenancy dilemma and the resulting disparity between regulated and deregulated tenancy. In the medium and long term the current deadlock may have a damaging effect on the competitive position of Dutch farmers. Whether this unsatisfactory situation will eventually be resolved and be replaced by agricultural tenancy legislation that is satisfactory for all parties involved is highly uncertain at this time, in the light of recent developments and the failed attempts so far to reach a full or even partial agreement that has broad support.

In conclusion, an effective and well-considered legal, fiscal and financial framework in the areas described, in combination with a stable medium and long-term political vision (plus the related political will), are vital if the Dutch agricultural sector wants to maintain and further strengthen its currently still leading position on the international front. The dependency of the sector on political choices is a given fact. In addition to land-use planning and agricultural tenancy, other areas obviously also need to meet quality standards; examples here include market regulation, agricultural environment law, city planning and agricultural quality policy. Only in this way will this sector continue to play a leading role on the international stage.

SUMMARY

In this paper I have described the impediments and stimuli for the international competitive strength of the Dutch agricultural sector by reference to two fields of agricultural law, namely land-use planning and tenancy law. This involved examining to what extent current and possibly future legislation, including in the field of taxation, stimulates or rather hinders land mobility, parcel reallotment and the necessary increase of scale within the agricultural sector in the Netherlands.

With regard to land management legislation and the related instruments, in particular reallotment and parcel exchange, we can conclude that the speed, effectiveness and flexibility with which the land-use planning process is carried out in the Netherlands contribute significantly to the maintenance and strengthening of its competitive position. The role of tax incentives and (to a lesser extent) provincial subsidies deserves special mention in this regard: without these supporting measures the popularity and consequently frequent use of land management instruments would be considerably less than is currently the case. Tax incentives and provincial subsidies are therefore two important pillars supporting Dutch land management legislation. With a view to the future legal basis (yet to be worked out) of land management legislation, these considerations should play a prominent role in the current debate.

It should be noted in this context that the current success of land-use planning can be attributed almost entirely to parcel exchange, as the voluntary counterpart of the mandatory reallotment instrument. This trend is expected to continue in the coming years.

With regard to agricultural tenancy legislation, the situation is less rosy, when viewed from the competitive position of Dutch agriculture. As a result of the imbalance in agricultural tenancy law that has continued for far too long, where the interests of landowners and tenants appear to lie miles apart, it is difficult to speak of an effective legal framework that will strengthen the sector's competitive position. Hopefully in the future there will be an agricultural tenancy system that will stimulate competitiveness and restore the balance, thus creating the boundary conditions for the properly regulated use of agricultural lands and buildings. But recent experiences in the preparations for such a new system are unfortunately not very promising. Nonetheless, a new tenancy system is needed that does justice to the interests of both landlords and land users. Efforts must be made to achieve a legal solution which is supported by both tenants and landlord and at the same time contains the elements to strengthen the Dutch agricultural sector. A worthwhile task for Dutch politicians and agricultural law experts.

A stable and effective set of instruments for land-use planning, as well as a properly balanced tenancy system that meets the needs of both landlords and tenants, are essential for the maintenance and further development of the competitiveness of this sector. Constant attention must be paid to this competitive position in the various policy assessments and debates on the contents of future legislation. The agricultural sector can only continue to play a leading international role if this higher goal remains on the horizon and is taken as guideline for the future.