COMITÉ EUROPÉEN DE DROIT RURAL – EUROPEAN COUNCIL FOR RURAL LAW – EUROPAÏSCHE GESELLSCHAFT FÜR AGRARRECHT UND DAS RECHT DES LÄNDLICHEN RAUMES

XXXe Congrès européen de droit rural 18-21 septembre 2019, Poznań (Pologne)
XXX European Congress of Agricultural Law 18-21 September 2019, Poznań (Poland)
XXX. Europäischer Agrarrechtskongress 18.-21. September 2019, Posen (Polen)

organisé sous la direction du C.E.D.R. par l'Association Polognais de Droit Rural
organised under the direction of the C.E.D.R. by the Polish Association for Rural Law
organisiert unter der Leitung des C.E.D.R. durch die Polnische Gesellschaft für Agrarrecht

Questionnaire – Fragebogen

PROTECTION DES TERRES CULTIVÉES : LE DROIT DE L'AMÉNAGEMENT DU TERRITOIRE RURAL ET LE DROIT RELATIF AUX CESSIONS DE BIENS AGRICOLES

PROTECTION OF CULTIVATED LAND: RURAL PLANNING LAW AND AGRICULTURAL PROPERTY AND REAL ESTATE LAW

KULTURLANDSCHUTZ: AGRARRAUMPLANUNGS- UND GRUNDSTÜCKVERKEHRSRECHT

Commission/Kommission II

Rapport national pour/National report/Landesbericht ITALY

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CEDR 2019, Sept. 18-21, Poznan ITALY REPORT – 2nd COMMISSION

PROTECTION OF CULTIVATED LAND: RURAL PLANNING LAW AND AGRICULTURAL PROPERTY AND REAL ESTATE LAW

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1. Introduction. The Italian legislation on agricultural land property.

The Italian Constitution, in the frame of the III Title concerning Economic relations, establishes special principles aimed at protect the property of land and the economic development of agricultural exploitation of the land. Without prejudice of the general provision recognizing the function of private property in Italian system (Art. 42 of the Constitution, establishing that private property can be acquired, enjoyed and restrained so as to ensure its social function and render it accessible to all), Art. 44 specifies the goals of the land property: "*For the purpose of ensuring a rational use of land and equitable social relationships, the law shall impose obligations and constraints on the private land ownership; sets limitations to the size of property according to the region and agricultural areas; encourages and imposes land reclamation, the conversion of large estate and the reorganisation of farm units; and assists small and medium-sized properties. The law shall make provisions for mountain areas*".

Furthermore, in the constitutional framework, the farmland ownership by direct farmers is considered as a priority instrument of implementation of job and productive activity, for the purpose of ensuring fair social relationships; therefore, art. 47 c.2 establish that "*The Republic promotes the access through citizens' mutual savings to the ownership of housing and of directly cultivated land, as well as to direct and indirect investment in the equity of the large production complexes of the country*".

The implementation of the Constitutional provisions by national legislation takes into account, at first, the interest of reorganization of the property ownership based on a land reform. It happens in the years following the 2nd World War: it was laid down the legislation reducing latifunda in several areas of Southern Italy – in the 1950's; as well as the access to the land by the contract, by means of the modification of the long lease rights through the *emphiteusis*, as an instrument to transfer the property of land to the tenants – in the 1970's.

At the same time it occurred the need to define legal tools aimed at increase the dimension of family holdings and to enable the purchase of land property by tenant farmers. As far as the minimum size of the farmland, art 846 civil code, should have been provide the minimum size of the farmland, considering the needs of the family farm, but it has never been implemented, by administrative acts. In

its place, it is now in force a legal tool called “land unit” (compendio unico), a rule of private law, that shall be applied on demand of the interested party, with the function to preserve the dimension of small property at the moment of succession, that enable the heir with special qualification as farmer to obtain the whole land instead of the division of property (see § 7).

In Italian legislation, pre-emption rights were defined by the law, and reserved to neighbouring farmers or to the tenants cultivating the land – still in the period 1965-1971. Currently, the traditional role of pre-emption rights has been confirmed and increased, including other subjects that can benefit from (see § 6).

In general, the Italian legislation concerning the planning of land pays attention to the protection of land from the point of view of an “environmental” rational use, for the preservation of land and territory. A milestone of this legislative evolution was the Law for the protection of environment and landscape, institutive of the Ministry of Environment in Italy (1985). Currently, in Italian legislation are in force the Environmental Code, d. lgs. no. 152/2006 and the Cultural Heritage and Landscape Code, d. lgs. no. 42/2004. Both legislative acts include provisions establishing limits to the use of land (included that used for the agricultural production), e.g. in the framework of definition of water planning areas related duties of owners of land included in the hydrographical areas defined by the law (the river basin districts, as defined by art 64 and 65 of the Environmental Code), as well as the limits of property use in case of landscape protected areas (art 143, providing a special planning tool for landscape protection: the landscape plan).

Furthermore, with the aim to preserve the functions of the land areas, through special planning rules defined by administrative bodies, the property of private land is limited by restraints, based on public interests (environmental, hydrogeological, safety reasons), in that areas which are relevant for the environmental protection, e.g. in case of forests, national parks and natural protected areas.

In general, the administrative planning power is referred to different level of regulation, mainly of local competence (beyond special planning tools abovementioned).

Since the Law no. 1150/1942, the detailed definition of a general planning law in local areas is demanded to the municipalities. Later, the Law no. 142/90 established the “greater metropolitan areas” to which was recognised the full competence in this field. The planning legislation, by an administrative point of view, shares the land in a set of zones, including different duties and constraints to the property, according to the destination of use.

Consequently, considering the content of property right, from the point of view of private law, the administrative constraints limit the owner in the use of the land, according to specific kind of areas (forest, cultivated land, landscape areas). Furthermore, special provisions are also in force in Italy, since the 1970’s, aimed at the protection of mountain areas.

The most recent update of Italian legislation in the field of planning law and land property law includes the forest law reform (generally oriented to the protection of environmental issues, now taking into account more in deeper than the past the sustainable use of the forest: d. lgs 34/2018); as well as the legislative measures aimed at avoid desertification of land or desertion of rural areas (regional laws, providing the rescue of uncultivated land). The Italian legislation empowers the transfer of uncultivated land to farmers, by the establishment of the "land bank" (see §. 4), which goal is to implement the use of the land, in front of risk of decrease agricultural productive activities, causing the pauperization of the land.

Furthermore, a special rule, laid down for properties expropriated in the framework of criminal persecution against mafia organizations, promotes the community service of the land: the Anti-mafia code, d. lgs. 159/2011, art 48 c. 3 c, provides that the expropriated properties of economic relevance may be transferred, *inter alia*, to social agriculture operators and to social cooperatives, on their request.

Finally, as far as the setting of limits to the purchase of land by non-UE citizens, in terms discussed in Case *Ospelt* by the Court of Justice, it should be recalled that the Italian legislation does not provide special rules.

In the following paragraphs, it will be described the most significant legislative provisions currently in force in Italian legislation, aimed at implement the use of cultivated land, in the framework of national planning law and the transfer and productive use of agricultural land within the property law legislation.

2. The agricultural land in Italian planning legislation.

Italian planning law defines agricultural land areas as a section of territory, distinguished from the other areas of the territory, mainly characterized by the building capacity in urban areas or for the industrial development. It seems, in general, that agricultural areas are considered "*residual*", compared to the qualification of the buildable areas, which is considered the main qualifying element for planning law, dependent on a specific destination of this use, approved by the public bodies.

The basic tool in Italian planning law is the "General urban development plan", defined at municipality level, which is the most detailed general urban plan defining the details of rights and duties in the use of the territory. At upper level, with the aim to coordinate the planning functions, the legislation establishes the "Territorial coordination plan" and, at Regional level, the "Regional territorial plan". Beyond these plans, the protection of landscape is ensured by the introduction, within the territorial plans, of specific goals for the landscape protection in single areas (art. 135 d. lgs. 42/2004, as modified in 2008), however considered as a priority in the framework of the ordinary planning activity. In this

case, rural areas may be considered under a special protection, considering their landscape relevance.

Within the "General urban development plan", the Municipality has the power to impose limits and condition of use to the land property, with the aim to guarantee the social function of private property, as declared by the Constitution (Fiale A, Fiale E. 2018, 155). Primarily, the General urban development plan has the function of defining the buildability of the territorial areas, in the perspective of matching the housing needs (Urbani P., p. 598). This plan includes provisions concerning the "localization" of public services in the area under the jurisdiction of the Municipality, as well as the "zoning" (that means the division of territory in areas with different characteristics). Among these "zones" are identified building areas (A, B, C), industrial and commercial areas (D), rural areas (E) areas where localize public services and public works (F). In this framework – in which the main relevance is reserved to the possibility to promote the economic development of the urban areas through the building capacity – the rural areas (classified as Zone "E") are not immediately intended for the agricultural production, but in the light of the limits to the buildability (Urbani P., 2011, 599; Porri E., 2018, 203). Indeed, also areas not useful for agricultural production (e.g. high mountain areas), shall be classified as rural zones for the purpose of this planning tool (Porri E., 2008, 103).

According to the administrative case law, the destination to the rural zone would not necessary meet the need for the implementation of agricultural activities, since the reason of this classification by the administrative bodies is intended to avoid the building and the expansion of the urban area, and to preserve the naturalistic values in the territory (see, *inter alia*: C. Stato IV, 21 Oct. 2013, n. 5113; 9 Sept. 2013 n. 4472; 31 Jan 2005 n. 259; Fiale A., Fiale E., 2018 p. 193).

Finally, it is to outline that the distinction in Italian legislation between buildable and agricultural areas (understood as "non buildable areas", for the purpose of planning law), has been thrown into crisis by the decision n. 181/2011 of the Constitutional Court (Francario L., 2011, 13), consequently applied by the Civil Supreme Court (Porri E., 2011, 128). In the perspective of the compensation for the land expropriation, the Constitutional Court outlined the need to diversify the criteria for compensation that Italian law referred only to the medium agricultural value, since it is necessary to define, following the principles of the European Court of Human Rights "a compensation related to the market value of the expropriated area, recognized also to owners of land without buildability vocation". The "agricultural medium value applied to all the agricultural/non buildable areas" is indeed considered far from a full consideration of the "reasonable relationship with the market value", requested by the European Court.

Apart the application of rules concerning the value to be paid for an equal compensation of the owner, this interpretation confirms that the simple distinction of land based on buildable or not buildable quality is improper to define the characteristics of the land, related to his planning use.

From a different point of view, at regional level, a wider consideration of agricultural productive areas is taken into consideration. In this direction, the regional legislation lays down a planning for the

agricultural activity (land use plans and economic activities planning), aimed at developing the agricultural business and related activities, with the provision of special rules for rural buildings useful for the farmer's activities (Urbani P. 2011, p. 605). The Provincial coordination Plan (art. 20 d. lgs 267/2000[1], replacing the Law 142/1990), approved by regional law (art. 57 D.lgs 112/1998), includes provisions concerning environmental protection, water and soil protection, landscape protection, and it can also establish constraints to the private property (Fiale A. Fiale E., 2019, p. 122-24).

Considering their nature, strictly related to the farmers activities, Italian legislation provides a lighter regime applicable to rural buildings, as defined by art. 9, c. 3-bis, D.L. 557/1993, including: building for protection of plants or animals and containers for farm machineries; houses of farmers or workers; buildings for holiday farms. Indeed, art. 17 of the T.U. 380/2001 establishes a free administrative authorization for rural buildings, on condition that it is applied by a farmer exercising his main activity and for the purposes of the agricultural business; furthermore, tax regime on buildings is reduced.

Finally, it is to notice that to the Italian Parliament have been submitted, in the last 2 legislatures, several legislative proposal aimed at reducing the soil consumption, due to urban sprawl, since Italy is at the 6th place between the 28 UE member states, for the artificial use of the soil (ISTAT, 2019). However, until now, most regions laid down restrictions in their planning instruments, e.g., prohibiting the change of destination of the land from agricultural to buildable, providing the reuse of the existing built heritage and defining measures aimed at the productive use of the farmland – for example, by the provision of regional "bank of land" (see § 4), to collect a list of private and public land available for the cultivation (Senato della Repubblica, Dossier, 2019).

3. The recent position of EU bodies on the acquisition of farmland.

In a recent document of the EU Commission, concerning the Commission Interpretative Communication on the Acquisition of Farmland and European Union Law (2017/C 350/05), it is pointed out that the reduction of value of agricultural land shall be a risk in the decline of agricultural use.

In Italy, the price of land is generally stationary and in several areas it is considered the highest of Europe (EU Commission, 2015). The market price of land is different, depending on the region and the

[1] The Province defines the Territorial Plan, with the aim at coordinating the territorial goals to be pursued in the area under its jurisdiction. Specifically, art. 20, c. 2 d. lgs 267/2000: "The province, without prejudice to the competences of the municipalities and pursuant to the regional legislation and regional programs, defines and implements the coordination territorial plan, which establishes the general guidance of territorial assessment, and in particular: a) the use of the land related to the vocation of the territory; b) the localization of the main infrastructures and communication lines; c) the guidelines for the water, hydrogeological and forestall management as well as for the soil straightening and the water regulation; d) the areas in which to establish natural parks and natural reserves".

characteristic of the territory[2]. E.g., an emerging issue is the way of considering, when defining the price of land for sale, the value of the land in geographical area included in the PDO or PGI production boundaries, depending on the relevance of land included in the geographical boundaries of PDO/PGI, with reference to the higher market value of the final product and of the business start-up, as it happens for geographical areas of protected names of wines (Mela G. et al., 2016).

Indeed, the "land grabbing" matter, typically present in Developing Counties is also registered, in the EU, in enlargement Countries, since "the relatively low price of land in the new Eastern European Member States compared to the older EU Member States has been a major incentive for investors to acquire farmland in these countries" (Kay S. et al, 2015, 27). Currently, Italy is not considered under risk from this perspective, therefore the legislation does not provide special rules restricting the ownership of foreign investments, as it happens in most of the old EU Member States, with exception, as in Greece, of special restriction for strategically sensitive areas (Ciaian P. et al., p. 6). Moreover, Italian insurance companies have been cited as significant foreign investor putting capital into agricultural land in East-Europe countries (Romania), in time of turmoil of financial markets (Commission Communication 2017, par. 1, b; Extent of farmland p. 18, 23). More recently, the holding of the Italian insurance company "Generali Italia", increased his investment in land in Romania by the purchase of a natural forest area for a total extension of 1770 ha[3].

At the main time, high prices of domestic land may cause difficulties for small farmers, young farmers and families in purchase the land, specially when starting with agricultural activities. This problem has been recently outlined, at general level, by the Parliament resolution "on the state of play of farmland concentration in the EU: how to facilitate the access to land for farmers", 30 March 2017, (2016/2141(INI)). Likewise, in the document "Implementation of CAP young farmers' tools in the EU after the 2013 reform" (2017/2088(INI)), the European Parliament stressed this point, saying that the access to the land has been considered the most relevant barrier for young and new farmers, also for the difficulties in obtaining bank financing and access to the credit programs, because of the lack of activities still undertaken, as warranty for the financing. Furthermore, the document points the attention on the instruments of cooperation between farmers, aimed at reducing costs for starting the agricultural activities.

From the perspective of the CAP functioning and its effect on the concentration of land (deeply examined by the study commissioned by the European Parliament's Committee on Agriculture and Rural Development, Kay S. et al, *Extent of farmland grabbing in the EU*, 2015), the European institutions recently took a clear position: the EU Parliament suggests a possible revision of direct

[2] The estimate of the middle land value in Italy, in each region, considering the typology of cultivation, is elaborated by CREA and reports are published on the webpage: http://antares.crea.gov.it:8080/mercato-fondiario/banca-dati

[3] See: The Italian wine Journal 2/2018, https://italianwinejournal.com/it/2018/07/02/genagricola-investe-in-romania-e-punta-sulle-foreste-acquisendo-unarea-di-1-770-ettari/ After all, the acquisition of forest land in Romania is used for the advertisement, within the policy of the company, defining as long term investment, with a positive environmental effect, oriented to the goals of sustainability.

payment system, since the link between the extension of land and the payment of subsidies currently in force is able to encourage the enlargement of the size of land. In the same way, the European Economic and Social Committee in his Opinion on 'Land grabbing — a warning for Europe and a threat to family farming' 2015/C 242/03, 3.8, underlines that "one reason for land concentration in Europe is the single area payment under the first pillar of the CAP, which gives greater financial leverage to large-scale farmers and thus creates advantages and releases capital for further land acquisition. The single farm payment is applied mainly in the EU-15 and the single area payment in the EU-12. Land concentration is also developing much more slowly in the EU-15 than in the EU-12".

Otherwise, the EU Commission, in the Communication of 2017, identifies as a reason of the risk of land grabbing in Europe, the different levels of direct payments between Member States (EU Commission, 2017, 8).

Furthermore, the EESC in the Opinion of 2015, argues that the European Union shall implement the goal of encouraging the purchase of land by young farmers and the continuity of family farms activities within the Common Agricultural Policy: "To protect family farms so that small-scale farming can offer a viable alternative to industrialised agriculture and to the land grabbing that this entails, active measures must be taken to protect family farms, including aid measures for producer organisations and measures to combat unfair trading practices. Policy measures at EU and at national level can help to make family farming more sustainable and more resilient" (European Economic and Social Committee, 2015, par. 5.4.5).

However, aside from a further CAP reform of payment measures, taking into consideration their effects on land concentration, all the EU documents focus the attention on the national legal systems. Indeed, Member States, for the purpose of ensuring a correct land use, shall be entitled to: (1) impose limits to the circulation of land, notwithstanding the principle of free movement of capitals in the EU; (2) define a public policy including limits to the extension of land; (3) facilitate the encounter of purchase and sale of land by a public system of intermediation; (4) encourage the purchase of land by young farmers and the continuity of family farms activities.

As far as these goals, the Italian legislation includes several legislative provisions aiming at ensuring the continuity of the land use, in case of sale and for enhancing agricultural production activity of new farmers.

4. The "Bank of land" in national and regional legislation.

The matter of the continuity in the exploitation of land, both for preventing wasteland and for the regulation of the encounter between supply and demand in case of sale of land, has been recently revised by the Italian legislation.

Currently, the Italian legislation provides at national level the "bank of agricultural land", and, at the same time, regional provisions lay down similar list of land, available to be transferred to private owners.

Art. 16 of the Law 154/2016 established the "national bank of agricultural land", managed by the ISMEA (Istituto di Servizi per il Mercato Agricolo Alimentare, a public economic body providing services for the agricultural and food market), with the aim at compiling an inventory of all the available agricultural land of public ownership, left free after the early retirement or characterised by the risk of desertion. The goal of national legislation is to enhance the land heritage, reducing the risk of desertification of the land, with a special attention for young farmers, that will be fostered in the allocation of land, calculated on 8000 ha (Ministry of Agricultural, press release 15. 3 2017[4]).

On one hand, the Institute shall create the free database, also providing information concerning the sale conditions and the characteristics of the land, including both natural condition and infrastructures related to the land. It also provides the information for accede to subsidies provided by the D. lgs. 185/2000, title III, reserved to young farmers succeeding in the management of family farms in disadvantages areas.

On the other, the role of the ISMEA is to propose programs of land reparcelling (ricomposizione fondiaria) concerning the land included in the "bank of land", with the aim to identify territorial areas where promote pilot business programs.

For the purpose of implementation of the land bank, ISMEA may sign agreements with the territorial public bodies (region and provinces) and it is supposed to work in cooperation with the most representative farmers organizations.

The sale procedure is defined by an internal regulation of ISMEA. The land is sold at auction, therefore the purchaser shall be the highest bidder. No more than four opening of auction are allowed in case of absence of competitors; ISMEA reserves the right to withdraw the land for sale (ISMEA, 2018).

Considering that the object of sale is only public land, it has been outlined that the final goal of the national legislation seems to be the privatization of public land (Strambi G., 2017, 626). The final goal of this legislation is to enhance the exploitation of the abandoned agricultural land, by implementing the agricultural production, supporting young farmers and reducing the negative environmental impact on the territory (Russo L., 2014, 607). In general, the legislation starts from the assumption that agricultural land shall not compulsory be a part of the state property; furthermore, from an economic point of view, the sale of cultivable land may become a solution for increasing the agricultural output and protecting the environment (Russo L., 2014, p. 608).

[4] https://www.politicheagricole.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/10940

Indeed, as argued in literature (Russo L., 2014, 609), this trend started with the d.l. 78/2009, art. 4*quinques*: the Ministry of Agriculture gave the task to the State Property Agency to identify public agricultural land (of the regions or of the state) that left any public use, with the aim at renting (or eventually selling) the land to young farmers, after a modification in the qualification of these goods, excluding them from the unalienable public property. Indeed, there was a lack in the implementation of this rule, since the Ministry never laid down any criteria for the selection of candidates (Russo L., 2014, 609).

The Italian legislation goes on with these goals - the purchase of public agricultural land – firstly by art. 7 L 183/2011, repealed in 2012, and later by art. 66 of d.l. 1/2012, that provides a new legislative regime, currently in force, implementing the sale of public agricultural land. According art. 66, the Ministry of agriculture, on the basis of data collected by the State Property Agency or on the recommendation of interested citizens, identifies the agricultural land for sale or rent, which price is defined considering the agricultural medium value; 20% of the available land is rented to young farmers starting their activity. As consequence of this first recognition, the public land available for the assignment is overall of 5300 ha; however, unlike than in the past, this law provides a systematic recognition of public land that can be transferred to farmers (Russo L., 2014, 613).

The national legislation above described, currently is added to regional provisions, including local list of available land, in force since the last decade (Calabria G., 2015). One of the most ancient regional legislation is the Law of Tuscany Region n. 80/2012 (Strambi G., 2017, 610; Di Marzio F., 2015), that is not only limited to the identification of public land, but it includes also the possibility to include in the "bank of land" also land of private ownership, available for tenancy, that private owners demand to be insert in the database.

In case of private land, however, the agreement is regulated by the parties, as well as the inclusion of the land within the bank is only a way to make a easier encounter of the demand and supply (not involving a recognition of abandoned land of private owners, that fall outside the power of the Region). As far as the private land included in the regional system of "land bank", it involves complex administrative procedures and it is generally characterized by a lack of publicity within the regional territory and any provision of economic incentives; consequently, this part of the regional program of land rescue is inefficient (Strambi G., 2017, 631).

Indeed, the interference of the regional and national level of "land bank" risks to slow down the regional legislation aimed at defining wider platform for abandoned land, that may include in regional database also private property land.

In conclusion, the establishment of the national land bank is undoubtedly a relevant legal scheme for the goal of the reduction of the land desertion, but it affects a limited part of territory, considering that it is only referred to the land of public ownership – than framed as a tool for the privatization of public

land.

5. A special legislative tool to improve young farmers' access to the land, by succeeding to old farmers: the "mentorship agreement".

A special legislative tool (in force during three years: 2018-2010), aimed at encourage young farmers that are not land owners in starting agricultural activities, has been introduced in 2018: the "mentorship agreement" (contratto di affiancamento, as defined by the Budget law 2018, art 1, c. 119-120 L 205/17). This issue was firstly considered by the law on the simplification of the agricultural sector, Law n. 154/2016, that included a delegation to the government to pass a decree concerning this kind of contract, but it was not adopted within the deadline.

The rule currently in force provides now a contract based on a training period of three years in an agricultural business run by a farmer over 65 or retired, reserved to young farmer, that shall at the main time submit an improvement plan for the farm.

Young farmers shall not be owners of land or holders of rights *in rem* (emphiteusis and usufruct on the farmland) – with exclusion of the rights of superficies (that is not allowed for planting, therefore a right of superficies does not conflict with the purpose of the law) and of the easement right (Pisciotta 2018b).

Indeed, this rule combines the interest of the private party in carrying on the farm activity (i.e. old people involved in the cultivation of land), with the goal of generational renewal in agriculture, e.g., preventing the parceling of the land in case of inheritance, in lack of a family farm. In general, it is an instrument aimed at promoting the access of young farmers to agricultural activities by transferring the ownership of the business and of the farmland to young farmers, even in case of partnership between young farmers. However, it is interest to notice that the law reserve this contract scheme to agreements signed with old farmers qualified as manual workers or farmers, for the purpose of art 2135, that means that the main interest is to save business which is not (necessary) still organised in a business structure, but almost run by manual workers, while the young farmer is equalized to the professional farmer (also for the purpose of the inscription to the providence system).

The content of the agreement, that has the goal to transfer the know how of the famer to the young party (or to young farmers in partnership) shall provide an improvement business plan and a profit sharing mechanism reserving 30-50% of the profit to the young(s) farmer(s), as well as the possibility of the business takeover after the end of contract and the conditions of the early termination of the contract. However, the legal qualification of the contract is not limited to an apprenticeship contract, since it provides also the profit sharing of the business: in any case, the legislative provision does not qualify the position of the party as a shared business ownership, providing only the sharing of the management (Pisciotta, 2018b, 652); therefore it is to conclude that it is a special contract figure,

different from a simple training contract, and characterized by a temporary participation to the business management, that give relevance to the factual situation (i.e. the effective participation to the business), which legal implications are provided by this rule, in lack of a clear legal qualification established by the law. It has been argued that this situation is very similar to that provided by art 230*bis* of civil code, laid down for family business, in lack of a formal business participation of family members (or employment contract) to the family firm (Pisciotta G. 2018b, 652).

Indeed, the profit sharing seems to be a balancing mechanism in a this legal scheme, where the young farmer shall have a professional legal qualification (as professional farmer) while the old farmer may be a manual worker, although he still remain – until the eventual transfer of the business – the main effective business owner. Moreover, as far as the contact shall define the responsibilities of the parties in the business plan implementation, it may request the assistance of the farmers representative organizations, mainly if the agreement include the rent of a farmland (art 45 L. 203/1982).

Finally, on the basis of this contract, the law provides two further advantages for young farmers: the access to preferential financing for young farmers, as laid down by d. lgs. 185/2000, title III, if the contract includes, at the end, a clause for the transfer of the farm to the young party; furthermore it is provided a pre-emption right in case of sale of land, claimed by the young farmer within the 6 months after the end of the contract. This special pre-emption right is acted among the general rule of art 8 Law 590/65 (see below): as special rule, the position of young farmer should prevail over that of the neighbouring owners (Pisciotta G., 2018b, 636).

6. Pre-emption rights established for sale of agricultural land.

An overlook of the Italian legislation on the abovementioned topics shows that national legislation provided, since the ’50, a restriction to the sale of agricultural land, granting pre-emption rights to tenants and to the owners of the property neighbouring the land for sale, if qualified, for the purpose of the law, as direct cultivator of the land: Law 590/1965, art. 8, established the pre-emption of the tenant, later amended by law 917/1971, including at the same conditions the pre-emption of neighbouring farmers (see the special volume of Rivista di Diritto Agrario, no. 2/2018, “Studi sulla prelazione agraria”, collecting the presentation at the Workshop on the pre-emption right, Milan, 25-26 May 2018: Jannarelli A., 2018; Matteoli S. 2018, Sciaudone A., 2018, Tamponi M., 2018; Russo L, 2018, Cinquetti O., 2018; Bolognini S., 2018; Pisciotta G., 2018a; Tommasini A., 2018; Tolanini P., 2018; Casarotto G., 2018).

Strict conditions are provided to apply the pre-emption right, which is consequently protected by the legal right of redemption: the interested party shall be a farmer cultivating the land by himself and with the labour of his family since at least four years; the labour shall cover one third, necessary for the production activity and this condition shall be fulfilled both considering the land in his availability at

the moment of the supply and considering his potential working capacity for the cultivation of the land to purchase; furthermore the interested party shall not have sold his land in the last two years; as far as the position of the land, if the pre-emption right is claimed by neighbouring owners, the fields shall be necessary bordered (indeed, the aim of the rule is the land reparcelling). In addition to the legislative provision, according to which the tenant is preferred to the neighbouring owner, the national legislation in 2001 (art 7 D.lgs. 228/2001) laid down preferential criteria in the case of more neighbouring owners, preferring firstly young farmers (farmers or professional farmers), than farmers employing a larger number of workers, and with specific technical knowledge for the farming activity. This provision precludes the interpretation of a quota sharing of the land in case of more interested parties (Sciaudone A., 2002, 353); however, by this rule, comes to light the interest of a deeper consideration of the professional activity of farmers and of business organization of owners allowed to claim the pre-emption right in national legislation, rather than the only reference to the manual workers of the land (Jannarelli A., 2018, 165).

Over last years, pre-emption rights have been enlarged to new categories of interested parties, i.e., agricultural companies and professional agricultural business operators.

The agricultural companies of individuals was included among the subjects legitimated to purchase the land with the pre-emption rights by d. lgs 99/2004 art. 2. In this case, at least half of the member of the company shall have the qualification requested by the law for the individuals, i.e., being direct cultivators of the land.

Some issues of interpretation have been raised in literature. It was argued that agricultural companies are entitled to exercise the pre-emption right, replacing the single members' rights (Casarotto G., 2009, 232). Furthermore, it is to notice that the subjective qualification requested for the companies as well as for the individuals (working capacity) shall be demonstrated, in case of pre-emption right claimed by a company, by the supplementary condition of the registration of the claimer in the Company register (Matteoli S., 2018, 187).

Similar conditions are currently required for the agricultural cooperatives (considered right holders since 1971) as defined by art. 1 c. 2 d. lgs 228/2001 (d.l. 91/2014, art 7*ter*). Members of the cooperative and administrators shall be, for the half of them all, farmers – however the law do not clear if they have to cultivate the land rented by the cooperative claiming the right of pre-emption, therefore, it is possible that the land is sold in pre-emption to a cooperative that is managing the land for purposes other than cultivation (Giuffrida M., 2016, 297).

More recently, the Law 154/2016, art. 1, extended the pre-emption right to the professional farmer, as defined by the art 1 d.lgs 99/2004. Also in this case, it seems should be applied the conditions requested by the law 590/65, in particular the capacity to cover 1/3 of the work needed for the agricultural activity on the land. In literature it has been outlined that the subjective figures of manual

worker of the land and professional farmer are divergent, and consequently the ratio of the extension of the pre-emption right shall be different: in the first case the establishment of a family farm and in the second case improving the competitiveness of the existing agricultural business with the aim at increasing the size of the cultivable land. Therefore, it has been argued that the condition of 1/3 of the manual work requested by the law 590, should not be considered compulsory for the purposes of the new legislative provision, considering the different models of business organization laid down by the professional farmer, that usually manage a big or middle-size farm, rather than a small farm that can be run also through the work of family members (Sciaudone A., 2018, 210-213). It has been also outlined that the qualification of professional farmer for the purpose of the d.lgs 99/2004 includes the whole framework of agricultural activities, as defined by art. 2135 civil code – included the breeding activity, that was not covered by the subjective figure laid down by Law 590/65, which was strictly referred to the cultivation of the land: therefore, with this new rule, has been improved also the framework of agricultural activity which is relevant for the purpose of the pre-emption right, aimed at the extension of the e farmland size (Jannarelli A., 2018, 172).

In general, it is to notice that in the national legislation on pre-emption rights, the conditions consolidated by the judicial interpretation, are defined with reference to the individuals (both tenants or neighbouring owners of land) and still related to their labour as well as to the relevance of the family farm; these criteria have been adapted, without any substantial modification, to the new situations extended by the law, with over mentioned difficulties of interpretation. Indeed, the subjects beneficiaries of the pre-emption right are currently diversified, in order to take into consideration the evolution of the concept of farmer in the national and EU legislative framework, enhancing his professional skills: indeed, these subjects are even more far from the idea of small farmer as manual worker originally laid down in the national legislation (Jannarelli A., 2018, 168 ss).

7. Preserving the size of the land: the "land unit" in Italian legislation.

The Civil Code formerly provided a rule for limiting the lowest size of the agricultural land (art. 846, minimum size of agricultural land unit). The minimum size should have been calculated as that "necessary and sufficient for allowing the work of a family farm". It was a provision aimed to avoid a breaking up of the land and to preserve the productivity of small family farms, but it has never been implemented by administrative measures required in fixing the legal definition of "lowest size" of the land. Therefore, after a long period of inapplicability, these rules have been finally repealed by art. 7 legislative decree n. 99/2004, introducing art. 5 *bis* in D. lgs. n. 228/2001; simultaneously it has been introduced a new provision, with a similar goal (aimed at the prevention of unsuitable division of farm and by the safeguard of land unit in presence of family farm), leaved to private action, enforceable only in the frame of succession: the rule allows the constitution of a "agricultural land unit" at the opening of succession, with the aim to avoid the breaking up of the land among coheirs.

In this case, the dimension of the land unit is related to the economic viability of the holding, defined by Regions, as access condition to rural development measures: art. 5 *bis* establishes that the agricultural unit shall be equivalent to the "extension of land necessary to achieve the minimum level of profitability determined by rural development plans" in order to obtain the related EU financing. The discipline is applied on request of the coheirs planning to enjoy the tax benefits mentioned in the original provision (stamp duty, land and mortgage taxes exemption and reduction of notarial acts costs). Anyway, currently the tax relief for the establishment of agricultural unit has been repealed, since the d. lgs 23/2011 art. 10, in force since 2014, laid down a unique tax rate for the transfer of land (9%), not envisaging the special provision in force (Giuffrida M., 2016, 292; Agenzia delle Entrate, circolare 2/E 21 Feb 2014, p. 76).

Once established the agricultural unit, the indivisibility restriction for ten years is recorded on the public registers of title and implies the break up prohibition, with subsequent invalidity of any deed and testamentary disposition containing it. In order to encourage its implementation, the provision also implies the repeal of the right to the entitlements and to the quota, should the agricultural unit not be established during succession. The fact that the constraint of indivisibility is limited to a period of 10 years, as outlined in literature, shows that the agrarian property is considered from a "dynamic" point of view (Giuffrida M., 2016, 280): the period identified by the law is aimed at develop an adequate farmer activity, rather than create a limit to the transfer of land.

The presence of several coheirs implies, for the heir assignee of the farm land, the obligation to pay off the difference in value within two years since the succession opening (Sciaudone A., 2004). Should any dispute arise with regard to the land value, the parties can request the intervention of the specially-instituted court of arbitration at the Ministry of agriculture.

A similar discipline was already in force in the Italian legal system, although limitedly in reference to farm businesses in upland areas, since 1997 (law no. 97/1994, art. 5 *bis*, applied to farms in mountain areas).

Furthermore, a special discipline, traditionally linked to the Bolzano province territory (undivided farmstead, so called "*maso chiuso*"), is also aimed at preventing the break up of land in case of succession, with obligation of direct management of the farm business for ten years by the assignee heir, identified among those grown up in the farmstead and who have participated habitually in the cultivation (Bolzano province law of 28th November 2001, no. 17). It is to outline that the legislation on the "maso chiuso" was originally reserved to male heirs (modified only by the law of 2001); however, with the decision n. 197/2017, the Constitutional Court repealed art. 5 of the Bolzano province Law no. 32/1978, in the part that provided the preference of men in relation to women at the same rank in the inheritance rights. To such cases, territorially limited to the Bolzano province, the same tax benefits provided for by the law on the agricultural unit are now applied.

8. Protection of cultivated land vs. green energy production

It falls outside of this work a deeper analysis of the whole environmental Italian legislation, affecting the soil protection that may be have positive effects on the cultivated land (e.g.: water protection and water distribution within agricultural areas; natural park regulation, including cultivated areas; climate change protection provisions; rules implementing green energy).

However, at the end of this report, shall be mentioned the rules concerning the protection of agricultural areas from the expansion of areas used for photovoltaic panels.

The legislation limiting the agricultural land use on behalf of the installation of green energy instruments, that also has the effect of reduce the use of cultivated land and may affects the landscape areas. The question was raised firstly at regional level. Apulia Region, for example, laid down a legislation, aimed at protecting the landscape and the agricultural qualified areas from the wild expansion of wind energy towers: indeed, the regional legislation was repealed by the Constitutional Court, because of the conflict with the State competence in this field in lack of the definition of national rules (Canfora I., 2011, 311). Anyway, the criteria for landscape protection were subsequently defined at national level: the national guidelines provide now that the competent regional authorities shall take into consideration the landscape value of the land, as well as the special qualification of rural areas, included in territories available for PDO and PGI productions (not simply referring to agricultural areas as themselves). However, with the goal to limit the increase of uncultivated areas, national legislation, in regulating the subsidies for installation of energy production facilities (d.lgs. 28/2011, art 10 c.4), firstly established that farmers can access to financial measures covering the maximum extension of 10% of the percentage of their cultivated land (Canfora I., 2011, 325); later fully excluded the access to government incentives for photovoltaic panels installed on agricultural land (Russo L., 2014).

In any case, the destination of agricultural areas to set up energy plants does not need a modification in the planning qualification of land (that remain "agricultural land for the purpose of planning legislation). This is a further demonstration that the qualification of agricultural areas in Italian legislation does not need an effective cultivation of land; furthermore, the conservation of "agricultural qualification" of these areas reduce the risk of speculative practices, stealing the cultivable land from agricultural activities: indeed, after the removal of the energy plants, the land shall come back to the agricultural use (Alabrese M. et al. 2013, 83).

Finally – even if from a different point of view – it is to notice that the inclusion of energy production within the agricultural activities (as related activities to the main agricultural farmers' production), even if it represents an environmental contribution of agriculture to the green energy needs, at the same time

may cause a loss of identity of the agricultural activities (Goldoni M., 2012, 35; Bolognini S., 2012, 159, Canfora I., 2016, 242).

9. Conclusions

The recent Italian legislation on protection of cultivated land is based on traditional tools (from the perspective of land reparcelling – pre-emption right, agricultural unit – with the adaptation in respect of the original legal scheme, as discussed above), as well as on new incentives and promotional rules aimed at combine both aspects of the farmland as place of agricultural activity: business production and protection of public good, towards the risk of abandonment and desertification.

From this point of view, some significant legislative measures have been implemented in Italian legislation in last years, moving from a perspective of a dynamic use of the land, in order to ensure the presence of farmers, as business owners, in rural territory. An important step in Italian legislation may be considered the establishment of the Bank of land at national level (although applicable only to public land), as well as the promotional measures directed to foster business competitiveness and to ensure the generational change in the agricultural business.

Finally, it is important to outline that legislative measures aimed at improving the use of cultivated land are inevitably linked to the economic situation of Italian (and European) agriculture, characterized by a low remuneration of agricultural commodities, added to the difficulty of the investment in the land by small farmers. The support, laid down by the legislative measures for starting agricultural business activity, ensuring the availability of the land by farmers, is therefore important to preserve the presence of farmers in the rural areas; which should be accompanied by additional rules aimed at enhancing agricultural products value in the agrifood chain.

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