

TO:

REPRESENTATIVE OFFICE OF
THE EUROPEAN COMMISSION IN
THE REPUBLIC OF BULGARIA

124, Rakovsky Str.
Sofia, BULGARIA

LETTER

WITH REFERENCE TO: Adoption of a new
sanctions regime in the Bulgarian Agricultural Land
Ownership and Use Act

Dear European Commission representatives,

We would like to draw your attention to the latest amendments to the Bulgarian Agricultural Land Ownership and Use Act (hereinafter "Agricultural Land Act") as adopted by the Bulgarian Parliament, promulgated in the State Gazette on 20 February 2015, which imposes unbearable fines on companies – holders of agricultural land ("Land Companies") with specific shareholding participation namely: (i) offshore companies, (ii) foreign individuals or entities, other than citizens or companies established in the Member States of the European Union and of the states – parties to the European Economic Area Agreement ("Non – EU Persons") and (iii) other than individuals or legal entities, who have the right to acquire right of ownership over agricultural land under the conditions of an international treaty, ratified in accordance with procedures stated in the Constitution of the Republic of Bulgaria. For each hectare of agricultural land owned such company shall be fined BGN 1,000 (approx. EUR 500) and with a triple amount within the next three months as of the day of last sanction (hereinafter "the Sanctions").

The bill of amendment to the Agricultural Land Act was adopted by the legislator with a rationale the preservation of the Bulgarian agricultural land as a national treasure. No impact assessment was made in the legislative process neither were any hazards or complications with respect to farming the rural land deriving from its present ownership identified in the document. However, even if the proclaimed idea behind that bill of amendments was to preserve and protect the agricultural lands and their usage the leading intention behind the Sanctions was to restrict investments in the field wherever they were made by foreign (non-Bulgarian) investors.

Nevertheless we find it paramount that local interest is protected within the perspective of the common European legal framework and particular the core principles of free movement of capital within the EU are protected, more precisely that the prohibition under Article 63 of the Treaty on the Functioning of the European Union (Treaty) of all restrictions on the movement of capital between Member States and between Member States and third countries is complied with.

It is common ground that national legislation on the acquisition of land (including rural) must comply with the provisions of the Treaty on freedom of establishment for nationals of Member States and the free movement of capital and should be assessed in that light (see to that effect European Court of Justice joined cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157).

Pursuant to Article 50(2)(e) of the Treaty the right to acquire, use or dispose of immovable property on the territory of another state generates capital movements when it is exercised. It is also clear from the provisions of Directive 88/361/EEC that capital movements include investments in real estate on the territory of a Member State by non-residents.

Here is in brief the effect of the bill of amendment of the Agricultural Land Act in practice:

Effect on EU Persons

Although citizens and companies established in the Member States of the European Union and of the states – parties to the European Economic Area Agreement (hereinafter “EU Persons”) are generally excluded from the shareholders’ restrictions introduced with the Agricultural Land Act, they are still subject to the Sanctions due to their (current or intended) participation in Land Companies, which might have Non - EU Persons shareholders (individuals or entities). The practical result of the amendments is that due to the mere fact that such Land Companies have even one shareholder, which is Non – EU Person, EU Persons are prevented from making and maintaining investments in Land Companies because the latter will be forced to either forgo acquiring rural land or to transfer their title of ownership to such property.

Following the same logic EU Persons are effectively deprived of the right to make investments in Land Companies provided the same EU Person holds shares in a Land Company through a company established in third country outside of the territory of the European Union or European Economic Area.

Effect on Shareholders in Public Companies

In addition public (listed) companies, whose shares are freely transferable and are traded on the stock exchange, do not have available any mechanism in place to restrict the acquisition of their shares by an investor (be it EU Person or Non - EU Person). Thus being unable to influence the transfer of its shares the public company could not guarantee to its EU Person shareholder that the latter’s investment would be kept away from Non EU Person shareholders, i.e. could be saved from the Sanctions imposed to the public company and therefore indirectly on its shareholders.

Permitted exemptions

The Treaty allows exceptions to the leading principle in Article 63 of the Treaty with reference to taxation specifics, public policy or public security and establishment rights. None of these exemptions apply to the essence of the Sanctions.

On the other hand restrictions on the free movement of capital, including on the acquisition of rural land introduced with national legislation shall not be prevented provided they pursue an objective in the public interest, made in a non-discriminatory way and complying with the proportionality principle. (see to that effect ECJ case C-182/83, C-271/09 and C-302/97).

Clearly measures for protection of the integrity of the rural land in Bulgaria have not been exhausted and much more effective ways of achieving the proclaimed goal have been and could be further introduced. Example is the compliant measure introduced with Article 3 (c) of the Agricultural Land Act whereby the right of ownership over rural land is linked to a residence requirement term of 5 years applicable to both to individuals and to shareholders of the Bulgarian company – land owner (provided the company has not been established more than 5 years previously).

Conclusion

With reference to the above the newly adopted amendments to the Agricultural Land Act are clearly in **breach of Article 63 of the Treaty**.

As the case at hand is, the mere introduction of sanctions is already a breach of one of the pillars of the free movement of capital principle that member States shall refrain from depriving the EU Persons from already acquired rights and from the value of their investments. Actions taken *a posteriori*, such as measures to sanction investment already made would lead to complications inconsistent with the requirements of continuity of use and sound land management. Such controversial effect to the free movement of capital principle of the Treaty was recently announced by the European Commission when it opened an infringement procedure against Hungary on rights of cross-border investors to use agricultural land (please refer to European Commission decision, dd. 16 October 2014).

In effect, the Sanctions violate the basic principle of free transferability of shares laid in Article 40(1) of Directive 2004/39 of 21 April 2004 on Markets in Financial Instruments amending Directives 85/611/EEC and Directive 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing council Directive 93/22/EEC.

Furthermore, as a result of the newly introduced fines public companies may not be able to meet the requirements for equitable treatment of the shareholders in accordance with Article 4 of Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the Exercise of Certain Rights of Shareholders in Listed Companies.

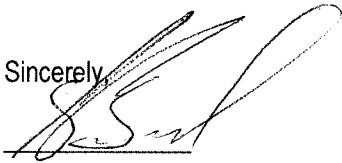
Expected Assistance

We expect that with your assistance we will be able to draw the attention of the Bulgarian Parliament to the matter once again so that a reasonable solution could be found and priority is given to principles that underlie the core structure of the European Union.

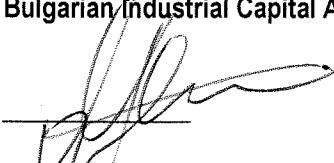
For your reference please find attached a letter we have addressed to the President, the Prime Minister and Members of Parliament and Government.

The city of Sofia, 24.02.2015

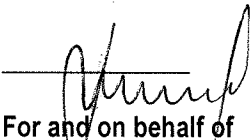
Sincerely,



For and on behalf of
Bulgarian Industrial Capital Association



For and on behalf of
Bulgarian Association of Supplementary Pension
Security Companies



For and on behalf of
Bulgarian Association of Special Investment Purpose Companies



For and on behalf of
Bulgarian Association of Licensed Investment Firms



For and on behalf of
Bulgarian Association of Asset Management Companies



For and on behalf of
Bulgarian Industrial Association



For and on behalf of
Confederation of Employers and Industrialists in Bulgaria



For and on behalf of
Bulgarian Stock Exchange- Sofia JSC