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Balance Between the European Union and Bulgarian Legislation as Regards the Agricultural Land Versus Food Sovereignty

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Abstract: The article analyzes the relations between the legislation on agricultural lands in Bulgaria and the European Union (EU) and the impact of the doctrine on food sovereignty of the country (de lege lata). Attention is paid to the EU infringement procedure against Bulgaria based on Art. 258 of the Treaty on the Functioning of the European Union (TFEU) as regards the restrictions on the acquisition of agricultural land. The European Commission (EC) has established a case of non-compliance with EU law as regards the acquisition of agricultural land not only against Bulgaria but also against several other EU Member countries. The main argument of the EC is the violation of EU principals as regards the free movement of capital and non discrimination of the EU citizens which may harm some groups of national investors or investors from the EU. On hand, the legislative change undertaken by the Bulgarian authorities does not create conditions for discrimination between Bulgarian and foreign individuals or legal entities. On the other hand, Bulgaria has not made any attempt to establish a balance between the EU acquis on the acquisition of agricultural land and the food sovereignty of Bulgaria. At the end, this result has led to too many legal changes by which the conditions for "legal error" have to be taken into account. In order to address this issue (de lege farenada) some conclusive normative proposals are made.

Keywords: Agricultural land, Food sovereignty, EU legislation

1. Introduction

Food sovereignty is a political, economic and legal policy framework/doctrine which publically appeared at the World food summit in Rome 1996 for the first time and introduced by the FAO in 2007. In order to distinguish between Food Security and Food Sovereignty the latter was defined as the right of people to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their rights to define their own food and agriculture systems. According to this definition and amongst others, the farmers should have the power to determine the policy and mechanisms for food production and distribution. Bulgaria is a member of the FAO (1961) and through its right as such, introduces its strategic documents on food sovereignty along the lines given by its obligations as regards its EU Membership.

Since 1991, the European Union (EU) is also a member of the FAO and influences the policy framework/doctrine on food sovereignty through its Common Agricultural Policy (CAP) and Common Organisation of the agricultural Markets (CMO). Food sovereignty is a component of a mix of efficiency, food security (Article 39, item 1 "a" of the TFEU), the income of farmers (Article 39, item 1 "b" of the TFEU) and the harmonious development of rural areas (Article 39 item 2 "a" of the TFEU). However, the CAP highlights, without a doubt, the benefits of consolidating resources and ubiquitous vertical and horizontal integration through international production (manufacturing) and other interbranch associations (EU Council, 2020).

Agricultural land is a primary factor of production and a major resource for agriculture, which is why the EU should "reverse" the theoretical dualism arising from the distribution of property rights on farmland. Negative consequences are possible for some groups of farmers who will not be able to produce their own food due to lack of access to land. Thus, the EU has a reason to strike a balance between food sovereignty and land policies. Through a historical review and institutional analysis, the dynamics of the legal framework for agricultural land in Bulgaria in relation to that of the EU are presented. As regards the direction of agriculture in Bulgaria the EU law, national legislation and atypical acts (Atanasov, 2019) are taken into account. The trajectory of change as regards legislation on agricultural lands (Fig. 1 below) has been studied in the context of the idea of "bioeconomy" of EC (EC, 2018).

2. Agricultural Land - The Basis of Food Sovereignty

The challenge of explaining the need for food sovereignty lays in the theoretical and even ideological dualism in the sense of the international dispute over free trade or protection regarding agricultural and food production. In addition, the question is about the specific powers that determine access to resources: what is the effect of the coordination mechanisms, and who should benefit from the goods produced. (Aerni, 2011; Wittman, 2009; McMichael, 2009).

The theory of land mobility leads to a discussion on the consequences regarding problems related to rights accessing and conquering agricultural land. Next to its ecological characteristics, the sustainability of the organizational forms within which property transfers take place (Conway et al., 2020; Hartvigsen, 2014) play a key role. It is important to clarify that efficiency is a direct consequence of property consolidation. However, efficiency cannot be automatically equated with increased productivity. Some entities take the subsidy as a key element for maximizing operating profits.

Thus, more efficient companies may have it as a type of sustainable annuity (Stiglitz, 1974). There is no evidence that in the integration of organizations, the positive role of competition remains unaffected (Glick, 2019). The same is true for resource-based consolidation (Norer, 2019). Discrimination through different levels of the resource-product chain is possible (Gray, 1960), which is likely to affect the ability of certain groups of people to produce their own food. The number of freedoms can be distorted by the argument that the lack of restrictions, e.g. agricultural land does not pose a danger in the distribution of exhaustible resources. The concentration of agricultural land (Kay, 2016) as a primary factor of food production is not considered as being fundamental, although it is not clear whether consumers receive a higher value (Bork, 1978; Honvencamp, 2010) by such a distribution of agricultural land.

It is realistic to assume that legislation on acquisition or access to agricultural land is a policy tool. Ownership is one of the categories of absolute rights. For this reason, some modern legal systems use a constitutional approach to impose the link between agricultural land and food sovereignty (Szilágyi and Raisz and Kocsis, 2017).

3. Institutional Change in Agricultural Land

During the attempt for a "new" codification regulating public relations in agriculture in Bulgaria the legal change have not stopped. As shown in Fig. 1 below the total number of normative acts having a direct and indirect relation to the agricultural lands in the period 1989 - 2021 sum up to 50 normative acts. Twenty six of them are of laws; 5 - regulations; 8 - ordinances, 5 - tariffs and; 6 - of other acts having the character of instructions.

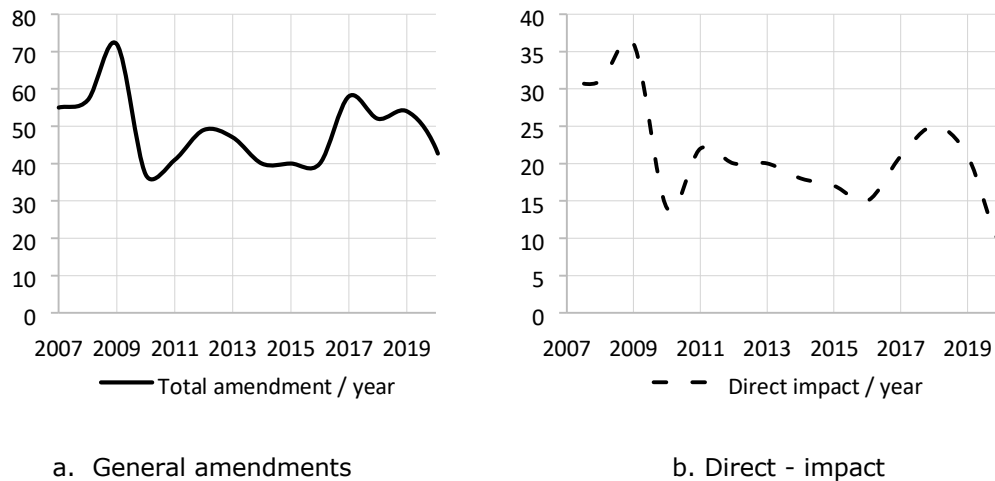


Figure 1: Amendments of legal acts related to agricultural lands

From Fig. 1 a. it can be seen that the total number of changes in the period (2007- apr.2021) related to agricultural land sum up to 705. Analysing the acts with direct effect on the agricultural lands (Fig. 1 b) it becomes clear that the former have been changed 308 times. An institutional analysis presents this "segment" of legislation as the most dynamically changing part of Bulgarian law.

The diffusion of new policies affecting agricultural land should affect every legal act. The changes are legislative acts fading. Questions are asked about the role of change and whether food sovereignty is introduced in the country with its help.

4. Is Bulgarian Legislation on Agricultural Land Violating the Eu Law?

According to Annex VI, No.3 to Article 23 of its Accession Treaty to the EU, Bulgaria had a five-year period for harmonization of its national legislation on the acquisition of agricultural land. Due to the direct effect of the provision of Art. 4, para. 5 of the Constitution of Bulgaria (CRB) as well as the "principle of supremacy" of EU law, a contradiction of Bulgarian legal acts with the founding Treaties of the EU was inadmissible.

Bulgaria could not continue to restrict the acquisition of its agricultural land. However, referring to the FAO basic document (2012) on agricultural land, the country's Parliament decided to extend the restriction on the purchase of land by foreign nationals. Thereafter however, the Constitutional Court of Bulgaria (CCB) ruled that such a decision contradicted the CRB . In response, the legislator made a change in Art. 3 to c of the Agricultural land ownership and use Act (ALOUA), which introduced new restrictions, but with a different philosophy. The acquisition was possible, but only after a residency period of the buyer in the country. Individuals and legal entities as potential buyers of agricultural land had to prove the origin of their capital.

In 2015, the EC reviewed the compliance of Bulgarian legislation on the acquisition of agricultural land with the EU Acquis. According to an extract from the infringement database of the European Commission dated January 2, 2021 there is a pending infringement case against Bulgaria for violation of Art. 258 TFEU. The exchange of official correspondence shows that the EC was concerned about the Bulgarian requirement for a long-term residency of potential buyers interested in investing in agricultural land in Bulgaria as a primary source for feed/food production. Although this requirement had not only to be fulfilled by non Bulgarian

investors but also by Bulgarian nationals the EC assumed that both groups were not able to effectively exercise their rights and were violated working in Bulgaria. Both groups which are not in the position to prove the required long-term residency were considered to be discriminated and disadvantaged according to the EC's opinion.

After the infringement process had started a year earlier, the EC sent a reasoned opinion to Bulgaria on 27.05.2016, in order to follow up the situation of the legal dispute. Being in charge of the process the Ministry of Agriculture and Food (MAF) of Bulgaria presented arguments to the EC, which had been established on the case by an interdepartmental working group analyzing the corresponding legislative framework of Bulgaria at that time.

This group concluded that it was necessary to amend the ALOUA by deleting its Article 3c. However, this would have had a strong socio-economic impact on the Bulgarian society. Thus, Bulgaria's first plan was to amend the law on Agricultural Land, which provided for the deletion of Article 3c. Envisaged by December 1, 2016. The draft for this amendment should have been ready, although the necessary parliamentary procedures and deadlines for this were not specified. Also MAF did not commit itself to precise the specific deadlines for its adoption and entry into force.

In parallel, the EC published a guideline on restrictions regarding the acquisition of agricultural land in October 2017 (Table 1, column IV below), thus explaining in a new context the objectives laid down by Art. 39 of the TFEU following up a corresponding Resolution of the European Parliament (EP) of April 2017 (see table 1, column III below). The EC pointed out as well what should be the incentives for reduction of concentration of agricultural land and how countries could regulate their agricultural land markets, related goods and labor markets in line with EU law.

5. Eu and the Concentration of Agricultural Land

As early as 2014, the European Economic and Social Committee (ECOSOC) drafted an opinion on "Land grabbing – a wake up call for Europe and an imminent threat to family farming" (2015 / C 242/03) published in January 2015, suggesting amongst others that the EU Member States should have certain rights to restrict access to farmland such as setting upper limits for the acquisition, a system of preemptive rights or official authorisation procedures.

In this context, ECOSOC also referred to Bulgaria's decision to extend the Moratorium of its EU Accession Treaty regarding the acquisition of farmland up to 2020, seeing this decision as an anticipation of direct threats to farmland (ECOSOC: 2015/C 242/03). One month later in February 2015, numerous national and international organizations as well as EU citizens submitted a petition on "Preserving and managing European farmland as our common wealth: A CSO call for sustainable and fair EU governance of farmland" to the EP (Petition No. 187/2015).

In May 2015, the EP published a study on the "Extent of farmland grabbing in the EU", which was critically analyzed by the Directorate-General for Agriculture and Rural Development of the EC in September 2015. Meanwhile, the EC "had threatened" also 5 other countries: Hungary, Slovakia, Lithuania, Latvia and Poland with possible lawsuits before the Court of Justice for non-compliance with Community law as regards their national legal restrictions on acquisition of farmland in their countries.

Making an assessment of the difficulties that farmers have in accessing agricultural land and referring to all of the opinions and petitions presented the EP adopted a Resolution in April 2017. Titled "On the state of play of farmland concentration in the EU: how to facilitate the access to land for farmers" the EP Resolution described the magnitude of the farmland

concentration in the EU and concluded that Member States have both, exclusive and shared competences for rules on access to agricultural land. The Member States were called upon maintaining a family-based agricultural model, but also to focus their domestic land use policies by improving the available taxation instruments, support schemes and financing through CAP-derived. Calls were also made on the EC to publish a clear set of criteria for measures to regulate the land market, as well as for restrictions which are relevant for the public interest and in line with the EU Acquis, in particular respecting the four freedoms of the EU.

6. The EC'S Guidance on Conditions for the Acquisition of the Agricultural Land in Compliance with the EU Acquis

On the request of the EP in October 2017, the EC has issued guidelines on the acquisition of agricultural land in the context of EU law and the case law of the Court of Justice. Contrary to the previous doctrine that agricultural land does not fall within the scope of EU law due to the lack of regulations in secondary law, the EC concluded that the acquisition of agricultural land is part of Community law. In particular, agricultural land is subject to fundamental freedoms for the movement of capital. It is a kind of absolute right and established in the founding treaties and the rules of the internal markets. The Commission acknowledged that the specific nature of agricultural land regulations is covered by EU primary law, which in turn determines the link to possible restrictions on investment in agricultural land.

The proportional protection of the public interest is linked to the prevention of land speculation on one hand and the preservation of agricultural communities on the other, as well as the maintenance of developed, viable agriculture. The latter however, is impossible without a guarantee of foreign investment in agricultural land. In the interpretative document, the EC addressed all aspects of the functional consequences following restrictions on land acquisition. Part I justified the need for a European legal act to address the allocation of this important resource at the EU institution level in relation to concentrations and land grabbing. In Part II the EC analyzes the applicable law. Part III presented the approach of the Court of Justice concerning the interpretation of the legislative framework related to agricultural land. In Part IV the specific interpretations were formulated as a hypotheses which shows how the rules should be applied and how far the restrictions on land acquisition should be extended. In Part V the tools for acquiring agricultural land were set.

The EC concluded that the objectives of the CAP cannot justify restrictions on fundamental rights and freedoms. Restrictive measures may be imposed only if they are proportionate. A balance between interests is mandatory, and agricultural land rules cannot be a precondition for direct or indirect discrimination. At the same time the EC did not justify direct measures to protect the productive interests of small farmers and their families as regards access to farmland. Thus, it could be assumed that a balance in support of the policy framework/doctrine on food sovereignty was not achieved.

7. Drafts for Legislative Change – National Legislative Acts

Draft Law deleting Article 3 c of the ALOUA / 2017.

Following step two of the infringement procedure against Bulgaria by the EC in 2016, the Bulgarian Ministry of Agriculture and Food tabled a draft law on amending Article 3c to the Council of Ministers for public consultation on the 12th July 2017. After the deadline of this procedure it seems that this MAF initiative has gone nowhere, because the draft text got many

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negative comments and was not supported by the majority of the Bulgarian Parliament, the National Assembly (NA).

The NA tasked the Ministry of Agriculture and Food with presenting a report containing an analysis of the normative regulation of public relations in land use and a Strategy for land management and development by 31 December 2017 (MAFF Bulgaria, 2017). MAF should present a draft of a unified legal framework governing land relations related to land use within the next 10 months. This period has been extended twice - once until 28 February 2019 and a second time until 31 December 2019.

A legislative draft for amending ALOUA / 17.12.2018.

After a debate in the National Assembly, it was decided to expand the scope of the bill on agricultural land to include: ownership, rental relations and rent. It was stated that the Law on Land Acquisition and the its corresponding Regulations have been amended and supplemented many times, due to which the whole legal framework has lost its sacred systematic and substantive and procedural legal norms were mixed. Numerous changes have made the framework fragmented and inconsistent, and the "insertion" of really important issues into the Rules of Procedure has made them unbalanced and ill-founded. Another part of the provisions of the Act could not exercise their legal effect or had completely lost their applicability due to a new reorganization of public relations after 1989 and during the Transition period. Restitution as an institution has been played out and at present should not be subject to current legislation in the field of land relations. Of course, the matter of restitution cannot be completely excluded, but it should be put in a separate normative act. This act may continue to be the ALOUA. A specific new act should be drawn up for the remaining "urgent issues".

On December 17, 2018, the Council of Ministers published on its website for public consultation until January 16, 2019, a new Draft Decision on the adoption of a draft Law on Property right, Land Relations and Protection of Agricultural Land. The reasons given for this draft law stated that it refers only to the permanently regulated relations. For those which do not meet this criterion a legal delegation was envisaged through by-laws according to the Law on Normative Acts (LNA).

The original approach of unifying the Regulation on the use and protection of agricultural lands had been kept. The main argument was that the provisions of the ALOUA and the Law for protection of agricultural land (LPAL) were amalgumated, because the regulated the public relations arising from the same subject "agricultural land". The project provided new legitimate definitions of basic concepts, such as: "use of agricultural lands " and "land relations".

Draft for a new legal framework on land relations/5. 11. 2019.

On November 5, 2019, a new Draft Law on Agricultural Land was published on the portal for public consultations of the Council of Ministers. In synchrony with the texts of Articles 19 (2), 20 and 21 of the CRB it was argued that the provisions of the bill consider agricultural land as a "national treasure". The envisaged financial restrictions for companies as regards the origin of their capital remain. The ideas of the new CAP (2021-2027) for change in agriculture were incorporated through four types of land use measures: (1) user protection; (2) protection of the owner - user; (3) assisting the owner, but with the aim of preventing the fragmentation of agricultural land (4); assistance to the owner - for environmental purposes.

The project continued with the idea of merging the two laws: the ALOUA and LPAL. The transitional and final provisions of the draft also foresaw the repeal of Art. 3c of the ALOUA. According to MAFF this new draft was in line with the Property Act (PA) and resolved the issue of EC infringement procedure against the Bulgaria. Another key tool foreseen was the instrument of voluntary land consolidation for which the the administrative approach was laid

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in detail. However questions were raised whether this tool would lead to success of land consolidation as regards the effect on private property and on surviving/ disadvantaged possibilities for smaller entities in this context.

Table 1: Synopsis of possible restrictions

No	General list of possible restrictions	EP Resolution Apr. 2017 Calls on	EC Guidelines Oct. 2017	BG Draft Nov. 2019
I	II	III	IV	V
1	Requirement on Residence/residence period (RR/RP) in the country for nonnational EU buyer	Maintaining a family-farm-based agricultural model with diverse residence based on agricultural structure with traditions (5, W)	RR/RP is incompatible with freedom of free capital movement and right of establishment (4f)	RR will be repealed (§ 38 of the Transitional and Final Provisions)
2	Prior authorisation (PA)	Farmland transactions to be subject to an ex-ante procedure for checking conformity with national land legislation (21) and State licensing of sales and leases (22)	Schemes involving PA could be acceptable under some circumstances (4a)	PA is not foreseen except for land in possession of the State or Municipality
3	Pre-emption rights (PR)	Priority in purchase of land for SM local producers, new entrants, young farmers including pre-emptive rights (12) and use of this instrument to regulate the land market (22)	PR could be considered as proportionate restriction being less restrictive than prohibition of acquisition (4b)	PR are not foreseen
4	Price controls (PC)	Permit access to land ownership/tenure under financial conditions appropriate to farming (21) and indexation of prices with preference to farm incomes (22) and use tax legislation to avoid speculative land transactions (24)	PC could be justifiable to prevent excessive land speculations (4c)	PC are not foreseen
5	Self-farming obligation (SO)	Use obligations for tenants to engage in farming and preference for farmers (22)	SO is disproportionate because less restrictive conditions could be applied (4d)	SO is not foreseen
6	Qualifications of the acquirer as farmer himself (QA)	---	QA not justifiable because farmer is not a regulated profession and proper cultivation of land could be achieved by less restrictive conditions (4e)	QA are not required
7	Prohibition on sales to legal persons (PS)	Use restrictions on the right of purchase of farmland by legal persons (22)	PS is not justifiable proper cultivation of land could be achieved by less restrictive conditions (4g)	PS are not foreseen
8	Acquisition caps (AC)	Use ceilings on the number of hectares that may be bought (22)	AC could be suitable and compliant with EU law and rights to prevent excessive land ownership concentration to support family farming and medium- sized farms provided each case is justified in the national, factual and legal context (4h)	AC are not anymore in place
9	Privileges in favour of local acquirers (PLA)	Involve local communities on decisions on land use (18) and Regulate sales, use and lease of agricultural land in coordination with local authorities and farmers' organisations (37)	PLA and other privileges for local buyers have to pursue legitimate objectives in the public interest reflecting socio-economic aspects (addressing land fragmentation, viable farms at local level, permanent agricultural community), otherwise they are not justified (4i)	PLA are not foreseen
10	Condition of reciprocity (CR)	---	CR is incompatible with EU law (4j)	CR are not foreseen

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11	Other tools	Create a legal framework to tackle the problems of small-scale family farms and a broad distribution of land ownership (14). Use of taxation, aid schemes, CAP funding to maintain family-farm-based agricultural model (5) and proper instruments for new entrants and young farmers facilitating	See measures 1-10 above by which the Member States could combine those, which are - compatible with the EU law, - proportionate to reach the objectives and - justifiable in each case to achieve the goals of the policy.	Acquirer can't change the purpose of the land for seven years after the acquisition (Art.5 (1))
12		their entry into farming by ensuring fair access to sustainable credits (17)		

Note: The figures in brackets refer to the paragraphs in the analyzed original documents

The balance between the different interests in the management and distribution of farmland from the State and Municipal Land Fund, as well as still some remaining land from former agricultural cooperatives had not been found yet. There is a lack of proportionality of the registered transfer acts regarding the use of agricultural land under the EU direct payment scheme compared with others regulating the ecological balance. The bill has received much criticism.

However, as this draft Single Act on Agricultural Land could yet not reflect the rules of the forthcoming CAP 2021-2027 according to the opinion of the Agriculture Committee of the NA expressed on the 6th Dec. 2019, the view was to postpone the parliamentary debate in the NA of Bulgaria and await another new draft.

Table 1 below shows a comparative analysis of the restrictions on the acquisition of farmland being the primary factor for the production of food. If legally possible restrictions are well chosen by a national legislator they could not only guarantee food security but also national food sovereignty. In case of Bulgaria as EU Member State the EU food sovereignty would be supported. At present however, no evidence could be found in the Bulgarian drafts reconciling the relationship between restrictions on access to agricultural land supporting the policy framework/doctrin on food sovereignty and bioeconomy (Tab. 1, col. V). In early 2021, after the decline in agricultural production accelerated by the "Covid-19 crisis", Bulgaria needs legal changes, including food sovereignty.

8. Conclusion

A). The EC released in 2020 its new "Farm to Fork Strategy" for a fair, healthy and environmentally-friendly food system. The management and access to farmland plays a key role for the realisation of this strategy safeguarding food safety and security. In addition with the recently adopted policy of the EU called "Open Strategic Autonomy (18th February 2021)" the EU could also develop a longer term vision on an EU policy framework regarding food sovereignty. Every producer must have access to agricultural land, which will allow him to produce enough food to feed himself and his family. At the same time, the rules must help to maintain sustainability as a production and social / organisational unit.

B). The political challenge is to preserve the rights related to economic freedoms concerning the distribution of market and investment opportunities for all groups of economic players, which are directly dependent on the distribution of resources such as agricultural land. For the EU the EC has provided guidelines on the restrictions to the access of farmland which are compliant with the EU Acquis and which could support the doctrine on food sovereignty at the time.

C). Legal change (de lege fareda) must respect an absolute right related to free movement and the right of people to be able to produce their own food. The use of any property right should take into account the opposing interests. Advantages in terms of access to agricultural

land should take into account the opposite needs of groups of people arising not only from their rights but also from their food needs. The opposite would mean reversing the meaning of the notion of public interest. The proposed changes to the idea of a new "bioeconomy" in the EU do not take into account the risks arising from the integration of organizations and resources in relation to the possibility of harming the viability of small agricultural units with specific adaptation. The Bulgarian legal framework is also linked to the formal "legal subordination" of international law. When adopting any new Bulgarian legal act in agriculture, the "impact assessment" according to Art. 28 para. 2, item 5 of the LNA should take into account the forthcoming changes in legal measures of the EU secondary law referring to rural support, direct funding, competition, organisation of agricultural producers, environmental format of the CAP for the period (2021-2027) and the balance between the doctrines/strategies on food safety, security, bioeconomics and food sovereignty. Despite the "systemic" nature, the current legislative framework creates a clear hierarchy between sources of law. A new codification in Bulgaria would make sense when, as a result, legal certainty increases and the balance between disparate legal interests does not pose problems of a social or political nature.

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