

RESEARCH ARTICLE

Deciphering the phenomenon of land grabbing within the framework of the European Union: legal-political responses and impact of biofuels production*

Descifrando el fenómeno de los acaparamientos de tierras en el marco de la Unión Europea: respuestas jurídico-políticas e incidencia de la producción de los biocombustibles

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Recibido: 27/02/2020 Aprobado: 05/06/2020
DOI: 10.25054/16576799.2379

ABSTRACT

When we talk about land grabbing, or problems around land, we do not really think that this is a phenomenon that is also occurring within the EU, but rather we think mainly of other parts of the world, such as the Global South, Latin American states or Africa. However, the reality is that in Europe today, the concentration of land under increasingly large farms controlled by fewer hands (partly as a result of land grabbing and reduced access to land for small-scale food producers) is accelerating. The aim of our work is to provide an overall legal, social and political analysis of the phenomenon of land grabbing, particularly of agricultural land, within the EU, presenting the main legal and political challenges that arise ad intra.

We will also focus on the analysis of certain European Directives that have an impact on the Union's policy on biofuels and therefore also on possible ad extra land grabs that are carried out within the framework of the European Union. The issues presented in this work are complex and multidisciplinary, so we can approach them from different perspectives. However, in order to shorten the scope of the study, we have taken into account the basis of land grabbing within the framework of European Union law. In this sense, the scientific method that has been used is the legal-sociological one, insofar as it is the one that we consider the most appropriate for the multidisciplinary approach. This method consists of analyzing the current state of the rules and the interrelationship between the possible legal sources but taking into account the social, economic, political and historical elements that allow to explain the effectiveness, rationale and applicability of the rules. This work has also required the use of a variety of methodological techniques, such as social and legal analysis, legal deduction and induction, description and interdisciplinarity.

KEYWORDS

Land Grabbing; European Union; Land Concentration; Farmland; Common Agricultural Policy; Biofuels.

* Research Article.

RESUMEN

Cuando se habla de acaparamientos de tierras, o de problemas en torno a la tierra, realmente no se piensa en que éste sea un fenómeno que se está produciendo también en el interior de la UE, más bien pensamos sobre todo en otras partes del mundo, como en el Sur Global, en Estados Latinoamericanos o en África. No obstante, la realidad es que en Europa hoy en día, la concentración de tierras bajo explotaciones cada vez más grandes controladas por menos manos (como resultado, en parte, del acaparamiento de tierras y de la reducción del acceso a la tierra para los pequeños productores de alimentos), se está acelerando. El objetivo de nuestro trabajo es ofrecer un análisis jurídico, social y político general del fenómeno del acaparamiento de tierras, sobre todo de las tierras agrícolas, dentro de la UE, haciendo una presentación de los principales retos jurídicos y políticos que se plantean *ad intra*. También nos centraremos en el análisis de ciertas Directivas Europeas que tienen incidencia en la política de la Unión sobre los biocombustibles y por tanto también en los posibles acaparamientos de tierra *ad extra* que se realicen en el marco de la Unión Europea.

Los temas presentados en este trabajo son complejos y multidisciplinarios por lo que se pueden abordar desde diferentes perspectivas, sin embargo, hemos tenido en cuenta, para acortarlo al objeto de estudio, la base de los acaparamientos de tierras en el marco del derecho de la Unión Europea. En este sentido, el método científico que ha sido empleado es el jurídico-sociológico, en la medida en que es el que consideramos más apropiado para el enfoque multidisciplinar. Este método consiste en analizar el estado actual de las normas y la interrelación entre las posibles fuentes jurídicas, pero teniéndose en cuenta los elementos sociales, económicos, políticos e históricos que permiten explicar la eficacia, fundamentación y aplicabilidad de las normas. Para la elaboración de este trabajo también se ha requerido el empleo de técnicas metodológicas muy variadas, como el análisis social y jurídico, la deducción e inducción jurídica, la descripción y la interdisciplinariedad.

PALABRAS CLAVE

Acaparamientos de Tierras; Unión Europea; Concentración de tierras; Tierras Agrícolas; Política Agraria Común; Biocombustibles.

INTRODUCTION

In relation to land and associated rights, academics and activists have been particularly interested in understanding how the increase in land grabbing for negative purposes has led to evictions, privatization of natural resources and human rights violations. As scientific studies, official reports and field surveys increase, the serious problems of this massive investment are confirmed: ignorance of customary rights, irregularities, lack of transparency of the contracts, lack of consultation with affected populations, forced displacement without compensation, deprivation of access to certain essential resources, transfer of the best land for the

production of exportable or agrofuels goods in States where food security is unstable, etc. (Borras, Hall, Scoones, & Wolford, 2011).

Although the figures will vary according to the database we use (Grain, Land Matrix, Food Policy Research Institute, World Bank, Oxfam Intermón, Committee on World Food Security, FAO, Oakland Institute etc.), the phenomenon of land grabbing is a complex one - with opacity in the investment contracts - which has different causes and does not stop.

This phenomenon expanded significantly after the global economic and food crisis of 2007 and 2008 and

is now occurring due to various causes. To mention the most known causes we can cite: the increase in the prices of basic grains at the end of 2007; the renewed interest on agrofuels due to the increase in oil prices; the increase in pressure on natural resources, augmented by the effects of climate change; the creation of special economic zones to valorize areas without production; the creation of financial instruments to reduce market risks and obtain benefits related to food production, etc. (Report of the Special Rapporteur on the right to food, De Schutter, 2009).

It should also be noted that the participation of States in the phenomenon of land grabbing should not hide the fact that it is mostly private operators, based on exclusively economic and profit objectives, who constitute the majority of investors in this field. We can cite here the traditional private operators in the agri-food sector but also new actors such as transnational corporations seeking new growth strategies, financial companies, commercial banks, investment and pension funds, etc. This implies a great difficulty in establishing and demanding the corresponding responsibilities when the human rights of the affected community are violated.

However, we can see that when we talk about land grabbing, or problems around land, we do not really think of this as a phenomenon that is also occurring within the EU, but rather we think mainly of other parts of the world, such as the Global South, Latin American states or Africa.

On the other hand, the reality is that in Europe today, the concentration of land under increasingly large farms controlled by fewer hands (partly as a result of land grabbing and reduced access to land for small food producers), is accelerating. To what extent, how and why this is happening, deserves much more critical attention than it is getting so far. In fact, the trend towards the concentration of land in the hands of non-agricultural investors and large farms is contrary to the model of sustainable agriculture and calls into question Articles 39 and 191 of the Treaty on the Functioning of the European Union.

The aim of our work is to provide a general legal, social and political analysis of the phenomenon of land grabbing, especially of agricultural land, within the EU, presenting the main legal and political challenges that arise *ad intra*. We will also focus on the analysis of certain European Directives that have an impact on the Union's policy on biofuels and therefore also on possible land grabs *ad extra* that are carried out within the framework of the European Union.

However, these Directives belong to the internal European legal body, therefore it is also an analysis *ad intra* (although these may have an impact on mitigating the phenomenon of land grabbing for biofuel production outside the Union), for that reason its study is justified in this work. The scientific method that has been used is the legal-sociological one. This method consists of analyzing the current state of the rules and the interrelationship between the possible legal sources but taking into account the social, economic, political and historical elements that make it possible to explain the effectiveness, rationale and applicability of the rules or to detect the legal gaps and the reason for them. The elaboration of this work has also required the use of very varied methodological techniques, such as description, interdisciplinarity and legal induction and deduction.

1. PREVIOUS CHALLENGES AND METHODOLOGICAL PROBLEMS IN THE PHENOMENON OF LAND GRABBING IN THE EUROPEAN UNION

The problem we find at the European level is that there is no a single policy or a general European framework on land governance. That is, the issue of land, its management and the rules of urban development fall within the competence of the Member States. In this regard, Member States may or may not impose restrictions on transactions when national energy or food security is at stake, or when there is a higher public interest that justifies the restrictions.

What happens is that the land sector and the competencies associated with it are divided into four

horizontal frameworks depending on the consideration that is to be given: "land as a commodity (subject to the rules governing the internal market); land as natural capital (governed by environmental policies); land as farmland (subject to CAP rules) or land as housing (subject to social cohesion policy)" (Kay, 2016, p. 22).

The problem is that the land brings together all these uses and values however, sometimes these values are subordinated to the evaluation or benefit of the economic interest, which can lead to a use of the land as a simple commodity, which is inserted in the market rules, leaving in the background the other values associated with it. The commodification of land is particularly caused by new institutional owners, such as private equity firms, hedge funds or pension funds (Bunkus & Theesfeld, 2018, p. 5).

In this sense, Mcmichael pointed out that modern agribusiness treats "land as an economic resource rather than as socio-ecological wealth" (2014, p. 51), so this mode of production use is more important than sustainability. In this sense, non-industrial agricultural enterprises lag behind in access to land for local cultivation. This causes land to be concentrated in the hands of a few and makes the phenomenon of land grabbing in marginalized rural areas in Europe more likely. In fact, in many European regions, the purchase and rental price assigned to agricultural land has encouraged financial speculation and, in economic terms, has prevented many farms from maintaining the lease or extending the areas necessary for the survival of small and medium-sized farms.

The problem is compounded by the lack of transparency surrounding land agreements in certain EU states. It is difficult to access reliable data on the dimensions of agricultural land grabs, since, either not all land transactions are registered, or land transactions between legal entities are not sufficiently transparent, as is the case of land acquisitions carried out between subsidiary companies and associated companies. In fact, the Committee on Agriculture and Rural Development of

the European Parliament expresses this problem by stating that "there is a general shortage of comprehensive, transparent, up-to-date, high-value data standardized at European level on price and volume movements on the European land market" (Committee on Agriculture and Rural Development, 2017, p.14).

Due to the lack of clarity in the information and records on transactions, the Committee on Agriculture and Rural Development requested the Commission already in 2017 to establish an Observatory service for the collection of information and data on the level of farmland concentration and distribution of agricultural land across the Union, and indicated that this service should record acquisition prices and leases, as well as the behavior of owners and tenants in the market. All of this in order to monitor the loss of farmland following the changes in land use.

Neither do we have a definition contained in any internationally recognized legal instrument of the concept of land grabbing, and so we have to start from the doctrinal construction and certain references made at European level by the European Parliament and the European Economic and Social Committee. For example, in the Committee's opinion of 21 January 2015, entitled "Land grabbing - a warning for Europe and a threat to family farming", this EU consultative body recognized that "there is no internationally recognized single definition of land grabbing" (European Economic and Social Committee, 2015, p.4).

In this opinion it is understood that, in general, land grabbing is the "process of large-scale acquisition of agricultural land without consulting the local population beforehand or obtaining its consent" (European Economic and Social Committee, 2015, p. 4). As a result, food security and the ability of the local population to manage a farm independently will be undermined.

For its part, the Committee on Agriculture and Rural Development of the European Parliament

understands that land concentration occurs "when the trade in farmland leads to land acquisition of an order of magnitude which is unusual for Europe" (Committee on Agriculture and Rural Development, 2017, p. 14).

In this regard, we can appreciate that large-scale land acquisitions (land concentration) do not have to be typecast directly as a "land grabbing". That is, land acquisitions and land concentration processes can lead to land grabbing, but not necessarily, since it can also lead to positive results, such as increased profitability of production, productivity, employment and good infrastructure.

In this respect, in order to differentiate between the two phenomena, let us take into account the European Parliament resolution of 12 March 2015 on Tanzania, in which it expressly referred to land grabbing by stating that:

Large-scale land acquisitions can be defined in accordance with the Tirana Declaration of 2011 as land grabbing when one or more of the following apply: when there is a clear violation of human rights; when the displacement of affected local communities is carried out without their free, prior and informed consent; when it is not based on transparent contracts; and when there is an assessed negative social, economic and environmental impact (European Parliament Resolution, 2015, para. I).

In that Resolution, Parliament condemned "the illegal displacement of local rural communities, the destruction of their villages and traditional way of life and the violation of their basic human rights", reiterating "that human rights and the rules prohibiting land grabbing should be mainstreamed in the EU's trade and investment agreements" (European Parliament Resolution, 2015, paras. 1 and 12).

2. THE CURRENT STATE OF AGRICULTURAL LAND IN THE EUROPEAN UNION

In the EU there is a trend towards land concentration. Already in 2010, we could see how only 3% of the largest farms controlled more than half of the total usable area, while 80% of the farms (with a length of less than 10 hectares) controlled only 12% of the total area (Kay, 2018). Eurostat data ultimately show that large farms represent only a small percentage of the European total and still control one fifth of the utilized agricultural area, which causes an unequal pattern of land distribution in Europe (Eurostat, 2019). In fact, the imbalance in land use in the Union, with a Gini coefficient of 0.82%, is at the level of countries such as Brazil, Colombia and the Philippines.

In the Report published in 2013 by La Via Campesina and the Hands Off the Land network, this situation was already evident when it was stated, through a case study, that in the EU, a process of land grabbing and concentration of ownership of agricultural land has been set in motion, which has a number of negative impacts on human rights, in particular on the right to adequate food. In this regard, the Report stated that the largest agricultural land grabbing has taken place in Hungary and Romania.

The European Economic and Social Committee confirmed this situation in its opinion of 2015 on land grabbing in Europe as a threat to family farming, stating that:

While agricultural land is dwindling throughout Europe, it is also becoming increasingly concentrated in the hands of certain large businesses. One per cent of agricultural businesses control 20% of agricultural land in the European Union and three per cent control 50%. Conversely, 80% of agricultural businesses control only 14.5% of agricultural land (European Economic and Social Committee, 2015, para. 3.3).

Currently, agricultural land grabbing takes place especially in Central and Eastern European countries. Among the States most affected by this situation we can highlight: Romania (Constantin, Lumini?a, & Vasile, 2017), Hungary (Gonda, 2019),

Bulgaria (Medarov, 2013), Poland (Petit, 2018) and East Germany (Bunkus & Theesfeld, 2018).

In addition to conventional land acquisitions, we see that there is now a tendency to take control over areas under cultivation by purchasing companies (or attempting to acquire shares in them) that own agricultural land or have the corresponding contracts lease. In the words of the European Economic and Social Committee, "as a result, there is increasing concentration of land ownership by large companies, with industrialized agriculture developing in some central and Eastern European countries" (European Economic and Social Committee, 2015, p. 18).

However, EU land policy remains somewhat undefined and uncoordinated. While access to land is clearly affected by a variety of EU policies and regulations, most member states and EU institutions are reluctant to address this issue in their debate and develop policy proposals that are oppose land grabbing, limit land concentration and facilitate access and good governance in land administration. However, due to concerns about land grabbing in the global South, some European institutions have begun to explore land grabbing in Europe and pay attention to land concentration, access and preservation.

Currently, a series of interesting advances are being made that are leading the course of the debate on land in Europe in a more positive direction. In this regard, in response to the acceleration of the problem, we can appreciate a civil and, in part, political activism, which aims to provide answers or, at least, to start raising public awareness about the need for action, both legal and political.

Among these advances, we can highlight the development of the own initiative opinion "the state of play of farmland concentration in the EU: how to facilitate the access to land for farmers" within the Committee on Agriculture and Rural Development of the European Parliament, as well as the petition on "Preserving and managing European farmland as our common wealth", submitted to the Committee on Petitions in 2015 (Kay, 2018, p. 29).

In both cases, we can appreciate the leading and important role that social organizations and movements, like the Hands on the Land Alliance, have played in promoting and developing these processes.

Thus, these are the most relevant milestones around the initiatives that are guiding the course of the debate on land grabbing in the EU towards a direction of consciousness and regulation:

- Opinion of the European Economic and Social Committee on 'Land grabbing: a warning for Europe and a threat to family farming' of 21 January 2015 (2015/C 242/03)¹ (Surman, 2014).
- Petition No 187/2015 to the European Parliament on the protection and administration of European agricultural land as shared wealth: a call by civil society organizations for a sustainable and fair EU land use policy.
- Study on extent of farmland grabbing in the EU of May 2015 requested by the European Parliament's Committee on Agriculture and Rural Development² (Kay, Peuch & Franco, 2015).
- Opinion of the European Committee of the Regions on supporting young European farmers in Europe (2017/C 207/11)³.

1 - As Surman explains it, the European Economic and Social Committee has decided to draw up an own-initiative opinion on land grabbing in the EU. After consulting a variety of public, private and civil society actors and also conducting research in Romania, it organized a public hearing in Brussels to discuss the preliminary draft opinion. The Committee called on the European authorities to discuss whether the free movement of capital towards land acquisition should be restricted by referring to the possibilities for regulating the market in agricultural land and thus avoiding land grabbing and land concentration. According to the Committee, "ownership of land and land use must be subject to greater regulation" (Opinion of the European Economic and Social Committee, 2015, para. 1.7.).

2 - Following a request from the European Parliament's Committee on Agriculture and Rural Development in 2015, the Transnational Institute prepared a report on the extent of agricultural land grabbing in the European Union. This Report focuses on analyzing how the number of large-scale land deals has been increasing. It also analyses some of the drivers of this phenomenon and examines the impacts that the phenomenon has on European food security. The Report argues that "that farmland grabbing, especially when connected to other burning European land issues, calls for a reform of European land governance" (Kay, Peuch & Franco, 2015, p.1).

- European Parliament resolution of 27 April 2017 on the state of play of farmland concentration in the EU: how to facilitate the access to land for farmers (2018/C 298/15)⁴.
- Commission Interpretative Communication on the Acquisition of Farmland and European Union Law (2017/C 350/05), October 2017.
- European Parliament resolution of 13 December 2017 on the Annual Report on Human Rights and Democracy in the World 2016 and the European Union's policy on the matter (2017/2122(INI))⁵.
- Letter from the Chairman of the Committee on Agriculture and Rural Development to the European Commission (IPOL-COM-AGRI -D (2018)8221), February 2018. Subject: Follow up by the Commission to Parliament's resolution of 27 April 2017 on the state of play of farmland concentration in the EU.

2.1. Direct Foreign Investment from the EU in land grabbing processes that aim to produce biofuels: European legal framework *ad intra* with external impact

Within this *ad intra* legal-political framework, on land grabbing in the EU towards a direction of awareness and regulation, we have to mention several relevant Directives that may have an impact outside the EU in relation to the issue of land grabbing. While it is true

that we have said previously that we were going to focus on the phenomenon of land grabs *ad intra* in the European Union, we also want to analyze the impact that Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018, on the promotion of the use of energy from renewable sources, can have in relation to land grabbing for the cultivation of agrofuels *ad extra*⁶.

The extraterritorial dimension of Human Rights has become clear following the adoption of the Treaty of Lisbon, specifically in Article 21(2)(b) of the Treaty on European Union (TEU):

The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: b) consolidate and support democracy, the rule of law, human rights and the principles of international law (Treaty on the European Union, 2012, Art.21(2)(b) TEU).

Furthermore, Article 205 of the Treaty on the Functioning of the European Union (TFEU) establishes the general provisions on the EU's external action, expressly including the common commercial policy in Title II:

The Union's action on the international scene, pursuant to this Part, shall be guided by the principles,

3 - The European Committee of the Regions issued an opinion on 9 February 2017 to support young European farmers, in which it devoted six paragraphs, from 17 to 22, to the issue of access to land, considering that the availability of land to buy and to rent are the biggest problems facing young farmers and new entrants into farming. Ultimately, this practice reduces the possibilities for local people to manage agricultural enterprises independently. See Opinion of the European Committee of the Regions on supporting young farmers in Europe, available at: European Committee of the Regions Opinion — supporting young European farmers (2017/C 207/11). *Official Journal of the European Union*, C 207/57, 2017, 30 June.

4 - In this Resolution, Parliament considered that the phenomenon of land grabbing is favored, among other aspects, by the increasing globalization, the demographic increase, a progressive demand for food and natural raw materials, and the negative repercussions of agricultural policy.

5 - In this resolution Parliament underlines that land grabbing has increased considerably in recent years in developing states, condemning practices such as land grabbing and indiscriminate consumption of natural resources. It calls once again for urgent intervention by the Commission, in response to its many recent resolutions on this subject.

6 - Through analysis of the Land Matrix database, has highlighted not only the importance of actors from the European Union in land grabbing processes, but also the relative importance of European FDI (Foreign Direct Investment) in large land acquisitions on the African continent. At the same time, most of the land grabbing processes detected on the continent are aimed at extensive agrofuel production. Taking into account these data, this investigation will also be centered in the analysis of the European policies on agrocombustibles, due to the mentioned quantitative importance that it has on the African continent, in which Europe has a remarkable presence.

pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union (Treaty on the Functioning of the European Union, 2012, Art. 205 TFEU).

In addition to the above-mentioned obligations, it should be recalled that the constitutional traditions of the Member States as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms are binding when applying European law as they form part of the general principles of law as specified in Article 6 TEU.

In the difficult conciliation between trade and human rights, States have traditionally been reluctant that their human rights obligations could apply extraterritorially, limiting their responsibility exclusively to their internal dimension, but within the framework of the European Union the situation is radically different.

Through the inclusion of the human rights clauses that the EU has introduced in all its trade, cooperation and association agreements, any trade policy that the EU develops cannot, under any circumstances, obviate the protection of human rights in third states (Bartels, 2014).

Taking into account this extraterritorial dimension in the protection of human rights, as mentioned above, the EU must adapt its policies that have an external dimension to these precepts, but in the same way, the States, which are responsible for implementing the Union's policies, have the obligation to adopt the necessary measures that guarantee the protection of human rights by private companies. Therefore, and within our scope of analysis, States have the obligation to avoid the undermining of human rights in third States, which may result from a process of land grabbing (Borras, 2016).

In recent years, as civil society has paid attention to human rights violations associated with land grabbing phenomena, European institutions have started to pay more attention to it. Highlighting not only the debates and reports requested, but also the inclusion for the first time of the phenomenon of land grabbing in the EU Action Plan 2015-2019 for Human Rights and Democracy:

Step up efforts to protect Human Rights Defenders including social partners, who are working to uphold economic, social and cultural rights, with a particular focus on human rights defenders working on labour rights, land-related human rights issues, and indigenous peoples, in the context of inter alia 'land grabbing' and climate change (EU Action Plan on Human Rights and Democracy, 2015, Obj. 17.c).

In this sense, investments in agrofuels are one of the main causes of land grabbing at world-wide level, being noteworthy the important role that the Foreign Direct Investment (FDI) coming from the EU plays in the land grabbing processes that have as objective the production of agrofuels (Borras, 2016). In view of this scenario, the external dimension of the internal regulatory framework for renewable energies, and specifically regarding agrofuels promotion policies, should not be overlooked under any circumstances.

The first regulation in this regard was the 2003 Biofuels Directive⁷, which established the ambitious target that by 2010, 5.75% of all petrol and diesel used in the transport sector in the EU should come from biofuels, a figure that in the subsequent Renewable Energy Directive of 2009⁸ rose to 10% by 2020. It is paradigmatic that the large processes of land purchases began in 2005 and reached their peak in 2009 (Cotula, 2014).

Already in 2008, a study carried out by the International Institute for Environment and

7 - Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transport. Official Journal of the European Union, L 123/42, 2003, May 17.

8 - Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC. Official Journal of the European Union, L 140/16, 2009, June 5

Development (IIED) together with FAO, showed that the main cause of the expansion of biofuels was the public policies to promote them, establishing mandatory percentages of biofuel uses in the total of fuels used in the transport sector and being articulated through different inducements to the private sector through subsidies or tax incentives (Cotula, 2008).

As it was previously mentioned, European private actors have played a key role in the acquisition of lands for the production of biofuels, especially in Africa. The European Commission, at first, considered this situation as a "win-win" one, since biofuel promotion policies would decisively benefit local communities in developing countries, thanks to the arrival of foreign investment, considering that land grabbing cases in these countries, responded to internal problems associated to a weak local governance (Borras, 2016).

The Renewable Energy Directive of 2009 was the first EU legal instrument that raised awareness about the collateral damage of biofuel promotion policies. Although the basis of this directive was to increase the percentage of renewable energy in the transport sector up to 10% for each Member State (Directive 2009/28/EC of the European Parliament and of the Council, Art. 3.4), it should not be forgotten that conventional biofuels predominate within this margin, in other words, those biofuels produced from food crops, but allowing its inclusion as renewable electricity within the mix of the transport sector (European Commission, 2019).

However, the main innovation of the Renewable Energy Directive regarding biofuels was the introduction of sustainability criteria for biofuels and bioliquids. The first thing to be noted from the Directive, is that the introduction of such sustainability criteria does not apply exclusively to biofuels produced within the EU, but also applies directly to biofuels produced outside the EU:

Irrespective of whether the raw materials were cultivated inside or outside the territory of the Community, energy from biofuels and bioliquids shall be taken into account for the purposes referred to in points (a), (b) and (c) only if they fulfil the sustainability criteria set out in paragraphs 2 to 6 (...) (Directive 2009/28/EC of the European Parliament and of the Council, Art. 17.1).

After being clearly established the external dimension of the Directive, the main novelty of this Directive in relation to land grabbing processes, is the establishment of prohibited areas for the extraction of biofuels, not only the areas protected by the different States, but also the forest areas with high carbon reserves or those with a high level of biodiversity (Directive 2009/28/EC of the European Parliament and of the Council, Art. 17.2 - 17.6). Although the Directive was a major step forward for the protection of forests, meadows, grasslands and large wooded areas outside the EU, even if it did not prevent criticism on this point by environmental organizations⁹, the level of protection from the indirect effects that such a rule would entail was quite different.

The main indirect effect of this new Directive is intrinsically related to land grabbing situations, since investments in biofuels in third States, by logically limiting the breaking up of new land, due to the environmental conditions specified in the previous paragraph, has as a consequence the expansion in lands cultivated by local farmers. The main consequence of this is, not only the expulsion of these farmers from the lands they have been cultivating traditionally and the implementation of a production based on monoculture, but also the breaking up by these farmers of non-agricultural lands protected by Directive 2009/28/EC in agricultural lands (Cotula, 2014).

A major step forward of the Directive regarding the land grabbing control process is that it requires the

9 - For more information see: Bird Life, European Environmental Bureau, FERN, Friends of the Earth Europe, Oxfam International, & Transport and Environment. (2009). *Biofuels: Handle with care. An analysis of EU biofuel policy with recommendations for action.*

European Commission to report to the European Parliament and the Council on:

(...) the impact on social sustainability in the Community and in third countries of increased demand for biofuel, on the impact of Community biofuel policy on the availability of foodstuffs at affordable prices, in particular for people living in developing countries, and wider development issues (...) (Directive 2009/28/EC of the European Parliament and of the Council, Art. 17.7).

This provision has not only allowed the European Parliament to play an important role in monitoring, but has also allowed a greater debate and monitoring by NGOs, who have widely criticized the Commission's systematic denial of the link between the biofuels increased demand by EU countries and abuses of land use rights (Cotula, 2014).

As a consequence, over the last few years, it has become clear that in reviewing renewable energy policy, the EU should take into account not only the environmental consequences, but also the inherent social consequences.

2.1.1. Directive (EU) 2018/2001, on the promotion of the use of energy from renewable sources. A new approach to European biofuel policy.

The legal framework described above is in a process of substantial reconstruction with the entry into force of the new Directive 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources. Although the effects derived from it are still not visible, because the States have until 30 June 2021 (Directive 2018/2001, Art. 36) to transpose the Directive, we proceed with the analysis of the substantial modifications of the Directive, and specifically in the field of biofuels.

The new Directive has recognized and resolutely addressed the problems arising from the indirect

change of land use, making a strong self-criticism in Recital 81 of the Directive itself, which states:

Directive 2009/28/EC introduced a set of sustainability criteria, including criteria protecting land with high biodiversity value and land with high-carbon stock, but did not cover the issue of indirect land-use change. Indirect land-use change occurs when the cultivation of crops for biofuels, bioliquids and biomass fuels displaces traditional production of crops for food and feed purposes. Such additional demand increases the pressure on land and can lead to the extension of agricultural land into areas with high-carbon stock, such as forests, wetlands and peatland, causing additional greenhouse gas emissions (Directive 2018/2001 of the European Parliament and of the Council, Recital 81).

In line with this new approach and unlike the previous Directive, the recital itself established a new way forward:

It is therefore appropriate, in general, to limit food and feed crops-based biofuels, bioliquids and biomass fuels promoted under this Directive and, in addition, to require Member States to set a specific and gradually decreasing limit for biofuels, bioliquids and biomass fuels produced from food and feed crops for which a significant expansion of the production area into land with high-carbon stock is observed. Low indirect land-use change-risk biofuels, bioliquids and biomass fuels should be exempt from the specific and gradually decreasing limit (Directive 2018/2001 of the European Parliament and of the Council, Recital 81).

This change of paradigm in the field of biofuels is reflected throughout the articles of the Directive, reflected in the following main characteristics: (1) The share of renewable energies in final energy consumption in the transport sector is increased to 14% (Directive 2018/2001 of the European Parliament and of the Council, Art.25); (2) Within the 14% of renewables in the transport sector, minimum quotas are established for the use of advanced biofuels¹⁰, that is, 0.2% by 2022, 1% by 2025 and

10 - A detailed list of the raw materials accepted for the total calculation can be found in Annex IX, including among them domestic and industrial biowaste to animal manure or straw.

3.5% by 2030 (Directive 2018/2001 of the European Parliament and of the Council, Art. 25); (3) The Directive introduces specific rules for those biofuels that come directly from food crops:

- It establishes a maximum of 7% for biofuels of this origin within the 14% established for final consumption in the transport sector (Directive 2018/2001 of the European Parliament and of the Council, Art. 26.1).
- If the proportion in a Member State is less than 1%, the final energy consumption in the transport sector may be increased to a maximum up to 2% (Directive 2018/2001 of the European Parliament and of the Council, Art. 26.1).
- Biofuels that entail a high risk of indirect land-use change and that are produced from this type of crops may not exceed the consumption levels of each Member State with respect to the year 2019, and their use must be reduced to 0% by the year 2030 (Directive 2018/2001 of the European Parliament and of the Council Art. 26).
- In order to specify the raw materials that would entail an indirect change of land-use, the Directive requires the adoption of a delegated act of technical nature that would determine the raw materials that entail such risks. This delegated act was adopted in March 2019¹¹, thus determining the biofuels with low risk and those with some risk of causing an indirect change of land-use, attending to their perceived expansion to lands with high carbon reserves (Commission Delegated Regulation 2019/807).
- Finally, the sustainability criteria already present in the previous Directive are maintained and reinforced, not counting as renewable energies those that do not meet the specified criteria (Directive 2018/2001 of the European Parliament and of the Council Art.7 and Art. 29).

3. THAT PROMOTE CONCENTRATION AND LAND GRABBING IN THE EU

3.1. Concentration of CAP subsidies for large farms

One of the reasons of the tendency towards land concentration in the EU is the concentration of subsidies from the Common Agricultural Policy (CAP) to large farms; for example, in 2009 only 2% of farms received 32% of CAP funding. EU policies and subsidies can support the concentration process, as direct payments by area benefit much more large farms and well-established farmers¹².

The system of direct payments under the CAP has been favoring the expansion of large industrial farms due to the payment by occupied hectare which encourages the expansion and purchase of land in order to be a beneficiary of subsidies. In this context, the least favoured are the small farmers, who receive these grants unequally compared to the "small elite" of farmers. In this sense, the more concentrated the land is, the greater the reception of subsidies from the CAP (Kay, 2018).

Thus, the economic and polarizing effect of capital accumulation in the rural economy and the food supply chain, has made small enterprises increasingly unable to compete with large farms. Part of the reason is due, as we have explained, to the EU CAP subsidy scheme.

Consequently, while small farms are weakening, large farms are becoming even stronger in terms of market competition, not because the latter are necessarily more efficient in agriculture, but because they are definitely more efficient in capturing

11 - Commission Delegated Regulation (EU) 2019/807 of 13 March 2019 supplementing Directive (EU) 2018/2001 of the European Parliament and of the Council as regards the determination of high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed and the certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels. *Official Journal of the European Union*, L 133/1, 2019, May 21.

12 - Certain EU policies have a direct or indirect impact on agricultural land grabbing in the EU and a world level, e.g. bio-economy, trade policy and agricultural policy. The liberal land policy and the generally accepted principle of free movement of capital and goods also play a role in this regard. See: Antonelli, M., Siciliano, G., Turvani, M.E., & Rulli M.C. (2015). Global investments in agricultural land and the role of the EU: Drivers, scope and potential impacts. *Land Use Policy*, 47, 98-111.

subsidies. If we analyze the case of Italy, in 2011, only 0.29% of the farms accessed to the 18% of the total CAP incentives, and 0.0001 of these (that is, only 150 farms) benefited from 6% of all subsidies (Franco & Borrás, 2013).

3.2. The increase of land prices and the exclusion of young farmers from access to agricultural land

As a consequence of what we have explained before, the so-called speculative bubbles will appear on the agricultural land markets, with serious consequences for agriculture. Speculation with raw materials in the futures market drives up the price of agricultural land, which leads to the exclusion of both, young people looking for land to settle, and small and medium-sized farms, that usually have more limited financial resources (Committee on Agriculture and Rural Development, 2017).

In addition to the growth in demand for food and feed, we are witnessing a growing demand for raw materials related to the "bioeconomy", such as biofuels and materials for the chemical and textile industry, which raises the interest of new actors in the acquisition of agricultural land. In fact, the acquisition of agricultural land is considered a safe investment in many Member States, especially since the outbreak of the economic and financial crisis in 2007. In this respect, non-agricultural investors and financial speculators, such as pension funds, insurance companies and corporations, are acquiring arable land in alarming amounts (Transnational Institute, 2015). According to these circumstances, land ownership will continue to be considered a safe investment despite rising inflation in the future.

3.3. Land and resource grabbing for environmental purposes: the so-called "green" grabs

A new term that has recently appeared worldwide related to land grabbing is the "green grabbing" one. This new emerging term is used to describe large-scale appropriation of land and resources with green credentials, due to its environmental protection or

because is financed through climate change reduction mechanisms (Fairhead, Leach & Scoone, 2012).

This new phenomenon has created a strong debate among academics and activists, because it is true that there is an important relief regarding the pressure on forest and increases the protection of biodiversity and landscapes, there are important collateral repercussions that should be taken into consideration (Fairhead, Leach & Scoone, 2012).

We can include here assumptions such as carbon sequestration through forest conservation or the production of renewable energy sources (large solar panel construction projects) that require some form of land control. Biodiesel production in Europe or ecotourism, for example, can possibly also be a form of "green" land grabbing when local people are negatively affected by dispossession, expulsion and especially when these areas were previously used as common goods (Nowak, 2013).

4. CONSEQUENCES OF LAND GRABBING IN THE EU

In view of the phenomenon of concentration and land grabbing that is being experienced in the EU, it is compulsory to point out a series of impacts and negative consequences that these processes can bring about in the long term. Accordingly, the reality of Europe derived from land grabbing processes is the following:

Farmland grabbing, combined with the high capital costs of EU agriculture, is leading to the departure of small farms in Europe and blocking the entry of young and aspiring farmers. The purchase and rental prices of farmland have increased, making the capital requirements for many new entrants too large and risky (Kay, Peuch & Franco, 2015, p. 38).

The rural sector in the EU is being damaged economically and socially by large-scale land deals. Privatization and control of land by large companies, as well as the dispossession of natural resources

associated with land, are contributing to this weakening (Kay, 2018, p.14).

Agricultural land grabbing is leading to land and environmental degradation through the substitution of a diversified family agriculture model, based on sustainable agricultural practices, by an industrial agricultural system, which depends largely on monoculture production and intensive use of agrochemicals (Kay, Peuch & Franco, 2015, p.38). The result would have repercussions on European food security, employment, welfare and biodiversity.

CONCLUSIONS

Due to the findings of this work, it is possible to state that farmland grabbing is leading to land and environmental degradation through the replacement of a diversified family farming model, based on healthy agricultural practices, by an industrial agricultural system, which depends largely on the production of monocultures and intensive use of agrochemicals. The result will have an impact on European food security, employment, welfare and biodiversity. Therefore, in order to reverse this process, it is essential to prioritize the access to land to those who work or wish to work in a socially and ecologically acceptable manner.

Land is not a commercial good like other goods, but a heritage that must be protected, defended and treated as such. In spite of this, there is enormous heterogeneity in the land markets and land regulations in the European Union. As mentioned above, there are no frameworks on land governance in the EU. Indeed, according to Article 345 of the TFEU, national governments are free to organize the use of land on their territory; this article stipulates in

particular that: "The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership". However, the settled case law of the CJEU (Court of Justice of the European Union) makes it clear that this competence of the Member States to take decisions concerning the property regime must be subject to EU law¹³. In other words, they must not infringe the principles of European law. Indeed, the CJEU itself recognizes "the specific nature of agricultural land" and allows justified limitations of the free market in land through non-discriminatory, appropriate, proportionate and general interest measures.

In particular, the Court justifies restrictions on investment in agricultural land when the restriction aims to: a) increase the size of agricultural holdings so that they can be profitably exploited and prevent real estate speculation¹⁴; b) the conservation of the agricultural population, the maintenance of a distribution of land ownership which allows the development of viable holdings and the harmonious maintenance of the land and the landscape to encourage reasonable land use; c) the support and development of viable agriculture, based on social and spatial planning considerations, which implies that land used for agriculture must remain in use¹⁵; d) the maintenance of traditional forms of farming, ensuring that farms are inhabited and exploited on a preferential basis by their owners, in order to maintain a permanent population in the rural environment and to encourage a reasonable use of the land available by combating pressure on ownership¹⁶.

We must not forget that the States that have ratified the International Covenant on Economic, Social and Cultural Rights, have the obligation to protect the right to food of their population (International Covenant on Economic, Social and Cultural Rights, Art. 11).

13 - See: CJEU (1999). Judgment of the Court of Justice of 1 June 1999. Case C-302/97. Paragraph 38; CJEU (2002). Judgment of the Court of Justice of 4 June 2002. Case C-367/98. Paragraph 48; CJEU (2003). Judgment of the Court of Justice of 23 September 2003. Case C-452/01. Paragraph 24; CJEU (2013). Judgment of the Court (Grand Chamber) of 22 October 2013. Joined Cases C-105/12 to C-107/12. Paragraph 36; CJEU (2012). Judgment of the Court (Fourth Chamber) of 8 November 2012. Case C-244/11. Paragraph 16.

14 - See: CJEU (1984). Judgment of the Court of Justice of 6 November 1984. Case 182/83. Paragraph 3.

15 - See: CJEU (2007). Judgment of the Court (Third Chamber) of 25 January 2007. Case C-370/05. Paragraphs 27-28.

16 - See: CJEU (2003). Judgment of the Court of Justice of 23 September 2003. Case C-452/01. Paragraphs 39-40.

The protection and promotion of the Right to Food is closely linked to the access of local farmers to land. According to the General Comment No. 12 adopted by the Committee on Economic, Social and Cultural Rights, which officially interprets the aforementioned International Treaty, "The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to respect, to protect and to fulfill" (Committee on Economic, Social and Cultural Rights, General Comment No. 12, para. 15).

In this sense, States cannot authorize or conclude contracts with multinational companies that aim to monopolize large areas of agricultural land to the detriment of food security and the feeding of the population. On this basis, it is necessary to give priority to the use of land for agricultural purposes and specifically for the production of small farmers and peasants, over the commercial interests of private property.

It is also necessary to strengthen the participation of local communities in land use decision-making, as well as to change the criteria on the installation and leasing of land, adopting support policies for sustainable small-scale farming projects. These policies should reduce the commodification of land and promote public management of land following the "Voluntary guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security" of the Committee on World Food Security, in the interest of creating responsible land governance in Europe within a framework of food sovereignty.

The uncontrolled promotion of the cultivation of biofuels, which, although it responds to laudable objectives, such as the reduction of greenhouse gases, has worrisome side effects on third States, mainly in developing countries. For a long time, the EU considered that the biofuel promotion policy was a successful story, benefiting local communities through the arrival of a large amount of direct investment, while at the same time partially reducing dependence on oil through clean energy.

For a long time, the EU prioritized environmental benefits over the social damages in third states due to the pernicious effects of indirect land-use change. The new Directive on the promotion of the use of renewable energy, however, is a major step forward, as it not only maintains the sustainability criteria, but also addresses the effects of land-use change. The effects of this paradigm shift will have to be analyzed in depth in the coming years, when the states transpose the new directive and the direct effects begin to be observed.

We need to prioritize the use of land for the production of food over the production of biofuels and other commercial uses of energy, extractive industries and useless megaprojects in Europe and in other parts of the world.

RECOMMENDATIONS

To introduce a more effective and fair mechanism for the distribution of CAP subsidies in order to avoid the tendency towards land concentration: In this regard, the direct payment scheme should be modified, for example by providing for the possibility of linking 30 percent of direct payments to the first few hectares of a farm in order to strengthen small-scale and family farming, provided that, at the same time, they apply the requirements of the CAP Regulation on direct payments. Furthermore, the definition of 'active peasant/ farmer', which initially determines eligibility for CAP subsidies, remains problematic. It is therefore recommended to establish, at EU level, an unequivocal definition of this term, that is linked clearly to work in an agricultural holding and that distinguishes between eligible and ineligible land. Accordingly, the Commission must protect active farmers so they are the only ones to receive direct payments.

To create an EU Legal Instrument about land governance with a comprehensive, holistic and human rights-based approach: This instrument can take the form of an EU Land Directive, based on the Committee on World Food Security's guidelines on responsible governance of tenure of land, fisheries

and forests. This instrument could be crystalized in a European Land Framework Directive, which would initiate a bold and progressive strategy for the governance of (arable) land in the EU, while respecting the competences of the EU and the Member States. If the Water Framework Directive changed the approach to water policy across the EU years ago, we might think that a new political challenge is possible and to start with the development of a Land and Soil Directive at European level. In April 2017 the European Parliament adopted the Resolution on the situation of agricultural land concentration in Europe, because of pressure from European social and agricultural organizations. This is the first political step towards the possible development of this Directive.

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