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Italian *comodato* vs agricultural lease: A comparative perspective

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Abstract

The article analyses the open-ended comodato of farmland, a civil-law arrangement under which land is granted for gratuitous use, and its borderline with agricultural leases is subject to the mandatory regime of Law No. 203 of 3 May 1982. Moving from recent Corte di Cassazione case law, it reconstructs the doctrinal and judicial criteria used to distinguish genuine comodato from disguised leases and clarifies the related procedural consequences (jurisdiction of specialised agrarian sections and application of the summary proceedings under Legislative Decree No. 150 of 1 September 2011). The analysis shows that the presence of consideration (including payments in kind), the allocation of productive enjoyment and organisational control over farming activities are the key indicators triggering re-characterisation as an agricultural lease and the operation of statutory reconduction. A comparative overview of France, Germany, Spain and England & Wales situates the Italian solution within a broader European context. The article ultimately proposes a normative and evidential test, translated into a practitioner-oriented checklist, to guide courts and practitioners in future disputes.

Keywords

loan for use • comodato • agricultural lease • tenancy re-characterisation

INTRODUCTION

Context and Legal Relevance of Gratuitous Use of Agricultural Land in the Italian System

In the Italian legal system, the gratuitous grant of agricultural land under the contract of *comodato* (gratuitous use; Italian Civil Code, Arts. 1803–1812, especially Art. 1810) represents a legally recognised mode of use and enjoyment of property that is distinct from agricultural leases governed by Law No. 203 of 3 May 1982 (in particular, Art. 27 on reconduction). Although not formally classified among the so-called *contratti agrari tipici* (typical agricultural contracts), the *comodato agrario* is widely employed in practice—particularly within family settings or among parties in a fiduciary relationship—as an instrument of temporary, cost-free land management. Its flexible structure, combined with the absence of rent, allows landowners to retain control over the land without triggering the mandatory statutory framework of agricultural lease legislation. However, this practice raises complex issues of legal classification, especially in relation to the risk of re-characterisation (*riqualificazione*) of the relationship as an agricultural lease under Art. 27 of Law No. 203 of 3 May 1982, with significant consequences in terms of mandatory protections, tax consequences and subject-matter jurisdiction (specialised agrarian sections *ex* of Legislative Decree No. 150 of 1 September 2011).

This article offers a doctrinal- and case-law-based analysis of the legal nature, operational framework and critical implications of the open-ended *comodato agrario*, articulating the criteria for re-characterisation (consideration, productive enjoyment, organisational control) and the ensuing procedural consequences (specialised agrarian sections; evidential burdens), and closing with a practitioner-oriented checklist.

More specifically, the contribution pursues a twofold aim. First, it seeks to clarify the substantive and procedural boundaries between genuine indefinite-term *comodato* of farmland and disguised agricultural leases, with a view to elaborating a coherent doctrinal and evidential test capable of guiding judicial practice and contractual design. Second, it assesses to what extent functionally similar arrangements are

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tolerated or re-characterised in other European jurisdictions, thereby identifying convergences, divergences and possible lessons for Italian agricultural tenancy law. Methodologically, the analysis combines a traditional doctrinal approach to the provisions of the Italian Civil Code and Law No. 203 of 3 May 1982, with a systematic review of recent Corte di Cassazione case law, interpreted through a functional, 'substance-over-form' lens. In addition, a comparative method is employed in relation to France, Germany, Spain and England & Wales, in order to contextualise the Italian experience and test the broader relevance of the proposed re-characterisation criteria.

RESEARCH RESULTS AND DISCUSSION

Preliminary remarks and systematic framework of the indefinite-term agricultural loan for use

The *comodato agrario* **(**agricultural gratuitous use) constitutes a contractual model frequently employed in agricultural practice, characterised by the gratuitous and typically temporary concession of a rural landholding (*fondo rustico*) or other agricultural assets, usually based on a fiduciary relationship between the parties. From a civil law perspective, it is governed by Italian Civil Code, Arts. 1803 et seq., where *comodato* is defined as a real contract (*contratto reale*) by which 'one party delivers to the other a movable or immovable thing, so that the latter may use it for a certain time or for a specific purpose, with the obligation to return the same thing received' (Italian Civil Code, Art. 1803; Carresi, 1950; Luminoso, 1988; Tamburrino, 1960).

Gratuitousness constitutes an essential element of the *comodato*, the underlying legal cause (causa) of which has traditionally been identified with the liberality of the lender (*comodante*) and the absence of a properly so-called patrimonial counter-performance (Court of Cassation, 2016a). This element is also the functional barrier that keeps *comodato* outside the scope of reconduction to agricultural lease under Art. 27 of Law No. 203 of 3 May 1982. This gratuitous nature, however, does not preclude the imposition of ancillary obligations on the borrower (*comodatario*), provided that such obligations do not assume the nature of a true consideration and remain modest in scope, so as not to alter the substantially gratuitous character of the contract (Italian Court of Cassation, 2005a, 2010). Where ancillary obligations amount to consideration (including rent in kind), the relationship becomes susceptible to re-characterisation as an agricultural lease.

In the specific context of agricultural *comodato*, it is common for the contract to be concluded without an agreed term of duration. In such cases, the contract takes the form of the so-called *comodato precario* (precarious loan for use), understood as a loan for use whose duration depends entirely on the lender's discretion and in which the lender may demand the return of the asset *ad nutum* (Court of Cassation, 1989, 2000, 2014), characterised by the lender's right to reclaim the asset at any time by means of a simple request addressed to the borrower (Art. 1810 of the Civil Code). By contrast, where a term can be inferred from the intended use or purpose (e.g. completion of a cropping cycle), the relationship is not '*precario*' but a *comodato* with an implied term, and early recovery by the lender is barred save for urgent and unforeseen need (Art. 1809(2) Civil Code). Accordingly, 'indefinite-term' *comodato* must be distinguished between (i) true *precario* under Art. 1810 and (ii) use-linked arrangements falling under Art. 1809, a classification that has direct consequences on the remedies available to the lender and on the timing and structure of any subsequent litigation.

It must also be clarified that, although the object of the *comodato* may be the use of agricultural land, the contract cannot be qualified as a true agrarian contract in the technical sense, as it lacks the specific constitutive or entrepreneurial purpose aimed at establishing an agricultural enterprise on land belonging to another—an essential element of the typical agrarian contracts governed by Law No. 203 of 3 May 1982 (Court of Cassation, 2015a, 2016b). Consistently, courts exclude the automatic application of agrarian-tenancy rules to *comodato*, including the agrarian rights of pre-emption (*prelazione*) and redemption (*riscatto*), which are reserved for tenants, sharecroppers or co-participants; a different outcome depends on proven re-characterisation into lease under Art. 27 of Law No. 203 of 3 May 1982 (Court of Cassation, 2007a, 2024).

Still with regard to the distinction between *comodato* and agrarian contracts, Art. 7(2) of Law No. 817 of 14 August 1971—which regulates the right of pre-emption granted to direct farmers owning land adjacent to plots offered for sale—must be regarded as an exceptional rule. It follows that the right of pre-emption of the adjoining farmer may not be excluded by the mere presence on the land of a subject who is not among those expressly listed in the law. Consequently, even the presence of a borrower under a *comodato*, albeit a direct farmer, is not sufficient to preclude the right of pre-emption of the neighbouring farmer (Court of Cassation, 1999).

From a formal point of view, it is finally relevant to note that the *comodato*, even when concerning agricultural land, may be validly concluded orally, as no particular form is required *ad substantiam* by law. Nevertheless, for evidentiary and fiscal reasons, it is advisable that the agreement be concluded in writing (with registration in *termine fisso* where applicable under Presidential Decree No. 131 of 26 April 1986) and that parties maintain adequate documentary evidence of the gratuitous nature to mitigate re-characterisation risk—particularly, where it is referenced in other documents subject to registration.

In sum, the indefinite-term *comodato* of farmland emerges as a legally recognised, structurally gratuitous instrument of temporary land management, positioned at the margins of the agrarian tenancy regime. Its practical utility depends on the effective absence of consideration, on a correct distinction between *precario* and use-linked arrangements, and on careful documentation of gratuitousness. At the same time, its very proximity to agricultural leases explains why Italian case law has progressively developed re-characterisation criteria designed to prevent the strategic use of *comodato* to circumvent the mandatory protections afforded by Law No. 203 of 3 May 1982.

Obligations of the parties and the legal regime of expenses in the indefinite-term agricultural loan for use

In the context of the *comodato agrario a tempo indeterminato* (agricultural loan for use without a fixed term), the Italian Civil Code sets out a detailed regulation of the respective obligations of the lender (*comodante*) and the borrower (*comodatario*), with rules that are fully applicable to the agricultural sector. The *comodatario*, in particular, is subject to specific duties of care and preservation of the asset received, and must use the land or agricultural asset strictly in accordance with the intended use specified in the contract or inherently arising from the nature of the asset itself (Italian Civil Code, Art. 1804(1)). Furthermore, the borrower is required to return the property upon the lender's request only in the *precario* scenario (Art. 1810 Civil Code); where a term can be inferred from the agreed use or purpose (Art. 1809(1)–(2) Civil Code), early recovery is admissible solely in the case of urgent and unforeseen need.

The standard of care required of the *comodatario* corresponds to that of the 'diligent *pater familias*' (Giorgianni, 1975; Rodotà, 1964; Art. 1176 Civil Code),1 which imposes a behavioural standard aimed at ensuring proper maintenance and preservation of the agricultural productivity of the land. In this perspective, the borrower is entirely responsible for covering the costs associated with ordinary maintenance of the agricultural land, as these are directly connected to the normal use of the property and therefore fall within the borrower's immediate sphere of interest and, more generally, the *comodatario* bears the expenses necessary for the use of the thing (Art. 1808(1) Civil Code).

By contrast, the legal regime applicable to extraordinary maintenance expenses is different. Under Art. 1808(2) Civil Code**,** the *comodatario* has a right to reimbursement from the lender for extraordinary expenses only where they are both necessary and urgent for the preservation of the asset (Fragali, 1966; *contra*, Luminoso, 1988 with an intermediate position in Giampiccolo, 1972)[2]. This principle is consistently upheld in case law, which recognises the *comodatario's* right to seek reimbursement from the lender exclusively for extraordinary expenses that are both necessary and urgent to ensure the preservation of the agricultural asset (Court of Cassation, 2016a). No reimbursement is due for non-urgent extraordinary expenditures or for mere improvements (*utilitates*), even when they result in actual improvements to the land, by reason of the structurally gratuitous nature of the contract and the burden of proving necessity, urgency and quantum lies entirely with the *comodatario*.

A particularly sensitive issue concerns the possibility for the *comodatario* to transfer possession or enjoyment of the asset to third parties. On this matter, Article 1804(2) of the Civil Code expressly prohibits the borrower from granting possession of the asset to others without the prior consent of the lender. This prohibition assumes specific relevance in the agricultural context, where the unauthorised sub-concession of a *fondo rustico* received in *comodato* may not only constitute a serious contractual breach, but—when coupled with the presence of consideration or a transfer of productive control—may also support re-characterisation of the relationship as an agricultural lease under Art. 27 of Law No. 203 of 3 May 1982, thereby triggering the application of the mandatory rules established by that statute (Court of Appeal of Florence, 2006).

Nevertheless, case law tends to clarify that not every instance of third-party use necessarily constitutes a serious breach. For example, the contract is not deemed terminated for serious breach in cases where the portion of land loaned to third parties is minimal (*de minimis*) in comparison to the overall area of the agricultural property and is not used for cultivation purposes or otherwise does not result in a substantial alteration of the land's agricultural use (Court of Appeal of Florence, 2006).

Taken together, these rules show that the internal allocation of duties and expenses in *comodato agrario* is structurally asymmetric in favour of the lender: the *comodatario* bears ordinary costs and most risks, while only a narrow category of extraordinary, necessary and urgent expenses is shifted back to the *comodante*. This asymmetry reinforces the gratuitous nature of the arrangement and provides an additional analytical benchmark for distinguishing genuine loans for use from disguised agricultural leases in which the economic burdens and benefits are redistributed in a manner incompatible with a truly gratuitous contract.

1 On this point, it has been observed that the level of care required from the borrower is not merely average, but rather good or even considerable.

2 Extraordinary maintenance expenses, when necessary and urgent, are borne by the lender, as he is responsible for ensuring that the item remains suitable for the agreed use.

Termination of the indefinite-term agricultural loan for use: Requirements, procedures and succession-related events

As previously noted, the indefinite-term *comodato agrario* must be distinguished between (i) true *precario* under Art. 1810 of the Italian Civil Code where the lender's (*comodante*) faculty to unilaterally and at any time request the return of the agricultural asset operates '*ad nutum*', and (ii) *comodato* with an implied term under Art. 1809 Civil Code, where early recovery is permitted only upon urgent and unforeseen need. This prerogative (in the *precario* scenario) is expressly established by Art. 1810 of the Italian Civil Code, which provides that, in the absence of a fixed term agreed upon by the parties, the borrower (*comodatario*) is obliged to return the asset 'as soon as the lender requests it'.

However, the requirement of a 'real, current and concrete need' does not apply to Art. 1810 Civil Code; it is instead a substantive limitation relevant where a term (express or implied) exists (Art. 1809(2) Civil Code). According to prevailing principles, the request for restitution in the presence of a term must be justified by an urgent and unforeseen need on the part of the *comodante*, which may consist of personal, familial or even economic necessities. Such need must be genuine and not pretextual, although the Italian Civil Code does not require the request to be supported by written reasoning. It is for the court to assess the seriousness and legitimacy of the need invoked by the lender (Court of Cassation, 1990a, 1991).

In the agricultural context, this judicial assessment takes on particular relevance, since the *comodatario* often carries out productive activities on the land, making investments and allocating resources to cultivation. Nevertheless, the inherently gratuitous nature of *comodato* (and, where applicable, its *precario* structure under Art. 1810 Civil Code) weakens the legal position of the borrower when compared with that of an agricultural tenant, who benefits from enhanced protections regarding minimum contractual duration and early termination. In other words, the more the relationship resembles a stable and investment-intensive agricultural enterprise, the more critical the correct classification of the arrangement under Arts. 1809–1810 Civil Code becomes for the allocation of termination risks.

A particularly important aspect concerns the formal procedure by which restitution is requested. Although the Civil Code does not prescribe a specific form, it is advisable to submit the request in writing, both for evidentiary purposes and to demonstrate the seriousness and immediacy of the restitution claim—especially in the event of future litigation. Should the borrower resist the return of the asset, the lender must obtain a judicial order declaring the unlawful occupation and authorising the compulsory release of the agricultural property by means of enforcement proceedings involving a court bailiff (Court of Cassation, 1995, 1997a, 2005b,c; De Mauro, 2007)[3]. As a procedural precondition, disputes in matters of '*comodato*' are subject to mandatory mediation pursuant to Art. 5(1-bis) of Legislative Decree No. 28 of 4 March 2010; the judge verifies compliance and, if absent, orders the parties to attempt mediation before proceeding on the merits. Jurisdiction lies with the ordinary courts; while the case is assigned to the Specialised Agrarian Section only where the *petitum* involves agricultural tenancy issues (for instance, a claim for reconduction to lease under Law No. 203 of 3 May 1982).The reassignment to a Specialised Agrarian Section does not, by itself, exclude the mediation precondition; any prior, valid attempt remains effective, while otherwise the judge may set a term to conduct it (Court of Appeal of Ancona, 2012; Court of Cassation, 2007b, 2015a).

Additional legal issues arise in the event that one of the parties dies during the term of the *comodato*. If the borrower dies, the heirs succeed to his position but, absent a fixed term, the lender may demand restitution under Art. 1810 Civil Code; where a term (express or implied) exists, restitution before expiry remains subject to the urgent-and-unforeseen-need test under Art. 1809(2) c.c. (Court of Cassation, 1990a).

Conversely, the scenario becomes more complex and controversial in the event of the lender's death. The Civil Code does not expressly regulate this situation, thereby giving rise to conflicting interpretations in the courts. A sound reconstruction treats the heirs as subrogated to the lender's position: if the relationship is *precario* (Art. 1810 Civil Code), they may request immediate return; if a term (express or implied) exists (Art. 1809 Civil Code), early restitution requires proof of urgent and unforeseen need (Court of Cassation, 1991). The view that the lender's death *per se* amounts to 'unexpected need' is not generally accepted; in practice, the court assesses the seriousness and legitimacy of the need alleged by the heirs (Court of Cassation, 2004). This latter approach better balances the borrower's legitimate expectations with the socio-economic function of the contract. From a practical standpoint, therefore, termination of an indefinite-term *comodato agrario* hinges on a fine-grained distinction between *precario* and term-linked arrangements, on the ability to demonstrate genuine urgent need where a term exists, and on strict compliance with procedural

3 It is settled case law that the agricultural loan for use (*comodato agrario*), even when involving rural land, does not fall within the category of agricultural contracts, being structurally unsuitable—due to its inherently precarious nature—for the stable constitution of a farming enterprise. As a result, disputes regarding the return of property granted under an agricultural *comodato* fall within the jurisdiction of the ordinary courts (Italian Code of Civil Procedure, Art. 9) and are governed by the ordinary civil procedure, not the special agricultural procedure (Italian Code of Civil Procedure Art. 50-*ter*).

prerequisites such as mediation. These elements not only shape the parties' respective risks in litigation but also provide courts with a further benchmark for distinguishing bona fide gratuitous use from relationships that, because of their duration and investment structure, should instead be re-characterised as agricultural leases.

Re-characterisation of the agricultural loan for use as a typical agrarian contract: Legal grounds, judicial criteria and practical consequences

Among the most debated issues concerning the gratuitous grant of agricultural land under *comodato* is the potential re-characterisation (*riqualificazione*) of the relationship as a typical agrarian contract, particularly as a lease (*affitto agrario*) governed by Art. 27 of Law No. 203 of 3 May 1982 (Calabrese, 1988; Carmignani, 2002; Carrozza, 1982; Confortini, 1988; Costato, 1997; Jesu, 2006; Rauseo, 1989; Tommasini, 2006). Such reclassification occurs when the court determines that, beneath the formal designation as a *comodato*, the agreement conceals a different contractual structure, marked by consideration (including *rent in kind*) and by the allocation of productive enjoyment and control, aimed at the stable establishment of an agricultural enterprise on land owned by another (Court of Cassation, 2016c; Tribunal of Ascoli Piceno, 2016, No. 1103).

Case law has clarified that the decisive criterion for re-characterisation is the examination of the contract's actual legal cause (*causa concreta*). While the cause of *comodato agrario* lies solely in the lender's liberality and the temporary gratuitous use of the land, the cause underlying statutorily regulated agrarian contracts—especially lease agreements—consists in ensuring the stable and continuous management of farmland for the professional exercise of agricultural activity, with an economically reciprocal exchange between the parties (Court of Cassation, 2007b, 2024).

Accordingly, the presence of consideration or any economically significant counter-performance exceeding mere reimbursement of expenses or a modest pecuniary contribution—tolerated in gratuitous contracts—may signal a genuine bilateral obligation and thus justify reclassification as an agrarian lease (Court of Cassation, 2010, 2016a). Indicators include: (i) rent in kind (share of produce/subsidies), (ii) systematic assumption by the borrower of costs and risks that ordinarily lie with the owner and (iii) contractual clauses that transfer productive control of the holding.

In particular, according to well-established case law, the essentially gratuitous nature of *comodato* is not undermined by the inclusion of a *modus* (i.e. an accessory obligation imposed on the borrower), provided that such obligation does not in substance constitute a true economic consideration. Any burden placed on the *comodatario* must remain proportionate and not such as to distort the gratuitous nature of the relationship. This limit is exceeded where the *modus* operates as a functional equivalent of rent or otherwise reveals a synallagmatic exchange typical of lease **(**Court of Cassation, 1990b, 1997b, 2003a**).**

Another relevant factor for judicial re-characterisation lies in the actual allocation of agricultural management and maintenance costs. If the borrower undertakes obligations normally incumbent on the landowner (Tribunal of Spoleto, Tribunal of Foggia)—such as bearing extraordinary maintenance in a systematic and non-reimbursed manner or executing improvements of substantial economic value for the lender's benefit—this may be considered a significant indicator of the parties' intent to create a remunerated and productively oriented relationship, rather than a merely precarious and gratuitous *comodato* (Court of Appeal of Firenze).

Conversely, the mere execution of necessary and urgent works with a view to reimbursement (Italian Civil Code, Art. 1808(2)) does not, by itself, convert the relationship into a lease.

In the legal literature, scholars debate whether it is admissible to impose a *modus* in agricultural *comodato*—that is, a productive use obligation—without this automatically transforming the relationship into a contract with consideration. Part of the doctrine has emphasised how the so-called *comodato modale* of rural land may be used with the aim of circumventing the restrictive rules applicable to typical agrarian contracts (Costato, 2023; Goldoni, 1988; Jannarelli, 1986). According to this interpretation, the inclusion of such clauses requires a substantive review of the parties' true intentions. Where the agreement reveals the will to establish a stable, productive and reciprocal relationship, the contract must be re-characterised as an agrarian lease.

Nevertheless, recent case law has confirmed that even a *comodato* involving productive assets and including a *modus* does not fall within the scope of agrarian lease legislation—in particular, the reconduction mechanism under Art. 27 of Law No. 203 of 3 May 1982—so long as gratuitousness is preserved and no consideration (direct or indirect, including rent in kind) is agreed or effectively paid (Court of Cassation, 2005c, 2016c)**.**

Consistent with this position, it has been affirmed that the essential cause of an agrarian lease lies in the creation of an agricultural enterprise on land belonging to another party—a purpose foreign to *comodato*, even where the object is a productive asset and the borrower engages in management activities beyond mere custody (Court of Cassation, 2003b).

In this respect, the courts have held that not every benefit conferred upon the lender automatically constitutes consideration. For example, a reservation of fruits to the owner has been considered compatible with *comodato* where it does not operate as remuneration but merely delimits the scope of the borrower's use (Court of Cassation, 1990c).

Similarly, no lease has been found where a landowner granted use of agricultural land for a single growing season without rent, stipulating only that a public subsidy would be retained by the owner, absent other indicators of consideration or productive control (Tribunal of Foggia, 1988).

Accordingly, proper legal classification of the contract requires a fact-intensive assessment of whether the obligations imposed on the borrower amount to reciprocal performance—even if atypical or indirect—and whether the relationship is functionally geared toward agricultural production for the lender's benefit. Where such conditions are met, the designation as *comodato* must yield to that of an agrarian lease, with the consequent application of Art. 27 of Law No. 203 of 3 May 1982.

On the procedural plane, the practical implications of re-characterisation are considerable and extend to both civil and agrarian aspects. First and foremost, judicial recognition of the contract's remunerative nature entails full application of the regulatory framework for typical agrarian leases (Law No. 203 of 3 May 1982), including mandatory rules on minimum duration, agrarian pre-emption rights (*prelazione agraria*) and compensation for improvements (Pisciotta, 2002)[4]. Second, fiscal and administrative consequences may also arise, including potential challenges from the Italian Revenue Agency for failure to register the contract properly or for underpayment of the taxes applicable to remunerated agreements.

Lastly, disputes concerning the re-characterisation of a *comodato* as an agrarian lease fall within the jurisdiction of the Specialised Agrarian Sections of the competent Tribunal, whereas ordinary *comodato* disputes remain under general civil jurisdiction. Competence is determined by the *petitum* and the substantive nature of the claim, not by the contractual label. Thus, any legal action seeking to determine the true legal nature of the contractual relationship necessarily involves a preliminary assessment of judicial competence, and the judge must verify whether the issues raised call for the application of agrarian tenancy rules or merely for the enforcement of a gratuitous loan for use (Court of Cassation, 2007b).

In summary, re-characterisation of *comodato agrario* hinges on three interrelated substantive indicators—gratuitousness, allocation of economic burdens and benefits, and transfer of productive control—combined with a functional analysis of the relationship's *causa concreta*. Once these elements reveal a reciprocal, production-oriented exchange, courts are compelled to qualify the arrangement as an agrarian lease, with far-reaching consequences in terms of statutory protections, fiscal treatment and specialised jurisdiction.

Tax implications: Agricultural income in the context of gratuitous loan for use

Although the *comodato agrario* (agricultural loan for use) does not fall within the category of typical agrarian contracts, its application gives rise to significant fiscal implications, particularly in relation to the determination and declaration of agricultural income (*reddito agrario*).

According to Art. 32 of the Italian Consolidated Income Tax Act (*Testo Unico delle Imposte sui Redditi* [TUIR]), agricultural income is defined as that portion of the average ordinary yield of the land attributable to the working capital and organisational labour employed in carrying out agricultural activities (calculated on a cadastral basis, rather than on actual profits). Within the cadastral framework, *reddito dominicale* remains attributed to the owner or other real-right holder, whereas *reddito agrario* is linked to the exercise of agricultural activity on the land.

However, both legislative evolution and interpretative developments (including administrative practice) have led to the recognition that, where the *comodatario* personally carries out agricultural activities on the land received under *comodato*, using his or her own capital and labour, the *reddito agrario* may be attributed to the *comodatario* as the subject who effectively conducts the farming activity. Despite not being the holder of a real right, the borrower is deemed to realise the taxable event (*presupposto impositivo*) associated with agricultural income by virtue of the effective exercise of agricultural operations on the land.

That said, case law and practice have shown differing approaches over time: according to an earlier approach (Central Tax Commission, 1985), agricultural income was attributed to the *comodante*, due to the absence of legal possession (*possesso*) on the part of the *comodatario*. A more recent—now frequently followed—reading in doctrine and administrative guidance (Central Tax Commission, 1986), favours attribution to the *comodatario* who actually cultivates. In the absence of an explicit statutory rule for *comodato*, the operational criterion is the effective exercise of the agricultural activity, without prejudice to the owner's *reddito dominicale*.

It is worth noting that Art. 33 of the Italian Consolidated Income Tax Act (TUIR) expressly assigns *reddito agrario* to the tenant (*affittuario*) only where there is a formal agricultural lease. Therefore, in the context of *comodato*, identifying the taxpayer for *reddito agrario* turns on who actually conducts the farming on the land, while *reddito dominicale* remains with the owner/real-right holder irrespective of *comodato*.

From a systematic perspective, this tax treatment confirms the functional centrality of effective cultivation in the

4 Part of the legal literature has held that, even in the absence of a reclassification of the contract as an agricultural lease, the *comodatario* may, in certain cases, be entitled to compensation for improvements. This view relies on the analogous application of the principles set out in Art. 17 of Law No. 203 of 3 May 1982, considering the equitable and compensatory nature of indemnification.

allocation of agricultural income: even in the absence of a typical agrarian contract, the *comodatario* who assumes the entrepreneurial risk and organises the farming activity is treated as the relevant tax subject for *reddito agrario*. This, in turn, provides an additional analytical clue for distinguishing genuinely gratuitous loans for use from relationships that, by concentrating productive risk and benefit on the user, may approach the economic profile of an agrarian lease.

Comparative perspectives: The indefinite-term agricultural loan for use in major European legal systems

Although the indefinite-term agricultural loan for use (*comodato agrario a tempo indeterminato*) is specifically regulated under Italian law, equivalent legal concepts can be found in other European jurisdictions. Despite differences in terminology and legal structure, these systems share the underlying logic of a gratuitous and temporary transfer of agricultural assets for use.

In French law, the *prêt à usage* (loan for use) is governed by Arts. 1875 et seq. of the French Civil Code *(Code civil)*. It is a real and gratuitous contract by which the *prêteur* (lender) hands over a good to the *emprunteur* for use, with the obligation to return it. In the agricultural context, the *prêt à usage* is used to allow the temporary use of land without transferring real rights, preserving both the gratuitous nature and the precariousness of the arrangement.

Similarly to the Italian system, French case law has established that the presence of any form of counter-performance, even indirect, may result in re-characterisation of the contract as a *bail rural* (agricultural lease), thereby triggering the application of the protective *statut du fermage*. Examples often cited include the shifting to the user of charges normally borne by the owner (e.g. certain property taxes or insurance), where they operate in substance as consideration (Cour de Cassation, 2016)[5].

As in Italy, the absence of a defined term in a *prêt à usage* agreement may generate uncertainty as to the duration of the relationship. Although such contracts may be concluded orally, it is strongly recommended to draft a written agreement clearly specifying the term, the conditions of use and the return modalities, thereby reducing the risk of disputes and of subsequent re-characterisation of the agreement.

Finally, it should be noted that despite the gratuitous nature of the *prêt à usage*, the use of agricultural land under such contracts may nonetheless be subject to the *contrôle des structures*[6], a system of prior administrative authorisation under French agricultural law governing the use and distribution of farmland. Consequently, in certain situations—such as when minimum surface thresholds are exceeded, or when the beneficiary is not a recognised professional farmer—administrative authorisation (*autorisation d'exploiter*) may be required even for a loan-for-use contract involving farmland.

Under German law, the *Leihe* (loan for use) is governed by Arts. 598 et seq. of the German Civil Code (*Bürgerliches Gesetzbuch* [BGB]). It is a gratuitous contract through which the *Verleiher* (lender) grants the *Entleiher* (borrower) temporary use of a good, with the obligation to return it. In the agricultural sector, the *Leihe* may be used to grant use of farmland, but it is less frequently employed than other contractual instruments such as the *Pacht* (lease), which involves a consideration and provides the tenant with greater legal protections.

As in the Italian legal system, German case law has clarified that the existence of any form of counter-performance, even indirect, may lead to re-characterisation of the contract as a *Pachtvertrag* (lease agreement), thereby subjecting it to the regulatory framework applicable to agricultural leases. In practice, indicators include shifting to the user of owner-typical burdens in a way that functions as remuneration (Oberlandesgericht Koblenz, 2006).[7]

As for administrative profiles, *Flurbereinigung* (land consolidation) is not, in itself, a prior authorisation regime for private use agreements; rather, agricultural land use can be affected by public-law controls arising from planning and environmental law and, for leases, from the *Landpachtverkehrsgesetz*. These frameworks may incidentally impact arrangements over farmland, but a *Leihe* is not generally subject to a dedicated prior-approval requirement as such Flurbereinigungsgericht Kassel (1966)[8].

5 In that case, the Court quashed a decision of the Riom Court of Appeal which had denied the reclassification of a prêt à usage as a bail rural, despite the fact that the borrower was responsible for paying taxes and levies associated with the agricultural land. The Court held that the onerous nature of the provision of agricultural land does not depend on the regularity or actual payment of the consideration stipulated by the parties.

6 The *contrôle des structures* is an administrative control mechanism under French law, primarily governed by the *Code rural et de la pêche maritime*, which subjects the establishment, enlargement and operation of agricultural holdings above certain thresholds to prior authorisation, irrespective of the contractual form used (lease, sale, prêt à usage, etc.).

7 A significant judicial precedent in this regard is the judgement of the Oberlandesgericht (OLG) Koblenz, which addressed the distinction between *Leihe* and *Pacht* in the agricultural context. The court stressed that the assumption by the borrower (*Entleiher*) of substantial economic burdens—such as the payment of taxes or the execution of major improvements—may indicate the parties' intention to establish an onerous relationship, characteristic of a lease (*Pachtvertrag*).

8 A further German authority is the decision of the *Flurbereinigungsgericht* Kassel on the classification of agricultural

In the common law system of England and Wales, there is no legal institution that perfectly corresponds to the Italian *comodato agrario*. However, a partially analogous role is played by the *licence to occupy*. This legal figure allows for the temporary and gratuitous use of land by a licensee, without conferring any real right, but only a personal right, which is in principle revocable (subject to contractual terms and equitable constraints). In the agricultural context, the *licence to occupy* is sometimes used to grant access to plots of land for non-commercial purposes or for contingent uses (e.g. limited grazing, non-intensive seasonal cultivation). However, it must be used with caution to avoid re-characterisation as a leasehold agreement, specifically as a Farm Business Tenancy under the Agricultural Tenancies Act, 1995 or an Agricultural Holding under the Agricultural Holdings Act, 1986.

As in the Italian legal system, English case law has clarified that where there are clear indicators of exclusive possession, a fixed or ascertainable term, and other lease-like attributes, the licence may be re-characterised as a lease, thereby triggering the protective regime applicable to agricultural tenancies (Bruton v London & Quadrant Housing Trust, 2000). Term length (e.g. over or under 12 months) is not decisive in itself; labels are likewise non-determinative. Relevant factors in this assessment include the duration of the agreement (particularly if it exceeds 12 months), the exclusivity of possession by the licensee, the intensity of the agricultural activity performed and the payment of sums which, though not formally labelled as rent, effectively constitute consideration. English courts consistently hold that exclusive possession and economic exploitation of the land are decisive factors in distinguishing a lease from a mere licence—resulting in the loss, for the licensor, of the fundamental safeguards of revocability and temporariness that characterise precarious relationships.

As a consequence, specific drafting precautions are recommended to avoid such risks: reserving meaningful rights of entry and control to the grantor; avoiding clauses that confer exclusive possession; aligning the factual matrix with genuinely limited and non-commercial uses; and ensuring that any payments do not function as rent in substance. Ultimately, the *licence to occupy* may serve as a useful legal tool in agricultural practice, but its effectiveness depends on proper legal structuring and the genuine intent of the parties.

In Spanish law, the *comodato* (also referred to as *préstamo de uso*) is governed by Arts. 1740 et seq. of the Spanish Civil Code *(Código Civil)*. In the agricultural context, this contractual form can be used to grant temporary access to land, but its application is relatively limited. More commonly, parties opt for agricultural lease agreements (*arrendamiento rústico*), which provide greater legal security for the tenant.

The *comodato* is a real contract that is perfected by the physical delivery of the asset. Art. 1740 of the Spanish Civil Code states: '*Por el contrato de préstamo, una de las partes entrega a la otra alguna cosa no fungible para que use de ella por cierto tiempo y se la devuelva, en cuyo caso se llama comodato'* ('By a loan agreement, one party delivers to another a non-fungible thing so that it may be used for a certain time and then returned, in which case it is called a *comodato*'). Gratuitousness is a fundamental element of this agreement: the inclusion of any form of compensation, even indirect, may lead to re-characterisation of the contract as an *arrendamiento*, thereby triggering the application of its binding regulatory regime[9].

Spanish case law has clarified the distinction between *comodato* and *precario*, emphasising that the *comodato* requires either a defined purpose for which the item is to be used or an agreed duration. In the absence of either of these elements, the arrangement will be classified as *precario*, allowing the lender to reclaim possession of the property at any time. (Tribunal Supremo, 2021)[10].

In agricultural practice, *comodato* agreements are used less frequently than other contractual instruments such as *arrendamiento*, which involve the payment of rent and provide stronger protections for the lessee (Audiencia Provincial de Alicante, 2008)[11]. However, in family settings or fiduciary relationships, the *comodato* may serve as a tool for the temporary and gratuitous use of farmland—provided that the essential requirements of gratuitousness and temporariness are respected.

The comparative analysis of major European legal systems demonstrates that, despite the absence of a harmonised supranational framework, the legal institution of the indefinite-term agricultural loan for use (*comodato*) finds structural recurrence—albeit with heterogeneous configurations—across

land-use relationships, which likewise stresses the relevance of the economic burdens borne by the holder of the land in determining whether the relationship is gratuitous or onerous.

9 For example, the payment of expenses normally borne by the owner—such as land tax or property insurance—may be interpreted as an element of onerosity, thereby transforming the agreement into an agricultural lease subject to the *Estatuto del Arrendamiento Rústico*.

10 The Spanish Supreme Court has emphasised the importance of specifying either the use or the duration in a loan-for-use (*comodato*) contract; in the absence of such elements, the agreement may be reclassified as a precarious occupation (*precario*), allowing the lender to reclaim the property at any time.

11 Spanish courts have clarified the distinction between *comodato* and *arrendamiento rústico*, both in cases concerning the legal classification of contracts over *fincas rústicas* and in disputes on whether gratuitous-use agreements over agricultural land should be requalified as rural leases

jurisdictions. What clearly emerges is that the *comodato* or its functional equivalents (such as the *prêt à usage*, *Leihe*, *licence to occupy* or *préstamo de uso*) continues to serve as a flexible contractual instrument for the gratuitous allocation of agricultural land, particularly within relational contexts marked by trust, family ties or provisional arrangements.

At the same time, divergences among legal systems go beyond formal classifications. They concern the degree of tolerance towards atypical forms of consideration, the effects of sector-specific mandatory regimes (such as the French *statut du fermage* or the UK's agricultural tenancy legislation) and the administrative consequences deriving from authorisation mechanisms like the *contrôle des structures* in France and, for leases, the *Landpachtverkehrsgesetz* in Germany. This framework reveals that even in relationships that appear gratuitous and precarious, contemporary agricultural law increasingly prioritises the economic and productive function of land use over the nominal legal classification of the contract.

A transversal trend among the examined systems is the inherent tension between contractual autonomy and the social function of agricultural land: whenever the contractual arrangement, even implicitly, aims to establish a stable and profitable agricultural enterprise, the legal order tends to privilege substance over form, favouring re-characterisation into a lease and applying the protective rules of agricultural tenancy law. In this context, Italy stands out for a particularly extensive and nuanced body of case law, yet the underlying rationale is widely shared: it is not the *nomen iuris* but rather the actual economic and causal configuration of the relationship that determines the applicable legal regime.

Finally, the comparative perspective highlights an opportunity—still only partially explored—for greater harmonisation or at least coordination at the EU level regarding the gratuitous use of agricultural land. Such coordination is increasingly relevant in light of policy objectives such as environmental sustainability, equitable land access, and support for family and youth farming. If properly regulated and consciously applied, the *comodato agrario* may still play a meaningful role in achieving this delicate normative and economic balance.

In sum, the comparative survey of France, Germany, Spain and England & Wales suggests that gratuitous arrangements for the use of agricultural land are generally framed as residual, ancillary or exceptional devices, whose stability is tolerated only insofar as they do not undermine the protective logic of agricultural tenancy law. The Italian model is distinctive in that it combines an unusually rigid and formalised statutory regime for agricultural leases (Law No. 203 of 3 May 1982) with a broadly construed loan for use, thereby creating a structurally high risk of strategic recourse to *comodato* in order to circumvent mandatory tenant protection. Precisely for this reason, the re-characterisation criteria and evidential test proposed in this article are not merely of domestic relevance: they offer a coherent analytical framework that can inform judicial reasoning, policy design and—prospectively—any future EU-level coordination regarding the gratuitous use of agricultural land.

CONCLUSION

Opportunities and risks of the indefinite-term agricultural loan for use in contemporary practice

The analysis developed in this article is not merely of dogmatic interest. It directly affects the way courts, lawyers and public authorities should approach disputes arising from long-term gratuitous arrangements in the agricultural sector, as well as the way in which public entities and land management agencies design, allocate and supervise the use of agricultural land. Clarifying the substantive and procedural boundaries between genuine *comodato* and disguised agricultural leases is crucial to ensure that the protective rationale of agrarian legislation is not frustrated, that contractual practices remain coherent with statutory policy objectives, and that administrative decision-making concerning land tenure and support schemes is grounded in a realistic assessment of the underlying private-law relationships.

Although the *comodato agrario a tempo indeterminato* (indefinite-term agricultural loan for use) is based on a structurally simple and gratuitous civil law model, it now operates within a complex regulatory framework in which the need for economic flexibility must be reconciled with a legal and judicial system increasingly focused on the actual function of the contractual relationship. In this 'substance-over-form' setting—central to the reconduction test under Art. 27 of Law No. 203 of 3 May 1982—the open-ended *comodato* retains practical value only where gratuitousness and the limited, non-remunerative use of the land are real and provable. Its widespread use in agricultural practice—especially in family or fiduciary settings—confirms its value as a temporary land management instrument, capable of affording the landowner broad decision-making autonomy, including with a view to the future allocation of the property.

Nevertheless, the structural precariousness of *comodato* and the absence of any form of consideration have significant implications for the borrower (*comodatario*), who lacks many of the protections granted under typical agrarian contracts, particularly in the event of early termination. The impact differs, however, between true *precario* (Art. 1810 of the Italian Civil Code, *restituzione ad nutum*) and *comodato* with an implied term (Art. 1809 of the Italian Civil Code, *restituzione anticipata solo per bisogno urgente e impreveduto*). Even more critical is the risk of judicial re-characterisation of the agreement, should factual elements emerge that contradict the ostensible gratuitousness of the arrangement (e.g. direct monetary payments or in-kind returns, a transfer of productive control, or the stable assumption by the borrower of owner-typical burdens), with ensuing procedural effects, including the application of agrarian lease legislation and the reassignment of jurisdiction to the Specialised Agrarian Sections.

In light of these critical aspects, the informed use of the indefinite-term *comodato agrario* requires careful contractual drafting, in which the parties' intentions are expressed clearly and consistently with the gratuitous and (where applicable) precarious nature of the agreement. Best practices include: (i) stating the intended use and, where appropriate, any implied term consistent with Art. 1809 Civil Code; (ii) expressly exclude any consideration, whether direct, indirect or in kind; (iii) allocate expenses in accordance with Arts. 1808–1809 Civil Code, avoiding borrower obligations that operate as a surrogate for rent; (iv) prohibit any onward grant/sub-licence of use without consent and reserve to the lender concrete rights of entry and control; (v) create and keep documentary evidence of gratuitousness; (vi) assess registration and tax implications and (vii) factor in the mandatory mediation requirement. Only through a properly structured legal arrangement can this instrument retain its practical utility, avoiding functionally evasive distortions and preventing the risk of litigation or judicial intervention aimed at contractual correction.

It should also be noted that, in the context of agricultural companies (*società agricole*), the grant of land or buildings under a *comodato* agreement is not deemed incompatible with the requirement of exclusive pursuit of agricultural activity. Art. 36(8) of Decree-Law No. 179 of 18 October 2012 (converted into Law No. 221 of 17 December 2012), amending Art. 2 of Legislative Decree No. 99 of 29 March 2004**,** clarified that the leasing, renting or gratuitous loan (*comodato*) of residential buildings, land or facilities instrumental to agricultural activity does not constitute a deviation from the exclusive agricultural purpose, provided that any related non-agricultural revenues (e.g. from lease/rent) remain marginal (≤10% of total revenues). In the specific case of *comodato*—being gratuitous—no revenue arises, but the operation must nonetheless be coherent with the company's exclusive agricultural object and not operate as a disguised remunerative scheme. The use of *comodato* thus also finds legitimate application within the asset management of agricultural companies, being compatible with the statutory requirement of exclusive agricultural purpose.

Overall, the indefinite-term *comodato agrario* emerges as an instrument that can still perform a valuable role in contemporary agricultural practice, provided that its gratuitous nature is taken seriously and that the allocation of risks, burdens and benefits does not surreptitiously reproduce the economic profile of an agrarian lease. The doctrinal criteria and evidential test reconstructed in this article, together with the practitioner-oriented checklist, are intended to offer courts, practitioners and policymakers a coherent analytical framework for distinguishing bona fide loans for use from disguised leases and for aligning private contractual practice with the broader social function of agricultural land.

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