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European legislation and Hungarian law regime of transfer of agricultural and forestry lands**

The law regime and jurisprudence of the European Union (EU) is a very important framework for the regulation of the transfer of Hungarian agricultural and forestry lands. Here[1] we wish to emphasize that there is a difference on the grounds of

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[1] Hungarian agricultural law, constitutional law and European law literature prepared for analysing land sales: Alvincz József: A földügyi szabályozás téves értelmezése, avagy hiteltelen írás a Hitelben, *Hitel,* 2013/6, 111-121; Andréka Tamás – Olajos István: A földforgalmi jogalkotás és jogalkalmazás végrehajtása kapcsán felmerült jogi problémák elemzése, *Magyar Jog,* 2017/7-8, 410-424; Anka Márton Tibor: Egymás ellen ható kodifikációk (Polgári Törvénykönyv és földforgalom), *Gazdaság és Jog,* 2015/10, 13-19; Bányai Krisztina: A zsebszerződések ügyészi szemmel, *Új Magyar Közigazgatás,* 2014/1, 62-71; Bányai Krisztina: A zsebszerződésekről a jogi környezet változásainak tükrében, *Studia Iurisprudentiae Doctorandorum Miskolciensium,* 2014/13, 7-33; Bányai Krisztina: A földszerzés korlátozásának elméleti és gyakorlati kérdései Magyarországon, *Agrár- és Környezetjog (JAEL)*, 2016/20, 16-27, doi: 10.21029/JAEL.2016.20.5; Bányai Krisztina: *A magyar mezőgazdasági föld tulajdoni és használati forgalmának jogi korlátai és azok kijátszása*, PhD-Értekezés, Miskolc, Miskolci Egyetem, 2016; Bobvos Pál: A termőföldre vonatkozó elővásárlási jog szabályozása, *Acta Universitatis Szegediensis Acta Juridica et Politica,* 2004/3, 1-25; Bobvos Pál – Hegyes Péter: *Földjogi szabályozások*, Szeged, JATEPress, 2014; Bobvos Pál – Hegyes Péter: *A földforgalom és földhasználat alapintézményei*, Szeged, SZTE ÁJK – JATE Press, 2015; Bobvos Pál – Farkas Csamangó Erika – Hegyes Péter – Jani Péter: A mező- és erdőgazdasági földek alapjogi védelme, in: Balogh Elemér (edit.): *Számadás az Alaptörvényről*, Budapest, Magyar Közlöny Lap- és Könyvkiadó, 2016, 31-40; Burgerné Gimes Anna: Földhasználati és földbirtok-politika az Európai Unióban és néhány csatlakozó országba, *Közgazdasági Szemle,* 2003/9, 819-832; Csák Csilla: Die ungarische Regulierung der Eigentums- und Nutzungsverhältnisse des Ackerbodens nach dem Beitritt zur Europäischen Union, *JAEL*, 2010/9, 20-31; Csák Csilla: A termőföldet érintő jogi szabályozás alkotmányossági normakontrollja, in: Csák Csilla (edit.): *Az európai földszabályozás aktuális kihívásai*, Miskolc, Novotni Alapítvány, 2010; Csák Csilla – Hornyák Zsófia: Az átalakuló mezőgazdasági földszabályozás, *Advocat,* 2013/1-4, 12-17; Csák Csilla – Hornyák Zsófia: A földforgalmi törvény szabályaiba ütköző mezőgazdasági földekkel kapcsolatos szerződések jogkövetkezményei, *Őstermelő,* 2014/2, 10-11; Csák Csilla – Hornyák Zsófia: Igényérvényesítés lehetőségei és határai a mezőgazdasági földforgalom körében - bírósági keretek, S*tudia Iurisprudentiae Doctorandorum Miskolciensium,* 2014/14, 139-158; Csák Csilla – Nagy Zoltán: Regulation of Obligation of Use Regarding the Agricultural Land in Hungary, *Zbornik radova Pravnog fakulteta u Novom Sadu,* 2011/2, 541-549; Csák Csilla – Szilágyi János Ede: Legislative tendencies of land ownership acquisition in Hungary, *Agrarrecht Jahrbuch*, 2013, 215-233; Csák Csilla – Kocsis Bianka Enikő – Raisz Anikó: Agrárpolitikai – agrárjogi vektorok és indikátorok a mezőgazdasági birtokstruktúra szemszögéből, *JAEL*, 2015/19, 44-55; Fodor László: Kis hazai

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the nature between regulations on the use and on the ownership of lands in the European Union's legislation on agricultural and forestry lands (hereafter lands). There are plenty of EU regulations on the use of lands and there are much less on the ownership of lands, and these even bear many problems of interpretation. Nevertheless, it does not reduce the importance of the EU legislation on the ownership of lands in the codification process of the member states. In view of this nature we discuss more in detail the *problem of ownership* bearing more interpretation difficulties.

1. The prelude of the EU-conform transformation of the Hungarian legislation on land transfer

I. We experienced the difference between the two fields of legislation already at the beginning of the process of our accession to the European integration. While based upon the European Agreement (proclaimed in Hungary by Act 1994 I) expressing our intention to accede in the field of the use of lands the *obligation of national treatment* prevailed from the beginning in connection with the citizens of the European Community, in the field of the acquisition of land the situation was different. The European Agreement settling several questions between Hungary and the European Community (hereafter European Union) the problem of the acquisition of ownership of land was determined in connection with the right of establishment of Community enterprises and citizens. The problem as to the *right of establishment* arose at the determination of the starting date from when on the right of establishment for the Community enterprises and citizens must be ensured in the country wishing to accede. The ownership, sale, long-term lease or right to lease of real estates, land and natural resources were on a so-called 'permanent list' meaning that Hungary was not obliged to enter into force the obligation of national treatment for EU enterprises and citizens *till the date when Hungary became full member of the EU*.[2]

101-102; Orlovits Zsolt (edit.): *Földforgalmi szabályozás*, Budapest, Nemzeti Agrárgazdasági Kamara, 2015; Prugberger Tamás: Szempontok az új földtörvény vitaanyagának értékeléséhez és a földtörvény újra kodifikációjához, *Kapu,* 2012/6-7, 62-65; Papik Orsolya: "Trends and current issues regarding member state's room to maneuver of land trade" panel discussion, *JAEL*, 2017/22, 132-145, doi: 10.21029/JAEL.2017.22.132; Raisz Anikó: Földtulajdoni és földhasználati kérdések az emberi jogi bíróságok gyakorlatában, in: Csák Csilla (edit.): *Az európai földszabályozás aktuális kihívásai,* Miskolc, Novotni Alapítvány, 2010, 241-253; Raisz Anikó: Topical issues of the Hungarian land-transfer law, *CEDR Journal of Rural Law,* 2017/1, 68-74; Raisz Anikó: A magyar földforgalom szabályozásának aktuális kérdéseiről, *Publicationes Universitatis Miskolcinensis Sectio Juridica et Politica*, 2017/35, 434-443; Tanka Endre: Történelmi alulnézet a magyar posztszocialista földviszonyok neoliberális diktátum szerinti átalakításáról, *Hitel,* 2013/1, 109-136; Téglási András: Az alapjogok hatása a magánjogi viszonyokban az Alkotmánybíróság gyakorlatában az Alaptörvény hatálybalépését követő első három évben, *Jogtudományi Közlöny*, 2015/3, 148-157.

[2] Cf. Prugberger Tamás: Reflexiók „A termőföldről szóló 1994:LV. tv. 6. §-a a nemzetközi jog és az EU-jog fényében" c. fórumcikkhez, *Magyar Jog*, 1998/5, 276-277.

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II. At the end of the accession procedure (2003) when signing the accession treaty the content of the European Agreement was slightly changed. On the one hand since in the Accession Treaty the problem of acquiring the ownership of lands was regulated in the framework of the *free movement of capital* instead of the right of establishment, on the other hand – similarly to other joining countries in 2004 and later – as Hungary succeeded to negotiate a further exemption period (*derogation during a transitional period*) until the full introduction of the obligation of national treatment.[3] Before reviewing the details we think it is important to mention that in case of the member states acceded before 2004 (hereafter old member states) this field was not mentioned in the accession treaty, that is this field of regulation became *as it were a permanent part of the Accession Treaty* just in case of the countries acceding in 2004 or later (hereafter new member states or newly acceded states).

According to the Accession Treaty and point 3 of its Annex X on the free movement of capital, Hungary succeeded in negotiating certain derogations in the following fields of acquisition of immovable: (a) acquisition of real estates not qualifying as agricultural lands by nationals of other Member States and (b) acquisition of agricultural lands (arable lands by the Hungarian terminology then in force) by natural persons not living in Hungary or not being Hungarian citizens as well as by legal persons.

Notwithstanding the obligations under the Treaties on which the European Union is founded, Hungary may maintain in force for seven years from the date of accession the prohibitions laid down in its legislation existing at the time of the signature of this Act on the acquisition of agricultural land by natural persons who are non-residents or non-citizens of Hungary and by legal persons. This part of the Accession Treaty is rather similar to the derogation rules of the other acceding countries, but the derogation rules of Hungary were exceptional compared with the transitional derogation rules of the other acceding countries in 2004 and 2007 namely it even pertained to legal persons (later similar regulations were accepted for Croatia). This is why we have frequently heard about foreigners' *legal* acquisition of land in new member states – having derogations as well – during the derogation period typically through their stake in a native legal person, while in Hungary the acquisition of land by

[3] On the transitional and after accession regulation of other new member states see Szilágyi János Ede: The Accession Treaties of the New Member States and the national legislations, particularly the Hungarian law, concerning the ownership of agricultural land, *JAEL*, 2010/9, 48-61; Anna Bandlerová – Loreta Schwarczová – Pavol Schwarcz: Acquisition of Agricultural Land by Foreigners – The Case of Slovakia, in: Bandlerová, Anna – Bohátová, Zuzana – Bumbalová, Monika (edit.): *Legal aspects of sustainable agriculture*, Nitra, Slovak University of Agriculture, 2012, 63-72; Anna Bandlerová – Jarmila Lazíková: Purchase and Lease Contracts of Agricultural Land – Case of Slovakia, in: Flavia Trentini (coord.): *Challenges of contemporary agrarian law proceedings*, Ribeirao Preto, Altai Edicoes, 2014, 65-84; Franci Avsec: Agricultural contracts in Slovenia, in: Flavia Trentini (coord.): *Challenges of contemporary agrarian law proceedings*, Ribeirao Preto, Altai Edicoes, 2014, 189-202; Pawel Gala –Teresa Kurowska – Dorota Lobos-Kotowska: *National report – Poland*, 2015, free access; Szilágyi János Ede: Rapport général de la Commission II, in: Roland Norer (edit.): *CAP Reform: Market Organisation and Rural Areas: Legal Framework and Implementation*, Baden-Baden, Nomos, 2017, 175-292.

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foreigners, except a few cases, was typically (but not exclusively) *illegal*. These transactions were generally called as `pocket contracts´[4] basically meaning fraudulent contracts.

Even during this seven years period there was a possibility for citizens of other member states to acquire the ownership of Hungarian arable land. According to this method, citizens of another Member State who want to establish themselves as self-employed farmers and who have been legally resident and active in farming in Hungary for at least three years continuously, shall not be subject to the provisions of the preceding subparagraph or to any rules and procedures other than those to which nationals of Hungary are subject to. Adopting this rule from the Accession Treaty and completing it, this possibility was ruled in details till May 2014 in the operative Hungarian Land Law (Act 1994 LV, Land Law Act). Here we must note that there were only a few cases applying this possibility to get ownership, especially after the year 2010.[5]

Annex X of the Accession Treaty offered a possibility to extend the seven years derogation period: If there is sufficient evidence that upon expiry of the transitional period there would be serious disturbances or a threat of serious disturbances of the agricultural land market of Hungary, the Commission, at the request of Hungary, shall decide upon the extension of the transitional period for up to a maximum of three years. According to the decision of the Parliament[6] Hungary made an attempt to extend the seven years moratorium since – among other reasons – (a) the EU's agrarian support for Hungary reached the first time the average support for the old member states in 2013, (b) the average land prices in Hungary still substantially lagged behind the land prices of the majority of the old member states, threatening with serious disturbances on the agricultural land market after 2011, (c) the settling of assets starting at the change of the regime (i.e. 1989/1990) had not finished by that time (and not even by now!). The Committee finally agreed to the extension of the land moratorium[7] till the 30th April 2014, besides the above-mentioned reasons some people think that the Committee was influenced by the fact that at the beginning of 2011 Hungary was the sequential president of the Council of European Union, although the fact that other newly acceding states received similar derogations contradicts to this supposition.

[4] In connection with analysis of pocket contracts see the study of István Olajos and his co-worker classifying the types of the pocket contracts and the possible ciminal law steps. This study had a codification effect, namely a compulsory declaration in connection with the land acquiring maximum hectare 300. Olajos István – Szalontai Éva: Zsebszerződések a termőföld-tulajdonszerzések területén, *Napi Jogász*, 2001/7, 3-10. Cf. Bányai Krisztina: A földszerzés korlátozásának elméleti és gyakorlati kérdései Magyarországon, *JAEL*, 2016/20, 16-27, doi: 10.21029/JAEL.2016.20.5; Kocsis 2015, 241-258; etc.

[5] Oral communication from Simon Attila under-secretary Ministry of Rural Development, Miskolc 11th November 2011, at Conference on Wine as Subject of Legal Aid, organized by Miskolc Committee of Hungarian Academy of Science, Faculty of Law of University of Miskolc, etc.

[6] 2/2010. (II.18.) Act of Parliament on the necessity of the extension of the prohibition of accquisition of lands for non-Hungarian natural and legal persons.

[7] See: Decision 2010/792/EU (20.12.2010) of EU Committee.

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III. Under these circumstances the legislator had to create the conception of a new land law regime before the expiry of the moratorium.[8] The Hungarian legislator could use mainly three legal sources when working out the legal bases of this conception. On the one hand the primary and the secondary sources of law of the EU (at the rules of acquiring the ownership of land mainly the primary sources of law), on the other hand the jurisdiction of the Court of Justice of the EU (CJEU), thirdly, the national law of land transfer of the earlier acceded countries, the latter serving as concrete examples of a regulatory model. As an introduction the following can be told on these three sources of law: (a) The *Treaty on the Functioning of the European Union (TFEU)* has an enhanced importance among the primary sources of law, but the rules and regulations in it on acquiring ownership of land are principles and objectives (as the free movement of capital and persons, Common Agricultural Policy, i.e. the objectives of the CAP) where the details are missing, that is they are too general. (b) Although the *jurisdiction of CJEU* interprets the above-mentioned principles of the TFEU, but in the field of acquiring ownership of land the number of concrete cases is small, and it can be seen that the jurisdiction of the CJEU is continuously changing. It means that even if one knows the jurisdiction of the CJEU, it is not evident how to apply the principles of the TFEU. (c) The *national regulation of the earlier acceded member states* serve as model for the newly acceded countries, but it is worth emphasizing that – due to the differences in the legal systems of different countries – it is impossible to copy the regulation of other countries without any changes, i.e. the ruling of a new member state using a model is necessarily different from the regulation of the chosen countries' regulation,[9] on the other hand it is not a must that the chosen countries' regulation complies with the EU law. This latter case may happen for several reasons. For example the EU Commission has never investigated the law and regulation of the country serving as the model, or the regulation has never been at the, or if all this has happened, in the meantime the jurisdiction of the CJEU has changed.[10]

We are investigating in this study only two of the three potential sources mentioned above namely the primary law-sources of the EU and the jurisdiction of the CJEU. After that in view of these we investigate the infringement procedures and preliminary rulings regarding Hungary, and discuss the European Parliament's report of utmost importance on the transfer of land.

[8] See: Ministry of Rural Development: *Az új földtörvény vitaanyaga – A magyar föld védelmében*, 30 May 2012, free access.

[9] One has to be carefull when applying the former jurisdiction of EU to a present case, „since the laws and regulations on acquisition of ownership of lands of different member states differ in their forms and aimes"; Point 23 of Case C-370/05. proposition of Advocate General (day of review: 3 October 2006). See: Korom Ágoston: A termőföldek külföldiek általi vásárlására vonatkozó `moratórium´ lejártát követően milyen birtokpolitikát tesz lehetővé a közösségi jog, *Európai Jog*, 2009/6, 15.

[10] For similar reasons speaks Ágoston Korom of estate political uncertainities; Korom (edit.): *Az új magyar földforgalmi szabályozás az uniós jogban*, Budapest, Nemzeti Közszolgálati Egyetem, 2013, 22-23.

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2. The EU's legal provisions and jurisprudence on the acquisition of the ownership of land

In the followings we shortly review the legal framework and the respective jurisdiction which highly constrains the freedom of the member states in ruling their own land transfer conditions.

2.1. The rules and regulations of the EU's negative and positive integration model

From the point of view of the regulation of land transfer both the primary and secondary sources of EU law have relevance (e. g. the rules and regulations in the framework of the Common Agricultural Policy). On the other hand, from the point of view of the rules and regulations of land transfer relations concerning the *acquisition of the ownership of land* in a member state the primary law sources are important[11] – even if not exclusively (see later) – such as (a) the TFEU (see later), (b) the *Charter of Fundamental Rights* of the EU with regard to the human rights (especially the right to property), (c) and the earlier mentioned *Accession Treaties* (e.g. the transition rules ensuring the derogation). In the next part of this paper we deal with the primary sources of law more which are more difficult to legally interpret. We have to keep in mind that even when applying primary law sources for the land transfer regime one has to rely on the jurisdiction of the CJEU; i.e. we can formulate the followings just through an *interpretation filter*, or in a better case: by the help of it. Before going into the details, we have to emphasize in advance, that EU law restricts the margin of appreciation of the Member States only in forming their land transfer law and regulation with regard to the Member States or State Parties of the EU and the European Economic Area and any other state enjoying similar treatment under an international agreement, while there are no restrictions when they apply for citizens or legal persons of countries outside this area. This means that the member states' land transfer rules may contain strong restrictions concerning the latter group of persons. The CJEU jurisdiction concerning the norms on the acquisition of land ownership underlines of the primary source of law especially the following regulations of TFEU: general prohibition of discrimination (Art. 18 TFEU), freedom of establishment, which is part of the freedom of movement (Art. 49 TFEU), free movement of capital (Art. 63 TFEU), aims of the Common Agricultural Policy (Art. 39 TFEU), the rules and regulations with regard to the system of property.[12] We remark on the latter that although on the basis of the wording of this act the rulings of the TFEU and the EU Treaty are *not to infringe the system of property ownership*, but the respective jurisdiction of the

[11] Cf.: Kecskés László – Szécsényi László: A termőföldről szóló 1994. évi LV. törvény 6. §-a a nemzetközi jog és az EK-jog fényében, *Magyar Jog*, 1997/12, 724.; Korom 2009, 7-16.

[12] See especially: *Fearon* case (182/83); Greek case (305/87); *Konle* case (C-302/97); *Jokela* case (C-9/97 and C-118/97); *Reisch* case (C-515/99 and C-527/99-C-540/99); *Salzmann* case (C-300/01); *Ospelt* case (C-452/01); *Burtscher* case (C-213/04); *Festersen* case (C-370/05); *Libert* case (C-197/11 and C-203/11).

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CJEU slightly changed (complemented) it declaring that although the member states are entitled forming their property ownership independently but when determining these regulations they cannot bar out the economic freedoms provided by the EU, in our case the free movement of capital and persons.[13] Therefore, at the CJEU the member states cannot refer to Art. 345 TFEU in order to exonerate from the restrictions of the EU law on the regulation of land property.

Analysing these TFEU regulations Ágoston Korom concluded that the EU law determines the margin of appreciation of the member states to form their own rules and regulations for land transfer as the point of intersection of the positive and the negative integration rules.[14] As an explanation of the previous statement Ágoston Korom calls the free movement of persons and capital a *negative integration rule*. In his opinion these and the other two freedoms – the freedom of goods and services – (Korom calls the four freedoms together as 'economical constitutionality of the EU') are the basis of the EU's law and order even today, and *'focus to the elimination of obstacles of movement of production factors and mainly the obstacles set up by the member states'*.[15] It implies as a main rule that the European institutions – including the CJEU as well – consider every act of the member states - thought to be an obstacle of these freedoms – as an infringement of the EU law,[16] just to begin with. Oppositely, *the positive integration form* means the creation of an earlier non-existant *above-nations institution*, a typical example of it is the creation of Common Agricultural Policy.[17] In the jurisdiction on land transfer of the CJEU especially one of the objectives of the common agricultural policy, "fair standard of living for the agricultural community" was treated as a satisfactory reference to legally create law on the land-transfer by the member states. That is this positive integration norm (Art 39 TFEU) that serves as a basis for the member states to get derogation for the negative integration regulations, (Art 49, 63 TFEU) when they introduce restrictions in their land transfer.[18]

In connection with the previously mentioned situation, it is important to note that the CJEU's interpretation that *agricultural land belongs to the movement of capital* is reinforced by a secondary law source, namely directive 88/361 EEC.[19] On the basis of the CJEU jurisdiction[20] the nomenclature of the movement of capital in Supplement 1 of the same directive implies that investments in real estate of nationals of another member state not living in the state belong to the category called movement of capital.

[13] See Point 7 of *Fearon* case and Points 37, 38 of *Konle* case.

[14] Korom (edit.) 2013, 14. Cf.: Kurucz Mihály: Gondolatok a magyar földforgalmi törvény uniós feszültségpontjainak kérdéseiről, in: Szalma József (edit.): *A Magyar Tudomány Napja a Délvidéken 2014*, Újvidék, VMTT, 2015, 120-173.

[15] Korom (edit.) 2013, 12.

[16] Korom (edit.) 2013, 14.

[17] Korom (edit.) 2013, 14.

[18] Korom draws this conclusion especially analysing cases *Ospelt* and *Festersen*; Korom (edit.) 2013, 14.

[19] 88/361/EEC Council directive (24 June 1988) on fulfilment of the Treaty, on fulfilment Art 67 of the Treaty. This directive overruled the former council directive 60/921/EEC.

[20] See: Case C-386/04, *Centro di Musicologia Walter Stauffer* versus *Finanzamt München für Körperschaften* case (Point 22 of verdict 14 September 2006)

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The directive declares the „Purchase of buildings and land and the construction of buildings by private persons for gain or personal use" as an investment in real estates. This category also involves rights of usufruct, usufruct, easements and building rights. The more detailed interpretation of the regulations of TFEU is explained in the coming part of the paper when analysing the jurisdiction of the EU.

2.2. The case-law of the Court of Justice of the European Union

I. The jurisdiction in land transfer of CJEU with special regard to purchasing land can be summarized as follows:

I.1. The CJEU strictly watches so that national law shall not discriminate EU citizens on the basis of their nationality.[21]

I.2. According to the interpretation of CJEU, a national law or regulation on the free movement of persons and free movement of capital fill the requirements of EU law just if in addition to satisfying the obligation of national treatment it also serves legal public interest objectives, and the restrictive national regulation cannot be replaced by another regulation less restrictive on the free movement of capital... In the jurisdiction of CJEU *such legal public interest objectives are* for example (a) maintaining a permanent population,[22] (b) prevent speculation, (c) reaching the objectives of CAP, or even (d) ensuring that agricultural property be occupied and farmed predominantly by the owners.[23] With certain restrictions, the CJEU accepts even ensuring that agricultural property be occupied and farmed predominantly by the owners.[24] It is not a coincidence, but rather the appearance of the jurisdiction of CJEU that the preamble of the Land Transfer Act names objectives likes this and similar objectives.

The existence of a public interest objective is not only sufficient to introduce a legal regulation on the purchase of agricultural land. The given measure must be proportional and satisfy the commutability requirement, this latter – as we hinted earlier – means that a restrictive measure satisfies the EU prescriptions if it cannot be exchanged by a restrictive measure less limiting the free movement of capital.

[21] An example of this is the earlier mentioned Greek case, where the Committee considered as prejudical – namely infridgement of the general prohibition of discriminance – the national regulations of the Greek Republic prohibiting acquisition of land on the borders. The importance of the case is underlined by the fact that the regulation concerned 55% of the area of the state.

[22] It is importannt to note that the expression „local community" may be interpreted in several different ways when the EU law is applied. There are some (for example the present Hungarian government) who mean by this a homogenous, born at that area population, and there are others (for example the representatives of the European Community who think that this is not involved in the category. For a detailed discussion see Szilágyi 2017. Furthermore we agree with the critical statement of Csilla Csák's saying „*even though the preserving local communities could be admitted by the European Law as a public interest, the applied measures fail when coming to the filter of proportionality*"; Csák – Kocsis – Raisz 2015, 52.

[23] See for example: Point 3 *Fearon* case Point 40 *Konle* case; Point 34 *Reisch* case; Point 44 *Salzmann* case; Points 38-39 *Ospelt* case; Points 27-28, 33 *Festersen* case.

[24] See *Ospelt* case.

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The *CJEU admits measures as legal ones as*: (a) the procedure of prior authorisation for the acquisition of agricultural land,[25] (b) the system of prior declaration,[26] (c) the provision for a higher tax on the resale of land occurring shortly after acquisition,[27] (d) the requirement of a substantial minimum duration for leases of agricultural land.[28] The jurisdiction of CJEU clearly reflects in the choice of some law-institution of the new Hungarian law-regime and substantially determines its conception – supplementing it with some Hungarian speciality (for example the full ban for legal persons to purchase the property of land). We can regard as a speciality of the Hungarian land transfer that the *residence requirement*[29] – *de jure* banned by the jurisdiction of CJEU – was *de facto* substituted by a strict hierarchy of the pre-emption rights...

II. As a closure of the review of jurisdiction of CJEU we think it is important to note that at the CJEU a substantial part of the cases connected with the ownership of land was born in preliminary ruling.[30] Till the EU Commission began to investigate the land transfer regime of the member states acceeded in 2004 and subsequently (see later) it was not typical to make infringement procedures in land transfer cases. Perhaps this may be the reason for the rise of the suspicion that the infringement procedures initiated by the EU Commission exclusively against new member states are of discriminative nature.[31]

3. The Hungarian infringement procedures and preliminary rulings

In the following part of this study we analyze firstly the infringement procedures brought against Hungary; then the strictly connected preliminary rulings (more precisely their joint case).

[25] Point 57 *Burtscher* case; Points 41-45 *Ospelt* case.

[26] The judgement of legality of this measure arose at CJEU in connection with an Astrian „pocket treaty; *Burtscher* case, Points 44., 52-54., 59-62. A detailed discussion is in Szilágyi János Ede: Az Európai Unió termőföld-szabályozása az Európai Bíróság joggyakorlatának tükrében, in: Csák Csilla (edit.): *Az európai földszabályozás aktuális kihívásai*, Miskolc, Novotni Alapítvány, 2010, 279-280.

[27] *Festersen* case, Point 39.

[28] *Festersen* case, Point 39.

[29] The *Jokela* case investigates the residence requirement in relation with complementary subsidies for handicapped regions. See *Festersen* case, Points 26., 30-33., 41-43., and cases *Fearon* and *Libert*.

[30] The Greek case can be mentioned as an exception, where infringement procedure happened. Another infringement procedure was started in the Vorarlberg province case, but this ended without judgement. (N° 2007/4766. violation of law); See: Roland Norer: General report Commission III – Scientific and practical development of rural law in the EU, in states and regions and in the WTO, in: Paul Richli (edit.): *L'agriculture et les exigencies du développement durable*, Párizs, L'Harmattan, 2013, 375-376.

[31] Korom Ágoston – Bokor Réka: Gondolatok az új tagállamok birtokpolitikájával kapcsolatban, in: Gellén Klára (edit.): *Honori et Virtuti*, Szeged, Iurisperitus, 2017, 266-267; Szilágyi 2017.

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3.1. The Hungarian infringement procedures

In connection with the Hungarian infringement procedure cases, first we have to underline that the EU Commission started infringement procedures because of the ruling of land transfer not only against Hungary. The Hungarian land transfer ruling entered into force in 2014 fits into the evolution of law, into which also the East-Central European states acceeded after 2003 got into. As we have hinted earlier, from 2004 for the states like the Czech Republic, Romania, Poland, the Baltic states, from 2007 Bulgaria and Romania, from 2012 Croatia it became possible (fixed in their respective Accession Treaties in 2003, 2005 and 2012) to preserve a transitional period for their national rulings effective when signing the Accession Treaty, rulings which limited the purchase of agricultural and forestry land for nationals of other countries. This transitional period most frequently was 7 years (it was longer in the case of Poland). In case of some countries it made possible (provided the EU Commission assent to it) to extend this period with typically 3 years, (here Bulgaria and Romania were the exceptions, their Accession Treaty did not include the possibility to extend the originally seven years transition period).

When the transitional period (fixed in the Accession Treaty) expired, the European Commission launched a comprehensive investigation on the ruling of land transfer of the new member states.[32] Since during the investigation the Commission experienced that the land transfer rulings of the new member states may contain some non-EU conform limiting measures in connection with the free movement of capital and persons (the basic economic freedom), therefore, after the corresponding pilot procedures, finally, in 2015 decided to launch infringement procedures against some new member states such as Bulgaria, Hungary, Latvia, Lithuania and Slovakia. "These new national rules contain several provisions which the Commission considers to be a restriction to the free movement of capital and freedom of establishment. This may in turn discourage cross-border investment… The main concern in Bulgaria and Slovakia is that buyers must be long-term residents in the country, which discriminates against other EU nationals. Hungary has a very restrictive system which imposes a complete ban on the acquisition of land by legal entities and an obligation on the buyer to farm the land himself. In addition, as in Latvia and Lithuania, buyers must qualify as farmers."[33]

[32] In connection with the transitional regulations *László Fodor* early emphasized – in my opinion properly –: „It is a double standard applied against the new member states. Its pseudolatry nature is hidden among other things that the subsidies given to equalize the price of the lands during these 7 years were much lower than had been for the earlier member states." Fodor 2010, 124.

[33] European Commission: Press release: Financial services: Commission requests Bulgaria, Hungary, Latvia, Lithuania and Slovakia to comply with EU rules on the acquisition of agricultural land, IP/16/1827, 26th May 2016, Brussels.

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Returning to the infringement procedures launched against Hungary in connection with the land transfer regime, first we have to fix that at present there are two procedures in progress. Firstly, the European Commission launched a procedure in a well-limited segment of the land transfer regime – namely: in the subject of *ex lege* extinction of usufructuary rights by contract made between non-close members of the same family (henceforward usufruct case)[34] –, then launched an infringement procedure in the subject of the land transfer regime as a whole[35] (as it was mentioned earlier, similarly to the procedures against other states; henceforth: comprehensive case). Owing to its system-level approach, this latter case – the *comprehensive* case – is important, therefore, we summarize its most important relations based on the scientific publication[36] of *Tamás Andréka* and *István Olajos* (since in the present stage of the procedure, the documents are not public).

In the comprehensive case it is worth emphasizing that in the case launched by the European Commission there are some Hungarian measures where Hungary succeeded to make accepted her reasoning that those measures comply with the EU law. Finally, this way among other measures the following ones fell out from the infringement procedure (a) the procedural role of local commissions, (b) land acquisition limit of farmers and land possession limit of farmers and agricultural producer organizations, (c) the system of pre-emption right and the right of first refusal, and (d) the regulation on the term of leasehold.[37] All these – now EU-conform qualified – measures are very important elements of the Hungarian land transfer regime. At the same time the European Commission in the infringement procedure - even now in progress – questions the objectivity and EU-conformity of the following measures: (a) complete ban on the acquisition of land by domestic and foreign legal entities, (b) proper degree in agricultural or forestry activities, (c) proper agricultural or forestry practice abroad, (d) obligation on the buyer to farm the land himself, (e) impartiality in prior authorisation for the sale of lands.[38] Among the questioned requirements especially the complete ban on the acquisition of land by legal entities can be considered as a keystone of the present Hungarian land transfer regime.

[34] In Andréka – Olajos 2017, 410-424, the authors discuss the usufruct case (2014/2246. violation of law) in details. In the excellent technical paper *Tamás Andréka* and *István Olajos* sum up their presentations for more hundred interested listeners on the special process of state-owned lands, on the altered role of participants in the land transfer process and on infringement procedures in connection with land transfer. In connection with certain Hungarian legal consequences of the usufruct case see. 25/2015. (VII.21.) Constitutional Court decision on the financial rules of the ceased usufruct and easement rights, in which the CC found negligence against the constitution.

[35] 2015/2023. violation of law.

[36] Andréka – Olajos 2017.

[37] Andréka – Olajos 2017, 422.

[38] Andréka – Olajos 2017, 422.

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In connection with the complete ban on the acquisition of land by legal entities we emphasize that: (a) the present land transfer regime regards not only the acquisition of land by foreign entities, but except some cases domestic legal entities as well, (b) the complete ban on legal entities regards the acquisition of land only but not the use of land.

The restriction on legal entities became part of the Hungarian land transfer law regime in 1994, prior to the new Hungarian land law regime and since then it was a part of it, one might say, it was one of the individual speciality of the Hungarian land transfer regime in the region. (One could find something similar in Croatia only). *Tamás Andréka* and *István Olajos summarize the* significance of the institution as follows: "aim of this institution is to avoid the uncontrollable chain of ownership which would be in contradiction with keeping the population preserving ability of the country, since it would be impossible to check land maximum and the other acquisition limits".[39] In this sense – in our opinion – if the Hungarian legislator was forced to drop the ban on land acquisition, then several other measures, accepted as legal by the European Commission, would become „penetrable" (one might say a hole comes into being in the strict net of regulations), that is this law institution not just one of the basic law institutions of the Hungarian land transfer regime, but a sort of conceptual framework, spirit of the law regime. So far Hungary succeeded in preventing foreigners from directly acquiring land (the official data treat dual citizens as domestic natural persons), but we have no data on the (indirect) acquisition of land through domestic legal entities. Its occident knock-off would cause vital reconsideration of the new land transfer regime. In case of a CJEU judgement the case would establish a precedent[40] even at the Union level.

3.2. Preliminary ruling procedures on usufruct cases

Some legal disputes began at the Hungarian courts in the subject of (the so-called) usufruct cases in connection with the Hungarian infringement procedures and there were some debates resulting in preliminary rulings at the CJEU. By the summer of 2017, on the basis of these cases, came the Advocate General's opinion heavily reflecting the negative integration model mentioned earlier.[41]

The basis of the preliminary ruling procedure was the submission of requests in national "proceedings between 'SEGRO' Ltd. and the Vas Megyei Kormányhivatal Sárvári Járási Földhivatala (Vas Region Administrative Department – Sárvár District Property Registry, Hungary) and between Mr Günter Horváth and the Vas Megyei Kormányhivatal (Vas Region Administrative Department, Hungary), concerning

[39] Andréka – Olajos 2017, 422.

[40] In the Ospelt case a Liechtenstein foundation, i.e. a legal person's right to acquire property was limited by an Austrian (namely *Vorarlberg*) regulation. The CJEU declared this regulation as non-EU conform, but the theoretical foundations of this case are so different that the application to the Hungarian land transfer regime is not simple.

[41] C-52/16 and C-113/16 joint case, Opinion of advocate general Saugmandsgaard Øe, 2017. 31 May (hereafter: Opinion of Advocate General).

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decisions on the cancellation of the registration in the property register of the usufructuary rights in agricultural land held by SEGRO and by Mr Horváth. Those cancellation decisions were based on national legislation prescribing the extinction of the usufructuary rights and rights of use in productive land in the absence of proof that those rights were created between close members of the same family."[42] In the opinion of the Advocate General, the legislation and the cancellation decisions taken on the basis thereof are contrary to the free movement of capital. In fact, the requirement that such rights must have been created between close members of the same family gives rise to effects which are indirectly discriminatory against nationals of other Member States and cannot be justified by any of objectives put forward by the Hungarian Government."[43] In connection with this Advocate General opinion we think it is important to underline the following remarks.

On the one hand, we call the attention to the fact that the Advocate General refers only to the relevant regulations belonging to the negative integration model, and suggests the judgement of the case in this regard. This means that the Advocate General in forming his opinion neglects the regulations of the positive integration model occurring in the jurisprudence of CJEU. This is a proof that the Advocate General treats agricultural lands exclusively as commercial goods. On this sort of direction of interpretation, an officer of the Ministry of Agriculture *Tamás Andréka* remarked that if the jurisdiction of CJEU in cross-border land-acquisition considers exclusively the regulations of the negative integration model (excessively negative integration model), in ten years time no Member State can maintain its restricting rules concerning land-acquisition. We ourselves fully share this interpretation.

On the other hand, after analyzing the reasons of the opinion of the Advocate General we got the impression that the Advocate General mixed up two Hungarian legal instruments; namely the *usufructuary rights /haszonélvezet/* were mixed up with the legal instrument of *lease /haszonbérlet/*, and this was the reason why he considered the Hungarian regulation as if the disputed regulations had been formulated on *lease*. And this is why from Hungarian jurisprudential point of view his opinion seems to be so unsubstantiated on the statement of indirect discrimination, since in Hungary the parties of usufructuary rights are typically relatives. This situation was judged by the Advocate General as indirect discrimination that is a situation "the existence of indirect discrimination must be found where even though a condition imposed by national legislation does not establish a formal distinction by reference to origin, it is more easily satisfied by nationals of the Member State concerned than by those of other Member States."[44] In our opinion this is a complete misinterpretation of usufructuary rights.

[42] Points 2-3 in Opinion of Advocate General
[43] Point 4 in Opinion of Advocate General
[44] Points 71-81 in Opinion of Advocate General

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4. The importance of the European Parliament on land concentration

If we consider the preliminary ruling opinion of the Advocate General on land-transfer as reflecting his standpoint on the excessively negative integration model, we can call the European Parliament's *report*[45] on land concentration might be considered as a document strengthening the standpoint of the positive integration model. In this report of utmost importance the European Parliament called the attention to the followings: (a) "land is on the one hand property, on the other a public asset, and is subject to social obligations";[46] (b) "land is an increasingly scarce resource, which is non-renewable, and is the basis of the human right to healthy and sufficient food, and of many ecosystem services vital to survival, and should therefore not be treated as an ordinary item of merchandise";[47] (c) "sufficient market transparency is essential… and should also extend to the activities of institutions active on the land market"[48]; (d) "the sale of land to non-agricultural investors and holding companies is an urgent problem throughout the Union, and whereas, following the expiry of the moratoriums on the sale of land to foreigners, especially the new Member States have faced particularly strong pressures to amend their legislation, as comparatively low land prices have accelerated the sale of farmland to large investors";[49] (e) "farmland areas used for smallholder farming are particularly important for water management and the climate, the carbon budget and the production of healthy food";[50] (f) "there is a substantial imbalance in the distribution of high-quality farmland, and whereas such land is decisive for the quality of food, food security and people's wellbeing";[51] (g) "small and medium-sized farms, distributed ownership or properly regulated tenancy, and access to common land… encourage people to remain in rural areas and enable them to work there, which has a positive impact on the socio-economic infrastructure of rural areas, food security, food sovereignty and the preservation of the rural way of life";[52] (h) "farmland prices and rents have in many regions risen to a level encouraging financial speculation, making it economically impossible for many farms to hold on to rented land or to acquire the additional land needed to keep small and medium-sized farms viable";[53] (i) "differences among the Member States in farmland prices further accentuate concentration processes";[54] (j) There are several statements in the report

[45] European Parliament (EP): *Report on the state of play of farmland concentration in the EU: how to facilitate the access to land for farmers*, Committee on Agriculture and Rural Development A8-0119/2017, 2017.03.30. (hereafter: EP 2017) On the predecessors of this report see Szilágyi János Ede – Raisz Anikó – Kocsis Bianka Enikő: New dimensions of the Hungarian agricultural law in respect of food sovereignty, *JAEL*, 2017/22, 160-162, doi: 10.21029/JAEL.2017.22.160
[46] EP 2017, point G.
[47] EP 2017, point J.
[48] EP 2017, point P.
[49] EP 2017, point Q.
[50] EP 2017 point, S.
[51] EP 2017, point T.
[52] EP 2017, point V.
[53] EP 2017, point AB.
[54] EP 2017, point AC.

concerning speculation[55] and misuses[56]; (k) "limited companies are moving into farming at an alarming speed; whereas these companies often operate across borders, and often have business models guided far more by interest in land speculation than in agricultural production".[57]

All these taken into consideration, the European Parliament, (a) "recognises the importance of small-scale family farms for rural life", and "considers that local communities should be involved in decisions on land use".[58] (b) The European Parliament "calls for farmland to be given special protection with a view to allowing the Member States, in coordination with local authorities and farmers' organisations, to regulate the sale, use and lease of agricultural land in order to ensure food security…"[59] (c) Furthermore the European Parliament – among other things – calls the European Committee (c1) to establish an observatory service for the collection of information and data on the level of farmland concentration and tenure throughout the Union";[60] (c2) "to report at regular intervals to the Council and Parliament on the situation regarding land use and on the structure, prices and national policies and laws on the ownership and renting of farmland, and to report to the Committee on World Food Security (CFS)…"[61]

Summary

In our opinion it can be established that the European Union regulations on the acquisition of land, especially the acquisition of arable land and their application in practice raise several interpretation problems and in some cases those even need development as well, with special regard to the 2017 report of the European Parliament. Concerning these developments Hungary's vital interest is the more emphasized appearance of the positive integration model in the jurisdiction or as much as possible in the EU law.

[55] "...the purchase of farmland has been seen as a safe investment in many Member States, particularly since the 2007 financial and economic crisis; ... farmland has been bought up in alarming quantities by non-agricultural investors and financial speculators, such as pension funds, insurance companies and businesses; ... land ownership will remain a safe investment even in the event of future inflation, EP 2017, point AJ; " the creation of speculative bubbles on farmland markets has serious consequences for farming, and whereas speculation in commodities on futures exchanges drives up farmland prices further" EP 2017, point AL.

[56] "a number of Member States have adopted regulatory measures to protect their arable land from being purchased by investors; … cases of fraud have been recorded in the form of land purchases involving the use of 'pocket contracts', in which the date of the conclusion of the contract is falsified; … at the same time, large amount of land has been acquired by investors" EP 2017, point AK.

[57] EP 2017, point AQ.

[58] EP 2017, point 18.

[59] EP 2017, point 38.

[60] EP 2017, point 2.

[61] EP 2017, point 8.

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After the closure of the manuscript of the present article, the European Commission presented its document `Commission Interpretative Communication on the Acquisition of Farmland and European Union Law'[62] in Brussels on 14th November 2017. In connection with this topic, the Commission's Interpretative Communication has an extraordinary importance. The detailed assessment of this interpretative communication needs a separate article. In advance, it is worth noticing that as to the restriction of the acquisition of agricultural land by legal persons no departure is to be seen from the point of view of the European Commission as represented in the infringement procedure against Hungary in the comprehensive case.

[62] No. 2017/C 350/05, published in the Official Journal of the European Union on 18.10.2017.