LEGAL PROTECTION OF FARMERS

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edited by János Ede Szilágyi

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Introduction: The Main Pillars of the Legal Protection of Farmers

The statement that many areas of modern law and jurisprudence are undergoing rapid change and are therefore worth publishing books rings true. The authors of this book also aim to analyse and present a rapidly changing field. Namely, the authors of this book, whose aim is to analyse the body of law governing the life of the agricultural sector, have undertaken to present and analyse an area which has undergone significant changes – and in some respects developments – in terms of both international, EU and national legislation.

The body of international, national and EU law on agriculture is vast. The authors of this monograph have set themselves the task of reviewing this vast body of law primarily from the perspective of how it can better serve the interests of Polish and Hungarian farmers. In addition to a thorough review and evaluation of the body of law, the authors of this monograph also considered it an important task to draw attention to possible good practices in national legislation and to formulate proposals for improvement of the body of law under review, taking into account the national (Polish and Hungarian) agricultural policy guidelines at the time of writing (summer 2023) and the interests of farmers in Poland and Hungary.

In order to make the present research as practice-sensitive as possible, an important starting point for the research was a list of challenges that farmers (mainly Polish) face today (hereinafter referred

to as Challenge List). This Challenge List was provided to the authors of this monograph by the Institute of Justice (Warsaw; IWS). The authors of the monograph were given a large degree of freedom in choosing which of the challenges to focus on in this monograph. Since I consider the Challenge List itself to be very valuable, I think it is important to present it unchanged in this introduction. The Challenge List of the legal protection of farmers is as follows.

> General aim: propose a relevant legal framework for more effective protection of farmers in the context of the current threats resulting from the functioning in society (criminal law, civil law, administrative law).
>
> Subsidiary goals:
> 1. Common Agricultural Policy. Opportunities and risks for farmers in the perspective of international and national legal solutions, e.g., in the context of improving the competitiveness of agriculture of EU member states.
> 2. Legal instruments for the protection of farmers in the perspective of environmental changes and counteracting climate change. Compensation mechanisms in case of natural disasters and emergencies and new obligations under EU law. Proposition of new or updated legal solutions for more effective protection of farmers.
> 3. Illegal practices in the food supply chain. Proposition of new or updated legal solutions for more effective protection of farmers.
> 4. Unfair market practices in the agricultural trade – legal protection of farmers (e.g., recognition by the courts of civil cases in the field of agricultural law; criminal protection of farmers; on restructuring of debt of farm operators; legal protection of agriculture in the enforcement of monetary benefits). Profitability problem of farms (production costs versus

income) – proposition of new or updated legal solutions for more effective protection of farmers.

5. Public legal protection of farmers in connection with the European Green Deal (e.g., in connection with taxation of agriculture and rationing of agricultural production; de minimis aid in agriculture and its registration). Proposition of new or updated legal solutions for more effective protection of farmers.
6. Legal protection of livestock welfare. Problems of livestock breeding. Proposition of new or updated legal solutions for more effective protection of farmers.
7. Contemporary legal conditions of the agricultural real estate market – the main regulatory levels. Legal issues of sale, perpetual usufruct, and lease of agricultural real estate, etc. Selected aspects of the restriction of trade in agricultural real estate in law in the context of the EU principle of freedom of movement of capital. Proposition of new or updated legal solutions for more effective protection of farmers.
8. On the need for the development and conception of the System of Agricultural Law and the Agricultural Code in an international and national perspective. Integration or decentralisation?
9. The legal position of the young farmer in EU and national law. Proposition of new or updated legal solutions for more effective protection of farmers.
10. Counteracting food waste as a challenge of modern agriculture. Rights and obligations of farmers. Proposition of new or updated legal solutions.

Based on the Challenge List detailed above, I suggested two possible monograph approaches to my fellow authors. A monograph based on a traditional agricultural law[1] approach and a monograph

[1] C.f. J.E. Szilágyi, *The Relationship Between Agricultural Law and Environmental Law in Hungary*, [in:] *Law and Agroecology*, M. Monteduro, P. Buongiorno, S. Di Benedetto, A. Isoni (eds.), Berlin–Heidelberg 2015, pp. 265–278.

based on the pillars of sustainable development.[2] The first, traditional approach monograph could be divided into two basic parts: on the one hand, the legal regulation of agricultural holdings (including agricultural land), including Goal 7 of the Challenge List, and, on the other hand, the legal regulation of the production of agricultural products, including Goals 3 and 4 of the Challenge List. The second monograph, based on 'the pillars of sustainable development' approach, could be divided into three basic parts: first, legislation on the issues of the environmental pillar, including Goals 2, 5, 6 and 10 of the Challenge List; second, legislation on the issues of the social pillar, including Goal 9 of the Challenge List; and third, legislation on the issues of the economic pillar, including Goal 1 of the Challenge List. Of the two monograph approaches, a traditional monograph approach to agricultural law was finally chosen, in large part due to the amount of research capacity available.

In view of the above, the chapters in our monograph, shaped by the traditional approach to agricultural law, are basically grouped around two themes (i.e., the monograph is divided into two parts in terms of themes).

The first part of the monograph focuses on the rules for the acquisition of agricultural holdings and agricultural land. This first part also analyses two separate topics. Firstly, it deals with the international and EU legal framework for the acquisition of agricultural land (I was the author of this chapter), and secondly, it analyses the relevant national legislation: the Hungarian national legislation[3]

[2] C.f. Gy. Bándi, *Sustainable Development, the Interests of Future Generations and Moral and Legal Implications*, [in:] *Constitutional Protection of the Environment and Future Generations*, J.E. Szilágyi (ed.), Miskolc–Budapest 2022, pp. 17–72.

[3] C.f. Cs. Csák, B.E. Kocsis, A. Raisz, *Vectors and indicators of agricultural policy and law from the point of view of the agricultural land structure*, "Journal of Agricultural and Environmental Law" 2015, Vol. 10, No. 19, pp. 34–41; Zs. Hornyák, *Legal Frame of Agricultural Land Succession and Acquisition by Legal Persons in Hungary*, "Journal of Agricultural and Environmental Law" 2021, Vol. 16, No. 30, pp. 86–99; I. Olajos, *Creation of Family Farms and its Impact on Agricultural and Forestry Land Trade Legislation*, "Journal of Agricultural and Environmental Law" 2022, Vol. 17, No. 33, pp. 105–117; J.E. Szilágyi, *Hungary: Strict Agricultural Land and Holding Regulations for Sustainable and Traditional*

was presented by Ms Zsófia Hornyák, and the Polish legislation[4] was analysed by Mr Marek Strzała.

The international and EU legal frameworks for the acquisition of agricultural land were discussed in relation to the international dimension:[5] (a) the so-called Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, adopted under the auspices of the Food and Agriculture Organization of the United Nations,

Rural Communities, [in:] *Acquisition of Agricultural Lands*, J.E. Szilágyi (ed.), Miskolc–Budapest 2022, pp. 145–197; H. Szinek Csütörtöki, *Agricultural land succession rules in the Visegrád countries and the relevant case-law of national constitutional courts*, "Journal of Agricultural and Environmental Law" 2023, Vol. 18, No. 35, pp. 128–144; etc.

[4] C.f. P.A. Blajer, *The constitutional aspect of regulations limiting agricultural land transactions in Poland*, "Journal of Agricultural and Environmental Law" 2022, Vol. 17, No. 32, pp. 7–26; R. Budzinowski, A. Suchoń, *Purchasing and ranting agricultural land in Poland*, "CEDR Journal of Rural Law" 2017, Vol. 3, No. 1, pp. 94–97; M. Csirszki, H. Szinek Csütörtöki, K. Zombory, *Food Sovereignity: Is There an Emerging Paradigm in V4 Countries for the Regulation of the Acquisition of Ownership of Agricultural Lands by Legal Persons?*, "Central European Journal of Comparative Law" 2021, Vol. 2, No. 1, pp. 29–52; A. Kubaj, *Legal frame for the succession/transfer of agricultural property between the generations and the acquisition of agricultural property by legal persons – in Poland*, "Journal of Agricultural and Environmental Law" 2020, Vol. 15, No. 29, pp. 118–132; P. Ledwoń, *Poland: An Attempt at a Balance Between the Protection of Family Holding and the Freedoms of the European Union*, [in:] *Acquisition of Agricultural Lands*, J.E. Szilágyi (ed.), Miskolc–Budapest 2022, pp. 199–217; K. Zombory, *The agricultural land trade*, "Journal of Agricultural and Environmental Law" 2021, Vol. 16, No. 30, pp. 174–190; etc.

[5] C.f. Gy. Marinkás, *Certain Aspects of the Agricultural Land Related Case Law of the European Court of Human Rights*, "Journal of Agricultural and Environmental Law" 2018, Vol. 13, No. 24, pp. 99–134; Gy. Marinkás, *Human Rights Aspects of the Acquisition of Agricultural Lands with special regard to the ECtHR Practice concerning the so-called "Visegrád Countries", Romania, Slovenia, Croatia, and Serbia*, [in:] *Acquisition of Agricultural Lands*, J.E. Szilágyi (ed.), Miskolc–Budapest 2022, pp. 25–53; J.E. Szilágyi, *Agricultural Land Law: Soft Law in Soft Law*, "Hungarian Yearbook of International Law and European Law" 2018, Vol. 6, pp. 190–207; J.E. Szilágyi, *The international investment treaties and the Hungarian land transfer law*, "Journal of Agricultural and Environmental Law" 2018, Vol. 13, No. 24, pp. 194–207; J.E. Szilágyi, B. Kovács, *Acquirement of Land Rights by Foreign Investors: An international investment law perspective*, [in:] *Acquisition of Agricultural Lands*, J.E. Szilágyi (ed.), Miskolc–Budapest 2022, pp. 55–75; etc.

(b) the European Convention on Human Rights and the relevant case law of the European Court of Human Rights, and (c) relevant aspects of international investment law, in particular the recent Treaties with Investment Provision of the European Union. As far as the EU legal dimension of agricultural land acquisition is concerned,[6] I covered (a) the analysis of the different sources of EU law at different levels in order to present the regulatory framework established by EU law, (b) Hungarian cases before the Court of Justice of the European Union, (c) the debate on the reform of the EU legal framework as conducted by the *Comité Européen de Droit Rural* (CEDR) and Hungarian jurisprudence.

The Hungarian and the Polish authors have attempted to present the Polish and the Hungarian holding and land transfer regulations from the same point of view. These would be as follows: (a) the ideal status in connection to the structure of agricultural holdings, (b) the acquisition of agricultural land and agricultural holding by legal entities (restrictions, conditions, share-acquisition, acquisition by churches, inheritance, tax exemptions), (c) the regulation on agricultural holding (general concept, components of agricultural holding, transaction and succession of agricultural holdings), (d) the special succession rules of agricultural land and agricultural holding, (e) special rules of the transfer of agricultural holdings *inter vivos*. What is clear about Polish and Hungarian national law is that they are the two most strictly regulated national legal systems in the Central European region;[7] both place a strong emphasis on the protection of Polish and Hungarian farmers. Nevertheless,

[6] C.f. Á. Korom, *How the KOB SIA case altered the Member States' margin of appreciation*, "Journal of Agricultural and Environmental Law" 2023, Vol. 18, No. 35, pp. 86–99; Á. Korom, *The European Union's Legal Framework on the Member State's Margin of Appreciation in Land Policy: The CJEU's Case Law After the "KOB" SIA Case*, [in:] *Acquisition of Agricultural Lands*, J.E. Szilágyi (ed.), Miskolc–Budapest 2022, pp. 77–90; J.E. Szilágyi, H. Szinek Csütörtöki, *The Past, Present, and the Future of Hungarian Land Law in the Context of EU Law*, "Hungarian Yearbook of International Law and European Law" 2023, Vol. 11, pp. 318–334; etc.

[7] J.E. Szilágyi, H. Szinek Csütörtöki, *Conclusions on Cross-border Acquisition of Agricultural Lands in Certain Central European Countries*, [in:] *Acquisition of Agricultural Lands*, J.E. Szilágyi (ed.), Miskolc–Budapest 2022, pp. 344–354.

the authors of the chapters have still formulated suggestions for improvement through which the protection of farmers could perhaps be even more effective.

The respective chapters on Poland and Hungary in the second part of the monograph can be divided into two main issues that are examined. First, both chapters have a part dealing with sectoral contract law provisions, and second, with competition-related regulations. The Polish chapter was written by Mr Rafał Adamus, the Hungarian one was prepared by Mr Martin Csirszki. It is clear from these two chapters that agricultural producers enjoy a more or less privileged position in commercial transactions, irrespective of conclusions stating that the two regimes could be bettered in certain ways. After the introductory remarks, both chapters deal with the relevant national strategies that establish the framework for agricultural producers in this regard, the principle of the freedom of contract as regards the sale of agricultural products, as well as the organisational forms that are available to farmers to get engaged in agricultural production. After these come the substantive analyses on the sectoral characteristics of contract law and competition regulation. The starting point of the chapters is that the market position of both Hungarian and Polish farmers should be strengthened with legal means, if possible.

Taking into account that both Poland and Hungary are Member States of the European Union, a few words are worth mentioning in connection with the EU law relevance of the topics presented in the second part of the monograph. In this regard, one must distinguish the two main issues of the chapters. Contract law provisions in general are not harmonised at the Union level, however, EU '[s]econdary law […] encompasses numerous directives that have been passed to achieve uniformity in different "policy" areas'.[8] Nevertheless, these directives (and regulations) were not adopted to regulate agricultural contracts.[9] What has actually appeared

[8] R. Schulze, E. Zoll, F. *European Contract Law*, Baden-Baden 2021, p. 12.

[9] Some recent examples outside the area of agriculture: Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital

at the level of the European Union for the sake of harmonisation, and – of course – has some not so indirect relevance to contract formulation, is the prohibition of certain unfair trading practices of agri-food buyers against producers.[10] That is to say, when the reader peruses the analysis on contract law provisions of the agricultural sector, these regulations are the *sui generis* product of national legislation. The authors of the monograph chapters do not aim to suggest that there has been no soft influence when determining these provisions, however, the conventional contractual provisions on, for example, the farming contract in the Polish Civil Code or the sales contract for the provision of self-produced agricultural goods in the Hungarian Civil Code were freely determined by national legislation.

On the contrary, when it comes to the other pillar of these chapters, i.e., competition regulation in a broad sense (including not only antitrust law, but also unfair trading practices beyond the reach of antitrust law), there is a quite new legal act that serves as a minimum standard for the protection of farmers in commercial transactions. This directive, the UTP Directive, was adopted in 2019, and it applies a minimum harmonisation approach. It is another question that by the time the European Union created and adopted the UTP Directive, both Hungary and Poland had accepted their own piece of sector-specific legislation on the issue (in 2009 and in late 2016,[11] respectively). Nevertheless, the chapters do not aim to compare the relevant national laws with the UTP Directive,[12]

services; Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC; Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

[10] See: Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.

[11] M. Namysłowska, A. Piszcz, *Poland*, [in:] *Legislation Covering Business-to-business Unfair Trading Practices in the Food Supply Chain in Central and Eastern European Countries*, A. Piszcz, A. Jasser (eds.), Warsaw 2019, p. 218.

[12] For that task, there is relevant legal scholarship in both countries. See, for example: J. Firniksz, B. Dávid, *A versenyjog határterületei: a vevői erő régi és új*

but rather to explore the complex system of civil law protection provided to farmers in the two countries. Furthermore, the competition law exemption for certain agreements in the agricultural sector in Hungary has also followed the path of the EU with spontaneous harmonisation.[13] In Poland, on the contrary, there is no agricultural antitrust exemption *expressis verbis* in the competition act; however, the directly applicable EU regulations apply.

Last, but not least, I would like to thank Director Marcin Wielec, Deputy Director Paweł Sobczyk and Bartłomiej Oręziak, Coordinator of the Strategic Analysis Centre , for allowing me to participate in the Polish Hungarian Research Platform (PHRP) 2023, which is a worthy partner to the Central European Professors' Network organised by the Central European Academy, and I believe that it will greatly serve not only to develop the relations between the Polish and Hungarian scientific communities, but also to enhance scientific cooperation in the entire Central European region. I would also like to thank the other co-authors of this book, namely Professor Rafał Adamus, Assistant Professor Zsófia Hornyák, Assistant Professor Marek Strzała, and Dr Martin Csirszki, for their collaboration. The work of the research team was supported by many people, among whom I would like to thank in particular my two Polish colleagues Agata Wróbel and Dr Zbigniew Więckowski for their help.

szabályai, "Magyar Jog" 2020, Vol. 67, No. 5, pp. 276–287; M.M. Csirszki, *Unfair trading practices in the food supply chain: Some remarks on the Hungarian and German regulation*, "CEDR Journal of Rural Law" 2021, Vol. 7, No. 1, pp. 58–68; M.M. Csirszki, *Tisztességtelen kereskedelmi gyakorlatok a mezőgazdaságban: Az uniós irányelv összevetése a magyar szabályozással*, "Magyar Jog" 2021, Vol. 68, No. 3, pp. 156–163; M. Namysłowska, A. Piszcz, *Poland*, *op. cit.*, pp. 215–242. Furthermore, a conference was also organised in January 2023 to explore the ways in which each and every EU Member State, including Poland and Hungary, implemented the UTP Directive. See: https://www.law.kuleuven.be/apps/activiteiten/activities/6058.

[13] The term is used by T. Tóth, *Jogharmonizáció a magyar versenyjog elmúlt harminc évében*, "Állam- és Jogtudomány" 2020, Vol. 61, No. 2, pp. 72–92. By it, he means the reasonable harmonisation of EU and national competition law, which is not, however, underpinned by obligation coming from EU law.

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Part I

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Chapter 1. The International and EU Legal Dimensions of Agricultural Land Acquisition and the Room for Nation-State Action

1.1. Introduction

In recent years, there have been some significant changes accompanied by intensifying internationalisation and Europeanisation in the regulation of agricultural land acquisition,[1] both in international law and in EU law. In our view, national policy-makers should follow these changes and trends closely, especially if they do not want to introduce a liberal land acquisition policy for agricultural land acquisitions, but want instead to follow rules that gear land acquisitions towards certain public interest objectives, and wish to maintain these land acquisition policies in the future. Based on a study published in 2022 that reviewed the regulations of several Central European countries,[2] it can be concluded that, in this region,

[1] In the present work, the concept of 'agricultural land acquisition' is taken from the following work: J.E. Szilágyi, *Introduction to Land Regulation in Central European Countries*, [in:] *Acquisition of Agricultural Lands*, J.E. Szilágyi (ed.), Miskolc–Budapest 2022, p. 12; J.E. Szilágyi, H. Szinek Csütörtöki, *Conclusions on Cross-border Acquisition of Agricultural Lands in Certain Central European Countries*, [in:] *Acquisition of Agricultural Lands*, J.E. Szilágyi (ed.), Miskolc–Budapest 2022, pp. 344–354.

[2] C.f. J.E. Szilágyi, H. Szinek Csütörtöki, *Conclusions…*, *op. cit.*, pp. 354–355; P. Ledwoń, *Poland: An Attempt at a Balance Between the Protection of Family*

the Polish[3] and Hungarian[4] agricultural land acquisition policies favour strict regulation that prioritises the interests of local farmers. In view of this, gaining a comprehensive picture of international and EU trends, mapping the legal frameworks defined by those trends, identifying the room available for action within the framework of such legal frameworks and developing an action plan can be important policy tasks.

In the following sections of this chapter, we will first look at the international dimensions, then those of the EU, and finally we will examine what position can be proposed for countries with strict

Holding and the Freedoms of the European Union, [in:] *Acquisition of Agricultural Lands*, J.E. Szilágyi (ed.), Miskolc–Budapest 2022, pp. 199–217; J.E. Szilágyi, *Hungary: Strict Agricultural Land and Holding Regulations for Sustainable and Traditional Rural Communities*, [in:] *Acquisition of Agricultural Lands*, J.E. Szilágyi (ed.), Miskolc–Budapest 2022, pp. 145–197.

[3] C.f. P.A. Blajer, *The constitutional aspect of regulations limiting agricultural land transactions in Poland*, "Journal of Agricultural and Environmental Law" 2022, Vol. 17, No. 32, pp. 7–26; R. Budzinowski, A. Suchoń, *Purchasing and ranting agricultural land in Poland*, "CEDR Journal of Rural Law" 2017, Vol. 3, No. 1, pp. 94–97; M. Csirszki, H. Szinek Csütörtöki, K. Zombory, *Food Sovereignity: Is There an Emerging Paradigm in V4 Countries for the Regulation of the Acquisition of Ownership of Agricultural Lands by Legal Persons?*, "Central European Journal of Comparative Law" 2021, Vol. 2, No. 1, pp. 29–52; A. Kubaj, *Legal frame for the succession/transfer of agricultural property between the generations and the acquisition of agricultural property by legal persons – in Poland*, "Journal of Agricultural and Environmental Law" 2020, Vol. 15, No. 29, pp. 118–132; P. Ledwoń, *Poland…*, *op. cit.*, pp. 199–217; K. Zombory, *The agricultural land trade*, "Journal of Agricultural and Environmental Law" 2021, Vol. 16, No. 30, pp. 174–190; etc.

[4] Cs. Csák, B.E. Kocsis, A. Raisz, *Vectors and indicators of agricultural policy and law from the point of view of the agricultural land structure*, "Journal of Agricultural and Environmental Law" 2015, Vol. 10, No. 19, pp. 34–41; Zs. Hornyák, *Legal Frame of Agricultural Land Succession and Acquisition by Legal Persons in Hungary*, "Journal of Agricultural and Environmental Law" 2021, Vol. 16, No. 30, pp. 86–99; I. Olajos, *Creation of Family Farms and its Impact on Agricultural and Forestry Land Trade Legislation*, "Journal of Agricultural and Environmental Law" 2022, Vol. 17, No. 33, pp. 105–117; I. Olajos, *The summary of the research on agricultural land as a natural resource*, "Journal of Agricultural and Environmental Law" 2018, Vol. 13, No. 25, pp. 190–212; A. Raisz, *Topical issues of the Hungarian land-transfer law: Purchasing and ranting agricultural land*, "CEDR Journal of Rural Law" 2017, Vol. 3, No. 1, pp. 68–74; etc.

land acquisition policies and rules within those international and EU frameworks.

1.2. International Legal Dimensions of Agricultural Land Acquisitions

Of the international aspects that also have an impact on national land acquisition law, this subsection focuses on (a) the voluntary guidelines on land acquisition adopted in 2012 under the auspices of the Food and Agriculture Organization of the United Nations (hereinafter FAO), (b) the land acquisition provisions of the European Convention on Human Rights (hereinafter ECHR) that are important from a land acquisition point of view, together with the relevant case law of the European Court of Human Rights, and (c) international investment agreements (hereinafter IIAs) between third countries and EU Member States governing agricultural land acquisition issues.

1.2.1. VOLUNTARY GUIDELINES OF THE FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

A set of voluntary guidelines was adopted in 2012 under the auspices of the Food and Agriculture Organization of the United Nations (hereinafter FAO) with the title "Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security" (hereinafter VGGT).[5] Those international voluntary guidelines can be considered unique in the field of agricultural land acquisition.[6] The VGGT is, by its own definition, the first such comprehensive and global instrument on

[5] Food and Agriculture Organization of the United Nations, *Voluntary Guidelines on the Responsible Governance of Tenure of land, fisheries and forests in the context of national food security*, Rome 2012 (hereinafter: VGGT).

[6] J.E. Szilágyi, *Agricultural Land Law: Soft Law in Soft Law*, "Hungarian Yearbook of International Law and European Law" 2018, Vol. 6, pp. 190–191, 207.

this topic to be prepared through intergovernmental negotiations.[7] This means that an unprecedented *soft law* regime has been adopted for agricultural land acquisitions at international level.

Before discussing some of the main substantive elements of the VGGT, we consider it of value to focus on its soft law nature. In our view, it is important to understand what the VGGT is, how soft laws work, and the related question of what impact such a voluntary document can have on specific legislative processes and legal decisions. It is clear to us that voluntary guidelines must not impose any specific obligation on a legislator or decision-maker in a particular country, but there are many cases where such voluntary documents can actually have an impact in particular cases, for example when invoked to substantiate a decision of a particular court. If we look at the impact the VGGT had on laws within the EU, we can see that some EU institutions have already reacted to the guidelines established in it. The European Economic and Social Committee (hereinafter EESC) called the VGGT "an important milestone, and calls for it to be resolutely and precisely implemented" in an opinion[8] (hereinafter EESC 2015), which was also identified as a soft law document.[9] In addition to this, with respect to the VGGT, the European Economic and Social Committee addresses EU Member States and:

> calls on all EU Member States to report to the EU Commission and FAO on the use and application of the Voluntary Guidelines on the Responsible Governance on Tenure (VGGT, adopted by the FAO in 2012) in their land governance policies. The VGGT has a global scope (Article 2.4), which includes Europe. The VGGT calls on States to set up multi-stakeholder platforms, […] to monitor the implementation of the Guidelines and bring their policies in line with them [See Article 26(2) of the VGGT].[10]

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[7] VGGT, p. 47.

[8] European Economic and Social Committee: *Land grabbing – a warning for Europe and a threat to family farming*. Opinion, NAT/632 – EESC-2014-00926-00-00-AC-TRA (EN), Brussels, 21 January 2015 (hereinafter: EESC 2015).

[9] EESC 2015, point 6.5.

[10] EESC 2015, point 6.20.

Following up on the opinion expressed in EESC 2015 on several points, the European Parliament (hereinafter EP) in a resolution[11] (hereinafter EP 2017), a document that can also be considered a soft law, now even mandates the European Commission to "adopt recommendations on EU land governance, in line with the VGGT and taking into account the horizontal EU frameworks on agriculture, the environment, the internal market and territorial cohesion".[12] We feel it is important to note that the European Commission is rather reticent on the VGGT in its soft law document, namely its interpretative communication on the subject matter[13] (hereafter EC 2017), which can also be interpreted as a response to the European Parliament.[14] In our opinion, this kind of caution is due to the fact that the European Commission has expressly avoided introducing the basic concept of the VGGT, which is food security, into the interpretative framework of the negative and positive integration models developed by the Court of Justice of the European Union over time in connection with land acquisitions,[15] although, if this concept were to be actually introduced, it would instead strengthen the interpretative position of the positive integration model, and would consequently reinforce the justifiability of the strict land acquisition rules of the Member States in the Court of Justice of the European Union's assessment of land acquisition cases. We will return to the three EU soft law documents later in this chapter in view of their importance; first, however, we will briefly discuss parts of the VGGT, which we believe may strengthen the international and EU legal conformity of the national land acquisition rules enacted by Hungarian and Polish legislators.

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[11] European Parliament (EP): *State of play of farmland concentration in the EU: how to facilitate the access to land for farmers*. Resolution, P8_TA (2017)0197, 27 April 2017 (hereinafter: EP 2017).

[12] EP 2017, point 28.

[13] European Commission (EC): *Commission Interpretative Communication on the Acquisition of Farmland and European Union Law*. 2017/C 350/05, HL C 350, 18.10.2017, pp. 5–20 (hereinafter: EC 2017).

[14] EC 2017, point 1. a).

[15] J.E. Szilágyi, D. Hojnyák, N. Jakab, *Food sovereignty and food security in Hungary: Concepts and legal framework*, "Lex et Scientia" 2021, Vol. 28, No. 1, pp. 72–79.

Turning to the content of the VGGT, the first thing to highlight is the purpose of the VGGT. According to this, the solutions proposed by the VGGT will help the recipients of the VGGT (e.g., nation states) to achieve 'responsible governance' of tenure.[16] The responsible governance of land tenure is central, among other things, to ensuring human rights, food security, poverty eradication, sustainable livelihoods and rural development.[17] Section 11 of the VGGT on the land market also introduces the concept of 'local community' as an asset to be protected. The significance of this for EU Member States, such as Poland and Hungary, is that some form of protection of local (rural or agricultural) communities is also recognised as a public interest objective in the case law of the Court of Justice of the European Union, without the Court of Justice elaborating what it considers to be the specific content of the term 'local community'. However, what is meant by local community actually matters, as the land market restrictions that protect it can vary widely according to the definition of the term. The situation is further complicated by the fact that the conceptualisation of local community, which was already potentially different across countries with different cultures, has become even more complicated following the 2016 redefinition of the EU's rural development strategy (essentially integrating the issue of migration).[18] With respect to this (and in relation to this topic), the VGGT states that land can have social, cultural, spiritual, environmental and political elements in addition to its market value.[19] According to the VGGT, individual states must take measures to prevent undesirable impacts on local communities; inter alia, land speculation and land concentration.[20] The VGGT believes that States and other parties need to recognise that values, such as social, cultural and environmental values, are

[16] VGGT, p. iv., points 1.2, 2.4, 5.1.

[17] Ibidem, point 4.1.

[18] J.E. Szilágyi, *The changing concept of rural community and its importance in connection with the transfer of agricultural land*, "Zbornik Radova Pravni Fakultet Novi Sad" 2019, Vol. 53, No. 2, pp. 633–652.

[19] VGGT, points 9.1 and 18.2.

[20] Just as a reminder, the ability of legal entities to be established in unlimited numbers can contribute greatly to land concentration.

not always well served by unregulated markets. States must protect the wider interests of societies through appropriate policies and laws on tenure.[21] In our view, the VGGT's concept of local community creates an opportunity for stakeholder states to use a cultural and spiritual community of values-based local community concept as the basis of their legislation. We believe that this could strengthen the position of Hungary and Poland when the EU compatibility of their national land acquisition rules is being assessed. Finally, as far as Section 11 of the VGGT on the land market is concerned, it should be pointed out that the VGGT also considers the protection of tenure by small-scale producers to be an important aspect of tenure regulation.[22]

Cross-border land acquisitions often appear in international law as investment issues. The guidelines laid down in the VGGT for this, primarily in Section 12, are also of particular importance.[23] In this context, the VGGT identifies the concept of 'responsible investment' as ensuring, inter alia, the promotion of food security[24] as a goal to be achieved, and provides guidelines for individual states, in particular for investor states[25] and investors.[26] Land grabbing and land concentration are two of the most important elements of the concept of responsible investment.[27] The question of transparency also arises in this regard. In this respect, the VGGT recommends that all forms of transactions regarding tenure rights as a result of land investments must be undertaken transparently, and[28] the (registration and authorisation) systems that ensure their traceability also need to include data on who holds such rights.[29] Since, in the current globalisation context, it is really difficult (we could even say that it is impossible) to map exactly the ownership

[21] VGGT, point 11.2.
[22] Ibidem, point 11.8.
[23] J.E. Szilágyi, *Agricultural Land Law…*, *op. cit.*, p. 2010.
[24] VGGT, points 12.1, 12.4, 12.8.
[25] Ibidem, points 3.2 and 12.15.
[26] Ibidem, point 12.12.
[27] Ibidem, points 12.5, 12.6, 12.10 and 12.14.
[28] Ibidem, point 12.3.
[29] Ibidem, point 17.1.

background of legal entities for countries such as Hungary and Poland, we believe that the justification for the provisions restricting the acquisition of land by legal entities in these two countries may be underlined by the guidelines provided by the VGGT.

In the light of the above and considering the interests of nation-states with stricter land acquisition rules, we have two important comments on the VGGT. On the one hand, the VGGT formally takes a position, albeit only as a soft law document, on national sovereignty issues, which is a sensitive area, and in this respect individual countries may be correct in seeing it as a suspect initiative that affects their sovereignty. On the other hand, certain parts of the VGGT may strengthen the position of countries that do not want to allow their agricultural land market to become a target for free trade and investment, because they see land not only as a commercial object, but rather as their heritage, which can play an essential role in sustaining local traditional communities.

1.2.2. THE RELEVANCE OF THE EUROPEAN HUMAN RIGHTS SYSTEM TO AGRICULTURAL LAND ACQUISITION

The provisions of the European Convention on Human Rights (hereinafter ECHR) relevant to the acquisition of agricultural land and the related practice of the European Court of Human Rights (hereinafter ECtHR) have been addressed by several authors (Raisz,[30] Marinkás,[31] etc.). One of the most recent of these studies is the one by György Marinkás, in which land acquisition cases before the ECtHR in Central European countries, including Poland and Hungary, were categorised as follows:

[30] A. Raisz, *A Beneš-dekrétumok által érintett tulajdoni kérdések az Emberi Jogok Európai Bírósága előtt,* [in:] *Beneš-dekrétumok az Európai Parlamentben*, A. Horváth, Á. Korom (eds.), Budapest 2014, pp. 64–72; A. Raisz, *Földtulajdoni és földhasználati kérdések az emberi jogi bíróságok gyakorlatában*, [in:] *Az európai földszabályozás aktuális kihívásai*, Cs. Csák (ed.), Miskolc 2010, pp. 241–253.

[31] Gy. Marinkás, *Certain Aspects of the Agricultural Land Related Case Law of the European Court of Human Rights*, "Journal of Agricultural and Environmental Law" 2018, Vol. 13, No. 24, pp. 99–134.

> After studying the agricultural land-related case law of the ECtHR regarding the selected countries, the author identified two main categories of legal issues that are relevant in the selected countries or that constitute a distinctive feature of these countries. The first main category comprised compensation-related cases that constitute the vast majority of agricultural land-related cases in the selected countries. This is attributable to the common historic heritage of such countries, namely that after World War II they all became part of what became known as the Eastern Bloc under communist control, imposed on them by the Soviet Union.[32] [...] The other main category is related to the issue of acquisition of agricultural lands by foreign natural or legal persons. However, [...] the ECtHR's case law is not as "rich" in this issue because Article 1 of Protocol No. 1 does not create a right to acquire property. Thus, under the established case law of the ECtHR, a possible claim submitted by a legal entity on the ground that it was not allowed to acquire agricultural land would be declared inadmissible by the ECtHR with a high probability.[33]

The second of the two main categories of cases mentioned by György Marinkás is of particularly interest for our discussion. In this respect, although several human rights may be at stake, the right to property plays an important role, as it is a major factor in the whole concept followed by the Member States that operate a strict land acquisition regime. Primarily because the right to property does not necessarily guarantee anyone the fundamental right to acquire property.[34] This is essentially due to the fact that, in the Pol-

[32] Gy. Marinkás, *Human Rights Aspects of the Acquisition of Agricultural Lands with special regard to the ECtHR Practice concerning the so-called "Visegrád Countries", Romania, Slovenia, Croatia, and Serbia*, [in:] *Acquisition of Agricultural Lands*, J.E. Szilágyi (ed.), Miskolc–Budapest 2022, pp. 26–27.

[33] Ibidem, p. 26.

[34] ECtHR, Gasparetz v. Slovakia, inadmissibility decision, 28 June 1995, No. 24506/94.

ish and Hungarian land law systems, restrictions are not imposed on land acquisition in relation to existing property, but there are restrictions applied on new land acquisitions, and so the right to property is not violated.

It is also important to mention that the Court of Justice of the European Union (CJEU) has recently ruled on a cross-border land acquisition case[35] in which, in addition to the classical economic freedoms, the Charter of Fundamental Rights of the EU and in particular the right to property (Article 17) have been given a decisive role. However, we will discuss the case law of the CJEU in more detail in the subsection of this paper on EU law and not in this section.

In the light of the above and considering the interests of nation-states that apply stricter land acquisition rules, we can establish that the right to property as a human right does not prevent nation-states from implementing restrictive rules on land acquisition, since the right to property does not imply or guarantee anyone the substantive right to acquire a property (namely agricultural land). For this reason, nation-states do not infringe the right to property per se when they impose restrictions at the time of land acquisition.

1.2.3. INTERNATIONAL INVESTMENT AGREEMENTS (IIAS) APPLICABLE TO AGRICULTURAL LAND ACQUISITIONS IN EU MEMBER STATES

When the rules on cross-border land acquisitions in EU Member States are analysed, a distinction must be made between cross-border acquisitions from within the European Union (so-called intra-EU acquisitions) and cross-border land transactions between third countries and EU countries (the so-called extra-EU acquisitions).[36]

[35] CJEU, C-235/17, Commission v. Hungary, 21 May 2019, Judgment.

[36] C.f. J.E. Szilágyi, *The international investment treaties and the Hungarian land transfer law*, "Journal of Agricultural and Environmental Law" 2018, Vol. 13, No. 24, pp. 194–207.

This sub-chapter discusses extra-EU dimensions[37] as intra-EU acquisitions, in other words, cross-border land acquisition between Member States and their citizens, will be dealt with in the subsection on EU law.

When looking at extra-EU investment transactions, what we need to consider first is that although EU investment law is heavily influenced by the international organisations[38] of which the EU is a member, those interactions are not covered in this paper due to the limitations of the study scope.

Extra-EU cross-border land acquisition issues are, to a significant extent, linked to the international investment law regime. This is what can be said about this regime in general:

> The international investment law (IIL) regime is an atomised system – as opposed to the multilateral trading system, with the World Trade Organization as its biggest component – mostly made up of bilateral investment treaties (BITs) and treaties with investment provisions (TIPs), collectively referred to as international investment agreements (or IIAs). IIAs are instruments for the facilitation and protection of foreign direct investment (FDI)

[37] In its interpretative communication on extra-EU cross-border land acquisitions, the European Commission has highlighted the following points: *"Different considerations apply to the movement of capital to and from third countries. The CJEU stressed that it 'takes place in a different legal context' from that which occurs within the Union. Consequently, under the Treaty additional justifications may be acceptable in the case of third country restrictions. Justifications may also be interpreted more broadly. Moreover, and in practice more importantly, any restrictions existing before the liberalisation of capital movements are grandfathered under Article 64(1) TFEU. The relevant date is 31 December 1993 for all Member States except Bulgaria, Estonia and Hungary (31 December 1999) and Croatia (31 December 2002). This means that restrictions in place before these dates affecting third country nationals cannot be challenged on the basis of the principle of the free movement of capital under the Treaty."* EC 2017, point 2. b).

[38] C.f. Organisation for Economic Co-operation and Development (OECD), United Nations Conference on Trade and Development (UNCTAD), World Trade Organisation (WTO), United Nations Commission on International Trade Law (UNCITRAL), International Centre for Settlement of Investment Disputes (ICSID), Energy Charter.

> and have been widely regarded as an important factor in attracting FDI. When two states conclude a bilateral investment treaty, they essentially grant the protections formulated therein to investments made on their territories by investors from the other contracting state. The country where the investment is made is called a *host country*, while the country of origin of the investor is called a *home country*.[39]

Cross-border land acquisitions are most often classified in the literature[40] as FDI types of investments. Accordingly, we also treat cross-border land acquisitions as investments and, within that, as FDI investments. Please note, however, that in practice there is a different approach for agricultural land, for example in the association agreement the European Union (back then known as the European Community) concluded with Central and Eastern European countries, the so-called European Agreements, in which, among other things, the relevant Central and Eastern European countries expressed their intentions to become full members of the European Union. The European Agreement with Hungary, for instance,

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[39] J.E. Szilágyi, B. Kovács, *Acquirement of Land Rights by Foreign Investors: An international investment law perspective*, [in:] *Acquisition of Agricultural Lands*, J.E. Szilágyi (ed.), Miskolc–Budapest 2022, pp. 55–56.

[40] L. Cotula, *'Land Grabbing' and International Investment Law: Toward a Global Reconfiguration of Property?*, [in:] *Yearbook on International Investment Law and Policy 2014–2015*, A.K. Bjorklund (ed.), New York 2016, pp. 201–214; C. Häberli, F. Smith, *Food Security and Agri-Foreign Direct Investment in Weak States: Finding the Governance Gap to Avoid 'Land Grab'*, "The Modern Law Review" 2014, Vol. 77, No. 2, pp. 189–222; E.R. Gorman, *When the poor have nothing to eat: The United States' obligation to regulate American investment in the African land grab*, "Ohio State Law Journal" 2014, Vol. 75, No. 1, pp. 200, 213–214; M. Dooly, *International land grabbing*, "Drake Journal of Agricultural Law" 2014, Vol. 19, No. 3, pp. 311–314; J. Ball, *A step in the wrong direction*, "Fordham International Law Journal" 2012, Vol. 35, p. 1744; O. De Schutter, *The Green Rush – The Global Race for Farmland and the Rights of Land Users*, "Harvard International Law Journal" 2011, Vol. 52, No. 2, pp. 512, 520; S. Hodgson, C. Cullinan, K. Campbell, *Land Ownership and Foreigners*, FAO Legal Papers Online 6, FAO, December 1999, pp. 2–3. C.f. K. Deininger, D. Byerlee, *Rising global interest in farmland*, The World Bank, Washington D.C. 2011.

regulates the issue of agricultural land use in the context of the *freedom of establishment* (which is linked to the free movement of persons in EU law). Some of the international investment agreements (see the free trade agreements with South Korea, Singapore and Vietnam) of the EU address agricultural land issues not only in the context of establishment, but also in connection with *services*.[41]

Extra-EU FDI type investments, which typically include cross-border acquisitions of agricultural land, have been an exclusive competence of the EU as part of the EU's Common Commercial Policy since the Lisbon Agreement entered into force (December 2009).[42] However, there are still some jurisdictional anomalies regarding foreign investments, which the Court of Justice of the European Union (CJEU) has attempted to resolve in the context of the FTA with Singapore.[43] Previously, EU Member States had concluded around 1,400 BITs,[44] which remain in force until they are replaced by an IIA concluded by the EU.[45] (The agreement underlying the Hungarian land case, the so-called *Inícia case*,[46] which was recently decided before the International Centre for Settlement of Investment Disputes (ICSID), was also an earlier BIT.) Simultaneously with this process, the EU sought to implement an important change in the international

[41] J.E. Szilágyi, *The international investment treaties…*, *op. cit.*, pp. 199–200.

[42] Treaty on the Functioning of the European Union (hereinafter TFEU) Articles 206–207. European Commission: *Towards a comprehensive European international investment policy*, COM (2010) 343, 07.07.2010.

[43] Analysing Article 218 TFEU, and referring, inter alia, to Article 207, the CJEU concludes that: The provisions of the free trade agreement relating to foreign investment other than direct investment and to the settlement of disputes between investors and States do not fall within the exclusive competence of the European Union and therefore the agreement cannot be concluded without the participation of the Member States in the present situation. CJEU, 2/15, 16 May 2017, Opinion.

[44] http://ec.europa.eu/trade/policy/accessing-markets/investment/ (accessed on: 29.01.2018).

[45] Regulation (EU) No 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

[46] J.E. Szilágyi, T. Andréka, *A New Aspect of the Cross-Border Acquisition of Agricultural Lands: The Inícia Case Before the ICSID*, "Hungarian Yearbook of International Law and European Law" 2020, Vol. 8, pp. 92–105.

investment regime by establishing a new 'investment court'[47] (the essential elements of which are already incorporated into the IIAs with Canada and Vietnam).[48]

This part of our study focuses on some IIAs of the EU, selected for their importance in cross-border land acquisitions, and on how Poland and Hungary have implemented their strict land acquisition policies in these IIAs.

Our analysis covers the new types of IIAs in force in the EU and, in some cases, its Member States. The IIAs concerned are: the Canadian (the so-called CETA 'applied' since 2017),[49] the Japanese (the so-called EU-Japan EPA in force since 2019),[50] the one concluded with the UK (the so-called EU-UK TCA in force since 2021),[51] the South Korean (the so-called EU-Korea FTA in force since 2015),[52] the Singaporean (the so-called EU-Singapore FTA in force since 2019),[53] and the Vietnamese (the so-called EU-Viet Nam FTA in force since 2020).[54] There are some similarities in these IIAs. The issue

[47] European Commission: *Investment in TTIP and beyond – the path for reform Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court*, Concept Paper, 2015, http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (accessed on: 29.01.2018).

[48] J.E. Szilágyi, *The international investment treaties…*, *op. cit.*, p. 195.

[49] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, published at Official Journal of the EU, 14 January 2017, L 11 (hereinafter: CETA).

[50] Agreement between the European Union and Japan for an Economic Partnership, published at Official Journal of the EU, 27 December 2018, L 330 (hereinafter: EU-Japan EPA).

[51] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, published at Official Journal of the EU, 31 December 2020, L 444 (hereinafter: EU-UK TCA).

[52] Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, published at Official Journal of the EU, 14 May 2011, L 127 (hereinafter: EU-Korea FTA).

[53] Free Trade Agreement between the European Union and the Republic of Singapore, published at Official Journal of the EU, 14 November 2019, L 294 (hereinafter: EU-Singapore FTA).

[54] Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, published at Official Journal of the EU, 30 March 2020, L 186 (hereinafter: EU-Viet Nam FTA).

of agricultural land acquisitions is similarly addressed by the treaties with Canada, Japan and the UK, on the one hand, and the IIAs with Singapore, South Korea and Vietnam, on the other.

I. Cross-border land acquisitions are typically regulated in the EU agreements with Canada, Japan and the UK in the context of 'investment', while in the case of Japan and the UK under 'investment and service'. These agreements offer two lists of exceptions (Annex I and Annex II) from which parties can select, and then use to ensure the enforcement of national rules that are stricter or more restrictive for investors, in the form of reservations. With regard to these agreements, reservations can be made in two ways: on the one hand, in Annex I, by adding a reservation to the list of existing national restrictions, and on the other hand, in Annex II, by adding a reservation to the list of existing or possible future national restrictions, which allows for greater political flexibility. The difference between the two countries is that while Poland has listed its reservations regarding the acquisition of agricultural land in the list of existing national measures in Annex I, Hungary has listed its reservations on the acquisition of agricultural land in Annex II, which also includes possible future national restrictions. Below there is a more detailed description of the agreements in this group, and the related Polish and Hungarian reservations.

In particular, Chapter 8 on investment of the EU international agreement with Canada,[55] the CETA,[56] will have to be taken into consideration when discussing cross-border land acquisitions. It refers to tenure as part of the concept of investment and when discussing the types of investment.[57] Annexes I (*Reservations on existing measures and liberalisation commitments*) and II (*Reservations on future measures*) to Chapter 8 of the CETA contain *reservations* by both Canada and EU Member States regarding investment

[55] C.f. J.E. Szilágyi, *The international investment treaties…*, *op. cit.*, pp. 204–206.
[56] Cf. CETA Chapter 10. Temporary entry and stay of natural persons for business purposes.
[57] CETA, Article 8.1, definition of 'investment', paragraphs (f) and (h).

rules, such as the principle of national treatment,[58] market access,[59] most-favoured-nation treatment,[60] performance requirements[61] and senior management and boards of directors.[62] For Canada, these reservations were typically referred to as national rules on "*land*", "*agricultural land*" and "*forestland*", while, for EU Member States, these national rules were most often referred to as "*property acquisition*" (in other words, something that, in our view, is a broader category). In this way, despite the fact that these national laws restrict land acquisition by the citizens or companies of the other trading partner compared to nationals, they are not considered by the CETA Parties to be an unlawful restriction of the investment chapter of the CETA because they are attached to the CETA as regular reservations by the contracting parties. With regard to the reservations in Annexes I and II, the CETA makes an important statement concerning GATS: "The reservations of the Parties are without prejudice to the rights and obligations of the Parties under the GATS."[63] Subject to the above, there is a material difference between the reservations made in Annexes I and II of the CETA in terms of their legal effect. Annex II (*Reservations on future measures*) is a collection of reservations on future measures that provide more room for different policies that may be adopted by states

[58] CETA, Article 8.6. See for example, the Canadian federal level reservation I-C-5, and the Canadian provincial and territorial level reservations I-PT-6, I-PT-38, I-PT-41, I-PT-83, I-PT-129, I-PT-138, I-PT-174, I-PT-183, I-PT-184 in Annex I. In connection with this, Hungary and Poland have expressed reservations on behalf of the EU. See Annex II for the reservation made by Hungary on behalf of the EU.

[59] CETA, Article 8.4. See for example the Canadian provincial and territorial reservations I-PT-6, I-PT-38, I-PT-41, I-PT-129, I-PT-138, I-PT-174 in Annex I. Hungary and Poland have made reservations on behalf of the EU. See Annex II for the reservation made by Hungary on behalf of the EU.

[60] CETA, Article 8.7. See for example the reservations made by Latvia and Romania in Annex I.

[61] CETA, Article 8.5. See for example reservations I-PT-183 and I-PT-184 in Annex I.

[62] CETA, Article 8.8. See for example reservations I-PT-183 and I-PT-184 in Annex I. See Annex II for the reservation made by Hungary on behalf of the EU with respect to state-owned properties.

[63] CETA, Annexes I and II, Headnote 2.

that have chosen to make use of this option. Poland has entered the following property acquisition-related reservation in Annex I of the CETA concerning national treatment and market access: "The acquisition of real estate, direct and indirect, by foreigners requires a permit. A permit is issued through an administrative decision by a minister competent in internal affairs, with the consent of the Minister of National Defence and, in the case of agricultural real estate, also with the consent of the Minister of Agriculture and Rural Development."[64] Hungary has made three reservations concerning the acquisition of real estate, one of which concerns the acquisition of non-agricultural real estate by foreigners and has been included in the list in Annex I, while the second and third reservations have been included in the list in Annex II. One of the reservations on the list in Annex II is for public property, and the other is for agricultural property. According to the reservation on national treatment and market access for the purchase of non-agricultural real estate in Annex I, "[t]he purchase of real estate by non-residents is subject to obtaining authorisation from the appropriate administrative authority responsible for the geographical location of the property".[65] For the acquisition of agricultural land, Hungary has made a reservation in Annex II on the investment rules stipulated in the CETA on national treatment and market access: "Hungary reserves the right to adopt or maintain any measure with regard to the acquisition of arable land by foreign legal persons and non-resident natural persons, including with regard to the authorisation process for the acquisition of arable land."[66] In our view, the reservation made in Annex II may also raise the question

[64] CETA, Annex I (existing measures), Schedule of the European Union, reservations applicable in Poland. The Polish measures underlying the specific reservation: Law of 24 March 1920 on the Acquisition of Real Estate by Foreigners (Journal of Laws, 2004, No 167, item 1758, as amended).

[65] CETA, Annex I (existing measures), Schedule of the European Union, reservations applicable in Hungary. The Hungarian measures underlying the specific reservation: Government Decree No 251/2014 (X. 2.).

[66] CETA, Annex II (future measures), Schedule of the European Union, reservations applicable in Hungary. The Hungarian measures underlying the specific reservation: Act CXXII of 2013.

of how much our freedom afforded by it may be affected if Hungary is unable to defend its interests in Hungarian land acquisition cases before the EU Court of Justice. Annex II is also relevant in the context of state-owned real estate, as Hungary has made the following reservations to investment rules stipulated in the CETA on market access, national treatment and senior management and boards of directors: "Hungary reserves the right to adopt or maintain any measure with respect to the acquisition of state-owned properties."[67]

The EU-Japan EPA addresses the issue of cross-border land acquisitions following a logic similar to that applied in the CETA. The issue is regulated in a separate chapter dedicated to investment and services.[68] EU Member States and Japan have also added reservations (both in separate annexes to the list) to some of the liberalisation provisions incorporated into that chapter. Several EU Member States and Japan have also made use of this option for cross-border land acquisitions. Just as in case of the CETA, reservations can be made in two ways: either in Annex I, by adding a reservation regarding existing national restrictions, or in Annex II, by adding a reservation regarding already existing or possible future national restrictions, which allows for greater political flexibility. Poland has repeated, almost word for word, its reservation made in the CETA in the form of a reservation regarding national treatment and market access for real estate acquisitions in the relevant Annex I of the EU-Japan EPA.[69] Reservations added by Hungary also follow the same logic as those made in the CETA. Thus, in its

[67] CETA, Annex II (future measures), Schedule of the European Union, reservations applicable in Hungary.

[68] EU-Japan EPA, Chapter 8 (Trade in services, investment liberalisation and electronic commerce).

[69] "The acquisition of real estate, direct and indirect, by foreigners requires a permit. A permit is issued through an administrative decision by a minister competent in internal affairs, with the consent of the Minister of National Defence and, in the case of agricultural real estate, also with the consent of the Minister of Agriculture and Rural Development." EU-Japan EPA, Annex 8-B, Annex I (existing measures), Schedule of the European Union, Reservation 1 (all sectors), point (b) (acquisition of real estate). The Polish measures underlying the specific reservation: Law of 24 March 1920 on the Acquisition of Real Estate by Foreigners (Journal of Laws, 2016, item 1061, as amended).

Reservation 1 (all sectors) in Annex I to the Schedule of the European Union regarding the acquisition of real estate, Hungary referred to its national measures allowing restrictions on the acquisition of non-agricultural land (using the same text word for word, plus some additions, and the reference to the same legislation as that used in the CETA).[70] The maintenance or future adoption of Hungarian measures allowing the cross-border acquisition of agricultural land is made possible by the fact that Reservation 1 in Annex II covers all sectors (with a similar content as the reservation in the CETA, but with more detailed legal references) with respect to the acquisition of real estate.[71] The reservation on Hungarian state-owned land, known from the CETA, is also inserted here.[72] Please note that Japan has made its own Reservations, no. 12 on cross-border land acquisition, in a manner similar to that applied by Hungary, extending them to future measures in Annex II to the Schedule of Japan (but in addition to national treatment and market access, Japan has also opted for a reservation regarding most-favoured-nation).[73]

An important post-Brexit question was how the details of the relationship between the UK and the European Union would be settled. As far as the land acquisition provisions of the EU-UK TCA

[70] EU-Japan EPA, Annex 8-B, Annex I (existing measures), Schedule of the European Union, Reservation 1 (all sectors), point (b) (acquisition of real estate). The Hungarian measures underlying the specific reservation: Government Decree No. 251/2014 (X. 2.) on the acquisition by foreign nationals of real estate other than land used for agricultural or forestry purposes; and Act LXXVIII of 1993 (Paragraph 1/A).

[71] EU-Japan EPA, Annex 8-B, Annex II (future measures), Schedule of the European Union, Reservation 1 (all sectors), point (b) (acquisition of real estate). The Hungarian measures underlying the specific reservation: Act CXXII of 2013 on the Transfer of Agricultural and Forestry Land (Chapter II (Paragraphs 6–36) and Chapter IV (Paragraphs 38–59)); Act CCXII of 2013 on the Transitional Measures and Certain Provisions related to Act CXXII of 2013 on the Transfer of Agricultural and Forestry Land (Chapter IV (Paragraphs 8–20)).

[72] EU-Japan EPA, Annex 8-B, Annex II (future measures), Schedule of the European Union, Reservation 1 (all sectors), point (b) (acquisition of real estate).

[73] EU-Japan EPA, Annex 8-B, Annex II (future measures), Schedule of Japan, Reservation 12 (land transactions). The Hungarian measures underlying the specific reservation: Alien Land Law (Law No. 42 of 1925), Article 1; Agricultural Land Act (Law No. 229 of 1952), Articles 2, 3, 6 and 7.

are concerned, both Poland and Hungary have followed the logic already known from the CETA and the EU-Japan EPA. Namely: Poland entered a reservation on the list of existing national restrictions. According to this, Poland has formulated its reservation as an exception to the principle of national treatment regarding the liberalisation of investment in real estate.[74] Hungary repeated its reservations on both lists. In the list of existing national restrictions, Hungary has expressed its reservation regarding the liberalisation of investment, and the principles of national treatment and market access for non-agricultural property acquisition, with the same content as that already described for the CETA.[75] As far as agricultural land is concerned, Hungary has made a reservation on the other list that allows greater political flexibility. In addition to its general reservation on the acquisition of state property,[76] Hungary has formulated its reservation on this list as an exception to the liberalisation of investment, to the principles of national treatment and market access for the acquisition of real estate, by referencing its

[74] Subject to the reservation, the following regulation is lawful: "The acquisition of real estate, direct and indirect, by foreigners requires a permit. A permit is issued through an administrative decision by a minister competent in internal affairs, with the consent of the Minister of National Defence and, in the case of agricultural real estate, also with the consent of the Minister of Agriculture and Rural Development." EU-UK TCA, Annex SERVIN-1 (existing measures), Schedule of the European Union, Reservation 1 (all sectors), point (b) (acquisition of real estate). The Polish measures underlying the reservation: Law of 24 March 1920 on the Acquisition of Real Estate by Foreigners (Journal of Laws of 2016, item 1061, as amended).

[75] Subject to the reservation, the following regulation is lawful: "The purchase of real estate by non-residents is subject to obtaining authorisation from the appropriate administrative authority responsible for the geographical location of the property". EU-UK TCA, Annex SERVIN-1 (existing measures), Schedule of the European Union, Reservation 1 (all sectors), point (b) (acquisition of real estate). The Hungarian measures underlying the reservation: Government Decree No. 251/2014 (X. 2.) on the acquisition by foreign nationals of real estate other than land used for agricultural or forestry purposes; and Act LXXVIII of 1993 (Paragraph 1/A).

[76] EU-UK TCA, Annex SERVIN-2 (future measures), Schedule of the European Union, Reservation 1 (all sectors), point (b) (acquisition of real estate).

measures applicable to "[t]he acquisition of arable land by foreign legal persons and non-resident natural persons".[77]

II. The EU agreements with South Korea (EU-Korea FTA) and Singapore (EU-Singapore FTA) follow a different approach to cross-border land acquisitions. Those agreements refer to cross-border land acquisitions in the context of cross-border "provision of services" on the one hand and "establishment" on the other, and there is a list of exceptions applicable to them, which allows for the enforcement of national rules that are stricter or more restrictive for investors by means of a national reservation. The structure of the EU-Viet Nam FTA is very similar to the that of the two IIAs; however, the acquisition of real estate again in this IIA concerns the liberalisation of investment rather than establishment.

So, the EU agreements with South Korea (EU-Korea FTA) and Singapore (EU-Singapore FTA) regulate cross-border land acquisitions in connection with cross-border provision of services on the one hand, and establishment on the other. A reservation on cross-border land acquisitions can be made under the chapters of these agreements on services and establishment.[78] Poland makes the same reservation in Annex 7-A-1 on cross-border provision of services and Annex 7-A-2 on establishment in the EU-Korea FTA, and in Appendix 8-A-1 on cross-border provision of services and Appendix 8-A-2 on establishment in the EU-Singapore FTA, and (all) these reservations are made with respect to "real estate", with the same wording as follows: "The acquisition of real estate, direct or indirect, by foreigners (a natural or foreign legal persons) requires permission. Unbound for the acquisition of state-owned

[77] EU-UK TCA, Annex SERVIN-2 (future measures), Schedule of the European Union, Reservation 1 (all sectors), point (b) (acquisition of real estate). The Hungarian measures underlying the reservation: Act CXXII of 2013 on the Transfer of Agricultural and Forestry Land (Chapter II (Paragraphs 6–36) and Chapter IV (Paragraphs 38–59)); Act CCXII of 2013 on the Transitional Measures and Certain Provisions related to Act CXXII of 2013 on the Transfer of Agricultural and Forestry Land (Chapter IV (Paragraphs 8–20)).

[78] See Chapter 7 of the EU-Korea FTA and Chapter 8 of the EU-Singapore FTA (Services, Establishment and Electronic Commerce).

property (i.e., the regulations governing the privatisation process)." Hungary has expressed the same reservations in Annexes 7-A-1 and 7-A-2 of the EU-Korea FTA and in Appendices 8-A-1 and 8-A-2 of the EU-Singapore FTA, and (all) these reservations concern "real estate", as follows: "[l]imitations on acquisition of land and real estate by foreign investors".

Chapter 8 of the EU-Viet Nam FTA is called "Liberalisation of investment, trade in services and electronic commerce"; in other words, it lacks the establishment element and, instead, real estate acquisitions are again linked to the liberalisation of investment, alongside trade in services. As an exception to Chapter 8 of the EU-Viet Nam FTA, reservations on the acquisition of real estate are found in two places in Annex 8-A of the EU-Viet Nam FTA, which contains the Schedule of the European Union. First, in Appendix 8-A-1 on the cross-border provision of services (within that as a reservation concerning "real estate"), and the second one is in Appendix 8-A-2 on the liberalisation of investment (within that as a reservation concerning "real estate" again). Both Poland and Hungary made reservations with respect to both appendices. The reservation made by Poland in Appendix 8-A-1 (the content of which is essentially the same as the reservations made for the EU-Korea FTA and the EU-Singapore FTA): "The acquisition of real estate, direct or indirect, by foreigners (a natural or foreign legal persons) requires permission. Unbound for the acquisition of state-owned property (i.e. the regulations governing the privatisation process)." The reservation made by Poland in Appendix 8-A-2 (the content of which differs significantly from the reservations made in the case of the EU-Korea FTA and the EU-Singapore FTA):

> The acquisition of real estate, direct and indirect, by foreigners requires a permit. Purchase or otherwise acquisition by a foreigner of shares, as well as any other act in law concerning shares of a company, the seat of which is in Poland and which is the owner or a perpetual user of a property located in the territory of Poland, requires a permit. A permit is issued through an administrative decision by a minister competent in internal affairs, with

> the consent of the Minister of National Defence and, in the case of agricultural real estate, also with the consent of the Minister of Agriculture and Rural Development.

Hungary has inserted reservations with the same content in both Appendices 8-A-1 and 8-A-2 (the content of which is essentially the same as the reservations made in the case of the EU-Korea FTA and the EU-Singapore FTA), namely that "[l]imitations apply on the acquisition of land and real estate by foreign investors". Please note that, with respect to the limitations in the Hungarian land acquisition regulations, all three agreements, namely the EU-Korea FTA, the EU-Singapore FTA and the EU-Viet Nam FTA, refer to the fact that "As regards services sectors, these limitations do not go beyond the limitations reflected in the existing GATS commitments."[79]

Only a few of the IIAs, those that are considered more significant, are presented above. A number of other IIAs to be concluded with major trading partners are still in the process of being adopted. In view of this, and considering the national land acquisition approach followed by Poland and Hungary so far, it is important that, in settling the pending extra-EU relations, Polish and Hungarian decision-makers will apply their concepts developed within the scope of the new IIAs that are already in force, which have been translated into reservations on tenure. In this context, the question is whether of all the different types of reservations, they have the possibility to enforce reservations that also provide more room for political consideration in their future actions in IIAs where negotiations are still open. Another important question is what kind of dispute settlement procedures are linked to the new IIAs. It is essential that Polish and Hungarian national interests can be asserted to a large extent in these dispute settlement procedures, and that the regime set up is not just a purely investor-friendly regime. In our view, these new extra-EU investment systems could have a huge impact

[79] Footnote 2 of Annex 7-A-1 and footnote 3 of Annex 7-A-2 of the EU-Korea FTA; furthermore footnote 2 of Annex 8-A-1 and footnote 3 of Annex 8-A-2 of the EU-Singapore FTA; furthermore footnote 2 of Annex 8-A-1 and footnote 3 of Annex 8-A-2 of the EU-Viet Nam FTA.

on the future development prospects of the Polish and Hungarian nations as a whole, hence the importance of focusing on and representing national interests in the development of these systems.

1.3. The Legal Dimensions of the European Union

Poland and Hungary joined the European Union at the same time, in 2004, along with eight other countries, as part of the EU's biggest-ever enlargement round. One of the specific features of this enlargement round was that the issue of agricultural land acquisition has been a priority in the accession treaties since that time. Seven out of the 10 newly acceded countries[80] negotiated, in the Act of Accession, a transitional period that allowed them to maintain their previous land regulations and, at the same time, to comply with the main rules of EU law only after that transitional period. Even back then, one of the central elements of the Hungarian transition period agreed in the Act of Accession was the limitation on and acquisition by legal entities. There was a significant difference in the length of the transition period between Poland and Hungary: the Poles managed to reach an agreement with the EU for the longest transition period of all the countries concerned. Among other things, this was why the European Union launched a comprehensive investigation into national land regulations for all new Member States when the transition period for the other new Member States expired, except for Poland (which is only natural, as the Polish transition period was still in progress). This EU investigation, which only covers the new Member States, is seen by some authors as discrimination against the new Member States, as there

[80] Cseh Köztársaság, Észtország, Lettország, Litvánia, Magyarország, Lengyelország és Szlovákia; J.E. Szilágyi, *The Accession Treaties of the New Member States and the National Legislations, particularly the Hungarian Law, concerning the Ownership of Agricultural Land*, "Journal of Agricultural and Environmental Law" 2010, Vol. 5, No. 9, p. 48.

has never been such a comprehensive review of land regulations in the old Member States.[81]

So, with what EU rules do Member States have to comply if they want to set up acquisition rules for their agricultural land? Is it possible to develop regulation that aims to maintain traditional rural communities (as the Hungarian national land law aims to do[82])? Or is it possible that primarily local natural person farmers, and not legal entities with a non-transparent or barely transparent ownership structure, should be allowed to acquire agricultural land (as is the case in Polish and Hungarian land regulations[83])? (It should be noted that, very often, even the meaning of these terms can also be a matter of debate. The curious reinterpretation of the concept of 'local/rural community', cited earlier[84] and given by the Commission, is a good example. This term can essentially be interpreted as encouraging the renewal of rural communities through migration).

I. Before describing the EU legal background to agricultural land acquisition, we would like to point out the interesting developments that have taken place at the EU level with regard to soft law documents. Just as the publication of the FAO's VGGT was unique at the international level, it was also exceptional for an EU body to take a position on land acquisition at the EU level. Moreover, not one but three EU-level institutions published soft law documents almost simultaneously. These documents are the opinion of the European Economic and Social Committee (hereinafter EESC)[85] (hereinafter EESC 2015), the resolution of the European Parliament

[81] Á. Korom, R. Bokor, *Gondolatok az új tagállamok birtokpolitikájával kapcsolatban: Transzparencia és egyenlő elbánás*, [in:] *Honori et virtuti*, K. Gellén, Iurisperitus (ed.), Szeged 2017, pp. 259–267.

[82] Preamble of Act CXXII of 2013 on transfer of agricultural and forestry lands.

[83] J.E. Szilágyi, H. Szinek Csütörtöki, *Conclusions…*, *op. cit.*, pp. 362–363.

[84] J.E. Szilágyi, *The changing concept of rural community…*, *op. cit.*, pp. 633–652.

[85] European Economic and Social Committee: *Land grabbing – a warning for Europe and a threat to family farming*. Opinion, NAT/632 – EESC-2014-00926-00-00-AC-TRA (EN), Brussels, 21 January 2015 (hereinafter: EESC 2015).

(hereinafter EP)[86] (hereinafter EP 2017), and the interpretative communication of the European Commission[87] (hereinafter EC 2017), which have already been cited and can be interpreted as a response to the European Parliament. Given that references to such documents cannot be excluded in the case law of the Court of Justice of the European Union (hereinafter CJEU) (nothing in this study is to be interpreted as an expression of our opinion on the correctness of the interpretation and reasoning methods of the CJEU; the statement above is only a communication of the facts as they are), it might be useful to explore their legal nature and content. In this respect, we should first look at the basis and the purpose of those documents, on which and for which they have been drawn up.

The legal basis for the first document, in chronological order, the "own-initiative opinion" of the European Economic and Social Committee (EESC 2015), is Rule 29(2) of the EESC's Rules of Procedure. It is clear that the EESC 2015 has a dominant 'pre-law' character (using the categorisation proposed by Petra Láncos[88]), which in this case means it has a function of calling for legislation. However, this call to take action is not targeted only to EU legislators[89] but also to Member States,[90] since the EESC recognises that "land policy comes under the authority of the Member States".[91]

The legal basis for the "resolution" issued by the European Parliament (EP 2017) and the circumstances that led to its publication are Rule 52 of the EP's Rules of Procedure on own-initiative procedures,

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[86] European Parliament (EP): *State of play of farmland concentration in the EU: how to facilitate the access to land for farmers*. Resolution, P8_TA (2017)0197, 27 April 2017 (hereinafter: EP 2017).

[87] European Commission (EC): *Commission Interpretative Communication on the Acquisition of Farmland and European Union Law*. 2017/C 350/05, HL C 350, 18.10.2017, pp. 5–20 (hereinafter: EC 2017).

[88] P.L. Láncos, *Snapshot of the EU Soft Law Research Landscape*, "Hungarian Yearbook of International Law and European Law" 2019, Vol. 7, pp. 273–287; P.L. Láncos, *East of Eden Hotel – soft law measures on harmful content between harmonisation and diversity*, "The Theory and Practice of Legislation" 2018, Vol. 6, No. 1, pp. 113–129, 128.

[89] EESC 2015, points 1.9, 6.9, 6.11–6.14, 6.21, etc.

[90] EESC 2015, points 1.10, 6.4, 6.10–6.13.

[91] EESC 2015, point 1.9.

the VGGT and EESC 2015, and the infringement procedures against the six new Member States. EP 2017, among others, is similar to EESC 2015, in that it has a strong pre-law character, essentially encouraging legislative action (or action that can be interpreted as legislation) by both Member States[92] and EU decision-makers.[93] Finally, we consider it important to draw attention to the fact that, in the context of infringement proceedings against new Member States, in point 39 of EP 2017, the European Parliament "calls on the Commission to consider a moratorium on the ongoing proceedings aimed at assessing whether Member States' legislations on farmland trading comply with EU law". The call proposed by the European Parliament was interesting for us, in that a similar suggestion made in Working Committee 2 of the 2015 congress of the European Council of Agricultural Law (*Comité Européen de Droit Rural*), a body consultant to the EU institutions,[94] had already generated a great debate among the members of the Working Committee, and there was no motion by the general rapporteur of the Working Committee in this regard.

The "interpretative communication" issued by the European Commission (EC 2017) was a response to the EP 2017,[95] meaning that, basically, the European Parliament's request itself provided a kind of legal basis for the European Commission to express its opinion on land acquisition issues. In our experience, the European Commission had previously been very reluctant to express its opinion on land issues in this way, preferring to do so only in individual cases, when investigating the land regulations of a specific Member State. This approach by the European Commission[96] is also why this document is the least assertive of the three EU soft law documents on legislative issues; if there is any reference to

[92] C.f. EP 2017, points 22, 37 and 12, 19, 21, 27.
[93] C.f. EP 2017, points 28, 31, 39 and 2, 6, 17, 27.
[94] J.E. Szilágyi, *Conclusions (Commission II)*, "Journal of Agricultural and Environmental Law" 2015, Vol. 10, No. 19, pp. 94–95.
[95] C.f. EP 2017, point 39 and EC 2017, preamble and point 1. c).
[96] C.f. Á. Korom, *Evaluation of Member State Provisions Addressing Land Policy and Restitution by the European Commission*, "Central European Journal of Comparative Law" 2021, Vol. 2, No. 2, pp. 101–125.

the issue, it is mostly in the context of the Member States having to develop their own national rules in the light of the relevant EU legal framework, which in itself is not a new feature, as this has been the Commission's view in individual cases. In the EC 2017 document, the European Commission does not elaborate on the question of further legislative work to be done by the EU institutions regarding this issue; however, the Commission refers[97] to the consistent implementation of certain legislative processes that had already started. According to the European Commission, the current legal framework in the European Union is clear, and this is essentially implied by the fact that the European Commission has a clear opinion on all points of contention (if any). We are of the view that, in this respect, the *harmonising soft law* character of the EC 2017 document[98] is the most predominant.

The content of the three documents[99] will be discussed in an upcoming section of this sub-chapter.

II. The sources of EU law to be taken into account when drafting national land law that is compliant with EU law are, on the one hand, the primary and secondary sources of EU law (mainly primary sources of law for land acquisition rules, until the judgment in the so-called "KOB" SIA case,[100] which may break this trend) and, on the other hand, the case law of the Court of Justice of the European

[97] EC 2017, point 1. c).

[98] P.L. Láncos, *Snapshot of the EU Soft Law…*, *op. cit.*; P.L. Láncos, *East of Eden Hotel…*, *op. cit.*, pp. 118–121.

[99] J.E. Szilágyi, *Agricultural Land Law: Soft Law in Soft Law…*, *op. cit.*, pp. 192–204.; J.E. Szilágyi, A. Raisz, B.E. Kocsis, *New dimensions of the Hungarian agricultural law in respect of food sovereignty*, "Journal of Agricultural and Environmental Law" 2017, Vol. 12, No. 22, pp. 160–164.

[100] CJEU, C206/19, „KOB" SIA kontra Madonas novada pašvaldības Administratīvo aktu strīdu komisija, 11 June 2020, Judgment. Á. Korom, *Requirements for the cross border inheritance of agricultural property: Which acts of the primary or secondary EU law can be applied in the case of agricultural properties' inheritance?*, "Journal of Agricultural and Environmental Law" 2022, Vol. 17, No. 33, pp. 63–74; Á. Korom, *The European Union's Legal Framework on the Member State's Margin of Appreciation in Land Policy: The CJEU's Case Law After the "KOB" SIA Case*, [in:] *Acquisition of Agricultural Lands*, J.E. Szilágyi (ed.), Miskolc–Budapest 2022, pp. 77–90.

Union (CJEU). Considering the particularly important role of the CJEU for our topic, before we turn to presenting the primary sources of law, it needs to be pointed out that we also rely on the case law of the CJEU when applying primary sources of law to the land acquisition regime. This means that primary sources of law are already presented to us through, or in some cases with the help of, an *interpretative filter* provided by the CJEU. As regards the case law of CJEU, we also need to draw attention to the fact that whenever the CJEU examines compliance with EU law, they do not only assess the compliance of national laws, but also the administrative and judicial practice in the relevant country. And if that practice is found to be deficient, there is a presumption that the national laws themselves lack compliance with EU law.[101] Finally, in relation to the decisions of the CJEU, which are relatively few in number compared to the importance of the subject, it needs to be highlighted that a significant number of the land cases before the CJEU have been decided by *preliminary rulings*.[102] In other words, up until the investigation conducted by the EU Commission of the land acquisition regimes of the countries that joined the EU in 2004 and afterwards (see below), the EU did not typically open *infringement* proceedings in cases of land acquisitions.

As we have said above, both primary and secondary sources of EU laws (e.g., the Common Agricultural Policy) are relevant for the regulation of tenure. However, the primary sources of EU law namely, (a) the *TFEU*, (b) the *Charter of Fundamental Rights of the European Union*, already mentioned in the context of human rights (in particular the right to property), (c) and the Acts of Accession, mentioned above, are relevant to a significant extent, if not exclusively (see the "KOB" SIA case, cited above), to the land *tenure* rules of the Member States. However, before analysing these primary sources in more detail, it must be pointed out that EU laws limit

[101] Á. Korom, *The European Union's Legal Framework…*, *op. cit.*, p. 80.

[102] The Greek case may be mentioned as an exception which is an infringement procedure: ECJ, 305/87, Commission of the European Communities versus Hellenic Republic, 30 May 1989, Judgment. Infringement proceedings have been opened but not concluded with a judgment in the case of the Austrian province of Vorarlberg; see INFR (2007)4766.

the options of Member States in developing their rules on land acquisition, mainly with regard to the Member States and States that are members of the EU or member countries of the European Economic Area (or States that are considered as such under an international treaty), in other words, in the intra-EU context mentioned above, and less so with regard to nationals and legal entities of countries outside these states, in other words, in the extra-EU context. Therefore, for the latter category of persons, the land acquisition rules of Member States may lawfully stipulate broad limitations.

The case law of the CJEU on national land acquisition rules[103] highlights in particular the following provisions of the TFEU from among the primary sources of EU law: the general prohibition of discrimination (Article 18 TFEU),[104] freedom of establishment as part of the free movement of persons (Article 49 TFEU), the free movement of capital (Article 63 TFEU) and the objectives of the common agricultural policy (Article 39 TFEU).

In the context of analysing the above rules of the TFEU, Ágoston Korom's statement from 2013 gives a good idea of the situation, namely that EU law defines the room available to Member States for developing their own land tenure rules with what can be defined as an intersection of the so-called negative and positive integration rules.[105] As an explanation of the above statement, Ágoston Korom calls the free movement of persons and capital *a negative rule of integration*. In his view, these and the other two freedoms,

[103] For example, CJEU, C-452/01, *Margarethe Ospelt* and *Schlössle Weissenberg Familienstiftung*, 23 September 2003, Judgment (*Ospelt* case); CJEU, C-213/04, *Ewald Burtscher* versus *Josef Stauderer*, 1 December 2005, Judgment (*Burtscher* case); CJEU, C-370/05, *Uwe Kay Festersen*, 25 January 2007, Judgment (*Festersen* case); CJEU, C-197/11, *Eric Libert* versus *Gouvernement flamand* (C-197/11) and *All Projects & Developments NV* versus *Vlaamse Regering* (C-203/11) joint cases, 8 May 2013, Judgment (*Libert* case).

[104] An infringement procedure can also be based on indirect discrimination, i.e. where the legislation discriminates in particular against nationals of other Member States; Á. Korom, *The European Union's Legal Framework…*, *op. cit.*, p. 79.

[105] Á. Korom, *Az új földtörvény az uniós jog tükrében. Jogegyenlőség vagy de facto más elbírálás?*, [in:] *Az új magyar földforgalmi szabályozás az uniós jogban*, Á. Korom (ed.), Budapest 2013, p. 14.

the freedom of goods and services (together the four freedoms, which Korom refers to as the EU's 'economic constitutionality'), are still the fundamental elements of the EU legal order, which "aim to remove obstacles to the movement of production factors, especially those imposed by the Member States".[106] Consequently, as a rule of thumb, the European institutions, including the CJEU, consider all measures by a Member State that impose a limitation on these freedoms as a starting point, to be in breach of EU law.[107] Whereas the positive form of integration means the creation of a supranational institutional system that has not existed before, a typical example of which is the creation of a common agricultural policy for the EU.[108] In the case law of the CJEU on land acquisition, in particular, one of the objectives of the common agricultural policy, namely that of improving the quality of life of farmers, has been considered a point of reference, on the basis of which Member States may lawfully adopt land tenure regulations. In other words, this positive integration rule (Article 39 TFEU) is the basis on which a Member State may be exempted to a certain extent from the negative integration rules (Articles 49 and 63 TFEU) if it introduces limitations in its land tenure (land acquisition) rules.[109] The exact position of a given national decision relative to the intersection of negative and positive integration rules, in other words, whether it is still within the limits of lawfulness or outside them, is ultimately decided by the CJEU. The CJEU has interpreted the rules on the free movement of persons and the free movement of capital as meaning that, in addition to respect for the principle of national treatment, a national law is compliant with EU law only if it pursues a legitimate objective of general interest and the restrictive national measure cannot be replaced by a measure that is less restrictive on the free movement of capital. As regards the public interest objective, it needs to be emphasised that a purely economic reason cannot be

[106] Ibidem, p. 12.
[107] Ibidem, p. 14.
[108] Ibidem, p. 14.
[109] Á. Korom, különösen az *Ospelt*- és *Festersen*-ügyeket elemezve vonja le ezt a következtetést; Á. Korom, *Az új földtörvény…*, *op. cit.*, p. 14.

used to restrict the functioning of the internal market in a legitimate way (in the field of property policy, this is less the case, as the positive integration model is being carried through); social objectives are far more acceptable as a limitation on the functioning of the internal market instead.[110] However, the mere existence of a public interest objective is not sufficient for a Member State to impose a lawful limitation on the acquisition of agricultural land. The measure must be *proportionate*, and must meet the *requirement of substitutability*, which means that a restrictive measure is only compliant with EU regulations if it cannot be substituted by a measure that is less restrictive on the free movement of capital.

If we try to place the three EU soft law documents mentioned above in the context[111] of whether they would push the EU system towards a positive or a negative integration model, the short answer would be that the EESC 2015 and EP 2015 were more open towards a positive integration model, while EC 2017 is more oriented towards a negative integration model.

However, in the context of the system outlined above, which is the result of the interplay of negative and positive integration models, there have been some shifts and changes in the practice of the CJEU over the last few years. One such noteworthy judgment is the one made in the "KOB" SIA case,[112] which suggests a certain shift in the interpretation of the law by the CJEU within the negative integration model (it is not yet clear to what extent this shift can be considered long-term). In particular, up until the "KOB" SIA judgment, within the negative integration model of the free movement of capital and the freedom of establishment, it was clearly the free movement of capital that determined the practice of the CJEU, but the "KOB" SIA case[113] brought the freedom of establishment to

[110] Á. Korom, *The European Union's Legal Framework…*, *op. cit.*, p. 79.

[111] J.E. Szilágyi, *Agricultural Land Law: Soft Law in Soft Law…*, *op. cit.*, pp. 192–204.

[112] CJEU, C206/19, „KOB" SIA kontra Madonas novada pašvaldības Administratīvo aktu strīdu komisija, 11 June 2020, Judgment.

[113] "KOB is an agricultural company owned by German citizens established in Latvia, with a German citizen as director. Several other companies owned by German citizens have shares in KOB. The company concluded a sales agreement on approximately 10 hectares of agricultural land in 2018 and asked for

the fore. Moreover, the "KOB" SIA judgment was an innovation in the application of secondary legislation in land acquisition cases, as Directive 2006/123/EC, the EU Services Directive, also was given an important role in the case.[114]

Another noteworthy change is that, in addition to the negative and positive integration model rules of the TFEU, the CJEU has now also applied the Charter of Fundamental Rights of the European Union (and primarily the right to property), and it did so for the first time in a Hungarian case, the so-called 'usufruct infringement' case.[115] In other words, a three-pillar system of interpretation has now been set up and completed with this case. The possibility of applying the Charter had already been raised before, but it essentially became a reality with this case. The case will be discussed in detail in the next section, in the context of Hungarian cases.

III. The Hungarian land cases before the CJEU now form a substantial group of EU land cases, which makes sense, at least in part, as the Hungarian legislation has built up one of the strictest systems in the region; however, the question whether one would be able to find similarly strict rules in other, possibly older Member States, that would justify, for example, the initiation of infringement proceedings, or, looking at it differently, that would justify the dismissal of infringement proceedings against Hungary.

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a license from the member state's authorities, which refused this. KOB turned to the Latvian courts, stating that the circumstances of the licensing scheme are discriminative based on nationality and incompatible with the free movement of capital or establishment, among other things. It should be stressed that the regulation mentioned above allows legal persons to acquire agricultural property. In this case, if a legal person is led or represented by another member state's citizen, the Latvian law sets two more requirements to acquire agricultural lands. The citizens of other member states should be registered in Latvia, which includes being required to stay in the state for more than 3 months and prove their knowledge of the Latvian language on a conversational level."; Á. Korom, *The European Union's Legal Framework…*, *op. cit.*, p. 83.

[114] Á. Korom, *The European Union's Legal Framework…*, *op. cit.*, pp. 87–88.

[115] CJEU, C-235, European Commission versus Hungary, 21 May 2019, Judgment.

III.1. The Hungarian cases were opened by the investigation conducted by the European Commission of the new Member States, in which the national land laws of the new Member States were reviewed after the expiry of the transitional period granted to them (when the investigation was opened, Poland was still under a moratorium, meaning that the national land law of Poland was not subject to the investigation). As the European Commission found that the land tenure rules of the new Member States may contain a number of restrictive measures on the EU's fundamental economic freedoms (free movement of capital and persons) that are non-compliant with EU law, the European Commission decided, after appropriate preparatory *(pilot)* procedures, to launch infringement proceedings in 2015 against several new EU Member States, including Bulgaria, Hungary, Latvia, Lithuania and Slovakia.

> These new national rules contain several provisions that 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.[116]

As regards the infringement proceedings against Hungary, which concern the most important elements of our land regulation[117] (hereinafter the "comprehensive case"), the following points should

[116] European Commission, *Press release*, IP/16/1827, 26 May 2016.
[117] INFR (2015)2023.

be highlighted, based mainly on the scientific communication by Tamás Andréka and István Olajos.[118]

First, as regards the comprehensive case, it needs to be stated that, in the proceedings initiated by the European Commission, Hungary successfully argued with respect to several Hungarian provisions, claiming that the relevant measures complied with EU law. Thus, the provisions on issues including, but not limited to (a) the role of the local land commission in the procedure, (b) the land acquisition and tenure maximum, (c) the system of pre-emption and pre-lease entitlements, and (d) the duration of the lease, were finally removed from the infringement proceedings.[119] All these measures, which are now considered EU-compliant, are essential elements of the Hungarian land law. However, in the ongoing infringement proceedings, the European Commission continues to challenge the EU law compliance of Hungarian institutions such as (a) the inability of legal persons to acquire land and the prohibition of transformation, (b) the professional competence requirement for farmers, (c) the non-recognition of practice acquired abroad, (d) the obligation of cultivation in person, and the Commission also questions the objectivity of (e) the conditions for the prior approval of sales contracts.[120] The issues challenged include the inability of legal persons to acquire land, which is considered in particular to be one of the fundamental pillars of current Hungarian land law.

In relation to the inability of legal persons to acquire land, it is important to point out that (a) the current land law applies not only to the acquisition of land by foreign legal persons, but also, with certain exceptions, to domestic legal entities; (b) the general restriction on legal entities applies only to their acquisition of land, not to their use of land. The importance of the institution is summarised by Tamás Andréka as follows:

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[118] I. Olajos, T. Andréka, *A földforgalmi jogalkotás és jogalkalmazás végrehajtása kapcsán felmerült jogi problémák elemzése*, "Magyar Jog" 2017, Vol. 64, No. 7–8, pp. 410–424.

[119] Ibidem, pp. 410–424.

[120] Ibidem.

> The aim is to prevent the creation of uncontrollably complex chains of property ownership that would negate the aim of maintaining the population retention capacity of the countryside, as it would be impossible to control compliance with the maximum landed property and other conditions of acquisition.[121]

III.2. Another, well-defined group of Hungarian cases is that of the so-called usufruct cases; in other words, CJEU proceedings for the *ex lege* termination of usufruct rights established by contract between parties who are not close relatives. These include one infringement procedure and several preliminary rulings.

In the connection with the usufruct case initiated within the framework of the infringement proceedings, it must be pointed out that the judgment of the case was preceded by a combined judgment made in the preliminary ruling procedure in usufruct cases. With this in mind, in the context of disputes concerning the *ex lege* termination of usufruct rights based on contracts between non-close relative parties under Hungarian land law, we will first discuss the Joined Cases C-52/16 and C-113/16 (i.e., the SEGRO and Horváth judgments),[122] followed by a brief discussion of the usufruct case C-235/17 in the infringement proceedings.[123] However, this paper[124] will not discuss the judgment of 10 March 2022 in case C-177/20 (i.e., the Grossmania case),[125] due to space limitations.

The preliminary ruling in the Joined Cases C-52/16 and C-113/16 (i.e., the SEGRO and Horváth judgments), the provisions

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[121] Ibidem.

[122] CJEU, joined cases C-52/16 and C-113/16, SEGRO' Kft. versus Vas Megyei Kormányhivatal Sárvári Járási Földhivatala (C-52/16) and Günther Horváth versus Vas Megyei Kormányhivatal (C-113/16), 6 March 2018, Judgment.

[123] CJEU, C-235, European Commission versus Hungary, 21 May 2019, Judgment.

[124] See J.E. Szilágyi, *Hungary…*, *op. cit.*, pp. 192–193; J.E. Szilágyi, H. Szinek Csütörtöki, *The Past, Present, and the Future of Hungarian Land Law in the Context of EU Law*, "Hungarian Yearbook of International Law and European Law" 2023, Vol. 11, in press.

[125] CJEU, C-177/20, "Grossmania" Mezőgazdasági Termelő and Szolgáltató Kft versus Vas Megyei Kormányhivatal, 10 March 2022, Judgment.

of Act CXXII of 2013 on the Transfer of Agricultural and Forestry Land (Land Transfer Act) and its implementing law, Act CCXII of 2013 (Implementation Land Act), which abolish *ex lege* the usufruct rights described above, were examined by the CJEU in relation to Article 49 TFEU (freedom of establishment), Article 63 TFEU (free movement of capital) and Article 17 (right to property) and Article 47 (right to a fair trial) of the Charter of Fundamental Rights of the European Union. In the light of the practice of the CJEU over the past decade and a half, it does not come as a surprise that the CJEU has delivered its judgment essentially in the context of the free movement of capital, in consideration of the EU law concept of land acquisition, which is situated at the intersection of the positive and negative integration models, and within the framework of which the CJEU has tended to lean towards the negative integration model. In particular, in the light of this approach, the CJEU ruled that the Hungarian regulation prevents the free movement of capital and that it could not be justified on the basis of the principle of proportionality.[126] However, it was more interesting to see what the position of the CJEU would be on the two provisions of the Charter of Fundamental Rights referenced above. In this respect, we can establish that there has not been any particular breakthrough in the case law, as the position of the CJEU at the time was that, having found that there was an infringement of the free movement of capital, it was "not necessary to examine the aforesaid national legislation in the light of Articles 17 and 47 of the Charter in order to resolve the disputes in the main proceedings."[127]

In the usufruct case C-235/17 in the infringement proceedings, the CJEU basically ruled against Hungary in relation to the Hungarian laws already known from the SERGO judgment. The interesting aspect of the case is that, in addition to Article 63 of the TFEU on the free movement of capital, the CJEU also considered Article 17 of the Charter of Fundamental Rights on the right to property on its merits and found that it was actually infringed. The CJEU considered the right of usufruct regulated by Hungarian law to fall

[126] C-52/16 and C-113/16, points 81–127.
[127] C-52/16 and C-113/16, point 128.

within the scope of Article 17 of the Charter of Fundamental Rights, basing its interpretation on the case law of the European Court of Human Rights.[128] the Court of Justice of the European Union has also ruled that the right of usufruct is a "legally acquired" right,[129] and has stated that "The contested provision does not involve restrictions on the use of possessions but rather entails a person being deprived of their possessions within the meaning of Article 17(1) of the Charter."[130] Although the CJEU adds that this provision of the Charter of Fundamental Rights:

> does not lay down an absolute prohibition on persons being deprived of their possessions, it does, however, provide that such deprivation may only occur where it is in the public interest, and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss.[131]

"In any event, the contested provision does not satisfy the requirement laid down in the second sentence of Article 17(1) of the Charter, according to which fair compensation must be paid in good time for a deprivation of property",[132] and the CJEU therefore concludes that:

> the deprivation of property effected by the contested provision cannot be justified on the ground that it is in the public interest; nor are any arrangements in place whereby fair compensation is paid in good time. Accordingly, that provision infringes the right to property guaranteed by Article 17(1) of the Charter.[133]

[128] C-235/17, points 69–72, 81.
[129] C-235/17, point 73.
[130] C-235/17, points 82, 85–86.
[131] C-235/17, point 87.
[132] C-235/17, point 125.
[133] C-235/17, point 129.

Hungary passed CL Act of 2021 (also commonly referred to as the Compensation Act) to implement this Case C-235/17 judgment, and Section 128 of that Act, largely by amending the Implementation Land Act, created the possibility of appropriate compensation in relation to rights of usufruct that were terminated *ex lege*.

IV. Meeting the requirements of the negative integration model for agricultural land acquisition is a major challenge for countries that have an interest in ensuring the transparency of ownership structures in land tenure, in the long-term maintenance of traditional rural communities, in support for family farming and in the improvement of the tenure of small-scale producers. The uncertainties inherent in the interpretation of the current EU legal framework make it very difficult for Member States to develop national legislation that meets these objectives. All national measures and rules capable of achieving the above objectives could be eliminated by invoking the negative integration model and, considering the findings of the EU investigation, this may be even happen in the same discriminatory manner as that already used against the new Member States. In view of this, legal scholars have for some time been wondering what solution is available in the current situation for Member States that consider it important to support these objectives and wish to give greater prominence to the achievements of the positive integration model.

Stimulated by the uncertainties observed in connection with the European Union law concerning acquisition of agricultural lands, Commission II's general reporter (János Ede Szilágyi) of the European Council for Rural Law (CEDR) Congress submitted a proposal in which the possible ways of the EU law's improvement were formally analysed. By virtue of the Conclusions of the Commission II:

> The question may be solved in different ways; here, we draw the attention to four possible solutions: [a] The EU ceases to apply the four fundamental freedoms with regard to the land policy of the MSs [Member States]. This step would mean in a way the easing of the integration. [b] Those MSs which introduced restrictions in their land

> market, liberalise the rules of their land market or introduce more liberal rules. Obviously, this may severely hurt the interests of the citizens of these MSs, and may lead to land-grabbing with regard to the land markets of the new MSs. [c] The debate may be solved in a simple political way: i.e., the case may be forgotten, e.g., based on a political backroom-deal. In this case, there is no guarantee that the question would not arise later again, or that someone (basically anyone) does not bring the question in front of the CJEU in the frame of a preliminary procedure, basically circumventing the backroom-deal of the politicians (i.e., of the EU Commission and the given MSs). [d] We move in the direction of further regulation, even modifying the primary legislation of the EU if necessary. This may cease the uncertainty and deepen the integration; on the other hand, it may be interpreted as giving up a certain part of the sovereignty.[134]

In an unaccepted part of the Conclusions of the Commission II:

> the general reporter elaborated a possible way how to develop the EU legislation toward the positive integration model. In the opinion of the general reporter, the agricultural land is not a typical object of a commercial transaction, and, therefore, the principles of the freedom of capital and of the free movement of persons [including establishment] shall not apply without restrictions in the case of agricultural land. For providing this special status of agricultural lands, the general reporter could imagine the amendment of the EU legislation (even of the Treaties of the EU). Otherwise, the general reporter would provide a liberty for the Member States whether they endeavour to apply special rules in the transaction

[134] Published by J.E. Szilágyi, *Conclusions (Commission II)*, "Journal of Agricultural and Environmental Law" 2015, Vol. 10, No. 19, p. 93 (this part of the Conclusions was adopted).

of agricultural lands or not. The general reporter would detail the definition of the 'agro-productional use of agricultural lands' and the admissible public interest objectives which can be called up when restricting the free movement of capital and persons with regard to agricultural lands. The general reporter would also regulate more precisely the applicable measures which may be considered as proportional restrictions. Among these measures, the general reporter would pay special attention to the regulations concerning the acquisitions by legal entities.[135,136]

Inspired by the adoption of the report of the European Parliament, the participants of a conference organised by the Hungarian Association for Agricultural Law in cooperation with the Public Law Sub-Commission of the Hungarian Academy of Sciences (Budapest, 2017) also dealt with the possible development opportunities of the EU law concerning the acquisition of agricultural lands (especially the ownership-acquisition). Mihály Kurucz determined several conceptions how to amend the EU law in order that the EU can fulfil the objectives defined in the report of the European Parliament. One of these concepts is about the *renationalisation* of the Common Agricultural Policy of the EU. According to this concept, Member States could regain their absolute competence and freedom to regulate their own land market in exchange for the EU agricultural and rural development financial supports (i.e., the Member States would lose these supports). His other concept would handle the situation, beyond the negative integration rules of the EU, via stricter rural development and environmental protection regulations adopted by

[135] Published by J.E. Szilágyi, *Conclusions*, 94–95 (this part of the Conclusions was not adopted).

[136] J.E. Szilágyi, *Cross-border acquisition of the ownership of agricultural lands and some topical issues of the Hungarian law*, "Zbornik Radova Pravni Fakultet Novi Sad" 2017, Vol. 51, No. 3/2, pp. 1067–1068.

> the EU. It could be a smart *indirect regulation* in connection with the land transfer. Tamás Andréka also proposed more concepts. One of them is a remarkable movement from the free movement of capital *towards the right of establishment*. According to another of Andréka's concepts, EU legislators should integrate *land-acquisition into the Common Agricultural Policy*. The concept of Ágoston Korom is not a real concept of the amendment of the EU law. Namely, in the opinion of Korom, the present legal framework of the EU is acceptable, nevertheless, European jurisprudence should rethink the *scientific background* of the issue, create a new system and communicate this to the European Commission.[137]

As an additional option, I would suggest that primary sources of EU law (e.g., TFEU) should allow countries much freedom in how they develop their national legislation on the acquisition of agricultural land, in the form of a reservation (known from international law) added to the relevant primary rule. This solution would not lead to more detailed regulation in primary or secondary EU law, possibly based on a more positive integration model (as this would in itself lead to a further reduction of Member State sovereignty), but would also protect Member State sovereignty by allowing Member States that wish to make an exception to the current (otherwise rather uncertain) EU regulatory environment, to regulate their land tenure freely, or more freely, within their own competence.

1.4. Proposals and Conclusions

Transparent ownership structures in their land acquisition-related transactions, the long-term maintenance of traditional rural communities, support for family farming and the improvement of the tenure of small-scale producers in the interest of both Poland and Hungary. However, maintaining their national regulations

[137] Ibidem, pp. 1068–1069.

to support these objectives poses an ever-increasing challenge in the light of the changes in international and EU law. Our paper described the changes that we consider to be the most important and, subject to them, we propose the following for consideration.

There seems to be an emergence of soft law documents (FAO VGGT, EESC 2015, EP 2017, EC 2017) in the development of land tenure regulations, both at the international and EU level. It is worth looking at how these soft law documents are born, and what their further fate is, since it cannot be ruled that these soft law documents will appear in the judgments of various judicial forums and their interpretative practice. All this is not necessarily a positive development for countries that are more protective of their sovereignty, although it must be said that some soft law documents can even be seen as positive as far as their content goes. The emergence of these soft law documents is a 'double-edged sword', in other words, negative in some respects while positive in others, and future reference to them should be handled with care.

Of course, human rights will appear in land tenure relations and, of these human rights, the most important in this context is the right to property. One of the most interesting developments in this regard is that the European Union's own human rights regime is now being established alongside the previously dominant Strasbourg human rights system (ECHR). It is an important development that, for example, the CJEU has now applied the Charter of Fundamental Rights of the European Union in Hungarian land acquisition cases, demonstrating that, in addition to the regulatory framework provided by the negative and positive integration models, Member States must also take into account the requirements of the Charter in developing their national land acquisition rules. One cannot help but wonder to what extent the ECHR and the EU human rights system will be similar or different in relation to land? Currently, one of the most important tasks of Member States is to monitor these developments.

The European Union is in the process of negotiating and concluding a series of International Investment Agreements (IIAs) governing agricultural land acquisitions. In our view, these new extra-EU investment systems could have a huge impact on the future

development prospects of the Polish and Hungarian nations as a whole, hence the importance of focusing on and representing national interests in the development of these systems. In view of this, and considering the national land acquisition approach followed by Poland and Hungary so far, it is important that, in settling the pending extra-EU relations, Polish and Hungarian decision-makers will apply their concepts developed within the scope of the new IIAs that are already in force, which have been translated into reservations on tenure. In this context, the question is whether, of all the different types of reservations, they have the possibility to enforce reservations that also provide more room for political consideration in their future actions in IIAs where negotiations are still possible. Another important question is what kind of dispute settlement procedures are linked to the new IIAs. It is essential that Polish and Hungarian national interests can be asserted to a large extent in these dispute settlement procedures, and that the regime set up is not just a purely investor-friendly regime.

There seems to be a great deal of uncertainty about the EU regulatory framework for agricultural land acquisitions in the European Union. In the light of the recent CJEU case law, it now seems that an approach based on a negative integration model, which leaves little room for national regulatory considerations, has been given priority. Considering this, Member States that wish to promote the interests of their farmers and rural communities better in their national land regulations may have an interest in revising the relevant EU legal framework. The following order of preference is proposed as a starting point for the re-regulation of this relevant EU legal framework. (a) The most important thing would be to allow Member States wishing to operate a regulated market for the acquisition of their agricultural land to do so. The best solution would be to use 'reservation' (which best respects the sovereignty of Member States), a form that is already known in international law. This way Member States could opt out of the relevant primary law requirements of EU law by making reservations and creating their own rules on land use in a regulated manner. Of course, they would still be subject to the standards that would ensure compliance with human rights rules (e.g., ECHR) in the development of land acquisition

rules. In my view, this solution would not necessarily mean the 'end of European integration'. For a 'stronger Europe' does not necessarily need to be based on closer integration in all walks of life; in some areas stronger Europe is facilitated by deeper integration, and others by greater freedom for Member States. Furthermore, it is also important to note that it is possible that not all Member States would make use of this option. Clearly, some Member States do not require this degree of freedom. At the same time, this solution could make European integration more attractive again for citizens of countries (in Central Europe or even in other regions) that see European integration as a threat to their national freedom, which they have struggled to achieve over the centuries. (b) If the above change is not possible, I would suggest that, as a greater restriction on the exercise of Member States' sovereignty, the framework for regulating the acquisition of agricultural land should be regulated within the TFEU, for example within the framework of the Common Agricultural Policy. Such a regulation should be designed to allow the positive integration model approach to be given priority in the land regulations of Member States that wish to apply it, as an exception to the negative integration model. In this new regulatory environment, it would be important that Member States were given the freedom to implement effective measures to ensure a long-term and reasonably transparent ownership structure in the agricultural land market, the long-term maintenance of traditional rural communities, support for family farming and the improvement of the tenure of small-scale producers. In this context, the limitation on the acquisition of land by legal entities should be formulated as a clearly-termed applicable option. Member States should also be given the freedom to develop their own concept of 'rural community' within this new system; in other words, to be able to implement measures to support the survival of their traditional rural communities.

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Chapter 2. Legal Issues of Transfer of Agricultural Land and Holding in Hungary

2.1. Introduction

In this book chapter I would like to present the legal institutions that form the backbone of the Hungarian land legislation, including the issue of land acquisition by legal entities, but the main emphasis will be on the issue of agricultural holdings and the related regulation, presenting the main points of the new legislation enacted since 2020. The other important area I will cover is the question of the regulation of inheritance, both for agricultural land and for agricultural holdings. At the end of the study, I will attempt to formulate *de lege ferenda* proposals which may be of interest for Hungarian as well as for Polish legislation.

2.2. Ideal Status in Connection to the Structure of Agricultural Holdings

The background of reforming the previous Hungarian land regulation and the development of the current regulation is our accession to the European Union and the resulting obligations. The Accession Treaty of Hungary (23 September 2003) and point 3 of its Annex X – on

the free movement of capital[1] – laid down[2] that Hungary may maintain in force for seven "of the signature of this Treaty on the acquisition of agricultural land by natural persons who are non-residents or non-citizens of Hungary and by legal persons.[3] We also had the opportunity to request an extension of the moratorium for a maximum of 3 years. Hungary made an attempt to do so, which was approved by the EU Commission Decision 2010/792/EU (20.12.2010), so the moratorium expired in Hungary on 30 April 2014.[4] This marked the beginning of the new land transfer legislation in Hungary, the first step of which was the enactment of Act CXXII of 2013 on the Transfer of Agricultural and Forest Land (hereinafter referred to as: Land Transfer Act),[5] which entered into force in its entirety on 1 May 2014.

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[1] See more: Á. Korom, *Az új földtörvény az uniós jog tükrében. Jogegyenlőség vagy de facto más elbírálás?,* [in:] *Az új magyar földforgalmi szabályozás az uniós jogban*, Á. Korom (ed.), Budapest 2013, pp. 11–24.

[2] See also: L. Fodor, *Kis hazai földjogi szemle 2010-ből*, [in:] *Az európai földszabályozás aktuális kihívásai*, Cs. Csák (ed.), Miskolc 2010, pp. 115–130.

[3] F. Benedek,*"A magyar földügy a XXI. század elején*", [in:] *"… a birtokolt föld… a szabadság maga*", Z. Fürj (ed.), Debrecen 2005, p. 13; M. Kurucz, *Gondolatok a termőföldjogi szabályozás kereteiről és feltételeiről III.*, "Geodézia *és* Kartográfia" 2008, Vol. 60, No. 11, p. 12.

[4] Á. Korom, *A termőföldek külföldiek általi vásárlására vonatkozó "moratórium" lejártát követően milyen mozgásteret tesz lehetővé a közösségi jog?*, "Európai Jog" 2009, Vol. 9, No. 6, pp. 7–16. See also about the expiry of the moratorium: A. Téglási, *The constitutional protection of agricultural land in Hungary with special respect to the expiring moratorium of land acquisition, in 2014*, "Jogelméleti Szemle" 2014, No. 1, pp. 155–175.

[5] For more about the analysis and its history, see: T. Andréka, *Birtokpolitikai távlatok a hazai mezőgazdaság versenyképességének szolgálatában*, [in:] *Az európai földszabályozás aktuális kihívásai*, Cs. Csák (ed.), Miskolc 2010, pp. 7–19; P. Bobvos, P. Hegyes, *A földforgalom* és *földhasználat alapintézményei*, Szeged 2015; Cs. Csák, *Die ungarische Regulierung der Eigentums- und Nutzungsverhältnisse des Ackerbodens nach dem Beitritt zur Europäischen Union*, "Journal of Agricultural and Environmental Law" 2010, Vol. 5, No. 9, pp. 20–31; Cs. Csák, J.E. Szilágyi, *Legislative tendencies of land ownership acquisition in Hungary*, [in:] *Agrarrecht Jahrbuch – 2013*, R. Norer, G. Holzer (ed.), Wien–Graz 2013, pp. 215–233; G. Horváth, *Protection of Land as a Special Subject of Property: New Directions of Land Law,* [in:] *The Transformation of the Hungarian Legal System 2010–2013*, P. Smuk (ed.), Budapest 2013, pp. 359–366; P. Jani, *A termőföld-szerzés hatósági engedélyezésének szabályozása de lege lata* és *de lege ferenda*, [in:] *Komplementer kutatási irányok és eredmények az agrár-, a környezeti- és a szövetkezeti jogban*,

During the development of the regulatory concept, the member states, including Hungary, had to pay attention to the fact that the rules restricting the free movement of persons and capital serve an appropriate public interest purpose and thus do not conflict with the provisions of EU law.[6] Among the purposes of the Land Transfer Act are facilitating the development of medium-size farms in the agricultural sector, and ensuring the stability and further development of small farms, expanding farming operations building on own work and direct production and service activities, offering a better potential for farming by way of sustainable land use, focusing on the protection of the natural environment of production (soil, water, natural habitats) and the cultivated landscape, the creation of estates sufficient in size for viable and economically feasible agricultural production, eliminating the detrimental consequences of a fragmented estate

E.I. Ágoston (ed.), Szeged 2013, pp. 15–28; I. Kapronczai, *Az új földszabályozás hatása az agrárpolitikára*, [in:] *Az új magyar földforgalmi szabályozás az uniós jogban,* Á. Korom (ed.), Budapest 2013, pp. 79–92; L. Kecskés, L. Szécsényi, *A termőföldről szóló 1994. évi LV. törvény 6. §-a a nemzetközi jog és az EK-jog fényében*, "Magyar Jog" 1997, Vol. 44, No. 12, pp. 721–729; M. Kurucz, *Gondolatok a termőföldjog szabályozás kereteiről és feltételeiről*, "Geodézia és Kartográfia" 2008, Vol. 60, No. 9, pp. 13–22; Z. Mikó, *A birtokpolitika megvalósulását segítő nemzeti jogi eszközök*, [in:] *Az új magyar földforgalmi szabályozás az uniós jogban*, Á. Korom (ed.), Budapest 2013, pp. 151–163; Z. Nagy, *A termőfölddel kapcsolatos szabályozás pénzügyi jogi aspektusai*, [in:] *Az európai földszabályozás aktuális kihívásai*, Cs. Csák (ed.), Miskolc 2010, pp. 187–197; I. Olajos, *A termőföldről szóló törvény változásai a kormányváltozások következtében: gazdasági eredményesség és politikai öncélúság*, "Napi Jogász" 2002, No. 10, pp. 13–17; I. Olajos, Sz. Szilágyi, *The most important changes in the field of agricultural law in Hungary between 2011 and 2013*, "Journal of Agricultural and Environmental Law" 2013, No. 15, pp. 93–110; T. Prugberger, *Szempontok az új földtörvény vitaanyagának értékeléséhez és a földtörvény újra kodifikációjához*, "Kapu" 2012, No. 9–10, pp. 62–65; J. Vass, *A földtörvény módosítások margójára,* [in:] *Tanulmányok Dr. Domé Mária egyetemi tanár 70. születésnapjára*, J. Vass (ed.), Budapest 2003, pp. 159–170; A. Zsohár, *A termőföldről szóló törvény módosításának problémái*, "Gazdaság *és* Jog" 2013, No. 4, pp. 23–24.

[6] J.E. Szilágyi, *Az Európai Unió termőföld-szabályozása az Európai Bíróság joggyakorlatának tükrében,* [in:] *Az európai földszabályozás aktuális kihívásai*, Cs. Csák (ed.), Miskolc 2010, p. 276; See also: Á. Korom, *A birtokpolitika közösségi jogi problémái*, "Gazdálkodás" 2010, No. 3, pp. 344–350; A. Raisz, *A magyar földforgalom szabályozásának aktuális kérdéseiről*, "Publicationes Universitatis Miskolcinensis" 2017, Sectio Juridica et Politica, Vol. 35, p. 436.

structure in terms of ownership, hence to permit farmers to ply their trade without unwarranted obstructions.[7]

We therefore had an obligation arising from our accession to the European Union to transform our land transfer regulation, but the area is not only regulated by the newly created Land Transfer Act; in this regard, the domestic background of the development of the regulation must also be examined. In Hungary, the following regulatory frameworks can be found in relation to the area. We have a National Rural Strategy, which basically defines the basic principles, action programmes, aims and the actions, which are necessary for their implementation for agriculture. The legislative background is quite diverse, as we must mention the Fundamental Law of Hungary, which is the name of the current constitution, and which contains provisions regarding agriculture. The next level in the hierarchy of sources of law is the cardinal act, which means an act of Parliament which may be passed or amended subject to two-thirds majority of the Members of Parliament present.[8] We also encounter cardinal act regulation among the agricultural law standards, and acts and decisions also contain provisions in this area. In this book chapter, I will deal with the most relevant pieces of legislation from the point of view of the topic.

Article P) Paragraph (2) of the Fundamental Law provides for a cardinal act regulation in the following areas: the regulations relating to the acquisition of ownership of agricultural land and forests, including the limits and conditions of their use for achieving the objectives set out under Paragraph (1)[9], and the rules concerning the organisation of integrated agricultural production and on family farms and other agricultural holdings shall be laid down in a cardinal act. However, this wording is only effective from 1 April 2013,[10]

[7] Preamble of the Land Transfer Act.

[8] Article T) (4) of the Fundamental Law.

[9] Article P) (1) of the Fundamental Law: Natural resources, particularly arable land, forests and water resources, as well as biological diversity, in particular native plant and animal species and cultural values shall comprise the nation's common heritage; responsibility to protect and preserve them for future generations lies with the State and every individual.

[10] Fourth Amendment to the Fundamental Law of Hungary (25 March 2013).

as it did not previously[11] include the clause concerning family farms. I will explain my position on this in more detail in point 3.2.

To date, among the acts regulating the areas listed in the Fundamental Law, the cardinal Act CXXII of 2013 on the Transfer of Agricultural and Forest Land, the partly cardinal Act CCXII of 2013 on Certain Provisions and Transition Rules Related to the Act CXXII of 2013 on the Transfer of Agricultural and Forest Land (hereinafter referred to as: Implementation Land Act), the partly cardinal Act LXXI of 2020 on the Liquidation of Undivided Common Ownership of Land (hereinafter referred to as: Co-ownership Land Act), the partly cardinal Act CXXIII of 2020 on Family Farms (hereinafter referred to as: Family Farms Act), and the partly cardinal Act CXLIII of 2021 on the Transfer of Agricultural Holdings (hereinafter referred to as: Farm Transfer Act) have been enacted.

Based on all of this, it can be seen that basically the Land Transfer Act is the one that was adopted in its entirety as a cardinal act in Hungary, since all its provisions regulate the area named in Article P) Paragraph (2) of the Fundamental Law. The qualification of the other acts as partly cardinal is due to the fact that certain of its provisions regulate the area named in the Fundamental Law, so these provisions are considered cardinal, but not the entire act. It is also worth pointing out that neither an integrated agricultural production organisation act nor an explicit agricultural holding act has been created in Hungary yet. The analysis of the issue of holding regulation is discussed in more detail in point 3.

In Hungary, in the focus of the regulation is therefore the agricultural land, not the agricultural holding, as in the case of most Western European countries,[12] or even in the European Union regulations,

[11] On 22 December 2012, the amendment introducing Article P) Paragraph (2) into the Fundamental Law entered into force, which read as follows: *"The regulations relating to the acquisition of ownership of agricultural land and forests, including the limits and conditions of their use for achieving the objectives set out under Paragraph (1), and the rules concerning the organization of integrated agricultural production and on agricultural holding shall be laid down in a cardinal act."*

[12] Zs. Hornyák, *Egyes európai országok földöröklési szabályozása*, "Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica" 2018, Vol. 36, No. 2, pp. 381–395; Zs. Hornyák, *A földöröklés szabályozása egyes európai országokban,*

where typically the basis of the subsidies is the holding, not the land. As an outlook I would note, that in its Article 23, adopted on 2 April 1997, the Constitution of Poland in force provides for a general principle, according to which the basis of the entire Polish agricultural system shall be the family farm.[13]

So, in Hungary we see efforts in the legal regulation to keep agricultural land as a unit in transfer, but only one or two specific legal institutions have been regulated in relation to the agricultural holding, but this is not the basic unit of regulation. Thus, as the current main regulatory instrument in the area, the Land Transfer is that which determines the lex specialis nature of certain acts in relation to the Land Transfer Act. It mentions the Farm Transfer Act[14] and the Co-ownership Land Act[15] as such, but in accordance with the provisions of the Fundamental Law, it also provides the possibility that regulations derogating from the provisions of the Land

"Miskolci Jogi Szemle" 2017, Vol. 12, No. 2. különszám, pp. 182–188; H. Kronaus, *The Austrian legal frame of the agricultural land/holding succession and the acquisition by legal persons*, "Journal of Agricultural and Environmental Law" 2022, Vol. 17, No. 33, pp. 75–92, https://doi.org/10.21029/JAEL.2022.33.75 (accessed on: 07.07.2023); F. Prete, *The Italian Legal Framework of Agricultural Land Succession and Acquisition by Legal Persons*, "Journal of Agricultural and Environmental Law" 2022, Vol. 17, No. 33, pp. 141–154, https://doi.org/10.21029/JAEL.2022.33.141 (accessed on: 07.07.2023); E. Muñiz Espada, *Particular Rules on the Transfer of the Holding Farm in Spanish Law*, "Journal of Agricultural and Environmental Law" 2020, Vol. 15, No. 29, pp. 171–183, https://doi.org/10.21029/JAEL.2020.29.171 (accessed on: 07.07.2023).

[13] The Constitution of the Republic of Poland adopted on 2 April 1997, Journal of Laws of 1997 No. 78, item 483, as amended. M. Csirszki, H. Szinek Csütörtöki, K. Zombory, *Food Sovereignty: Is There an Emerging Paradigm in V4 Countries for the Regulation of the Acquisition of Ownership of Agricultural Lands by Legal Persons?*, "Central European Journal of Comparative Law" 2021, Vol. 2, Issue 1, p. 41, https://doi.org/10.47078/2021.1.29-52 (accessed on: 07.07.2023).

[14] Land Transfer Act, Art. 2(5): The provisions of this Act shall apply subject to the derogations provided for in Act CXLIII of 2021 on the Transfer of Agricultural Holdings.

[15] Land Transfer Act, Art. 2(7): The provisions of this Act shall apply with the derogations provided for in Act LXXI of 2020 on the liquidation of undivided common ownership of land. See also about this: J.E. Szilágyi, *A magyar földjogi szabályozás egyes sarkalatos kérdései*, "Miskolci Jogi Szemle" 2022, Vol. 17, No. 2, p. 407, https://doi.org/10.32980/MJSz.2022.2.2030 (accessed on: 07.07.2023).

Transfer Act may be introduced by specific other act, having regard to the operating specificities of bodies of integrated agricultural production organisation, relating to the acquisition of the right of use of land for the purpose of utilisation in integrated production organization,[16] and that regulations derogating from the provisions of the Land Transfer Act may be introduced by specific other act, having regard to the specificities of proprietary rights and utilisation rights of agricultural holdings, relating to the acquisition of ownership and the right of use of land and the related agricultural equipment, for the purpose of large-scale agricultural operations.[17] Based on this definition, we get an idea of what the Land Transfer Act means by agricultural holding, since it mentions the area as the acquisition of land and related agricultural equipment for the purpose of holding utilisation. The justification of the Fundamental Law defines an agricultural holding as an economic unit connected to agricultural land. Among the purposes laid down in the preamble of the Land Transfer Act, some were formulated in relation to the agricultural holding, such as, for example, that facilitating the development of medium-size farms in the agricultural sector, and ensuring the stability and further development of small farms, and effectively promoting the operations of newly developed farming bodies through transfer in agricultural and forest land.

As a starting point, it is definitely necessary to clarify the definition of agricultural and forest land, according to which agricultural and forest land shall mean any parcel of land, irrespective of where it is located (within or outside the limits of a settlement), registered in the real estate register as cropland, vineyard, orchard, garden, meadow, permanent pasture (grassland), reed bank or forest or woodland, including any parcel of land shown in the real estate register as non-agricultural land noted under the legal concept of land registered in the Országos Erdőállomány Adattár (National Register of Forests) as forest.[18]

[16] Land Transfer Act, Art. 1(3).
[17] Land Transfer Act, Art. 1(2).
[18] Land Transfer Act, Art. 5, point 17.

Some basic provisions of the Land Transfer Act also need to be explained in order to get an overview of the topic. The Land Transfer Act governs the acquisition of ownership of, and usufructuary rights on, agricultural and forest land, the use of land, as well as the monitoring of restrictions on land acquisitions, and contains provisions on local land commissions.[19] This Act applies to all lands located in the territory of Hungary. In connection with the title, the scope of this Act shall cover the acquisition of ownership of land under any title and by any means, but not including where ownership is acquired by way of intestate succession, offer to the State in probate proceedings, expropriation – including if obtained by purchase or exchange instead of expropriation – or through auction for the purpose of indemnification.[20] Ownership acquisition rights shall exist on condition that the acquiring party undertakes in the contract for the transfer of ownership not to permit third-party use of the land, and to use the land himself, and in that context to fulfil the obligation of land use, and agrees not to use the land for other purposes – with certain exceptions[21] – for a period of five years from the time of acquisition. If the land to which the contract for the transfer of ownership pertains is used by a third party, the acquiring party shall undertake: a) the obligation not to extend the duration of the existing land use contract, and b) the commitment set out above for the period after the existing land use contract is terminated. Furthermore, ownership acquisition rights shall exist on condition that the acquiring party provides a statement enclosed with the contract for the transfer of ownership, of having no outstanding fee or other debt owed in connection with land use, as established by final ruling relating to any previous land use, moreover, he declares in the contract for the transfer of ownership that he had not been found to be involved during the period of five years before the acquisition in any transaction aiming to circumvent restrictions on land acquisitions.[22] As a general

[19] Land Transfer Act, Art. 1(1).
[20] Land Transfer Act, Art. 2(1); Art. 6(2).
[21] Land Transfer Act, Art. 13(3).
[22] Land Transfer Act, Art. 13(1) and (4); 14(1) and (2).

rule, contracts for the transfer of ownership shall be approved by the agricultural administration body,[23] and the approval of the agricultural administration body is required also for the acquisition of ownership of land by means other than transfer. The approval of the agricultural administration body shall not be a substitute for other conditions of validity and statutory formalities, and shall not be a substitute for the prior authorisation or approval of other authorities, which are also required for the execution and validity of the transaction in question.[24]

2.3. Rules of Acquisition of Ownership of Land by Legal Entities

2.3.1. BASIC PROVISIONS ON THE CONDITIONS FOR OWNERSHIP ACQUISITION RIGHT

As a general rule, ownership of agricultural and forest land may be acquired by domestic natural persons and EU nationals, if they meet the additional legal conditions, namely that they are classified as farmers,[25] in which case they can acquire the ownership

[23] See: P. Bobvos, *A földforgalom hatósági engedélyezés alá eső tulajdonszerzési jogcímei*, [in:] *A földforgalom és földhasználat alapintézményei*, P. Bobvos, P. Hegyes, Szeged 2015, pp. 61–67.

[24] Land Transfer Act, Art. 7(1) and (2).

[25] Land Transfer Act, Art. 5, point 7: Farmer shall mean any domestic natural person or EU national registered in Hungary, who has specific vocational skills or professional qualification in agricultural or forestry activities as provided for in the decree adopted for the implementation of this Act, or, in the absence thereof, who:

a) has been verifiably engaged in the pursuit of agricultural and/or forestry activities, and other secondary activities in his/her own name and at his/her own risk in Hungary continuously for at least three years, and has verifiably produced revenue by such activities, or revenue did not materialise for the – completed – agricultural or forestry investment project has not yet turned productive, or
b) verifiably holds membership for at least three years in an agricultural producer organisation in which he/she has at least a 25 per cent ownership share,

of the land up to the land acquisition limit,[26] i.e., up to 300 hectares. If he does not meet the criteria for becoming a farmer, but the natural person is a close relative of the person transferring ownership, he can also acquire land ownership up to 300 hectares; as well as in the case of land acquisition for recreational use;[27] in other cases, a person other than a farmer may acquire the ownership of a maximum of 1 hectare of land.[28]

Pursuant to the Land Transfer Act, ownership of land may not be acquired by a) third-country natural persons; b) foreign states, including their provinces, local authorities, and the bodies thereof; c) legal persons, except as provided for in the Land Transfer Act. So, the Land Transfer Act declares a general prohibition on acquiring land ownership, and only a few legal entities named by it can acquire land ownership exclusively, we can classify these legal entities into two groups, because a given legal entity can acquire land ownership without restrictions, while other named legal entities can acquire land ownership with restrictions. I would like to note here that this type of prohibition only applies to the acquisition of land ownership, not to the acquisition of the right to land use; in relation to legal entities, the concept of agricultural producer organisation[29]

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and who personally participates in agricultural and forestry operations, or in agricultural and forestry operations and the related secondary activities.

[26] Land Transfer Act, Art. 16(1).

[27] Land Transfer Act, Art. 5, point 22a: Acquisition of land for recreational use shall mean the acquisition by domestic natural persons or EU nationals, other than farmers, of land appertaining to a municipal government or a Budapest district government and designated for such purpose by means of a resolution, not exceeding one hectare in size, for the purpose of use by the acquiring party and to collect its proceeds up to an extent not exceeding his own needs and those of his relatives living in the same household.

[28] Land Transfer Act, Art. 10(1) and (2) and (3) and (3a).

[29] Land Transfer Act, Art. 5, point 19: Agricultural producer organization shall mean a legal person or unincorporated organization established in any Member State and registered by the agricultural administration body under the conditions set out in the decree adopted for the implementation of this Act:

a) where:

aa) the organisation is engaged in the pursuit of agricultural, forestry activity or secondary activity, as its basic activity, for at least three years continuously, prior to the transaction in question,

was defined by analogy with the farmer category already described for natural persons, which organisation can basically acquire the right to land use, but I will not analyse the details of the acquisition of land use within the framework of this book chapter.

2.3.2. CONDITIONS FOR THE ACQUISITION OF OWNERSHIP OF AGRICULTURAL LAND AND HOLDING BY LEGAL ENTITIES

Given the fact that we do not yet have a holding regulation in the classical sense, and that the current rules only apply to a few specific situations on the holding, I can only comment on the conditions for the acquisition of ownership by a legal entity in relation to agricultural land. Based on this, the Hungarian State can acquire the ownership of the land without restrictions,[30] and with restriction a) a listed church, or the internal legal entities thereof, b) a mortgage loan company, c) the municipal government of the community where the land is located.[31] But the way of the restriction is different for each legal entity. For the listed church, or the internal legal entities thereof, we encounter a restriction by title; according to this, it can only acquire land ownership by testamentary disposition, under a maintenance or life-annuity agreement or an agreement for providing care, or a contract of gift, and for the construction and expansion of cemeteries, by

ab) more than half of the organisation's net annual sales revenue is from agricultural, forestry activity and/or secondary activity, and

ac) at least one executive officer or manager of the organization performs agricultural, forestry activity or secondary activity having regard to its membership in the organization, and has specific vocational skills or professional qualification in agricultural or forestry activities as provided for in the decree adopted for the implementation of this Act, or at least three years of work experience verified by the agricultural administration body; or

b) that is construed as a newly established agricultural producer organisation;

c) that is construed as a national park directorate;

d) that is construed as an authorised forestry company specializing in forest management.

[30] Land Transfer Act, Art. 11(1).

[31] Land Transfer Act, Art. 11(2).

way of transfer, and by way of exchange of existing lands. In the case of a mortgage loan company, the restriction is twofold, as it contains a limitation by title and a condition on duration, the precise details of which are set out in the Act on Mortgage Loan Companies and on Mortgage Bonds, according to this, a land may be acquired by a mortgage loan company only for a temporary period of not more than one year following the date of acquisition, by way of liquidation or enforcement procedure.[32] If the mortgage loan company is unable to sell the land it has acquired within one year of the date of acquisition, the land in question shall be transferred to the State, and shall then be given to the National Land Fund. The land fund management body shall pay to the mortgage loan company the collateral value of the land within ninety days from the date when the transfer of title to the State is recorded in the real estate register. In this case the day following the date of registration of title in the real estate register shall be recognised as the date of acquisition.[33] Another restriction of the Mortgage Loan Company Act is that Mortgage loan companies operating as branch offices may not acquire ownership of agricultural land.[34] Restrictions by purposes are encountered in the case of the municipal government of the community where the land is located, because it can acquire the ownership of land for the implementation of public benefit employment programmes and social land programmes, and for urban development purposes, furthermore, if the land is a protected site of local importance, for the purpose of protection of the land under the Act on Protection of the Nature.

There are, however, certain special cases when the act specifically states which categories of natural and legal persons may acquire land ownership under a given title; this is a taxative list. Land may be transferred as a gift only to a close relative, a listed church or the internal legal entities thereof, to a municipal government, and

[32] Act XXX of 1997 on Mortgage Loan Companies and on Mortgage Bonds, Art. 10(4).

[33] Act XXX of 1997 on Mortgage Loan Companies and on Mortgage Bonds, Art. 10(5).

[34] Act XXX of 1997 on Mortgage Loan Companies and on Mortgage Bonds, Art. 25/A(3).

to the State.[35] Land may be transferred on the grounds of maintenance and life annuity only to a close relative, a listed church or the internal legal entities thereof, to a municipal government and to the State, with the provision that the State may enter into a life annuity relationship only.[36]

There are certain exception rules regarding legal entities who – with or without restrictions – can acquire land ownership. Pursuant to these provisions, not all of the general rules of the Land Transfer Act need to be applied to these legal entities. On the one hand, they do not have to make the following declarations in the contract on the transfer of ownership: not to permit third-party use of the land, and to use the land himself, and in that context to fulfil the obligation of land use, and agrees not to use the land for other purposes for a period of five years from the time of acquisition.[37] On the other hand, the land acquisition limit (300 hectares) shall not apply to the legal persons who can acquire the ownership of land.[38] A further exception rule in relation to the acquisition of ownership of land by a legal entity is found in the pre-emption right, which is only applicable, mutatis mutandis, in the case of acquisition of land by sale. The right of preemption shall not apply – among others – to any sales transaction by the municipal government of the community where the land is located for the purpose of the implementation of public benefit employment programmes and social land programmes, and for urban development purposes, furthermore, if the land is a protected site of local importance, for the purpose of protection of the land under the Act on Protection of the Nature; to acquisition of land by the State; to any transfer made to a listed church, or the internal legal entities thereof, for the implementation or expansion of a cemetery.[39] Furthermore, approval by the agricultural administration body is not required for the acquisitions of the State; for the alienation of land owned by the State or by any

[35] Land Transfer Act, Art. 12(2).
[36] Land Transfer Act, Art. 12(3).
[37] Land Transfer Act, Art. 13(1).
[38] Land Transfer Act, Art. 16(7).
[39] Land Transfer Act, Art. 20, points d), f), h).

municipal government; and for acquisitions by legal entities who can acquire the ownership of land with restrictions.[40] Thus, those legal entities which can acquire the ownership of agricultural and forest land can acquire land ownership much more easily compared to the general land acquisition procedure.

Before to the entry into force of the Land Transfer Act, a group of legal entities may have acquired land at certain times, which may no longer acquire land under the Land Transfer Act – but this group of legal entities did not lose their previously acquired land after the entry into force of the Land Transfer Act. However, according to the provisions currently in force, legal persons established by way of division, separation, merger (merger by the formation of a new company or merger by acquisition), reorganisation (organisational transformation) – not including listed churches or their internal legal entities – may not acquire the ownership of land acquired by its predecessor as provided for in the Act on Arable Land, or acquired by its predecessor before the time of entry into force of the Act on Arable Land.[41] The Act on Arable Land is the immediate predecessor of the Land Transfer Act, i.e., the Act LV of 1994.

An infringement procedure is currently underway against Hungary, in which the EU Commission is disputing – among other things – the EU conformity of the general ban on the acquisition of land by domestic and foreign legal entities.[42] According to Tamás Andréka's opinion, the aim with a general prohibition on the acquisition of land by legal entities is:

> to prevent the development of a complex chain of ownership that is in practice uncontrollable, which would

[40] Land Transfer Act, Art. 36(1), points a), b), h).

[41] Land Transfer Act, Art. 9(2).

[42] J.E. Szilágyi, T. Andréka, *A New Aspect of the Cross-Border Acquisition of Agricultural Lands: The Inícia Case Before the ICSID*, "Hungarian Yearbook of International Law and European Law" 2020, Vol. 8, No. 1, p. 95, DOI:10.5553/HYIEL/266627012020008001006 (accessed on: 07.07.2023); A. Raisz, *Topical issues of the Hungarian land-transfer law Purchasing and renting agricultural land: Legal framework and practical problems,* "CEDR Journal of Rural Law" 2017, Vol. 3, No. 1, pp. 73–74.

> contradict the aim of preserving the population retention capacity of the countryside, as it would be impossible to control the land possession limit[43] and other acquisition conditions.[44]

In János Ede Szilágyi's opinion:

> If the Hungarian legislator were to lift the prohibition on legal persons acquiring land, several other Hungarian provisions that the Commission of the European Union has otherwise deemed to be lawful would become "permeable" (so to speak, a kind of unwanted gap would be created in the strict web of rules); in other words, this legal institution is not merely one of the fundamental institutions of the Hungarian land regime but a kind of conceptual framework, its spirit.[45]

Agreeing with both points of view, I believe that due to all these reasons, it is justified to maintain strict regulations regarding legal entities.

[43] Land Transfer Act, Art. 16(2): Subject to the exceptions provided for in Subsection (3), the size of land that may be held in possession by a farmer or an agricultural producer organisation may not exceed 1,200 hectares, including the size of land already held in possession (land possession limit).

[44] T. Andréka, I. Olajos, *A földforgalmi jogalkotás és jogalkalmazás végrehajtása kapcsán felmerült jogi problémák elemzése*, "Magyar Jog" 2017, Vol. 64, No. 7–8, pp. 410–424.

[45] J.E. Szilágyi, *Hungary: Strict Agricultural Land and Holding Regulations for Sustainable and Traditional Rural Communities,* [in:] *Acquisition of Agricultural Lands: Cross-Border Issues from a Central European Perspective*, J.E. Szilágyi (ed.), Miskolc–Budapest 2022, pp. 189–190, https://doi.org/10.54171/2022.jesz.aoalcbicec_7 (accessed on: 07.07.2023).

2.3.3. RULES FOR ACQUIRING A SHARE IN A LEGAL ENTITY

Given the general prohibition of acquisition of ownership of land by legal entities, there are no special rules for this case in Hungary.[46]

2.3.4. ACQUIRING AGRICULTURAL LAND BY CHURCHES AND ITS LEGAL ENTITIES

A listed church or its internal legal entities can acquire the ownership of agricultural land, but with restrictions. In order to make it easier to follow, the relevant rules are explained in point 2.2.

2.3.5. DETAILED RULES REGARDING THE ACQUISITION OF LAND BY CHURCHES AND THEIR LEGAL ENTITIES

As mentioned before, the detailed rules are explained in point 2.2.

2.3.6. LIMITATIONS IN ACQUIRING LAND BY CHURCHES AND THEIR LEGAL ENTITIES

The relevant rules are explained in point 2.2.

2.3.7. SPECIAL RULES CONCERNING SUCCESSION OF LAND BY CHURCHES AND THEIR LEGAL ENTITIES

A listed church, or its internal legal entities can acquire the ownership of agricultural land by testamentary disposition. The detailed rules about how it can acquire the ownership of land can be seen in point 2.2.

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[46] J.E. Szilágyi, H. Szinek Csütörtöki, *Conclusions on Cross-border Acquisition of Agricultural Lands in Certain Central European Countries,* [in:] *Acquisition of Agricultural Lands: Cross-Border Issues from a Central European Perspective*, J.E. Szilágyi (ed.), Miskolc–Budapest 2022, p. 353.

2.3.8. TAX EXEMPTIONS IN ACQUIRING LAND BY CHURCHES AND THEIR LEGAL ENTITIES

There are no special rules regarding this issue.

2.4. On Agricultural Holding Regulation

2.4.1. LEGAL BACKGROUND

In order to make it easier to follow, I would like to present the legal background together with the individual holding concepts defined in these acts, so this point is explained in more detail in the following point 3.2.

2.4.2. ANALYSIS OF DIFFERENT HOLDING CONCEPTS

Agricultural legislation in Hungary has accelerated in recent times, and the previously absent holding regulation seems to be taking shape. However, it is questionable whether it is really taking shape, or whether we can only talk about the beginnings of regulation and the creation of its seeds. Based on the opinion of János Ede Szilágyi, the Family Farms Act was the one in the Hungarian legislation that brought about a marked regulation of agricultural holdings in relation to land transactions, and thus, according to his point of view, introduced a conceptual change in Hungarian land law.[47] But did it really bring holding regulation? Can we really call the legislation and certain legal provisions that have been continuously introduced since 2020 as holding regulation? At this point, we are looking for the answer to this through a partly dogmatic, partly historical analysis.

But first, I would like to introduce the concept of an agricultural holding formulated at the level of the European Union. According to Article 4 Paragraph (1) Point b) of the Regulation (EU) No. 1307/2013 of the European Parliament and of the Council, "holding" means all

[47] J.E. Szilágyi, *A magyar...*, *op. cit.*, p. 407.

the units used for agricultural activities and managed by a farmer situated within the territory of the same Member State. Point a) of the same Paragraph defines the category of "farmer", according to which "farmer" means a natural or legal person, or a group of natural or legal persons, regardless of the legal status granted to such group and its members by national law, whose holding is situated within the territorial scope of the Treaties, as defined in Article 52 TEU in conjunction with Articles 349 and 355 TFEU, and who exercises an agricultural activity.

The legal definition of an agricultural holding was already formulated in the Hungarian regulation and has changed somewhat over the years, partly depending on the act under which the concept was defined. In Article 2 Point a) of Act XLVI of 1999 on the General Census of Agriculture, we find a definition of agricultural holding under the heading "farm", according to which a farm is a technically and economically separate unit carrying out agricultural activity, which has its own independent management. The definition of the term "holding" can already be found in the FVM Decree No. 23/2007. (17.IV.), Article 3, Point 10, according to which an agricultural holding is the totality of production units used by a given agricultural producer for the pursuit of agricultural activities, in particular farmland, livestock, machinery, buildings, constructions, plantations, and equipment. Article 2 Point 5 of FVM Decree No. 83/2007 (10.VIII.) defines 'farm' as the sum of the land and livestock owned or used by the transferor at the time of the subsidy application, as well as the quotas, subsidy entitlements and obligations related to the agricultural production activity.[48]

The current Land Transfer Act contains the following definition of 'agricultural holding': agricultural holding shall mean the basic organisation unit of production equipment and other means of agricultural production (land, agricultural equipment, other assets) operated with the same objective, functioning also as a basic economic

[48] Zs. Hornyák, *Die Regeln bezüglich des landwirtschaftlichen Gewerbes in einer Rechtsvergleichsanalyse,* "Journal of Agricultural and Environmental Law" 2018, Vol. 13, No. 24, p. 35, DOI:10.21029/JAEL.2018.24.33 (accessed on: 07.07.2023).

unit by way of economic cohesion.[49] Until 1 January 2021, the Land Transfer Act also defined the term "family farm" as a special type of agricultural holding, according to which a "family farm" was an agricultural holding registered by the agricultural administration body as a family farm.[50] The point of the Land Transfer Act containing this provision was repealed by the Family Farms Act at the same time as it entered into force. In addition to the Land Transfer Act, the Implementation Land Act,[51] which supplemented it, also contained the provision on the "family farm", on the basis of which until the entry into force of the implementing act on agricultural holdings, "family farm" means a group of land owned and used by the members of the farming family, as well as immovable and movable properties belonging to the land and identified in the inventory – in particular buildings, structures, agricultural equipment and other equipment, machinery, livestock and stock – the use of which, according to the contract between the members of the farming family, is based on the full employment of one member of the family and on the contribution of the other members of the family, and which was registered by the agricultural administrative body as a family farm.[52] This provision is also ineffective from 1 January 2021, and was repealed by the Family Farms Act.

The legislative wave that I have already mentioned therefore started in 2020, in which year Act LXXI of 2020 on the Liquidation of Undivided Common Ownership of Land was born, as was Act CXXIII of 2020 on Family Farms.[53] The Family Farms Act, which entered into force on 1 January 2021, defines the concept of "own farm", according to which an "own farm" is agricultural and forest land in the natural person's own use or common use by the members of a family farm of primary agricultural producers,

[49] Land Transfer Act, Art. 5, point 20.

[50] Land Transfer Act, Art. 5, point 4 (no longer in force: from 1 January 2021).

[51] Act CCXII of 2013 on certain provisions and transition rules related to the Act CXXII of 2013 on the Transfer of Agricultural and Forest Land.

[52] Implementation Land Act, Art. 4.

[53] See previous regulation on family farms: E. Bacskai, *Jogi tudnivalók: A családi gazdaság alapítására és működtetésére vonatkozó alapvető szabályok*, "Agro napló" 2013, Vol. 3, No. 11, p. 11.

as well as the range of agricultural production tools for which the concerned person or persons are entitled to organise the production, as well as – with the exception of production of seed for hire, hired breeding, hired fattening and the keeping of exposed animals – the right to use the results of production.[54] But this provision of the act came into force only from 1 January 2022. Here it is necessary to mention the third act of great importance of the recent period, which regulates the area, which is about the transfer of agricultural holdings,[55] and the provisions of which will be explained later in point 5. This act entered into force on 1 January 2023, and the reason why I would like to draw attention to it now, is that it also created a relevant concept in relation to the topic, as it defines the concept of "farm", which is worth comparing with the concept of "own farm" in the Family Farms Act. According to the definition of 'farm' in the Farm Transfer Act, the "farm" means: aa) agricultural and forest land, including farmstead, owned or used by the transferor of the holding taking into account Article 3(3)[56], ab) other immovable properties owned or used by the transferor of the holding necessary for carrying on agricultural and forestry activities, ac) movable properties owned or used by the transferor of the holding for carrying on agricultural and forestry activities, in respect of which the transferor has the right to organise production and – with the exception of production of seed for hire, hired breeding, hired fattening and the keeping of exposed animals – the right to use the results of production, ad) rights in rem in respect of agricultural and forestry activities belonging to the transferor of the holding, ae) a share in the assets of a business association related to the agricultural and forestry activities carried out on the holding, a share in a cooperative society, a corporate interest in an association of forest holders , and af) rights and obligations relating to the assets set out in points aa) to ae), which are serving

[54] Family Farms Act, Art. 2, point h).

[55] Act CXLIII of 2021 on the Transfer of Agricultural Holdings.

[56] Farm Transfer Act, Art. 3(3): Special provisions for farm transfer land use contract.

the operation of the farm.[57] Basically, it can be seen that the Family Farms Act speaks of the totality of land and agricultural production tools in use on an 'own farm', using the term "agricultural production tools" as a collective term, where the use is referred to as the own use of the natural person or the common use of the members of the family farm of primary agricultural producers. By contrast, the Farm Transfer Act refers to the elements owned or used by the transferor – which means a "natural person" as defined in the act – under "farm", which elements are explained in detail; not only the land is specifically named among them.

Returning to the Family Farms Act[58] – considering that I will analyse the provisions of the Farm Transfer Act later – according to the justification of the act, the aim of the legislator was to determine the rules that regulate the holding forms and operation of family farming. According to the justification, agricultural and forestry activities performed with the participation of family members, the joint use of their resources and the result of their work for their common prosperity, as well as supplementary activities, are considered family farming.[59] The preamble to the Act states that the legislator attaches great importance to the fact that the backbone of agricultural production is defined by the family farm form of production.

The Family Farms Act approaches the regulation in others, if we can say so, from the subject side,[60] because it covers three categories in detail, without precisely defining whether they are named as the type of family farm or as the holder of the totality of production factors, which is why I mentioned the subject side as an approach to

[57] Farm Transfer Act, Art. 2, point a).

[58] For the effect of the introduction of this Act on the Land Transfer Act, see: I. Olajos, *Creation of Family Farms and its Impact on Agricultural and Forestry Land Trade Legislation*, "Journal of Agricultural and Environmental Law" 2022, Vol. 17, No. 33, pp. 105–117, https://doi.org/10.21029/JAEL.2022.33.105 (accessed on: 07.07.2023).

[59] Final justification to the Act CXXIII of 2020, Detailed justification to Article 1.

[60] I emphasise that the family farm is not an entity. See about it: K. Bányai, *A mezőgazdasági föld megszerzése – a szerzéskorlátozások alapjai és kihívásai*, Budapest 2023, pp. 142–143.

the question. It defines the category of primary agricultural producer, the family farm of primary agricultural producers, and the family agricultural company. The act transformed the system of economic organisations, which were operating until its entry into force in 2021 in agriculture. Farms previously operating as primary producers[61] can continue to operate as primary producers without a change in form, although a new definition of primary producer has been introduced. And, those engaged in collective primary producer activities could transform into a family farm of primary agricultural producers. And, the former family farm could choose to continue its activities as a family farm of primary agricultural producers or as a family agricultural company. Companies, cooperatives, or forest management associations active in agriculture could be transformed into family agricultural companies.[62]

Within the framework of the act, a primary agricultural producer is a natural person who has reached the age of 16 and is listed in the register of primary agricultural producers, who carries out primary agricultural activities on his own farm. A primary agricultural producer may carry out his primary agricultural activities either independently or as a member of a family farm of primary agricultural producers. A primary agricultural producer may not be self-employed in respect of his primary agricultural activities. The annual income of a primary agricultural producer from their supplementary farming activity may not exceed one quarter of their annual income from their primary agricultural producer activity. During the sale of the product produced by primary agricultural producer activities, a close relative or employee may also act on behalf of the primary agricultural producer, as his representative.[63]

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[61] See about the previous regulation on the primary agricultural producer: F. Szilva-Orosz, *A szociális farm alanyi köre*, [in:] *Hátrányos helyzetű személyek foglalkoztatása. A szociális farm*, Cs. Csák, N. Jakab, B. Szekeres, F. Szilva-Orosz, Miskolc 2022, p. 106.

[62] I. Olajos, *A természeti erőforrások védelméről szóló sarkalatos törvények elfogadásának sorrendje és hatása a már kialakult földforgalmi joggyakorlatra*, "Miskolci Jogi Szemle" 2022, Vol. 17, No. 2, p. 303, https://doi.org/10.32980/MJSz.2022.2.2020 (accessed on: 07.07.2023).

[63] Family Farms Act, Art. 3(2)–(5).

The family farm of primary agricultural producers is a production community established by at least two primary agricultural producers, who are relatives of each other, having neither legal personality nor assets separate from those of its members, within the framework of which the primary agricultural producers conduct their agricultural activities collectively on their own farms, based on the personal contribution of all members and in a coordinated manner. The background regulation of family farm of primary agricultural producers and its member beyond the Family Farms Act is provided by the provisions of the Civil Code[64] on civil law partnership contracts; therefore, under a civil law partnership contract, the parties undertake to cooperate in order to achieve their common goals and to make capital contributions necessary for achieving said common goals, and to bear the risks of their activities collectively.[65] A primary agricultural producer may be a member of only one family farm of primary agricultural producers at the same time.[66] By designating the provisions on civil law partnership contracts as the background legislation, the legislator has changed the basic understanding of the family farm as a group of things.[67] However, the question still arises as to how exactly the legislator views the family farm.

A company, cooperative, or forest management association may operate as a family agricultural company after registration. A family agricultural company is a company, cooperative, or forest management association registered in the register of family agricultural companies, exclusively engaged in agricultural, forestry, or supplementary activity defined by the Land Transfer Act, with at least two members who are related to each other. A person may be a member of only one family agricultural company at the same time. A legal

[64] Act V of 2013 on the Civil Code.

[65] Civil Code Art. 6:498.

[66] Family Farms Act, Art. 6(1) and (3).

[67] A. Schiller-Dobrovitz, *Új kihívások a családi gazdaságokban a családi gazdaságokról szóló törvény tükrében*, [in:] *Jogi Tanulmányok*, M. Fazekas (ed.), Budapest 2021, p. 69.

person may not be a member of a family agricultural association, except in the case of the acquisition of an own share or own stock.[68]

The legislator's aim with the regulation was to simplify the forms of operation, to avoid an increase in the tax and contribution burden, to create a tax regime that promotes development and to facilitate generational change. In addition, the range of activities of primary agricultural producers has been expanded to include agricultural, forestry and supplementary activities, so that there is no need to operate multiple forms of businesses for sustainable farming.[69] The act brings together common efforts in the fields of tax policy, agricultural administration and farm restructuring, and aims to contribute to the whitening of the economy, reduce administrative burdens, encourage horizontal and vertical cooperation, strengthen the market bargaining position of producers, and to improve competitiveness.[70]

In my opinion, it is difficult to define, on the basis of the acts created so far, how the legislator views the agricultural holding and, in this context, the family farm. As we have seen before, we encounter differences in the wording of the acts and their justification, as well as in the scientific literature so far, regarding the definition. This category is sometimes referred to as a management structure, sometimes as a production community, sometimes as a form of production, sometimes as a form of operation, sometimes as a specific set of assets. Thus, it is also difficult to determine under which cardinal legal regulatory area named in the Fundamental Law these provisions can be classified. It is not clear whether they can be interpreted as rules on agricultural holding or integrated production organisation, in my opinion this is also why the family farm was also mentioned separately in Article P) of the Fundamental Law by now. On this basis, I also believe that we cannot yet talk about a uniform, complex holding regulation in Hungary, but rather

[68] Family Farms Act, Art. 14(1)–(4).

[69] T. Andréka, Lecture titled *Üzemi rendszer* at the Asset Management Specialist Lawyer training in Miskolc on 7 October 2022, Family Farms Act: Célkitűzések (Slide 35), Őstermelői agrárigazgatási szabályok (Slide 36).

[70] Final justification to the Act CXXIII of 2020, General justification.

about the beginnings of it. In my opinion, the provisions found in the various pieces of legislation should be harmonised so that we look at the holding in the same way and the regulation is developed in a complex manner along these lines, which will also harmonise our land transfer regulation.

2.4.3. GENERAL CONCEPT IN RELATION TO HOLDING REGULATION

On the one hand, Mihály Kurucz's[71] proposal can form the basis of this holding regulation to be developed, based on which the agricultural holding can be regulated in two ways in the regulation that also affects land transfer. The first possibility is the regulation according to the agricultural holding (*Betrieb*) understood in the objective sense, based on the group of things or the group of assets, and the second is the enterprise-based holding regulation (*Unternehmen*).[72] For businesses that are not structured and do not have legal personality, a *Betrieb*-type regulation could be a solution. However, in the case of businesses with legal personality or organizational structure, the regulations regarding the legal entity – such as the Cooperative Act or the company law rules of the Civil Code – defines the legal framework, so there is no need for separate holding structured regulations.[73]

[71] For possible holding regulation solutions, see: M. Kurucz, *A mezőgazdasági üzem, mint jogi egység: a nyilvánkönyvi jószágtest kialakítása különös tekintettel az elővásárlási jogok tömegvételi problémájának kiküszöbölésére*, [in:] *Az európai földszabályozás aktuális kihívásai*, Cs. Csák (ed.), Miskolc 2010, pp. 151–176.

[72] See: M. Kurucz, *Az ún. agrárüzem-szabályozás tárgyának többféle modellje és annak alapjai*, [in:] *Az új magyar földforgalmi szabályozás az uniós jogban*, Á. Korom (ed.), Budapest 2013, pp. 66–70.

[73] This was highlighted by Mihály Kurucz in his presentation titled "The rules of transfer applicable to different types of group of things in the Land Transfer Act and Hungarian legislation in the light of EU law" on 6 May 2014 at the academic conference entitled "The new Hungarian land transfer legislation from the perspective of EU examination", cited by B.E. Kocsis, *The new Hungarian land transfer regulation from the aspect of examination of the European Union*, "Journal of Agricultural and Environmental Law" 2014, Vol. 9, No. 16, pp. 105–106.

Tamás Andréka, contrary to Mihály Kurucz, would prefer a minimalist approach to agricultural holdings, which would be reflected in a tax law-like regulation.[74]

The definition of an agricultural holding can be approached from three points of view. Firstly, we can examine it as a subject of transfer, secondly as a set of assets, and thirdly as a set of rights and obligations.[75] In the course of this research, I examine the holding as the subject of transfer, so I look at it as a group of things,[76] although the legislator's intention in this regard is not entirely clear based on the rules that have been established so far. A group of things is a collection of several separate things which serve a common economic purpose and which are shown as a unit in the transfer. This unit is not a physical unit but a transfer unit. The holding is made up of material components, including immovable property (land, buildings erected for agricultural activity, structures, developed land) and movable property (crops, animals, equipment) as well. But the agricultural holding is not a unitary thing, since it is not naturally created in its final form, but is made up of several separate components into which the holding can be divided.[77, 78]

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[74] B.E. Kocsis, *The new…*, *op. cit.*, p. 127.

[75] M. Kurucz, *A mezőgazdasági ingatlanok agrárjogi szabályozása*, Budapest 2001, p. 229; M. Kurucz, *Agricultural law's subject, concept, axioms and system*, "Journal of Agricultural and Environmental Law" 2007, No. 2, pp. 43–44; M. Kurucz, *Az agrárüzem és földtörvény lehetséges szabályozási modellje és annak jogi környezete*, [in:] *Van megoldás. "Földtörvény – Üzemszabályozás"*, L. Jójárt, M. Kurucz, Budapest 2008, p. 83.

[76] Endre Tanka is also of the opinion that the transfer of ownership of the agricultural holding must be ensured as a group of things. E. Tanka, *Mezőgazdasági üzemtörvény a föld nemzeti önvédelmére*, "Hitel" 2014, Vol. 27, No. 11, p. 124; About the agricultural holding as a group of things, see also: M. Kurucz, *Gondolattöredékek a termőföldforgalom szabályozásának alapkérdéseiről és meghatározottságairól*, [in:] *Gazdaság és Jog. Szakács István ünnepi tanulmánykötet*, J. Steiger (ed.), Budapest 2005, pp. 68–70.

[77] M. Kurucz, *Az agrárüzem és földtörvény lehetséges szabályozási…*, *op. cit.*, pp. 84–86.

[78] Zs. Hornyák, *A mezőgazdasági földek öröklése*, Miskolc 2019, pp. 82–83.

2.4.4. ON THE SPECIAL RULES FOR THE TRANSFER AND SUCCESSION OF THE AGRICULTURAL HOLDING

From the foregoing, it follows that the basic unit of transfer regulation in Hungarian agricultural law is agricultural land, not the holding, so the Family Farms Act and the Farm Transfer Act contain some kind of regulation regarding holdings. The Farm Transfer Act provides a solution to a very special situation that promotes generational change, which rules I will mention in point 5. The Family Farms Act does not specifically regulate the transfer of family farms, as we have read in point 3.2 that the legislator does not treat the family farm as a group of things. Succession of holdings will be discussed in point 4.2, anticipating that sui generis succession rules will not be encountered in the case of agricultural holdings due to the lack of a classical holding regime.

2.5. Special Succession Rules in Relation to Agriculture

The reason why a separate discussion of the rules governing the succession of agricultural land and the rules governing the succession of agricultural holdings is justified is that the classic concept of holding regulation has not yet been developed in Hungary, so in this not very coherent regulatory environment it is justified to separate the presentation of the rules from the point of view of the object of succession. Given that agricultural land is at the centre of the transfer rules in relation to agriculture, I must start with the analysis of the succession rules for land.

2.5.1. ON THE SUCCESSION OF AGRICULTURAL LAND

The regulations regarding the succession of agricultural land have undergone significant changes in Hungary over the past few years. The Land Transfer Act created in 2013 basically excluded from its scope the acquisition of land through intestate succession, thus referring the acquisition of land through intestate succession

to the general succession rules of the Civil Code. In contrast, the scope of the act extends to succession by way of testamentary disposition, and is subject to the ownership acquisition conditions introduced by the Act, which prefer the keeping of the land together as a unit and the acquisition by a person with expertise, but the Land Transfer Act treats the testamentary disposition as a special title, and compared to the general ownership acquisition conditions determines deviations for the acquisition of ownership on this title.

The first anomaly in the Hungarian regulation is that, in the case of succession of land, it treats the acquisition of land by the two titles separately, as the provisions of the Land Transfer Act do not apply in the case of intestate succession, but do apply in the case of succession by testamentary disposition. However, among the general provisions of the Land Transfer Act, which apply to the acquisition of land ownership, the following must be applied in the case of land succession through testamentary disposition: the named heir must be a citizen of Hungary or a citizen of another Member State of the European Union corresponding to the category of farmer; it is necessary to make the statements required by the Land Transfer Act as conditions for acquiring land ownership; the rule of land acquisition limit applies; the approval of the agricultural administrative body is necessary for the acquisition of ownership, but here we already encounter deviations compared to the general rules of the Land Transfer Act, namely the agricultural administration body shall consider the eligibility of the heir and as to whether testamentary disposition is predisposed to breach or circumvent restrictions on land acquisitions.[79] Of course, the rules on the preemption right do not apply, and the opinion of the local land commission is not required either.[80] Another special provision contained in the Land Transfer Act for the case of land succession by way of testamentary disposition is that, if the agricultural administration body refuses to approve the acquisition of title by the heir, and the land in question is transferred under State ownership and assigned to the National Land Fund, the heir shall be entitled to

[79] Land Transfer Act, Art. 34(3).
[80] Land Transfer Act, Art. 34(2).

compensation. The amount of compensation shall cover the value established by the appraisal of the property, minus the estate debt falling upon the State, as the heir. The person exercising ownership rights shall provide for having the appraisal prepared and for the payment of compensation within sixty days date of registration of ownership rights exercised by the body delegated to manage the National Land Reserves. This can only happen if the acquisition of ownership by the State did not occur because the legal heir disclaimed the inheritance.[81]

Based on all of this, if the agricultural administrative body does not give its approval, the named heir will not acquire the ownership of the land. Here the question of freedom of testamentary disposition arises, since it depends on the authority's decision whether the testator's last will can be enforced. The Land Transfer Act was enacted in 2013, so all stakeholders have had time to familiarise themselves with its provisions, and these specific provisions reinforce the legislative intention that "the land should belong to those who can cultivate it". But in my view, the two principles, and therefore the intention behind them, could be brought closer together if a provision were introduced which would give the named heir the opportunity to fulfil the conditions set out in the Land Transfer Act within a predetermined period of time, thereby giving him the opportunity to inherit the land. I consider this option to be justified specifically in the case of a will, since in this case the heir may not necessarily have information that the testator intends to grant him land in the event of his death. In the case of a bilateral testamentary disposition, however, the named heir is already well aware of this when it is concluded.

The situation that there are special rules for the succession of land by testamentary disposition, while the general rules of succession are applied in the case of intestate succession, has changed somewhat since 1 January 2023. The special provisions of the Act on the Liquidation of Undivided Common Ownership of Land[82] for the intestate succession of land in the case that several people jointly inherit

[81] Land Transfer Act, Art. 34(4) and (5).

[82] These provisions were incorporated into the act later.

the land are effective from that date.[83] The main purpose of these new rules is to prevent the creation of undivided co-ownership of land in the future, but they do not address the question of whether a person with a background in agriculture should necessarily own the land. In fact, it basically names separately the case when the ownership interest in the land is the object of intestate succession, and the rules in this case apply to ensure that undivided co-ownership does not arise on this ownership interest, but it does not strive to ensure that on the entire land area the existing undivided co-ownership should be terminated, although the object of the succession may be only a certain ownership interest of the land, given that the testator owned that much.

According to the provisions of the act, if, under the rules of intestate succession, several heirs jointly inherit the agricultural land – including a legal heir too, who is entitled only to a compulsory share but who receives his compulsory share from the land in kind – the heirs may choose one of four options to avoid the creation of undivided co-ownership of the land: (a) they may enter into an allocation agreement, or (b) the land is transferred by the heir or heirs to another person interested in the succession, to the defaulting heir, or to the creditor of the estate, in such a way that co-ownership does not arise, or (c) the heirs sell the land as a unit, or (d) the heirs offer the land free of charge for the benefit of the State.

If the previous rules do not lead to results, the co-heirs will inherit the ownership interest in the land – including a legal heir too, who is entitled only to a compulsory share but who receives his compulsory share from the land in kind – according to the rules of intestate succession,[84] provided that within five years[85] a) they must sell it

[83] Co-ownership Land Act Art. 18/A, Art. 18/B; See about it: T. Kiss, *A termőföld öröklésének új szabályai*, "Gazdaság és Jog" 2022, No. 7–8, pp. 39–43.

[84] The legal heir who is only entitled to a compulsory share, but who receives his compulsory share from the land in kind, acquires it with the title of dispensation of compulsory share.

[85] Within five years after the grant of probate of full effect and the ruling declaring the temporary grant of probate fully enforceable and the ruling on the conclusion of the probate proceedings according to Article 89 of the Act XXXVIII of 2010 on Probate Proceedings are declared final and binding.

together, or b) it shall be owned by one of them, or c) they must offer it free of charge for the benefit of the State, or d) they must terminate the undivided co-ownership of the land by initiating the procedure according to subsection 2 (*Termination of undivided co-ownership by division of the land*) or – if the conditions are met – the procedure according to subsection 3 (*Termination of undivided co-ownership by acquisition of ownership of land by a single co-owner*). If the co-heirs do not fulfil these requirements, the land affected by the intestate succession will be compulsorily sold.[86]

By way of analogy, the legal settlement was laid down on the model of the former, in the case if the object of the succession is an ownership interest in undivided co-owned agricultural land, which, according to the rules of intestate succession, is jointly inherited by several co-heirs.[87]

In connection with the two special procedures introduced by the Co-ownership Land Act, i.e., 1) the termination of undivided co-ownership by division of the land[88] and 2) the termination of undivided co-ownership by acquisition of ownership of land by a single co-owner,[89] without undertaking to describe them in detail, from the point of view of the topic, I would like to highlight the relevant rule, because unfortunately, the settlement of undivided co-ownership results in the fragmentation of land, but in order to create areas of a suitable size for operational farming,[90] the act also defines territorial minimum for the agricultural lands that will be created in this way. According to this, the land created as a result of the termination of the undivided co-ownership – not including the road used to access the land – may not be less than 3,000 m² in the case of vineyards, gardens, orchards, and reeds, or less than

[86] Co-ownership Land Act, Art. 18/A.

[87] Co-ownership Land Act, Art. 18/B.

[88] See: A. Szinay, *Az osztatlan közös földtulajdon megszüntetésének új szabályairól*, "Gazdaság és Jog" 2022, No. 7–8, pp. 29–34.

[89] See: A. Szinay, *Az osztatlan…*, *op. cit*., pp. 34–36.

[90] T. Andréka, *A földeken fennálló osztatlan közös tulajdon felszámolására vonatkozó új szabályok*, "Agro napló" 2020, No. 10, pp. 6–11, https://www.agronaplo.hu/szakfolyoirat/2020/10/aktualis/a-foldeken-fennallo-osztatlan-kozos-tulajdon-felszamolasara-vonatkozo-uj-szabalyok (accessed on: 07.07.2023).

10,000 m² in the case of cropland, meadows, pastures, forests, and wooded areas, and in the case of any parcel of land shown in the real estate register as non-agricultural land noted under the legal concept of land registered in the *Országos Erdőállomány Adattár* (National Register of Forests) as forest. In the case of land in mixed cultivation, the rate for the cultivation with the lower minimum area shall apply. If the object of the division procedure is a land classified as closed garden, the land created as a result of the termination of undivided co-ownership cannot be less than 1,000 m².[91] If at least two agricultural plots corresponding to the territorial minimum cannot be created from the land, there is no room for division, but the land can be owned by a single co-owner. In such a case, any owner of the land can initiate the annexation of the ownership interest of the other co-owners.[92]

Therefore, the provisions introduced by the act to regulate the intestate succession of agricultural land apply to the case when several co-heirs jointly inherit the land, but do not contain a provision regarding intestate succession of one heir. Although this is because in such a case there would be no undivided co-ownership and therefore no risk of fragmentation of the land, but the principles and purposes linked to agriculture and favouring the acquisition of ownership by a person with expertise would not be respected.

Undoubtedly, the real problem is the joint succession of several co-heirs, to which the new regulation of the Co-ownership Land Act tries to offer a solution. I would definitely like to highlight one of the solution options outlined above, when avoiding the creation of undivided co-ownership is achieved by the co-heirs selling the land together, since this is the case when – in contrast to the other options – not an in-succession affected person, and not the Hungarian State will acquire the ownership, but a complete "outsider". And the problem appears in this regard is that the Co-ownership Land Act defines certain facilitations in the process of ownership acquisition

[91] Co-ownership Land Act, Art. 11(1) and (2) and (3).
[92] Co-ownership Land Act, Art. 16(1) and (2).

under the title[93] Common Rules of Ownership Acquisition,[94] which means that certain provisions of the Land Transfer Act do not apply to the acquisition of land ownership based on the Co-ownership Land Act.[95] However, if the provisions of this title are really to be applied to Title 5/A (*Termination of undivided co-ownership in the case of succession*) – which question arose in my mind because of the later incorporation of this Title 5/A into the Co-ownership Land Act – then in the case that the land is sold together by the co-heirs, it is possible to obtain land ownership by bypassing the provisions of the Land Transfer Act, which was presumably not the intention of the legislator when this provision was laid down. As much as it is necessary to avoid the development of undivided co-ownership, I think that the introduction of this type of facilitation for this case is contrary to the aims of creating the land transfer regulation.

It can be seen from the above reasoning that it is very difficult to properly settle this issue, as it has to comply with fundamental legal principles, EU and national standards, and management considerations. For this reason, general proposals can be formulated, but the detailed rules must be adapted to the national, i.e., in the case of the present research, to the Hungarian and Polish legal contexts.

[93] Co-ownership Land Act, Title 4.

[94] For additional issues related to this, see: M. Nagy, *Tanulmány a termőföldeken fennálló osztatlan közös tulajdon felszámolásának új lehetőségéről*, "Miskolci Jogtudó" 2022, No. 1, pp. 112–113.

[95] The Land Transfer Act's 1 hectare land acquisition limit rule for non-agricultural citizens of a Member State, as well as the rules on obligatory statements and the land acquisition limit and land possession limit, do not have to be applied, and the pre-emption right based on neither act nor contract can be exercised, no approval of the agricultural administration body is required for the acquisition of land, and the title of acquiring land ownership based on the Co-ownership Land Act is in all cases termination of co-ownership. Co-ownership Land Act, Art. 17(2) and (3) and (4) and (4a).

2.5.2. ON THE SUCCESSION OF AGRICULTURAL HOLDINGS

Given the fact that there is basically no holding regulation in the classical sense in Hungary, and that none of the acts regulating the field so far – the Family Farms Act and the Farm Transfer Act – contain provisions on the acquisition of ownership of the holding in the case of death, for now we cannot talk about special succession rules for agricultural holdings. I should mention here the provision of the Civil Code on the succession law which contains a rule on the disclaimer of inheritance specifically relating to agricultural holdings, according to which the heir shall be entitled to separately disclaim inheritance of a farmland and/or its equipment, accessories, livestock, and tools and implements, if he is not engaged in agricultural production by profession.[96]

In addition, there is no legal provision that would keep the agricultural holding together in the case of succession, so we only encounter special succession rules in relation to the main constituent element of the holding, i.e., the agricultural land, which is separated from the other elements of the holding during the succession, and we have seen previously that the inheritance rules for agricultural land were created in a non-coherent manner.

It is a thought-provoking suggestion,[97] that it would be worthwhile to develop a complete holding regulation for the transfer of the agricultural holding in Hungary first, if the legislator also aims to develop a complete holding regulation, and within this to settle the issues related to the succession of the holding, and to fit the rules on the transfer and succession of one of the elements of the holding, which is the land, into this system.

2.6. Special Rules for the Transfer of Holding Inter Vivos

On 1 January 2023, the act came into force, which is intended to facilitate the generational change, specifically to facilitate the transfer of holding between living persons, from the older farming generation

[96] Civil Code, Art. 7:89(2).

[97] M. Kurucz, *Az ún. agrárüzem-szabályozás tárgyának többféle …*, *op. cit.*, p. 75.

to the younger one. The purpose of the creation of Act CXLIII of 2021 on the Transfer of Agricultural Holding[98] is to facilitate the transfer of the holding, as an individual set of assets created during agricultural and forestry activities with the participation of family members, the joint use of their resources and the results of their work for their common well-being, to the next generation in a way that ensures the efficiency and viability of the holding. Earlier, in point 3.2, I explained what this act means by holding, and in its preamble it refers to the holding as an individual set of assets.

At the same time, it should be pointed out that the provisions of this act refer to a very special case and do not cover all transfer situations, the subject of which is an agricultural holding. The basic aim is to facilitate the transfer of ownership of the holding within the family through regulation.

The main aim in drafting the concept of the Act was to lighten the administrative burden, and the basic premise is that the majority of farmers in Hungary are small and medium-sized primary agricultural producers and sole proprietors, who either work individually or as part of a family farm of primary agricultural producers.[99]

Thus, within the framework of the act, the farm transfer contract was introduced as a new legal institution, of which four types are distinguished by the act: the farm transfer sale contract,[100] the farm transfer gift contract,[101] the farm transfer maintenance contract[102] and the farm transfer life-annuity contract.[103]

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[98] See: Á.L. Nagy, *Generációváltás a magyar agráriumban: új törvény az agrárgazdaságok átadásáról*, available at: https://jogaszegylet.hu/jogelet/generaciovaltas-a-magyar-agrariumban-uj-torveny-az-agrargazdasagok-atadasarol/ (accessed on: 07.07.2023); I. Olajos, *A gazdaságátadási szerződés, mint a generációváltást megalapozó szerződéstípus*, "Advocat" 2022, No. 2, pp. 29–36; I. Olajos, *Át kell-e alakítani a mezőgazdasági cégeket? Avagy a családi gazdaságokra vonatkozó jogalkotás hatása a mezőgazdasági termelőszervezetekre*, "Miskolci Jogi Szemle" 2022, Vol. 17, No. 4, pp. 56–75, https://doi.org/10.32980/MJSz.2022.4.2114 (accessed on: 07.07.2023).

[99] T. Andréka, *Üzemi rendszer*…, *op. cit.*, Slide 85.

[100] Farm Transfer Act, Art. 3(2), point a).

[101] Farm Transfer Act, Art. 3(2), point b).

[102] Farm Transfer Act, Art. 3(2), point c).

[103] Farm Transfer Act, Art. 3(2), point d).

A more detailed analysis of this new legal institution will be presented in a study on generational change and the situation of young farmers in land transfer, also in the framework of the Polish-Hungarian Research Platform 2023.

2.7. Good Practices

I can classify the Hungarian good practices that I would like to highlight into four groups. 1. information about the changes affecting agriculture by the bodies affected by the legislative amendments; 2. The "Land for Farmers!" programme; 3. designation of model farms; 4. practices arising during the application of law.

In terms of information, I can highlight the activities of the National Chamber of Agriculture, under whose auspices an information brochure on the Family Farms Act[104] was published in 2020 and a brochure on the liquidation of undivided common ownership of land published in 2021.[105] They also aim to publish all relevant up-to-date information for farmers on their website.[106]

It is worth mentioning the Act CVI of 2016 on the "Land for Farmers!" programme, according to which:

> Parliament, recognising the work done by Hungarian farmers to cultivate the agricultural lands owned by them, agrees that the land should belong to the person who cultivates it, i.e., the land is owned in the best place by the local farmers who cultivate it. Our goal is to keep Hungarian land in Hungarian hands, which is why with the "Land for Farmers!" programme, the Hungarian State provided an opportunity for Hungarian farmers to purchase land previously owned by the State but not cultivated by

[104] I. Cseszlai (ed.), *Családi gazdaságok reformja. Tájékoztató kiadvány a családi gazdaságokról szóló törvényről*, Budapest 2020.

[105] https://miniapp.nak.hu/lapozhato/foldugy/kiadvany-osztatlan-kozos-2021/ (accessed on: 07.07.2023).

[106] https://www.nak.hu/nyitolap (accessed on: 07.07.2023).

> the State at a fair market price. The "Land for Farmers!" programme enabled nearly 30,000 Hungarian farmers to acquire land. Never before has there been such a programme that has supported farmers and the Hungarian countryside to such an extent. This promotes the recovery of the Hungarian countryside and strengthens the agricultural economic positions of the small and medium-sized landlord stratum, and greatly contributes to the goal of changing the rate of small and large estates from 50:50 to 80:20. The Parliament, praising the "Land for Farmers!" programme, in order to maintain responsible state land asset management, the following Act shall be enacted:
>
> § (1) The Parliament approves the sale of State-owned lands within the framework of the "Land for Farmers" programme.
>
> § (2) Within the framework of the "Land for Farmers!" programme, the auction procedures for State-owned arable lands will be closed.

As a continuation of this programme, the National Land Management Centre is now selling parcels of land over 10 hectares owned by the Hungarian State and belonging to the assets of the National Land Fund in a public auction.[107]

Based on the compliance with the conditions set out in Article 15/A of Act LXXXVII of 2010 on the National Land Fund, the Government designated five agricultural producer organizations as model farms in its Decision 1281/2023 of 17 July 2023. Under the National Land Fund Act:

> "model farm" means a farmer or an agricultural producer organisation designated by decision of the Government on a recommendation by the Minister, committed to improve the output of the Hungarian agricultural sector by means

[107] Prospectus of National Land Management Centre 2023, https://www.kormanyhivatal.hu/download/f/fd/b8000/NFK_T%C3%81J%C3%89KOZTAT%C3%93_2023.pdf (accessed on: 07.07.2023).

> of more efficient use of available resources, strengthening the level of integration, producing higher value-added products, technological development and conservation, use of genetic resources at the highest possible level, cultivating State-owned and other land, designed to realise the full potential of existing reserves for growth, and that is in compliance with the requirements set out in Subsections (2), (2a) or (3).[108]

During the application of the provisions of the acts, situations arise for which experts come up with suggestions to facilitate and put the affected parties in a more favourable situation. One of these practices, which is recommended by Tibor András Cseh, the Secretary General of the Association of Hungarian Farmers' Cooperatives, in the case that there is a joint succession by several heirs through intestate succession, is the following. Because in such a case, if the co-heirs do not settle the situation of the land within one year from the start of the succession procedure according to one of the options outlined in the Co-ownership Land Act, they will lose the tax exemption due to close relatives and the surviving spouse, so as a general rule they are obliged to pay a tax of 9 percent after the value of the land – even though the act stipulates a five-year settlement obligation. Thus, in his opinion, it is worth paying attention to this and resolving the situation within 1 year.[109]

2.8. Conclusions and *De Lege Ferenda* Proposals

On the basis of this research, I have formulated *de lege ferenda* proposals in two areas, which may be worth considering with regard to both Hungarian and Polish regulations. What makes it easy to make these proposals for both countries is that the Hungarian and Polish

[108] Act LXXXVII of 2010 on the National Land Fund, Art. 15/A(1).

[109] T.A. Cseh, *Illetékmentesen földet szerezni? Ezek a szabályai,* available at: https://agrokep.vg.hu/kozelet/illetekmentesen-foldet-szerezni-ezek-a-szabalyai-27735/ (accessed on: 07.07.2023).

regulations regarding to agricultural land are extremely similar. It can be said that the regulations of the two countries are the strictest in Central Europe.[110,111]

The first topic is the issue of agricultural holding regulation. In my opinion, it is difficult to define in Hungary, on the basis of the acts created so far, how the legislator views the agricultural holding and, in this context, the family farm. We encounter differences in the wording of the acts and their justification, as well as in the scientific

[110] For the regulation of some Central European countries, see: L. Palsova, A. Bandrelova, Z. Ilková, *Succession and Transfer of Agricultural Land Holding: Evidence from Slovakia*, "Journal of Agricultural and Environmental Law" 2022, Vol. 17, No. 33, pp. 130–140, https://doi.org/10.21029/JAEL.2022.33.130 (accessed on: 07.07.2023); P.A. Blajer, *The constitutional aspect of regulations limiting agricultural land transactions in Poland*, "Journal of Agricultural and Environmental Law" 2022, Vol. 17, No. 32, pp. 7–26, https://doi.org/10.21029/JAEL.2022.32.7 (accessed on: 07.07.2023); F. Staničić, *Land Consolidation in Croatia, Problems and Perspectives*, "Journal of Agricultural and Environmental Law" 2022, Vol. 17, No. 32, pp. 112–125, https://doi.org/10.21029/JAEL.2022.32.112 (accessed on: 07.07.2023); H. Szinek Csütörtöki, *The current legislation on land protection in Slovakia with particular regard to the decision of the Slovak Constitutional Court on unconstitutional provisions of the Act on land acquisition,* "Journal of Agricultural and Environmental Law" 2022, Vol. 17, No. 32, pp. 126–143, https://doi.org/10.21029/JAEL.2022.32.126 (accessed on: 07.07.2023); F. Avsec, *Legal Framework of Agricultural Land/Holding Succession and Acquisition in Slovenia*, "Journal of Agricultural and Environmental Law" 2021, Vol. 16, No. 30, pp. 24–39, https://doi.org/10.21029/JAEL.2021.30.24 (accessed on: 07.07.2023); A. Dudás, *Legal Frame of Agricultural Land Succession and Acquisition by Legal Persons in Serbia*, "Journal of Agricultural and Environmental Law" 2021, Vol. 16, No. 30, pp. 59–73, https://doi.org/10.21029/JAEL.2021.30.59 (accessed on: 07.07.2023); T. Josipović, *Acquisition of Agricultural Land by Foreigners and Family Agricultural Holdings in Croatia, Recent Developments*, "Journal of Agricultural and Environmental Law" 2021, Vol. 16, No. 30, pp. 100–122, https://doi.org/10.21029/JAEL.2021.30.100 (accessed on: 07.07.2023); S. Buletsa, *Features of circulation of agricultural lands in Ukraine for legal entities*, "Journal of Agricultural and Environmental Law" 2020, Vol. 15, No. 29, pp. 23–50, https://doi.org/10.21029/JAEL.2020.29.23 (accessed on: 07.07.2023); M. Georgiev, D. Grozdanova, *Acquisition and inheritance of agricultural land in Bulgaria – from fragmentation towards consolidation,* "Journal of Agricultural and Environmental Law" 2020, Vol. 15, No. 29, pp. 66–84, https://doi.org/10.21029/JAEL.2020.29.66 (accessed on: 07.07.2023).

[111] The basis for this conclusion was a comprehensive Central European research: J.E. Szilágyi, H. Szinek Csütörtöki, *Conclusions…*, *op. cit.*, pp. 335–374.

literature so far, regarding the definition. This category is sometimes referred to as a management structure, sometimes as a production community, sometimes as a form of production, sometimes as a form of operation, sometimes as a specific set of assets. First of all, the unification of concepts would be welcome in both Hungarian and Polish regulations, as the concept of agricultural holding appears in several pieces of legislation in both countries, defined differently, and the name of the category itself is not uniform in the individual national pieces of legislation. I have previously presented the concepts appearing in the Hungarian regulation, in the Polish regulation – without explaining the detailed rules – the main categories are as follows: agricultural real estate, agricultural holding, family agricultural holding, agricultural farm, family farm.[112] In my opinion, it would be worthwhile to develop one concept of agricultural land and one of agricultural holding, which could then have a special type, such as the family farm, but in order to create coherent regulation, I propose that the concepts be clarified and standardised. And then it would be possible to move in the direction of the establishment of a unified holding regulation, because on the basis of the present research I think that we cannot yet talk about a unified, complex holding regulation in Hungary, but rather about the beginnings of it. In my opinion, the provisions found in the various pieces of legislation should be harmonised so that we look at the holding in the same way and the regulation is developed in a complex manner along these lines, which would also harmonise our land transfer regulation. On this basis, and agreeing with Mihály Kurucz's proposal,[113] I recommend that a full holding regime for holding transfer should be developed first, including the issues of succession of holding, and to fit the rules on the transfer and succession of one of the elements of the holding, which is the land, into this system. And this idea leads to the other area where I would like to make a proposal, and

[112] M. Strzała, *Legal issues of transfer of agricultural land and holding in Poland,* [in:] *Main pillars of the legal protection of farmers: systematization, holding-structure and commercial issues* (under publication); J.E. Szilágyi, H. Szinek Csütörtöki, *Conclusions…*, *op. cit.*, pp. 349–350.

[113] M. Kurucz, *Az ún. agrárüzem-szabályozás tárgyának többféle…*, *op. cit.*, p. 75.

that is the regulation of agricultural succession, where in my opinion, both countries should make some changes to the current legal arrangements.

In Polish regulation, until 2001, a complex special succession law regulation was in force in relation to agricultural holdings, but at present there is no coherent sui generis regulation of this kind,[114] only a few special provisions.[115] As explained in point 4, it is very difficult to properly settle this issue, as it has to comply with fundamental legal principles, EU and national standards, and management considerations. For this reason, general proposals can be formulated, but the detailed rules must be adapted to the national, i.e., in the case of the present research, to Hungarian and Polish legal context. My general proposals are as follows: in the case of regulation of succession of agricultural holding and, as part of it, of agricultural land, a complex system should be established where the rules of testamentary disposition and intestate succession are formulated along the same principles. The sui generis succession rules for both the holding and the land should be laid down in such a way as to avoid fragmentation of the holding/land in the succession, and to take into account the succession of a person with competence, special skills and experience in agricultural production that will enable proper management.

With regard to Hungarian regulation, I would like to highlight my suggestion that it would be worthwhile to clarify the provisions of the Co-ownership Land Act regarding intestate succession. I propose to insert a clause in the Common rules of ownership acquisition under which the provisions of the Land Transfer Act

[114] A. Kubaj, *Legal frame for the succession/transfer of agricultural property between the generations and the acquisition of agricultural property by legal persons – in Poland*, "Journal of Agricultural and Environmental Law" 2020, Vol. 15, No. 29, p. 123, https://doi.org/10.21029/JAEL.2020.29.118 (accessed on: 07.07.2023).

[115] P. Ledwoń, *Poland: An Attempt at a Balance Between the Protection of Family Holding and the Freedoms of the European Union*, [in:] *Acquisition of Agricultural Lands: Cross-border Issues from a Central European Perspective. Legal Studies on Central Europe*, J.E. Szilágyi (ed.), Miskolc–Budapest 2022, pp. 204–205, http://doi.org/10.54171/2022.jesz.aoalcbicec_8 (accessed on: 07.07.2023).

would apply exceptionally only in the case that the co-heirs sell the agricultural land together, in order to comply with the objectives of property policy.

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Chapter 3. Legal Issues of Transfer of Agricultural Land and Holding in Poland

3.1. Introduction

On 30 April 2016, the rules for acquiring agricultural lands in Poland changed significantly. Since then, the general rule is that only an individual farmer can acquire agricultural land.

The exemptions from that rule are listed in the provisions of the regulation from 2003 (amended accordingly in 2016). Further changes were brought by the amendment in 2019. The aim of this work is to present Polish regulation on the transfer of agricultural land and agricultural holding in Poland, as well as describe some legal issues in this field with proposals *de lege ferenda*. The first part is dedicated to introductory issues such as presenting the relevant constitutional background, describing development of the regulations and bringing attention to terminology differences. The second part deals with possibilities of acquiring agricultural land by legal entities, especially by presenting a typology of situations in which such acquisition can occur and describing the relevant provisions of law. In two following parts, acquisition of agricultural holding (agricultural holding is different from agricultural land – see terminology remarks) and special rules concerning inheritance are presented accordingly. There is also a paragraph answering the question about the existence of special regulation in the field

of transfer of agricultural holding inter vivos. Finally, the last two parts includes good practices and *de lege ferenda* proposals.

3.2. The Family Farm as the Preferred Model of Structure of Ownership of Agricultural Land in Poland. Development of the Regulation in the Field of Transfer of Agricultural Land in Poland. Terminology Remarks

Among the models of structure of ownership of agricultural land, the Constitution of the Republic of Poland of 2 April 1997[1] (hereafter referred to as Constitution RP) prefers the family farm. According to Art. 23 of the Constitution RP, explicitly the basis of the agricultural system of the State shall be the family farm. The same article states that this principle shall not infringe the provisions of Art. 21 of the Constitution RP (the protection of ownership and the right of succession), as well as provisions of Art. 22 of the Constitution RP (the freedom of economic activity). It means that Art. 23 of the Constitution RP can provide legal grounds for a special legal regulation, however, lawmakers should take into consideration the above-mentioned values, and balance them.[2]

The principle derived from Art. 23 of the Constitution RP is implemented, inter alia, through special regulations concerning the transfer of agricultural holdings,[3] some of which have already been the subject of the judgements of Polish Constitutional Tribunal and have been found compliant with the principle of property

[1] Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz. U. z 1997 r. Nr 78, poz. 483, z późn. zm.). See the English translation: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (accessed on: 16.05.2023).

[2] See: P. Tuleja, [in:] P. Czarny, M. Florczak-Wątor, B. Naleziński, P. Radziewicz, P. Tuleja, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2019, pp. 95–96. Regarding to Art. 23 of the Constitution RP see further: K. Complak, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, M. Haczkowska (red.), Warszawa 2014, p. 38.

[3] P. Tuleja, [in:] P. Czarny, M. Florczak-Wątor, B. Naleziński, P. Radziewicz, P. Tuleja, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2019, pp. 95–96.

protection.[4] Due to significance of agriculture land, there are in Poland special regulations about its transfer, as well as its inheritance and the abolition of its joint ownership. Is noted that those regulations serve the protection of agricultural property and its proper management.[5] It is worth mentioning that the special nature of agricultural land (as non-transferable and non-multiplicable), is pointed out also in international documents (e.g., EU[6] and UN[7]) and in the literature, in which excessive land concentration (including in particular so-called "land grabbing") is sometimes explicitly treated as a negative phenomenon.[8]

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[4] See: wyrok TK z dnia 18 marca 2010 r. sygn. akt K 8/08, OTK-A 2010, nr 3, poz. 23. In another case Polish Constitutional Tribunal stated that EU law is not incompatible with art. 23 of the Constitution RP – see wyrok TK z dnia 11 maja 2005 r. sygn. akt K 18/04, OTK-A 2005, nr 5, poz. 49.

[5] See: M. Korzycka, *Cechy szczególne ochrony własności rolniczej*, [in:] *Instytucje prawa rolnego*, M. Korzycka (red.), Warszawa 2019, pp. 54–55.

[6] See: Komunikat wyjaśniający Komisji w sprawie nabywania gruntów rolnych i prawa Unii Europejskiej (Dz. U. UE C z 2017 r. Nr 350, p. 5); Rezolucja Parlamentu Europejskiego z dnia 27 kwietnia 2017 r. w sprawie aktualnego stanu koncentracji gruntów rolnych w UE: jak ułatwić rolnikom dostęp do gruntów? (2016/2141(INI)) (Dz. U. UE C z 2018 r. Nr 298, p. 112); Opinia Europejskiego Komitetu Ekonomiczno-Społecznego w sprawie: „Masowy wykup gruntów rolnych – dzwonek alarmowy dla Europy i zagrożenie dla rolnictwa rodzinnego" (opinia z inicjatywy własnej) (Dz. U. UE C z 2015 r. Nr 242, p. 15). See also: J.E. Szilágyi, *Agricultural Land Law – Soft Law in Soft Law*, [in:] *Hungarian Yearbook of International Law and European Law 2018*, M. Szabó, P. Láncos, R. Varga (eds.), pp. 196–201, https://doi.org/10.5553/hyiel/266627012018006001011 (accessed on: 18.05.2023).

[7] See: The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, https://www.fao.org/3/i2801e/i2801e.pdf (accessed on: 18.05.2023). See also: Szilágyi J.E., *Agricultural Land…*, pp. 204–210.

[8] See: H. Ciepła, *Aspekty prawne obrotu gruntami rolnymi od 30.04.2016 r. na nowych zasadach ustalonych w ustawie z dnia 11.04.2003 r. o kształtowaniu ustroju rolnego oraz w ustawie z dnia 14.04.2016 r. o wstrzymaniu sprzedaży nieruchomości Zasobu Własności Rolnej Skarbu Państwa*, "Rejent" 2016, nr 9, pp. 33–34; M. Pyziak-Szafnicka, *Zasadnicze problemy…*, p. 16; P. Wojciechowski, *Pojęcie…*, pp. 146–148. See also: P. Litwiniuk, *O potrzebie nowych regulacji kształtujących ustrój rolny w świetle współczesnych wyzwań oraz doświadczeń zagranicznych*, [in:] *Prawne mechanizmy wspierania i ochrony rolnictwa rodzinnego w Polsce i innych państwach Unii Europejskiej*, P. Litwiniuk (red.), Warszawa 2015, pp. 107 and 113.

Historically, according to the Law of 24 March 1920,[9] that (amended) is still in force today, acquiring real estate in Poland by foreigners or foreign legal entities required permission from state authorities (Art. 1 para. 1). Other restrictions (concerning not only foreign individuals or entities) on the acquisition of agricultural real estate were previously included also in the Polish Civil Code of 1964 (k.c.).[10] According to them, ownership of an agricultural real estate (agricultural land) or its parts could have been transferred to an individual only if the purchaser continuously had worked on any agricultural holding (and had been involved directly in agricultural production) or had had the qualification to run an agricultural holding (Art. 160 para. 1 k.c.). With regard to legal entities, the Civil Code stipulated that they could acquire ownership of agricultural real estate (agricultural land) or its parts only with the permission of the competent state authority (Art. 160 para. 2 k.c.). However, Art. 160 para. 3 k.c. provided for exceptions to the above rule in favour of the State, of agricultural production cooperatives, local groups of farmers and other agricultural (cooperative or social) organisational units. All above mentioned restrictions were abolished in 1990, due to the amendment to the k.c.[11] The justification of the draft that abolished those restrictions, proposed by the Council of Ministers, only briefly stated that one of draft's aims was the "abolition of objective and subjective restrictions in the field of [agricultural – annotation M.S.] real estate trading" (page 13, point 5).[12] The result of the amendment was the most

[9] See: Ustawa z dnia 24 marca 1920 r. o nabywaniu nieruchomości przez cudzoziemców (Dz. U. z 1920 r. Nr 31, poz. 178).

[10] Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny (Dz. U. z 1964 r. Nr 16, poz. 93 z późn. zm.).

[11] Ustawa z dnia 28 lipca 1990 r. o zmianie ustawy – Kodeks cywilny (Dz. U. z 1990 r. Nr 55, poz. 321). Cf. Z. Truszkiewicz, *Dziedziczenie…*, *op. cit.*, p. 322.

[12] See: Druk sejmowy nr 288 Sejmu X kadencji: Rządowy projekt ustawy o zmianie ustawy – Kodeks cywilny, available on-line: https://bs.sejm.gov.pl/exlibris/aleph/a22@1/apache_media/T8E6FGN2GX4GD82QL4L1XLVGPL6DNF.pdf (accessed on: 05.05.2023). It was noted that the aim of this regulation was to concentrate agricultural land in bigger and thus more efficient agricultural holdings – see: P. Litwiniuk, O *potrzebie…*, *op. cit.*, p. 103.

liberal approach to acquisition of agricultural land in the recent history of Poland, in which generally any owner of agricultural land could sell it to any purchaser.[13]

Even before Poland's accession to the EU on the 1 May 2004, certain restrictions were placed on the acquisition of agricultural real estate under the Law of 11 April 2003 (u.k.u.r.),[14] irrespective of the nationality of the acquirer. The law introduced in the case of a sale of an agricultural real estate (agricultural land) pre-emption right (under certain conditions) in favour of a lessee. When there was no one entitled to this pre-emption right or its holder was not exercising it, pre-emption right was granted to the State Treasury. In the case of a transfer of ownership under a contract other than a sale, the State Treasury had the right to acquire the agricultural property, paying its equivalent. The objectives of this law according to Art. 1 para. 1–3 was "improving the area structure of farms; counteracting excessive concentration of agricultural real estate; ensuring that agricultural activities are conducted on farms by persons with appropriate qualifications".[15]

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[13] M. Budzikowski, *Ograniczenia uprawnień właściciela nieruchomości rolnej w prawie administracyjnym*, [in:] *Z zagadnień systemu prawa: księga Jubileuszowa Profesora Pawła Czechowskiego*, A. Niewiadomski, K. Marciniuk, P. Litwiniuk (red.), Warszawa 2021, p. 195. About the opinions about regulations at that time – see S. Prutis, *Rolnicy indywidualni*, [in:] P. Czechowski, M. Korzycka-Iwanow, S. Prutis, A. Stelmachowski, *Polskie prawo rolne na tle ustawodawstwa Unii Europejskiej*, Warszawa 1999, pp. 98–99.

[14] Ustawa z dnia 11 kwietnia 2003 r. o kształtowaniu ustroju rolnego (Dz. U. z 2003 r. Nr 64, poz. 592).

[15] This law was the result of a joint legislative procedure of three different drafts with different content: drafts of 6 March 2002, 2 July 2002 and 28 November 2002. See: Druk sejmowy nr 401 Sejmu IV kadencji: Poselski projekt ustawy o obrocie ziemią rolną, available on-line: https://orka.sejm.gov.pl/Druki4ka.nsf/wgdruku/401/$file/401.pdf (accessed on: 05.05.2023); Druk sejmowy nr 697 Sejmu IV kadencji: Poselski projekt ustawy o obrocie nieruchomościami rolnymi i dzierżawie rolniczej oraz o zmianie niektórych ustaw, available on-line: https://orka.sejm.gov.pl/Druki4ka.nsf/o/E8F2CC4AF17A456AC1256BF9003CF540/$file/697.pdf (accessed on: 05.05.2023); Druk sejmowy nr 1128 Sejmu IV kadencji: Rządowy projekt ustawy o kształtowaniu ustroju rolnego państwa oraz o zmianie niektórych ustaw, available on-line: https://orka.sejm.gov.pl/Druki4ka.nsf/wgdruku/1128/$file/1128.PDF (accessed on: 05.05.2023). The justification of the first draft explicitly mentioned the need to provide protection against

Because of the accession to the EU, provisions of the Law of 24 March 1920 had to be modified because of the rule of free movement of capital. The amendment introduced by the Law of 20 February 2004[16] took effect on 1 May 2004 (date of accession of Poland to the EU). According to the new provisions (Art. 8 para. 2 point 1 of the Law of 24 March 1920), no permission was required for foreigners who were citizens or entrepreneurs of Member States of the European Economic Area (EEA) or the Swiss Confederation, except for the acquisition of agricultural and forestry real estates, for a period of 12 years from the date of accession of the Republic of Poland to the EU.[17] In other words, foreigners from the EEA or

speculative buying of agricultural land, including by foreigners in connection with the planned accession to the EU. The objectives included in the justification of the second draft were the same as those listed in Art. 1 paras. 1–3 u.k.u.r. This draft contained, among other provisions, the general rule that the purchaser of agricultural real estate could be only a natural person who (among other conditions) had the appropriate agricultural qualifications and at the same time made a declaration of personally running an agricultural farm on the acquired real estate for at least 10 years (legal persons could generally acquire such real estate if their primary object of their activity was agricultural activity; in other cases they could buy agricultural land only with the permission of an administrative body). Similar solutions were included in the third draft, which in its justification also referred to the same goals as those listed in Art. 1–3 u.k.u.r. This draft also indicated a desire to counter both the fragmentation of agricultural holdings, as well as the excessive concentration of ownership of agricultural land within a small group of owners. It is worth noting that at the stage of the legislative procedure, all three drafts were evaluated for compliance with EU law (the first and second by the Office of Studies and Expertise of the Chancellery of the lower chamber of Polish parliament; the third by the Committee for European Integration – a body of Polish government), and all were found to be in compliance with EU law. It is considered that this law aimed at counteracting of excessive purchases of agricultural land in Poland by individuals and entities from EU countries – see: M. Budzikowski, *Ograniczenia…*, *op. cit.*, p. 196. Strong feeling of threat to Polish agriculture due to the possibility of acquiring agricultural land by foreigners is still present in some views – see: K. Konopka, *Prawne systemy a rozwój i zagrożenia polskiego rolnictwa (966–2020)*, Białystok 2022, pp. 133 and 170–171.

[16] Ustawa z dnia 20 lutego 2004 r. o zmianie ustawy o nabywaniu nieruchomości przez cudzoziemców oraz ustawy o opłacie skarbowej (Dz. U. z 2004 r. Nr 49, poz. 466).

[17] This was the implementation of the provisions of para. 2 point 4 of the Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic

the Swiss Confederation needed to obtain permission for acquiring agricultural land until 1 May 2016.[18]

The situation changed profoundly on 30 April 2016[19] (i.e., a day before the expiration of the time limit for restrictions on the acquisition of agricultural land by foreigners from EEA and the Swiss Confederation) because of coming into force of the Law of 14 April 2016,[20] which amended the u.k.u.r. and introduced revolutionary changes to it.[21] As far as the aims of this law are concerned, by this amendment added the following preamble to the u.k.u.r.:

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of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union (Official Journal L 236, 23/09/2003 P. 0017 – 0930), available online: http://data.europa.eu/eli/treaty/acc_2003/sign (accessed on: 18.05.2023). Cf. H. Ciepła, *Aspekty…*, *op. cit.*, p. 34; M. Pyziak-Szafnicka, *Zasadnicze problemy…*, *op. cit.*, pp. 15–16.

[18] Foreigners from the EEA and the Swiss Confederation could acquire agricultural real estate, if they personally conducted agricultural activity on the property and legally resided in the territory of the Republic of Poland for 3 or 7 years (depending on the province) on the grounds of lease agreement with a definite date (Art. 8 para. 2a point 1). They could also acquire agricultural real estate (agricultural land) smaller than 1 ha on the grounds of other exceptions (see: Art. 8 para. 1 points 2–4).

[19] There was another Law of 5 August 2015 (Ustawa z dnia 5 sierpnia 2015 r. o kształtowaniu ustroju rolnego, Dz. U. z 2015 r., poz. 1433z późn. zm.), but eventually it did not come into force. For comparison of it provisions with u.k.u.r. – see: J. Pisuliński, *O niektórych osobliwościach obrotu nieruchomościami rolnymi*, "Rejent" 2016, nr 5, pp. 23–49.

[20] Ustawa z dnia 14 kwietnia 2016 r. o wstrzymaniu sprzedaży nieruchomości Zasobu Własności Rolnej Skarbu Państwa oraz o zmianie niektórych ustaw (Dz. U. z 2016 r., poz. 585).

[21] See: Part 3.3.1. Poland was not the only country to introduce special rules on acquiring agricultural land after expiration of the land acquisition derogation period. For example, Hungary introduced a similar in some aspects and very

> In order to strengthen the protection and development of family farms, which under the Constitution of the Republic of Poland are the basis of the agricultural system of the Republic of Poland, to ensure proper management of agricultural land in the Republic of Poland, for the sake of ensuring food security for citizens and to support sustainable agriculture conducted in accordance with the requirements of environment and conducive to the development of rural areas, this law is adopted.

The aims of the amendment can be also deduced from the justification of its draft, which mentions the special meaning of agricultural land and the need to protect against speculative purchase.[22]

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strict regulation in that field – see: J.E. Szilágyi, *Hungary: Strict Agricultural Land and Holding Regulations for Sustainable and Traditional Rural Communities*, [in:] *Acquisition of Agricultural Lands: Crossborder Issues from a Central European Perspective*, J.E. Szilágyi (ed.), Miskolc–Budapest 2002, pp. 161–178, https://doi.org/10.54171/2022.jesz.aoalcbicec_7 (accessed on: 18.05.2023). See also: Z. Hornyák, *Die Voraussetzungen und die Beschränkungen des landwirtschaftlichen Grunderwerbes in rechtsvergleichender Analyse*, "CEDR Journal of Rural Law" 2015, No. 1, pp. 91–97; *idem*, *Grunderwerb in Ungarn und im* österreichischen *Land Vorarlberg*, "Journal of Agricultural and Environmental Law" 2014, No. 2, pp. 62–76; *idem*, *Legal frame of agricultural land succession and acquisition by legal persons in Hungary*, "Journal of Agricultural and Environmental Law" 2021, No. 30, pp. 88–94, https://doi.org/10.21029/JAEL.2021.30.86 (accessed on: 18.05.2023). On the particular issue of succession of agricultural land in Hungary – see: Z. Hornyák, *A mezőgazdasági földek* öröklése, Miskolc 2019; *idem*, *Richtungen für die Fortentwicklungen: Beerbung des Grundstückes*, "Journal of Agricultural and Environmental Law" 2018, No. 2, pp. 116–118, https://doi.org/10.21029/JAEL.2018.25.107 (accessed on: 18.05.2023).

[22] Justification of the draft states as follows: "Agricultural property (agricultural land) is the most important means of food production and the fulfilment of the fundamental obligation to feed the whole society. Properties enabling agricultural use of land are not universal, permanent and unchanging. Civilization progress, urbanization processes and climate change mean that agricultural land resources are rapidly decreasing due to changes in their intended use, degradation of production properties or complete devastation of the environment. For these reasons, agricultural land should be treated as a non-reproducible public good and as such should be subject to specific legal regulations. Legal protection should usually be implemented as quantitative protection, aimed at maintaining the existing acreage of agricultural land and ensuring its proper use, and as qualitative protection, the aim of which is not to deteriorate

Apart from the objectives concerning acquisition of agricultural land, this amendment aimed also at promoting long-term leases as a main form of using the agricultural land that belonged to the State, instead of selling it.[23] It is worth mentioning, that the Law of 26 April 2019[24] included new objectives in aims of the u.k.u.r., i.e., "supporting rural development; implementation and use of agricultural support instruments; active agricultural policy of the state" (Art. 1 points 4–6 u.k.u.r.).[25] Amendments from 2016 and 2019 were

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the productive properties of soils and to restore the lost properties of agricultural land. Undoubtedly, therefore, provisions establishing the rules and procedure for trading in agricultural real estate also have a protective character. In connection with the above, it is necessary to introduce appropriate legal provisions that will allow for the proper distribution of agricultural real estate as a non-reproducible public good (…). The draft act on the protection of agricultural land in Poland against its speculative purchase by important and foreign persons who are not in line with the interest of the application for the use of land for agricultural purposes (…)". See also: J. Górecki, *Nabywanie nieruchomości przez cudzoziemców – wybrane zagadnienia*, "Rejent" 2017, nr 7, p. 38; K. Maj, *Zmiany…*, p. 54; K. Marciniuk, *Zinstytucjonalizowane formy ingerencji w obrót nieruchomościami rolnymi*, [in:] *Z zagadnień systemu prawa: księga Jubileuszowa Profesora Pawła Czechowskiego*, A. Niewiadomski, K. Marciniuk, P. Litwiniuk (red.), Warszawa 2021, p. 607; Z. Truszkiewicz, *O kilku podstawowych zagadnieniach…(część II)*, p. 41 with footnote 72; P. Wojciechowski, *Ograniczenie obrotu nieruchomościami rolnymi a bezpieczeństwo żywnościowe*, [in:] *Z zagadnień systemu prawa: księga Jubileuszowa Profesora Pawła Czechowskiego*, A. Niewiadomski, K. Marciniuk, P. Litwiniuk (red.), Warszawa 2021, pp. 980–982.

[23] This amendment in general halted sales of the agricultural land owned by the Polish state for 10 years (see Art. 1). According to the justification of its draft: "In the first place, additional functions were obtained for the implementation, which are the source of power supply for real estate or their parts providing the Agricultural Property Stock of the State Treasury for a period of 5 years from the date of entry into force of the draft act. Establishing a solution is necessary due to the economic interests of the state, but also the concern for Polish farmers, who should have equal access to state-owned agricultural land in Poland. State-owned agricultural land should continue to be utilized Agricultural Property Agency, and then the method of land development should be beneficial for farmers on permanent leases (…)". This regulation was complementary to the changes introduced to u.k.u.r. as it aimed at avoiding acquisition of agricultural land for speculative purpose.

[24] Ustawa z dnia 26 kwietnia 2019 r. o zmianie ustawy o kształtowaniu ustroju rolnego oraz niektórych innych ustaw (Dz. U. z 2019 r., poz. 1080).

[25] Law of 26 April 2019 was supplementary to the Law of 14 April 2016 due to the fact that it did not introduce revolutionary changes to the provisions

differently evaluated in literature[26] and questions were raised about their conformity with the Constitution RP and EU law.[27]

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of the u.k.u.r., but modified existing regulations. Therefore, the text will present current provisions of the u.k.u.r. and not separately both amendments. It is worth noting that amendment from 2019 resolved some controversies aroused in jurisprudence – see: M. Komarowska-Horosz, *Znowelizowana ustawa o kształtowaniu ustroju rolnego w orzecznictwie sądowym*, [in:] *Współczesne problemy prawa rolnego i żywnościowego*, D. Łobos-Kotowska (red.), Katowice 2019, pp. 17, 19 and 23.

[26] See (among others): P. Bender, *Podstawowe problemy… (cz. I)*, *op. cit*., pp. 60–61; P. Bender, *Podstawowe problemy stosowania znowelizowanej ustawy o kształtowaniu ustroju rolnego (cz. III)*, "Rejent" 2020, nr 2, pp. 44–47; P. Blajer, *Umowa…*, pp. 138–139; *idem*, *Z rozważań…*, *op. cit*., pp. 90–91; M. Budzikowski, *Ograniczenia…*, *op. cit.*, pp. 196–197 and 199; S. Byczko, *Ustawowe prawo…*, *op. cit.,* pp. 244–246; B. Jelonek-Jarco, *Przesłanki…*, *op. cit.*, pp. 77–78; E. Kremer, *Dziedziczenie…*, *op. cit.*, pp. 369, 371–372; P. Litwiniuk, *O wybranych problemach ze stosowaniem prawa pierwokupu nieruchomości rolnej w praktyce notarialnej*, [in:] *Z zagadnień systemu prawa: księga Jubileuszowa Profesora Pawła Czechowskiego*, A. Niewiadomski, K. Marciniuk, P. Litwiniuk (red.), Warszawa 2021, p. 575; M. Łata, *Sytuacja…*, *op. cit.*, pp. 88–89; K. Maj, *Nowelizacja…*, *op. cit*., p. 91; *idem*, *Zmiany…*, *op. cit.*, p. 105; E. Malcherczyk, *Ograniczenia w obrocie nieruchomościami rolnymi w Polsce i ich wpływ na sektor inwestycyjny*, [in:] *Współczesne problemy prawa rolnego i żywnościowego*, D. Łobos-Kotowska (red.), Katowice 2019, pp. 49–50 and 55; K. Marciniuk, *Zinstytucjonalizowane formy*, *op. cit*., pp. 610–611; J. Pisuliński, *op. cit.*, pp. 47–48; M. Pyziak-Szafnicka, *Zasadnicze problemy…*, *op. cit.*, pp. 17–18; Z. Truszkiewicz, *Dziedziczenie i dział…*, *op. cit.*, pp. 36–37; *idem, Zakres…*, *op. cit.*, pp. 122–123; P. Wojciechowski, *Ograniczenie…*, *op. cit.*, pp. 982 and 984.

[27] On the EU regulations involved in cross-border acquisition of agricultural land and historical development of the EU law in that field – see: J.E. Szilagyi, T. Andréka, *A New Aspect of the Cross-Border Acquisition of Agricultural Lands: The Inicia Case before the ICSID*, "Hungarian Yearbook of International Law and European Law" 2020, pp. 94–100. On the opinions about the accordance of restrictions included in u.k.u.r. and the provisions of the Constitution RP and EU law – see: J. Bieluk, *Legal mechanisms of limiting …*, *op. cit.*, pp. 45–47; P. Blajer, *The constitutional aspect…*, *op. cit.*, pp. 7–26 with footnotes 6 and 8 as well as mentioned there literature.; H. Ciepła, *Aspekty…*, *op. cit.*, p. 77; M. Giżewski, *Restrictions on Trading in Agricultural Land and European Union law*, "Studia Iuridica" 2017, Vol. 71, pp. 51–60, DOI: 10.5604/01.3001.0010.5813 (accessed on: 24.06.2023); P. Ledwoń, *An attempt at a Balance between the Protection of Family Holding and the Freedoms of the European Union*, [in:] *Acquisition of agricultural lands: cross-border issues from a Central European perspective*, J.E. Szilágyi (ed.), Miskolc–Budapest 2022, p. 216; K. Maj, *Zmiany…*, *op. cit.*, pp. 50–55; E. Malcherczyk, *Ograniczenia…*, *op. cit.*, pp. 46–47. See also: P. Ledwoń, *An attempt…*, *op. cit.*, pp. 210–216; P. Litwiniuk, O *potrzebie…*, *op. cit.*, pp. 112–116; P. Wojciechowski, *Wybrane aspekty ograniczenia obrotu nieruchomościami rolnymi w prawie polskim*

Summarising,[28] currently in Poland there are special regulations about acquiring agricultural land (agricultural holding)[29] by individuals and entities, as well as provisions about the right to acquire

w kontekście unijnej zasady swobody przepływu kapitału, "Przegląd Prawa Rolnego" 2020, No. 2, pp. 25–51, DOI: 10.14746/ppr.2020.27.2.2 (accessed on: 24.06.2023); See also: P. Bender, *Podstawowe problemy … (cz. III)*, *op. cit.*, p. 45 footnote 357; P. Włodarczyk, *Obrót nieruchomościami rolnymi w świetle traktatowej swobody przepływu kapitału – rozważania na gruncie orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej*, "Przegląd Prawa Rolnego" 2019, No. 2, pp. 37–46, DOI: 10.14746/ppr.2019.25.2.3 (accessed on: 26.05.2023); Z. Truszkiewicz, *Zakres…*, *op. cit.*, p. 123 with footnote 51 and the literature mentioned there. The same issue of the compatibility national restrictions concerning acquisition of agricultural land with EU law was subject of the analysis by Hungarian jurisprudence – see (among others): J.E. Szilágyi, Szilágyi J.E., *Agricultural Land…*, *op. cit.*, pp. 192–196; *idem*, *The Accession Treaties of the New Member States and the national legislations, particularly the Hungarian law, concerning the ownership of agricultural land*, "Journal of Agricultural and Environmental Law" 2010, pp. 53–55, https://epa.oszk.hu/01000/01040/00009/pdf (accessed on: 25.06.2023); *idem*, *European legislation and Hungarian law regime of transfer of agricultural and forestry lands*, "Journal of Agricultural and Environmental Law" 2017, No. 2, pp. 157–160, https://doi.org/10.21029/JAEL.2017.23.148 (accessed on: 25.05.2023).

[28] The following issues were already the subject of numerous Polish-language works, however English language works in the field of acquiring agriculture land in Poland are still few and they present different approach and/or deals only with specific issues. See: J. Bieluk, *Legal mechanisms of limiting the turnover of agricultural land in Poland*, "CEDR Journal of Rural Law" 2018, No. 1, pp. 39–50; *idem*, *Legal mechanisms of protection of family farms in Poland*, [in:] *14 Congreso mundial de derecho agrario: fuentes, política agraria y desarrollo rural, justicia agraria y paz social*, E.N. Ulate Chacón (ed.), San José 2016, pp. 377–383; P. Blajer, *Public Control of Share Deals in Companies Owning Agricultural Real Estate in a Comparative Perspective*, "Przegląd Prawa Rolnego" 2022, nr 2, pp. 45–68, https://doi.org/10.14746/ppr.2022.31.2.3 (accessed on: 25.06.2023); *idem*, *The constitutional aspect of regulations limiting agricultural land transactions in Poland*, Agrár- és Környezetjog 2022, No. 1, pp. 7–26; https://doi.org/10.21029/JAEL.2022.32.7 (accessed on: 25.06.2023); P. Ledwoń, *An attempt at a Balance between the Protection of Family Holding and the Freedoms of the European Union*, [in:] *Acquisition of agricultural lands: cross-border issues from a Central European perspective*, J.E. Szilágyi (ed.), Miskolc–Budapest 2022, pp. 199–217, https://doi.org/10.54171/2022.jesz.aoalcbicec_8 (accessed on: 25.04.2023). See also: P. Blajer, *Neue Regelungen* über *den Grundstücksverkehr in Polen – Rückkehr in die Vergangenheit?*, "Przegląd Prawa Rolnego" 2016, nr 1, pp. 65–79, http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.desklight-012a8c96-do3c-41fo-a79e-4b607350ddea (accessed on: 25.06.2023).

[29] About the difference of two terms – see next pages.

agricultural land and pre-emption right of the State Treasury (regulated mainly in the u.k.u.r.).[30] There are also provisions on inheritance of the agricultural holding[31] (regulated partly in u.k.u.r.

[30] See (among others): P. Bender., *Podstawowe problemy… (cz. I)*, *op. cit.*, pp. 9–66; *idem*, *Podstawowe problemy stosowania znowelizowanej ustawy o kształtowaniu ustroju rolnego, (cz. II)*, "Rejent" 2019, nr 12, pp. 9–101; A. Bieranowski, *Wykonanie prawa pierwokupu własności nieruchomości rolnej przez ANR*, "Rejent" 2017, nr 7, pp. 24–35; P. Blajer, P., *Umowa sprzedaży nieruchomości rolnej po wejściu w życie ustawy z dnia 26.04.2019 r. o zmianie ustawy o kształtowaniu ustroju rolnego oraz niektórych innych ustaw*, "Rejent" 2019, nr 12, pp. 102–140; *idem*, *Z rozważań nad tzw. prawem nabycia w świetle znowelizowanych ustaw o kształtowaniu ustroju rolnego i o lasach*, [in:] *Nieruchomości rolne w praktyce notarialnej*, P. Księżak, J. Mikołajczyk (red.), Warszawa 2017, pp. 66–80; S. Byczko, *Ustawowe prawo pierwokupu udziałów i akcji spółek będących właścicielami nieruchomości rolnych*, [in:] *Nieruchomości rolne w praktyce notarialnej*, P. Księżak, J. Mikołajczyk (red.), Warszawa 2017, pp. 236–246; B. Jelonek-Jarco, *Przesłanki i zakres prawa nabycia nieruchomości rolnej przez Agencję Nieruchomości Rolnych*, "Rejent" 2017, nr 7, pp. 56–78; K. Maj, *Nowelizacja ustawy o kształtowaniu ustroju rolnego obowiązująca od dnia 26.06.2019 r.*, "Krakowski Przegląd Notarialny" 2019, nr 2, pp. 63–92; *idem*, *Zmiany w ustawie o kształtowaniu ustroju rolnego obowiązujące od dnia 30 kwietnia 2016 r.*, "Krakowski Przegląd Notarialny" 2016, nr 2, pp. 49–106; Z. Truszkiewicz, *O kilku podstawowych zagadnieniach na tle ustawy o kształtowaniu ustroju rolnego (część I)*, "Rejent" 2017, nr 10, pp. 41–68; *idem, O kilku podstawowych zagadnieniach na tle ustawy o kształtowaniu ustroju rolnego (część II)*, "Rejent" 2017, nr 11, pp. 9–80.

[31] See (among others): J. Bieluk, *Nowe zasady dziedziczenia gospodarstw rolnych po nowelizacji ustawy o kształtowaniu ustroju rolnego*, „Studia Iuridica Agraria" 2016, t. 14, pp. 75–87; E. Kremer, *Dziedziczenie gospodarstw rolnych*, [in:] *Prawo rolne*, P. Czechowski (red.), Warszawa 2022, pp. 344–347; *idem*, [in:] *Instytucje prawa rolnego*, M. Korzycka (red.), Warszawa 2019, pp. 351–372; P. Księżak, *Nabycie nieruchomości rolnej wskutek sukcesji mortis causa w świetle przepisów ustawy o kształtowaniu ustroju rolnego*, [in:] *Nieruchomości rolne w praktyce notarialnej*, P. Księżak, J. Mikołajczyk (red.), Warszawa 2017, pp. 147–159; M. Łata, *Sytuacja prawna cudzoziemca-spadkobiercy nabywającego nieruchomość rolną położoną w Polsce w drodze sukcesji mortis causa*, [in:] *Współczesne problemy prawa rolnego i żywnościowego*, D. Łobos-Kotowska (red.), Katowice 2019, pp. 73–91; Z. Truszkiewicz, *Dziedziczenie gospodarstw rolnych*, [in:] *Prawo rolne*, P. Czechowski (red.), Warszawa 2022, pp. 329–344; Z. Truszkiewicz, *Dziedziczenie i dział spadku rolnego po nowelizacji z 2016 r. ustawy o kształtowaniu ustroju rolnego*, "Rejent" 2018, nr 1, pp. 13–38; *idem*, *O kilku podstawowych zagadnieniach… (część II)*, pp. 17–24.

and k.c.) and abolition of co-ownership of agricultural holding (partly in u.k.u.r. and k.c.).[32]

Before presenting aforementioned provisions in detail, there is a necessary to make some remarks on terminology. Norms of Polish law, that regulate acquisition of agricultural land (especially provisions of u.k.u.r.) are expressed with the use of three phrases: "agricultural land", "agricultural holding", and "agricultural activity".[33] Their meaning does not reflect the dictionary meanings of their wording, because their meaning is regulated by stipulative definition. Because of the fact, that these legal definitions includes some prerequisites, they affect the scope of the provisions of the statutes and they should be carefully examined.[34]

The term "agricultural land"[35] has its own legal definition in Art. 46^1 k.c., which reads: "Agricultural immovable property (agricultural land) is an immovable property which is or may be used for conducting agricultural production of plants and animals, not excluding horticultural, fruit and fish production."[36] This definition includes all prerequisites for a land to achieve status of "agricultural

[32] See (among others): E. Klat-Górska, *Zniesienie współwłasności gospodarstwa rolnego*, [in:] *Instytucje prawa rolnego*, M. Korzycka (red.), Warszawa 2019, pp. 59–91; K. Stefańska, M. Mikołajczyk, *Zniesienie współwłasności nieruchomości rolnej*, [in:] *Prawo rolne*, P. Czechowski (red.), Warszawa 2022, pp. 275–288; B. Swaczyna, *Zniesienie współwłasności nieruchomości rolnej po 29.04.2016 r.*, "Rejent" 2017, nr 7, pp. 79–94; Z. Truszkiewicz, *Dziedziczenie i dział…*, *op. cit.*, pp. 20–31.

[33] About three definitions in u.k.u.r. and their practical implications – see: A. Suchoń, *Pojęcie nieruchomości rolnej, gospodarstwa rolnego i działalności rolniczej w ustawie o kształtowaniu ustroju rolnego - wybrane kwestie z praktyki notarialnej*, "Przegląd Prawa Rolnego" 2019, nr 2, pp. 91–111, DOI: 10.14746/ppr.2019.25.2.6 (accessed on: 28.04.2023).

[34] Cf. K. Maj, *Zmiany…*, *op. cit.*, p. 57.

[35] For further information – see: K. Maj, *Zmiany…*, *op. cit.*, pp. 57–59; Z. Truszkiewicz, *O kilku podstawowych zagadnieniach… (część I)*, *op. cit.*, pp. 42–48; *idem, Nieruchomość rolna i gospodarstwo rolne w rozumieniu U.K.U.R.*, "Krakowski Przegląd Notarialny" 2016, nr 2, pp. 139–172; P. Wojciechowski, *Pojęcie nieruchomości rolnej*, [in:] *Instytucje prawa rolnego*, M. Korzycka (red.), Warszawa 2019, pp. 146–172.

[36] Cf. "*Immovable property which is or may be used for carrying out agricultural production activity within the scope of plant and animal production, not excluding gardening, horticulture and fishery production shall be agricultural immovable*

land".[37] The term "agricultural real estate" (not "agricultural land"[38]) is present in provisions that regulates agricultural holding (Art. 55^3 k.c.), pre-emption right (Art. 166 k.c.), acquisitive prescription (Art. 172 k.c.), severance of co-ownership (Art. 210 k.c. *et al.*), lease (Art. 704 k.c. and Art. 706 k.c.) and inheritance (Art. 1058 k.c. and following). The provisions of the u.k.u.r. introduce their own definition of agricultural real estate (agricultural land). According to Art. 2 point 1 u.k.u.r., agricultural land is an "agricultural real estate within the meaning of the Civil Code, excluding real estate located in areas designated in spatial development plans for non-agricultural purposes".[39]

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property" (T. Bil, A. Broniek, A. Cincio, M. Kiełbasa, *Kodeks cywilny. Civil Code. Przepisy Dwujęzyczne*, Warszawa 2011).

[37] As other regulations for fulfilling prerequisites of agricultural status of land are irrelevant, this rule particularly applies to entries in the lands and buildings' register as well as spatial development plans do not affect it. See: Z. Truszkiewicz, *O kilku podstawowych zagadnieniach… (część I)*, *op. cit.*, p. 67; *idem*, *Wpływ planowania przestrzennego na pojęcie nieruchomości rolnej w rozumieniu Kodeksu cywilnego*, "Studia Iuridica Agraria: Rocznik Stowarzyszenia Prawników Agrarystów" 2007, t. 6, pp. 144–155; P. Wojciechowski, *Pojęcie…*, *op. cit.*, pp. 157–159. For contrary opinions – see: M. Stańko, *Rejestry publiczne w obrocie nieruchomościami rolnymi (ewidencja gruntów i budynków)*, [in:] *Prawo rolne*, P. Czechowski (red.), Warszawa 2022, pp. 292–299. See also: H. Ciepła, *Aspekty…*, *op. cit.*, pp. 38–46; K. Maj, *Zmiany…*, *op. cit.*, pp. 60–68; E. Malcherczyk, *Ograniczenia…*, *op. cit.*, pp. 48–49; Z. Truszkiewicz, *O kilku podstawowych zagadnieniach… (część I)*, *op. cit.*, pp. 60–66.

[38] If the context does not suggest otherwise, later in this work both terms are used as synonyms, in accordance with the majority of the views (see for example: K. Maj, *Zmiany…*, *op. cit.*, p. 57; K. Marciniuk, *Rodzinne gospodarstwo…*, *op. cit.*, p. 178). However, combining these two concepts in one definition resulted in controversies – see P. Wojciechowski, *Pojęcie…*, pp. 173–174 with the literature listed there. *De lege ferenda* Art. 46^1 k.c. could be amended to resolve the controversy whether this both terms are synonyms or not.

[39] This method of defining unnecessarily introduce new meaning of the term "agricultural land" to the system of Polish agricultural law, which needlessly makes it more difficult to decode regulations. *De lege ferenda* this definition could reflect the definition in the k.c. and provisions concerning spatial development plans could be included in other norms.

The phrase "agricultural holding"[40] is used in many statutes (e.g., laws on agricultural tax,[41] income tax[42] and social insurance[43]). The most important definition is included in Art. 55^3 k.c.:

> Agricultural land [not agricultural real estate – annotation MS] together with forest land, buildings and their parts, installations and livestock, if they constitute or may constitute an organised economic entirety along with the rights bound with conducting an agricultural farm shall be considered an agricultural farm.[44]

Worth noting is its irrelevance of ownership and irrelevance of other regulations for fulfilling prerequisites for the agricultural status of a holding. As far as acquisition of agricultural land is concerned, another important definition of agricultural holding is introduced in Art. 2 point 2 u.k.u.r., which reads: "agricultural real estate within the meaning of the Civil Code, in which the area of agricultural property or the total area of agricultural property is not less than 1 ha".[45]

The third phrase ("conducting agricultural activity") in not defined in the k.c. Its legal definition is introduced by u.k.u.r. (Art. 2 point 3), whose provision states that, whenever the text of the u.k.u.r. mentions "conducting agricultural activity", it means "conducting

[40] For further information – see: K. Maj, *Zmiany…*, *op. cit.*, pp. 68–71.

[41] See: Art. 2 para. 1 of the Law of 15 November 1984 (ustawa z dnia 15 listopada 1984 r. o podatku rolnym, t.j. Dz. U. z 2020 r., poz. 333).

[42] See: Art. 2 para. 4 of the Law of 26 July 1991 (ustawa z dnia 26 lipca 1991 r. o podatku dochodowym od osób fizycznych, t.j. Dz. U. z 2022 r., poz. 2647 z późn. zm.); Art. 2 para. 4 of the Law of 15 February 1992 (ustawa z dnia 15 lutego 1992 r. o podatku dochodowym od osób prawnych, t.j. Dz. U. z 2022 r. poz. 2587 z późn. zm.).

[43] See: Art. 6 para. 3 Law of 20 December 1990 (ustawa z dnia 20 grudnia 1990 r. o ubezpieczeniu społecznym rolników, t.j. Dz. U. z 2023 r., poz. 208 z późn. zm.).

[44] Translated by: T. Bil, A. Broniek, A. Cincio, M. Kiełbasa, *op. cit*.

[45] *De lege ferenda* proposals mentioned in footnote 39 apply accordingly. See also: P. Wojciechowski, *Współczesne definicje…*, *op. cit.*, pp. 208–209.

production activity in agriculture in the field of plant or animal production, including horticultural, fruit and fish production".[46]

3.3. Acquisition of Agricultural Land by a Legal Entity in Poland

3.3.1. RESTRICTIONS CONCERNING ACQUISITION OF AGRICULTURAL LAND BY A LEGAL ENTITY

The fundamental rule concerning acquisition of agricultural land in Poland is introduced by Art. 2a point 1 u.k.u.r. (in force since 30 April 2016 due to the Law of 14 April 2016, which amended the u.k.u.r.). The above-mentioned provision states that: "The acquirer of agricultural land may only be an individual farmer, unless the Act provides otherwise"[47]. This rule[48] applies to all legal events resulting from the acquisition of an agricultural land (Art. 2 point 7 u.k.u.r.), i.e., not only the sale contract or other types

[46] There are numerous other legal definitions of 'agricultural activity' in other statutes. See (among others): Art. 2 p. 2 Law of 15 November 1984: "Agricultural activity is considered to be plant and animal production, including the production of seed, nursery, breeding and reproductive material, vegetable production, ornamental plants, cultivated fungi, fruit-growing, breeding and production of breeding material for animals, birds and useful insects, industrial animal production farm and fish farming". Cf. Art. 2 para. 2 of the Law of 26 July 1991.

[47] There are also other crucial regulations. According to Art. 2b para. 1 u.k.u.r. the acquirer of agricultural land is obliged to run the agricultural holding for a period of at least 5 years from the date of its acquisition (in the case of an individual, to run it personally). Additionally, during those 5 years period, the acquired real estate may not be sold or given into possession to other individual or entities (Art. 2b para. 2 u.k.u.r.). See further (among others): P. Bender, *Podstawowe problemy… (cz. II)*, pp. 44–101; A. Bieranowski, *Uwagi o błędnym dekodowaniu zakazu zbywania własności nieruchomości rolnej*, "Rejent" 2019, nr 8, pp. 110–117; K. Maj, *Nowelizacja…*, *op. cit.*, pp. 78–82; *idem*, *Zmiany…*, *op. cit.*, pp. 87–90; Z. Truszkiewicz, *O kilku podstawowych zagadnieniach… (część II)*, *op. cit.*, pp. 14–17.

[48] On the discussion of the scope of this provision – see: P. Blajer, *Z rozważań…*, *op. cit.*, pp. 62–65; K. Kurosz, *Prawo…*, *op. cit.*, pp. 94, 97–109, 113–118. See also: H. Ciepła, *Aspekty…*, *op. cit.*, p. 68; K. Maj, *Zmiany…*, *op. cit.*, pp. 80–81.

of contracts, but also legal events such as acquisitive prescription.[49] Thus, the scope of this provision is comprehensive.[50]

The term "individual farmer" was defined as:

> a natural person who is the owner, perpetual usufructuary, owner or lessee of an agricultural land, the total area of which does not exceed 300 ha, holding agricultural qualifications and residing in the municipality where one of the agricultural real estate constituting an agricultural holding is located for at least 5 years and running the agricultural holding personally during this period (Art. 6 para. 1 u.k.u.r.).
>
> Accordingly, an individual is considered as personally running a farm if he/she works on this farm and takes all decisions concerning the pursuit of agricultural activities on that holding (Art. 6 para. 2 point 1 u.k.u.r.).
>
> In the light of aforementioned regulation, legal entities cannot acquire agricultural land in Poland. However, there are some cases in which entities can lawfully become the owner of the agricultural real estate. These cases can be categorised into five types: acquiring beyond the scope of the u.k.u.r.; acquiring "non-agricultural land";

[49] In Art. 172 § 3 k.c. there is supplementary regulation on the acquisitive prescription of agricultural land. This provision states that an agricultural land within the meaning of the u.k.u.r., may be acquired due to the prescription only by an individual farmer according to the definition from u.k.u.r. and only if the acreage of the sum of previously owned and acquired land does not exceed 300 ha of cultivated land. For further information – see: A. Bieranowski, *Dekompozycja konstrukcji zasiedzenia w nowym reżimie ograniczeń nabycia własności nieruchomości rolnej: zagadnienia węzłowe i uwagi de lege ferenda*, "Rejent" 2016, nr 5, pp. 80–92. There is a discrepancy between this regulation and provisions of u. k. u. r. introducing rule that acquirer must be an individual farmer. The previous formally apply to agricultural land of any surface (even smaller than 1 ha), the latter only to agricultural land with the acreage greater than 1 ha. See: P. Bender, *Podstawowe problemy… (cz. 1)*, *op. cit.*, pp. 39–40 with footnote 49. *De lege ferenda* both regulations should be consistent as there are no reasons why situation of the acquisitive prescription of small plots should be treated differently.

[50] K. Maj, *Zmiany…*, *op. cit.*, p. 76.

object-based exemptions; subject-based exemptions; and acquiring with the authorities' permit.

3.3.2. CASES OF LAWFUL ACQUISITION OF AGRICULTURE LAND BY LEGAL ENTITIES

Logically speaking, because the rule derived from Art. 2a para. 1 is a part of the u.k.u.r., this rule is not binding in the cases when acquisition of agricultural land occurs out of the scope of the u.k.u.r. The main regulation concerning the scope of the u.k.u.r. is included in Art. 1a–1c. The provisions of Art. 1a u.k.u.r. state that, the u.k.u.r. does not apply to agricultural real estates (or shares in their co-ownership) included in the Agricultural Property Stock of the State Treasury[51] or with an area of less than 0.3 ha or being internal roads or being land sold necessarily as a part of selling contract of a house (apartment, outbuilding, backyard garden)[52] or in which land (designated in the lands and buildings' register as land under ponds), constitutes at least 70% of its area. Another exception (regulated in Art. 1b u.k.u.r.) concerns agricultural properties located within the administrative boundaries of cities, but only if transfer of their ownership is a part of the housing investment or accompanying investment process referred in the Law of 5 July 2018[53] (nevertheless, the right of the State Treasury to acquire the land applies according to Art. 4 u.k.u.r.[54]). Finally, the provisions of the u.k.u.r. do not apply to the acquisition of agricultural land

[51] The relevant provision, when mentions the Agricultural Property Stock of the State Treasury, refers to the real estates described by the Law of 19 October 1991 (ustawa z dnia 19 października 1991 r. o gospodarowaniu nieruchomościami rolnymi Skarbu Państwa, t.j. Dz. U. z 2021 r., poz. 1538).

[52] The relevant provision refers to transactions made on the grounds of Art. 42 paras. 1 and 6 of the Law of 19 October 1991.

[53] Ustawa z dnia 5 lipca 2018 r. o ułatwieniach w przygotowaniu i realizacji inwestycji mieszkaniowych oraz inwestycji towarzyszących (Dz. U. z 2018 r., poz. 1496).

[54] See next pages.

into the National Real Estate Stock[55] and acquisition from that Stock due to the housing investment or technical development (but only if the agricultural land is located within the administrative boundaries of a city – see Art. 1c u.k.u.r.).[56]

The second possibility for acquiring agricultural land by entities can be deduced from the definition of agricultural land included in the u.k.u.r. As it was described above, in the light of the u.k.u.r., agricultural land is an 'agricultural real estate within the meaning of the Civil Code, excluding real estate located in areas designated in spatial development plans for non-agricultural purposes' (Art. 2 point 1 u.k.u.r.). This means that restrictions introduced by the u.k.u.r. about acquiring agricultural land (especially the rule stated in Art. 2a para. 1 u.k.u.r. that the acquirer of the agricultural land can be only the individual farmer) do not apply to lands that are agricultural in its nature, but declared formally by the resolution of a municipality to be non-agricultural in so-called spatial development plans.[57]

The third possibility results from object-based exemptions regulated in Art. 2a para. 3 points 1a–13 u.k.u.r. The first provision states that provisions of Art. 2a paras. 1 and 2 do not apply to the acquisition of agricultural land of an acreage less than 1 ha (Art. 2a para. 3 point 1 letter a) u.k.u.r.). The following point establishes a similar

[55] The relevant provision refers to the Law of 20 July 2017 (ustawa z dnia 20 lipca 2017 r. o Krajowym Zasobie Nieruchomości, Dz. U. z 2021 r. poz. 1961 and 2022 r. poz. 807 and 1561).

[56] There is a separate regulation about the scope of the u.k.u.r. Art. 11 point 1 of the Law of 14 April 2016 provides that u.k.u.r. shall not apply to built-up agricultural land of an area not exceeding 0.5 hectares, which, on the date of entry into force of the Act, is occupied by residential buildings and buildings, structures and facilities that are not currently used for agricultural production if this land. The second point of the same article states that u.k.u.r. does not apply to agricultural real estate, which, as of the date of entry into force of the Law, in final decisions on land development and zoning, is intended for non-agricultural purposes.

[57] A problem has arisen how to apply this regulation in the situation when there are no spatial development plans. For further details and broad argumentation supporting opinion that in such cases rules of the u.k.u.r. apply – see: P. Wojciechowski, *Pojęcie…*, *op. cit.*, pp. 165–170. See also: E. Malcherczyk, *Ograniczenia…*, *op. cit.*, p. 56.

rule regarding acquisition of agricultural land due to inheritance or a specific bequest (Art. 2a para. 3 point 2 u.k.u.r.). The third exception refers to acquisition on the grounds of Art. 151[58] and Art. 231 k.c.[59] (Art. 2a para. 3 point 3 u.k.u.r.). The next provision concerns acquisition during restructuring proceedings (Art. 2a para. 3 point 4 u.k.u.r.). The next two exemptions (Art. 2a para. 3 points 5–6 u.k.u.r.) are about special types of acquisition of agricultural holdings, i.e., return acquisition of agricultural holding previously transferred to the State (on the grounds of Art. 118 of the Law of 20 December 1990) and acquisition on the demand of the owner of the land, that level of agricultural production was reduced due to the industrial production of the nearby enterprise (on the grounds of Art. 17 para. 1 of the Law of 3 February 1995[60]). Two other exemptions deal with mining (Art. 2a para. 3 points 7–8 u.k.u.r.), i.e., acquisition on demand of the owner of agricultural land the use of which was limited by the local authority for the purpose of prospecting, exploration, extraction of fossils for more than one year (on the ground of Art. 125 para. 3 of Law of 21 August 1997[61]) and any acquisition that was concluded on the grounds of the Law of 9 June 2011.[62] The next provision states that the rule that only the individual farmer can acquire agricultural land does not apply to the acquisition done due to the enforcement and bankruptcy proceedings (Art. 2a para. 3 point 9 u.k.u.r.).[63] One more important group of exemptions concerns cases of cessation of co-ownership, i.e., abolition of joint ownership, division of marital joint property and division of inheritance estate (Art. 2a para. 3 point 10 u.k.u.r.).

[58] This provision regulates situation in which boundaries of the plot were violated during the construction of the building (or other improvement).

[59] This provision regulates situation in which an autonomous possessor of land (being in good faith) constructed a building or other improvement of a value exceeded significantly the value of the occupied part of the land.

[60] Ustawa z dnia 3 lutego 1995 r. o ochronie gruntów rolnych i leśnych (t.j. Dz. U. z 2022 r., poz. 2409).

[61] Ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami (t.j. Dz. U. z 2023 r., poz. 344 z późn. zm.).

[62] Ustawa z dnia 9 czerwca 2011 r. – Prawo geologiczne i górnicze (t.j. Dz. U. z 2023 r., poz. 633).

[63] U.k.u.r. does not refer in this provision to any specific act.

Another very important cases, in which the above-mentioned rule does not apply, deal with the division, transformation and merger of commercial companies that resulted in acquisition of agricultural land (Art. 2a para. 3 point 11 u.k.u.r.). There is also separate regulation in the field of mining that introduces exceptions not only for the acquisition on the grounds of the Law of 9 June 2011,[64] but for all acquisition of agricultural land located in a mining area or a mining site in the light of this statute (art 2a para. 3 point 12 u.k.u.r.). The last exception concerns acquisition in order to construct an offshore wind farm within the meaning of the Law of 17 December 2020[65] (Art. 2a para. 3 point 13 u.k.u.r.).

The fourth possibility results from subject-based exemptions regulated in Art. 2a para. 3 point 1 letters a)–l) u.k.u.r. The first provision states that provisions of Art. 2a paras. 1 and 2 do not apply to the acquisition by close persons (Art. 2a para. 3 point 1 letter a) u.k.u.r.). The following points establish a similar rule regarding local government units (municipalities, counties and provinces, which in Poland have their own legal personality; Art. 2a para. 3 point 1 letter b) u.k.u.r.); the State Treasury (Art. 2a para. 3 point 1 letter c) u.k.u.r.; the provision adds the National Centre for the Support of Agriculture acting on account of the State Treasury[66]); companies in which all of the shares belong to the State or which are transmission system operators or have a concession for the transmission of liquid fuels within the meaning of the Law of 10 April 1997[67] (Art. 2a para. 3 point 1 letters c) and a) u.k.u.r.); companies which are gas distribution system operators (within the meaning of the Law of 10 April 1997; Art. 2a para. 3 point 1 letters c) and a) u.k.u.r.) and companies or the group of companies operating in the electricity, oil and gas fuels sectors (which are mentioned in the Law of 18 March

[64] See above.

[65] Ustawa z dnia 17 grudnia 2020 r. o promowaniu wytwarzania energii elektrycznej w morskich farmach wiatrowych (t.j. Dz. U. z 2023 r., poz. 1385).

[66] See below.

[67] Ustawa z dnia 10 kwietnia 1997 r. – Prawo energetyczne (t.j. Dz. U. z 2022 r., poz. 1385 z późn. zm.).

2010;[68] Art. 2a para. 3 point 1 letters c) and b) u.k.u.r.). There is also special regulation for religious communities.[69]

The next exemptions concern national parks (in the case of the acquisition of agricultural property for nature conservation purposes, Art. 2a para. 3 point 1 letter e) u.k.u.r.) and acquisitions by (as mentioned in the Law of 10 May 2018[70]) Special Purpose Vehicle or by entities which transferred or were expropriated for purposes of investments associated with building Central Communication Port (Art. 2a para. 3 point 1 letters f)–g) u.k.u.r.). The next two provisions (Art. 2a para. 3 point 1 letters h)–i) u.k.u.r.) are about some acquisitions by agricultural cooperatives and its members. There are also exceptions made for some acquisitions by persons who transferred agricultural land or were expropriated due to the building of an offshore wind farm within the meaning of the Law of 17 December 2020 (Art. 2a para. 3 point 1 letters k)–l) u.k.u.r.) or due to investments associated with nuclear energy within the meaning of the Law of 29 June 2011[71] or acquisitions by the investor mentioned in that latter act (Art. 2a para. 3 point 1 letters k)–l) u.k.u.r.). Lastly, there are two exemptions concerning so-called family foundations (Art. 2a para. 3 point 1 letters k)–l)[72]).

Finally, there is a possibility to obtain permit from authorities. According to Art. 2a para. 4 u.k.u.r., acquisition of an agricultural real estate by other entities or in cases other than those mentioned

[68] Ustawa z dnia 18 marca 2010 r. o szczególnych uprawnieniach ministra właściwego do spraw energii oraz ich wykonywanie w niektórych spółkach kapitałowych lub grupach kapitałowych prowadzących działalność w sektorach energii elektrycznej, ropy naftowej oraz paliw gazowych (t.j. Dz. U. z 2020 r., poz. 2173).

[69] See below, in Parts 3.3.4–3.3.7.

[70] Ustawa z dnia 10 maja 2018 r. o Centralnym Porcie Komunikacyjnym (t.j. Dz. U. z 2023 r., poz. 892 z późn. zm.).

[71] Ustawa z dnia 29 czerwca 2011 r. o przygotowaniu i realizacji inwestycji w zakresie obiektów energetyki jądrowej oraz inwestycji towarzyszących (t.j. Dz. U. z 2021 r., poz. 1484 z późn. zm.).

[72] There is repetition of the letters k) and l) in Art. 2a para. 3 point 1 u.k.u.r. because two different statutes were passed in parliament (both introducing exemptions under those letters) approximately the same time and up to date there is no consolidated text of the u.k.u.r. resolving the issue.

in paragraphs 1 and 3 (i.e., by individual farmers or within the aforementioned object-based and subject-based exemptions) may take place with the permission of the Director General of the state entity named "National Centre for the Support of Agriculture"[73] (KOWR). The permission is issued in the form of an administrative decision and can be granted in the situations described in Art. 2a para. 4 points 1–5 u.k.u.r. Among other cases, permission can be issued at the request of the seller of agricultural land if he/she (the conditions must be met cumulatively) demonstrates that it was not possible to sell the agricultural real estate to the individual farmer (unless the acquisition of the real estate is to take place on the basis of a legal transaction other than a sale) and the purchaser of the agricultural real estate agrees to carry out agricultural activities on the agricultural real estate acquired and the acquisition of the agricultural real estate will not result in an excessive concentration of agricultural land (Art. 2a para. 4 points 1–5 u.k.u.r.).[74]

Described above rules about the capacity to acquire agricultural land are complemented by two other legal institutions that can effectively make acquiring agricultural land impossible even if the conditions described in Art. 2a u.k.u.r. are met or the exemptions mentioned in the given article apply. It is important to note that these two regulations are not dependent on aforementioned rules, in that they have their own prerequisites and exemptions.[75] These two legal institutions are the pre-emption right to agricultural land and the so-called right to acquire agricultural land, generally both granted to KOWR acting on the behalf of the State Treasury. Differentiation of these two regulations is based on the kind of legal event resulting in acquiring ownership of agricultural land (sale contract in the first case, other contract or legal event in the latter case).

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[73] Krajowy Ośrodek Wsparcia Rolnictwa.

[74] For further information about aforementioned permit – see (among others): K. Marciniuk, *Zgoda administracyjna jako przesłanka nabycia nieruchomości rolnej*, [in:] *Nieruchomości rolne w praktyce notarialnej*, P. Księżak, J. Mikołajczyk (red.), Warszawa 2017, pp. 119–146.

[75] Cf. P. Bender, *Podstawowe problemy… (cz. 1)*, *op. cit.*, p. 38 with footnote 47 and pp. 60–61; K. Maj, *Nowelizacja…*, *op. cit.*, p. 64.

According to Art. 3 para. 1 u.k.u.r., in the case of the sale of an agricultural land, the lessee has the right of pre-emption[76] if the lease agreement was concluded in writing, has a certified date and has been performed for at least 3 years from that date, as well as the purchased agricultural property is a part of the lessee's family farm. If all those conditions are met, the lessee should be notified of the content of the sale agreement if the lease agreement lasted for at least 3 years from the date of its conclusion (Art. 3 para. 2 u.k.u.r.). But the most important issue is, if there is no holder of pre-emption right or he/she is not exercising it, KOWR is entitled to exercise the pre-emption right (Art. 3 para. 4 u.k.u.r.). The exemptions are few and they are listed almost exclusively in Art. 3 paras. 5 and 7 u.k.u.r. They concern mainly acquiring by public law institutions (Art. 3 para. 5 point 1 letters a) and b)), companies controlled by the state (Art. 3 para. 5 point 1 letters a), b), and d)), close persons to the seller (Art. 3 para. 5 point 1 letter c)) or previously issued authorities' permit (Art. 3 para. 5 point 2). The latter is especially important if the acquirer-to-be is a legal person, as it is the main way for securing acquiring agricultural land by entity. There is also an exception for religious communities.[77]

It is worth noting, that regulations included it the k.c. apply to this pre-emption right. The judicial sentences confirmed that the pre-emption right as described in the u.k.u.r. is regulated directly by the provisions of the k.c.[78] The applicable provisions are described in Art. 596–602 k.c. According to them, there is 1 month for exercising the pre-emption right (Art. 598 para. 2 k.c.) and, in general, concluding sale contract with violation of the pre-emption right does not affect the validity of the contract, but results only in liability for damages (Art. 599 para. 1 k.c.). However, if the right of pre-emption is entitled by statute to the State Treasury or local government unit,

[76] This is one of more than twenty regulations concerning statutory pre-emption right in Poland – see: K. Maj, *O trudnościach z ustaleniem istnienia ustawowego prawa pierwokupu*, "Krakowski Przegląd Notarialny" 2019, nr 1, pp. 55–56.

[77] See below in Parts 3.3.4–3.3.7.

[78] See: postanowienie SN z 14.01.2009 r., IV CSK 344/08, LEX nr 487530; SN z 21.09.2018 r.; postanowienie SN z 4.04.2018 r., V CSK 540/17, LEX nr 2500465; wyrok SA w Gdańsku z 20.01.2016 r., V ACa 621/15, LEX nr 2052630.

co-owner or lessee, the sale made unconditionally is invalid (Art. 599 para. 2 k.c.). Hence, as the preemption right is granted by the statute (i.e., the u.k.u.r.) and it is granted to the lessee or the State Treasury, violation of it implies nullity of the contract.

The second legal instrument granted to KOWR is the so-called 'right to acquire' agricultural land. According to Art. 4 para. 1 points 1–3 u.k.u.r., if the acquisition of an agricultural real estate takes place as a result of a conclusion of a contract other than a sale contract or as a result of an unilateral legal act, or a court decision, or an authority decision, or an enforcement body decision, issued on the basis of the provisions on enforcement proceedings, KOWR is entitled to submit a statement of the purchase of this real estate against payment of the price of this real estate.[79] It is important that this regulation applies to any legal action or other legal event resulting in acquisition of an agricultural real estate (other than sale contract), in particular it applies to the acquisitive prescription of an agricultural real estate, to the inheritance or to the specific bequest (which the subject of is an agricultural land or an agricultural holding[80]), as well as to the division, transformation or merger of commercial law companies (Art. 4 para. 1 point 4 u.k.u.r.). The exemptions are similar to the exceptions concerning pre-emption rights. They concern mainly acquiring by a company controlled by the state (Art. 4 para. 4 point 2 letters e)–g)), a close relative of the owner (Art. 4 para. 4 point 2 letter b) u.k.u.r.) or acquiring after previously issued authorities' permit (Art. 4 para. 4 point 2 letter a) u.k.u.r.). Other exceptions were made to the statutory

[79] About some practical issues concerning execution of pre-emption right granted to KOWR – see: P. Litwiniuk, *O wybranych problemach…*, *op. cit.*, pp. 577–584.

[80] This exemption (Art. 4 para. 4 point 2 u.k.u.r. *in principio*) literally concern only agricultural land and not agricultural holding. However, Art. 4 para. 1 point 4 letter a) u.k.u.r. states about agricultural land or agricultural holding. This exception is broader in its scope that the rule – see: P. Blajer, *Z rozważań…*, *op. cit.*, p. 74. *De lege ferenda* proposal may be to omit the words "agricultural holding" in Art. 4 para. 1 point 4 letter a) u.k.u.r. Both, the rule and exception would still apply to agricultural holdings on the grounds of Art. 4a u.k.u.r.

inheritance,[81] testamentary inheritance and specific bequest (all three if the acquirer is an individual farmer; Art. 4 para. 4 point 2 letters c)–d) u.k.u.r.), as well as enlargement of family agricultural holding (Art. 4 para. 4 point 1 u.k.u.r.). There is also regulation concerning religious communities.[82] The consequences of violation of the rules concerning the right to acquire agricultural land are the same as in the case of pre-emption right. The u.k.u.r. provides that failing to inform KOWR about the acquisition results in the nullity of the acquisition.[83] Other rules concerning pre-emption right as regulated in the k.c. apply to "right to acquire" on the grounds of legal reference.[84]

Finally, it should be noted, that acquiring an agricultural holding or an agricultural land can be the result of the abolition of joint ownership. The abolition of joint ownership can be the result of an agreement between the co-owners or a court decision. In both situations, the law prioritises division of the object of co-ownership over two other ways of abolition of joint ownership, i.e., granting full ownership to one of the co-owners or auctions by public auctioneer with the division of the income among the co-owners.[85] According to Art. 210 para. 2 k.c., dissolution of co-ownership is done in accordance with the rules of the u.k.u.r.[86] In the case of the abolition

[81] There is a view, that right to acquire should not apply to situation in which a testamentary heir or legatee would have inherit on the grounds of law if there had not been a testament. See: Z. Truszkiewicz, *Dziedziczenie…*, p. 341; Z. Truszkiewicz, *Dziedziczenie i dział…*, *op. cit.*, pp. 17–18. See also: P. Księżak, *Nabycie…*, *op. cit.*, pp. 155–156; M. Łata, *Sytuacja…*, *op. cit.*, pp. 79–80.

[82] See below in Parts 3.3.4–3.3.7.

[83] There is a proposal *de lege ferenda* that the sanction should be less severe – see: P. Blajer, *Z rozważań…*, *op. cit.*, p. 91. See also: Z. Truszkiewicz, *O kilku podstawowych zagadnieniach… (część II)*, *op. cit.*, pp. 35–41.

[84] There is a proposal *de lege ferenda* that the regulation on the right to acquire should be comprehensive and this reference omitted – see: P. Blajer, *Z rozważań…*, *op. cit.*, p. 91.

[85] E. Klat-Górska, *Zniesienie…*, *op. cit.*, pp. 65, 70–71 i 76; E. Kremer, *Dziedziczenie…*, *op. cit.*, [in:] *Instytucje…*, *op. cit.*, p. 360.

[86] This effect is already the result of the definition of acquiring described in Art. 2 point 7 u.k.u.r., which regulate (indirectly) scope of the provisions of u.k.u.r. There is a *de lege ferenda* proposal to synchronize provisions of the k.c. and u.k.u.r. See: K. Stefańska, M. Mikołajczyk, *Zniesienie…*, *op. cit.*, pp. 279–280.

of joint ownership, exemption from Art. 2a para. 3 point 10 u.k.u.r. apply.[87] In other words, there is no need for the co-owner who become sole owner of the agricultural land due to the abolition of joint ownership to be an individual farmer.[88] Firstly, this rule concerns any co-ownership, including joint ownership resulted from inheritance[89] or marriage. Secondly, this rule applies also to abolition of joint ownership by court decision.[90] In the case of a foreigner from a country other than UE member states or the Swiss Confederation, there is a necessity to obtain permit from the authorities (Art. 1 paras. 1 and 4 of Law of 24 March 1920).[91] As in the case of inheritance, exemption from the rule that acquirer must be an individual farmer does not mean that there is an exemption from the KOWR's right to acquire agricultural land. On the contrary, acquiring ownership of an agricultural land due to the abolition of co-ownership (on the grounds of the agreement between co-owners[92] or as a result of court decision[93]) is subject to KOWR's right to acquire agricultural real estate.[94]

Additionally in the case of abolition of co-ownership due to the court decision, provisions of the k.c. introduce some changes with regard to agricultural holding.[95] Normally, according to Art. 622

[87] Formally this exemption concern only agricultural land of an acreage greater than 1 ha, as the rule that acquirer must be an individual farmer apply only to such real estates. Cf. E. Klat-Górska, *Zniesienie…*, *op. cit.*, p. 63.

[88] Cf. P. Bender, *Podstawowe problemy…*, *op. cit.*, pp. 51–5; K. Stefańska, M. Mikołajczyk, *Zniesienie…*, *op. cit.*, p. 279; Z. Truszkiewicz, *Dziedziczenie i dział…*, *op. cit.*, p. 30. See also: E. Klat-Górska, *Zniesienie…*, *op. cit.*, p. 64; E. Kremer, *Dziedziczenie…*, *op. cit.*, [in:] *Instytucje…*, *op. cit.*, p. 370.

[89] Cf. Z. Truszkiewicz, *Dziedziczenie…*, *op. cit.*, p. 342.

[90] E. Klat-Górska, *Zniesienie…*, *op. cit.*, p. 74; K. Kurosz, *Prawo…*, *op. cit.*, pp. 113–118.

[91] Cf. E. Klat-Górska, *Zniesienie…*, *op. cit.*, p. 60.

[92] Cf. P. Blajer, *Z rozważań…*, *op. cit.*, p. 66; E. Klat-Górska, *Zniesienie…*, *op. cit.*, p. 68.

[93] Cf. K. Kurosz, *Prawo…*, *op. cit.*, pp. 110–111; E. Klat-Górska, *Zniesienie…*, *op. cit.*, p. 73.

[94] Cf. K. Stefańska, M. Mikołajczyk, *Zniesienie…*, *op. cit.*, p. 279.

[95] They do not apply to abolition on the grounds of the contract of the co-owners. See: E. Klat-Górska, *Zniesienie…*, *op. cit.*, p. 68; E. Kremer, *Dziedziczenie…*, [in:] *Instytucje…*, *op. cit.*, p. 346.

para. 2 of the Code of Civil Procedure[96] (k.p.c.), the court is obliged to abolish joint ownership in the way all parties agree[97]. Accordingly, if there is no consent between all the parties about the way of abolishing, the court is obliged to abolish joint ownership in the way, that results from preferred by the law order of co-ownership dissolution (physical division, granting full ownership to one of the co-owners, selling through auction with the division of the income among the co-owners).[98] However, in regard to agricultural holding, Art. 213 para. 1 k.c. provides that if the abolition of co-ownership of an agricultural holding by division between co-owners would be contrary to the principles of careful agricultural management, agricultural holding should be granted to the co-owner to whom all of the co-owners agree. If this is not the situation and co-owners do not agree about the way of abolition of joint ownership, the court should grant the agricultural holding to the co-owner who runs it or works in it permanently, unless the socio-economic interest argues in favour of another co-owner (Art. 214 para. 1 k.c.). Apart from differences of minor significance, there is also a possibility for reducing payment of pecuniary equivalent of the shares to other co-owners (Art. 216 para. 2 k.c.[99]).

3.3.3. ACQUISITION OF SHARES OF A COMPANY THAT OWNS AGRICULTURAL LAND

In Poland there are no restrictions in the sole acquiring of a share of a legal entity that owns agricultural land (with exception of the rules concerning acquiring land by foreigners[100]). However, as far as ownership of the agricultural land belong to the entities, it is worth noting that – in general – the right to acquire and

[96] Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego (t.j. Dz. U. z 2021 r., poz. 1805 z późn. zm.).

[97] E. Klat-Górska, *Zniesienie…*, *op. cit.*, p. 71; E. Kremer, *Dziedziczenie…*, *op. cit.*, [in:] *Instytucje…*, *op. cit.*, p. 361.

[98] E. Klat-Górska, *Zniesienie…*, *op. cit.*, pp. 65 and 83.

[99] This rule applies also in the case of a pecuniary legacy (Art. 1067 para. 1 k.c.).

[100] See above.

the preemption right apply to changes of the partners in companies (Art. 3b para. 1 u.k.u.r.) and acquiring shares in companies that own at least 5 ha of agricultural land (Art. 3a para. 1 and Art. 4 para. 6 u.k.u.r.).[101]

3.3.4. ACQUIRING AGRICULTURAL LAND BY LEGAL ENTITIES OF RELIGIOUS COMMUNITIES

Article 2a paragraph 3 u.k.u.r. lists exemptions from the provision that the acquirer of the agricultural land must be an individual farmer, including entities. In that list of exemptions, after the enumeration of entities pursuing state's (public) aims, the first exemption concerns denominational legal entities. In other words, legal persons of religious organisations are mentioned first among the private-law entities exempted from the rule that the acquirer of the agricultural land must be an individual farmer. Art. 2a para. 3 point 1 letter d) u.k.u.r. provides that the rule that the acquirer of the agricultural land must be an individual farmer does not apply to:

> legal persons acting on the basis of regulations on the relationship between the State and the Catholic Church in the Republic of Poland, on the relationship between the State and other churches and denominational associations and on guarantees of freedom of conscience and religion.[102]

This is another example of a friendly policies of the Polish state towards religious communities in the field of denominational legal

[101] On cases see further: P. Blajer, *Z rozważań…*, *op. cit.*, pp. 75–80; S. Byczko, *Ustawowe prawo…*, *op. cit.*, pp. 237–244; P. Ledwoń, *An attempt…*, *op. cit.*, pp. 207–208.

[102] About the definition of denominational legal entity, types of legal entities of religious communities in Poland and list of them – see: M. Strzała, *Oświadczenie woli wyznaniowej osoby prawnej*, Kraków 2019, pp. 23–25, 228–268 with Annex 2 on pp. 537–547, https://doi.org/10.12797/ISBN.9788381381055 (accessed on: 05.06.2023).

entities,[103] however, a question was raised about the conformity of this preferential regulation with the Constitution RP and its rule about the equality before the law (Art. 32 para. 1 of the Constitution RP).[104] Indeed, denominational legal persons are the only private-law (simplifying: NGO) legal entities that can acquire agriculture land without further conditions.[105]

3.3.5. KINDS OF LAWFUL ACQUISITION OF AGRICULTURAL LAND BY LEGAL ENTITIES OF RELIGIOUS COMMUNITIES

According to the regulation described above, denominational legal persons can acquire agricultural land both on the grounds of sale contract, other contract resulting in transfer of agricultural land, as well as any other legal event.

3.3.6. RESTRICTIONS CONCERNING ACQUISITION OF AGRICULTURAL LAND BY LEGAL ENTITIES OF RELIGIOUS COMMUNITIES

There are no limitations in the u.k.u.r. concerning sole acquisition of agricultural land by a denominational legal entity (with the exception for the acreage). However, the exemption mentioned in Art. 2a para. 3 point 1 letter d) u.k.u.r. applies only to denominational legal entities. Thus, beyond its scope are companies in which all shares

[103] About other examples of this friendly policies – see: M. Strzała, *Wybrane uregulowania prawne Trzeciej Rzeczpospolitej dotyczące osobowości prawnej Kościołów i związków wyznaniowych jako przykład przyjaznej polityki wyznaniowej*, [in:] *Polityka wyznaniowa a prawo III Rzeczypospolitej*, M. Skwarzyński, P. Steczkowski (red.), Lublin 2016, pp. 265–283.

[104] See: K. Maj, *Zmiany…*, *op. cit.*, pp. 82 and 105.

[105] For the overview of acquisition agricultural land by legal entities in the Czech Republic, Hungary, Poland and Slovakia – see: M. Csirszki. H. Szinek Csütörtöki, K. Zombory, *Food Sovereignty: Is There an Emerging Paradigm in V4 Countries for the Regulation of the Acquisition of Ownership of Agricultural Lands by Legal Persons?*, "Central European Journal of Comparative Law" 2021, No. 1, pp. 29–52, https://doi.org/10.47078/2021.1.29-52 (accessed on: 26.05.2023).

are owned by the legal entities of religious communities or by an association established by the members of the religious community solely on the grounds of association law. However, acquiring agricultural land by denominational legal entities is subjected to provisions concerning the right to acquire and the pre-emption right of the State Treasury. The only case in which rights are not granted to the State Treasury, is the transfer of an agricultural land between denominational legal entities of the same religious community (Art. 3 para. 5 point 3 and Art. 4 para. 4 point 4 u.k.u.r.).

3.3.7. ACQUISITION OF AGRICULTURAL LAND MORTIS CAUSA BY LEGAL ENTITIES OF RELIGIOUS COMMUNITIES

As inheritance of agricultural land is treated in the u.k.u.r. as an example of a legal event that results in acquisition of agricultural land, the described below provisions of the u.k.u.r. formally apply to acquiring mortis cause agricultural land by denominational legal entities. However, due to the general exemption of acquiring agricultural land as a result of inheritance from the rule, that acquirer must be an individual farmer, and because of the general exemption of denominational legal entities from the same rule, legal entities of religious communities can acquire agricultural land without restrictions. Still, the state can execute its right to acquire agricultural land that was inherited by denominational legal entity, as the exemption mentioned in Art. 4 para. 4 point 4 of the u.k.u.r. applies only to transfer between legal entities of the same religious community. The same is true in the case of specific and ordinary bequest (in the case of the latter solely on the grounds of Art. 2a para. 3 point 1 letter d) and Art. 4 para. 4 point 4 u.k.u.r., as Art. 2a para. 3 point 1 u.k.u.r. does not mention ordinary legacy).

3.3.8. TAX REGULATIONS

The general rule is that acquiring agricultural land is subjected to general tax provisions. Thus, transactions which concern agricultural land are taxed as other transactions, on the grounds of income tax, especially according to the earlier-mentioned Law of 26 July 1991 and Law of 15 February 1992. On the other hand, sale of the agricultural land is exempted from the tax on civil law transactions according to Art. 9 point 2 of the Law of 9 September 2000.[106] Prerequisites for this exemption (which must be met cumulatively) are: there will be an agricultural holding created or enlarged as a result of the transaction; the area of the agricultural holding created or enlarged will be not less than 11 hectares and not more than 300 hectares; the agricultural holding will be run by the purchaser for at least 5 years from the date of acquisition. Generally, owning agricultural land is taxed with the agricultural tax according to Law of 15 November 1984 and not with the property tax regulated by Law of 12 January 1991.[107]

3.4. Acquisition of an Agricultural Holding

3.4.1. STATUTES CONCERNING ACQUISITION OF AN AGRICULTURAL HOLDING

Generally, provisions of the u.k.u.r. deal with acquisition of agricultural land and not agricultural holding (see, e.g., Art. 2a para. 1 u.k.u.r.). However, as agricultural land is a necessary component of the agricultural holding in the definition applicable in the u.k.u.r.,[108] the regulations of the u.k.u.r. concerning agricultural land affect agricultural holding as well.

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[106] Ustawa z dnia 9 września 2000 r. o podatku od czynności cywilnoprawnych (t.j. Dz. U. z 2023 r., poz. 170 z późn. zm.).

[107] Ustawa z dnia 12 stycznia 1991 r. o podatkach i opłatach lokalnych (t.j. Dz. U. z 2023 r., poz. 70).

[108] See above, in Part 3.2.

3.4.2. COMPONENTS OF AGRICULTURAL HOLDING IN DIFFERENT REGULATIONS

The definitions of the agricultural holding in the k.c. and u.k.u.r. were described above in Part 3.2. Presenting all of the definitions in numerous Polish statutes is beyond the scope of this study,[109] thus only some will be presented. According to Art. 2 para. 1 of the Law of 15 November 1984, the agricultural holding is the area of land referred to in Art. 1 [i.e., land classified in the land and building register as agricultural land, except for land occupied for business activities other than agricultural activities – annotation M.S.], with a total area exceeding 1 hectare, owned or held by a natural person, a legal person or an organisational unit, including a company, without legal personality. To this definition refers Art. 2 para. 4 of the Law of 26 July 1991 and Art. 2 para 4 of the Law of 15 February 1992. The definition using general terms is introduced in Art. 6 para. 3 of the Law of 20 December 1990. The provision states that agricultural holding is any holding used for agricultural activities.

Some statutes refers to EU law, as does the case of the Law of 18 December 2003.[110] Art. 3 point 1 of this statute provide that agricultural holding means a holding within the meaning of Art. 3 point 2 of Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No. 1305/2013 and (EU) No. 1307/2013.

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[109] For further information on the definitions of agricultural holding in Polish and EU law – see: P. Wojciechowski, *Współczesne definicje gospodarstwa rolnego w prawie polskim i prawie Unii Europejskiej*, [in:] *Instytucje prawa rolnego*, M. Korzycka (red.), Warszawa 2019, pp. 198–221.

[110] Ustawa z dnia 18 grudnia 2003 r. o krajowym systemie ewidencji producentów, ewidencji gospodarstw rolnych oraz ewidencji wniosków o przyznanie płatności (t.j. Dz. U. z 2023 r., poz. 885).

3.4.3. EXISTENCE OF GENERAL CONCEPTS OF AGRICULTURAL HOLDING IN POLISH LAW

There is no single definition of agricultural holding for all regulations in Poland. However, the most important concepts of agricultural holding because of the importance for the practice and the scope of application are the definitions included in the k.c. and u.k.u.r.

3.4.4. PROVISIONS ON THE ACQUISITION OF AGRICULTURAL HOLDING

Provisions that regulate the transfer of agricultural land inter vivos were described earlier. As far as the succession of agricultural land is concerned, it should be noted that from 1963[111] till 14 February 2001[112] in Poland there were special regulations concerning inheritance of agricultural holdings. With the exception for the special rules concerning foreigners[113] and some provisions still in force

[111] They were first introduced by the Law of 29 June 1963 (ustawa z dnia 29 czerwca 1963 r. o ograniczeniu podziału gospodarstw rolnych, Dz. U. z 1963 r. Nr 28, poz. 168). Applicable provisions depend on the date of the death of decedent (sometimes with retroactive effect).

[112] On this day verdict of the Polish Constitutional Tribunal came into force, which had declared those provisions as contrary to some provisions of the Constitution RP. See: wyrok Trybunału Konstytucyjnego z dnia 31 stycznia 2001 r. sygn. akt P 4/99 (Dz. U. z 2001 r. Nr 11, poz. 91). After that verdict, there are only some minor provisions included in k. c. dealing with the case of inheritance of agricultural holding.

[113] According to Law of 24 March 1920, acquiring real estate (including agricultural real estate) in Poland by foreigners or foreign legal entities, requires permission from state authorities (Art. 1 para. 1). This does not apply to foreigners who are citizens or entrepreneurs of Member States of the EEA or the Swiss Confederation (after 1 May 2016 this exception apply to agricultural land too – see above in Part 3.2). Other foreigners still need to obtain permission if there are not subjected to any exemption of which one concern statutory heirs (Art. 7 para. 2 of the Law of 24 March 1920). On acquiring agricultural land by foreigners – see further: J. Górecki, *Nabywanie…*, *op. cit.*, pp. 39–55; I. Wereśniak-Masri, *Nabywanie nieruchomości rolnych przez cudzoziemców: zezwolenie i zgoda – problem podwójnej regulacji*, [w:] *Współczesne problemy prawa rolnego i żywnościowego*, D. Łobos-Kotowska (red.), Katowice 2019, pp. 59–71; D. Sęczkowski, *Nabywanie*

in the k.c.,[114] since 2001 there exists no special regulation in that matter.[115] In particular there is no restriction concerning succession of the agricultural holding by the legal entities.[116] The special provisions of the k.c., which still affect succession of the agricultural holdings, concern mainly regulation about supplementary payment in the case of a legacy (Art. 1067 para. 1 k.c.), performance of legacy resulting in the division of agriculture holding (Art. 1067 para. 2 k.c.) and liability for estate debts connected with the running of an agricultural farm (Art. 1081 k.c.). The first regulation refers to Art. 216 k.c. in the case of monetary bequest, which allows to its reduction.[117] The second provision introduces the rule that if the performance of an ordinary legacy will result in the division of an agricultural holding that is contrary to the principles of proper agricultural management, the successor, which is obliged to perform the legacy, may instead of the performance of the legacy pay its cash equivalent. The third regulation provides that from the moment of the division of the inheritance estate, the liability for estate debts connected with the running of an agricultural farm is imposed on the heir, who inherited the agricultural holding and other heirs, who receive the equivalent of their shares in the estate.

The u.k.u.r. affects neither the inheritance (on the grounds of statutory succession or last will) nor the specific bequest of an agricultural land (Art. 2a para. 3 point 2),[118] i.e., becoming an owner on the date of the death of a previous owner. It is necessary to mention that this exception concerns only specific bequests, which

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nieruchomości rolnych przez cudzoziemców, [in:] *Nieruchomości rolne w praktyce notarialnej*, P. Księżak, J. Mikołajczyk (red.), Warszawa 2017, pp. 283–305.

[114] See below.

[115] Cf. P. Blajer, *Z rozważań…*, *op. cit.*, p. 73; E. Kremer, *Dziedziczenie…*, *op. cit.*, pp. 354, 358 i 361; P. Księżak, *Nabycie…*, *op. cit.*, p. 148; Z. Truszkiewicz, *Dziedziczenie…*, *op. cit.*, pp. 334–335.

[116] E. Kremer, *Dziedziczenie…*, *op. cit.*, p. 365; P. Ledwoń, *An attempt…*, *op. cit.*, p. 204; Z. Truszkiewicz, *Dziedziczenie…*, *op. cit.*, p. 337; *idem*, *Dziedziczenie i dział*, [in:] *Instytucje…*, *op. cit.*, pp. 16–17; *idem*. *O kilku podstawowych zagadnieniach… (część II)*, *op. cit.*, p. 23.

[117] See below.

[118] See literature listed in footnote 115. See also: Z. Truszkiewicz, *Dziedziczenie i dział…*, *op. cit.*, pp. 16–17.

results in automatic transfer of ownership on the moment of death of a decedent. Contrary to the above, restrictions introduced by the u.k.u.r. (especially the rule that the acquirer must be an individual farmer and – if not – a permit must be obtained from the authorities) still apply to the transfer of the ownership of agricultural land on the grounds of ordinary legacy, which creates only an obligation of the heir to transfer the ownership to the legatee.[119] However, in all cases, there is a right to acquire the agricultural land by the KOWR (Art. 4 paras. 1 and 2 point 4 letter a)) with some exceptions listed in Art. 4 para. 4 u.k.u.r. (mainly if the successor is an individual farmer, the successor inherits on the grounds of statutory succession, or if the successor is a close relative).[120]

It is worth noting that restrictions of the u.k.u.r. apply to alienation of the entire inheritance estate, a part of it, or of a share in the inheritance estate if it includes ownership of agricultural holding or agricultural land (Art. 1070^1 k.c.).[121] However, this provision is a part of title X of the k.c. ("Specific provisions on succession of agricultural farms"[122]), the scope of which according to Art. 1058 k.c. is limited to agricultural holding comprising agricultural land of an area larger than 1 ha.[123]

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[119] This situation resulted in different opinions. Some authors claim that there no grounds for different treatment acquirers of the agricultural land only on the basis of the form of legacy. See: Księżak, *Nabycie…*, *op. cit.*, pp. 149–151; Z. Truszkiewicz, *Dziedziczenie…*, *op. cit.*, p. 341; *idem*, *Dziedziczenie i dział…*, *op. cit.*, pp. 18–19; *idem*, *O kilku podstawowych zagadnieniach… (część II)*, p. 21. For different opinions – see: J. Bieluk, *Nowe zasady…*, *op. cit.*, p. 79; K. Maj, *Zmiany…*, *op. cit.*, p. 82. There is a proposal *de lege ferenda* to introduce ordinary bequest to the exemption listed in Art. 2a para. 3 point 2 u.k.u.r. – see: P. Księżak, *Nabycie…*, *op. cit.*, p. 149.

[120] See above, in Part 3.2.

[121] Z. Truszkiewicz, *Dziedziczenie…*, *op. cit.*, p. 342.

[122] Translation from T. Bil, A. Broniek, A. Cincio, M. Kiełbasa, *op. cit*.

[123] There is a discrepancy with the definition of an agricultural land in Art. 2 point 2 u.k.u.r., which includes agricultural real estate exactly with the acreage of 1 ha. See: Z. Truszkiewicz, *Zakres stosowania ustawy o kształtowaniu ustroju rolnego po nowelizacji z 2016 r.*, "Rejent" 2017, nr 7, p. 101 with footnote 9 and p. 121 with footnote 49.

3.5. Existence of Special Regulations in the Field of Transfer of Agricultural Land and Agricultural Holding Mortis Causa

3.5.1. AGRICULTURAL LAND

The provisions of the u.k.u.r. that deal with succession of agricultural land were described above. As agricultural land is a necessary component of agriculture holding according to its definition introduced in the k.c., the rules of the k.c. concerning agricultural holdings apply to inheritance of an agricultural land.

3.5.2. AGRICULTURAL HOLDING

Rules concerning succession of agricultural holding included in the k.c. were described above. As agricultural land is a necessary component of agriculture holding according to its definition introduced in the k.c. (which apply in general to the provisions of the u.k.u.r.), above-described rules of the u.k.u.r. concerning agricultural land apply to inheritance of an agricultural holding.

3.6. Existence of Special Regulation in the Field of Transfer of Agricultural Holding Inter Vivos

As agricultural land is a necessary component of agriculture holding according to its definition introduced in the k.c. (which apply in general to the provisions of the u.k.u.r.), the above-described rules of the u.k.u.r. concerning agricultural land apply to transfer of an agricultural holding.

3.7. Good Practices

Insofar as the aim is the counteracting of excessive land concentration, some rules introduced by the u.k.u.r. can be helpful, e.g., introducing a maximum area of agricultural land that can be acquired without further restrictions. Wherever the constitutional preferred model of structure of ownership of agricultural land is the family farm, the rule of the u.k.u.r. that in general only an individual farmer can acquire agricultural land is also worth consideration. The same applies to countries in which there are no constitutional regulations in that matter, but there is a political will and no legal obstacles to shape the structure of ownership of agriculture land in accordance with that model.

Some specific regulations of the u.k.u.r. can be seen as a good practice in any case. This concerns mainly granting right to acquire and preemption right to the long-term lessee of the agricultural land. Another aspect of the Polish regulation worth noting is introducing regulation for all forms of acquisition of agricultural land (inter vivos, mortis causa, due to the transfer on the grounds of a contract or due to any other legal event). Exempting denominational legal entities, which generally do not acquire agricultural land for speculative purposes as their aims are different than generating income, is also to be mentioned (a problematic issue is to create exception that does not violate the rule of the equality before the law).

3.8. *De Lege Ferenda* Proposals Concerning Polish National Law

Proposals *de lege ferenda* can be divided into two categories. The first type of proposals resolves issues due to the theoretical principles of the system of law (especially coherence) and deals mainly with technical issues (thus they concern formal aspects of provisions and have an insignificant or minor impact on the practical effects of the regulation). The second category of propositions relates to the substantive content of the regulations.

The first group include general proposals to simplify the structure and regulations of the u.k.u.r., the provisions of which are considered to be too complicated.[124] Apart from issues related to general concepts and definitions of Polish agricultural law,[125] the definition of 'agricultural real estate' described in Art. 2 point 1 u.k.u.r. should be the simple reflection of the definition of the term described in Art. 46^1 k.c., as there is no need to introduce to the legal system another, different definition of the same term (conditions about spatial development plans can be included in other provisions, especially dealing with the scope of the u.k.u.r.). The same rules apply to the definition of "agricultural holding" (Art. 2 point 2 u.k.u.r.), which should only reference Art. 55^1 k.c. (provisions about minimum area also can be a part of the regulation of the scope of the u.k.u.r.).[126] Additionally, Art. 4 para. 1 point 4 letter a) u.k.u.r. should omit the words "agricultural holding", as Art. 4 u.k.u.r. deals with agricultural land and not with agricultural holding.[127] Finally, Art. 210 para. 2 k.c. should omit the reference to the u.k.u.r., as applying the rules of the u.k.u.r. to the situation mentioned in Art. 210 para. 2 k.c. is already covered by the provisions of the u.k.u.r. itself.[128]

The proposal to change the regulation regarding acquisitive prescription belong to the second group. Rules introduced in Art. 172

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[124] See: P. Bender, *Podstawowe problemy… (cz. 1)*, p. 11; P. Bender, *Podstawowe problemy… (cz. III)*, *op. cit.*, p. 45; K. Maj, *Nowelizacja…*, *op. cit.*, p. 91; Z. Truszkiewicz, *Dziedziczenie i dział…*, *op. cit.*, p. 36–37; *idem, O kilku podstawowych zagadnieniach… (część II)*, *op. cit.*, p. 41; *idem, Zakres…*, *op. cit.*, p. 123.

[125] See footnote 38 above and the proposal of amending art 46^1 k.c. to avoid controversies about the relation of the terms "agricultural real estate" and "agricultural land", e.g., by deletion the term "agricultural land". Another change in the definition regulated by Art. 46^1 k.c. could consist of explicit provision that the only type of immovable property that could form "agricultural real estate" is land (according to Art. 46 para. 1 k.c. immovable property are also buildings or their parts – e.g., apartments – if they itself constitute an object of ownership according to law), e.g., by amending first part of the definition to state that "*Agricultural immovable property is land*". Finally, the definition could introduce minimum acreage of 1 ha (in cohesion with Art. 1058 k.c. and Art. 2 point 1 u.k.u.r.) and provision about cessation of agricultural status of land.

[126] See footnotes 39 and 45 above.

[127] See footnote 80 above.

[128] See footnote 86 above.

para. 3 of the k.c. should apply only to agricultural land of an area not less than 1 ha (or greater than 1 ha in the case of the amendment to Art. 2a para. 3 point 1 letter a) u.k.u.r. and to be in accord with Art. 1058 k.c.). The inclusion of minimum surface in Art. 172 para. 3 k.c. (and not in another provision) is supported by the fact that this article introduces the maximum surface for acquisitive prescription of agricultural land.[129]

In my opinion, there is a necessity of equal treatment of ordinary bequest and specific bequest. Article 2a paragraph 3 point 2 u.k.u.r. should include ordinary legacy, and thus the rule that the acquirer of an agricultural land could only be an individual farmer should not apply to acquisition on the grounds of the performance an ordinary bequest.[130] The issue raised by some authors, that the nullity of the contract is too severe a consequence of the violation of rules of the u.k.u.r., should also be considered.[131]

3.9. Summary

The provisions of the u.k.u.r. can be approached from perspectives. Introducing a maximum area of agricultural land that can be acquired without further restrictions can be treated as an effective mechanism for counteracting excessive land concentration. On the other hand, it is treated by some as too restrictive, especially when taking into consideration liberal concepts of ownership and the free market. Similarly, the constitutionally preferred model of the structure of ownership of agricultural land – the family farm – is reflected in many u.k.u.r. regulations, especially in the lifting of restrictions for acquisitions between close relatives and acquisitions mortis causa. It is also the decision of the lawmakers to introduce and maintain the general rule that agricultural land can in general be acquired by an individual farmer. The rule draws criticism from some authors, but the criticism is about agricultural

[129] See footnote 49 above.
[130] See footnote 119 above.
[131] See footnote 83 above.

policy and political decision-making, and is not about the rule's legal validity.

Despite the difference of opinion, granting the right to acquire and the preemption right to the long-term lessee of the agricultural land seems a solution that can be justified in any case. The same applies to exempting denominational legal entities, which generally do not acquire agricultural land for speculative purposes, as their aims are different than generating income (however, the problematic issue is to create exception that does not violate the rule of the equality before the law).

Even in the case of generally accepting the rules of the u.k.u.r., some of its provisions should be amended. Some of the proposals *de lege ferenda* presented in this work deal with technical issues, and others concern some minor changes in the law. Apart from a general proposal to simplify the structure and regulations of the u.k.u.r. and to obviate terminology problems, the provisions concerning acquisitive prescription should be changed to comply with the relevant provisions of the u.k.u.r. The strongest proposition in this work deals with necessity of equal treatment of ordinary bequest and specific bequest.

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Part II

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Chapter 4. Legal Protection of Farmers in Poland on the Level of the Selected Civil Law Rules *De Lege Lata* and *De Lege Ferenda*

4.1. Introductory Remarks

4.1.1. RESEARCH OBJECTIVE OF THE STUDY

In this study[1] the aim of my individual research – as a part of the ongoing scientific and research project "Polish-Hungarian Research Platform 2023" guided by Instytut Wymiaru Sprawiedliwości in Warsaw – is to create proposals of selected civil rules *de lege ferenda* in order to improve legal protection of agricultural producers in Poland and in particular natural persons conducting agricultural activity.[2] Pursuant to Article 23 sentence 1 of the Constitution of the Republic of Poland of 1997, the basis of the agricultural system of the State is the family farm. Cyclical statistical surveys

[1] As part of the Institute of Justice's project "Polish-Hungarian Research Platform 2023", my research will be summarised in two main works: (1) "Legal protection of farmers in Poland on the level of the selected civil law rules *de lege lata* and *de lege ferenda*', and (2) "Preventing bankruptcy in Poland – financial restructuring of farmers who are natural persons in insolvency proceedings *de lege ferenda*".

[2] As part of this paper, I will refer to my own elaboration of the draft amendments to the private law regulations prepared for the Institute of Justice in Warsaw in 2023.

carried out in Poland show that the trend of decreasing the number of farms continues, while their average total area and agricultural land increases.[3] This can be interpreted as a disturbing phenomenon, prompting reflection on, among others, the legislator. Socio-cultural changes have a significant impact on the condition and development of agriculture in Poland. Currently, only some villagers in Poland are engaged in agricultural activities. It is worth pointing out that the legal protection of farmers in Poland – on the general level – is gaining its legislative priority. This applies to both adopted laws[4] and drafts of new crucial legal acts.[5]

The detailed scope of my scientific research in this study relates to the following selected issues are the following:

1. the problem of amending of the cultivation contract ("farming contract", "umowa kontraktacji") regulated in the Civil Code (Art. 613–626). It is a world-wide well – known institution.[6] Legal aspects of agriculture are growing in significance.

[3] Główny Urząd Statystyczny, *Powszechny Spis Rolny 2020. Charakterystyka gospodarstw rolnych w 2020 r.*, Warszawa 2022, p. 22.

[4] As an example, it should be pointed out, the Act of 9 May 2023 on the Agricultural Protection Fund. According to this law, the Fund's financial resources are to grant and pay compensation to an agricultural producer who has not received payment for agricultural products disposed of to a purchaser who has become insolvent. A draft of the Rural Code has been prepared.

[5] In particular, it should be mentioned the proposal to regulate the so-called "Agricultural Code". P. Kalinowski, *Przegląd wybranych europejskich modeli kodeksu rolnego w kontekście ich potencjalnego zastosowania dla kodyfikacji polskiego prawa rolnego*, "Business Law Journal" 2019, No. 3, p. 106; P. Kalinowski, *Projekt Kodeksu agrarnego W.L. Jaworskiego – wybrane aspekty*, [in:] *Współczesne problemy prawa rolnego i żywnościowego*, D. Łobos-Kotowska (red.), Katowice, 2019, p. 149. The project of the "Agricultural Code Act" ("Kodeks rolny") is a milestone in the development of the agricultural law in Poland.

[6] Therefore, it is worth referring here to a wider, international literature. A. Ajao, G.A. Oyedele, *Economic efficiency of contract farming in Oyo state: experience from British American Tobacco Company*, "International Journal of AgriScience" 2013, Vol. 3, No. 9; A. Akhter, *Determinants of cherry production and marketing in Pakistan: a propensity score matching approach*, "Agricultural Economic Review" 2013, Vol. 14; J. Baker, *Evaluating the Impact of Development Projects on Poverty: A Handbook for Practitioners. Directions in Development*, Washington 2000; I. Begum, *Contract farmer and poultry farm efficiency in Bangladesh: A data envelopment analysis*, "Applied Economics" 2012, Vol. 44, No. 28; M. Bellemare,

UNIDROIT,[7] FAO[8] and IFAD[9] jointly prepared and issued *Legal guide on contract farming* (2015).[10] However, "Legal Guide" does not intend to be a model law. Its goal is to be the source of good practice. The issue of the farming contract is the major part of my research presented in this paper;

2. the issue of reinforcement of a legal position of the agricultural producer who is a natural person in contractual relations with entrepreneurs;
3. the concept of providing a new simplified institution of a security for farmer's borrowings and received credits. "Agricultural deposit" could be a competitive institution for an existing a) registered pledge ("zastaw rejestrowy") and b) transfer of ownership as a collateral ("przewłaszczenie na zabezpieczenie");
4. the concept of minor legislative changes of a registered pledge;

F. Marc, *As you sow, so shall you reap: the welfare impacts of contract farming*, "World Development" 2012, Vol. 40, No. 7; P. Baumann, *Equity and Efficiency in Contract Farming Schemes: The Experience of Agricultural Tree Crops*, "Working Paper" 2000, Vol. 139, Overseas Development Institute; J. Bingen, *Producer Groups: Becoming Full Partners in Agricultural Markets and Agroenterprises*, *Guide to Developing Agricultural Markets and Agro-Enterprises Series*, World Bank, 1999; *Building Climate Resilience for Food Security and Nutrition*, Food and Agriculture Organization, 2018; *Contract farming and out-grower schemes: appropriate development models to tackle poverty and hunger?*, "Policy Discussion Paper" 2015, March, Johannesburg; A. Dorward, *The Effects of Transaction Costs, Power and Risk on Contractual Arrangements: a Conceptual Framework for Quantitative Analysis*, "Journal of Agricultural Economics" 2001, Vol. 52, No. 2; C. Eaton, A. Shepherd, *Contract Farming, Partnerships for Growth*, "FAO Agricultural Services Bulletin" 2001, No. 145; D. Glover, K. Kusterer, *Small Farmers, Big Business: Contract Farming and Rural Development*, London 1990; S. Miyata, N. Minot, D. Hu, *Impact of contract farming on income: linking small farmers, packers, and supermarkets in China*, "World Development" 2009, Vol. 37, No. 11; M. Prowse, *Contract Farming in developing Countries: A Review; Institute of Development Policy and Management*, University of Antwerp; Agence Française de Développement (AFD), 2012, http://www.value-chains.org/dyn/bds/docs/830/12-VA-A-Savoir_ContractFarmingReview.pdf (accessed on: 5.04.2024).

[7] International Institute for the Unification of Private Law.

[8] Food and Agriculture Organization of the United Nations.

[9] International Fund for Agricultural Development.

[10] Rome, 2015, *passim*.

5. encouragement to create online private-owned platforms connecting agricultural producers selling their goods and buyers;
6. final issue: farmers' protection against unfair competition in the regulation of private law.

From the scope of my scientific research, I excluded those issues that, in the field of civil law, were the subject of legislative postulates of other persons.

Within the above-mentioned area of my research, I will focus on the *de lege ferenda* issues. Therefore, my working hypotheses are as follows below.

1. The safety of agricultural production is of strategic importance for the Polish State.[11] Traditional Polish agriculture is of obvious value. On the one hand, there is the phenomenon of "industrial" food production. Food producers on a massive scale are capital-strong entities and pose competitive dangers for the existence of family farms. On the other hand, opinions are formulated about the allegedly civilisational need to look for an alternative to the traditional way of obtaining food, as well as to redefine the concept of food.
2. The regulation of a cultivation contract in Poland, mostly created sixty years ago, is outdated due to the political, social and economic significant changes that have occurred since 1965. However, any changes to the Civil Code should be introduced with particular care and after comprehensive and profound discussion. A good solution would be to return to the practice of the permanent Civil Law Codification Commission, which would give its opinion on any proposed changes to the Civil Code.
3. Polish new regulation of a cultivation contract should be compared with global standards in similar relations.
4. The legal position of an agricultural producer, who is a natural person, in contractual relations with entrepreneurs needs to be strengthened.

[11] A. Mikuła, *Bezpieczeństwo żywnościowe Polski*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2012, t. 99, nr 4.

5. There is a need for a simple, cheap and effective security for farmer borrowings and changes in the regulation of a registered pledge.
6. Entrepreneurs, chambers of agriculture, chambers of industry, chambers of industry and commerce should be encouraged to create and manage Internet platforms for matching buyers with sellers.
7. New named types of acts of unfair competition should be added to the system of prohibition of acts of unfair competition on the level of private law (the title of the study excludes dealing with issues within the scope of public competition law).

A short chapter in the monograph does not allow for full justification of the possible changes *de lege ferenda*. The study will be limited to a general presentation of them.

4.1.2. THE POLISH OFFICIAL "STRATEGY FOR SUSTAINABLE DEVELOPMENT OF RURAL AREAS, AGRICULTURE AND FISHERIES 2030"

Due to the fact that this study is being prepared as part of Polish-Hungarian scientific cooperation, for information purposes and in order to maintain symmetry in this monograph, it is necessary to present the current assumptions of the agricultural policy of the Polish state. The implementation of this policy takes place, as a rule, within the framework of a vertical relationship, with the sovereign position of the State in relation to all the entities concerned. Appropriate legislation relating to private law may be a part of State policy.

In the Polish legal system, the Act of 6 December 2006 on the principles of conducting development policy[12] establishes that the Republic of Poland develops special strategies. On this directional legal basis, on 15 October 2019, the Council of Ministers (Government) created a resolution on the adoption of the "Strategy for sustainable development of rural areas, agriculture and fisheries 2030" (hereinafter

[12] Official Journal of 2021 item 1057 and of 2022 item 1079.

"Strategy 2030").[13] It is a basic strategic document in the field of agricultural policy and rural development of the Polish State. It presents the objectives, directions of intervention and actions that should be taken by the Polish State in the perspective of 2030.

> The strategy presents an in-depth analysis of the possibilities of rural development, agriculture and fisheries in the regional dimension, which made it possible to determine the key directions of their development until 2030. The activities of Strategy 2030 will be financed from national and external public funds, which include, inter alia, funds from the EU budget for 2021–2027 (including, among others, the Common Agricultural Policy, cohesion policy, common fisheries policy and funds under the 'Horizon Europe' program).[14]

Financing from the national level will be supported by development funds of local government units and private funds. The planned measures until 2030 include:

- maintaining the principle that the basis of the agricultural system will be family farms;
- supporting the sustainable development of small, medium and large farms;
- greater use of the potential of the agri-food sector than before thanks to the development of new skills and competences of its employees, as well as through the use of the latest technologies in production and the use of digital solutions and creating conditions for the creation of innovative products;
- building a competitive position of Polish food on foreign markets, the hallmark of which will be high quality and reference to the best Polish traditions, as well as adaptation

[13] Resolution No. 123 of the Council of Ministers of 15 October 2019 on the adoption of the "Strategy for Sustainable Development of Rural Areas, Agriculture and Fisheries 2030", Polish Monitor of 5 December 2019, item 1150.

[14] https://www.gov.pl/web/rolnictwo/strategia-zrownowazonego-rozwoju-wsi-rolnictwa-i-rybactwa-2030 (accessed on: 5.04.2024).

of agri-food products to changing consumption patterns (e.g., the growing interest in organic food);

- conducting agricultural and fisheries production respecting the principles of environmental protection and adapting the agri-food sector to climate change, including, among others, in terms of access to water; dynamic development of rural areas in cooperation with cities, which will result in stable and sustainable economic growth, providing every inhabitant of rural areas with decent work, and city dwellers with access to healthy Polish food;
- creating conditions for improving the professional mobility of rural residents and taking advantage of opportunities for development and change of qualifications resulting from the emergence of new sectors of the economy (such as the bioeconomy).[15]

> The adopted document allows to address in a coherent and complementary way the scope of public interventions financed from national and Community funds in the EU financial perspective 2021–2027, which plays an important role in the process of programming EU funds implemented at the national and regional level.[16]

Tax policy is certainly an important aspect of state policy with regard to agriculture.[17] However, a broader analysis of this issue goes beyond the scope of this study.

[15] https://www.gov.pl/web/rolnictwo/strategia-zrownowazonego-rozwoju-wsi-rolnictwa-i-rybactwa-2030 (accessed on: 5.04.2024).

[16] Ibidem.

[17] J. Bieluk, *Special departments of agricultural production. Legal problems*, Białystok 2013, p. 24.

4.1.3. LEGAL FREEDOM OF CONDUCTING AGRICULTURAL ACTIVITY IN POLAND

Agriculture is a part of the national economy.[18] It is worth mentioning the strong tradition of agriculture in Poland. Even in communist times (1945–1989), when economic activity was a state monopoly, individual farms were not dismantled. Although the state then gave preferential treatment to so-called "socialized agriculture" (including agricultural production cooperatives), individual farmers continued to function.

The freedom to undertake agricultural activity has a broad axiological justification. Pursuant to Article 23 of the Constitution of the Republic of Poland, the basis of the agricultural system of the state is the family farm.[19] This does not mean a monopoly of family farms for agricultural activity.

The freedom to conduct agricultural activity can be linked to the broadly understood principle of freedom of economic activity.[20] In accordance with the Constitution of the Republic of Poland (Art. 20, 22), adopted in 1997, the social market economy based on the freedom of economic activity, private ownership and solidarity, dialogue and cooperation of social partners is the basis of the economic system of the Republic of Poland.[21] Restriction of the freedom of economic activity is permitted only by law (Act of both chambers of the Parliament – the Sejm and the Senate – signed by the President, published in the Polish Journal of Laws – "Dziennik Ustaw") and only for reasons of important public interest. Freedom of commercial activity is the founding rule of administrative

[18] A. Powałowski, *Aspects of the subject and subject of the agricultural system*, "Gdańskie Studia Prawnicze" 2014, t. 31, p. 1091.

[19] J. Bieluk, *Special…*, *op. cit*., p. 31.

[20] I. Hasińska, *Evolution from individual farmer to agricultural entrepreneur. Remarks on the background of the legal status of a farmer and a civil partnership*, "Przegląd Prawa Rolnego" 2017, nr 2(21), p. 103.

[21] A. Ogonowski, *Konstytucyjna zasada społecznej gospodarki rynkowej – w poszukiwaniu znamion polskiego modelu*, [in:] *Między wykluczeniem a dobrobytem. Refleksja nad społeczną myślą encykliki "Centesimus annus" Jana Pawła II*, B. Bąk, R. Kantor, M. Kluz, J. Młyński (red.), Kraków 2017, pp. 181–211.

commercial law. To put it simply, agricultural activity is a special kind of economic activity, in the broad sense of the term.[22] By virtue of Article 6 of the Act of March 6, 2018 Law of Entrepreneurs (a part of administrative law), the provisions of the mentioned Act – including the obligation of natural persons to enter in a special register of entrepreneurs – shall not apply to: production activity in agriculture in the field of agricultural crops and animal husbandry; horticulture; vegetable growing; forestry and inland fishing; renting rooms by farmers; selling home meals and providing other services related to the stay of tourists on farms; and the production of wine by wine producers within the meaning of Art. 2 point 23 of the Act of 2 December 2021 on wine products who are farmers producing less than 100 hectoliters of wine in a wine year exclusively from grapes from their own vineyards.[23] Polish law does not introduce a census of formal qualifications for taking up agricultural activity. In Poland there are some restrictions on the purchase of land by foreigners.[24] There are also restrictions on trading agricultural land.[25] Nevertheless, it is possible to conduct agricultural activity on someone else's land, which can be disposed of on the basis of a contract, such as rent or lease.

[22] D. Łobos-Kotowska, A. Doliwa, *Social Justice and Solidarity in Agricultural Law (on the Example of Rural Development Support*, "Studia Iuridica Lublinensia" 2021, Vol. 30, No. 5, pp. 430; A. Suchoń, *The lease and sale of agricultural real estate in Poland – legal and economic aspects*, "EU Agrarian Law" 2017, Vol. 6, Issue 2, p. 43; A. Suchoń, *Jeszcze o pojęciu działalności rolniczej*, "Rejent" 2017, nr 12; I. Hasińska, *Prawno-Ekonomiczne ujęcie rolniczej działalności gospodarczej w świetle "Konstytucji Biznesu"*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2021, t. 83, nr 3, p. 153.

[23] Agricultural activity is not subject to entry in the register of economic activity kept for entrepreneurs, but its specific registration is made as part of the land and building register on the basis of geodetic and cartographic regulations, or under detailed provisions on the national system of registering producers, registering agricultural holdings and registering applications for payments.

[24] P. Bołtyk, *Conversion of agricultural land into non-agricultural land in Poland*, "Ekonomia i Środowisko" 2020, t. 72, nr 1, p. 41.

[25] H. Kryszk, K. Kurowska, R. Marks-Bielsk, *Legal and Socio-Economic Conditions Underlying the Shaping of the Agricultural System in Poland*, "Sustainability" 2022, Vol. 14, Issue 20, p. 3, https://doi.org/10.3390/su142013174 (accessed on: 5.04.2024).

The freedom to pursue agricultural activity may also result from the foundations of the right to property (the right to the benefits of natural things) or the principle of freedom of contract. The Polish legal system applies the principle of unity of civil law, which means that commercial law is a specialised branch of civil law.[26] Agricultural activity may be taken up and conducted by natural persons and legal persons (capital companies, cooperatives, foundations, family foundations, etc.), as well as the "third category" of legal entities, which are "organisational units without legal personality but with legal capacity" (called "defective" legal persons or "incomplete" legal persons).[27] In principle, there is freedom to choose any type of the legal form for conducting agricultural activity. The Civil Code does not distinguish an "agricultural producer" (or a "farmer"). The subjects of the law ("persons") are "entrepreneurs" (Article 43^1 of the Civil Code), "consumers" (Article 22^1 of the Civil Code) and others. Among the provisions on property, the legislator introduces in Art. 55^3 of the Civil Code the concept of an "agricultural holding" ("gospodarstwo rolne"). It is considered to be agricultural land together with forest land, buildings or their parts, equipment and livestock, if they constitute or may constitute an organised economic entity, and rights related to running an "agricultural holding". Polish civil law is built on the foundation of the principle of freedom of contract.[28] The parties concluding the contract may arrange the legal relationship at their discretion, as long as its content or purpose does not contradict the nature (nature) of the relationship, the law or the principles of social coexistence (Art. 353^1 Civil Code).

[26] M. Tarska, *Jedność prawa cywilnego a regulacja prawna spółek handlowych – zagadnienia wybrane*, "Acta Iuris Stetinensis" 2019, t. 27, nr 3, p. 193.

[27] A. Suchoń, *Agricultural Producers Cooperatives in the years 1920–2022 – selected legal issues*, "Studia Prawniczne KUL" 2022, nr 4(92), p. 65.

[28] P. Machnikowski, *Swoboda umów według art. 3531 k.c. Konstrukcja prawna*, Warszawa 2005, *passim*, K. Bączyk, *Zasada swobody umów w prawie polskim*, "Studia Iuridica Toruniensia. Przemiany Polskiego Prawa" 2002, t. 2, p. 35.

4.1.4. FORMS OF CONDUCTING AGRICULTURAL ACTIVITY IN POLAND

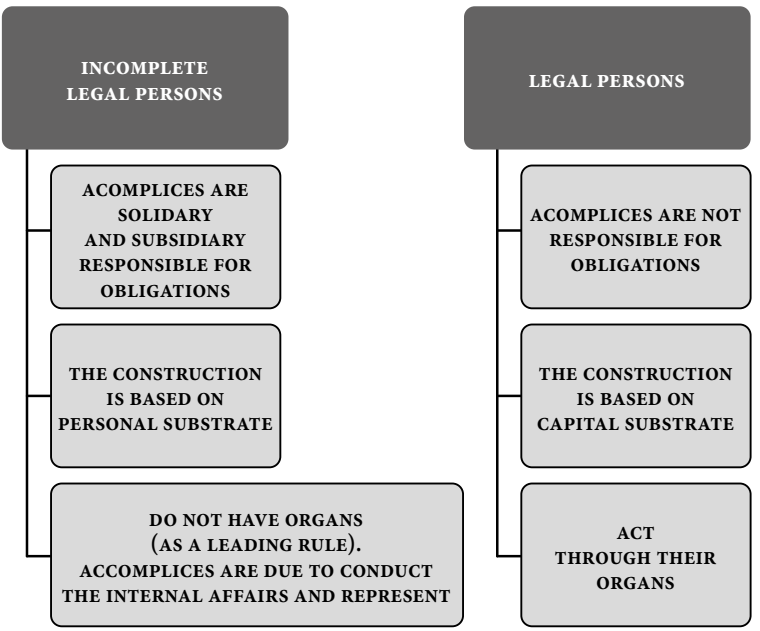
The dominant entity in Polish agriculture and running a farm is a natural person (natural persons).[29] This does not exclude the possibility of running a farm by different organisational units. This section will present basic information but crucial for persons not familiar with the Polish legal system. It will be indicated entities that in theory can conduct agricultural activity in Poland. First of all, the three different types of persons in Polish civil law will be presented (Figure 1). Next, the sense of distinguishing two categories of organisational units, 'defective legal persons' and legal persons, should be explained (Figure 2).

Figure 1. *Types of persons in Polish civil law*

Source: author's own preparation.

[29] A. Powałowski, *Aspects of the subject and subject of the agricultural system*, "Gdańskie Studia Prawnicze" 2014, t. 31, p. 1091.

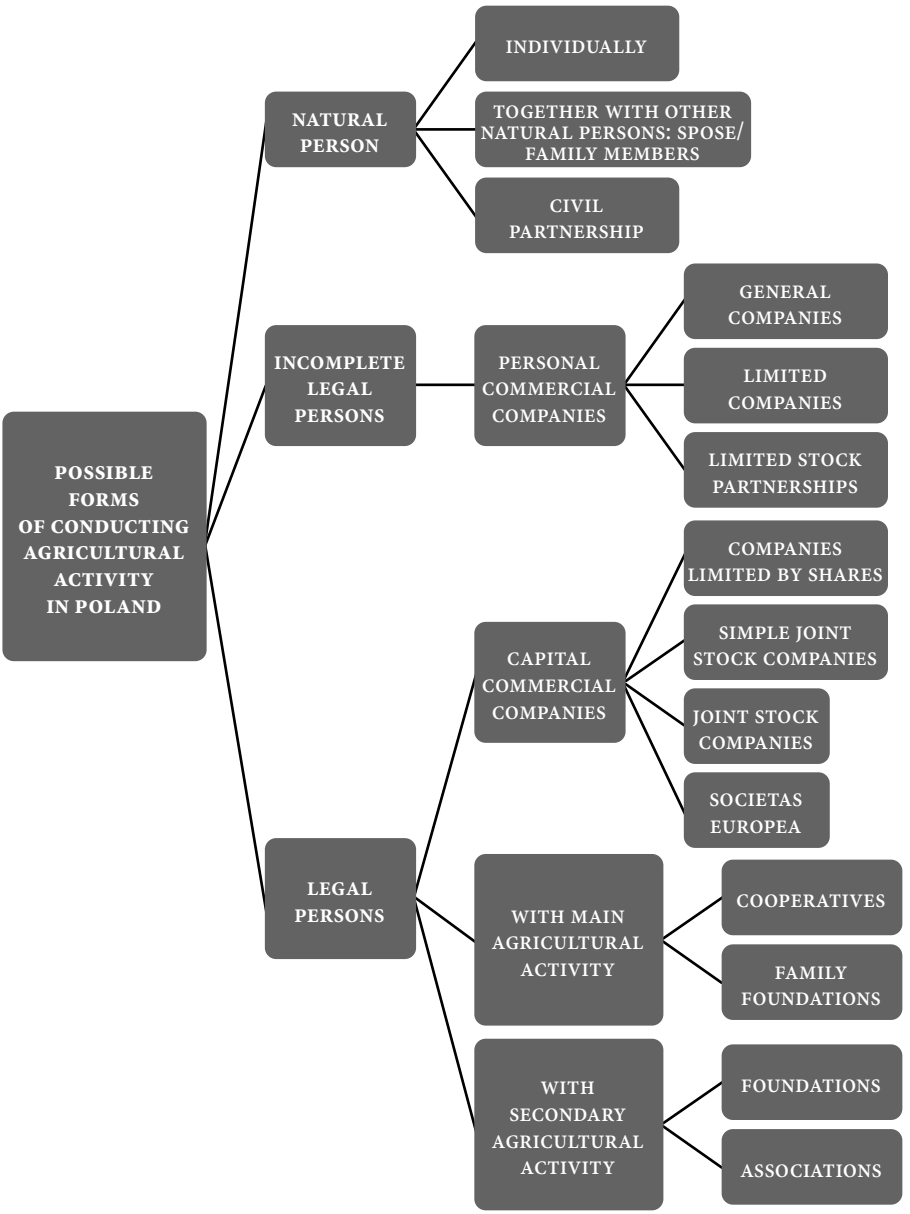
Figure 2. *Two categories of organisational units, 'defective legal persons' and legal persons*



Source: author's own preparation.

Theoretically possible legal forms of conducting agricultural activity in Poland, under Polish law, are presented below. This is not a numerus clausus of acceptable legal forms (Figure 3).

Figure 3. *Possible legal forms of conducting agricultural activity in Poland, under Polish law*

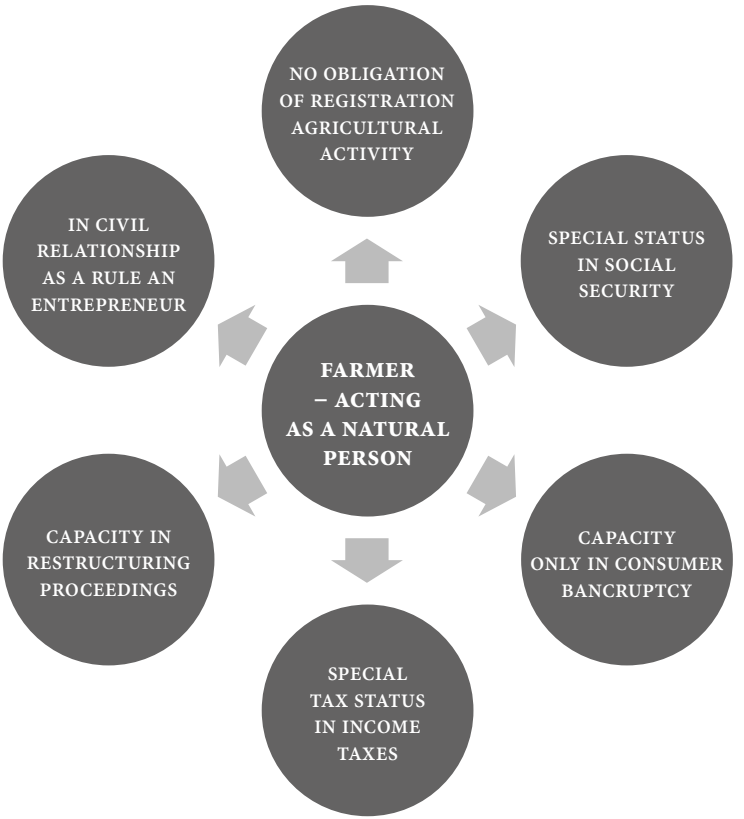


Source: author's own preparation.

At this point the so-called "producer groups" ("grupy producenckie") should be mentioned. Producer groups are established on the basis of the Act on Groups of Agricultural Producers and their Associations of 15 September 2000. Groups of agricultural producers may be formed by natural persons, legal persons and organisational units without legal personality. The basic condition is that these entities run an agricultural holding within the meaning of the provisions on agricultural tax or agricultural activity within the scope of special departments of agricultural production. Conducting activity as an entrepreneur by a group of agricultural producers is possible provided that the following subjective conditions are met: (1) it is formed by producers of one agricultural product or group of products, (2) operates on the basis of an agreement or statute referred to as the memorandum of association, (3) consists of members, shareholders or shareholders – none of them may have more than 20% of votes at the general meeting or shareholders' meeting, (4) defines the production rules applicable to the members of the group, (5) revenues from the sale of products (groups of products) produced on the holdings of group members are to constitute more than half of the group's revenues from the sale of products or groups of products for which the group was created. The most important objectives pursued by a group of agricultural producers in the course of its activity are: joint sale of products or groups of products produced on the farms of group members or through them; adaptation of agricultural production to market conditions; concentration of supply; improvement of management efficiency; increase of farmers' income by reducing costs; the possibility of planning and preparing large, homogeneous batches of high-quality products.

The simplest and the cheapest form of conducting agricultural activity is an activity of a natural person. However, there is no difference between an estate dedicated to agricultural activity and one that's "private". In case of insolvency a natural person is responsible with all sorts of assets. The Figure 4 presents a special legal status of a natural person as an individual farmer.

Figure 4. *A special legal status of a natural person as an individual farmer*



Source: author's own preparation.

4.2. Part One: Selected Civil Rules Protecting Farmers *De Lege Lata*

4.2.1. OUTDATED REGULATION OF THE CULTIVATION CONTRACT IN POLAND

4.2.1.1. *General Remarks*

A cultivation contract is one of traditional agreements in Polish civil law.[30] Poland has been an agricultural country for centuries.[31] The export of grain, mainly through Gdańsk, was the basis of golden prosperity of the First Polish Republic.[32] Nowadays an agricultural

[30] R. Budzinowski, *Agricultural Law in Poland, Revista de la Facultad de Derecho de México Tomo LXIX*, Número 273, Enero-Abril 2019, http://dx.doi.org/10.22201/fder.244889333e.2019.273-1.68623, p. 441; H. Chołaj, *Kontraktacja produktów rolnych. Studium ekonomiczne*, Warszawa 1965; S. Grzybowski, *Umowa kontraktacji w systemie kodeksu cywilnego*, "Ruch Prawniczy Ekonomiczny i Społeczny" 1967, nr 29; W. Kozak, *Kontraktacja produkcji roślinnej*, Warszawa 1954; J. Krajewski, *Z zagadnień kontraktacji*, "Nowe Prawo" 1956, nr 2; I. Lipińska, *Umowa kontraktacji jako instrument polityki rolnej*, "Stowarzyszenie Ekonomistów Rolnictwa i Agrobiznesu" 2012, t. 14, nr 2; I. Lipińska, *Kontraktacja jako prawny instrument organizowania rynku w systemie limitowanej produkcji (na przykładzie rynku cukru)*, "Zeszyty SGGW w Warszawie. Ekonomika i Organizacja Gospodarki Żywnościowej" 2012, nr 100; J. Paliwoda, *Wokół zagadnień kontraktacji produktów rolnych*, "Państwo i Prawo" 1967, nr 1; Z. Policzkiewicz, *Odpowiedzialność stron w stosunku kontraktacji w obrocie powszechnym*, Warszawa 1980; P. Pytlak, *Umowy kształtujące branżowe rynki rolne ze szczególnym uwzględnieniem umowy kontraktacji*, "Zeszyty Naukowe Wyższej Szkoły Humanistyczno-Ekonomicznej w Zamościu" 2005, nr 121; D. Strzębicki, *Ekonomiczne uwarunkowania zawierania umów na kontrakty rolne*, "Studia Ekonomiczne i Regionalne" 2013, t. 6, nr 4; A. Suchoń, *Kontraktacja*, [in:] *Instytucje prawa rolnego*, M. Korzycka (red.), Warszawa 2019; A. Suchoń, *Z prawnej problematyki umowy kontraktacji w praktyce*, "Przegląd Prawa Rolnego" 2017, nr 1(20); A. Szpunar; *Charakter prawny umowy kontraktacyjnej*, "Nowe Prawo" 1955, nr 5.

[31] A. Stelmachowski, [in:] *System prawa prywatnego. Prawo zobowiązań – część szczegółowa*, J. Rajski (red.), Warszawa 2004, p. 249.

[32] However, the literature expresses the view that in Poland "the first cultivation contracts appeared in the eighteenth century. Around 1775, the Tabaczne Company was established, which in factories leased from the state carried out the production of tobacco based on both imported and domestic raw materials. The supply of domestic raw material was based on cultivation contracts."

producer concludes a cultivation contract to (1) ensure that the agricultural products produced are disposed of and to (2) obtain financing for the commencement and operation of production, for example in the form of advances granted by the contactor. A contractor grants targeted cash loans to an agricultural producer. In turn, the contactor concludes a cultivation contract to ensure the certainty of supply. The issue of the development of agricultural production is not left solely to the provisions of private law governing the relationship between the agricultural producer and the person in contact. There are many legal standards in the European Union law regulating to means and quality of agricultural production.[33]

The UNIDROIT, FAO and IFAD document draws attention to the benefits of a cultivation contract. On the one hand, early contracting allows for better organisation of production, better availability to obtain financing for production, better access to agricultural means of production. On the other hand, concluding a contract may be a source of certain risks. Given the scale of agricultural production, these risks may be relevant to the solvency of the agricultural producer. The demand for a particular type of agricultural production can lead to a) monoculture of agricultural production, b) loss of diversity, and the oversupply of certain agricultural products in previous seasons favourably contracted by agricultural producers. For this reason, legislators are active in regulating the agricultural production market at very different levels by way of private law legislation, public aid programs, and other forms of public activity in matters of agricultural production (e.g., protections for their own market).[34]

Andrzej Stelmachowski, [in:] *Prawo zobowiązań – część szczegółowa. System Prawa Prywatnego*, J. Rajski (red.), t. 7, wyd. 4, Warszawa 2018.

[33] M. Lemanowicz, *Theory of contracts in the light of new institutional economics. The specificity of agricultural contracts*, "Acta Scientarum Polonorum. Oeconomia" 2018, Vol. 17, No. 4, 97–104, DOI: 10.22630/ASPE.2018.17.4.5.

[34] Legal Guide, *op. cit*., 7.

4.2.1.2. *Contractus Nominatus*

A cultivation contract in the Polish legal system is a "named contract" (*contractus nominatus*). However, the cultivation contract was developed by commercial practice and as such is not a theoretical "invention". Under Civil Code Art. 613 § 1, by a cultivation contract, an agricultural producer undertakes, firstly, to produce agricultural products and, secondly, to deliver (which means primarily the collection of manufactured agricultural products) to the contractor a specified quantity of agricultural products of a certain type. And the contractor undertakes to collect these products on the agreed date, pay the agreed price and perform a specific additional service if the contract "or specific regulations" provide for an obligation the fulfilment of such a service.[35] A cultivation contract may cover the whole of the agricultural producer's production or just a specific part thereof or an individual quantity of it.[36] Some cultivation contracts provide for a minimum quota for purchase by the contractor with the contract.[37]

4.2.1.3. *Performance of the Cultivation Contract*

In practice, as a rule the provisions of a cultivation contract specifies the quality of the agricultural product. According to the general principles of contract law, unless otherwise agreed by the parties, the performance is to be of average quality. The parties may agree

[35] See, e.g., A. Stelmachowski, *Kontraktacja*, Katowice 1965, *passim,* A. Stelmachowski, *Kontraktacja produktów rolnych*, Warszawa 1960, *passim*; A. Stelmachowski, *Zagadnienia prawne kontraktacji*, "Państwo i Prawo" 1954, nr 7–8, p. 76 and next. The subject of contracts for the production and delivery of agricultural products is the subject of UNIDROIT analyses in the document entitled Legal guide on contract farming, UNIDROIT, FAO, IFAD, Rome 2015, p. 1 et seq. It defines UNIDROI's universal recommendations as to shaping the rights and obligations of the parties to such contracts – starting from the negotiation stage, through contract performance and termination. Model UNIDROIT solutions cannot lead to violation of the relevant iuris cogentis regulations.

[36] Legal Guide, *op. cit*., 84.

[37] Legal Guide, *op. cit*., 85.

on a high average or minimum quality of performance. The agricultural producer should adhere to the indications of agricultural culture and the techniques of agricultural work.

Performance of the contract cannot lead to violation of the relevant iuris cogentis legal regulations. An important issue in the case of a cultivation contract is "safety production". Safety production primarily means the correct production cycle, without the use of banned substances, etc.[38] An important issue is to maintain an appropriate production cycle, which can be particularly specified in the contract. It may result from health-promoting premises, religious, etc.

4.2.1.4. *Detailed Issues*

The contract is concluded before the start of the agricultural production. This distinguishes a cultivation contract from a contract for the sale or delivery of finished agricultural products.[39] The responsibility of an agricultural producer is not only to produce, but also to deliver (collect) goods.[40] "Delivery" usually requires a significant commitment of the agricultural producer. The "delivery" certainly includes preparation for release. It can take place at the agricultural producer's premises or even at the seat of the contract. Delivery may consist in handing over the subject of contracting to the carrier. If the cultivation contract is correlated with a storage agreement under which the agricultural producer is the custodian, the "delivery" may consist in placing the agricultural products in an appropriate storage warehouse.

If the essence of the contract concluded by the parties consists in undertaking to produce in future and subsequently supply agricultural products for consideration, it will always be a cultivation contract, regardless of the nomenclature adopted by the parties to the contract and whether the specific obligation relationship is called

[38] Legal Guide, *op. cit*., 91.
[39] Legal Guide, *op. cit.*, 14.
[40] Legal Guide, *op. cit.*, 111.

"sale", "delivery" or otherwise. A Cultivation contract is not the sale of finished agricultural products existing on the date of conclusion of the contract. The scope of application of a cultivation contract is very wide. The designation "cultivation contracts" applies to agricultural production (both crops and animals), horticulture, animal husbandry, fishing, forest management, and in some cases even supplying drinking water.[41]

A cultivation contract, developed through hundreds of years of practice then separately regulated in the Civil Code, is an independent juridical construction. It is different from a sales agreement, articles of association, consortium agreement, cooperation agreement, employment contract, etc.[42] The agricultural producer retains legal autonomy regardless of the control and supervisory powers granted to the contact during agricultural production. The contract may be concluded in any manner provided for by law, that is, by the procedure of making an offer and acceptance, negotiations, auction, or tender. Mixed ways of concluding the contract are possible, as well. The exclusive formula is characteristic for a cultivation contract. In other words, the contract might cover the entirety of agricultural production.[43]

4.2.1.5. *The Scope of the De Lege Lata Regulation of a Cultivation Contract in the Civil Code*

In the case of "named" contracts, the provisions of the general part of the Civil Code as well as the general provisions on obligations apply. The Civil Code *de lege lata* regulates directly the following aspects of the cultivation contract:

a) determination of the parties to the cultivation contract (Article 613 Civil Code);
b) determination of the subject of the service (Article 613 of the Civil Code);

[41] Legal Guide, *op. cit.*, 41.
[42] Legal Guide, *op. cit.*, 18.
[43] Legal Guide, *op. cit.*, 80.

c) clarification of the concept of so-called supplementary benefits (Article 615 of the Civil Code);
d) outlining the liability of several persons in a situation where the object of cultivation is to be produced on a farm run by several persons (Article 614 of the Civil Code);
e) the form of a cultivation contracts (Article 616 of the Civil Code);
f) the contractor's competence in the field of supervision and control over the performance of the contract (Article 617 of the Civil Code);
g) determining the place of the service (Article 618 of the Civil Code);
h) determination of the contractual obligation to accept partial performance if the object of the performance is divisible (Article 620 of the Civil Code);
i) civil liability under the warranty for defects (Artrticle 621 of the Civil Code);
j) subsequent impossibility of performance and its legal consequences (Article 622 of the Civil Code);
k) the obligation to notify subsequent impossibility of performance and the consequences of omission of this obligation (Artticle 623 of the Civil Code);
l) specific limitation period for claims (Article 624 of the Civil Code);
m) consequences of changing the ownership of a farm for the existence of a cultivation contract (Articles 625–626 of the Civil Code).

4.2.1.6. *A Characteristic Supply Under the Cultivation Contract*

A characteristic performance under the cultivation contract is the service of the agricultural producer (farmer). It takes the form of a non-monetary benefit. When regulating the rights and obligations of the parties to a cultivation contract, the provisions should take into account the fact that the production for sale of agricultural products involves a particular agrobiological risk (understood

as the biological production cycle) of the agricultural producer.[44] The scheme of the agricultural producer's performance under the cultivation contract consists of two elements: the production of agricultural products and their delivery to the contracting authority. The scheme of the characteristic service under Civil Code Art. 613 § 1 structurally resembles the supplier's performance scheme. Pursuant to Art. 605 of the Civil Code, the supplier undertakes to manufacture the goods and deliver them to the recipient. The main difference, however, is in the causative force of producing the object of the benefit.

4.2.1.7. *The Driving Force Behind the Production of the Object of the Service*

The production of agricultural products that are the subject of the agricultural producer's service requires (to put it in a simplified way) two causative elements of different intensity. Firstly, the appropriate human behaviour (including, among others, the use of appropriate machinery and means in accordance with agricultural culture, including, for example, planting, fertilisation, irrigation, etc.) and – secondly – the key contribution of natural forces (this is the participation sine qua non). At the same time, the production of the object of delivery may also require certain elements of the forces of nature (a plant set in motion by the forces of nature). However, the two cases, i.e., the production of an agricultural product and the production of the object of delivery, differ in the intensity of the influence of natural forces on the production of the object of performance. The action of natural forces in the production of an agricultural product is predictable. Assuming the normal operation of natural forces, it is possible to agree on obtaining certain sizes of agricultural products. However, anomalies in the operation of natural forces – not caused by the agricultural producer – may prevent the final fulfilment of the agreed service. However, the agricultural producer

[44] D. Łobos-Kotowska, [in:] *Kodeks cywilny. Komentarz*, t. 4, M. Habdas, M. Phrase (red.), Warszawa 2018, p. 196, Art. 535-7649.

may not be able to provide the service in full or may not be able to provide the service in a certain quality and/or quantity.

4.2.1.8. *Reasons Justifying Serious Changes in the Regulation of a Cultivation Contract*

State self-sufficiency in the field of agricultural production, in the face of emerging deglobalisation tendencies, geopolitical threats are becoming more and more important. Cultivation contract is of significant importance for the economy of the state. From a social and economic point of view, the proper functioning of a cultivation contract is important.

In Poland, the cultivation contract was regulated in the Civil Code that entered into force on January 1, 1965. Currently, this design is obsolete due to:

a) change of the economic system in Poland from socialist to free market economy
b) political conditions, and in particular the abolition of the primacy of collective farming over individual farming;
c) terms of the availability of agricultural inputs;
d) change in the ownership structure;
e) changes in the size of an average farm;
f) changes in demand for consumption of agricultural products, due to the phenomenon of urbanisation, a reduction in the number of agricultural producers per capita;
g) stratification of quality expectations to agricultural products (the phenomenon of traditional agriculture and mass production);
h) the problem of genetically modified food production and production free from genetic changes;
i) in the field of logistics, means of transport, mechanisation and computerisation of agricultural production;
j) distribution in the field of agricultural production sectors, precise division of tasks into logistics, production quality management, sanitary supervision, etc.;

k) diversification of agricultural production for human food needs, for animal production, for industrial purposes;
l) the effect of the so-called steppe as a result of drainage works carried out in Poland, and thus the phenomenon of structural drought;
m) increasingly frequent extreme weather phenomena, such as hail, downpours, flooding, etc.;
n) activities of speculative groups influencing the formation of purchase prices of agricultural products;
o) the problem of animal epidemics, plant diseases;
p) the need to be resistant to sudden political and economic phenomena, e.g., an embargo of state food imports and exports;
q) the conditions of the common agricultural policy, including the impact of public aid to agricultural production;
r) the prospects of changes in the concept of agricultural production;
s) the problem of questioning the current food culture and the problem of changes in the approach to the future consumption of agricultural products (alternative methods of obtaining proteins).

4.2.1.9. *Present Good Practice in Cultivation Contracts on the Basis of the De Lege Lata Regulation in the Light of Judicial Decisions*

Good practices in contractual relations[45] will be introduced on the basis of an analysis of various judicial decisions. It is one of the starting points for preparing *de lege ferenda* proposals. The selection of decisions was made on the basis of the criteria of:

[45] Good contractual practices should be distinguished from the so-called Code of Good Agricultural Practice, Warszawa 2004, a document (in the form of recommendations) developed by the then Ministry of Agriculture and Rural Development and the Ministry of the Environment. The Code of Good Agricultural Practice referred to agricultural activity in the context of environmental protection, water protection, air protection, landscape protection and biodiversity preservation, etc.

a) the date of the decision (decision not older than issued in the 2000 year);
b) the functional differentiation: Supreme Court ("Sąd Najwyższy"), of appeal ("sądy apelacyjne"), regional courts ("sądy okręgowe"), district courts ("sądy rejonowe");
c) the sort of courts: common courts;
d) geographical diversity.

1. **Distinguishing a cultivation contract from a sales contract.** Court decisions recognise that:

> a cultivation contract is considered in the doctrine of civil law as a subtype of a contract of sale. Cultivation differs from a contract of sale in subjective restrictions, because it can apply only to agricultural producers, and objective ones, because such a substrate of the contract can only be agricultural products that are yet to be produced on the farm. The subject of contracting is not the supply of any product originating from somewhere in genere, but the production of an agricultural product on the agricultural producer's farm and its delivery. Own production is an important element of the cultivation contract. This essential feature of a cultivation contract clearly distinguishes it from a contract of sale, which does not provide for or include the obligation to produce the object of sale in the so-called essentialia negotii, as is precisely the case in contracting.[46]

2. **Agricultural producer as an entrepreneur.** The case law draws attention to the fact that the provisions of commercial

[46] Sentence Regional Court in Brzeg – I Civil Department of 20 January 2014, I C 834/12. See also Sentence Supreme Court – Civil Chamber of 14 April 2016, II CSK 447/15, Sentence Regional Court for the Capital City of Warsaw in Warsaw – IX Commercial Department of 13 November 2018, IX GC 2511/17, Sentence Court of Appeal in Gdańsk – I Civil Department of 30 August 2012, I ACa 442/12, Sentence Court Appeal in Gdańsk – V Civil Department of 12 February 2013, ACa 1043/12.

administrative law do not affect the qualification of an agricultural producer as an entrepreneur in the field of civil law relations. This does not preclude a farmer from being regarded as an entrepreneur within the meaning of civil law, provided that his activity has features commonly accepted in case law and legal doctrine defining economic activity.[47] There is no single standard defining in a universal way the status of a farmer as an entrepreneur; this issue is subject to individual resolution taking into account the specific circumstances of a given case, which, among others, the scope of agricultural activity, its model and organisational degree are important.[48]

3. **Commercial proceedings.** A case brought by an agricultural producer against the contractor (entrepreneur) for a claim under a cultivation contract should be treated as commercial proceedings.[49]
4. **Material elements of the cultivation contract.** The material and essential components of the cultivation contract, i.e., the components whose presence determines the effective conclusion of a specific contract, are: the subject of the contract in the form of an agricultural product of a specific type, and the price. In addition, it is also added that the actual distinction between a cultivation contract and other contracts in the trade of goods (sale, delivery) lies in the additional services that the contracting entity can provide to the agricultural producer. Such benefits undoubtedly also include an additional bonus.[50]

[47] Sentence District Court in Sieradz – I Civil Department of 26 July 2021, I Ca 303/21. See also Sentence Court of Appeal in Warsaw – VII Commercial Department of 20 July 2020, VII AGa 455/20; Sentence Court of Appeal in Białystok – I Civil Department of 12 April 2021, I ACa 79/20.

[48] Sentence Court of Appeal in Szczecin – I Civil Department of 20 April 2021, I ACa 470/20.

[49] Resolution of Supreme Court – Civil Chamber of 26 February 2015, III CZP 108/14.

[50] Sentence Court of Appeal in Białystok – I Civil Department of 3 July 2015, I ACa 247/15.

5. **Subject of the cultivation contract.** In the case law, the issue of qualifying a water supply contract as a contract with elements of a cultivation contract, or as a mixed contract, has appeared.[51]
6. **Duration.** A cultivation contract may be concluded for an indefinite period of time.[52] The performance of a long-term cultivation contract may be important in cases of prescription of real estate.[53]
7. **Method of specifying the quantity of agricultural products.** For a cultivation contract to be valid, it is sufficient to indicate the required quantity of agricultural products of a particular type as the "whole" of such product produced at a given time on a designated holding known to the contracting party.[54]
8. **The cultivation contract specifies the appropriate standard of service of the agricultural producer.** For example: "the grain was supposed to be healthy, clean, free from warehouse pests and fungal infestation with a moisture base of 15%." Failure to comply with this condition may expose to a contractual penalty.[55]
9. **Determination of the amount of remuneration of the agricultural producer.** Court decisions consider it permissible to determine the price in a cultivation contract by indicating the average purchase price of an agricultural product on the European Union market and on the national market. Another ruling pointed out that:

   there is no obstacle to fixing a price in a cultivation contract in the same way that a price can be determined

[51] Sentence Supreme Court – Civil Chamber of 13 July 2017, I CSK 193/17, Sentence Regional Court in Wąbrzeźno – I Civil Department and of 12 February 2018, I C 724/17.

[52] Sentence District Court in Rzeszów – VI Commercial Department of 25 February 2015, VI Ga 404/14.

[53] Provision Regional Court in Lublin – II Civil Appeal Division of 18 September 2019, II Ca 977/18.

[54] Sentence Supreme Court – Civil Chamber of 4 March 2015, IV CSK 437/14.

[55] Sentence Court of Appeal in Poznań – I Civil Department of 23 April 2021, I ACa 199/19.

in a contract of sale. In order to determine the price to be paid by the contracting party to the producer for the agricultural products delivered, the parties to the cultivation contract may refer to the buying-in prices of those products paid at a specified time and place by a specific operator.[56]

10. **Premiums.** The cultivation contract may provide for cash premiums for the agricultural producer.[57]
11. **Other provisions of the parties to the contract.** The contract may effectively include an obligation to produce agricultural products from seed purchased from the contracting party.[58]
12. **Returns.** If, according to the contract concluded by the parties and the annex thereto, the seeds and plant protection products delivered to the plaintiff were not additional services within the basic cultivation relationship, but the main benefits under the contract of sale, it is difficult to speak of any violation of Article 622 of the Civil Code in the case of the obligation to return them.[59]
13. **Supervision.** The cultivation contract can have a special type of supervision on the part of the contracting party.[60]
14. **Currency.** The currency of payment, as well as the currency of compensation for non-performance or improper performance of an obligation, is a derivative of the currency of the contract (liability). Therefore, the demand for performance of a monetary obligation by the counterparty, or a demand for payment of compensation for contractual damage may be expressed in a currency other than the currency of the contract (obligation), if it has been expressly provided for in the contract.[61]

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[56] Sentence Regional Court in Chełmno – I Civil Department of 23 September 2016 I C 536/15. Likewise: Sentence Supreme Court – Civil Chamber of 27 June 2002, IV CKN 1165/00.

[57] Provision Supreme Court – Civil Chamber of 30 July 2019, IV CSK 122/19.

[58] Sentence Regional Court in Kwidzyn – I Civil Department of 24 February 2016, I C 1182/15.

[59] Sentence Supreme Court – Civil Chamber of 14 January 2000, I CKN 340/98.

[60] Provision Supreme Court – Civil Chamber of 30 July 2019, IV CSK 122/19.

[61] Sentence Supreme Court – Civil Chamber of 14 April 2016, II CSK 447/15.

15. **Security.** The claim for payment under the cultivation contract may be secured by a blank promissory note.[62]
16. **Form of the contract.** Written form of contract for evidentiary purposes. The case law emphasizes that failure to comply with the written form of the Cultivation Agreement has only the rigor of evidence.[63]
17. **Valuation of a damage caused by wild animals and veterinary slaughter.** Relevance of the content of the cultivation contract for claims for compensation for damage caused by wild animals. In cases of compensation caused by wild animals, a cultivation contract may also have some evidential value. However, this does not mean that the prices under that contract are taken directly as the basis for determining the amount of compensation.[64] Compensation is determined according to objective rates.[65] The price conditions specified in the contract may be relevant for compensation for preventive veterinary slaughter.[66]
18. **Contractual penalty.** The contractual penalty is an admissible additional reservation in the cultivation contract[67]. Titles reservation of contractual penalties may be of many kinds – it may be contamination of GMO grains.[68] The condition for the creditor's claim for payment of the contractual penalty

[62] Sentence Supreme Court – Civil Chamber of 20 June 2008, IV CSK 65/08.
[63] Sentence Court of Appeal in Wrocław – I Civil Department of 11 August 2016, I ACa 1004/16.
[64] Sentence Supreme Court – Civil Chamber of 26 June 2003, I CKN 405/01, Sentence Regional Court in Radzyń Podlaski – I Civil Department of 10 February 2017, I C 255/15, Sentence Regional Court in Brodnica – I Civil Department of 7 December 2021, I C 989/19, Sentence Regional Court in Stargard – I Civil Department of 20 February 2019, I C 1163/16.
[65] Provision Supreme Court – Civil Chamber of 11 September 2013, III CZP 41/13.
[66] Sentence Supreme Court – Civil Chamber of 3 July 2019, II CSK 424/18. See also Sentence Regional Court in Gorzów Wielkopolski – V Civil Appeal Division of 13 March 2018, V Ca 33/18.
[67] Sentence District Court in Warsaw – IV Civil Department of 11 December 2017, IV C 531/17.
[68] Sentence District Court in Częstochowa – VIII Commercial Department of 20 November 2020, VIII GC 871/20.

referred to in Article 483 § 1 of the Civil Code may be any form of both non-performance and improper performance of a non-pecuniary obligation by the debtor. As regards the terms used in this provision – non-performance or improper performance of an obligation – it should be clearly emphasized that these concepts – as in the case of Article 471 of the Civil Code – must be distinguished from each other. Each of them constitutes a separate basis for pursuing such a claim and, as a rule, the facts underlying those concepts do not coincide. Improper performance of an obligation means all those situations that are not qualified as non-performance of an obligation and consists in the performance of the obligation by the debtor in a manner inconsistent with its content. Failure to perform an obligation, in turn, is associated with a complete non-performance of contractual obligations by the debtor, which in the case of continuing obligations may mean not only not starting to perform it, but also ceasing to perform it during the term of the contract. The provisions on contractual penalties, and thus the contractual reservations referring to them, as constituting a modification of the normative grounds for liability for damages, cannot be interpreted broadly. Therefore, the contractual penalty may refer to individualized forms of non-performance or improper performance of an obligation expressly specified in the contract. Therefore, the scope of application of the contractual penalty is determined in any case by the content of the reservation made by the parties.[69] Exclusion of the obligation to pay a contractual penalty if the non-performance of the contract is a consequence of circumstances beyond the control of the agricultural producer. Such an event is a natural disaster.[70] The circumstance excluding the liability of the agricultural producer is drought[71] as well

[69] Sentence Court of Appeal in Szczecin – I Civil Department of 26 January 2022, I ACa 54/21.

[70] Sentence Supreme Court – Civil Chamber of 8 April 2003, IV CKN 18/01.

[71] Sentence District Court in Wrocław – II Civil Appeal Division of 20 March 2019, II Ca 1544/1, Sentence Regional Court for Wrocław-Fabryczna – IV Commercial Department of 27 June 2019, IV GC 517/18.

as excessive rainfall.[72] The contractual penalty from the concluded cultivation contract may be subject to moderation. However, the VAT rate is not subject to moderation.[73]

19. **Effective withdrawal from the cultivation contract.** In the case law, it was assumed that 'effective withdrawal by the contracting party from the contract, in respect of all parts of the subject of cultivation, required proving: – first, that significant defects – within the meaning of Article 621 of the Civil Code – affected all items delivered in the first batch, or if only some of them were defective, that they could not be separated from items free from defects, without prejudice to both parties; – secondly, that the manufacturer, despite the contractor's request, did not deliver the same quantity of goods free from defects.[74]
20. **Object of agricultural production and enforcement proceedings against the agricultural producer.** A creditor of an agricultural producer may enforce agricultural products whose production was covered by the cultivation contract. The effect of transfer of ownership to secure Future agricultural products will only materialize when they are created and therefore does not protect against foreclosure.[75] In a situation where the acquisition of separated agricultural products did not take place as a result of a civil law transaction, but was the result of enforcement actions, the entity to which the bailiff entrusted the duties of a caretaker does not acquire ownership of the harvested agricultural products, because the conditions of Article 157 § 2 and Article 55 §, Article 190 of the Civil Code have not been fulfilled Seizure of sowings on land made by a court bailiff, to which the debtor was entitled should be regarded as attachment of future crops after their

[72] Sentence Supreme Court – Civil Chamber of 11 May 2007, I CSK 45/07.
[73] Sentence Court of Appeal in Łódź – I Civil Division of 24 March 2017, I ACa 1238/16.
[74] Sentence Court of Appeal in Białystok – I Civil Department of 24 February 2016, I ACa 913/15.
[75] Sentence District Court in Elbląg – I Civil Department of 4 March 2015, I Ca 48/15.

harvest (future items – movables), which may, in principle, fall under the provision of Article 841 of the Code of Civil Procedure. In connection with the debtor's declaration that the contracting authority is entitled to the rights to the seized sowing under the cultivation contract, the burden is shifted to the ordering party demonstrating that these sowings are exempt from enforcement.[76]

21. **Burden of proof.** The burden of proof that there was a natural disaster in the case was borne by the agricultural producer in the case for payment of remuneration under the cultivation contract, which was deducted with a contractual penalty for non-performance of the contract.[77]
22. **Limitation period for claims.** The Civil Code provides for special limitation periods for claims under a cultivation contract. The above provision applies to all claims between the parties to the cultivation contract, including compensation constituting the implementation of the obligation to repair damage resulting from non-performance or improper performance of the contract.[78]
23. **Limitation period for partial deliveries.** Court decisions have been held that deliveries of individual batches of reared poultry made under a cultivation contract are partial services within the meaning of Article 624 § 2 of the Civil Code. If the last partial performance has not been fulfilled, the limitation period for the claim referred to in Article 624 § 1 of the Civil Code begins to run from the date on which it should have been performed.[79]
24. **Transfer of rights and obligations under the cultivation contract.** The rights and obligations arising from the cultivation contract shall pass to the new holder of the agricultural holding. However, this does not apply if the transfer of possession

[76] Sentence Supreme Court – Civil Chamber of 7 March 2017, II CSK 290/16.
[77] Sentence Supreme Court – Civil Chamber of 8 April 2003, IV CKN 18/01.
[78] Sentence Regional Court in Ciechanów – I Civil Department of 12 October 2018, I C 472/18.
[79] Sentence Supreme Court – Civil Chamber of 17 December 2003, IV CK 303/02.

was the result of the acquisition of a farm for consideration and the purchaser did not know, and despite exercising due diligence, could not have become aware of the existence of the cultivation contract.[80]

25. **Admissibility of taking over the rights and obligations of cultivation by a third party.** Under a tripartite agreement, rights and obligations under a cultivation contract can be transferred.[81]

4.2.2. SECURITIES *DE LEGE LATA*

Agricultural producers – based on general and common principles – are in the position to use various forms of securities, in order to obtain financing. Securities may be under personal liability (the debtor is liable to the creditor with all his property, present and future, and the creditor has no priority to satisfy himself from this property) or under material liability (the debtor is liable to the creditor for a specific thing, the creditor secured materially has priority to satisfy from this thing). A civil pledge (traditional, manual) is of very little use due to the obligation of the pledgor to hand over the pledged item to the pledgee or a third party. A registered pledge is more useful, but involves legal formalism.

4.2.3. COMPETITION LAW *DE LEGE LATA*

Competition law in Poland consists of private competition law (actions are undertaken by private law entities on their own interest) and public competition law, known as antimonopoly, anticartel or anti-trust law (actions in the public interest are undertaken by a public authority). There are some links between private and

[80] Sentence District Court in Bydgoszcz of 17 December 2013, II Ca 356/13.
[81] Sentence Regional Court in Łomża – I Civil Department of 15 January 2015, I Ca 299/1.

public competition law.[82] The undertaking by the entrepreneur of unacceptable acts of unfair competition may constitute a practice infringing the collective interests of consumers. In cases of such practices, the public authority has competence. Public competition protection law may be a) general, b) specific. In the latter case, it should be mentioned the Act of November 17, 2021 on counteracting unfair use of contractual advantage in trade in agricultural and food products.[83] The Act implements Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair commercial practices in relations between entrepreneurs in the supply chain of agricultural and food products.[84] This act defines the rules and procedure of counteracting in order to protect the interest public, practices unfairly using contractual advantage by buyers of agricultural or food products or suppliers of these products. The Act also defines the competence of the authority in matters of practices unfairly using contractual advantage and cooperation with the European Commission and the authorities

[82] This study refers to the civil law and therefore does not necessarily concern public competition law. Treaty law of the European Union treats agricultural activities in a special way in the context of competition law. Article 42 of The Treaty of the Functioning of the European Union (ex Article 36 TEC) stipulates that "The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the European Parliament and the Council within the framework of Article 43(2) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39. The Council, on a proposal from the Commission, may authorise the granting of aid: (a) for the protection of enterprises handicapped by structural or natural conditions; (b) within the framework of economic development programmes." E. Kosiński, *Rolnictwo a publicznoprawna ochrona konkurencji w wybranych systemach prawnych: (cz. I)*, "Kwartalnik Prawa Publicznego" 2005, nr 5/1/2, pp. 183–207; E. Kosiński, *Rolnictwo a publicznoprawna ochrona konkurencji w wybranych systemach prawnych: (cz. II)*, "Kwartalnik Prawa Publicznego" 2005, nr 5/3, pp. 239–264.

[83] J. Kępiński, *Interests protected under the Polish law on combating unfair competition*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2020, t. 82, nr 2, p. 51; M. Salitra, *Analiza wybranych regulacji wprowadzonych ustawą o przeciwdziałaniu nieuczciwemu wykorzystywaniu przewagi kontraktowej w obrocie produktami rolnymi i spożywczymi – jakie zmiany w polskim prawie?*, "Internetowy Kwartalnik Antymonopolowy i Regulacyjny" 2017, t. 6, nr 1.

[84] Official Journal EU L 111 of April 25, 2019, p. 59.

of the European Union Member States, whose scope of activity enforcement of the rules on practices that unfairly use a contractual advantage. The Act applies to contracts for the purchase of agricultural or food products concluded between buyers of these products and their suppliers. Practices that unfairly use a contractual advantage are prohibited buyer to supplier and supplier to buyer.

Pursuant to the Act, the use of contractual advantage is unfair if it is contrary to good practice and threatens the essential interest of the other party or violates such interest. The contractual advantage is the existence of a significant disproportion in the economic potential of the buyer relative to the supplier or the supplier relative to the buyer. It considers practices unfairly using contractual advantage in particular practices involving:

1) late payment by the buyer to the supplier;
2) cancellation of the order by the buyer within a period of less than 30 days before the expected date of delivery of perishable agricultural products or food;
3) a unilateral change by the purchaser of the terms of the contract in terms of the frequency, method of performance, place, date or size of all deliveries or individual deliveries of agricultural or food products, standards the quality of agricultural or food products, terms of payment or prices;
4) unjustified reduction of receivables for the delivery of agricultural or food products after their acceptance by the buyer in whole or in part, in particular as a result of a request for a discount;
5) the purchaser's request from the supplier for payments not related to the sale of agricultural or food products to the supplier;
6) the purchaser's request from the supplier for payment for deterioration or loss of agricultural or food products that occurred at the buyer's premises or after the ownership of these products has passed to the buyer for reasons not attributable to the supplier;
7) refusal by the buyer to confirm the terms of the contract in writing between the buyer and the supplier, for which written confirmation has been requested by the supplier.

4.3. Part Two: Proposals *De Lege Ferenda*

4.3.1. CULTIVATION CONTRACT *DE LEGE FERENDA*

4.3.1.1. *A Model Scope of a Cultivation Contract Regulation – Conclusions De Lege Ferenda*

In the opinion of UNIDROIT, FAO, and IFAD, a cultivation contract, in the sense of the direct consensus of the parties, covers the following issues:

1. clarification of the parties to the contract;[85]
2. definition of the purpose of the contract;[86]
3. identification of places of agricultural production;[87]
4. determination of the parties[88] performances. In the case of an agricultural producer, it will be specification of the subject of the service, quantity, quality, date of production, place of issue, etc. In the case of the other party, this will be the obligation to pay a certain sum of money, specifying the dates of payment of the amount of payment;
5. identification of emergencies, due to the high risk of uncertainty as to the final state of performance of the contract;[89]
6. determination of remedies in the event of non-performance or improper performance of the contract;[90]
7. duration of the contract;[91]
8. extension of the contract;[92]
9. termination policy;[93]
10. dispute resolution policy;[94]
11. signatures of the parties.

[85] Legal Guide, *op. cit.*, p. 71.
[86] Ibidem.
[87] Ibidem.
[88] Ibidem.
[89] Ibidem, p. 72.
[90] Ibidem.
[91] Ibidem, p. 73.
[92] Ibidem.
[93] Ibidem.
[94] Ibidem.

Of course, in view of the existence of a general part of the Civil Code and a general part of the law of obligations there is no need to repeat the issues that are the matter of universal regulation, which applies to all named and unnamed contracts in the regulation of contracts named in the special part of the book of obligations. However, any changes to the Civil Code should be introduced with particular care and after the comprehensive and profound discussion on the theoretical level. A good solution would be to return to the practice of the permanent Civil Law Codification Commission, which would give its opinion on any changes to the Civil Code.

4.3.1.2. *Identification of the Basic Risk in the Case of a Cultivation Contract*

There are two main external levels of risk that the parties to the cultivation contract cannot prevent and which can lead to serious disturbances. The first is the risk of planning related to agricultural production. Despite the due diligence of the agricultural producer, the quantity and quality of production may differ from the former assumptions. The risk associated with the failure of agricultural production can be combined with the issue of the transfer of ownership of the object of cultivation as a typical moment for the transfer of risks.[95] The second level of risk are the commercial circumstances. The market value of agricultural products at the date of performance of the contract may differ from the estimates made at the stage of conclusion of the contract. Price fluctuations may be beneficial for the agricultural producer or for the other party.

The new regulation should introduce special legal protection of an agricultural producer who is a natural persons both in obligatione and in solutione. The following adjustment could be proposed *de lege ferenda* (Art. 626):

> If, after the conclusion of a cultivation contract with an agricultural producer who is a natural person, there

[95] Ibidem, p. 79.

> is a legal succession and the successor in title is not a natural person the provisions on special protection for agricultural producers who are natural persons shall not apply.

The legal successor and the contractor are free to agree otherwise.

4.3.1.3. *Principle of the Freedom of Contract*

The content of a cultivation contract is subject to the principle of freedom of contract (Art. 353^1 Civil Code). With the conclusion and arrangement of the content of the legal relationship which is a cultivation contract is subject to the autonomy of the free will of the parties. The principle of the contract freedom is hindered, inter alia, by mandatory and semi-mandatory rules of law. The adoption of legislative concepts under which the cultivation contract is a named contract is important for contract practice. The positive provisions of law will then regulate a significant part of the content of the legal relationship. *De lege ferenda* framing the quality of regulation of a cultivation contract will improve the quality of legal relations in contract practice. *De lege ferenda*, a cultivation contract should be concluded in written, electronic or documentary form.

4.3.1.4. *The Legal Regime Governing the Contract in the Case of an External Element*

In the case of a relationship with a so-called "foreign element", the question arises as to the proper law applicable to the contract. In that regard, the rules of private international law apply in resolving conflicts between the different legal orders at stake. From the principle of the autonomy of the will, it must be inferred that the parties are free to choose the law governing the contract. It should be remembered that the choice of law is limited only to the contract between the parties and does not cover its legal environment. Meanwhile, the law of the place of performance of the contract most often introduces very detailed regulations and at the same time relatively

binding parties. *De lege ferenda*, where the agricultural producer is a natural person in Poland, the possibility of choosing another law governing the contract should be excluded.

4.3.1.5. *Determinants of the Legal Consequences of Contracts in Relation to a Cultivation Contract*

The legal basis of contracting is formed by: direct consensus of the parties; mandatory and semi-mandatory legal provisions; legal norms binding to the extent not excluded by the parties to the contract. Further should be mentioned contractual templates, general terms and conditions of contracts (if they have been prepared), rules of social coexistence, and established customs. Good practice in agricultural culture has not been codified. They should be recognised in terms of a "custom" (Art. 56 Civil Code[96]).

The fulfilment of the agricultural producer's obligations in the field of agricultural production is influenced by numerous regulations concerning food safety, environmental regulations, environmental protection regulations, regulations concerning the treatment of animals (e.g., the issue of ritual slaughter, animal husbandry fur), and restrictions or prohibitions on genetic modification. The content of the legal relationship of contracting may be influenced by the provisions of the law on the protection of competition (antitrust law). *De lege ferenda,* it is possible to develop a statutory standard of contracting that will apply when the agricultural producer is a natural person.

4.3.1.6. *Parties to the Contract*

As a rule, a cultivation contract is concluded between the agricultural producer (*producent rolny*) and the other party – a contractor (*kontraktujący*). The legal status of the parties to a cultivation agreement can vary greatly. Differences may arise from legal circumstances

[96] Z. Radwański, *Teoria umów*, Warszawa 1977, p. 56.

(different legal forms of doing business) and from facts (the economic potential of the parties, the establishment of a dominant position on the so-called relevant market within the meaning of the regulations public protection of the concurrency). An agricultural producer can be a natural person but also an appropriate organisational unit (companies, cooperatives, foundations, family foundations, associations, etc.). In practice more people may participate in the contract as an agriculture producer (all family members). The activity of an agricultural producer may be classified as a commercial activity or as a non-profit activity. For this reason, it is necessary to profile the legal status of an agricultural producer in the context of the scope of legal protection granted to him. The contactor may be the final addressee of agricultural products or only an intermediary between the agricultural producer and the final recipient, or one of many in the intermediary chain (e.g., as an exporter). As a rule, the contactor is an entrepreneur.

De lege ferenda, the following content of Article 614 of the Civil Code could be proposed:

> If the object of cultivation is to be produced on an agricultural holding operated jointly by several persons, they are joint and several creditors vis-à-vis the contracting party and the liability of these persons towards the contracting party is joint and several.

In some cases, the structure of the contract may be more complicated, due to the connection with other persons, such as suppliers of means of production, financing entities, insurers, etc.[97] It is therefore possible in practice to use the construction of a complex of contracts, interrelated with each other. As a consequence, the failure to conclude one contract may be the reason for the termination of others. *De lege ferenda,* special legal protection should be proposed for agricultural producers who are natural persons.

[97] Legal Guide, *op. cit*., p. 13.

4.3.1.7. *Essential Elements (Essentialia Negotii) of the Cultivation Contract*

On the basis of a cultivation contract the agricultural producer is obliged to produce the agricultural products specified in the contract and to hand them over to the contactor. The obligation of the contractor is to pay the agreed remuneration and give additional services. The remuneration for the agricultural producer may be determined both at "fixed" prices and by indicating the criteria for calculating the price. *De lege ferenda*, it should be stipulated that the remuneration for the agricultural producer should not be less than the sum of the direct targeted costs incurred by the agricultural producer. This allows the classification of the cultivation contract as a causal agreement (causa obligandi, causa solvendi), as well as a bilaterally binding, pecuniary and reciprocal agreement (based on the formula "do ut des"). As the contactor expects a certain effect, there is a question whether the cultivation contract is a contract of a "special result" or a contract of "diligence performance". However, the final result is influenced not only by the behaviour of the agricultural producer, but also by factors independent of him. Therefore, there is not a simple division into contracts of either careful action or contracts of a special result. UNIDROIT, FAO and IFAD points out that the obligations of an agricultural producer can be divided into those relating to the product (type, quantity, quality) and the obligation relating to the way it is produced.[98]

De lege ferenda, for the discussion the following content of Art. 613 § 1–3 of the Civil Code could be proposed:

> (§ 1) By a cultivation contract, the agricultural producer, within the scope of his agricultural holding, undertakes, unless he is prevented by objective circumstances beyond his control, in particular agrobiological, hydrological and weather, to produce and deliver to the contractor a specified quantity of agricultural products of a certain type,

[98] Ibidem, p. 75.

> and the contractor undertakes to collect the contracted agricultural products within the agreed period, pay the agreed price and meet the specified additional benefit and to grant advances, if the contract provides for the obligation to provide such a benefit and the granting of advances. (§ 2) The price may also be indicated by indicating the grounds for its determination. (§ 3) The quantity of agricultural products may be indicated in particular in the contract: (1) by the area from which the products are to be harvested; (2) by minimum quantity or by maximum quantity; (3) for one or more production cycles of agricultural products; (4) as the whole production of the agricultural farm.

The proposed regulation is characterised by high flexibility. It underlines the importance of external risks.

4.3.1.8. *New List of Additional Benefits for the Agricultural Producer*

The contractor is obliged to fulfil the main pecuniary performance: payment of the price, but also to provide some additional benefits (pecuniary and non – pecuniary). *De lege ferenda,* the following content of the Art. 615 of the Civil Code could be proposed:

> Additional benefits from the contractor party may be in particular: (1) ensuring that the agricultural producer can acquire certain means of production with deferred payment; (2) conclusion of an insurance contract for agricultural products for the benefit of an agricultural producer; (3) granting sureties or payment guarantees for the purchase of means of production by an agricultural entrepreneur; (4) agrotechnical and zootechnical assistance.

4.3.1.9. *The Concept of the Optional (Voluntary) General Terms and Conditions*

The Civil Code could delegate the Minister of Justice to establish the general terms and conditions for the cultivation contract. The aim of this idea is to support agricultural producers – on the legal level – who are natural persons. The amending Act could specify the normative basis for delegations for the Minister of Justice. In such a case, the Minister of Justice could lay down the general terms and conditions of the cultivation contract by an official regulation. The intention of this concept is not to limit the autonomy of the will of the parties to the cultivation contract, but to introduce the possibility for the agricultural producer, with the consent of the contractor, to use the recommended general terms and conditions. The parties should not be forced to apply the general terms and conditions of the cultivation contract. On the contrary – both parties should decide to incorporate the general terms and conditions of the cultivation contract into the legal relationship between them. Agricultural producers usually do not have their own contract templates and instead rely on contractual forms developed by the contractor. The general terms and conditions of the cultivation contract are therefore intended to help the agricultural producer to properly arrange the legal relationship, as well as to fulfil educational functions.

4.3.1.10. *The Scope of General Terms and Conditions*

The general terms and conditions of cultivation contracts may include provisions concerning, in particular:

1. standard rights and obligations of the agricultural producer and contractor;
2. the possibility of extending the contract for further periods;
3. rules for the termination of the legal relationship;
4. limits in the case of high contractual penalties;
5. the exclusion of the possibility of paying the agricultural producer by way of offsetting;

6. the choice of Polish law as applicable in the case of the presence of the so-called foreign element;
7. the choice of the jurisdiction of Polish courts;
8. the local competence of the court to deal with the specific case of the agricultural holding.

4.3.1.11. *Duration of the Cultivation Contract*

A cultivation contract can be concluded for a specific cycle or cycles of agricultural production. It can also be a contract subject to automatic renewal for the next production stage or subsequent production stages.[99] A "multi-cycle" agreement can use the structure of a framework agreement and the conclusion of implementing agreements in relation to it, specifying the detailed parameters of cooperation.

4.3.1.12. *The Scope of the Contractor's Involvement in Agricultural Production*

A typical cultivation contract assumes the need of the contractor to be involved in supervising agricultural production. Most often, the contractor has been granted competence in the field of agricultural production and control.[100] The contractor may have an impact on the way agricultural production is carried out, the seed materials used, the fertilisers used. In the case of animal production: detailed identification of animals for fattening, feed requirements, veterinary care requirements, etc. The contractor can affect the way certain processes are performed, such as fertilisation, harvesting, storage, etc. The contractor can influence the way agricultural production is financed, in particular by ensuring that the costs of financing do not burden the undue risk of agricultural production effects.

[99] Ibidem, p. 13.
[100] Ibidem.

De lege ferenda, the following content of the Art. 617 of the Civil Code could be proposed:

> (§ 1). The contract may contain detailed instructions and guidelines as to how agricultural products are produced. The agricultural producer may undertake a special procedure for the production of agricultural products. (§ 2) The contractor shall be entitled to supervise and control the performance of the cultivation contract by the agricultural producer. (§ 3) At the request of the contractor, the agricultural producer must demonstrate the legality and conformity of the means or production techniques used by him.

4.3.1.13. *The Issue of Transfer of Ownership*

In the Polish civil law generally applies the principle of the so-called 'double effect'. An agreement obliging to transfer the right of ownership, unless it provides otherwise or otherwise provides for the law, carries ownership of the property to the buyer (Art. 155 § 1 of the Civil Code). The cultivation agreement is not mentioned directly in Civil Code (Art. 155 § 1), but there should be no doubt that this regulation also applies to the cultivation contract.

In the case of the cultivation contract, the agreed object of performance are items marked as to the general species (in genere), and not items marked as to identity (in specie). As a rule, agricultural products in the field of property law are "natural benefits" (fructus naturales). Under Civil Code Art. 53 § 1, the natural benefits of a thing (res) are its foetuses and other components separated from it, provided that, according to the principles of proper management, they constitute normal income. In other words, the contractor cannot become the owner of the crops before harvesting the crops. The parties may include a pactum reservati dominii clause (title retention clause) in the cultivation contract.

4.3.1.14. *Place of Performance and Other Rules Related to the Performance of the Contract*

As of the matter of performance of the contract, the following regulation can be proposed *de lege ferenda* (Art. 618 § 1 of the Civil Code): "The place of performance of the agricultural producer should be the agricultural holding, unless otherwise stipulated in the contract". In fact, it is a common, basic solution and ius dispositivum. However, the level of legal protection should be stronger:

> (§ 2) If, according to the contract, the place of performance of the agricultural producer is a place other than his agricultural holding and the transport is to be carried out at the expense and risk of the agricultural producer, the contractor who, regardless of the reason, refuses to accept the agreed service shall be obliged to reimburse the transport costs incurred, unless the agricultural producer has unduly prevented the contractor from examining the object of cultivation. If the agricultural producer is a natural person, the less favourable contractual provisions are null and void.[101]

In this respect there is one more *de lege ferenda* proposal: "If the object of cultivation is divisible, the contractor may not refuse to accept partial performance, unless otherwise stipulated for important reasons" (Art. 619 of the Civil Code).

4.3.1.15. *Impossibilium*

The Civil Code in Poland does not explicitly use the common term "force majeure" (vis maior). Nevertheless, it refers to the state of "impossibility" of the party to the contract. *De lege ferenda*, it could be proposed the following content of Art. 620 Civil Code:

[101] Z. Staszczyk, B. Zdziennicki, *W sprawie rozkładu ryzyka w umowie kontraktacji (dwugłos)*, "Państwo i Prawo" 1972, nr 10.

> (§ 1) If the agricultural producer's performance has become impossible as a result of circumstances for which none of the parties is responsible, the agricultural producer may not claim the remuneration, and if he has already received it, he is obliged to return it in accordance with the provisions on unjust enrichment.

The obligation to return does not apply to properly used advances and additional benefits previously received from the contractor. If it is objectively impossible to perform the cultivation contract, the agricultural producer loses the title to the discussed remuneration. The issue requires a serious debate in order to find the proper balance between the parties.

The issue of the impossibility of only part of the service requires separate *de lege ferenda* proposal:

> (§ 2) If the agricultural producer's performance has become impossible only partially, he shall lose the right to the corresponding part of the consideration and, if he has already received it, he shall be obliged to reimburse it in accordance with the provisions on unjust enrichment. The obligation to reimburse does not apply to proportionally accrued, correctly used and previously received advances and additional benefits. However, the contractor may withdraw from the contract if the object of cultivation is indivisible.

In the next step, it should be considered the following *de lege ferenda* proposal:

> (§ 3) If the agricultural producer's performance has become impossible as a result of circumstances for which none of the parties is responsible, the agricultural producer shall not be required to pay the equivalent of the supplementary benefits properly used or proportional parts thereof.

In order to get a proper balance between the contracting parties it should be considered the following rule:

> (§ 4) The absence of an obligation to reimburse advances and additional benefits duly used and the absence of an obligation to pay the equivalent of duly used additional benefits shall not apply to advances and supplementary benefits used after the farmer became aware that his performance became impossible due to circumstances for which none of the parties is responsible.

In the case of insurance, the following rule could be proposed: "(§ 5) The agricultural producer shall have priority over the contracting party for agricultural production insurance."

Finally, the importance of the proposed regulation should be underlined as follows "(§ 6) If the agricultural producer is a natural person the less favourable contractual provisions shall be null and void."

4.3.1.16. *The Culpable Failure to Perform the Contract by the Agricultural Producer and the Legal Consequences Thereof*

The following regulation of cases of improper performance of the cultivation contract can be proposed *de lege ferenda*.

1. (Art. 621^2 Civil Code). "If an agricultural producer is so late in starting the manufacture of the object of cultivation or individual parts thereof that it is unlikely that he will be able to produce and deliver them within the agreed time, the contractor may, without setting an additional period from the contract, withdraw before the expiry of the deadline for delivery of the object of cultivation."
2. (Art. 621^3 Civil Code). "If, in the course of production of the object of cultivation, it turns out that the agricultural producer produces this object in a way defective or contrary to the law or the contract, the contractor may call on the agricultural producer to change the manner of performance by

setting the agricultural producer an appropriate deadline for this purpose, and withdraw from the contract after the ineffective expiry of the deadline."

4.3.1.17. *Civil Liability of the Agricultural Producer*

De lege ferenda, the following content of the Article 621 Civil Code could be proposed:

> (§ 1) The agricultural producer is liable to the contractor if the agricultural products have a defect to the extent that the defect is not a consequence of circumstances for which none of the parties is responsible. (§ 2) In the event of defects in the subject of contracting, the contractor may (1) make a proportional reduction in the price; (2) withdraw from the contract. (§ 3) The contractor may not exercise the rights referred to in § 2 if the agricultural producer replaces the defective contracting object with one free from defects or removes the defects. (§ 4) The reduced price shall be in such proportion to the contract price in which the value of agricultural production with the defect remains to the value of agricultural production without the defect. (§ 5) The contractor loses his rights under the warranty if he has not examined the subject of cultivation in time and in the manner adopted for such items and has not immediately notified the agricultural producer about the defect, and if the defect came to light only later – if he did not notify the agricultural producer immediately after its discovery. (§ 6) In the cases provided for in § 5, the loss of rights under the warranty for defects does not occur despite failure to meet the deadlines for examining the subject of cultivation by the buyer or for notifying the agricultural producer about the defect, if the agricultural producer knew about the defect or assured the contractor that the defects did not exist. (§ 7) If only part of the object of contracting is defective and can be

separated from the part free from defects, the contractual partner's right to withdraw from the contract is limited to the defective part. (§ 8) An agricultural producer shall be liable under the warranty for defects also in the case where the production of the subject of cultivation took place in the manner specified by the contractor, unless the agricultural producer, despite exercising due diligence, could not detect the defectiveness of the production method or that the contractor, despite drawing the agricultural producer's attention to the above defects, insisted on the agricultural production method specified by him. (§ 9) The agricultural producer shall be liable under the warranty if the defect is found within three months from the date of delivery of the subject of cultivation to the contractor. (§ 10) Claims shall expire after six months from the date of discovery of the defect. (§ 11) The expiry of the deadline for finding a defect shall not exclude the exercise of rights under the warranty if the agricultural producer has fraudulently concealed the defect (§ 12). If the agricultural producer is a natural person, the less favourable contractual provisions shall be null and void.

4.3.1.18. *The Problem of Withdrawal from the Contract Due to Production Defects and Its Consequences*

The following rules can be proposed regarding withdrawal from the cultivation contract and the effects of withdrawal.

1. (Art. 621^4 Civil Code). "If, due to a defect in the object of agricultural production, the contractor has made a declaration of withdrawal from the contract or price reduction, he may claim compensation only for the damage he suffered as a result of concluding the contract and if the damage was the result of circumstances for which the agricultural producer is solely responsible. In particular, it may demand reimbursement of the costs

of concluding the contract, the costs of collection, transport, storage and storage insurance. This does not prejudice the provisions on the obligation to redress damage on general principles."

2. (Art. 622 Civil Code). "The party who withdraws from the contract is obliged to return to the other party everything he has received under the contract, and the other party is obliged to accept it. The party who withdraws from the contract may demand not only the return of what has provided, and if the return is not possible to pay its value, but also on general terms compensation for damage resulting from non-performance of the obligation. The contractor may require the agricultural producer to release him from his obligations."

4.3.1.19. *Civil Liability of the Contractor*

De lege ferenda, the following content of Article 621^1 could be proposed: "In the case of defects in the means of production supplied to the agricultural producer by the contractor, the provisions on the warranty on sale shall apply accordingly."

4.3.1.20. *Limitation of Claims*

It would be necessary to regulate the issue of limitation of claims in an individual manner for a cultivation contract. The following solution can be proposed *de lege ferenda*.

(Art. 624 § 1 Civil Code). "Mutual claims of the agricultural producer and the contractor expire after two years from the date of performance by the agricultural producer, and if the producer's performance has not been fulfilled – from the date on which it should have been fulfilled."

(§ 2). "If the agricultural producer's service was provided in parts, the limitation period shall run from the date on which the last partial benefit was performed."

4.3.1.21. *Special Cases of Personal Changes*

The following regulation of the issue of subjective changes may be proposed.

(Art. 625 § 1). "If, after the conclusion of the cultivation contract, the agricultural holding of the agricultural producer has passed to another person, including as a result of a contribution to a company, cooperative, family foundation or other entity, the rights and obligations arising from this contract shall pass to the buyer."

(§ 2). "However, this does not apply if the farm was acquired for consideration and the purchaser did not know and, despite exercising due diligence, could not have become aware of the existence of a cultivation contract."

4.3.2. THE CONCEPT *DE LEGE FERENDA* OF STRENGTHENING THE CONTRACTUAL POSITION OF AGRICULTURAL PRODUCENTS IN CONTRACTS WITH ENTREPRENEURS

The legislator could *de lege ferenda* extend the protection resulting from the provisions on prohibited clauses to natural persons running a farm. Previously, such protection was extended to certain entrepreneurs. In order to strengthen the contractual position of an agricultural producent in any contracts with entrepreneurs, it may be proposed to add to the Civil Code Article 385^6 as follows: "The provisions concerning the consumer contained in Articles 385^1 to 385^3 shall apply to a natural person running an agricultural holding even if it is apparent from the content of the contract that he has a professional character."

4.3.3. THE CONCEPT OF THE AGRICULTURAL DEPOSIT *DE LEGE FERENDA*

4.3.3.1. *General Remarks*

In practice, it is more profitable for farmers to sell their crops not immediately after the harvest, but at some points after it. Unfortunately, due to a lack of money, agricultural producers are being forced by circumstances – linked to the need to pay their debts– to dispose of their produced crops as soon as possible. The existing situation benefits financial intermediaries who do not incur expenditure on agricultural production and are not at risk of failure. They buy agricultural products from agricultural producers for cheap money in order to sell them later at a large profit. The concept pursues the objective of protecting agricultural producers by creating a new institution of "agricultural deposit" ("depozyt rolniczy"). It would be a special type of a security, effective against third parties. The purpose of the agricultural deposit is to enable farmers to obtain financing from a bank (state bank, commercial bank, cooperative bank) or cooperative savings and credit union, in a similar way (in terms of economic mechanism) to obtaining financing through factoring by entrepreneurs. However, the intention of the proposed regulation is neither to encourage agricultural producers to speculate, nor to limit the economic activity of intermediaries in the purchase of agricultural products. The intention of the project is to give agricultural producers an additional choice, thanks to a simple, costless, not too formal, legal instrument which, once adapted by the financing entities, would give agricultural producers earlier access to money. The agricultural producer would thus be able to obtain financing and sell his agricultural products without time pressure.

The agricultural producer could receive financing to secure the actually harvested and properly stored crops. In order to obtain financing, the agricultural producer should:

a) make a statement on the creation of an agricultural deposit,
b) conclude a financing agreement.

The declaration of the agricultural producer on the creation of the deposit must bear an officially approved date (the date can be

certified by a notary). It should take effect only when the financing agreement relating to that agricultural deposit is concluded.

The agricultural deposit should be constructed in such a way as to protect the interests of the financing entity in relation to the creditors of the agricultural producer. The agricultural producer should, in the optimal period of time for him, sell the object of the agricultural deposit and notify the financing entity about this fact. If the agricultural producer does not sell the subject of the agricultural deposit within the time limit set by the party, the financing entity will obtain special rights. Thanks to this regulation, agricultural producers should obtain an instrument for financing based on the security of harvested agricultural products. Because the concept concerns rights in rem, it requires a very thorough critique.

4.3.3.2. *The Legal Essence of the Agricultural Deposit*

The depositor of the agricultural deposit is the agricultural producer running the agricultural holding, and the depositary of the agricultural deposit is the financing entity. The financing entity could be a bank within the meaning of Article 2 of the Banking Law Act of 29 August 1997[102] and a cooperative savings and credit union, within the meaning of Article 1 of the Act of 5 November 2009 on cooperative savings and credit unions.[103] The depositor of the agricultural deposit shall be either the depositor or a third party agreed by the depositary.

In order to obtain financing from the financing entity the agricultural producer may create an agricultural deposit. An agricultural deposit shall be appropriately separated from property owned by the agricultural producer. The subject of the agricultural deposit could be agricultural products actually harvested, indicated at least as to their kind, date and place of harvesting, quantity and quality

[102] Journal of Laws: of 2022, items 2324, 2339, 2640, 2707; of 2023, item 180.
[103] Journal of Laws: of 2022, item 924, 1358, 1488, 1933, 2339, 2640; of 2023, item 180.

(designation of the object of the agricultural deposit), and stored under appropriate conditions for subsequent sale.

4.3.3.3. *Creation of the Agricultural Deposit*

The agricultural deposit shall be based on the declaration of the agricultural producer, which shall take effect when a financing agreement is concluded between the depositor and the depositary. No register is provided, which is a certain simplification in relation to a registered pledge. It should be unacceptable to create an agricultural deposit by an agricultural producer after its bankruptcy, or if this would make it impossible to satisfy a previous claim of a third party, in particular that arising from a cultivation contract.

The declaration of the creation of an agricultural deposit shall specify at least: the subject of the agricultural deposit, the manner and places of storage, the maximum storage period not exceeding nine months, an indication of the latest date on which the agricultural deposit is terminated by virtue of law (the end date of the agricultural deposit) and, if applicable, the third party who will be the custodian. The depositor shall declare that there are no obstacles to the establishment of the agricultural deposit referred. The agricultural producer shall submit a handwritten or electronic declaration on the form provided by the financing entity. The declaration of the agricultural producer on the creation of an agricultural deposit should be made in writing with an officially certified date.

4.3.3.4. *Maintenance of the Agricultural Deposit*

The agricultural deposit shall be held at the agricultural producer's own expense and risk. The depositor is responsible for the behaviour of the third party who is the custodian as for his own behaviour. The depositor shall be not entitled to change the place where the agricultural deposit is held without the consent of the depositary, unless he acts to prevent imminent damage. If an agricultural deposit is removed without the depositary's consent, the depositor shall also

be liable for any accidental loss thereof (responsibility for a casus mixtus).

4.3.3.5. *Payment*

After the establishment of the agricultural deposit, immediately after the conclusion of the financing agreement, the financing entity shall make a payment, to the account of the agricultural producer. The payment should be of amount specified in the agreement but not lower than 75% of the average market purchase price of the agricultural product being the subject of the agricultural deposit. The average market purchase price should be taken into consideration at:

1. the date of creation of the agricultural deposit specified by the parties in the contract,
2. the date of conclusion of the financing agreement,
3. other date or dates falling 14 days before the conclusion of the financing agreement.

4.3.3.6. *Ownership of the Agricultural Deposit*

The object of the agricultural deposit is exclusively owned by the agricultural producer. Since the moment of conclusion of the financing agreement until the final date of the agricultural deposit it should not be subject to attachment or enforcement proceedings or forced charge. It does not enter the bankruptcy estate, the sanation estate, the arrangement estate of an agricultural producer.

4.3.3.7. *Selling Goods Covered by the Agricultural Deposit*

The crops under the agricultural deposit should be sold by the agricultural producer before the stipulated final date of the agricultural deposit, as part of one or more legal transactions. The sale should be allowed after submitting to the financing entity a declaration on the total or partial termination of the agricultural deposit for sale.

The notice should contain at least the identification of the buyer, the type and quantity of the object of sale and the price, on the form provided by the financing entity. The subject of the agricultural deposit may be sold only through an account maintained by the financing entity.

The delivery of the object of the agricultural deposit to the buyer and the transfer to the buyer of the ownership of the object of this deposit should take place only on the basis of a written statement (permission) of the financing entity. The financing entity should have a statutory pledge on the claims of an agricultural producer arising from the sale of an object at an agricultural deposit. The financing entity shall have priority over the creditors of the agricultural producer in respect of the amounts paid to the agricultural producer at the time of the creation of the agricultural deposit and in respect of the amounts constituting the agreed remuneration of the depositary, provided that the attachment of claims from this account did not take place before the agricultural producer made a declaration of the creation of the agricultural deposit.

4.3.3.8. *The Remuneration of the Financing Entity*

The remuneration of the financing entity should be clearly determined in the contract. The total amount of interests, fees, costs, and commissions should not exceed the cost of credit granted by the financing entity on the date of creation of the agricultural deposit.

4.3.3.9. *Protection of the Financing Entity*

If the agricultural producer does not sell all or a part of the agricultural deposit by the expiry date of the agricultural deposit, claims against the agricultural producer shall become automatically due by virtue of law. In this respect the financing entity could in particular:

1. submit a declaration to the agricultural producer on taking ownership of all or part of the object of the agricultural deposit upon the expiry of the final date of the agricultural deposit, and

then, independently or through an authorised specialised person, dispose of the object of the agricultural deposit even at the place of its storage, and settle the resulting sale price with the claim against the agricultural producer;
2. oblige the agricultural producer to sell the object of the agricultural deposit – in this case, the financing entity has a statutory pledge on the farmer's claims for sale;
3. require the agricultural producer to reimburse the amounts paid, together with interest and costs;
4. take other actions permitted by law.

4.3.4. AMENDMENT OF THE REGULATIONS ON REGISTERED PLEDGES *DE LEGE FERENDA*

It can be recommended to amend the regulations on registered pledges by allowing expressis verbis to establish a registered pledge on a collection of crops from the agricultural holding.[104]

The next proposal *de lege ferenda* is introducing the possibility of selling the subject of the registered pledge (in its entirety or part), by the pledger, with the required pledgee's consent.

The sale will lead to the expiry of the registered pledge if a) the pledgee has consented to the transaction and its terms, b) the buyer will pay the sale price (in the amount equal to the secured debt) directly to the pledgee. The essence of this proposal is to simplify the mode of satisfaction from the subject of the registered pledge.

[104] In the Act of 6 December 1996 on registered pledges and the register of pledges (i.e., Journal of Laws of 2018, item 2017), the following should be added in Art. 7 sec. 2 point 31 with the following wording: "harvested agricultural products".

4.3.5. ACTS OF UNFAIR COMPETITION IN CONNECTION WITH AGRICULTURAL PRODUCTION *DE LEGE FERENDA*

De lege ferenda, the following named and forbidden deed of unfair competition could be created.

1. The unfair competition is committed by the party who: acquires; mediates, helps in the acquisition, undertakes to acquire (including a preliminary agreement). The liability of several persons is joint and several. The act of unfair competition should consist in purchasing agricultural products from a natural person below the direct costs of their production. However, it is not an act of unfair competition to purchase agricultural products for the average market price valid on the date of performance of the contract. Direct costs there are costs incurred by that farmer, provided that they were reasonable by circumstances not exceeding the usual typical costs in such relationships and necessary to obtain products from the production of the agricultural holding and in particular the costs of sowing, fertilisers, feed, and medicines. Direct costs are not the costs of own work, interest costs on credit, tax costs, or lease costs. The farmer shall be entitled to a compensatory payment.
2. The act of unfair competition is committed by the person who reserves the debtor's liability in his favour, including in the form of a contractual penalty, for events beyond the debtor's control and which constitute a subsequent impossibility of performance.[105]
3. The act of unfair competition is committed who takes possession of the products of a farmer who is a natural person without prior or simultaneous payment or securing of remuneration in the amount of at least 50% of the agreed remuneration.

[105] R. Adamus, *Następcza niemożliwość świadczenia producenta rolnego z umowy kontraktacji*, "Studia Prawnicze. Rozprawy i Materiały" 2020, t. 27, nr 2; J. Krajewski, *Kara umowna przy kontraktacjach a obowiązek zawiadomienia o nieurodzaju*, "Nowe Prawo" 1954, nr 4.

4.3.6. EXCHANGE PLATFORM FOR SELLING AGRICULTURAL PRODUCTS *DE LEGE FERENDA*

The legislator should encourage voluntary creation and managing of exchange platforms for selling agricultural products. Exchange platform should be managed by entrepreneurs, chambers of commerce and chambers of agriculture. The law should not contain too detailed regulation in this respect. The statutory rules for the establishment of an agricultural exchange could be as follows. The organiser of the online agricultural exchange would enable agricultural producers to conclude distance contracts with other entrepreneurs (buyers of goods). The organiser of the online agricultural exchange would allow verified buyers or unverified buyers to conclude contracts through this exchange.

Verified buyers of goods are understood as persons who have secured payment for the agricultural producer before performing the distance contract, in a manner appropriate to the value of the transaction, in particular: prepayment of the entire remuneration, letter of credit, bank surety, bank guarantee, or will pay the entire amount of the transaction to the bank escrow account of the organiser of the online agricultural exchange.

4.4. Conclusions

In this chapter there are identified some areas which require careful discussion about changes. First of all, the reform of the cultivation contract should be deeply considered. Since its regulation in the Civil Code, many social and ownership changes have taken place (change of the state system from centrally controlled to free market, establishment of many large farms generating greater risk than small farms, dominant private ownership, etc.). There have been climate changes resulting in violent and negative weather phenomena for agriculture. Next, we should mention hydrological problems (the steppe phenomenon), the entry of Polish agriculture into the common market of the European Union, the emergence of strong nearby competitive markets in the game. Added

to this is the activity of financial speculative groups. The quality of the regulation of the cultivation contract is evidenced, among others, by the distribution of the risk burden between the agricultural producer and the contracting party. The production of agricultural products depends on the work of the agricultural producer, the agrobiological cycle, the absence of negative external phenomena. In the event that agricultural products have not been produced, due to circumstances for which neither party is liable, then – in accordance with the dispositive provision – the agricultural producer is obliged to return the advance payments. In fact, however, he bears the entire contractual risk consisting in increasing expenditures, e.g., for preparatory work, fertilisers, sowing, rents. The question arises whether such risk distribution is adequate. It is possible to propose a discussion on another basic solution, which would be the lack of the obligation to return properly used advances and correctly used additional benefits. Another practical problem of agricultural producers is charging them with contractual penalties in the event of failure to meet quantitative and qualitative conditions. Very often, however, failure to meet the requirements is independent of the agricultural producer. In turn, the contractual penalty generated thanks to the deduction mechanism actually serves to reduce the agricultural producer's remuneration. This circumstance also needs to be noticed by the legislator. The list of additional benefits is completely anachronistic. It is written for a socialist economy struggling with shortages. The same can be said about the obligation to notify about events preventing the proper performance of the contract by the agricultural producer and the consequences of failure to comply with it. It is difficult to read the reference to the provisions on the sales warranty, especially in view of the revolution that affected the provisions on the seller's warranty. An appropriate focus was placed on the case of subsequent impossibility of providing the agricultural producer.

Secondly, it seems necessary to consider the proposal to strengthen the legal position of an agricultural producer who is a natural person in contractual relations with entrepreneurs. An agricultural producer is not a consumer, in most cases – in the civil law – he is treated as an entrepreneur. The question arises whether

the legal protection of agricultural producers who are natural persons should not be extended by applying to them the provisions on abusive clauses.

Thirdly, the question arises about the need for a new type of security, very easy to use and with a limited minimum of formalities. Thanks to this, it would be possible to create something such as "agricultural factoring". Except for the case of 2023, it was usually the case that the later the agricultural producer sold agricultural products, the more he received for them. The problem was that indebted agricultural producers were forced to sell agricultural products at the lowest price point for them, that is, immediately after they were harvested. A solution to such a problem could be an agricultural deposit, which would consist in encumbering agricultural products stored by the farmer or a third party with it. Based on the deposit, the financial institution could pay the agricultural producer a loan appropriate to his creditworthiness. The agricultural producer would be obliged, with the consent of the financial institution, to sell the subject of the agricultural deposit within a specified period, and the obtained sale price would be transferred directly to the agricultural producer's financing institution in the appropriate amount. In the part free of loan burdens, it would be collected by an agricultural producer. The creation of an agricultural deposit would involve a minimum of formalities, its subject would not be subject to enforcement or other forced satisfaction for the benefit of third parties.

Fourthly, possible changes to the regulations on registered pledges should be considered, which would explicitly provide for the establishment of a registered pledge on agricultural products, with an additional simplified path for the pledgee to obtain satisfaction from the subject of such a registered pledge.

Fifthly, the subject of discussion should be the introduction of new named types of unfair competition into the provisions on combating unfair competition.

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Chapter 5. Contracting in Agriculture: Curtailed Freedom of Contract for the Protection of Producers?

5.1. Introduction

The food supply chain is immensely complex: input suppliers, producers, processors, wholesalers, retailers and – last but not least – consumers all have their own interests. While it is obvious that we want to buy cheap food which is of high quality, for a non-farming person it is less well-publicised that producers can have a better standard of living if they sell their produce at a higher price. Higher farm gate prices result in higher consumer prices; however, not directly. The profit of each and every middleman goes hand in hand with the increase of the end price to be paid by the consumer. Taking this into consideration, consumers and traders are on the same side, while producers on the other: they have competing interests.

It would, however, be ill-advised to forget that agricultural production, which in most cases takes place in rural areas, is not only an economic activity. Many say that producers embody traditional values that are superior to the ones represented by urban society: independence, self-sufficiency, proximity to nature, heritage, sense of belonging, etc. It is beyond dispute that rural lifestyle is of crucial importance to the preservation of rural areas, and rural exodus is to be solved by governments to safeguard the intrinsic values offered by producers.

Volatile and low incomes for agricultural producers are a symptom to be treated to preserve rural communities. It is revealing, and I might not be the only one to feel it extremely low, that "farmers receive, on average, 27% of consumer expenditure on foods consumed at home and a far lower percentage of food consumed away from home".[1] Organic food supply chains are no different; producers "capture a relative small proportion of added value".[2] Unfair returns for the suppliers of agri-food products in the food chain are evidence of injustice.[3] That I am not the only one to feel the distribution in food chains unfair is evidenced by empirical research. For example, German consumers are of the opinion that farmers should be treated in a fairer way and should receive more compensation.[4]

The income of agricultural producers seems to dominate among the reasons as to why the sector should be supported. The volatility of incomes tends to be a concern both in the short and long run. Its root cause is embedded in the features of agricultural supply and demand. While the supply of agricultural products may drastically change year by year as a consequence of production risks, the demand stagnates. In general, when supply decreases and prices increase, consumers do not buy and eat less food, because it is a basic necessity.[5] With being uncertain about the quantity of production and prices, agricultural producers are challenged by the unpredictability of their income.[6]

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[1] J. Yi, E-M. Meemken, V. Mazariegos-Anastassiou, J. Liu, E. Kim, M.I. Gómez, P. Canning, C.B. Barrett, *Post-farmgate food value chains make up most of consumer food expenditures globally*, "Nature Food" 2021, Vol. 2, No. 6, pp. 417–425.

[2] J. Sanders, D. Gambelli, J. Lernoud, S. Orsini, S. Padel, M. Stolze, H. Willer, R. Zanoli, *Distribution of the added value of the organic food chain*, Braunschweig 2016.

[3] T. Lang, M. Heasman, *Food Wars: The Global Battle for Mouths, Minds and Markets*, London 2004, p. 8.

[4] G. Busch, A. Spiller, *Farmer share and fair distribution in food chains from a consumer's perspective*, "Journal of Economic Psychology" 2016, Vol. 55, Issue C, pp. 149–158.

[5] See the price inelasticity of food products: T. Andreyeva, M.W. Long, K.D. Brownell, *The Impact of Food Prices on Consumption: A Systematic Review of Research on the Price Elasticity of Demand for Food*, "American Journal of Public Health" 2010, Vol. 100, No. 2, pp. 216–222.

[6] R. Ackrill, *Common Agricultural Policy*, London 2000, pp. 20–22.

It is a well-known fact that the most alarming problem faced by farmers is their lack of bargaining power.[7] The question arises: what can law do about it? This chapter aims to shed light on how private law contributes to the protection of agricultural producers in commercial transactions. I concentrate on the time frame when farmers try to negotiate and sell their produce to buyers, in particular processors, wholesalers and retailers.

The central focus of this chapter is the legal instruments of civil law and competition law in a broad sense, and for this reason I divide my study to two main parts. I examine those *sui generis* contract types that are codified in the Hungarian Civil Code and complemented by further provisions in Act XCVII of 2015. Furthermore, I take a look at the possibilities created by competition regulation – on the one hand, antitrust law, and, on the other hand, trade regulation. Both main chapters take a "protective" approach, that is to say, analyse the safeguards provided to agricultural producers by the respective legal areas. These two main parts are preceded by an introductory part consisting of, first, a description about the relevant parts of Hungarian agricultural strategy and policy, second, an analysis of the legal forms that can serve as a basis to conduct agricultural activity, and third, the assessment of the principle of the freedom of contract in business transactions related to the sale of agricultural products. In the end, I list the best practices that I identified, I conclude and formulate *de lege ferenda* proposals.

It is important to touch upon the national strategy to present the basic policy framework in which Hungarian farmers operate. The analysis about the possible legal forms of conducting agricultural activity is crucial to identify whether certain operational frameworks are more privileged than others, and if they are, in what ways. This is followed by the examination about freedom of contract as the governing principle of doing business in all market economies. The question is whether the freedom of contract in agricultural business transactions is curtailed, and if it is, whether

[7] A. Sorrentino, C. Russo, L. Cacchiarelli, *Strengthening Farmers' Bargaining Power in the New CAP*, "International Journal on Food System Dynamics" 2017, p. 123.

it can deliver the expected outcome of a better living standard for producers. In the main analysis, I concentrate on contract law and competition regulation, given their possible regulatory nature to intervene in business transactions. The main aim of the chapter is to find the strengths and weaknesses of the current regime to deepen the understanding of agri-food relations and to explore the possible development directions.

5.1.1. NATIONAL AGRICULTURE-RELATED STRATEGIES

In Hungary, according to the Hungarian Central Statistical Office's 2021 data, agriculture, forestry and fishing contributed 4.1% to the gross domestic product. In the same year, the contribution of the whole agricultural sector to the GDP of the European Union was 1.3%.[8] In the period from 2010 to 2020, the Hungarian rate was between 3.6% and 4.7%.[9] Furthermore, in relation to other EU countries, the share of agriculture in the GDP – based on World Bank data – places Hungary in the top 5 EU countries.[10] Of course, this does not tell us any more than that the Hungarian agricultural sector plays a more emphasised role in creating market value in our country than the whole EU agricultural sector in the European Union as well as than in most of the EU countries separately. This gives a constant impetus to deal with the situation of Hungarian agricultural producers who contribute to the GDP at a relatively high rate. Although with the increase of the share of industry and services, the contribution of the agricultural sector may decrease, but until agricultural production adds a relatively high value to our national economy, I am of the opinion that decision-makers have an even more enhanced responsibility to give particular attention to farmers.

[8] See: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Performance_of_the_agricultural_sector (accessed on: 6.09.2023).

[9] See: https://www.ksh.hu/mezogazdasag (accessed on: 6.09.2023).

[10] See: https://data.worldbank.org/indicator/NV.AGR.TOTL.ZS?locations=EU&most_recent_value_desc=true (accessed on: 6.092023).

This particular attention has not been missing recently. Nevertheless, it is worth mentioning that, prima facie, the Hungarian legal regulation on issues as regards tackling the difficulties of the lack of bargaining power has already reached a level from where it would be a challenge to further develop conceptionally. This may be a reason that national policy and strategic documents touch upon the topic marginally. To mention an example of Hungary's advanced legal approach towards the protection of producers: by the time the European Union adopted a directive on unfair trading practices against the sellers of agricultural products in April 2019, Hungarian law had already had a decade-long enforcement experience in protecting agri-food suppliers against their buyers through the Unfair Distribution Practices Act,[11] which will be later analysed in this chapter.

In the mid-2010s Hungary's medium and long-term food development strategy set out the objective of establishing equal market positions in the food supply chain through promoting vertical and horizontal cooperation. As possible means for that, the following were formulated: the review of legal conditions, drafting of supporting legislation where necessary; preference for programmes promoting cooperation, integration, social cooperatives, networks for competitiveness and innovation; development, organisation and promotion of short supply chains and promotion of producer participation; involving small producers in quality food supply; support for the creation of regional food processing centres based on the use of shared infrastructure, enabling efficient resource management; support for logistical and commercial development investments, in particular by micro-, small- and medium-sized enterprises, cooperating in any form to promote joint market access; support for the integration of trading houses; promotion of effective forms of cooperation and their benefits, as well as presentation of their advantages.[12]

[11] Act XCV of 2009 on the Prohibition of Unfair Distributor Practices in Relation to Suppliers of Agricultural and Food Products.

[12] Hungary's medium and long-term food industry development strategy 2014–2020, p. 10.

Of the recent declarations about agricultural producers' market situation, it is important to mention one of the government orders from mid-2019 on the promotion and coordination of the digitalisation of Hungarian agriculture and on Hungary's Digital Agricultural Strategy. In this order, the Government declared that it considers necessary to develop digital-based distribution and sales sharing economy methods to support the sale of domestic agricultural products and the recycling of agricultural waste, to shorten trade chains (by exploring the possibilities of using blockchain solutions), and supports the development of recommendations to help achieve these goals, to which end it calls on the ministers concerned to take the necessary measures.[13] If digital solutions would make it easier for producers to explore distribution options and to increase their access to market information, the current legal regime may become even more effective.

From a broader perspective, Hungary's Digital Food Industry Strategy sheds light on the fact that the Hungarian Government does not take a simplified approach to agricultural production. "Agricultural production is nowadays not only one of the sectors of production, but also plays a major role in maintaining the population of the countryside, and environmental protection."[14] That is to say, agricultural production has three main functions: producing, ensuring the employment of rural areas, and preserving agricultural landscapes.[15] This approach towards the role of agriculture is of great importance, because in certain cases the additional protection of farmers in business transactions cannot be explained and justified by pure efficiency-based considerations. If, however, one steps out of the box of one-factor assessment of agricultural production based on efficiency, and lets non-economic aspects into the picture, in particular social and environmental ones, the creation

[13] Government Order no. 1470/2019. (VIII. 1.) on the promotion and coordination of the digitalisation of Hungarian agriculture and on Hungary's Digital Agricultural Strategy, point 9.

[14] Hungary's Digital Food Industry Strategy, p. 8.

[15] Ibidem, p. 9.

of safeguards in business transactions for those who produce our food may become more accepted.

High politics also expressed its commitment to the protection of producers: in his annual assessment speech in February 2023, Hungary's prime minister explicitly said that they would keep the promise they had made to the countryside, they would launch unprecedented developments, they would provide more money than the Hungarian countryside had ever seen, even under the Austro-Hungarian Monarchy.[16]

As can be seen, the situation of agricultural producers is not a neglected issue in policy making processes, and the sector's development hand in hand with the improving of market possibilities for famers are of great importance in Hungary, which means that the framework producers operate in has a positive atmosphere that aims to support them from not only a legal but also an economic viewpoint.

5.1.2. LEGAL FORMS OF CONDUCTING AGRICULTURAL ACTIVITY

Agricultural production has several forms as regards organisational structure. The most basic distinction can be drawn up between individual producers and those who – in one way or another – combine their forces and are engaged in production processes together. Whether the latter form embodies any legally recognised and institutionalised structure depends on the legal area through the lens of which we examine the given type. Civil law (commercial law[17]), competition law and tax law all have their termini technici that are used to describe a distinctive group of producers. From the viewpoint of the protection of farmers, the most relevant feature is whether in a certain form the lack of bargaining power of producers can be counterbalanced. That is to say, in commercial relations when a producer or a group of producers attempts to sell their products,

[16] See: https://www.napi.hu/mezogazdasag/orban-viktor-agrarium-mezogazdasag-unios-penzek-evertekelo.767658.html (accessed on: 8.09.2023).

[17] In Hungary, company forms are regulated in Act V of 2013 on the Civil Code.

the organisational structure in which they do it does not matter. What is relevant is the *de facto* situation whether – as sellers – they can act in a way which make them capable not to be forced into agreements they feel disadvantageous to themselves. Nevertheless, some thoughts are worth presenting to give an overview of the relevance of different organisational forms established by various legal areas.

It is worth starting that the new Family Farms Act[18] has brought to the fore a conceptual rethinking of the regulation on agricultural family holdings in Hungary. In principle, the Family Farms Act regulates three *sui generis* agricultural law categories: primary agricultural producer, family farm of primary agricultural producers, and family agricultural company.[19] These legal forms are relevant from two perspectives: taxation and the acquisition of agricultural land (preemptive and prelease rights).

The basic operational forms of conducting agricultural (or any other economic) activity, however, have remained untouched by the Family Farms Act.[20] That is to say, from a commercial law perspective, the economic activity of agricultural production can still be performed as individual entrepreneur[21] or in any company form that is regulated in the Civil Code.[22] These are the following: general partnership,[23] limited partnership,[24] limited liability company,[25] and public limited company.[26] Furthermore, agricultural production can also be conducted in the form of a cooperative.[27]

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[18] Act CXXIII of 2020 on Family Farms.

[19] See their meanings: J.E. Szilágyi, *Hungary: Strict Agricultural Land and Holding Regulations for Sustainable and Traditional Rural Communities*, [in:] *Acquisition of Agricultural Lands: Cross-Border Issues from a Central European Perspective*, J.E. Szilágyi (ed.), Miskolc–Budapest 2022, p. 149.

[20] See: https://www.nak.hu/csg (accessed on: 8.09.2023).

[21] Individual entrepreneurs are regulated by Act CXV of 2009 on the Individual Entrepreneur and the Individual Company. Section 2(2)(a) of Act CXV of 2009 declares its inapplicability to the activity of primary agricultural production regulated by the Family Farms Act.

[22] Act V of 2013 on the Civil Code.

[23] Civil Code, §§ 3:138–3:153.

[24] Ibidem, Sections 3:154–3:158.

[25] Ibidem, Sections 3:159–3:209.

[26] Ibidem, Sections 3:210–3:323.

[27] Ibidem, Sections 3:325–3:366.

What is of crucial importance is that a primary agricultural producer can produce on his/her own or as part of a family farm of primary agricultural producers. As regards primary agricultural production, producers cannot be individual entrepreneurs.[28, 29] This is an incompatibility rule, namely, not to apply in parallel legal forms that overlap each other from the viewpoint of tax law.[30] Therefore, who is engaged in agricultural production can choose to perform the economic activity either as individual entrepreneur or primary agricultural producer. Not so surprisingly, based on 2020 data, the number of producers who performed agricultural production as primary agricultural producers was more than 291,000, while persons conducting agricultural activity as individual entrepreneurs did not even reach 30,000.[31] This can be explained by the favourable tax reductions applying to primary agricultural producers.[32] The other two agricultural law categories, i.e., family farm of primary agricultural producers and family agricultural company, also aim to provide beneficial taxation forms to farmers who produce jointly. While the concept "family farm of primary agricultural producers" has been rather created by law to introduce a favourable taxation system for primary agricultural producers who combine their forces as relatives, the "family agricultural company" presupposes a company registered pursuant to commercial law provisions (general partnership, limited partnership, limited liability company, public limited company), which – if also registered by the Hungarian Chamber of Agriculture as a family agricultural company – can employ some further favourable taxation methods incidentally.

Derogating from tax law and commercial law, competition law employs completely different terms when establishing privileges

[28] Family Farms Act, Section 3(3).

[29] It does not mean that a person who is registered as primary agricultural producer could not perform an economic activity other than primary agricultural production as individual entrepreneur.

[30] Nemzeti Agrárgazdasági Kamara, *Családi Gazdaságok Reformja: Tájékoztató kiadvány a családi gazdaságokról szóló törvényről*, Budapest 2020, p. 15.

[31] Ibidem.

[32] Rules on personal income tax, including those of individual entrepreneurs and of primary agricultural producers, are laid down in Act CXVII of 1995.

for the market participants of the agricultural sector. In this regard, a distinction is necessary between Hungarian law and EU law. In Hungary,[33] on the one hand, the general competition law exemption from the prohibition of anti-competitive agreements is formulated regardless of any organisational form of the respective producers. The applicability of these exception rules is connected to the fact that the subject-matter of the agreement is an agricultural product. The organisational form of producers is, therefore, irrelevant when deciding on the applicability of the exemption codified in Section 93/A of the Competition Act.[34] On the other hand, the other exemption laid down by Section 25 of the Agricultural Markets Act[35] requires a legally recognised interbranch organisation (hereinafter referred to as IBO) whose agreement is made public and other market participants that are not part of the respective IBO can join, with a written declaration irrespective of their organisational form. Nevertheless, this exemption can be used only by a recognised IBO.

In EU law, as regards horizontal cooperation, certain exemptions from the prohibition of anti-competitive agreements apply only to legally recognised producer organisations and associations of producer organisations, while others can also be enjoyed by non-recognised farmers' associations. Concerning vertical agreements, only recognised IBOs are entitled to the exemption, as is the case with the Hungarian rules.[36]

In sum, if one examines the protection of agricultural producers through the lens of private law, in particular of competition law, the organisational form in which agricultural production is performed has no relevance. In business transactions, when producers step up as sellers of their produce in a particular market, the legal form in which the agricultural activity was conducted to produce their products to be sold does not matter. It is irrelevant whether

[33] See Section 3.1.

[34] Act LVII of 1996 on the Prohibition of Unfair Market Practices and Restrictions of Competition.

[35] Act XCVII of 2015 on Certain Aspects of the Organisation of Agricultural Product Markets, Producer and Interbranch Organisations.

[36] See a detailed analysis: M.M. Csirszki, *The Comparison of the US and EU Agricultural Antitrust Exemptions*, "Yearbook of Antitrust and Regulatory Studies" 2022, Vol. 15, No. 25.

the production takes place as primary agricultural producer, individual entrepreneur, limited liability company or cooperative.

Neither company types nor taxation forms determine and influence the protection provided to farmers by private law, including competition law, when negotiating sales contracts. Nonetheless, this does not mean that, for example, the applicability of certain competition law exemptions would not require legally recognised structures in some cases, as mentioned above. However, the two layers – production and marketing – must be distinguished. The legal forms in which agricultural production can be carried out do not limit the safeguards introduced by sector-specific contract law and competition law provisions. Curtailing the freedom of agricultural contracts has no connection with the legal form in which agricultural production is realised.

5.1.3. THE BASIC PRINCIPLE: FREEDOM OF AGRICULTURAL CONTRACTS

When analysing the trade regulation rules introduced by the UTP Directive[37] at EU level, *Pichler* noted that with the adoption of sector-specific rules in agriculture the freedom of contract (as well as the principle of competition) had been further restricted in the food supply chain by interest-driven policies.[38] In light of this contention, it is worth taking a look at the aspects of agricultural contracting that are affected by pro-farmer rules and which may limit the freedom of the parties.

The constraints that influence the freedom of contract of the parties come from two directions. On the one hand, there are sectoral contract law provisions (see Section 2). On the other hand, with public enforceability, trade regulation provisions (see Section 3.2)

[37] Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, OJ L 111, 25.4.2019, pp. 59–72.

[38] P. Pichler, *Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ordnungspolitisches Ungetüm*, "Neue Zeitschrift für Kartellrecht" 2021, p. 537.

also have an impact on the possible terms and conditions stipulated by contracting parties. The third subject of the chapter, competition law exemptions (see Section 3.1) do not influence the parties' freedom of contract, but rather alleviate the situation of producers who aim to countervail the bargaining power of buyers.

The freedom of contract consists of three subprinciples: first, persons can decide whether they would like to enter into a contract at all; second, they can choose those persons with whom they would like to enter into a contract; and third, contracting parties are free to determine the terms and conditions of their contract.[39] The sector-specific provisions applying to contracts in connection with agricultural products limit the third subprinciple of the freedom of contract. Here, four general remarks are important.

First, certain provisions in contract law are formulated taking into account the special characteristics of agricultural production. The following aspects are touched by these sectoral rules that are analysed in Section 2:

- list of obligatory elements in the contract;
- period of completion;
- minimum period for the contract;
- the entry into force of the contract;
- deadline for payment;
- tightened rules for late payment;
- quantity to be delivered;
- reimbursement of the costs of services provided by the buyer to the seller;
- exclusion from liability;
- the method of price determination.

Second, what is unusual from a contract law perspective, which is also related to the third subprinciple of the freedom of contract, is that – for certain cases – there are contract type constraints. Though the general rule is the freedom of contract type, that is to say, the Civil Code only provides "examples" of contract types to contracting parties who can decide which rules are used by them (and

[39] L. Vékás, [in:] *Nagykommentár a Polgári Törvénykönyvről szóló 2013. évi V. törvényhez*, P. Gárdos, L. Vékás (eds.), Budapest 2021.

can also mix the rules to be included in their contract), the Agricultural Markets Act declares that *before harvest* only those contract types can be concluded by parties which are mentioned in Section 6:232 and Section 6:233 of the Civil Code. This declaration is of public law nature, and contracting parties cannot deviate from it.

Third, there are certain agricultural products where formal constraints are laid down in the form of obligatory written contracts. It is not a unique requirement, since there are several contracts that shall be in writing (for example, a sales contract for real estate, etc.).

Fourth, certain contract law provisions are also enforced by public authorities having competence to impose fines on non-compliant contracting parties. The obligation to conclude written agreement, the minimum period for the contract, the method of price determination as well as the latest date of the entry into force of certain contracts can be monitored by public authorities, and if non-compliance is found, a fine can be imposed.

To sum up, freedom of contract related to agricultural products is indeed more limited than in general. Added to this is the enforceability of certain private rules under public law with the possible imposition of fines.

5.2. Civil Law

This section aims to present the agriculture-specific contract types in the Civil Code as well as the complementary provisions codified in the Agricultural Markets Act.

5.2.1. AGRICULTURE-SPECIFIC CONTRACT TYPES AND PROVISIONS

5.2.1.1. *Sales Contracts*

The Civil Code has two different types of contracts that are formulated for the sales of agricultural products. The difference between them is whether the buyer contributes to the production. These two

contract types have some special provisions that intend to provide additional protection for producers.

The agriculture-specific sales contract types are codified as subtypes of the sales contract.[40]

Regarding the sales contract concluded for the provision of self-produced agricultural goods, in which the seller undertakes to deliver at a later date agricultural produce, products or animals of his own breeding or fattening, he is entitled to deliver 10% less than the quantity stipulated in the contract. Furthermore, the seller is entitled to perform before the stipulated time for performance, provided that the buyer is notified in advance of the commencement of performance by giving him the time necessary for preparation for taking delivery.[41] Both specific provisions (performing less and performing earlier) are in connection with the acknowledgement that agricultural production has its own uncertainties. It is a protective pillar for producers that – without bearing the burden of a possible breach of contract – they can deliver 10% less than the quantity agreed upon by the parties. Furthermore, the performance before the stipulated time is based on the premise that the buyer may not have the necessary infrastructure and capacity to store the products. In reverse position, if the buyer produces more than the quantity stipulated in the contract, the buyer is not obliged to take over the surplus.[42]

The contract type has four distinctive features: the subject matter of the contract must be agricultural product; the agricultural product is produced by the seller; the seller must transfer the ownership of the product; the transfer takes place at a later date than the contract is concluded.[43]

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[40] Civil Code, Book 6, Part Three, Title XIV, Chapter XXXIV.

[41] Ibidem, Section 6:232, paragraphs (1)–(2).

[42] A. Kisfaludi, [in:] *Nagykommentár a Polgári Törvénykönyvről szóló 2013. évi V. törvényhez*, P. Gárdos, L. Vékás (eds.), Budapest 2021.

[43] O. Papik, *A mezőgazdasági termékértékesítési szerződés nyomában, avagy a mezőgazdasági termékértékesítés normáinak továbbélése az új Ptk.-ban*, "Journal of Agricultural and Environmental Law" 2015, Vol. 10, No. 18, p. 65.

The provisions on these contract types are complemented by the relevant provisions of the Agricultural Markets Act.[44] While its Section 5 sets out further provisions for the sales contract of self-produced products, its Section 6 for the sales contract with the participation of the buyer that is analysed later.

It is declared in Section 4(1) of the Agricultural Markets Act that before harvesting only these two above-mentioned types of contracts can be concluded with an agricultural producer as a seller of agricultural products produced on the land that is used by that agricultural producer. The person who produces the agricultural products covered by the contract in his own name and at his own risk on the agricultural land he uses is also considered seller as an agricultural producer.[45]

The sales contract of self-produced agricultural products shall include (1) a declaration by the seller that he will produce the agricultural produce for the performance of the contract as an agricultural producer in his own name and at his own risk, (2) an indication, by means of a unique identification device, of the agricultural land on which the seller is to perform the contract, (3) in the case of an undertaking to supply a fixed quantity, a statement by the seller of the quantity of normal production per hectare of land as referred to in the previous point, (4) the detailed conditions for notifying the buyer of and certifying to the buyer any cause beyond his control which prevents performance of the contract, (5) the method of determining quality, and (6) the arrangements for settling disputes concerning performance and quality.[46]

A producer is wholly or partly released from the obligation to sell the quantity of agricultural products covered by the contract only in the case, if – on the respective agricultural land – the quantity of agricultural products determined in the contract has not been harvested for reasons beyond the producer's control and of which he has informed the other party before the harvesting of the products, as well as the producer has proved with the decision of the county

[44] Agricultural Markets Act, Section 4(3).
[45] Ibidem, Section 4(1)–(2).
[46] Ibidem, Section 5(1).

government office[47] the occurrence of the event causing agricultural damage outside the producer's control. Of course, the producer shall notify the county government office of the event preliminarily in order that the county government office could issue its decision.[48] This shall be without prejudice to the agreement of the contracting parties that the producer shall make up for the loss of production with agricultural products produced on other agricultural land used by him. In this case, the producer is relieved of the obligation to sell the agricultural produce only if he has declared and proved the event beyond his control regarding all the agricultural land he uses.[49]

The other type of sales contract dedicated for agricultural products sets out special provisions for those cases when the buyer also participates in the production. If not only the seller undertakes to supply at a later date an agricultural product or a product of his own production, or an animal reared or fattened by him, and but also the parties agree that the buyer will provide a service to facilitate performance and supply the seller with information relating thereto, the seller is obliged to use that service in accordance with the information. The seller is obliged to pay the contract price for the buyer's services in support of performance, and to repay the part of the production advance paid by the buyer not covered by the purchase price, even if the production result does not cover it.[50]

On the one hand, the provisions on the sales contract of self-produced agricultural products shall apply mutatis mutandis to the sales contract of agricultural products produced with the participation of the buyer. On the other hand, in the event of a resale to a third party by the buyer, the buyer may invoke the limitation of liability based on Section 5(2) of the Agricultural Markets Act against the third party only if the contract concluded with the third party so permits.

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[47] Pursuant to Section 4 of the Government Decree no. 383/2016. (XII. 2.), the county government office is the administrative authority responsible to decide whether an agricultural damage has happened because of an event.

[48] Agricultural Markets Act, Section 5(2).

[49] Ibidem, Section 5(3).

[50] Civil Code, Section 6:233.

5.2.1.2. *Service Contracts*

Pursuant to Section 6:255 of the Civil Code, under a contract to perform an agricultural work, the producer shall rear an animal owned by the client or produce crops on the land owned by the client, and the client shall pay the fee to the producer.

The producer shall not be liable for the contract that has become impossible to perform due to an animal or crop disease, if the reason for this disease was outside of the producer's control and it was unpreventable. In this event, the producer shall be entitled to a pro rata fee.

The producer shall not refuse to refund the services provided by the client for settlement or as an advance payment on the grounds that these cannot be covered by the results of the production.

5.2.1.3. *Further Contractual Provisions*

The Agricultural Markets Act sets out further provisions that affect the rights and obligations of contracting parties. One of them is in connection with payment deadlines, while the other with the requirement of certain contracts to be in writing. In addition, there are certain provisions applying only to some agricultural products, such as apple, sour cherry, horseradish and sugar beet, as well as fresh and perishable fruit.

First, as to the deadline for payment, it is declared that in relations between the producer, the processor, the collector and the distributor, payment of the price of the agricultural and food product shall not exceed thirty days from the date of delivery of the goods, provided that the invoice, duly drawn up, is sent to the processor, the collector or the distributor within fifteen days of the date of delivery. If the correctly issued invoice is made available more than fifteen days after the delivery, payment for the goods must be made within fifteen days of the receipt of the correctly issued invoice. If this requirement is not met, the debtor is obliged to pay the price of the product with the interest on arrears specified

in the Civil Code, but at least twice the base rate of the Hungarian Central Bank.[51]

A further protective pillar for producers is that the sales contract between the producer and the processor or collector shall include a provision in which – in the event of late payment – the debtor (that is, the processor or collector) gives its consent or authorisation to its payment service provider for a direct debit mandate covering both the price of the product and the interest on arrears.[52]

However, a derogation is also introduced by the Agricultural Markets Act, which permits the contracting parties to conclude their contract in accordance with a standard model contract, including a payment period, adopted by an interbranch organisation recognised in the respective sector. In this case, the payment period determined by their model contract can be different from the above-mentioned deadline.[53]

Second, the requirement of written contract comes from the possibility provided by Regulation 1308/2013.[54] Pursuant to Article 148 of Regulation 1308/2013, Member States can decide that every delivery of raw milk in its territory by a farmer to a processor of raw milk must be covered by a written contract. With Section 7 of the Agricultural Markets Act, Hungary uses this opportunity: contracts for the sale of raw milk in Hungary (until the raw milk is processed), with the exception of direct sale to the final consumer, shall be concluded in writing with the content specified in Article 148 of Regulation 1308/2013.[55] Furthermore, based on Article 148(4)(a)(ii) of Regulation 1308/2013, in Hungary the duration of the fixed-term contract between the parties shall be at least 6 months. If the duration of the contract is indeterminate, the contract can be terminated

[51] Agricultural Markets Act, Section 3(1)–(2).
[52] Ibidem, Section 3(3).
[53] Ibidem, Section 3(4).
[54] Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No. 922/72, (EEC) No. 234/79, (EC) No. 1037/2001 and (EC) No. 1234/2007.
[55] Agricultural Markets Act, Section 7(1).

subject to a six months' notice.[56] Compliance with these obligations are supervised by the National Food Chain Safety Office and the county government offices.[57] In the event of a breach of any of these obligations, a fine between 10,000 and 50,000,000 Hungarian forints can be imposed, which, however, cannot exceed ten per cent of the net turnover achieved by the infringer in the business year preceding the decision that establishes the infringement.[58]

Third, Sections 7/A and 7/C determine provisions that apply to certain agricultural products. If sour cherry and apple are imported to Hungary as basic products for processing, the sales contract between the seller and the collector shall be concluded in writing. Furthermore, contracts for the purchase of horseradish produced in Hungary shall also be in writing.[59] These contracts shall specify the price to be paid as static that is set out in the contract, and/or as calculated by combining various factors set out in the contract,[60] as well as shall comply with the requirements laid down in Article 168(4) of Regulation 1308/2013.[61] Compliance with these obligations are supervised

[56] Ibidem, Section 7(2).

[57] Pursuant to Section 42(2a) of the Government Decree no. 383/2016. (XII. 2.), the National Food Chain Safety Office and the county government offices are the designated administrative authorities to investigate the performance of these obligations.

[58] Agricultural Markets Act, Section 7(3).

[59] Ibidem, Section 7/A(1).

[60] Ibidem, Section 7/A(2).

[61] Any contract or offer for a contract shall (a) be made in advance of the delivery; (b) be made in writing; and (c) include, in particular, the following elements: (i) the price payable for the delivery, which shall: be static and be set out in the contract and/or be calculated by combining various factors set out in the contract, which may include objective indicators, indices and methods of calculation of the final price, that are easily accessible and comprehensible and that reflect changes in market conditions, the quantities delivered and the quality or composition of the agricultural products delivered; those indicators may be based on relevant prices, production and market costs; to that effect, Member States may determine indicators, in accordance with objective criteria based on studies carried out on production and the food supply chain; the parties to the contracts are free to refer to these indicators or any other indicators which they deem relevant. (ii) the quantity and quality of the products concerned which may or must be delivered and the timing of such deliveries, (iii) the duration of the contract, which may include either a definite duration or an indefinite

by the county government office.[62] Contracts for the purchase of at least 60% of the fruit to be processed by the processor in a given year shall enter into force by 15th of May of that year in case of sour cherry, while by the 1st of August in case of apple. These deadlines shall not apply to processors who process not more than 100 tonnes of sour cherries or 200 tonnes of apples in a given year.[63] In the case of horseradish, contracts shall enter into force also by the 1st of August.[64] This deadline shall not apply, if the horseradish is sold directly to the consumer or in a wholesale market.[65]

In the event of a breach of any of these obligations, a fine between 10,000 and 50,000,000 Hungarian forints can be imposed by the county government office having jurisdiction in the geographical area of the processor's agricultural holding centre.[66]

Undertakings producing sugar in Hungary and the organisation representing the interests of sugar beet growers shall start negotiations on contracts for the sale of products in accordance with Annex X to Regulation 1308/2013[67] by the 10th of December of each marketing year.[68] The determination of the latest date for the opening of negotiations between sugar operators is intended to ensure the predictability of production.[69]

As to defective execution, the Agricultural Markets Act also establishes a specific provision. No quality objection can be raised in respect of fresh or perishable agricultural and food products sold between the producer, processor, purchaser and distributor after

duration with termination clauses, (iv) details regarding payment periods and procedures, (v) arrangements for collecting or delivering the agricultural products, and (vi) rules applicable in the event of force majeure.

[62] Pursuant to Section 42(2a) of the Government Decree no. 383/2016. (XII. 2.), the National Food Chain Safety Office and the county government offices are the designated administrative authorities to investigate the performance of these obligations.

[63] Agricultural Markets Act, Section 7/A(7).

[64] Ibidem, Section 7/A(4).

[65] Ibidem, Section 7/A(8).

[66] Section 42(2a) of the Government Decree no. 383/2016. (XII. 2.).

[67] Annex X of Regulation 1308/2013 determines the purchase terms for beet.

[68] Agricultural Markets Act, Section 7/C.

[69] Explanatory memorandum to Section 7/C of Agricultural Markets Act.

the expiry of the storage life or the date of minimum durability laid down in a written contract between the parties or, in the absence of a contractual provision to that effect, after the product has been taken into their possession.[70] This aims to decrease the vulnerability of producers, especially in the fresh fruits markets, by excluding late quality complaints based on which producers would only receive the value of the goods at a reduced or zero price, or with delay. Furthermore, in certain cases, buyers take over the goods at a reduced or zero price, but process or resell them, on one hand, generating profit from it and, on the other hand, creating price pressure on goods of high quality.[71]

5.3. Regulation of Competition in Agricultural Markets

Competition policy decisions can be realised through not only conventional competition (in other words, antitrust) laws[72] but also other forms of regulation.[73] Recently, competition law has been treated as means to increase economic efficiency and consumer welfare. Beyond this approach, other forms of regulation, such as the prohibition of unfair trading practices, may be suitable to take into consideration further objectives that cannot be fulfilled by the current framework of competition law.

The agricultural sector is a prime example where both of these approaches have to be applied in order for the peculiar nature of agricultural production to be respected. Certain trading practices that are detrimental to agricultural producers from an agricultural policy perspective cannot be reached and prevented by the scope of competition law, and this results in the need to use other forms of regulation.

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[70] Agricultural Markets Act, Section 7/B.

[71] Explanatory memorandum to Section 7/B of Agricultural Markets Act.

[72] By conventional competition law, I mean three legal instruments: the prohibition of anti-competitive agreements, the prohibition of abuse of dominance, and merger control.

[73] H. Shelanski, *Antitrust and Deregulation*, "The Yale Law Journal" 2018, Vol. 127, No. 7, p. 1923.

In this section, first, I present the relevant Hungarian competition law provisions, then, second, the regulation of unfair trading practices. On the one hand, the agriculture-specific competition law provisions are related to the prohibition of anti-competitive agreements. Agricultural producers are exempt from the general prohibition in order that they could increase their bargaining power by joining forces, which would otherwise constitute an unlawful collusion. On the other hand, the prohibition of unfair trading practices covers those behaviours of agri-food buyers, which are not covered by the competition rules on abuse of dominance because of the buyers' lack of dominant position.

5.3.1. COMPETITION LAW

The sectoral exemption for agricultural producers from the prohibition of anti-competitive agreements is codified in the Competition Act.

In relation to an agricultural product, the prohibition of anti-competitive agreements shall not be deemed to have been infringed if the distortion, restriction or prevention of competition resulting from the agreement does not exceed what is necessary to obtain an economically justified and fair income, as well as the market participant affected by the agreement is not prevented from obtaining such income. The Agricultural Minister shall determine whether the conditions for exemption provided for are fulfilled.[74]

When investigating a breach of the prohibition in relation to an agricultural product, the Hungarian Competition Authority shall obtain the opinion of the Minister and shall act on the basis of the opinion. The Minister shall issue the opinion within sixty days of receipt of the request from the Hungarian Competition Authority, during which period the Hungarian Competition Authority shall suspend its proceedings. The Competition Council (the decision-making body of the Hungarian Competition Authority) shall suspend the imposition of a fine in the case of an agreement

[74] Competition Act, Section 93/A(1)–(2).

contrary to the prohibition of anti-competitive agreement, where the violation has been committed in relation to an agricultural product. In such a case, the Competition Council shall set a time limit and require the parties to the agreement or concerted practice to bring their conduct into conformity with the provisions of the law. If the time limit expires without result, the acting Competition Council shall impose a fine.[75]

These provisions can only apply to a case, if the application of Article 101 on the Treaty on the Functioning of the European Union (hereinafter referred to as TFEU) does not arise. The necessity to apply Article 101 TFEU shall be established by the Authority in its competition proceedings pursuant to Article 3(1) of Council Regulation (EC) No 1/2003 before a final decision is taken.[76]

5.3.1.1. *A Brief History on the Location of the Provisions and Their Justification*

Originally, the provisions mentioned here were not included in the Competition Act but amended the Act CXXVIII of 2012 on Interbranch Organisations and Certain Aspects of Agricultural Market Regulation.[77] The provisions were codified as Section 18/A of Act CXXVIII of 2012. Later, when Act CXXVIII of 2012 was repealed with effect as of 1 September 2015,[78] the provisions were relocated to the Competition Act and were re-codified as Section 93/A.[79] It was an interesting legislative solution that

[75] Ibidem, Section 93/A(3)–(4).

[76] Ibidem, Section 93/A(5).

[77] The amending provision was Section 1 of Act CLXXVI of 2012 on the Amendment of Act CXXVIII of 2012 on Interbranch Organisations and Certain Aspects of Agricultural Market Regulation. It came into force on 28 November 2012.

[78] The repealing provision was Section 32 of Act XCVII of 2015 on Certain Aspects of the Organisation of Agricultural Product Markets, Producer and Interbranch Organisations.

[79] The amending provision was Section 16 of Act LXXVIII of 2015 on the Amendment of Act LVII of 1996 on the Prohibition of Unfair Market Conduct and Competition Restriction as well as of Certain Provisions Relating to the Proceedings of the Hungarian Competition Authority.

the provisions which established an exemption under the general prohibition of anti-competitive agreements originally had been codified in a sector-specific and not in the general competition statute. This formal choice was corrected by placing the exception rules into the Competition Act.

The general explanatory memorandum to the amending Act CLXXVI of 2012 posited the following:

> The practice of the Hungarian Competition Authority highlights the fundamental shortcoming of Hungarian agricultural law, namely that Hungarian competition law does not take into account the vulnerability of agriculture due to its different characteristics compared to other sectors (seasonal presence of products on the market, weather effects, security of supply, i.e., food is a basic product of consumer purchases), and the different (preferred) treatment, which is also present in EU law, is missing from Hungarian competition law. However, the economic need for this is evident and the EU legal framework would also allow for more room to manoeuvre. These legal shortcomings prevent the Competition Authority from taking into account the sectoral characteristics of agriculture in its proceedings. In view of this, it is justified to relax the strictness of domestic competition rules to the extent of EU obligations, i.e., to lay down more permissive provisions for agricultural products.[80]

This explanatory memorandum, besides the justification of the analysed provisions, provides unusual doctrinal insights on the relationship between agricultural law and competition law. It is utterly strange that we can read reflections on the relationship between two areas of law in an explanatory memorandum, which considers it a shortcoming of agricultural law that there were no

[80] See in Hungarian: Explanatory Memorandum to the Act CLXXVI of 2012 on the Amendment of Act CXXVIII of 2012 on Interbranch Organisations and Certain Aspects of Agricultural Market Regulation.

special competition law provisions applying to the agricultural sector until the date of the adoption of the provisions.

The detailed explanatory memorandum says that – differently from EU law[81] – the Competition Act did not include any positive distinction for the agricultural sector, therefore the same benchmark tool was employed for all sectors of the economy. Given that the prohibition of anti-competitive agreements in the Competition Act only applies to cases when there is no EU relevance, the Hungarian legislator is entitled to alter the respective provisions. If a restricting practice is horizontal in nature (it takes place within the framework of a sectoral interest group), that is, all market participants in the sector are equally involved, no competing market participant can find itself in a favourable position compared to the others, meaning that there is no anti-competitive agreement in its classic sense. The conduct has only vertical effects, i.e., the operators concerned are equally protected against market players of the supply chain downstream (for example, agricultural producers as suppliers vis-à-vis their buyers). This approach is in line with Article 39 TFEU, which aims to ensure a fair standard of living for the agricultural community.[82]

In the proceedings before the Hungarian Competition Authority, the Agricultural Minister shall be consulted to decide whether the restrictive practice is horizontal in nature and whether the price advantage achieved by the agreement does not exceed a reasonable level. Given that the Minister has the most comprehensive and up-to-date information on agri-food markets, it is appropriate to confer on him the power to assess these two issues. Nevertheless, it should also be possible for parties involved in restrictive practices to bring their conduct into line with the law on the basis of indications from the Hungarian Competition Authority, without incurring a fine, thus

[81] It refers to Article 42 TFEU.

[82] See the Detailed Explanatory Memorandum to Section 1 of the Act CLXXVI of 2012 on the Amendment of Act CXXVIII of 2012 on Interbranch Organisations and Certain Aspects of Agricultural Market Regulation.

giving them the possibility of voluntary compliance. Failure to do so, however, should be subject to the possibility to impose fines.[83]

The main difference between the first version of these provisions included in Act CXXVIII of 2012 and the version codified in the Competition Act was that in the latter version the provisions shall not apply if the application of Article 101 TFEU may arise.[84] The first version of the rules declared that the Competition Council suspends the fine imposition, if an agreement or concerted practice in relation to an agricultural product between competitors violates Article 101 TFEU.[85] The modification of the first-version provisions became necessary after the likeliness of an infringement of EU competition law arose.

However, some problematic points can be made about the wording of the exception rules. Both conditions of the provision are vaguely formulated: the distortion, restriction or prevention of economic competition shall not exceed what is necessary to obtain an economically justified and fair income; and the operator of the market affected by the agreement shall not be prevented from obtaining such income. The main question is who is covered by the term "operator of the market": this provision should be limited to protect agricultural producers, but the term "operator of the market" includes much more, and it seems that any market participant in the supply chain may become the subject of this provision. Not only agricultural producers can conclude an agreement concerning the price of an agricultural product, but so too can any market participant downstream. For example, all retail chains in the market can agree that they sell apples at the same price. Given that the exception rules are not limited expressis verbis to protect agricultural producers, if the Minister declares that both conditions are fulfilled by the parties of the agreement, theoretically even retailers could be excluded from the scope of the general prohibition of anti-competitive agreements.

[83] See the Detailed Explanatory Memorandum to Section 1 of the Act CLXXVI of 2012 on the Amendment of Act CXXVIII of 2012 on Interbranch Organisations and Certain Aspects of Agricultural Market Regulation.

[84] Act LVII of 1996, Section 93/A(5).

[85] See the provision: Section 18(4) of Act CXXVIII of 2012 on Interbranch Organisations and Certain Aspects of Agricultural Market Regulation.

5.3.1.2. *The Enforcement of the Provisions*

So far, the Agricultural Minister has issued only two resolutions, which had an impact on the respective proceedings of the Hungarian Competition Authority. Both were issued in 2013, so they were established on Section 18/A of Act CXXVIII of 2012. While one found that the conditions for exemption were met, the other declared that they were not. Let us start with the latter one.

The Hungarian Competition Authority found that two bidders in public procurement for fruit and vegetables had colluded with each other in a likely unfair manner, in particular by withdrawing from the tender in the knowledge of the results, by failing to submit supplementary documents, and by preliminarily deciding which of them should win. Pursuant to Section 18/A(1) of Act CXXVIII of 2012, no infringement could be established in relation to an agricultural product, if the distortion, restriction or prevention of economic competition resulting from the agreement did not exceed what is necessary to obtain an economically justified and fair benefit; participants on the respective market affected by the agreement were not prevented from obtaining that benefit; and Article 101 TFEU should not apply.

On the basis of the information available, the Minister concluded that, in the case of unfair collusion between two market participants as bidders for public contracts, there is no possibility of all market participants having access to an economically justified and reasonable benefit, whereby at least one of the conditions for exemption under Section 18/A(1) of Act CXXVIII of 2012 is not fulfilled. Given that all the conditions shall be fulfilled in order to be exempted, the Minister did not examine the other condition, with the result that the respective agreement was not exempted from the general prohibition.

In the other case, in which a resolution was issued by the Agricultural Minister, the conditions for exempting the respective agreement from the general prohibition were met. Since 13 July 2012, press reports appeared that an agreement had been reached between watermelon growers, food retailers and the representatives

of FruitVeB[86] and the Watermelon Association,[87] with the cooperation of the Ministry of Rural Development (hereinafter: the Ministry), that the multinational supermarket chains would sell Hungarian watermelons at a fixed price of at least 99 Hungarian Forints per kilogramme. On the basis of the information obtained, the Hungarian Competition Authority concluded that the undertakings subject to the procedure were likely to have infringed both the national[88] and the EU[89] prohibition of anti-competitive agreements, therefore initiated competition proceedings against them on 27 August 2012. The Ministry, which does not carry out economic activities, was not subject to the proceedings due to the lack of scope under the Competition Act. Pursuant to Section 18/A(3) of Act CXXVIII of 2012, the Competition Authority turned to the Minister to issue the resolution including an opinion, and suspended the proceedings. The resolution arrived at the Competition Authority on 19 February 2013.

Given that the investigation showed that it was likely that the conduct under investigation concerning the agricultural product infringed both the EU and national prohibition of anti-competitive agreements, the Competition Authority requested the opinion of the Minister as to whether the distortion, restriction or prevention of economic competition resulting from the alleged agreement restricting competition exceeds what is necessary to obtain an economically justified and fair return for each undertaking subject to the procedure, or whether the operator on the market affected by the agreement is not prevented from obtaining such a return. Since the Competition Authority also initiated its proceedings on the basis of Article 101 TFEU, and thus, pursuant to Section 18/A(1) of Act CXXVIII of 2012, the provision of EU law was also applied, it was not obligatory for the Hungarian Competition Authority to request the opinion of the Minister. It did so only in the event that

[86] FruitVeB is the abbreviated name of Hungarian Fruit and Vegetables Interbranch Organisation and Product Council.

[87] Watermelon Association is the abbreviated name of Hungarian Watermelon Non-Profit Association.

[88] See: Act LVII of 1996, Section 11.

[89] TFEU, Article 101(1).

it concluded in the course of the proceedings that Article 101 TFEU was not applicable. The Hungarian Competition Authority noted that the request for the opinion of the Minister was necessary only if Article 101 TFEU did not apply to the case.[90]

The resolution of the Minister declared that the conditions were met for the agreement to be exempted. Thus, it was up to the Hungarian Competition Authority whether there is an effect on trade between Member States and whether Article 101 TFEU shall apply. If yes, based on the provisions then in force, the resolution of the Minister would have become irrelevant, and the undertakings concerned would have been liable for the infringement of Article 101 TFEU. However, the Competition Council would have suspended the imposition of the fine.

The Competition Authority found that the conduct under investigation is capable of affecting trade between Member States, meaning that Article 101 TFEU applies. Following this finding, the Competition Authority investigated the possibility of continuing the procedure. In view of the fact that the conduct under investigation had certainly come to an end due to the nature of the product, the Authority concluded that Section 18/A(4) of Act CXXVIII of 2012 would preclude the application of a fine in the case of both national and EU competition law infringements, as the possibility to impose a fine is linked to the fact that the unlawful conduct has continued. The Competition Authority has found that this provision of Act CXXVIII of 2012 effectively precludes, or at least formally limits, the sanctioning of infringements of Article 101 TFEU. It therefore appears that this provision of Act CXXVIII of 2012 infringes, on the one hand, Article 5 of Council Regulation (EC) No 1/2003,

[90] As mentioned, the request to issue a ministerial resolution can only apply to cases when the application of Article 101 TFEU does not arise. Nevertheless, the first version of the provisions included a questionable sentence which declared that the Competition Council shall suspend the imposition of the fine even in the case when it was imposed because of an infringement of Article 101 TFEU. This provision was contrary to EU law, because national laws shall not undermine the applicability of EU law. The anomaly was corrected by repealing this sentence when the provisions were relocated from Act CXXVIII of 2012 to the Hungarian Competition Act.

which requires the national competition authority to be able to impose fines in the event of conduct contrary to Article 101 TFEU, and, on the other hand, Article 4(3) of the Treaty on European Union, which requires Member States to ensure the effective enforcement of Article 101 TFEU. However, given that the question as to whether Section 18/A(4) of Act CXXVIII of 2012 is in conflict with EU law could only be clarified by a preliminary ruling of the European Court of Justice and only competent domestic courts have the power to decide on the initiation of preliminary procedure in the course of any court proceedings, the Competition Authority does not have the power to resolve any conflict between Act CXXVIII and Regulation (EC) No 1/2003 or the TFEU.

The Competition Authority, first, examined whether the finding of an infringement had sufficient general and specific deterrent effect on the allegedly unlawful conduct. In this context, the Authority took into account the amendment of Act CXXVIII introduced after the initiation of the respective competition proceedings, i.e., the fact that the conduct under investigation was organised by the same ministry as the one which, as a result of this amendment, was entitled to engage in the conduct in question under Section 11(1) of the Competition Act. On this basis, the Competition Authority found that, in the current legal environment, a formal finding of an infringement would not be sufficiently dissuasive and could not be expected to remedy the competition problem and could not bring about a meaningful improvement in competition in the relevant market. Second, the Competition Authority examined whether the protection of the public interest justified the continuation of the procedure. It found that Section 18/A of Act CXXVIII of 2012 does not allow for effective action against restrictive agreements within the meaning of the Competition Act, including the most harmful infringements, i.e., cartels, in relation to agricultural products. In addition, Section 18/A(4) of Act CXXVIII of 2012 also seeks to exclude sanctions for infringements of EU competition law. On that basis, the Competition Authority considered that the legislation has called into question the content of the public interest defined in the Competition Act for the sector concerned, which the Competition Authority is required to protect. In doing so, the legislation left

both the Competition Authority and the undertakings concerned in uncertainty concerning the precise legal framework of lawful conducts. In view of the considerable uncertainty in the assessment of the public interest resulting from the above-mentioned circumstances, the Competition Authority considered that the public interest as set out in the Competition Act was better served by devoting the Authority's resources to effective action against other infringements not affected by the uncertainty. Therefore, the continuation of the proceedings in the present case was no longer justified in view of the fact that the evidence currently available to it, further procedural steps, which would have required greater resources due to uncooperative customers, would have probably been necessary to bring the proceedings to a successful conclusion.[91]

This competition procedure and the parallel events were heavily criticised from a number of quarters;[92] obviously, the target of criticism was the legislative intervention and not the Hungarian Competition Authority. Although the timing of the amendment was not very fortunate and even the wording raises concerns, the basic goal of this legislative step was quite justifiable, if one is aware of the trends in the Hungarian watermelon market. In order for Hungarian watermelon producers to make a reasonable income, retail chains would have to sell watermelons to consumers at a price of around 99 Hungarian Forints per kilogramme. A peculiarity of Hungarian watermelons is that they ripen only in July. From then on, retail chains start to cut the price of watermelons and try to sell imported watermelons at incredibly depressed prices.[93] This puts

[91] Decision no. Vj-62/2012 of the Hungarian Competition Authority.

[92] B. Csépai, *The Ceasefire Is Over*, "European Competition Law Review" 2015, Vol. 36, No. 9, pp. 404–405; T. Tóth, *The Fall of Agricultural Cartel Enforcement in Hungary*, "European Competition Law Review" 2015, Vol. 36, No. 9, pp. 364–366; and Á. Pina, *Enhancing Competition and the Business Environment in Hungary*, "OECD Economics Department Working Papers" 2014, No. 1123, pp. 15–16 are cited by K.J. Cseres, "*Acceptable*" *Cartels at the Crossroads of EU Competition Law and the Common Agricultural Policy: A Legal Inquiry into the Political, Economic, and Social Dimensions of (Strengthening Farmers') Bargaining Power*, "The Antitrust Bulletin" 2020, Vol. 65, No. 3, p. 405.

[93] There were occasions when a retailer sold watermelons at 49 Hungarian Forints. The low level of final consumer price is to the detriment of producers

Hungarian watermelon producers in an extremely difficult situation year by year.

5.3.2. UNFAIR TRADING PRACTICES

Beyond the competition law exemption analysed in Section 3.1, agricultural producers have a further protective pillar with competition relevance. The Unfair Distribution Practices Act declares as unlawful certain contractual provisions that are typically imposed by buyers of agricultural products unilaterally on producers to allocate risks to them to a more significant extent. The regulatory intervention in the form of the Unfair Distribution Practices Act comes from the recognition that – based on the characteristics of agricultural markets – competition law instruments may prove to be inadequate to retain the well-functioning of the sector. The inadequacy of competition law is created by the fact that the buyers of agri-food products are – in most cases – not dominant in a conventional competition law sense (thus, no competition law enforcement will be triggered), but despite this, they can still use their bargaining power to the detriment of producers.

5.3.2.1. *Material and Personal Scope*

The Unfair Distribution Practices Act applies only to sales in agricultural and food products. The definition of agricultural and food products is divided into two parts: it covers, on the one hand, products that meet the definition in Article 2 of Regulation (EC) No 178/2002 and, on the other hand, only those products which do not require further processing before being sold to the final

and not of retail chains. As farmers being the weakest actors in the food supply chain, retailers "roll over" these costs to producers, and it results in a price of 25 Hungarian Forints paid by retailers to producers (as suppliers) which does not even cover the production costs. See, for example: http://www.atv.hu/belfold/20160727-tuntetes-teherautokrol-dobaltak-le-a-dinnyet-a-tesco-parkolojaban-kepek (accessed on: 12.09.2023).

consumer. Article 2 of the Food Regulation defines food (or foodstuff) as follows: any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans. What is relevant for us is what Article 2 does not consider as food: including, but not limited to, feed, live animals unless they are prepared for placing on the market for human consumption, plants prior to harvesting, tobacco and tobacco products etc.

As regards the personal scope, the Unfair Distribution Practices Act only covers the conduct of retailers and wholesalers against agri-food suppliers, who resell the products without transformation (processing).[94] Nevertheless, these market actors are bound by the prohibitions irrespective of their size, turnover, market position, etc. That is, when a processor buys agricultural product, the Act does not apply, and it does not provide protection for farmers against unfair practices of processors.

5.3.2.2. *Prohibited Practices*

After declaring that unfair distribution practices are forbidden,[95] in an exhaustive list all practices which constitute an unfair practice per se are enumerated. That is, practices that are not included in the list cannot be considered unfair. The following practices are covered by the Unfair Distribution Practices Act:[96]

(a) the trader imposes conditions on the supplier which result in the unilateral imposition of risk-sharing terms favouring the trader;

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[94] Unfair Distribution Practices Act, Section 2(2)(c). See: J. Firniksz, B. Dávid, *A versenyjog határterületei: a vevői erő régi és új szabályai*, "Magyar jog" 2020, Vol. 67, No. 5, pp. 276–287.

[95] Unfair Distribution Practices Act, Section 3(1).

[96] See also: M. Papp, *Hungary*, [in:] *Legislation Covering Business-to-business Unfair Trading Practices in the Food Supply Chain in Central and Eastern European Countries*, A. Piszcz, A. Jasser (eds.), Warsaw 2019, pp. 156–160. [Note: I use different translations than Mónika Papp in this chapter.]

(b) the use of a contract term, with the exception of the obligation in connection with non-conformity, which provides with regard to the products supplied by the supplier to the trader:
  (ba) the obligation for the supplier to repurchase or take back the products, with the exception of products which remain in the trader's stock when they are first introduced into the trader's range and products which are taken over from the supplier as close to their sell-by date and remain in the trader's stock after the expiry of their sell-by date or the best-before date, or
  (bb) the repurchase or repossession by the supplier at a price which – arising from the characteristics of the product and its availability for further use by the supplier – is inappropriately reduced in relation to the purchase price;
(c) the trader passes on to the supplier all or part of the costs being in the business interest of the trader, in particular the costs of installation, operation, maintenance, transport of the product from the logistics unit used by the trader to another logistics unit or to the shop, either by the trader or through the use of a third-party intermediary;
(d) the trader, either itself or through the use of a third-party intermediary, charges a fee to the supplier for getting included in the trader's group of suppliers or remaining therein, or for getting included the supplier's products in the trader's stock or remaining therein;
(e) the trader, either itself or through the use of a third-party intermediary, charges a fee to the supplier on any legal ground:
  (ea) for services not actually provided by the trade,
  (eb) for activities related to the sale by the trader to the final consumer which do not provide any additional service to the supplier, in particular the display of the product in the trader's premises in a specific place in a manner which does not provide any additional service to the supplier, the storage or refrigeration of the product, or the keeping of live animals,

(ec) for services not required by the supplier and not being in the supplier's interest,

(ed) for distribution-related services required by the supplier and actually provided by the trader not proportionately, or taking into account the tax rate on the product, if the consideration for the service is determined at a fixed proportion of the price at which the goods are supplied;

(f) the trader:

(fa) lays down that the supplier shall pay a full or partial contribution to a discount provided by the trader to the final consumer for a period longer than the period for which the discount is granted to the consumer, or for a quantity greater than the quantity involved in the given discount, or

(fb) lays down that the supplier shall pay a contribution higher than the discount provided for the final consumer,

(fc) fails to comply with the provision in Section 3(2a); it declares that the trader shall present financial statements to the supplier with regard to the discount granted and the quantity of products concerned; it shall take place no later than 30 days after the end date of the discount provided by the trader with the consent of the supplier to the final consumer, or no later than 30 days after drawing up the inventory necessary to the financial report pursuant to Act C of 2000 on Accounting, if the previous year's total net revenue of the trader does not exceed HUF 100,000,000;

(g) the trader passes on to the supplier the costs resulting from a penalty imposed by a public authority on the trader for an infringement of the law within the trader's sphere of activity;

(h) the payment of the price of the products by the trader to the supplier, or – after informing the trader – to the person to whom the supplier has assigned the price, with the exception of the case of non-conformity, takes place:

(ha) more than 30 days after taking of physical possession of the products by the trader or by another person acting

on his behalf [hereinafter referred to as "take-over"], provided that the supplier handed over the correct invoice to the trader within 15 days after the take-over,

(hb) more than 15 days after the receipt of a correctly issued invoice, provided that the supplier handed over the correct invoice to the trader more than 15 days after the take-over;

(i) the trader lays down that the supplier shall provide a discount to the trader, if the trader's payment takes place in accordance with the payment deadline;

(j) the trader precludes the application of interest rate, of penalties because of late payment, or of other ancillary contractual obligations ensuring the performance of the contract against himself;

(k) the trader lays down that the supplier has an exclusive obligation to sell to the trader, not including the trader's private label products, without any proportionate remuneration, or that the supplier shall ensure the application of the most favourable terms compared with other traders;

(l) the use of a non-written contractual provision between the trader and the supplier, if the non-written contractual provision is not put into writing within three working days of the supplier's request for it;

(m) the trader notifies the supplier of an order for the product or of a change to it after a reasonable period of time;

(n) a unilateral modification of the contract by the trader for a reason which cannot be objectively justified and which is not due to an event external to the trader's operation;

(o) the trader fails to disclose to the public his business terms and conditions, deviates from his public business terms and conditions, or applies a term or condition which is not included in his public terms and conditions;

(p) the trader restricts the supplier's legitimate use of a trade mark;

(q) the trader offers the product to final consumers at a price lower than the price indicated on the invoice issued by the supplier, or – in case of the trader's own production – at a price lower than the cost price including general operating

expenses, with the exception of cases when – because of the trader's ceasing of trading or profile change – the trader sells out his stock for a maximum of 15 days with the prior notification of the concerned agricultural authority, as well as when the trader sells out products of having no full value, including the case when a product has been accumulated in the trader's stock for an unforeseeable reason and is close to its expiry date;

(r) the trader charges a fee (in the form of discount, commission or any other fee) to the supplier on any legal ground which can be enforced based on the quantity distributed by the trader, with the exception of the case when an *ex post* discount is applied which can be considered as an incentive for the trader to increase the distributed quantity and which is a proportionate amount related to the commercial characteristics of the product and based on the additional sales determined by the parties in relation to the sales achieved or estimated in a previous period, without taking into account the tax rate on the product;

(s) the trader fails to reimburse the supplier for the amount of the public health product tax payable by the supplier on the product supplied to the trader within the time limit laid down in point (h);

(t) the trader fails to comply with Section 3(2b) or Section 3(2c); the former declares that the trader shall notify the supplier of his claim for compensation at least five days before the claim is made, while the latter declares that the supplier shall inform the trader of the tax amount chargeable on the products in accordance with points (ed) and (r);

(x) the trader unilaterally reduces the purchase price determined by the supplier despite the supplier's objection, or the trader threatens the supplier with the termination of the contractual relationship, the cancellation of the order, the reduction of the ordered quantity, the cancellation of sales promotions or any other means causing the supplier financial or moral loss,

in order to obtain a contract amendment aimed at reducing the purchase price.[97]

As can be seen, this list is extremely detailed, and the wording of the practices covered by the Unfair Distribution Practices Act is extremely casuistic. This method of formulating prohibitions, however, sheds light on the nature of unfair trading practices. The list had to be gradually expanded, because when certain practices became unlawful, buyers came out with new ways of risk allocation to producers and of putting pressure on producers to syphon away their profits.

5.3.2.3. *Sanction System*

The sanction system of the Unfair Distribution Practices Act can be divided into two parts: first, if the enforcement authority – the National Food Chain Safety Office – finds an infringement, it may inform the trader before making a final decision that the trader can make a commitment within ten days to bring his conduct into line with the provisions of the law; second, if this does not happen, the enforcement authority imposes a fine.[98] The minimum fine shall be HUF 100,000,[99] the maximum HUF 500 million,[100] but not more than 10% of the trader's net turnover in the year preceding the decision establishing the infringement.[101] The 10% threshold is the same maximum amount as in competition law.

The enforcement statistics may serve us with a good overall picture on the sanction system. From 1 January 2020 to 31 December 2022, 62 cases were closed: 10 cases in 2020, 25 cases in 2021 and 27 cases in 2022. As it is manifest from the number of cases, the authority enforces the provisions intensively, and it was not different in the pre-2020 period.

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97 Unfair Distribution Practices Act, Section 3(2).
98 Unfair Distribution Practices Act, Section 6(1).
99 Approximately EUR 270.
100 Approximately EUR 1,362,800.
101 Act XCV of 2009, Section 6(2).

Of the 62 cases, 42 were closed with a fine, which is approximately 68% of all cases. The overall amount of fine in 2020 was HUF 142,500,000, in 2021 HUF 226,620,000 and in 2022 HUF 161,690,000. The lowest amount of fine was HUF 500,000, while the highest was HUF 90,000,000. In connection with these 42 cases closed, the average amount of fine was approximately HUF 12,700,000.

If one looks at the enforcement statistics in the 2010s (2011–2019), the following findings can be determined. During the nine years under review, 206 infringements were found: the majority of these are substantive infringements, which constitute a violation of Section 3(2) of the Act; there are a few cases of procedural infringements, typically failure to provide data. In terms of the overall number of cases in these nine years, it can be concluded that in about 70% of cases the procedure ended with the imposition of a fine, while in about 30% of cases the infringer submitted a commitment. The data show that 45 decisions of the authority were subject to judicial review, representing approximately 22% of the cases. When looking at the level of fines imposed, it is clear that the years 2011 and 2012 stand out, with fines of more than HUF 1,000,000,000 imposed in both years. The overall amounts of fines fell to HUF 215,000,000 in 2013, HUF 224,000,000 in 2015 and HUF 227,000,000 in 2016. In 2014, a record low of HUF 6,500,000 was imposed overall. From 2017 onwards (HUF 81,000,000), a slow increase can be observed, with 2018 (HUF 108,000,000) and 2019 (HUF 166,000,000) both exceeding the previous year. However, as regards the level of fines, it should be noted that they do not reflect the final legal situation, but the levels established by decisions of the enforcement authority. That is to say, these amounts are not necessarily equal to the amounts actually paid by undertakings, because judicial review procedures can set aside the decision of the authority as a whole or the fine imposed therein.[102]

As can be seen, the Hungarian enforcement mechanism works with the predominant feature of applying financial sanctions.

[102] Based on public data from https://portal.nebih.gov.hu (accessed on: 18.09.2023).

5.4. Conclusions

In this section, I mention the best practices of the Hungarian regulation as well as formulate my *de lege ferenda* proposal on the recommended adaptation of the Hungarian system.

5.4.1. BEST PRACTICES

Concerning the best practices, from a policy perspective, it is worth mentioning the positive atmosphere that surrounds agricultural producers and agricultural production in public life. The Hungarian government as well as policymakers emphasise the crucial role of farmers in maintaining a well-functioning economy, and they are treated as important building blocks of the Hungarian rural areas. It is of high importance for farmers to feel appreciated. High politics also expresses its commitment towards the agricultural sector and its participants. It is not to be forgotten that the Hungarian approach towards agriculture is in accordance with the multifunctional standpoint of the sector. It is recognised that the agricultural sector is not merely a small part of the national economy with some profit-generating features, but also a complex societal and environmental system that benefits the whole country with its worthwhile functions related to biodiversity, environmental protection, the competitiveness of rural areas, the conservation of traditional values, the enhancement of rural job creation, etc.

From a legal perspective, in general, producers are provided with several means to develop their market situation. The freedom of contract as a basic principle of civil law is limited for the sake of the protection of farmers. It has significance, on the one hand, for contract drafting, and, on the other hand, for countervailing the lack of bargaining power against agri-food buyers. There are many aspects of contract law that are modified for the advantage of agricultural producers. These are the following: list of obligatory elements in the contract, period of completion, minimum period for the contract, the entry into force of the contract, deadline for

payment, tightened rules for late payment, quantity to be delivered, exclusion from liability, the method of price determination.

What is unique but quite forward-looking is the public law enforcement behind certain contract law provisions, that is to say, the possibility to impose fines on those market participants which do not comply with the obligatory contract drafting rules.

The protection of farmers against unfair trading practices of their buyers has a well-established system in Hungary, and the enforcement of these provisions by the National Food Chain Safety Office is active. The system of prohibitions of unfair trading practices preceded the EU legislation by more than 10 years, and it means a significant enforcement experience for the sake of farmers. As can be seen, the enforcement agency is not afraid of imposing serious fines against those agri-food buyers that apply unfair trading practices to the detriment of producers. The list of unfair trading practices has continuously been expanded to cover each and every new practice that can be employed against farmers.

As regards competition law, the Hungarian legal system unequivocally prefers agricultural producers to their buyers. In sum, farmers can combine forces in many ways to offset the bargaining power of processors, wholesalers and retailers. The agricultural sector enjoys relatively broad competition law exemptions that help producers market their products in a more beneficial environment. The solution that the Hungarian Competition Authority is bound to the opinion of the Agricultural Minister when deciding on the possible exemption of a likely anti-competitive agreement is advantageous for farmers, since the Minister has the most relevant and appropriate information on the functioning of agricultural markets.

In Hungary, the freedom of contract in the agricultural sector is definitely more limited than in other sectors of the economy, however, this is justified by the special characteristics of agricultural production and the market position of producers.

5.4.2. *DE LEGE FERENDA* PROPOSALS

De lege ferenda proposals are really difficult to get formulated concerning the Hungarian civil law system of agricultural production, at least if one concentrates only on the existing laws that are in force. Both contract law and competition law provide protection to farmers well above the average. The solutions chosen by the Hungarian legislation are in line with EU law, however, they go beyond the requirements coming from EU legislation as regards the level of protection. This is not only true for the prohibition of unfair trading practices, but also the system of competition law exemptions. Nevertheless, certain fine-tunings can be carried out. Although a detailed comparison of the Unfair Distribution Practices Act and the relevant EU legal act, the UTP Directive, was not the objective of the chapter, the protection of farmers against the unfair practices of processors should be created in line with the UTP Directive (this is a small shortcoming, because the Unfair Distribution Practices Act only covers the practices of traders against producers).

Nevertheless, the current protection system could be expanded with the reform of the other two pillars of competition law (abuse of dominance and merger control). There are no sector-specific regulations in agri-food markets regarding these legal instruments. Typically and generally, the business partners of agricultural producers, i.e., those to whom they sell their products, are not in a dominant position. Agricultural producers as suppliers bargain with buyers (food processors, retailers) who are not in a dominant position, therefore the protective shield of antitrust does not cover these bargains. Abuses – such as directly or indirectly imposing unfair purchase prices or other unfair trading conditions, applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, and making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage – are not interpretable, if no dominance is found. These practices, however, are common occurrences committed against agricultural producers. No dominance – as understood in the current antitrust regime – is necessary for buyers to engage

in and to be able to commit these practices. Obviously, the existence of a dominant position shall be decided on a case-by-case basis. Sectoral differences can be expressed in the respective case, but the question arises as to how far law enforcement is willing to deviate from the general (average) trend when there are only general rules, whereas the respective product market (sector) under investigation is very different from all other sectors. If one concentrates on the most important factor and the first indicator of dominance and accepts the 40% market share as a guide to and starting point for finding a dominant position, it is unlikely that an undertaking with 25%–30% market share will be found dominant. Deviating with 10%–15% from the guiding principle may seem like a lack of good judgment on part of the enforcer.

The third pillar of antitrust, merger control, also has no sector-specific rules applying to the agricultural and food sector. That is to say, mergers and acquisitions between food companies, including processors and grocery retail chains, are assessed pursuant to general rules. This is despite the acknowledged facts that food supply chains are becoming more and more integrated vertically and their respective levels (e.g., processing and retailing) more and more concentrated horizontally.

I am of the opinion that in agri-food markets at the processing, wholesale and retail level, a presumption should be introduced that an undertaking (the buyer of agricultural products from the producer) with 25% of the market shares in the relevant market is in a dominant position *ex lege*. It would not mean that the respective undertaking has actually abused its dominance, but would make it simpler to prove the prerequisite of abuse of dominance – the dominant position itself. This simplified approach would take into account the special characteristics of agricultural production and the vulnerable position of farmers that is taken advantage even by undertakings which are not considered dominant in the current system. The advantage of this solution in contrast with the prohibition of unfair trading practices can be found in the higher deterrent effect of competition law enforcement. Concerning merger control, it would be crucial to introduce an obligation on competition

agencies to examine in all cases the effects of the respective agri-food merger on not only consumers but also on producers upstream.

What goes beyond the area of law as a possible development direction is the encouragement of producers to combine forces and sell their produce together as members of producer organisations. With this, the bargaining power of farmers could be increased. Unfortunately, the advantages of collective bargaining are not acknowledged among producers. The ministries (the Ministry of Agriculture and the ministries responsible for the economy), enforcement agencies (in particular, the National Food Chain Safety Office, but also – with more limited powers in this regard – the Hungarian Competition Authority), as well as self-governing organisations (such as the Hungarian Chamber of Agriculture) should cooperate with one another to raise awareness among agricultural producers in this regard.

As a final conclusion, however, one may only recommend the adopted civil law instruments of Hungarian law which were introduced in this chapter, if the main objective is to create an economic environment that alleviates the situation of producers and that aims to place them in an advantageous position to bargain with other market participants downstream.

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