Theses

for the dissertation entitled

Hungarian land transaction regulations—in the crossfire of constitutionality and EU law

by Dr Zoltán VARGA

1. Reason for the choice of topic

In 2013, the Hungarian legislature put land transaction regulations on a completely new footing, and two new acts of Parliament were adopted in this field, i.e. Act CXXII of 2013 on transactions in agricultural and forestry land (hereinafter: Land Transaction Act) and Act CCXII of 2013 laying down various provisions and transitional measures concerning Act CXXII of 2013 on transactions in agricultural and forestry land (2013 Act on Transitional Measures). The interpretation of the new legal provisions and the new legal institutions (e.g. local land committee) created a major task for the courts applying the law. In response to judicial initiatives, the Constitutional Court also scrutinised certain elements of land transaction regulations and made some particularly important findings, such as its Decision No. 17/2015. (VI. 5.), which took a stand on the new legal institutions and procedures introduced by the land transaction acts. A reference for preliminary rulings pending before the Court of Justice of the European Union found a breach of EU law in relation to the link between the extinguishment of rights to usufruct and rights to use by operation of law and the free movement of capital.

As an administrative judge of first instance, I have to deal with a lot of problems related to land transaction regulations. The aim of my doctoral thesis is to present the history of Hungarian land transaction regulations, to place it in a European context, to review and interpret the decisions of the Constitutional Court and the Court of Justice of the European Union in relation to the new land transaction laws, as well as to present other aspects of land transaction regulations in terms of constitutionality and EU law and to review the case law of the courts. In my work, I pay particular attention to the examination of judicial practice from the point of view of how the decisions of the Constitutional Court and the Court of Justice of the European Union are reflected in judgments, and how the Constitutional Court and the courts interact in their interpretation of the law. The administrative courts of first instance, unlike in other types of administrative matters and judges of first instance in other branches, have already cited the decisions of the Constitutional Court on land transactions in their judgments of first instance in support of their legal position. In my thesis, I have undertaken to review this vibrant case-law of the courts of first instance, obtaining and reviewing the judgments of administrative and labour courts of first instance in the field of land transactions.

The choice of the topic of the doctoral thesis was also obvious to me because I played an integral part of the law development activities of the Constitutional Court and the Court of Justice of the European Union in the sense that Decision No. 3278/2017. (XI. 2.) of the Constitutional Court was adopted, among others, on my initiative. With this decision, the Constitutional Court rejected or dismissed the judicial initiatives to declare Sections 50/A and 110/A of the 2013 Act on Transitional Measures and Section 53/C of Act CLXXVII of 2013 on the transitional and authorising provisions related to the entry into force of Act V of 2013 on the Civil Code (hereinafter: Transition Act) inconsistency with the Fundamental Law and to annul it. The continuation of this "story" was Decision No. 22/2018. (XI. 20.) of the Constitutional Court, in which the Constitutional Court found that the National Assembly had caused an inconsistency with the Fundamental Law by failing to define in Section 53/C of the Transition Act the detailed rules of the transfer of contracts based on the provisions of the law in accordance with the requirement of legal certainty arising from the fundamental constitutional value of the rule of law in Paragraph (1) of Article B) of the Fundamental Law. Therefore, it called on the National Assembly to perform its legislative task by 31 March 2019 in order to ensure consistency with the Civil Code. At the same time, it rejected the motion and the judicial initiative for the establishment of the inconsistency of Section 53/C of the Transition Act with the Fundamental Law and for its annulment.

And the Court of Justice of the European Union, on a request for a preliminary ruling from the Szombathely Administrative and Labour Court, made by myself and my colleague, held in its judgment in Joined Cases C-52/16 and C-113/16 that Article 63 of the TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which rights of usufruct which have previously been created over agricultural land and the holders of which do not have the status of close relation of the owner of that land are extinguished by operation of law and are, consequently, deleted from the property registers.

In addition to the above, Decision No. 11/2020. (VI. 3.) of the Constitutional Court was also adopted on my judicial initiative, which established a constitutional requirement in relation to the absence of involvement of EU law and the obligation to apply Hungarian law.

It is therefore clear from the above that I have come into close contact with the topic in the course of my legal practice. In the course of this I became interested in the case law of the Constitutional Court and the European Court of Justice related to the ownership of

agricultural land, since it is clear that the new legal institutions and legislative provisions of Hungarian land transaction regulations pose new challenges and problems to be solved almost daily, both for the courts and the Constitutional Court and the Court of Justice of the European Union.

The Curia set up a group for the analysis of case law in relation to land transaction regulations, which, at the end of its operation, compiled a summary opinion detailing the most important issues and problems in relation to the application of land transaction regulations. The Curia also shapes judicial practice in relation to land transaction regulations in the form of opinions of the Administrative and Labour College (No. 2/2016. (III. 21.).) and decisions of principle.

One of the main areas of my research is to examine the role of local land committees in the new Hungarian land transaction regulations, looking at similar institutions codified in foreign legislation and at the preceding institutions in Hungarian legal history. In order to clarify the role of local land committees and the chamber bodies acting within their powers, it is necessary to refer to the already mentioned Decision No. 17/2015. (VI. 5.) of the Constitutional Court, which considers these bodies as indirect stakeholders governed by private law. The appearance of chamber bodies in administrative lawsuits (either as plaintiffs or as interveners/interested parties) posed a serious problem for judicial practice, first in the area of the right to bring an action, then in the area of the right of actionability. Court judgments of this period cited the above decision of the Constitutional Court on several occasions in support of their positions. That is why I have decided to carry out an extensive examination of the judgments of the courts of first instance in land transaction cases, in order to see in which cases and in what position the decisions of the Constitutional Court are invoked. I reviewed the judgments of the courts of first instance (and, of course, the decisions of the courts of appeal and the Curia in this context) for the period from 1 June 2015 to 1 June 2018, by examining all judgments of first instance and grouping them by topic, in order to identify the legal problems in relation to which the Hungarian courts refer to the decisions of the Constitutional Court. I started this research at the end of 2018 and finished it at the beginning of 2020. I believe that in Hungarian judicial practice, land transaction cases are currently the only cases in which the courts of first instance rely to a significant extent on

the practice of the Constitutional Court and refer to these decisions. At the end of the research, I will draw a parallel between the practices of the courts and the Constitutional Court and the changes in land transaction regulations, and then I will propose a process of codification that meets the requirements of the relevant decisions of the Constitutional Court and the expectations of the evolving judicial practice.

At the same time I will also analyse the decisions of the Court of Justice of the European Union on the ownership of agricultural land, since the Luxembourg court has given a number of judgments that led to its decisions in the joint cases C-52/16 and C-113/16. Without claiming to be exhaustive, mention may be made of the judgments in cases 182/83 Robert Fearon & Company Limited, 305/87 European Commission v Greece, 302/97 Klaus Konle, C-213/04 Burtscher, C-452/01 Ospelt and C-370/05 Festersen.

In addition to the reference for preliminary ruling concerning Hungary, the European Commission has also initiated infringement proceedings against Hungary in two cases concerning the land transaction regulation. One of the proceedings (2014/2246) concerns the extinguishment of rights to usufruct and rights to use involved in a reference for a preliminary ruling and the other (2015/2023) concerns the compatibility of restrictions and prohibitions of the Land Transaction Act with EU law. In my doctoral thesis, I will cover both infringement procedures.

In the dissertation I also examine how Hungarian land transaction regulations changed following the judgments of the Court of Justice of the European Union in the joint cases C-52/16 and C/113/16, and whether the amendment is in line with EU law, and what difficulties judicial practice has to face in this respect.

2. Objectives of the research

Before presenting the objectives of the research, it is necessary to clarify the basic concepts and institutions introduced into the Hungarian legal system by the new Hungarian land transaction regulations.

The land transaction regime, which entered into force in 2014, is based on official approval for the acquisition of agricultural land, which means that sale and lease contracts for

agricultural land must be approved by the competent agricultural administration body (currently within the organisations of county/capital government offices). This act of public authority is a legal institution restricting the freedom of contract of the parties to the contract (as is the compulsory notification of holders of right of first refusal, their possible "application" and the procedure of the local land committee). The agricultural administration bodies first check whether the conditions laid down in the Land Transaction Act are met or not in a so-called preliminary examination. Subsequently, sales contracts and use contracts follow a different route: in the case of the former, the local land committee decides on the granting or refusal of support in relation to the parties concerned [buyer, holder(s) of right of first refusal], again on the basis of an assessment of the criteria laid down in the Land Transaction Act.

The original legislative concept for the local land committee was that it would be the representative body of the local farming community, elected by the local community, and responsible for deciding whether or not to grant support in the case of contracts for the sale of local land, in order to achieve the following objectives: transparency of tenure; prevention of speculative land acquisitions; creation and preservation of viable and competitive land holdings under operational cultivation, forming a single tenure; and promotion of the interests of the local farming community.

The decision of the local land committee was of particular importance in the context of the final decision of the agricultural administration body to approve or refuse approval. Prior to Decision No. 17/2015. (VI. 5.) of the Constitutional Court, the "silence" of the local land committee (when it does not issue a position paper even when called upon by the agricultural administration body) had the consequence that the agricultural administration body had to refuse to approve the contract. In the case of non-support, the above legal consequence had to be applied by the competent government office. The position or lack of position of the local land committee therefore determined the content of the decision to approve.

Until the setting up of local land committees, the legislature delegated the powers of the land committee to the local bodies of the National Chamber of Agriculture (NCA), i.e. the (county) chamber bodies acting within the powers of the local land committee issued positions on the promotion of property acquisition. However, due to the non-establishment of local land committees, the amendment to the Land Transaction Act, which entered into force on 11 January 2019, defined the regional bodies of the NCA as local land committees. However, the regional bodies of the NCA request the recommendations of the so-called municipal

agribusiness committees before taking a position. The inclusion of these committees, which are not defined in the law, is or may become necessary due to a more thorough channeling of local conditions and interests.

According to the provisions of the Land Transaction Act in force prior to 1 January 2019, an objection could be submitted to the municipal council of the municipal authority in charge prior to the position of the land committee. Pursuant to Decision No. 17/2015. (VI. 5.) of the Constitutional Court, the decision of the municipal council could be appealed to the courts of administrative matters.

The problematic situations in the application of the law in the courts arose when the NCA contested the decision of the municipal council in court. In judicial practice, the question arose as to whether the NCA was involved in the proceedings of the municipal council at all, and whether it could bring an action against its decision. Solutions in the application of the law were generally followed by legislative reactions in order to establish the NCA as a plaintiff in administrative lawsuits. First, a government decree stated that the local land committee and the body acting in its capacity exercises the rights of the client in administrative proceedings concerning it, and then, following judgments rejecting actions for lack of legal standing, an Act of Parliament established the Chamber's right to bring an action (which is not and cannot be the same as legal standing). The alternation between lawmaking and the application of the law was abolished on 11 January 2019 with the abolition of the municipal council procedure.

The most important objective of the research is to examine the judicial practice in relation to the problems related to the local land committees as outlined above, namely from the aspect of the extent to which the courts of first instance relied on the principles and aspects of the Constitutional Court's decisions on issues of land transactions regarding the procedure, positions and role of local land committees in litigation, and to what extent and how the decisions of the Constitutional Court were incorporated into the reasoning of the judgments of first instance.

The other objective of the research concerns the regulation of rights to usufruct and rights to use.

Already at the time of its entry into force, the 2013 Act on Transitional Measures contained the provision that rights of usufruct existing on 30 April 2014 for an indefinite period or expiring after 30 April 2014 for a definite period between non-close relatives by contract shall

cease to have effect as of 1 May 2014 by operation of law. The purpose of this legislative provision was clearly to abolish rights of usufruct and rights of use in favour of non-Hungarian nationals. In the view of both the legislature and the Constitutional Court, the establishment of these rights in this way constituted a dysfunctional application of rights.

The regulatory logic of EU Member States is that agricultural land should be owned and used by the citizens of the Member State concerned. The normative consequences of these overtly discriminatory objectives have resulted in a variety of legal provisions: Member States have sought to restrict or exclude the acquisition and use of land by non-nationals not on the basis of nationality, but on other grounds.

The Court of Justice of the European Union has in several cases examined these legislative solutions in the context of the free movement of capital, establishing the aspects which constitute justifiable and unjustifiable restrictions of this fundamental freedom.

The other objective of the research is therefore to examine the EU law on the rights to usufruct and the rights to use, using the principles reflected in the decisions of the European Court of Justice/Court of Justice of the European Union and the EU law yardsticks of national property policies. The aim of this thesis is to outline a regulatory methodology that is in line with EU law.

3. Research methodology

In the context of the objectives of the research, it was mentioned that the courts encountered problems in their application of the law when the NCA challenged the decision of a municipal council by means of a complaint. Some of the courts of first instance argued in favour of issuing the application without a summons, while others argued in favour of dismissing the application by judgment for lack of legal standing. Judicial practice also had to take into account the decisions of the Constitutional Court on land transactions and legislative changes.

The period 2015–2018 has been a busy one for administrative and labour courts. I was a part of this period both as a judge of first instance and as a member of the regional college, and I was able to observe how my fellow judges of first and second instance supported their own positions with unparalleled legal theoretical and constitutional arguments. It was then that I decided to research the extent and depth to which the courts of first instance rely on the

decisions of the Constitutional Court on land transactions in their judgments on land transactions to support their legal position. I was convinced that there were no other first instance court cases where judges of first instance refer so much to the relevant decisions of the Constitutional Court. The research only confirmed my opinion above.

The starting point of the research was the database of the Curia, in which I reviewed all judgments on land transactions in which a reference was made to a decision of the Constitutional Court on land transactions.

As most judgments on land transactions did not reach the Curia, I became interested in the full spectrum of judgments of first and second instance in terms of the citation of decisions of the Constitutional Court on land transactions.

I have asked the presidents of the regional courts in charge for permission to study judgments of first and second instance on land transactions and to present them anonymously in the context of a doctoral thesis. The presidents of the regional courts granted research authorisation in all cases, and in the second half of the research, the President of the Hungarian National Office of the Judiciary also granted a permission for research in all regional courts. In the context of the research, the regional courts applied two types of solution: they sent me all the judgments of first and second instance of the period under study, or they allowed me to consult the judgments in the administrative and labour courts concerned.

On the basis of the above, I selected from the judgments on land transactions those which contained a reference to the decisions of the Constitutional Court on land transactions in their legal reasonings, and grouped these judgments by the problem areas affected by the constitutional arguments. For each of these courts of first instance, I prepared a summary and a chart showing clearly the number of times each court referred to a margin number of a decision of the Constitutional Court on land transactions in connection with a given problem.

On the basis of the aggregations for the individual courts, it was already possible to draw the conclusions on the basis of which it was possible to make observations on the judicial practice of first instance concerning land transactions in relation to the citation of the decisions of the Constitutional Court on land transactions.

Such in-depth research on rights to usufruct and rights to use was not possible given the small number of courts of first instance that have initiated a reference for preliminary ruling on the

Hungarian legal provision. In this case, I analysed the reference for preliminary ruling on land transactions and I also touched upon the infringement procedures concerning land transaction regulations.

4. Short summary of the research results

The research going down to the case law of the courts of first instance clearly showed that the administrative and labour courts most often referred to the "classic" Decision of the Constitutional Court on land transactions (Decision No 17/2015. (VI. 5.)), while references to other decisions of the Constitutional Court were only occasional.

The above decision of the Constitutional Court was mainly taken into account by the courts of first instance in relation to the Chamber's legal standing, and referred to the parts of its reasoning which explained the specific interest governed by private law of the local land committee. There were also many references in the judgments of first instance to the Constitutional Court's decisions on the assessment obligation of the land committee and its depth, and on the procedure of the municipal councils for the examination of objections to the land committee. There were also relatively frequent arguments on the constitutionality of the communication of the land committee's position.

It can be seen that individual courts referred to decisions of the Constitutional Court in 20-30% of cases. Judges referred to decisions of the Constitutional Court in 61% of the judgments on land transactions in the Tatabánya Administrative and Labour Court, 69% in the Zalaegerszeg Administrative and Labour Court, 38% in the Székesfehérvár Administrative and Labour Court, 29% in the Budapest Environs Administrative and Labour Court, 2% in the Gyula Administrative and Labour Court, 14% in the Salgótarján Administrative and Labour Court, 58% of the Kaposvár Administrative and Labour Court, 79% of the Veszprém Administrative and Labour Court, 36% in the Kecskemét Administrative and Labour Court, 19% of the Pécs Administrative and Labour Court, 12% in the Debrecen Administrative and Labour Court, 57% in the Budapest-Capital Administrative and Labour Court and 10% in the Szekszárd Administrative and Labour Court. Only the Nyíregyháza Administrative and Labour Court did not refer to the decisions of the Constitutional Court in its judgments on land transactions.

It can be observed, therefore, that the courts of first instance were courageous in referring to the decisions of the Constitutional Court on land transactions in justifying their judgments, and often cited the theses established in those decisions as the basis for their decisions.
I believe that an in-depth analysis of the case law of the courts of first instance in terms of the citation and use of the decisions of the Constitutional Court can provide guidance and encouragement to all judges of first instance to apply constitutional reasoning in their judgments with a sure hand—where possible and necessary.

Considering the main topic of the thesis, it can be seen that a critical point of the new Hungarian land transaction regulations is the legal status of local land committees and their role in the official approval procedure. The research also clearly confirmed that the courts of first instance mainly cited, analysed and examined the findings concerning the local land committees in connection with the decisions of the Constitutional Court on land transactions: we can think of the local land committee's right to bring an action, legal standing, specific indirect stakeholder status governed by private law, the requirements regarding the detail of the position, the binding force of the position on the agricultural administration body. The emergence of the local land committee in the Hungarian land transaction regulations is not a devil's idea, but in order for these bodies to fulfil the role intended for them by the legislator, it is essential to create a government decree regulating the procedure of the local land committee and, in particular, the content of the position. It is of particular importance that the legislation sets out the assessment criteria to be taken into account by the local land committee and the circumstances within those criteria to be taken into account in the land committee's discretionary action. At present, judicial practice can mainly rely on the Chamber's information publications, which set out the circumstances to be taken into account for each assessment criterion. I believe that these chamber information publications could be a good starting point for the codification of the government decree. If the above legislation is enacted, it may also be justified to consider that local (municipal) land committees should indeed act on individual legal transactions instead of the regional bodies of the NCA. At present, the regional bodies of the NCA adopt the positions of the local land committees on the basis of the opinions of the municipal agricultural committees, which are not regulated by the Land Transaction Act. In my view, the possible role of the NCA in representation in litigation should be retained, in order to ensure uniform practice and representation.

The question of when the local land committee's position is binding on the agricultural administration body and when it may deviate from it must be addressed primarily on the basis of the current legal provisions: under the current legislation, the agricultural administration body has the statutory authorisation to deviate only from the supportive position, and no such authorisation in the case of a non-supportive position. The Council of the Curia (fortunately only one of them for the time being) takes the opposite view, as explained in its paper, and in its view, in the case of mixed positions (both with and without support) the agricultural administration body may also deviate from the non-supportive opinion. If the legislator takes a similar view, I believe that the law should be amended in this regard. Until this happens, the position of the Curia is, in my opinion, a contra legem interpretation of the law and, as such, should not be followed. If we think further about the position of the Curia, according to which in the repeated procedure the agricultural administration body must start from the assumption that it is not bound by the non-supportive opinion, the administrative body in the repeated procedure (in view of the double constraint of the Curia's decision and the lack of statutory authorisation) will probably decide within the scope of its own discretion (?) that it considers that the non-supportive opinion of the local land committee is correct, does not wish to deviate from it and takes it into account in its decision. So, we are back where we started, only the approval procedure has increased by half a year or so.

Regarding the duration of the procedure, it can be concluded that it was a correct legislative decision to exclude the objection procedure of the municipal council from the approval process, given that it unduly increased the duration of the procedure (the decision of the municipal council was even subject to judicial review as a result of Decision No. 17/2015. (VI. 5.) of the Constitutional Court), and the municipal councils were not meant to carry out a substantive procedure of evidence and fact-finding on the basis of the objections (most of the administrative lawsuits ended with the repeal of the decisions of the municipal councils and the obligation of the council to conduct a new procedure). The amendment of land transaction regulations on 1 January 2019 allowed the court to examine both the decision of the defendant agricultural administration body and the land committee's position on which it is based. This shortened the duration of the approval procedure, but by eliminating the reformatory power of the court, the court cannot make a decision closing the dispute by claiming finality (which is contrary to the original objective of the Code of Administrative Procedure declaring the precedence of the power of modification). Within the framework of the present statutory regulations, the courts have to resolve, within the framework of the

decision on the annulment and requiring new procedure, that their judgment also covers the local land committee to some extent (they cannot make a provision in the operative part concerning the local land committee, they cannot annul the position, the defendant must obtain a new position in the repeated procedure). The appropriate solution would be to reinstate the reformatory powers of the court, which would definitively resolve the parties' dispute by changing the decision of the agricultural administration body. This solution would comply with the requirement to complete the procedures within a reasonable period of time, as well as with management considerations (it is not acceptable that farmland cultivation is delayed because of approval procedures that may take 5 or more years). In addition to the power of alteration, it may also be appropriate to reintroduce the possibility to appeal against a court judgment, so that the proceedings and judgment of the court of first instance are reviewed by a higher judicial forum in a way that is satisfactory to all parties.

With regard to the other major topic of the dissertation, the regulation on the extinguishment of rights of usufruct and rights of use, at the beginning of 2022 it can finally be said that the legislator has fulfilled its legislative obligation as set out in Decision No. 25/2015. (VII. 21.) of the Constitutional Court and the judgment of the Court of Justice of the European Union in the infringement procedure C-235/17. Unfortunately, this required a new reference for preliminary ruling, in the framework of which Hungary started to "bargain" with the Commission on the legislative implementation of the obligations resulting from judgment C-235/17, as a result of which the provisions of Sections 108/B–108/Q of the 2013 Act on Transitional Measures entered into force on 1 January 2022, providing for the reregistration of the cancelled rights to usufruct and the compensation of those affected by this cancellation.