THE RIGHT OF PREEMPTION AND ARABLE LAND – NEW RULES, NEW METHODS?

PÉTER JANI

University of Szeged
Faculty of Law and Political Sciences
Department of Agricultural and Environmental Law
Szeged 6721 Rákóczi square 1.
jpeter@juris.u-szeged.hu

ABSTRACT
In Hungary like in the case of most of the European Union member states we can see particular rules regarding ownership of land. Corresponding to the special role and strategic importance law is building up a defence system that would help the protection and preservation of the soil. Fast land legislation followed the new governments step into power in 2010 along a new land policy: the Act LXXXVII of 2010 on the National Land Fund (NLF) was born which brought with it the "rethinking of land-related legislation". The new rules, most importantly the changes in the institution of the right of preemption do not justify the high-sounding rhetoric of "the land belongs to the person working on it". We can say that: the new regulation has not fulfilled it goal, it even brought more uncertainty for the players of the land market. So the law is still not able to handle the decade practise of pocket contracts, neither did it help to decide – despite the legislative goals – whether the government is backing family farmers or large plants. In this current study I want to show one of these restrictions regarding the new rules brought in 2010 on pre-emption right on agricultural land in the lights of the land policy goals of the new government primarily examining its constitutionality.

Keywords: agricultural law, arable land, ownership of arable land, right of pre-emption, land policy

INTRODUCTION

Fast land legislation followed the new governments step into power in 2010 along a new land policy: the Act LXXXVII of 2010 on the National Land Fund [NLF] was born which brought with it the "rethinking of land-related legislation. Is the current regulation sufficient to fulfil this goal? Doesn't the Hungarian rule limit the freedom to property and acquisition too much? The law, which contains the modification of the Act LV. of 1994 (on Arable Land) [Land Act] which above all (for the umpteen times) changed the ranking of those entitled to purchase. In respect of sale of arable land or farmstead the state is entitled to the right of preemption the first place (contrary to its earlier last place). The list of those entitled to this right are as follows: any local person who is a party to the leasehold (share-lease, share-farming) contract pertaining to the land or farmstead in question; any local neighbor; any local resident and finally any person who is a party to the leasehold (share-lease, share-farming) contract [Land Act art. 10 (1)]. The justification of the law states that the legislator had two goals with the modification primarily: the strengthening of the right of preemption of the state is the basic tool to fulfilling the gland policy goals, by which the state can actively appear on the land market. Another basic goal is that those (natural) persons could gain land who are really have a professional bound to agriculture.

MATERIAL AND METHOD

It was in the summer of 2011 when the Act LV. of 1994 was modified again [Act CI. of 2011], which brought with it the regulation on gifting of land as well as changing the

exercise of the right of preemption: the change in the law extended the rights of the state to between co-owners sales [Land Act art. 10 (3a)]. Then the right of preemption does not apply to the sale between close relatives as defined in the Civil Law, as well as in the case of the land sale as condition to the farm transfer support of the farmers, or in the case of the sale of parcels which were considered as enclosed gardens before the Land Act came into [Land Act art. 10 (3)]. And so from now on the state has to be informed each time before the change in land owner whether it wishes to exercise its pre-emption right.

The land itself is an important economical, social and political factor. The Constitutional Court of Hungary assumes the special character of the land: the natural and financial characteristics of the land": namely the land's nature as a finite good, (land namely as a natural object is limitedly available and cannot be reproducible or substitutable with something else). Its indispensability, renewable capacity, specific risk-sensibility and its low yield gains embodies the specific social bound of the land [Decision of Constitutional Court no. 35/1994 (VI.24.)]. Consequently from the importance and specificity of the land the provisions regarding its ownership are also special, under which most governments (most EU states as well) interferes with the functioning of land markets by setting up constraints of land acquisition. The EU court does not find ownership limits always incompatible with EU law. The court case law, the development of viable farms, maintenance of green spaces, allowing the recovery of land ownership or the aims to comply with the common agricultural policy was always accepted as a legitimate reason (ANDRÉKA, 2010).
One of the key elements of this is the pre-emption right, which "means some degree of the limitation of the principle of contractual freedom" (BESENYEI, 2009), since neither the owner nor the buyer does not enjoy the principle of the freedom of partner choice. However content vies it means the limitation of the owner's right of disposal, which – where appropriate- it involves a violation of the right to property as referred to in the article XII (1) of the Fundamental Law of Hungary ["Every person shall have the right to property and inheritance. Property shall entail social responsibility"].
It is important to note that, this no doubt serious private legal restriction solely prevents the freedom of partner choice, civil harm cannot happen to the seller, since the sales contract is created with the same content as if it pre-emption right and the practitioner did not step into the process.

The rules on the sequence of pre-emption right is determined by the Civil Code (CC) [art. 97 and 145] as a lex generalis according to which firstly the pre-emption right established by the law can be exercised which is followed by the pre-emption right of the owner of the real estate respectively the owner of separately owned parcel on the addition to the building, and the owner of the addition to the land set by the CC. Finally the contract established re-emption right can be exercised. Regarding the land the rules of the Land Act are considered as lex specialis compared to the CC, since the land act specifies the circle of those eligible for pre-emption, and among them it establishes a strict hierarchy. "It should be considered natural that when the law guarantees the pre-emption right to someone, then a significant values has to be behind it" (BESENYEI, 2009). The article XIII (2) only requires the existence of public interest for the deprivation of property, so – on the principle of argumentum a maiore ad minus – a more stringent necessity is the ownership restriction, in this case is not a demand in the case of the pre-emption right. Approaching it from another side: the restriction on acquisition is only constitutional if the restriction is done due to the enforcement of a public policy goal, in which case the distinction is allowed and acceptable. The restriction of an element of the ownership right only comes

with the restriction of ownership if not inventible, furthermore if the limit of restriction is disproportionate to the intended purpose [Decision of Constitutional Court no. 2299/B/1991].

The Constitutional Court addressed the constitutionality of the legislation affecting the land in several of its decisions. The Constitutional Court did not find the restrictions on acquisition of land unconstitutional in any case, so not even the pre-emption right or the hierarchy established within (BOBVOS, 2004). On its own determining the ranking of competitive pre-emption rights is not objectionable [Decision of Constitutional Court no. 39/1992 (VII.16.)], since beyond the traditional non-profit and public restrictions those restrictions also meets the requirement of public interest which favours individuals, and in the meantime solves social problems [Decision of Constitutional Court no. 64/1993 (XII.22.)].

On the constitutionality of the pre-emption right the robed body noted that ensuring it is not unconstitutional till it does not lead to emptying the provision on the dispose of property on one side and making the freedom of contract impossible on the other. The order specified in the Land Act is not against the Constitution because the pre-emption right only restricts the customer choice (and not the ownership change itself) but does not apply to the purchase between close relatives and co-owners [Decision of Constitutional Court no. 7/2006 (II.22.)]. By this logic it is strongly doubtful that the new modification of the Land Act would pass through the Constitutional Court. In contrast, according to the position of the lawmaker primary pre-emption right of the state is a discount between the constitutional boundaries, because it does not touch the right to property, does not distinguish regards obtaining ownership, but establishes the ranking of the pre-emption right, so with the operation of the National Land Fund it remains within the concept of economic aspect regulation. The Constitutional Court regarding this has explained that, "the restrictions of the land act are constitutional till the reasonable explanations of adjudicated restrictions are according to objective considerations" [Decision of Constitutional Court no. 35/1994 (VI.24.)].

Based on these it is clear that amongst the rules on land the pre-emption right has an outstanding importance. But on the land market it introduces severe constraints so it is opposed to one of the key objectives of land policy, the growth of land prices and through this land traffic.

Public interest is not a concept that can be generally worded or described by abstract criteria, but a specific "target" defined by the lawmaker, which if marked where appropriate justifies the restriction of a fundamental – in our case the right to property. Regarding the constitutionality of ownership restrictions it is appropriate to examine the practice of the Constitutional Court. The Constitutional Court in lot of its decisions [Decision of Constitutional Court no. 35/1994 (VI.24.); no. 64/1993 (XII.22.); no. 7/2006 (II.22.)] names the land policy of the state as the best interest of the „public" which justifies not just the restriction, but the existence of the pre-emption right. The definition of the concept of land policy is not given, but entrusts the state.

In general, land policy if not the only, but the most important element of agricultural policy. According to Endre Tanka's definition it is none other than the system of institutions intended to creating the best design of land, land use, land protection and the land administration – that is, the possession order (TANKA' 2008). The principles of control

depending on the economic, social and political conditions are constantly changing. Following 1989 the transformation of ownership and the strengthening of private property was the primarily goal, while since that the correction of distorted land structure (formed in the early nineties), development of viable farm size, approximation of land ownership and use and focus on family farms. All these go together with the continuous adjustment of land acquisition and land use as well as the rethinking the role of the state in the land market processes.

RESULTS

The Act on National Land Fund specifies the new national land policy. This means that the aim of the law is to help the transformation of a agriculture that adapts to the natural conditions and managements traditions of different landscapes, furthermore builds on the decisive role of individual and small and medium sized family farms. Since this is what ensures the good master's care arising from the ownership mindset, the responsible relationship within the generations following each other, as well as the employment, quality, production, food and environmental performances, which are vital for the whole society and for the long-term survival of the rural.
If we accept, that the land policy goals defined in the Act on National Land Fund only concerns the state and National Land Fund owned land, then it is fundamentally questioned that in the case of privately owned land what are the public interest objectives that constitutionally justify the ownership restrictions.

The practice of the Constitutional Court – described above – of the implementation of state land policy interpreted it extending to the whole of the land, highlighting that the functions of public interest of the land themselves are so important, that they (without using the measure of need) justify the statutory limit of the right to property. The only question is, how does the state's pre-emption right relate to the pre-emption right to other eligible entities, and what goals does the state have by codifying the first place pre-emption right. These goals are not always in line with the land policy goals defined by the National Land Fund Act. In the legislator's view "to implement the land policy goals, efficient holding structure, the development of family farms the greater role of the state is indispensable for the stimulation of land market. Therefore the guarantee for the state for the right of preemption is necessary" (Act CXVI of 2001 National Land Fund Act, General reasoning). This statement could arise from the new National Land Fund Act; however it does not give a satisfactory answer for the questions rose above.

The stimulation of land market on itself is a goal to support. But this comes with the increase in land prices, which maintains, and even strengthens the proliferated practice of speculative land purchases against which the National Land Fund Act was brought. The other contradiction, that if the state primarily want to give the land to family farmers, young farmers then why does it give itself a right of preemption preceding everyone else. The land acquisition of the state is in many ways justified; above all it is a great investment besides the surely occurring increase of land prices, but it has no evidence to the government goal, which is to grant lands to the preferred groups, since the state is not required to supply anyone with property. It this is the goal than it is surely unconstitutional. Only the demise can be an option.

Under the National Land Fund Act the majority of the current public land users does not

belong to the “priority” category, so for the land to get into the targeted production circle’s use, they needed to be taken away from the current tenants. And with this the state would undermine the majority of the commercial tenants of state land – practically it would “pull the land from under them”. A further effect of this can be the decrease of agricultural employment and production volumes, which can’t be the goal of the state, particularly in the light that besides the land policy goals stable land use and “stabilizing the situation of land users” are also there.

The lease of state lands can be justified in the case when it partly affects the land, which will become the property of the state in the future. There is a small chance for major land acquisition with the current fiscal position. Since the mentioned changes of legislation National Land Fund Management Organization rather rarely lived with its pre-emption rights, in which besides the lack of resources the fifteen days exercise time also played a part.

CONCLUSIONS

According to the practice of the Constitutional Court the rules introduced the last one and a half years related to new agricultural land does not always meet the demand of constitutionality. In addition, some measures, goals are so full of contradictions that there are strong doubts that they can be implemented. The renewal of the moratorium on the ban on foreigners receiving ownership gave the last chance for the lawmaker to settle the land market situation and by creating stable legislation actually preparing the Hungarian agriculture for the effects of the termination of the moratorium. The decision was given, but due to political reasons it has not been decided.
The new rules, most importantly the changes in the institution of the right of preemption do not justify the high-sounding rhetoric of “the land belongs to the person working on it”. On this basis we can say that: the new regulation has not fulfilled it goal, it even brought more uncertainty for the players of the land market. So the law is still not able to handle the decade practise of pocket contracts, neither did it help to decide – despite the legislative goals – whether the government is backing family farmers or large plants. The duality was maintained in land policy.

ACKNOWLEDGEMENTS

My research was supported by University of Szeged, Faculty of Law and Political Sciences, Department of Agricultural and Environmental Law.

REFERENCES

Act LXXXVII of 2010 on the National Land Fund
Act LV. of 1994 on Arable Land
Act CXVI of 2001 on the National Land Fund Act, General reasoning
Act IV of 1959 on the Civil Code (Hungarian Civil Code)
ANDRÉKA, T. (2010): Birtokpolitikai távlatok a hazai mezőgazdaság versenyképességének szolgálatában, In: CSÁK, CS. (ed.): Az európai földszabályozás aktuális kihívásai, Novotni, Miskolc, pp. 7-19.

BESENYEI, L. (2009): A tulajdonjog korlátozásáról, In: BOBVOS, P (ed.): Reformator iuris cooperandi. Tanulmányok Veres József 80. születésnapja tiszteletére, Pólay Alapítvány Szeged, pp. 99-106.
BOBVOS, P. (2004): A termőföldre vonatkozó elővásárlási jog szabályozása, Officina Press, Szeged, pp. 1-25.
Decision of Constitutional Court no. 35/1994 (VI.24.); no. 64/1993 (XII.22.); no. 7/2006 (II.22.)
TANKA, E. (2008): Van Megoldás – Földtörvény, Barankovics Alapítvány, Budapest, pp. 100-152.
The Fundamental Law of Hungary (25 April 2011)