The Past, Present, and the Future of Hungarian Land Law in the Context of EU Law

Or, why Hungary Became One of the Most Active Member States in Land Matters before the CJEU?

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Abstract

In the span of a few years, Hungarian land law regulation has significantly changed from an under-regulated area to a highly structured, well-established system of detailed rules. This transformation can be attributed, inter alia, to the country's accession to the EU – which is definitely an important milestone for Hungarian land law. Indeed, EU law provides an essential regulatory framework for agricultural and forestry land transfer. After the expiry of the transitional period, the European Commission launched a comprehensive investigation of the land law legislation of Member States that joined the EU in 2004 (including Hungary) or thereafter. The investigation revealed that certain land law regulations were non-compliant with EU law, leading to the initiation of infringement proceedings. Moreover, it should be highlighted that preliminary ruling procedures were also initiated before the CJEU on questions of national land law. The present paper provides a comprehensive overview of the infringement proceedings and preliminary rulings concerning the Hungarian land law regime, paying particular attention to the recent Grossmania case.

Keywords: land law, Hungary, Grossmania, SEGRO and Horváth, CJEU.

1. Introduction

Hungarian land law can be described as a dynamically changing area of the Hungarian law, which at the end of the 20th century was still under-regulated in a certain sense. The Hungarian legislator has made significant efforts to remedy the situation, which meant the re-regulation of Act LV of 1994 on Arable Land, and, at the same time, also a parallel process of restitution for Hungarian agricultural land and holdings. While the latter process has successfully settled certain issues, it has

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also been the source of many problems.[1] In addition, Hungary's accession to the EU marked a significant turning point in its history and brought about a major change in its land law.

Member States, which joined the EU in 2004 or thereafter,[2] must align their national laws with those of the EU. Consequently, the Hungarian legislator adopted several acts to ensure EU-compliant legislation, such as Act CXXII of 2013 on the Transfer of Agricultural and Forest Land (Land Transfer Act) based on the Fundamental Law of Hungary and many other acts and other norms supplementing it. In designing this regulatory model, while respecting EU law, the legislator sought to ensure the right to property and the protection of agricultural land,[3] a critical natural resource and national asset protected by the Fundamental Law of Hungary.[4]

It should also be noted that the new Member States included in their Accession Treaties[5] the possibility of maintaining, for a so-called transitional period, the national rules in force at the time of the signature of the Accession Treaties designed to restrict the acquisition of ownership of agricultural and forestry land.[6] For most Member States, this transitional period was seven years,[7] but a few Member States, including Hungary, made use of the possibility to extend this period. As a result, Hungary managed to negotiate a further three years beyond the

1 János Ede Szilágyi, 'Hungary: Strict Agricultural Land and Holding Regulations for Sustainable and Traditional Rural Communities', *in* János Ede Szilágyi (ed.), *Acquisition of Agricultural Lands: Cross-border Issues from a Central European Perspective*, Central European Academic Publishing, Miskolc-Budapest, 2022, p. 336.

2 It is important to point out that the Accession Treaties for countries that joined the EU before 2004 did not incorporate agricultural land acquisition as a distinct regulatory aspect. However, for the countries that joined in 2004 and after, this matter was included in their Accession Treaties. As a result, agricultural land acquisition is of major significance and is a characteristic of these nations' legal policies and land rules. For more on this issue, *see* János Ede Szilágyi, 'European legislation and Hungarian law regime of transfer of agricultural and forestry lands', *Journal of Agricultural and Environmental Law*, Vol. 12, Issue 23, 2017, p. 151.

3 *See* Tamás Prugberger, 'Földvédelem és környezethez való jog', *in* József Szalma (ed.), *A Magyar Tudomány Napja a Délvidéken 2016: A vidék népességmegtartó erejének fokozását elősegítő társadalmi, jogi és természeti tényezők*, Dialóg-Campus, Budapest, 2016, pp. 69-106.

4 The Hungarian land law has undergone significant changes, where agricultural holding has now been included as one of the key subjects of regulation alongside agricultural land. Moreover, the legislator adopted a specialized regime for the intestate succession of agricultural land. For more information *see* Act LXXI of 2020 on the Termination of Undivided Co-ownership of Land. *See also* Zsófia Hornyák, *A mezőgazdasági földek öröklése*, Bíbor, Miskolc, 2019; Zsófia Hornyák, 'Legal frame of agricultural land succession and acquisition by legal persons in Hungary', *Journal of Agricultural and Environmental Law*, Vol. 16, Issue 30, 2021, pp. 86-99.

5 János Ede 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*, Vol. 5, Issue 9, 2010, pp. 48-60.

6 Szilágyi 2017, p. 158.

7 It is worth noting that Poland had a longer transitional period compared to some other countries. Typically, for several countries, the transitional period could be extended by three years with the approval of the European Commission. However, Romania and Bulgaria are exceptions to this, as their Accession Treaty did not allow for an extension beyond the original seven-year period. *See* Szilágyi 2017, p. 158.

seven years, amounting to a ten-year derogation before bringing its land law rules in line with EU law.[8]

Following the expiry of the transitional period, the European Commission carried out a comprehensive investigation of the national land law rules of new Member States[9] and found that specific provisions of their new national land law legislation had the effect of restricting the fundamental market freedoms of the EU. In this respect, existing restrictions on the free movement of capital and the freedom of establishment should be highlighted, as these could significantly reduce cross-border agricultural investments. For these reasons, the Commission launched infringement proceedings against certain Member States in 2015.[10]

In the above context, we must describe two 'specificities'. *(i)* Firstly, it is worth pointing out that infringement proceedings were rare in land transfer matters in the past; requests for preliminary rulings were more typical.[11] *(ii)* Secondly, the European Commission launched a comprehensive investigation and the ensuing infringement proceedings solely against those Member States that had joined the EU in 2004 or thereafter. This is of particular importance, since the 'new' Member States have drawn inspiration from the national legislations of other Member States that had joined the EU earlier, *i.e*. before 2004. In this respect, a Hungarian expert refers to double standard of the European Commission.[12] In our view, this issue should also be investigated, perhaps the European Ombudsman's procedure could contribute to clarifying the situations.[13]

In the following, we describe the infringement proceedings initiated in respect of the land law legislation of the 'new' Member States after the end of the

8 Mihály Kurucz, 'Gondolatok a magyar földforgalmi törvény uniós jogi feszültségpontjainak kérdéseiről', *in* József Szalma (ed.), *A Magyar Tudomány Napja a Délvidéken 2014: Föld- és ingatlantulajdon, fenntartható mezőgazdasági fejlődés*, Vajdasági Magyar Turományos Társaság, Újvidék, 2015, p. 151.

9 Except for Poland, given the longer transitional period.

10 Financial services: Commission requests Bulgaria, Hungary, Latvia, Lithuania and Slovakia to comply with EU rules on the acquisition of agricultural land. Press release of the European Commission, at https://ec.europa.eu/commission/presscorner/detail/hu/IP_16_1827.

11 János Ede Szilágyi, 'Magyarország földjogi szabályozásának egyes aktuális kérdései', *in* József Szalma (ed.), *A Magyar Tudomány Napja a Délvidéken 2017: Migráció, környezetvédelem – társadalom és természet*', Vajdasági Magyar Tudományos Társaság, Újvidék, 2018, p. 185.

12 Ágoston Korom & Réka Bokor, 'Gondolatok az új tagállamok birtokpolitikájával kapcsolatban. Transzparencia és egyenlő bánásmód', *in* Klára Gellén (ed.), *Honori et virtuti*, Pólay Elemér Alapítvány, Szeged, 2013, pp. 266-267. *See also* Szilágyi 2018, p. 186, and Orsolya Papik, '"Trends and current issues regarding member state's room to maneuver of land trade" panel discussion,' *Journal of Agricultural and Environmental Law*, Vol. 12, Issue 22, 2017, p. 155.

13 *See* Szilágyi 2018, p. 186. It should also be mentioned that some Hungarian experts have proposed several ways out of the situation. On the one hand, the second working committee of the European Council For Rural Law (CEDR) congress in Potsdam in 2015 dealt with these solutions. On the other hand, a conference in Budapest in 2017 was organized by the Hungarian Agricultural Law Association and the Public Law Subcommittee of the Hungarian Academy of Sciences, where experts considered this issue further. It seems that some Hungarian experts (Tamás Andréka, Mihály Kurucz, Ede János Szilágyi) see the issue as being best addressed by legislation at the EU level (Ágoston Korom takes a somewhat different view). For more on this topic, *see* Anikó Raisz, 'A magyar földforgalom szabályozásának aktuális kérdéseiről', *Publicationes Universitatis Miskolcinensis, Sectio Juridica et Politica*, Vol. 35, Issue 1, 2017, p. 441.

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transitional period and subsequently also outline the preliminary rulings rendered by the CJEU.

2. General Overview of Infringement Proceedings and Preliminary Rulings Initiated following the Expiry of the Transitional Period

At the outset, we provide a general overview of the infringement proceedings that the European Commission launched against Hungary concerning the country's land law legislation. In addition, we briefly discuss the preliminary ruling proceedings before the CJEU. Due to the constraints of this paper, we will not delve into a detailed analysis of all the cases but rather focus on their most significant points.

In the context of the EU's investigation of the land law regime, two infringement proceedings were initiated against Hungary. *(i)* Firstly, the European Commission initiated an infringement proceeding regarding the *ex lege* termination of rights of usufruct established by contract between non-relatives[14] (hereinafter referred to as usufructuary case).[15] It should be noted that not only infringement proceedings, but requests for a preliminary ruling were also made in the usufructuary case, which will be further discussed below. *(ii)* Secondly, an infringement proceeding was launched concerning the entirety of the Hungarian land law regime (hereinafter referred to as a global case).[16]

2.1. Infringement Proceedings

First, the general infringement procedure, *i.e.* the global case, is presented, followed by the specific infringement procedure, *i.e.* the usufructuary case. Regarding the global case, it should be highlighted that in the procedure initiated by the European Commission, Hungary successfully argued in respect of several contested provisions that they comply with EU law. As a result, the scope of various conditions, such as the procedural role of the local land commission, the land acquisition and possession limits, the system of preemption and pre-lease entitlements, and the duration of leases, was ultimately removed from the scope of the infringement procedure.[17] These measures are now deemed compliant with EU law but remain essential components of the Hungary's land law. Nevertheless, the European Commission continues to challenge the legality of some other instruments under EU law in the ongoing infringement proceedings – this pertains to institutional matters such as the prohibition on legal persons to acquire agricultural land and also the ban of transformation, the requirement of professional competence of agricultural producers, the non-recognition of practice acquired abroad, the

14 Infringement number: INFR(2014)2246, decision date: 18 June 2015.

15 For more one the usufructuary case, *see* Tamás Andréka & István Olajos, 'A földforgalmi jogalkotás és jogalkalmazás végrehajtása kapcsán felmerült jogi problémák elemzése', *Magyar Jog*, Vol. 64, Issue 7-8, 2017, pp. 410-424.

16 Infringement number: INFR(2015)2023, decision date: 26 March 2015.

17 Andréka & Olajos 2017, pp. 410-424.

self-farming obligation, and also the objective nature of conditions for prior authorization of sales contracts.[18]

Among the instruments listed above, the inability of legal persons to acquire agricultural land is one of the main pillars of effective Hungarian land law, which was already a part of the national land law[19] before the new land regime, to be precise, from the year 1994. Indeed, it is one of the unique features of the Hungarian land regime in the Central European region.[20] However, it should be noted that the land law in force applies not only to the acquisition of land by foreign legal persons, but also, with certain exceptions, to domestic legal persons.[21] In this context, it is essential to note that the general restriction concerning legal persons only applies to the acquisition, but not the use of land.[22] Tamás Andréka and István Olajos summarized the significance of this institution by stating that its purpose is to prevent the emergence of an ownership structure that would be practically uncontrollable. This would fly in the face of goal to maintain the population retention capabilities of rural areas, as it would impede the regulation of land possession limits and other conditions surrounding acquisition.[23] Should the Hungarian legislator lift the ban on legal persons acquiring agricultural land, it may impact other laws that the EU has deemed lawful. The ban is a fundamental aspect of Hungary's land law regime, and its removal would require a significant rethinking of land laws enacted in 2014. The case could also set a precedent at the EU level[24] if it is reviewed by the CJEU.[25]

As far as the second infringement proceeding is concerned, the judgment was preceded by a combined decision rendered in a preliminary ruling procedure on usufruct cases. In connection also with the issues of *ex lege* termination of usufruct rights established by contract between non-relatives, in the following subchapter,

18 János Ede Szilágyi, 'Agricultural Land Law: Soft Law in Soft Law', *Hungarian Yearbook of International Law and European Law*, Vol. 6, Issue 1, 2018, pp. 193-194.

19 *Cf*. Péter Hegyes, 'A földforgalmi törvény a gyakorlatban', *in* Klára Gellén (ed.), *Honori et virtuti*, Iurisperitus, Szeged, 2017, pp. 116-121; Pál Bobvos *et al*., 'A mező- és erdőgazdasági földek alapjogi védelme', *in* Elemér Balogh (ed.), *Számadás az Alaptörvényről*, Magyar Közlöny Lap- és Könyvkiadó, Budapest, 2016, pp. 31-41; Csilla Csák, 'Constitutional issues of land transactions regulation', *Journal of Agricultural and Environmental Law*, Vol. 13, Issue 24, 2018, pp. 5-32; Csilla Csák, 'Integrated agricultural organization of production system and the organizations carrying that', *Journal of Agricultural and Environmental Law*, Vol. 13, Issue 25, 2018, pp. 6-21.

20 János Ede Szilágyi & Hajnalka Szinek Csütörtöki, 'Conclusions on Cross-border Acquisition of Agricultural Lands in Certain Central European Countries', *in* János Ede Szilágyi (ed.), *Acquisition of Agricultural Lands: Cross-border Issues from a Central European Perspective*, Central European Academic Publishing, Miskolc-Budapest, 2022, pp. 362-363.

21 Martin Milán Csirszki *et al*., '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*, Vol. 2, Issue 1, 2021, pp. 29-52.

22 Szilágyi 2022, p. 189.

23 Andréka & Olajos 2017, pp. 410-424.

24 The CJEU ruled that an Austrian law that limited the acquisition of property by a Lichtenstein foundation was contrary to EU law in the Judgment of 23 September 2003, *Case C-452/01, Ospelt and Schlössle Weissenberg*, ECLI:EU:C:2003:493. However, the ruling is not directly applicable to the Hungarian land regime as the case was different in principle.

25 Szilágyi 2022, p. 190.

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we focus on three cases, including the judgment in *C-235/17 (European Commission versus Hungary)*.

2.2. Preliminary Rulings

In the present subchapter, a detailed analysis of *SEGRO and Horváth* will be presented.[26] Subsequently, we will briefly discuss the order in *Bán*,[27] also decided on the basis of a preliminary ruling, and the usufruct case, *Case C-235/17*,[28] which was decided in infringement proceedings. The analysis concludes with a review of the most recent preliminary ruling, *Grossmania*.[29] It is worth noting that the Hungarian land law under scrutiny has also been the subject of a decision rendered by the Hungarian Constitutional Court. However, for this study, we will only briefly mention this decision without delving into a detailed analysis.[30]

Turning to *SEGRO and Horváth*, as far as the parties in the instant case are concerned, on the one hand, SEGRO is a company with a registered office in Hungary, whose shareholders are nationals of other Member States and residents in Germany,[31] on the other hand, Günther Horváth is an Austrian citizen residing in Austria. Both have usufructuary rights over agricultural land in Hungary, and the Hungarian authorities have terminated their usufructuary rights without compensation based on new provisions in national legislation. According to the new regulation, such a right can only be established or maintained in favor of a close relative of the agricultural land's owner. Since the parties considered that these new provisions were contrary to the principle of free movement of capital, they brought an action before the Administrative and Labour Court of Szombathely to have the decisions of the Hungarian authorities annulled. As a result, the authority decided to stay proceedings and to refer a question to the CJEU for a preliminary ruling.

In this respect, it is worth mentioning that Advocate General Saugmandsgaard Øe's opinion[32] only considered provisions related to the negative integration model[33] and recommended a judgment based on this approach. This implies that

26 Judgment of 6 March 2018, Joined Cases C-52/16 and C-113/16, *SEGRO and Horváth*, ECLI:EU:C:2018:157.

27 Order of 31 May 2018, *Case C-24/18, Bán*, ECLI:EU:C:2018:376.

28 Judgment of 21 May 2019, *Case C-235/17, Commission v Hungary*, ECLI:EU:C:2019:432.

29 Judgment of 10 March 2022, *C-177/20, Grossmania*, ECLI:EU:C:2022:175.

30 In this context, *see* Decision No. 11/2020. (VI. 3.) AB, relevant to the relationship between Hungarian national law and EU law, which was based on the provisions of the Act CCXII of 2013 on Certain Provisions and Transitional Rules in Connection with the Land Transfer Act (Implementation Land Act), which declared the *ipso iure* termination of the right of usufruct and use *in rem* between non-relatives on 1 May 2014. In addition, concerning the research topic, regarding the *ex lege* termination of the usufruct on agricultural land, it may be worth examining Decision No. 3199/2013. (X. 31.) AB and No. 25/2015. (VII. 21.) AB.

31 *Joined Cases C-52/16 and C-113/16*, *SEGRO and Horváth*, para. 15.

32 Opinion of Advocate General Saugmandsgaard Øe, Delivered on 31 May 2017, *Joined Cases C-52/16 and C-113/16*, *SEGRO and Horváth*, ECLI:EU:C:2017:410, paras. 71-81.

33 Ágoston 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* János Ede Szilágyi (ed.), *Acquisition of Agricultural Lands: Cross-border Issues from a Central European Perspective*, Central European Academic Publishing, Miskolc-Budapest, 2022, pp. 78, and 81.

the Advocate General disregarded the positive integration model regulations established in the CJEU jurisprudence, indicating that the Advocate General views agricultural lands as purely commercial goods. Moreover, upon analyzing the Advocate General's opinion, there appears to be a confusion between two separate legal instruments in Hungary: the usufructuary rights *(haszonélvezet)* and the instrument of lease *(haszonbérlet)*. This led the Advocate General Øe to erroneously interpret the Hungarian rules on lease instead of usufructuary rights. As a result, the Advocate General's assertion of indirect discrimination seems unfounded from a Hungarian jurisprudential perspective, since usufructuary rights in Hungary are typically granted to relatives. Therefore, the Advocate General's conclusion of indirect discrimination appears to be a misinterpretation of the nature of usufructuary rights.[34]

In the present case, the CJEU examined some provisions of the Land Transfer Act and the Act CCXII of 2013 on Certain Provisions and Transitional Rules in Connection with the Land Transfer Act (Implementation Land Act), which aimed at abolishing rights of usufruct (*ex lege*), in relation to Article 49 TFEU (freedom of establishment), Article 63 TFEU (free movement of capital), and last, but not least Article 17 (right to property) and 47 (right to a fair trial) of the EU Charter of Fundamental Rights (EU CFR).[35]

Considering the CJEU's case law developed over the past 15 years, it is not unexpected that the judgment primarily focuses on the free movement of capital in the context of the EU's concept of land acquisition. This concept lies at the intersection of positive and negative integration models, with a current emphasis on the negative integration model.[36] In light of this approach, the CJEU concluded that the Hungarian legislation hinders the free movement of capital and cannot be justified under the principle of proportionality.[37]

It was exciting to see how the CJEU would rule on compatibility with the relevant provisions of the EU CFR, but the outcome could have been more forthcoming. More precisely, there was no fundamental change or breakthrough in the case law, as the CJEU concluded that since it had already found a violation of the free movement of capital, it was not necessary to examine the national legislation under Articles 17 and 47 of the Charter in order to resolve the main proceedings.[38]

34 It was also pointed out in a previous study. *See* Szilágyi 2017, p. 161.

35 Szilágyi 2022, p. 190.

36 Ágoston Korom, 'Evaluation of Member State Provisions Addressing Land Policy and Restitution by the European Commission', *Central European Journal of Comparative Law*, Vol. 2, Issue 2, 2021, pp. 101-125. *See also* Szilágyi 2022, p. 190.

37 *Joined Cases C-52/16 and C-113/16*, *SEGRO and Horváth*, paras. 81-126, and 127.

38 Id. para. 128. The *Kúria* of Hungary, in its recent decisions, has declared the relevant statutory provision to be in violation of EU law, following the CJEU's decision in *SEGRO and Horváth*. The *Kúria* has upheld the principle of the primacy of EU law and consequently excluded the application of national legislation that is contradictory to EU law. Additionally, the *Kúria* extended this to situations not affected by EU law through Administrative Principle Decision No. 11/2019.

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Moving on to the next preliminary ruling, *Bán*, the CJEU found the application to be inadmissible. The national court had referred the following question for a preliminary ruling:

> "Does it infringe Articles 49 and 63 TFEU if a legislation of a Member State which, by operation of law, terminates, without compensation, the right of use of land for agricultural and forestry purposes in cases where the property to which the right of use relates is acquired by a new owner the property to which the right of use relates is acquired by a new owner by way of execution and the user of the land has not benefited from agricultural, rural development support from EU or national sources linked to land, which is subject to a statutory obligation to use the land for a certain period?"[39]

The CJEU closed the case, deeming the application manifestly inadmissible. This was because the primary legal dispute was limited to Hungary, pertaining to the invalidity or nullity of a land lease between a Hungarian national and a company established in that same Member State. The CJEU noted that the referring court failed to indicate to what extent the dispute, which was of purely internal nature, was linked to the provisions of the TFEU on freedom of establishment and free movement of capital, a connection which, for the purposes of the resolution of that dispute, requires the interpretation requested in the context of the reference for a preliminary ruling.[40]

Turning to the last issue (before *Grossmania*), it should be recalled that the CJEU issued a judgment on usufruct in *C-235/17*, namely, a ruling against Hungary concerning the legislation that was previously addressed in the *SEGRO* judgment. What makes the case really important is that the CJEU, besides examining Article 63 TFEU on the free movement of capital, also evaluated Article 17 EU CFR regarding the right to property and concluded that it had been violated.[41] The CJEU based its interpretation on the ECtHR's case law and held that the right of usufruct, which is regulated by Hungarian law, falls under the scope of Article 17 EU CFR.[42] In addition, the CJEU deemed the right of usufruct to be a 'lawfully acquired' right.[43] It ruled that the termination of usufructuary rights by the contested provision is a form of property deprivation as defined in Article 17(1) EU CFR.[44] The CJEU also stated that according to the second sentence of Article 17(1) of the Charter, fair compensation must be paid in a timely manner for deprivation of property, such as the loss of usufructuary rights. The contested provision did not meet this requirement, and therefore the CJEU held that the deprivation of

39 Szilágyi 2022, p. 191.

40 *Case C-24/18, Bán*, paras. 16, and 19.

41 Ágoston 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*, Vol. 17, Issue 33, 2022, p. 67.

42 *Case C-235, European Commission v Hungary*, paras. 69-72, and 81.

43 Id. para. 73.

44 Id. paras. 82, 85-86.

property could not be justified based on public interest.[45] The CJEU also found that there were no arrangements in place for fair compensation to be paid in a timely manner. As a result, the CJEU held that the provision violated the right to property guaranteed by Article 17(1) EU CFR.[46]

It should be emphasized that Act CL of 2021, commonly known as the Compensation Act, was enacted to implement the judgment in *C-235/17*. Article 128 of this Act, which extensively amends the Implementation Land Act, introduces the option of providing adequate compensation for the *ex lege* termination of usufructuary rights.[47]

3. Striking the Balance between Legal Certainty and Legality – Grossmania

3.1. The Background of the Case

The ruling in *Grossmania*, like the cases described above, also arose in the context of the review of the 2013 legislation. The amendment to the law in question, which entered into force on 1 May 2014, provided that the right of usufruct and the right of use *(használat joga)* established by contract between non-relatives for an indefinite period on 30 April 2014 or for a definite period expiring after 30 April 2014, shall cease to have an effect.

Grossmania is a commercial company registered in Hungary. However, its members are individuals who are nationals of other EU Member States. Grossmania acquired usufruct rights over agricultural parcels located specifically in Jánosháza and Duka.[48] However, given that these rights of usufruct ceased to exist by operation of law on 1 May 2014, under the legislation mentioned above, these rights were deleted from the land register.[49] At this point, however, it should be highlighted that, although Grossmania had no legal remedy against this cancellation, it applied to the Hungarian authorities for the reinstatement of its rights of usufruct in the land register,[50] which, however, rejected its application based on the legislation in force.

Next, Grossmania applied to the Administrative and Labor Court in Győr[51] – challenging the administrative decision by way of action. This court in turn asked the CJEU a question[52] focusing on whether a legislative provision declared incompatible with EU law in a previous preliminary ruling by the CJEU can be applied in subsequent national administrative or judicial proceedings even if the

45 Zoltán Varga, 'A termőföldre vonatkozó tagállami szabályozások az Európai Unió Bírósága előtt', *Európai Jog*, Vol. 20, Issue 1, 2020, pp. 6-7.

46 *Case C-235, European Commission v Hungary*, paras. 87, 125, and 129.

47 Szilágyi 2022, p. 192.

48 *C-177/20, Grossmania*, para. 16.

49 Press release no. 44/22, CJEU, Luxembourg, 10 March 2022, at https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-03/cp220044hu.pdf.

50 Following the *SEGRO and Horváth* judgment.

51 Administrative and Labour Court of Győr, 10.K.27.809/2019/7.

52 In this regard it can be said that the Hungarian Administrative and Labour Court raised a question to the CJEU regarding the duration to which the principle of primacy applies.

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facts of the pending case are not entirely identical.[53] The question in the case was therefore not whether or not the provision of the Implementation Land Act infringes EU law but rather

> "whether a national court may set aside a provision of national law that is contrary to EU law on the basis of a factual situation that is not identical, which has already been held to be contrary to EU law by the CJEU in a previous decision. Therefore, the facts of the two cases are different, but the applicable national provision is the same."[54]

As Ana Bobić pointed it out,

> "The Court of Justice is in a position to instil some rather permanent changes to the operation of the principle of primacy. If answered in the affirmative, this may result not in a disapplication of the relevant national provision in the case at hand, but in invalidating such a norm for the future. It is less obvious, however, whether the Court of Justice would go as far as turning the obligation of disapplication into one of invalidation for national courts, which would demand a serious reconsideration of the role and scope of the principle of primacy."[55]

3.2. Opinion of Advocate General Evgeni Tanchev

The Opinion of Advocate General Evgeni Tanchev was delivered on 16 September 2021, in which the Advocate General briefly presented – focusing on facts of the issue and the question referred for the preliminary ruling – the judgment in *SEGRO and Horváth*, and also judgment *C-235/17* related to the infringement proceeding.[56] Accordingly, the Hungarian authorities are obliged to misapply Section 108 of the Implementation Land Act, which is still maintained in force by the Hungarian legislator.[57] In the Advocate General's opinion, Hungary failed to comply with the CJEU's two judgments and introduced new provisions that hindered the full implementation of EU law. These provisions make it more challenging to re-register usufruct rights following their illegal termination.[58]

Advocate General Tanchev expressed uncertainty about the finality of the administrative decisions that denied the request to reinstate the terminated usufruct rights.[59] Nevertheless, if they were deemed final, he believed that

53 Administrative and Labour Court of Győr, 10.K.27.809/2019/7, p. 7.

54 Id.

55 Ana Bobić, 'Constructive Versus Destructive Conflict: Taking Stock of the Recent Constitutional Jurisprudence in the EU', *Cambridge Yearbook of European Legal Studies*, 2020/22, p. 76.

56 Zoltán Varga, 'Az Európai Unió Bírósága Grossmania-ügyben hozott ítélete: Az előzmények és a következmények', *Európai jog*, Vol. 22, Issue 2, 2022, p. 67.

57 Opinion of Advocate General Tanchev, Delivered on 16 September 2021, *C-177/20, Grossmania*, ECLI:EU:C:2021:748, para. 15.

58 Id. paras. 16, and 17.

59 Xabier Arzoz, 'The Legal Effects of a Serious Infringement of EU Law on Administrative Authorities and Courts: Comments on the Judgment of 10 March 2022, Case C-177/20 Grossmania, EU:C:2022:175', *Review of European Administrative Law*, Vol. 15, Issue 3, 2022, p. 67.

Byankov[60] should be applied, and therefore, under the principle of effectiveness, EU law would prevent national laws from enforcing the definitiveness of a decision that was not challenged in court, especially if it contravenes EU law. Notwithstanding the fact that such a prohibition continues to have legal implications for the individual in question.[61]

According to the Advocate General, a Member State cannot invoke the principle of legal certainty to avoid applying EU law, and Hungary cannot refer to it in the current case. The opinion argues that compliance with the CJEU's judgments and obligations under EU law would resolve the debate on the principle of legal certainty. Specifically, the Hungarian legislature should adopt provisions that compensate individuals whose beneficial rights have been unlawfully revoked, while allowing for the possibility of regaining those rights and providing appropriate financial compensation when that is not feasible. As such measures have not been taken, the European Commission emphasized during the hearing that it is reasonable to assume that the Hungarian authorities intended to limit the legal consequences of the CJEU's judgments.[62]

It can be stated that according to Advocate General Tanchev, Hungary cannot claim to uphold the principle of legal certainty if it continues to maintain provisions in its legal system that were deemed to be in violation of EU law by the CJEU some years ago.[63] Advocate General Tanchev recommended that if the reinstatement of usufruct rights faced objective obstacles and there was no provision for financial compensation in Hungarian law, the *Brasserie du pêcheur and Factortame* case law[64] jurisprudence applies. This would oblige Hungary to provide compensation to Grossmania for any damage caused due to its violation of EU law.[65]

However, Advocate General Tanchev's opinion went beyond its original scope. He also presented general considerations and criticisms of the CJEU's previous case law regarding the finality of administrative decisions that contradict EU law and their potential revocation. Within the framework of the preliminary reference, he also took the opportunity to critique the *Kühne & Heitz* judgment,[66] which he felt lacked a clear rationale for its position and created ambiguity in interpreting the four *Kühne & Heitz* conditions. Advocate General Tanchev argued for a consistent approach to balancing the principles of legality and legal certainty, regardless of whether the revocation concerns an unlawful EU or national act.[67]

60 Judgment of 4 October 2012, *Case C-249, Byankov*, ECLI:EU:C:2012:608.
61 Opinion of Advocate General Tanchev, *C-177/20, Grossmania*, paras. 45-47.
62 Id. para. 48.
63 Id.
64 Judgment of 5 March 1996, *C-46/93 and C-48/93, Brasserie du Pêcheur and Factortame*, ECLI:EU:C:1996:79, paras. 21., 22., 31. and 36.
65 Arzoz 2022, p. 68.
66 Judgment of 13 January 2004, *C-453/00, Kühne & Heitz*, ECLI:EU:C:2004:17.
67 Arzoz 2022, p. 68.

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3.3. The Decision Itself

The CJEU issued its judgment in *Grossmania* on 10 March 2022. The Administrative and Labour Court of Győr decided to submit the following question to the CJEU for a preliminary ruling:

> "Must Article 267 TFEU be interpreted as meaning that, where the Court of Justice, in a decision given in preliminary ruling proceedings, has declared a legislative provision of a Member State to be incompatible with EU law, that legislative provision cannot be applied in subsequent national administrative or judicial proceedings either, notwithstanding that the facts of the subsequent proceedings are not entirely identical to those of the previous preliminary ruling proceedings?"[68]

Initially, the CJEU was presented with a straightforward preliminary question regarding the application of the *SEGRO and Horváth* judgment in subsequent national administrative or judicial proceedings, even if the facts are not identical to those in the previous preliminary ruling proceedings.[69] However, the CJEU rephrased the question[70] into two distinct issues.[71] The first one focused on the issue of whether the omission of a legal contestation of the cancellation of the usufruct rights had relevance for the application of the *SEGRO and Horváth* judgment.[72] By contrast, the second issue focused on whether the national court could order the reinstatement of the usufruct rights in the absence of a legal basis for compensation under Hungarian law.[73]

In the first part of the judgment, the CJEU recalled its established case law. It affirmed that the interpretation of a rule of EU law provided by the CJEU during its exercise of the jurisdiction conferred upon it by Article 267 TFEU defines and clarifies the meaning and scope of the rule, as it ought to have been understood and applied since its inception.[74] Considering the principle of primacy, a national court that is responsible for enforcing EU law provisions within its jurisdiction must ensure that these provisions are fully executed, even if it means disregarding any conflicting provisions of national law, including those that were enacted later. In cases where the national court cannot interpret national law in a manner that is compliant with EU law requirements, it has the responsibility to give effect to EU law provisions without waiting for any prior invalidation of conflicting national provisions by legislative or constitutional means.[75] The national court that hears a case seeking annulment of a decision based on the relevant legislation must therefore ensure the complete application of Article 63 TFEU by setting aside the

68 *C-177/20, Grossmania*, para. 28.
69 Id. para. 28.
70 For the rephrased version of the question, *see* Id. para. 32.
71 Professor Xabier Arzoz considers the first question to be an explicit issue, and the second question to be a latent issue. *See* Arzoz 2022, p. 68.
72 *C-177/20, Grossmania*, para. 30.
73 Id. para. 31.
74 Id. para. 42.
75 Id. para. 43.

national legislation to resolve the ongoing dispute. Similarly, the national administrative authorities, to whom Grossmania had applied for the reinstatement of its rights of usufruct in the land register, were also obliged to comply with this duty.[76]

The CJEU found that the referring court must provide sufficient explanation on how the lack of challenge to the termination of the usufruct rights would affect the resolution of the dispute in the main proceedings. This was due to the fact that the national authority refused to reinstate Grossmania's usufruct rights based on national legislation that had been declared contrary to EU law, but was nevertheless still in force. While Advocate General Tanchev was uncertain about the finality of the administrative decisions, the CJEU was unclear about their relevance.[77] Nonetheless, the CJEU reminded the referring court of the general framework for applying national law in the context of EU law, which includes the principles of procedural autonomy and equivalence, and effectiveness.[78]

In general, the CJEU's case law supports the finality of administrative decisions and adherence to time limits to preserve legal certainty. However, there are exceptions based on effectiveness and sincere cooperation in unique circumstances where a national body may need to review or set aside a final administrative decision to comply with EU law. Balancing legal certainty and EU law obligations is essential in such cases.[79]

The CJEU found that the national legislation violated Article 63 TFEU and Article 17(1) EU CFR, and had significant repercussions for over 5,000 nationals of other Member States. The fact that the termination of usufruct rights resulted from the 'operation of law' was also considered.[80]

The first part of the judgment concludes that if it is proven that under Hungarian law, it is not possible to challenge the termination of usufruct rights, which has become final when bringing an action against the rejection of a request for reinstatement of those rights, then such an impossibility cannot be justified by the principle of legal certainty and should be deemed contrary to the principles of effectiveness and sincere cooperation under Article 4(3) TEU, and therefore rejected by the court.[81] The second part of the judgment focused on determining the appropriate measures to address the consequences of the violation of EU law. The CJEU emphasized that national authorities must not only disapply national legislation that violates EU law but also take necessary measures to ensure compliance with EU law.[82] Moreover, the CJEU examined the available options for redressing the consequences of the infringement of EU law in this case. It concluded that reinstating canceled rights of usufruct is the most suitable way to restore the legal and factual situation of the affected person and the national court has the power to order such reinstatement under EU law.

76 Id. paras. 45-46.
77 Arzoz 2022, p. 69.
78 Id.
79 *C-177/20, Grossmania*, paras. 52-54.
80 Id. para. 57.
81 Id. para. 62.
82 Id. para. 64.

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The CJEU acknowledged that there may be situations where reinstatement of unlawfully canceled rights of usufruct is not possible due to objective and legitimate (primarily legal) obstacles, such as when a new owner has acquired the land in good faith (since the cancellation of such rights) or the land had been restructured. Moreover, the referring court must consider the legal and factual circumstances to determine if reinstatement is appropriate. Suppose the reinstatement of canceled rights of usufruct is not possible. In that case, the former holders of the canceled rights should be granted compensation in financial or other form. This compensation must be of sufficient value to provide economic reparation for the loss resulting from the cancellation of the rights.[83] The CJEU referred to the principle of state liability for loss or damage resulting from a breach of EU law, which requires three conditions to be met:

> "the breached rule of EU law must intend to confer rights on individuals, the breached rule of EU law must be sufficiently serious, and there must be a direct causal link between the breach and the harm suffered by the individuals."[84]

The CJEU found that all three conditions were met in this case, as the previous legal reasoning had already highlighted the serious and manifest nature of the infringement. Furthermore, the CJEU emphasized the duration of the violation, which persisted despite two previous judgments finding the breach established.[85]

To conclude, the second part of the judgment highlighted that Hungarian authorities and courts must take measures to eliminate the unlawful consequences of national legislation, including the re-registration of unlawfully extinguished usufruct rights in the land register. If re-registration is impossible because it would harm the rights of third parties acquired in good faith, former holders of the extinguished rights should receive compensation. This compensation should be sufficient to cover the economic loss caused by terminating those rights. In addition, former holders are entitled to compensation for the loss suffered due to the termination, subject to the conditions laid down in the case law of the CJEU.[86]

4. Steps Were Taken by the Hungarian Legislator before the Court's Decision

In an attempt to anticipate the ruling of the CJEU, the Hungarian legislator implemented a few new Sections (to be precise, Sections 108/B-Q of the Implementation Land Act) on 1 January 2022, while repealing Sections 108(2) to (5). It is important to note that Section 108(1) of this Act remains in effect.

According to the new provisions, a natural or legal person whose right of usufruct has been terminated according to Section 108(1) of the Implementation

83 Id. paras. 66-67.

84 Id. para. 69.

85 *See* further Judgment of 19 November 1991, *Joined Cases C-6/90 and 9/90, Francovich and Bonifaci*, ECLI:EU:C:1991:428, para. 40; *Joined Cases C-46/93 and C-48/93, Brasserie du Pêcheur and Factortame*, paras. 51. and 71.

86 Szilágyi 2022, p. 193.

Land Act or its successor in title may request not only the reinstatement of the canceled right of usufruct in the land register, but also compensation. The application for the examination of the possibility of reinstatement or compensation may be submitted to the National Land Centre *(Nemzeti Földügyi Központ)*. The reinstatement procedure itself is carried out *ex officio* by the Land Registry Authority *(ingatlanügyi hatóság)*, which acts based on a decision of the National Land Centre. Applications to initiate such proceedings may be made by the deleted beneficiary or his or her successor in the title using a standard form. While the application for a procedure to examine the possibility of reinstatement may be submitted between 1 September 2022 and 28 February 2023 (the time limit is final), the application for compensation may be submitted within a time limit of 60 days after the end of the reinstatement procedure. In the case of an application for compensation only, the application may be submitted between 1 September 2022 and 28 February 2023, the time limit being final.[87]

As far as this amendment is concerned, it should be noted that Article 108(1) of the Act is still in force. The amendment only entails the removal of the mention of the automatic termination of usufructuary rights, leaving only the right of use to be covered by this section. This alteration is believed to have resulted from the rulings of the CJEU, which only addressed the termination of usufructuary rights in Hungarian law. It's assumed that the right of use did not have any impact on natural or legal persons from other Member States and as such, posed no issues under EU law.[88]

The fact that the right of use regime remains in effect should not trigger a new preliminary ruling procedure, as no natural or legal person from another Member State has acquired the right of use on Hungarian land. However, a potential issue that may arise from the amendment is if a person whose right of use has been terminated, initiates proceedings regarding reinstatement of, or compensation for such right. The National Land Centre must reject such a request. Still, administrative proceedings against its decision may be initiated, in which the court's review may include the possibility of initiating a preliminary ruling procedure in the case of a non-Hungarian national concerned, and a procedure for *ex post* review of the Constitutional Court in the case of a Hungarian national concerned.[89]

The law defines in detail the cases in which a refund may be granted for a *non-bona fide* customer and lists the objective obstacles to a refund. The amendment to the Implementation Land Act also provides detailed rules on the basis and amount of compensation. Moreover, the amendment to the regulation offers explicit guidelines for determining the cause and amount of compensation. This amendment conforms to the *Grossmania* judgment by regulating the reinstatement of the usufructuary rights terminated and the compensation paid by the government when re-registration is hindered.

87 For other detailed rules, *see* Sections 108B-108Q of the Implementation Land Act.

88 Moreover, the Constitutional Court of Hungary, in its Decision No. 11/2020. (VI. 3.) AB clearly stated that legal persons could not acquire the right to use agricultural land under the old Civil Code. *See* Péter Szabó, 'Az uniós jog határai a magyar alkotmánybíróság legfrissebb döntéseinek tükrében', *Európai Jog*, Vol. 20, Issue 6, 2020, pp. 16-23.

89 Varga 2022, p. 35.

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As regards the pending proceedings, we believe that the national court will have no problem applying the *Grossmania* judgment and the rules that entered into force on 1 January 2022, as the priority of reinstatement provided for by the CJEU is also reflected in the Hungarian legislation. The amendment to the Implementation Land Act defines the scope of compensation more broadly than the CJEU's judgment. In academic literature, there is a view that the problem may arise as to whether and in what form those affected by the procedure for reinstatement or compensation should be involved. Still, in the current court proceedings, the legislator only provides for the mandatory proceeding of the National Land Centre.[90]

5. Conclusions

Following Hungary's accession to the EU in May 2004, its land legislation was 'granted' a temporary derogation to maintain pre-existing national regulations for ten years. The fundamental component in developing legislation compliant with EU standards is the Land Transfer Act, which is based on the Fundamental Law of Hungary and supplemented by many other laws and legal provisions. In designing this regulatory framework, the Hungarian legislator endeavored to guarantee both the right to property and the protection of agricultural land foremost as a natural resource and national asset, as enshrined in the national constitution. Concerning the regulation of agricultural land, several significant judgments have been recently issued by both the Constitutional Court of Hungary and the CJEU.

The aim of this study was to examine the infringement proceedings and preliminary rulings against Hungary, revealing that two infringement proceedings and three preliminary rulings have been issued regarding Hungarian land law legislation. The most recent case, *Grossmania*, is analyzed in detail, in which the CJEU ruled on the application of EU law in the context of Hungarian legislation that terminated usufructuary rights, finding that the legislation infringed Article 63 TFEU and Article 17(1) EU CFR. The CJEU emphasized the importance of national courts ensuring the complete application of EU law and noted the liability of the Member State for damages caused by the infringement. The national authorities must refrain from applying the national law that violates EU law and take measures to ensure compliance with EU law.

Grossmania addressed two critical issues related to the legal consequences of national authorities breaching EU law, namely: the balance between the principle of legality and the principle of legal certainty and the instruments to restore legality and nullify the consequences of the implementation of national legislation that violates EU law. The CJEU found that the infringement was severe and manifest due to the violation of EU primary law provisions, the number of EU citizens affected, and the persistence in time of these effects. The most innovative aspect of the judgment was the explicit proposal for possible instruments to remedy the consequences of a severe and manifest infringement of EU law, with

90 Id.

restitution being the preferential remedy. If restitution is impossible, the former holders of the terminated right should be granted the right to compensation, which is governed by national law. The CJEU did not define the nature of this right but pointed out the value of compensation. The CJEU also established that the three conditions for establishing state liability were met in the case and that the state is liable for the damage caused.

Finally, in our opinion – considering the strictly regulated nature of Hungarian land law – the *Grossmania* won't be the last significant case of the CJEU concerning the Hungarian land regulation. Therefore, it shouldn't be seen as the end of 'an era'. We anticipate that further problems with the national regulation can be expected in the future.

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