11 Agricultural Land Law

Soft Law in Soft Law

János Ede Szilágyi[*]

Might the voluntary guidelines change the present practice of the CJEU in connection with cross-border acquisition of agricultural lands?
In the present article, soft law is assessed in a field of the EU law, namely in connection with the cross-border acquisition of agricultural lands, in which field EU soft law documents have been used infrequently. Three institutions of the European Union (European Economic and Social Committee, European Parliament, European Commission) have recently issued separate documents concerning the cross-border acquisition of lands, and these documents include certain findings that vary from one document to another. All of these documents might be capable of providing a basis of informal reference for the Court of Justice of the European Union (CJEU) in cases regarding the acquisition of lands. This situation raises the following questions, namely, on the one hand, whether the CJEU will refer to these documents, on the other hand, which of these document(s) will be applied by the CJEU, and finally (if more than one document is cited by the Court), how the CJEU will choose the acceptable finding(s) from the contradicting statements. Is there any hierarchy among the different soft law documents in the practice of the CJEU? Besides, all three institutions of the EU deal with the voluntary guidelines of the UN FAO, namely the Voluntary Guidelines on the Responsible Governance of Tenure of land, fisheries and forests in the context of national food security (VGGT). Additionally, two of them (European Economic and Social Committee, European Parliament) recommend the substantive application of the VGGT in the EU law and in the national laws of the Member States. Consequently, the VGGT might be applied even in the practice of the CJEU concerning the cross-border acquisition of lands. Namely, the food security concept of the FAO and (in a certain sense) even some aspects of the food sovereignty might be referred to by the CJEU, which situation may significantly amend the present CJEU practice concerning the cross-border acquisition of lands.

The idea of the present study[1] came from the *soft law* research cooperation organized at the Faculty of Law of the Pázmány Péter Catholic University. The cooperation was initiated by *Petra Láncos* and her colleagues, and, in the framework of this research coop-

* János Ede Szilágyi: associate professor, University of Miskolc.

1 The study was prepared with the financial assistance of the New National Excellence Program of the Ministry of Human Resources (code number: ÚNKP-17-4-III.).

eration, the participants could analyse and compare the application of soft law, which is present in large numbers in European Union (EU) law, in various policy areas. Therefore, to ensure comparability, it was essential to determine what was meant by 'soft law' in respect of EU law. In my opinion, the conceptual frameworks and classification outlined by Láncos Petra[2] constitute a good starting point for the assessment of the soft law phenomenon also in the field of agricultural law.

There are many areas in *EU agricultural law*[3] where soft law can be found, but, in the present study, we would like to draw attention to an area where the issue of such documents has never been a factor before. Namely, more legal documents, which can be regarded as soft law, concerning the acquisition of agricultural lands have been issued by certain institutes of the European Union in rapid succession; thus, the European Economic and Social Committee (EESC) has issued an opinion,[4] the European Parliament (EP) has issued a resolution[5] and the European Commission (EC) has issued an interpretative communication.[6] Moreover, in these legal documents of the European Union, references were made to soft law documents of certain international organizations (as indicated in the title of this study as well), of which particular attention was given to the voluntary guidelines of the Food and Agriculture Organization of the United Nations (hereinafter: FAO) entitled 'Responsible Governance of Tenure of land, fisheries and forests in the context of national food security' (hereinafter: VGGT).[7] Moreover, these international voluntary guidelines are rare in this field, similarly to the fact that the occurrence of the issue in soft law has so far been almost unprecedented in the European Union. According to its own self-determination, VGGT is the first comprehensive, global instrument on this topic prepared through intergovernmental negotiations.[8] That is to

2 Petra Lea Láncos, 'East of Eden Hotel – soft law measures on harmful content between harmonisation and diversity', *The Theory and Practice of Legislation*, 2018/1, pp. 113-129. [Láncos 2018a]; Petra Lea Láncos, 'A Hard Core under the Soft Shell: How Binding is Union Soft Law for Member States?'*European Public Law*, 2018, 2018/4. 755-784; Petra Lea Láncos, 'Piercing the Soft Law Veil: Too Hard a Gamble?' *Common Market Law Review*, 2018, under publication; Petra Lea Láncos, *The phenomenon and implementation of 'directive-like recommendations: Lessons from the Hungarian legislative practice*, Lecture, ICON conference, Budapest, 20 April 2018.

3 For the definition of EU agricultural law, *see for example*: Alois Leidwein, *Europäisches Agrarrecht* (European agricultural law), Wien – Graz, NWV, 2004; Joseph A. McMahon, *EU Agricultural Law*, Oxford, Oxford University Press, 2007; Joseph A. McMahon & Michael N. Cardwell (eds.), *Research Handbook on EU Agriculture Law*. Cheltenham, Edward Elgar, 2015.

4 Opinion of the European Economic and Social Committee (EESC) on 'Land grabbing – a warning for Europe and a threat to family farming', NAT/632 – EESC-2014-00926-00-00-AC-TRA (EN), Brussels, 21 January 2015.

5 European Parliament (EP) resolution of 27 April 2017 on the state of play of farmland concentration in the EU: how to facilitate the access to land for farmers, P8_TA(2017)0197.

6 European Commission (EC): Commission Interpretative Communication on the Acquisition of Farmland and European Union Law (2017/C 350/05), OJ C 350, 18.10.2017, pp. 5-20.

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

8 VGGT, p. 47.

say, in respect of the acquisition of agricultural lands, we have just witnessed the emergence of soft law measures both at international and at Union level. In my opinion, all this can make this field particularly relevant in respect of soft law research.

For a more effective analyses of the VGGT and the legal documents of the European Union on the basis of soft law concept, it is important to emphasise that these documents are of great significance to two current topics of the *science of* Hungarian *agricultural law*.[9] One of the topics relates to the research on the internationalisation of agricultural law,[10] while the other topic is the cross-border acquisition of agricultural land.[11] Within the last topic, two issues have been examined, in particular, in today's Hungarian science of agricultural law: on the one hand, the legal framework of the European Union (EU) in respect of the cross-border acquisition of land,[12] and, on the other hand, the aspects of

9 The *Nomenclature for the Fields of Science* issued by the Hungarian Academy of Sciences on 7 September 2016 specifies the Science of Agricultural Law within the field of Law and Political Sciences.

10 For the internationalisation of agricultural law, *see*: Roland Norer, 'Agrarrecht – eine Einführung (Agricultural Law – Introduction)', in: Roland Norer (ed.), *Handbuch des Agrarrechts* (Handbook on Agricultural Law), Wien, Verlag Österreich, 2012. pp. 13-14; Anikó Raisz & János Ede Szilágyi, 'Development of agricultural law and related fields', *Agrár- és Környezetjog*, 2012/12, pp. 128-134; Saverio Di Benedetto, 'Agriculture and the Environment in International Law', in: Massimo Monteduro et al. (eds.), *Law and Agroecology*, Berlin-Heidelberg, Springer, 2015, pp. 99-126; János Ede Szilágyi, 'Változások az agrárjog elméletében?' (Changes in the theory of Agricultural Law?), *Miskolci Jogi Szemle*, 2016/1, pp. 42-45.

11 As a starting point for the definition of 'cross-border acquisition of land', *see*: János Ede Szilágyi, 'A magyar földforgalmi szabályozás új rezsimje és a határon átnyúló tulajdonszerzések (The new Hungarian law regime on the acquisition of lands and cross border acquisitions)', *Miskolci Jogi Szemle*, 2017/1. pp. 110-114. [Szilágyi 2017a].

12 János Ede Szilágyi, 'European legislation and Hungarian law regime of transfer of agricultural and forestry lands', *Agrár- és Környezetjog*, 2017/23. pp. 148-181. [Szilágyi 2017b]. With regard to the subject, see also the works of the following authors: Tamás Andréka & István Olajos, 'A földforgalmi jogalkotás és jogalkalmazás végrehajtása kapcsán felmerült jogi problémák elemzése' (The analyses of legal issues arisen in relation to the legislation on the acquisition of lands and its application), *Magyar Jog*, 2017/7-8. pp. 410-424; Ildikó Bartha, 'Földindulás. A földforgalom-szabályozás tagállami és uniós joga' (Land rush. The national and EU legislation on the acquisition of lands), *Jogtudományi Közlöny*, 2017/9, pp. 409-413; Csilla Csák, 'Die ungarische Regulierung der Eigentums- und Nutzungsverhältnisse des Ackerbodens nach dem Beitritt zur Europäischen Union' (The Hungarian legislation on the system of land ownership and use after the accession to the European Union)', *Agrár- és Környezetjog*, 2010/9, pp. 20-31; Csilla Csák, Bianka Kocsis & Anikó Raisz, 'Vectors and indicators of agricultural policy and law from the point of view of the agricultural land structure', *Agrár- és Környezetjog*, 2015/19, pp. 32-43; Ágoston Korom, 'A birtokpolitika közösségi jogi problémái (The land policy issues of Community Law)', *Gazdálkodás*, 2010/3, pp. 344-350; Ágoston Korom, 'A földpiacra vonatkozó kettős jogalap tételének bírálata' (The criticism of the thesis of dual legal basis related to the land market), *Magyar Jog*, 2011/3, pp. 152-159; Mihály Kurucz, 'Gondolatok a magyar földforgalmi törvény uniós feszültségpontjainak kérdéseiről' (Thoughts on the issues of points of conflic with the EU in relation to the Hungarian law on the acquisition of lands), in: József Szalma (ed.), *A Magyar Tudomány Napja a Délvidéken 2014* (The Hungarian Science's Day in the Southern territories), Novi Sad, Vajdasági Magyar Tudományos Társaság, 2015, pp. 120-173; Anikó Raisz, 'Topical issues of the Hungarian land-transfer law', *CEDR Journal of Rural Law*, 2017/1, pp. 69, 73-74; etc.

international law in relation to the cross-border acquisition of land.[13] These issues constitute also an important background to this study, but, for reasons of space, we cannot outline them in detail. Instead, one of them will be briefly addressed in the first part of the present study, namely the legal framework of the European Union in respect of the cross-border acquisition of lands and, to somewhat narrow the analysis, the actualities of the examination of Hungarian land regulations against EU law. The purpose of this is to reveal the circumstances and reasons of the emergence of the Union's soft law measures in the field of the transactions in agricultural land. Then, in the second part of the study, the three soft law documents of the European Union will be analysed. Since each of these documents is rather large and complex, therefore, for reasons of space, the substantive analyses of these documents will be narrowed down to certain relevant aspects of Hungarian land regulations. In the last and third part of this study, VGGT will be presented with the restrictions already mentioned in the other parts, that is to say, some of the more interesting parts relevant to our country will be, in particular, presented.

11.1 The Legal Framework of the European Union in Respect of the Legislation of the Member States and, in particular, of Hungary in Connection with the Cross-Border Acquisition of Lands

Hungary became a Member State of the European Union in 2004, however, under the terms laid down in our Act of Accession, we were entitled to a transitional period of ten years in relation to the acquisition of agricultural lands – as was the case also in respect of more other Member States which acceded to the European Union in 2004 or thereafter (hereinafter: new Member States). During this transitional period, Hungary did not have to adapt EU-compliant legislation in relation to the acquisition of agricultural lands. However, after the expiry of the transitional period, that is from 1 May 2014, the legal framework of the European Union has been applied also to Hungary. Until the expiry of the transitional period, Hungary created a new legal environment in relation to the acquisition of agricultural lands, and, more widely, in relation to the transactions in agricultural lands. The new legal environment (hereinafter: land regime), including the Fundamental Law, cardinal, partially cardinal and non-cardinal acts as well as all kinds of decrees, was developed in a way so that it affects a number of other areas of law (for example, by incorporating the offence of unlawful acquisition of agricultural and horti-

13 In this regard, *see*: Anikó Raisz, 'Földtulajdoni és földhasználati kérdések az emberi jogi bíróságok gyakorlatában' (The issues of land ownership and use in the practice of the courts of human rights), in: Csilla Csák (ed.), *Az európai földszabályozás aktuális kihívásai* (The current challanges of the European land regulations), Miskolc, Novotni Alapítvány, 2010, pp. 241-254; György Marinkás, 'Certain aspects of the agricultural land related case law of the European Court of Human Rights', *Agrár- és Környezetjog*, 2018/24, pp. 99-116, Ede Szilágyi János, 'The international investment treaties and the Hungarian land transfer law', *Agrár- és Környezetjog*, 2018/24, pp. 194-207. [Szilágyi 2018a].

cultural land, known in everyday speech as secret deals, into the Criminal Code). With this new land regime, Hungary joined the group of EU Member States, which is described in the literature, using the classification of Tamás Prugberger,[14] as the group of 'comprehensively controlled strict systems'. An important characteristic of this group is that the transactions in agricultural land are restricted in many respects with mandatory *ius strictum* rules. Several new Member States acted in the same way as Hungary, that is to say, they significantly modified their former rules on the transactions in land, however, it is important to emphasize that the rethinking of the national land regulations can be considered to be relevant in several old Member State as well, among many other reasons, due to the 2008 – first financial, then economic – crisis.[15] In other words, the soft law documents of the EU on this matter, presented below, are, in the short term, not only relevant to the new Member States.

The European Commission has carried out a comprehensive analysis of the rules of the new Member States on grounds which were disputed by many parties.[16] As a result of this analyses, an *infringement procedure* was initiated against more new Member States – Slovakia, Bulgaria, Latvia, Lithuania and Hungary. Moreover, against Hungary, in addition to the abovementioned *comprehensive case*, the European Commission launched a further infringement procedure also in a miner case, namely in the case of legal disputes on the deletion of *usufructuary rights* registered on agricultural land from the land register (infringement No. 2014/2246). In addition, on the latter subject, a *preliminary ruling procedure* was initiated before the Court of Justice of the European Union, in which the opinion of the Advocate General[17] was published last year.[18]

As regards the Commission's objections expressed in the comprehensive case concerning the new Hungarian land regime, it should be noted first that, in respect of more Hungarian provisions, Hungary could have its arguments accepted by the European Commission, according to which the measures concerned are in conformity with EU law. This ultimately led to the removal of the provisions, inter alia, on (a) the procedural role of the local land committee, (b) the ceilings set for the acquisition of lands and for the ownership of property, (c) the system of the right of pre-emption to buy and lease, or (d)

14 Tamás Prugberger, 'A fejlett polgári államok földtulajdoni és mezőgazdasági üzemstruktúrája a XX. század agrárreformjai tükrében' (Land ownership and agricultural structure in developed democratic states in the light of the agricultural reforms of the 20th century), in: Prugberger Tamás (ed.), *Agrárjog I.* (Agricultural Law I), Miskolc, Bíbor Kiadó, pp. 81-116.

15 János Ede Szilágyi, 'General Report of Commission II.', in: *CAP Reform: Market Organisation and Rural Areas*, Nomos, Baden-Baden, 2017, pp. 239-242. [Szilágyi 2017c]

16 János Ede Szilágyi, 'Conclusion', *Agrár- és Környezetjog*, 2015/19, pp. 92-93; Ágoston Korom & Réka Bokor, 'Gondolatok az új tagállamok birtokpolitikájával kapcsolatban' (Thoughts on the land policy of the new Member States), in: Klára Gellén (ed.), *Honori et Virtuti*, Szeged, Iurisperitus, 2017, pp. 266-267.

17 Opinion of Advocate General Saugmandsgaard Øe delivered on 31 May 2017 in Joined Cases C-52/16 and C-113/16, *'SEGRO' Kft. v. Vas Megyei Kormányhivatal Sárvári Járási Földhivatala* and *Günther Horváth v. Vas Megyei Kormányhivatal*, ECLI:EU:C:2017:410 [hereinafter: opinion of Advocat General].

18 For the analyses of these, *see, for example*: Szilágyi 2017b, pp. 157-161.

the duration of leasehold.[19] Thus, all these Hungarian provisions can be now considered EU-compliant. In the ongoing infringement procedure, however, the European Commission continues to dispute the legality of certain institutions under EU law, such as (a) the inability of legal persons to acquire ownership and the prohibition of their transformation, (b) the skills requirements of farmers, (c) the non-recognition of experience acquired abroad, (d) the personal obligation to cultivate, and the European Commission also doubts (e) the objectivity of the provisions on the prior consent required in the cases of sale and purchase contracts.[20] Concerning the issues challenged, it is, *in particular, the inability of legal persons to acquire ownership* which can be considered as one of the basic pillars of the current Hungarian land regime, since, according to *Tamás Andréka* and *István Olajos*, its

> "purpose is to prevent the development of a practically unverifiable and complex chain of ownership which would be contrary to the purpose of preserving the capacity of the country to retain the population, since it would not be possible to verify compliance with the ceiling set for the ownership of property and with other requirements for the acquisition of land."[21]

With regard to the above, it has not yet been mentioned what kind of framework was established by EU law for the Member State legislation regarding the acquisition of lands, in other words, on what basis can a Member State provision regarding the acquisition of lands be considered to be EU-compliant or contrary to EU law. With regard to the provisions of the Member States concerning the *acquisition of land ownership* as part of the transactions in land, the Union's primary law is substantially,[22] if not exclusively, important, thus, (a) the *Treaty on the Functioning of the European Union* (TFEU) (see below), (b) as regards human rights (especially the right to property), the *Charter of Fundamental Rights of the European Union*, and (c) the *Acts of Accession* (for example, transitional arrangements providing for derogations). In the following part of this work, the sources of primary law which are more difficult in terms of legal interpretation will be primarily dealt with. It should be noted, however, that when applying the sources of primary law to the land regime, we rely on the case law of the Court of Justice of the European Union; that is to say, the followings can only be formulated already through or, at best, by means of an *interpretive filter*.

19 Andréka & Olajos 2017, p. 422.
20 Id.
21 Id.
22 *Cf.* László Kecskés & László Szécsényi, 'A termőföldről szóló 1994. évi LV. törvény 6. §-a a nemzetközi jog és az EK-jog fényében' (Act LV of 1994 on Arable Land in the light of international law and EC law), *Magyar Jog*, 1997/12, p. 724.

From among the sources of primary law, the case law of the Court of Justice of the European Union regarding the Member States' rules on the acquisition of lands[23] highlights, in particular, the following provisions of the TFEU: general principle on non-discrimination (Article 18 TFEU), the right of establishment, which is an integral part of the freedom of movement of persons (Article 49 TFEU), the free movement of capital (Article 63 TFEU), the common agricultural policy objectives (Article 39 TFEU). As regards the analyses of these rules of TFEU, *Ágoston Korom* concluded that EU law determines the Member States' elbow room to establish their own rules on the transactions in land at the crossroads of the so-called negative and positive integration rules.[24] As an explanation of the above statement, Korom describes the free movement of persons and capital as a *negative integration rule*. In his view, these and the other two freedoms – the freedom of goods and services – are still the basis of the EU legal order, which "aim to remove the obstacles to the free movement of production factors – and mainly the obstacles thereof posed by the Member States."[25] Consequently, as a general rule and a starting point, the European institutions, including the Court of Justice of the European Union, regard all measures taken by the Member States and constituting a restriction on these freedoms as being contrary to EU law.[26] On the other hand, *positive integration* means the *establishment of a supranational institutional system* that did not exist before, a typical example of which is the creation of the EU's common agricultural policy.[27] In the case law of the Court of Justice of the European Union on the acquisition of lands, one of the objectives of the common agricultural policy, the objective of "increasing the quality of life of farmers", was considered such a basis of reference in the light of which Member States may legitimately formulate rules on the transactions in land. That is to say, this positive in-

23 *See, in particular*: Judgment of 6 November 1984 in Case 182/83, *Robert Fearon & Company Limited v. Irish Land Commission*, [1984] ECR 03677; Judgment of 30 May 1989 in Case 305/87, *Commission of the European Communities v. Hellenic Republic*, [1989] ECR 01461; Judgment of 1 June 1999 in Case C-302/97, *Klaus Konle v. Republik Österreich*, [1999] ECR 03099; Judgment of 22 October 1998 in Joined Cases C-9/97 and C-118/97, *Raija-Liisa Jokela and Laura Pitkäranta*, [1998] ECR 06267; Judgment of 5 March 2002 in Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99, *Hans Reisch and Others* (Joined Cases C-515/99 and C-527/99 to C-540/99) v. *Bürgermeister der Landeshauptstadt Salzburg and Grundverkehrsbeauftragter des Landes Salzburg and Anton Lassacher and Others* (Joined Cases C-519/99 to C-524/99 and C-526/99) v. *Grundverkehrsbeauftragter des Landes Salzburg and Grundverkehrslandeskommission des Landes Salzburg*, [2002] ECR 02157; Judgment of 15 May 2003 in Case C-300/01, *Doris Salzmann*, [2003] ECR 04899; Judgment of 23 September 2003 in Case C-452/01, *Margarethe Ospelt and Schlössle Weissenberg Familienstiftung*, [2003] ECR 09743; Judgment of 1 december 2005 in Case C-213/04, *Ewald Burtscher v. Josef Stauderer*, [2005] ECR 10309; Judgment of 25 January 2007 in Case C-370/05, *Criminal proceedings against Uwe Kay Festersen*, [2007] ECR 01129; Judgment of 8 May 2013 in Joined Cases C-197/11 and C-203/11, *Eric Libert and Others v. Gouvernement flamand* (C-197/11) and *All Projects & Developments NV and Others v. Vlaamse Regering* (C-203/11), ECLI:EU:C:2013:288.

24 Ágoston Korom, 'Az új földtörvény az uniós jog tükrében' (The new Land Law in the light of EU law), in: Ágoston Korom (ed.): *Az új magyar földforgalmi szabályozás az uniós jogban* (The new Hungarian land regime in EU law), Budapest, National University of Public Service, 2013, p. 14.

25 Korom 2013, p. 12.

26 Id., p. 14.

27 Id.

tegration rule (Article 39 TFEU) is the basis on the grounds of which a Member State can be exempted from the negative integration rules (Articles 49 and 63 TFEU) to a certain extent, if it introduces restrictions with regard to its national legislation on the transactions in land (acquisition of land ownership).[28] On the basis of the above, the cardinal question in this interpretative framework is to what extent this model of positive integration provides for an exemption from the rules of the negative integration model. In other words, on this basis, each dispute or opinion on the conformity of a Member State's legislation on the transactions in land with EU law can be essentially placed within the interpretative framework defined by the negative and positive integration models. For example, the opinion of the Advocate General issued in the Hungarian preliminary ruling procedure proposes to resolve the Hungarian usufructuary case excessively, almost exclusively by the negative integration model. Following a similar logic, the EU soft law documents issued in 2015 and 2017 may also be placed within this interpretative framework. On this basis, from among the documents to be discussed in more detail below, the Opinion of the European Economic and Social Committee and the Resolution of the European Parliament are rather based on the positive integration model, while the Interpretative Communication of the European Commission rather highlights the negative integration model, although not as excessively as the abovementioned opinion of the Advocat General. In the next chapter, the three EU documents will be further dealt with on the basis of that finding; at the same time, it should be noted that the options of long-term solutions to the interpretative disputes will not be addressed in the present work.[29]

11.2 The Soft Law Documents Issued by Certain Institutions of the European Union Regarding the Transactions in Land

It can result from the circumstances analysed in the first chapter of this study that, unlike before, certain institutions of the European Union, namely the European Economic and Social Committee, then the European Parliament and finally the European Commission, pay active attention to the connection of the transactions in land with EU law in a way not met before. In the following, I will try to delineate the soft law documents issued by the three institutions on the basis of the following considerations. On the one hand, I will try to assess the soft law character of the documents based on the previously referred system of Petra Láncos, paying particular attention to the legal basis enabling the three

28 Korom draws this conclusion analysing in particular the *Ospelt* and *Festersen* cases; Korom 2013, p. 14.

29 As regards the long-term solutions, *see*, in detail: Szilágyi 2015, pp. 93-95; János Ede Szilágyi, 'Cross-border acquisition of the ownership of agricultural lands and some topical issues of the Hungarian law', *Zbornik Radova Pravni Fakultet Novi Sad*, 2017/3/2, pp. 1067-1069. [Szilágyi 2017d]; Orsolya Papik, 'Trends and current issues regarding member state's room to maneuver of land trade' panel discussion, *Agrár- és Környezetjog*, 2017/22, pp. 132-145.

documents to be issued, that is, to the legal authorisation which gave rise to the issue of documents. On the other hand, considering the contents of the documents, I will address their findings on the acquisition of ownership by legal persons; I do this because, as explained above, this is the cardinal, conceptual system element of the Hungarian legislation on the transactions in land that is criticized by the European Commission at EU level. Thirdly, I will also examine how VGGT appears in each document. It is important to emphasize that all three documents can be analysed by considering several other aspects and that it would be worthwhile to include other aspects having regard also to the narrower subject of this study. The reason why I do not proceed with all this is the limited scope of this study, but I hope that the aspects set out in this chapter demonstrate that a more thorough analysis of the three documents can be an important goal for the future for Hungarian legal experts.

11.2.1 The Soft Law Character and the Legal Basis of the Documents

The legal basis for the first document, namely the '*own-initiative opinion*' of the European Economic and Social Committee (hereinafter: EESC 2015),[30] is laid down in Article 29(2) of the Rules of Procedure of the EESC. With regard to EESC 2015, it can be clearly stated, by applying the categorization of Petra Láncos,[31] that it has a dominant '*pre-law*' character, that is, in this case, a function of calling for legislation. In this respect, it not only calls on EU legislators to act,[32] but also the Member States.[33] The latter can be explained by the fact that the EESC also acknowledges: "land policy comes under the authority of the Member States."[34]

The legal basis of the '*resolution*' of the European Parliament (hereinafter: EP 2017)[35] and the circumstances giving rise to the issue thereof (interestingly, the two are not separate in the EP 2017) are, inter alia,[36] Article 52 of the Rules of Procedure of the European Parliament on own-initiative proceedings, VGGT and EESC 2015, as well as the infringement procedures initiated against the six new Member States. EP 2017 is similar

30 Opinion of the European Economic and Social Committee (EESC) on '*Land grabbing – a warning for Europe and a threat to family farming*', NAT/632 – EESC-2014-00926-00-00-AC-TRA (EN), Brussels, 21 January 2015.

31 Láncos 2018, pp. 128.

32 Points 1.9, 6.9, 6.11-6.13, 6.14, 6.21, etc. of EESC 2015.

33 Points 1.10, 6.4, 6.10, 6.11-6.13 of EESC 2015.

34 Point 1.9. of EESC 2015.

35 European Parliament (EP) resolution of 27 April 2017 on the state of play of farmland concentration in the EU: how to facilitate the access to land for farmers, P8_TA(2017)0197.

36 It also refers to (a) Petition No 187/2015 on the protection and administration of European agricultural land as shared wealth, (b) the study requested by the European Parliament's Committee on Agriculture and Rural Development, namely: Sylvia Kay – Jonathan Peuch – Jennifer Franco: *Extent of Farmland Grabbing in the EU* IP/B/AGRI/IC/2014-069, PE 540.369, Brussels, European Union, May 2015; (c) the report of the Committee on Agriculture and Rural Development No. A8-0119/2017.

to EESC 2015, amongst other things, as regards the fact that the pre-law character can be easily recognized, encouraging both the Member States[37] and EU decision-makers[38] to take legislative action (or action that can be regarded as legislative). Finally, with regard to EP 2017, I consider it important to note that, in paragraph 39 of EP 2017, in connection with the infringement procedures against the new Member States, the European Parliament "calls on the Commission to consider a moratorium on the ongoing proceedings aimed at assessing whether Member States' legislations on farmland trading comply with EU law." The call by the European Parliament was interesting to us because a proposition with a similar content[39] led to substantial debate among the members in the 2nd working committee of the European Council for Rural Law (*Comité Européen de Droit Rural*) Congress 2015 – which council has a consultative status with EU institutions and, in this respect, the respective motion of the general rapporteur of the working committee was not accepted.

The '*interpretative communication*' of the European Commission (hereinafter: EC 2017)[40] came, quasi, in response to EP 2017,[41] that is to say, the request or call by the European Parliament provided the legal basis for the European Commission to express its opinion on issues of land transactions; in my experience, the European Commission has been very reluctant to have a voice in this manner with regard to issues of land transactions, and it expressed its views rather in individual cases, in the course of examining the land rules of a specific Member State. This approach of the European Commission is also the reason why this document is the most moderate, among the three EU documents, with regard to the legislative issues; if there is any reference to this issue, it mostly appears in the context that the Member States have to develop their own national rules in the light of the relevant legal framework of the EU; this is not very much of an innovation in itself, as this has always been the view of the European Commission in individual cases. In EC 2017, the European Commission does not raise the question whether the EU institutions has any kind of further legislative work with regard to the subject; however, the European Commission refers[42] to the consistent implementation of certain legislative processes initiated previously (we will return to these in connection with the issues on the acquisition of ownership by legal entities). According to the European Commission's interpretation, the current legal framework in the European Union is clear and, in essence, this is also suggested by the fact that the European Commission has a clear view on the possible

37 These can be interpreted as such: Points 22, 37. and 12, 19, 21, 27. of European Parliament resolution on the state of play of farmland concentration in the EU.

38 These can be interpreted as such: Points 28, 31, 39. and 2, 6, 17, 27. of European Parliament resolution on the state of play of farmland concentration in the EU.

39 Szilágyi 2015, p. 95. For a more detailed analysis of the issue, *see also*: Szilágyi 2017c.

40 European Commission (EC): Commission Interpretative Communication on the Acquisition of Farmland and European Union Law (2017/C 350/05), OJ C 350, 18.10.2017, pp. 5-20. [EC 2017].

41 Cf. Point 39 of EP 2017 and the introductory part and Point 1. c) of the EC 2017.

42 Point 1. c) of EC 2017.

controversial matters. In this regard, I believe that, in EC 2017, the '*harmonizing soft law*' character[43] is the most decisive.

In view of the above, it can be clearly stated that the three documents on almost the same issues clearly reflect the different attitude of the three EU institutions to the issue of cross-border acquisition of agricultural lands.

11.2.2 The Substantive Provisions of the Documents on the Acquisition of Ownership by Legal Persons

The three EU documents approach differently to the issue on the acquisition of ownership by legal persons and to other regulatory issues related to it, such as transparency and traceability.

As regards these matters, the European Economic and Social Committee clearly highlights the issue of transparency with regard to legal persons, emphasizing that "[i]t is difficult to obtain reliable data on the extent of land grabbing as not all land transactions are recorded and *there is often insufficient transparency on land transactions between companies*, for example in the case of purchases by subsidiaries and partner companies."[44] In other parts, the European Economic and Social Committee adds that "there are now increasing indications that the legal entities are *particularly vulnerable* to non-agricultural investors."[45] Thereafter, the European Economic and Social Committee puts forward a proposal to address the issue of transparency; it is another matter that, in my opinion, the proposal would be able to guarantee the transparency of the relations arising from the ownership chain of legal persons, taking into account, in essence, the limited possibilities of the Member States, only to a certain extent: "EU Member States should have state institutions with an overview of agricultural land ownership and use structures. To this end, national databases should include information not only on landowners but also on users."[46] I note that the problem of traceability has been acknowledged also by the European Commission (see below).[47] In respect of the subject hereof, it is a further substantive[48] issue in relation to the acquisition of ownership by legal persons that the European Economic and Social Committee, while requesting the European Parliament and Council to discuss "whether the free movement of capital should always be guaranteed in the case of alienation and acquisition of agricultural land and agribusinesses",[49] also sets out the task that "[w]e need an answer to the question whether the free movement of

43 Láncos 2018, pp. 118-121.
44 Point 2.7 of EESC 2015.
45 Id., point 3.6.
46 Id., point 6.18.
47 Point 1. c) of EC 2017.
48 For example, a proposal that concerns legal entities, but is less important in terms of the Hungarian legislation: Point 6.15 of EESC 2015.
49 Point 6.9 of EESC 2015.

capital and free markets are compatible with equal access to land acquisition for all natural and legal persons."[50]

In the resolution of the European Parliament, there are several important findings concerning the acquisition of ownership by legal persons. On the one hand, the European Parliament itself recognizes that a group of legal persons as owners can establish, in essence, an unlimited number of legal persons, thus, certain rules apply completely otherwise in respect of such owners as compared to a natural person; therefore, the European Parliament concludes that "existing rules on the capping of direct payments above EUR 150 000 become inoperative if legal persons own multiple agricultural subsidiaries, each of which receives less than EUR 150 000 in direct payments."[51] Applying this finding of the EP 2017 in an analogous way, the Hungarian position, according to which the provisions on the ceilings set for the acquisition of land and for the ownership of property (considered to be EU-compliant also by the European Commission in respect of the Hungarian legislation[52] and supported also by the EESC[53] and EP[54]) could not be controlled and would become meaningless if legal persons would acquire ownership, can be strengthened. In respect of the ceilings set for the acquisition of land ownership by legal persons, another important finding of the EP 2017 is that the European Parliament considers it an acceptable restriction and even encourages its application; namely

> "[the European Parliament] encourages all Member States to use such instruments to regulate the market in land as are already being used successfully in some Member States, in line with EU Treaty provisions, such as state licensing of land sales and leases, rights of pre-emption, obligations for tenants to engage in farming, *restrictions on the right of purchase by legal persons*, ceilings on the number of hectares that may be bought, preference for farmers, land banking, indexation of prices with reference to farm incomes, etc."[55]

Of course, this part of the EP 2017 should be interpreted in its entirety, which means that the European Parliament places a requirement in respect of all the aforementioned measures that they are applied "in line with EU Treaty provisions." Nevertheless, for Hungary, it can be interpreted as significant support that the restriction of land acquisition by legal persons is considered by the European Parliament to be compliant with EU law. This can be considered a serious feat of arms for Hungary in the light of the fact that the European

50 Id.
51 Point W. of EP 2017.
52 On the other hand, cf. Point 4. h) of EC 2017.
53 Point 6.15 of EESC 2015.
54 Point 22 of EP 2017.
55 Id.

Commission, on the other hand, almost conceptually denies the conformity of the institution with EU law, as detailed below.

The interpretative communication of the European Commission, which is based on the case law of the Court of Justice of the European Union (CJEU), goes through the restrictions on the acquisition of lands applied by the new Member States and disputed by the European Commission. In this assessment, the European Commission pays special attention to the prohibition of the sale to legal persons and concludes, in this context, that

> "a national rule prohibiting the sale of farmland to legal persons is a restriction on the free movement of capital and, where applicable, the freedom of establishment. It can be concluded from the CJEU's jurisprudence that such a restriction is unlikely to be justified… It can be concluded from the CJEU's considerations that such a prohibition is not justified because it is not necessary to achieve the claimed objective. In this context, the CJEU also referred to examples of less restrictive measures, in particular making the transfer to a legal person subject to the obligation that the land will be let on a long lease."[56]

In the light of the fact that one of the grounds for initiating the infringement procedure against Hungary was this restriction, the abovementioned opinion of the European Commission does not contain any novelty. For my part, with regard to this issue, I would highlight – beyond what I pointed out with regard to the anomaly of the monitoring of restrictions to acquisition – that in the case law of the Court of Justice of the European Union, a general restriction to acquisition such as the Hungarian one has not yet been assessed. Moreover, the question also arises how the Court of Justice of the European Union will ultimately decide on such an issue, which includes strong elements of sovereignty (or, in this respect, policy elements), in the interpretative framework at the crossroads of the negative and positive integration models, having regard to the resolution of the European Parliament which is revolutionary in many respects and has moved towards the positive integration model in this regard.

11.2.3 The Relationship between the Documents and FAO Soft Law

The three EU documents refer to several international documents in a wide variety of contexts. In this regard, the question may arise, inter alia, to what extent they fit into the interpretative framework within which the Court of Justice of the European Union has reached its decisions regarding cross-border acquisition of lands so far. From among the three EU documents, the opinion of the European Economic and Social Committee refers

56 Point 4. g) of EC 2017.

most widely to the international documents. In respect of the transactions in land, the European Economic and Social Committee refers to Article 25 of the Universal Declaration of Human Rights, the *hard law or soft law* status of which is debated, and to Article 11 of the International Covenant on Economic, Social and Cultural Rights, which is considered hard law, as important documents of human rights for sufficient and safe food. Concerning the two specific legislation, it draws the following conclusions; on the one hand, that "[t]he above two articles are also directly linked to the *access to land*,"[57] and, on the other hand, that "[a]gricultural land provides the basis for food production and is thus the prerequisite for ensuring *food security*."[58] After all that, in respect of the transactions in land, EESC 2015 refers expressly to a number of *soft law* documents[59] which typically deal with the acquisitions of land as *investments*,[60] and also devotes particular attention to the FAO *guidelines on tenure rights*, which the European Economic and Social Committee considers to be a "milestone, and calls for them to be resolutely and precisely implemented"[61] in all Member States. In addition, in respect of VGGT, the European Economic and Social Committee launches the following call:

> "The EESC calls on all EU Member States to report to the EU Commission and FAO on the use and application of the Voluntary Guidelines on the Responsible Governance on Tenure (VGGT, adopted by the FAO in 2012) in their land governance policies. The guidelines have a global scope (Article 2.4) including Europe. The VGGT call on States to set up multi-stakeholder platforms … to monitor the implementation of the Guidelines and bring their policies in line with them… [See Point 2 of Article 26 of VGGT]."[62]

Yet, the European Economic and Social Committee goes beyond the point to merely call for the implementation of VGGT, as, in my view, it intends also to make reforms in respect of the establishment of the EU legal framework on land transactions by considering it important to involve the assessment of a new element within the interpretative framework dominated by the old negative and positive integration models, namely, the

57 Point 6.1 of EESC 2015.

58 Id., point 1.2.

59 "UNCTAD, FAO, IFAD and the World Bank have jointly developed principles for responsible agricultural investment respecting rights, livelihoods and resources. The Organisation for Economic Cooperation and Development (OECD) has drawn up a Policy Framework for Investment in Agriculture (PFIA). The aim is to guide states in framing policy measures to encourage private agricultural." Point 6.4 of EESC 2015. *See*: UNCTAD – FAO – IFAD – World Bank: *Principles for responsible agricultural investment that respects rights, livelihoods and resources (PRAI)*. http://unctad.org/en/Pages/DIAE/G-20/PRAI.aspx; OECD: *Policy Framework for Investment in Agriculture – PFIA*. OECD, 2013, http://www.oecd.org/daf/inv/investment-policy/PFIA-July-2014.pdf.

60 For a more detailed analysis of this approach, *see*: Szilágyi 2018a, pp. 194-222.

61 Point 6.5 of EESC 2015.

62 Point 6.20 of EESC 2015.

EESC would leave scope for the aspects of food security: "[i]f the European Parliament and the Council conclude that restrictions on the movement of capital are justified in the interests of food security, discussions at international level will be needed since free movement of capital is safeguarded under various international agreements."[63] A similar conclusion can be drawn from other parts of EESC 2015: "[r]esearch should also look at the risks of land concentration for food security, employment, the environment and rural development."[64]

The European Parliament considers the EESC 2015 as an important basis of reference but considers it important that VGGT is specifically highlighted and particularly addressed by the European Parliament itself. In addition to the fact that, in respect of VGGT, similar phrases may be found in EP 2017[65] as in EESC 2015 (with some differences, for example, in respect of the reporting of the European Commission related to VGGT, the EP calls more firmly for the fulfilment thereof), such as including the concept of food security into the interpretative system of cross-border land grabbing.[66] Another novelty offered by EP 2017 was that the European Parliament "[s]uggests, in this regard, that the Commission adopt recommendations on EU land governance, in line with the VGGT and taking into account the horizontal EU frameworks on agriculture, the environment, the internal market and territorial cohesion."[67]

The European Commission, although VGGT is mentioned in EC 2017 by the European Commission itself,[68] is rather modest in connection with VGGT as compared to the documents of the European Economic and Social Committee and the European Parliament. In my view, in EC 2017, the European Commission, in essence, specifically avoided including the fundamental concept of VGGT, that is, food security, in the interpretative framework developed within the system of negative and positive integration models by the Court of Justice of the European Union. All this raises the question as to what can VGGT and food security mean in terms of content, as it is possible to take a position, for example, on the necessity of the involvement of all these into the EU legal framework on the cross-border acquisition of agricultural lands only on this basis. However, before addressing that issue, it should be noted that, in other respects, the European Commission considers it important to use the FAO documents. For example, the fact that "[i]n its research, the FAO concludes that, globally, foreign agricultural investments benefit national economies, local communities and the agricultural sector…."[69] In support of its above statement, the European Commission refers to a website of FAO,[70] but few months

63 Id., point 6.11.
64 Id., point 6.19.
65 Points 8, 27, 37 of EP 2017.
66 Id., points T, V, 8, 37.
67 Id., point 28.
68 Point 1. a) of EC 2017.
69 Id., point 1. d).
70 http://fao.org/investment-in-agriculture/en.

after the publication of the interpretative communication of the European Commission, when this study was written, the page cited was no longer available. Instead, the FAO website led to another site.[71] However, the FAO reports[72] on agricultural investments available on this site do not make such a statement. The materials argue for the importance of agricultural investments (which can undoubtedly be foreign direct investments, *i.e.* FDIs, as well), but no material could be found which would, by specifically focusing on foreign agricultural investment, highlight some of its unique positive effects. In my understanding, FAO materials deal with investments and highlight their positive nature only in general terms. In other words, it is questionable to which FAO report, document the European Commission referred in support of its argument. I hereby note that EC 2017 also refers here to an OECD document, but, in this respect, I was not able to come to a conclusion similar to that of the European Commission, as, also in this OECD material, the importance of investments in agriculture is underlined in general terms. Moreover, in respect of foreign investments in land, the cited OECD material draws attention also to the social risks.[73]

11.3 FAO's VGGT as the Document Implementing the Concept on Food Security into the Relationships Concerning the Transactions in Land

In the following, FAO's voluntary guideline issued on the subject-matter of this study, VGGT will be presented, by first discussing FAO's concept on food safety in general terms and then presenting its interpretation developed for the relationships relating to agricultural land ownership and use structures on the basis of VGGT.

11.3.1 FAO's Concept on Food Security

FAO, as a UN organization, aims to promote the implementation of a number of noble goals and concepts on the organization of society, for example, sustainable development and a high level of protection of the environment, but perhaps the most important concept on the organization of society is the concept of *food security* which seems to be the *sine qua non* of FAO's current[74] functioning.[75] Before unravelling the nature of food security, it is important to note that it is not equal to *food safety* and *food sovereignty*,

71 http://www.fao.org/support-to-investment/en.

72 *See, for example*: FAO – IFAD – WFP: *Achieving Zero Hunger: the critical role of investments in social protection and agriculture*. Rome, FAO, 2015, http://www.fao.org/3/a-i4951e.pdf.

73 OECD op. cit. 29.

74 On the changes of FAO's operation over time, *see*: Di Benedetto, pp. 103-107.

75 Di Benedetto notes that FAO's objectives on food chain came into view just when the issue of the preservation of natural resources was marginalized; *see*: Di Benedetto, p. 104.

although its relationship with these concepts is close. With this in mind, after defining food security in a way, the other two concepts will also be referred to in this part.

There are many definitions of *food security*.[76] In the present work, I undertake to discuss the main elements of FAO's food security concept. In this context, it seems important to point out that FAO's food security concept itself kept constantly changing,[77] its current form was adopted in 1996 at the World Food Summit and was published in a two-part document.[78] The second part of this document, the so-called World Food Summit Plan of Action (paragraph 1) includes the definition itself. According to this, food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life. Based on the above definition, four dimensions of food security are distinguished:[79] (a) food should be physically available in a geographical environment, (b) the people concerned should have economic and physical access to food, (c) food should allow appropriate utilization by the human body, (d) the above three dimensions should be stable over time. With regard to the concept of food security, *Norer* and *Preisig* point out that this concept is often "monopolized" in the discussions related to the 'right to food'[80] (as mentioned above, this right and its international legal basis were also referred to in EESC 2015).

Food safety – as opposed to food security – is related to human health and essentially expresses whether the quality of foodstuffs is appropriate for human consumption and does not pose a risk to human health. An important task of food safety is to prevent food-related illnesses. In relation to the comparison of the concepts of food security and food safety, *Norer* and *Preisig* consider it important to point out both the difference between the two and their relationship. They think that the key reason for the difference is the fact that while food security covers the quantitative aspect of the food chain, food safety is more of a quality aspect of the food chain. As an example of the relationship between the two concepts, they mention the development the starting point of which was the 'right to food', from where a shift has hitherto taken place towards the '*right to adequate* food' in which, besides the quantitative dimensions of food security, the quality dimensions of food safety have also appeared.[81]

---

76 Per Pinstrup-Andersen, 'Food security: definition and measurement', *Food Security*, 2009/1. pp. 5-7.

77 FAO, *Trade reforms and food security*, Rome, 2003, pp. 25-31.

78 FAO, *Rome Declaration on World Food Security and World Food Summit Plan of Action*, Rome, 13 November 1996, http://www.fao.org/docrep/003/w3613e/w3613e00.HTM.

79 FAO, *An Introduction to the Basic Concepts of Food Security*, [-], EC – FAO Food Security Programme, 2008. 1. http://www.fao.org/docrep/013/al936e/al936e00.pdf.

80 Roland Norer & Christa Preisig, 'Genetic Technology in the Light of Food Security and Food Safety – General Report' in: Roland Norer (ed.), *Genetic Technology and Food Safety*, Switzerland, Springer International, 2016, pp. 12-13. An important monographic work on the subject: Júlia Téglásiné Kovács, *Az élelemhez való jog társadalmi igénye és alkotmányjogi dogmatikája*, (The social need and constitutional dogmatics of the right to food), Doctoral thesis, Budapest, Pázmány Péter Catholic University, 2017.

81 Norer & Preisig, pp. 14-15.

I consider it important to discuss also the concept of *food sovereignty*, since EP 2017 addresses it, and, as will be shown below, it relates to VGGT as well,[82] and it can be particularly suitable for strengthening the Hungarian position in our EU legal disputes concerning the legislation on the transactions in land. The concept of food sovereignty[83] is mostly linked to an international organization involving small farmers, *La Via Campesina*, which published its concept[84] in conjunction with the FAO World Food Summit as a kind of response to the food security concept of FAO.[85] The concept of food sovereignty was formulated as a reaction to the economic liberalization of the food chain and, inter alia, the issue of *who controls* the natural food producing resources such as land, water, seeds and genetics and for what purposes was defined to be an important criteria.[86] According to the original definition of the concept, food sovereignty is the right of each nation to maintain and develop its own capacity to produce its basic foods *in its own territory* respecting *cultural and productive diversity*; food sovereignty is a precondition to genuine food security.[87] With regard to the concept, *Dirgasová* and *Lazíková* draw the attention to the fact that VGGT itself aims to achieve goals such as food sovereignty (!), although VGGT *expressis verbis* does not include food sovereignty, only food security.[88] The Manual on the VGGT fully supports this interpretation. There was a serious social initiative which wanted to specify also the concept of food sovereignty in VGGT. Although this revolutionary innovation did not happen, also the Manual refers to the fact that some elements of food sovereignty were incorporated into VGGT, and VGGT can also be suitable for providing assistance in the implementation of this concept.[89] In view of the above, the possible application of the VGGT in the EU legal framework for cross-border acquisitions would, in my view, provide a decisive move towards an interpretation based on the positive integration model.

82 Points V, W of EP 2017.

83 *Cf*. Norer & Preisig, p. 12.

84 *Profit for few or food for all – Food Sovereignty and Security to Eliminate the Globalisation of Hunger*. Statement by the NGO Forum to the World Food Summit, Rome, 17 November 1996.

85 European Coordination Via Campesina, *Food Sovereignty Now! – a Guide to Food Sovereignty*, Bruxelles, ECVC, 2018, p. 5. Anyways, another UN institution and the person by whom this position is filled (Olivier De Schutter) has done quite a lot to ensure that food sovereignty is also given sufficient weight in the UN discussions: Colin Sage, Food security, food sovereignty and the special rapporteur, *Dialogues in Human Geography*, 2014/2, pp. 195-196.

86 European Coordination Via Campesina 2019, p. 7.

87 Via Campesina, *The Right to Produce and Access to Land*. Rome, 11-17 November 1996, http://www.acordinternational.org/silo/files/decfoodsov1996.pdf. The most recent definition of food sovereignty was introduced in 2007: *Declaration of Nyéléni*. Nyéléni Village, Mali, 27 February 2007, https://nyeleni.org/spip.php?article344.

88 Katarína Dirgasová & Jarmila Lazíková, 'Agricultural Land Ownership as Food Sovereignty', in: Mariagrazia Alabrese et al. (ed.), *Agricultural Law*, Cham, Springer International, 2017, pp. 368-369.

89 Delphine Ortega-Espčs et al. (eds.), *People's Manual on the Guidelines on Governance of Land, Fisheries and Forests*, [-], FAO, 2016, pp. 16-19, http://www.eurovia.org/wp-content/uploads/2016/06/peoplesmanual.pdf *See, also*: Annex to People's Manual on the Guidelines on Governance of Land, Fisheries and Forests. http://www.eurovia.org/wp-content/uploads/2016/06/peoplesmanual_annex.pdf.

11.3.2 The Voluntary Guidelines

Di Benedetto's below thoughts draw attention to the significance of the fact that, through VGGT, FAO established orienting rules on issues of transactions in land in a concise form: the issues of land ownership and transactions in land initially fell outside the "quasi normative" competence of FAO;[90] the question of why we cannot speak of a uniform international discipline of agricultural law at international level can be explained by the lack of regulation or effective case law on issues of land ownership and transactions in land at international level.[91] In other words, if we agree with Di Benedetto's thoughts above, the adoption of VGGT can be regarded as groundbreaking not only in terms of the internationalisation of the legislation on the transactions in land but also in terms of the science of agricultural law. In the present work, however, a detailed analysis, according to the importance of VGGT,[92] cannot be provided, and only some comments, which hopefully encourages to perform further research, will be formulated in relation to the restrictions outlined in earlier parts of this work.

In addition to land, VGGT also covers the issues of forestry and fisheries, nevertheless, FAO recommends the application of its *voluntary*[93] rules taking into account the other natural resources as well. In this study, however, VGGT is analysed *in relation to the transactions in land* only, as the EU documents referring to it also dealt with it in this respect.

However, before this restrictive analysis, it is important to emphasize, that VGGT is not based on the logic of EU law (including the case law of CJEU) on cross-border land transactions, but, following a fundamentally different concept, it analyses the situation essentially[94] on the basis of food security and, in view of the above, to a certain extent, food sovereignty, and it addresses, inter alia, the issues of land transactions and acquisitions of lands in this context.

90 Di Benedetto, footnote 21.

91 Id., pp. 106-107.

92 For a kind of afterlife of VGGT, *see, for example*: World Forum on Access to Land and Natural Resources: *Final Report from the WFAL 2016*. Valencia, March 31st – April 2nd 2016, http://www.landaccessforum.org/wp-content/uploads/2015/05/Final-report_EN.pdf.

93 VGGT, p. iv and Points 2.1, 2.2, 2.3 and 2.5 of VGGT. For an explanation of the voluntary character of VGGT, see, also: Ortega-Espčs 2016, pp. 12-16.

94 VGGT itself is based on more draft materials of FAO including the right to food as well (for example: *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, also known as: *Voluntary Guidelines on the Right to Food*), and the 'tenure rights' referred to in *Millennium Development Goals*; VGGT, iv–vi. The same interpretation is strengthened by Point 4.1 of VGGT. It is important to mention that, in this way, these concepts are also incorporated into and strengthened in the EU soft law with regard to the issues on cross-border acquisition of land.

From among the provisions of VGGT, which may be divided into a preface and 7 further parts and into 26 points within the parts in all, the provisions of the following parts are, in particular,[95] relevant for the subject-matter of this study: the preface being an aid to the interpretation of VGGT, Part 1 on the objectives and scope, Part 2 on general matters, Part 3 on the legal nature of tenure rights and duties and, Part 4 on the transactions in land, transfers and acquisitions of tenure rights and duties.

For the proper interpretation of VGGT, it is important to emphasize that it was written for states with the most different economic development and organized on the basis of radically *different social models*. Therefore, it contains a number of elements which, for example, are obvious for a Member State of the European Union and can be considered as being a part of its legal system for many years. Such provisions, which also appear repeatedly in other UN documents, provide, for example, for ensuring gender equality and combating discrimination and corruption. In this study, such or similar provisions are treated as an integral part of EU and national law, so these are not addressed in greater detail, instead, I try to focus on provisions which relate more to the specialties of the legislation on the transactions in land.

In addition to the above, in respect of the conceptual structure of VGGT, it is worth pointing out two important elements: the avoidance of the so-called *land grabbing*,[96] which has come to the forefront of public attention in recent years and is treated essentially as a negative phenomenon, or, as it is mentioned in the VGGT: *large-scale transaction* and the protection of *indigenous people*.

With regard to the protection of the latter group, it often raises problems that although they have been using their homeland since ancient times, they are not registered as subjects of ownership or use rights recognized in the modern legal system, therefore, the land concerned is an easy target for investors who are experienced in legal matters. In my view, the protection of indigenous people from such threats is less relevant for Europe or the European Union as compared to Africa or South America. On the contrary, land grabbing may raise more questions for Europe and for the European Union. In recent years, several forums have expressed their views on the question of whether it is possible to speak of land-grabbing on our continent or within the European Union.[97]

As regards the category of '*(agricultural) land*' contained in VGGT, the voluntary guideline draws attention to the fact that, in relation to *tenure*, there is no international

95 I hereby note the Part 5 of VGGT contains Point 22 which details '*cross-border transactions*', but this point essentially addresses situations such as grazing practices of nomadic, which are irrelevant in our case. Nonetheless, it should be noted that the wording of Point 22.1 is somewhat ambiguous about *migration*. In my view, migration, in this point, refers to the temporary movements of the aforementioned (shepherding of nomadic nations) or similar life situations.

96 For a definition of this, *see*: Szilágyi 2017a, p. 112; Szilágyi 2015, p. 92.

97 EESC 2015 was essentially based on this theme alone; *see*: Points 2.9 and 3.1-3.9 of EESC 2015. *Cf.* Szilágyi 2015, pp. 92-94; Ludivine Petetin, 'Developments in rural law following the 2017 European Congress on Rural Law', *Cardiff University Blogs Environmental Justice Research Unit*, https://tinyurl.com/petetin061017.

definition of land; therefore, the meaning of the word can only be defined in a national context.[98] The other basic category of VGGT is 'tenure', which, in the title of VGGT, was translated to Hungarian as the '*ownership and use relationships*' of the land, and it is recommended to use it in this quite general context also for other aspects of VGGT. In my view, this interpretation of tenure and *tenure systems* is supported by both the VGGT[99] and the related FAO literature.[100] Ownership and use relationships, of course, vary considerably across jurisdictions, nations and levels of regulation (for example, in relations between the EU and the Member States or between federal states and its constituent states). According to the approach of VGGT, land ownership and use relationships cannot be regarded as absolute in the sense that they may be constrained by the rights of others or by restrictions in the public interest which are adopted to protect the environment (such as sustainable land use) or to ensure human rights.[101] Against this background, the purpose of VGGT is to enable the addressees of VGGT to implement '*responsible governance*' as regards land ownership and use relationships by means of solutions proposed by VGGT.[102] The responsible governance as regards land ownership and use relationships is intended to ensure, inter alia, human rights, food security, poverty eradication, sustainable livelihoods and rural development.[103]

In Point 11 of VGGT on land market, the '*local community*' also appears as a value deserving protection. This is important because a certain form of protection of local (rural or agricultural) communities is reflected in the case law of the Court of Justice of the European Union as a general interest objective, but without explaining the substantive elements of the definition of local community. It certainly makes quite a difference what is meant by the term 'local community', since, subject to this, the ranges of restrictions on land market protecting local communities can be very broad. The landscape is further characterised by the fact that the interpretation of local community, which was always potentially different in countries of different cultures, has become even more complicated since the reinterpretation of EU's rural development strategy in 2016 (essentially by integrating the migration issues).[104] In this respect (or in relation to these issues), VGGT concludes that, beyond the market value, land may have social, cultural, spiritual,

98 Footnote of Point 1.1 of VGGT. For the values of land, *see*: Points 9.1 and 9.7 of VGGT.

99 VGGT, iv. and Point 1.2 of VGGT. *See, also*: Points 4.3, 4.8, 8.8 and 11.1 of VGGT. For the interpretation of tenure, *see, also*: Ortega-Espčs 2016, p. 13.

100 FAO, *Land tenure and rural development*, FAO Land Tenure Studies 3, [Rome], FAO, 2002, 1-18, http://www.fao.org/3/a-y4307e.pdf.

101 Points 4.3 and 4.8 of VGGT.

102 VGGT, iv, and Points 1.2, 2.4, 5.1 of VGGT.

103 Point 4.1 of VGGT.

104 János Ede Szilágyi, 'A vidéki közösség koncepciójának változó kategóriája és jelentősége a föld, mint természeti erőforrás viszonyában (The changing category and significance of the concept of rural community in relation to land as a natural resource)', *Publicationes Universitatis Miskolcinensis Sectio Juridica et Politica*, 2018/36, 485-502, [Szilágyi 2018b].

environmental and political values as well.[105] According to VGGT, states should take measures to prevent such undesirable impacts on local communities that may arise from, inter alia, land speculation and land concentration;[106] according to VGGT, states and other parties (!) should recognize that values, such as social, cultural and environmental values, are not always well served by unregulated land markets; states should therefore protect the wider interests of societies through appropriate policies and laws on tenure.[107] In my view, the local community concept of VGGT enables the interested states to use a local community concept based on a cultural, spiritual commonality of interests as a basis for their regulation deserving protection. In my opinion, all this could strengthen the Hungarian position in our EU legal disputes concerning the legislation on the transactions in land. Finally, with regard to Point 11 of VGGT on land market, I observe that VGGT also considers the protection of the land ownership and use relations of agricultural *small-scale producers* as an important criterion in relation to the legislation on transactions in land.[108]

As indicated previously, cross-border acquisitions of land often appear in international law as *investment* issues. Accordingly, the relevant guidelines of VGGT, principally set out in Point 12, are also of paramount importance. In this regard, VGGT defines, inter alia, the concept of 'responsible investment',[109] which ensures the improvement of food security, as an objective to be achieved, in relation to which it formulates guidelines for the states, especially the states which are investors,[110] and also for investors.[111] Important elements of responsible investment are, inter alia, the issues of land grabbing and land concentration.[112] Finally, in this work, I wish to refer in more detail only to a specific element of VGGT, namely transparency. In this regard, VGGT considers it important that all forms of transactions in tenure rights as a result of investments in land should be done transparently, and the (registration and licensing) systems, which ensure the transparency thereof, should also contain the ownership background.[113] Since the accurate mapping of the ownership background of legal persons, in the context of the current conditions of globalization, present serious difficulties (here, the term 'impossible' could also be used) for such a small country as Hungary, therefore, in my view, the guideline laid down in VGGT could also strengthen the Hungarian position in our EU legal disputes concerning the restrictions on the acquisition of land ownership by legal persons.

105 Points 9.1 and 18.2 of VGGT, 9.
106 I note only as a reminder that the capacity of legal persons that it is possible to establish an unlimited number of legal persons can contribute significantly to land concentration.
107 Point 11.2 of VGGT.
108 Point 11.8 of VGGT. The issues of active support to small-scale producers appear, for example, in relation to investments as well; Point 12.2 of VGGT.
109 Points 12.1, 12.4 and 12.8 of VGGT.
110 Points 3.2 and 12.15 of VGGT.
111 Point 12.12 of VGGT.
112 See, in particular: Points 12.5, 12.6, 12.10 and 12.14 of VGGT.
113 Point 17.1 of VGGT.

11.4 Conclusions

In this study, soft law was analysed in a field of European Union law, namely in relation to cross-border acquisitions of agricultural lands, where such documents have so far not been typically used. In this regard, three EU institutions issued documents, which contain different conclusions on some issues. In my view, all three documents might be capable of providing a basis of informal reference for the Court of Justice of the European Union in cases regarding the acquisition of lands. This situation raises the following questions, namely, on the one hand, whether the Court of Justice of the European Union will refer to these documents, on the other hand, which of these document(s) will be applied by the Court of Justice of the European Union, and finally (if more than one document is cited by the Court), how the Court of Justice of the European Union will choose the acceptable finding(s) from the contradicting statements. Is there any hierarchy among the different soft law documents in the practice of the Court of Justice of the European Union? In this study, great emphasis was similarly placed on the fact that all three EU documents addressed the relevant voluntary guidelines of the UN FAO which guidelines can also be considered unusual. Additionally, two of the three EU documents recommend the substantive application of the FAO document. In my view, the voluntary guidelines of FAO may, on this basis, have a role even in the practice of the Court of Justice of the European Union in cases regarding the acquisition of lands. The question arises as to whether the food security concept of the FAO and, in a certain sense, even the food sovereignty concept can be applied in the practice of the Court of Justice of the European Union in cases regarding the acquisition of lands, which situation may significantly amend the interpretative framework of the Court's case law.