PRAVNI FAKULTET UNIVERZITETA U NOVOM SADU

ZBORNIK RADOVA

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Zbornik radova (sveske od 2007. godine) pod nazivom *Proceedings of Novi Sad Faculty of Law* dostupan je u *EBSCO* bazi *Academic Search Complete* (http://www. ebscohost. com).

Zbornik radova (sveske od 2005. godine) dostupan je na veb sajtu Pravnog fakulteta u Novom Sadu (http://www. pf.uns.ac.rs).

Zbornik izlazi neprekidno od 1966. godine
Od 2012. godine Zbornik izlazi četiri puta godišnje.

Cena jedne sveske Zbornika je 5.000 dinara.

UNIVERZITET U NOVOM SADU
PRAVNI FAKULTET U NOVOM SADU
UNIVERSITY OF NOVI SAD
FACULTY OF LAW NOVI SAD
(SERBIA)

ZBORNIK RADOVA
COLLECTED PAPERS

LI 3 (2017)

Том II

NOVI SAD, 2017.

ZRPFNS, godina LI Novi Sad, br. 3 (2017)

UDK 3 ISSN 0550-2179 eISSN 2406-1255

SADRŽAJ

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Poštovani čitaoci,

Proces globalizacije, kao i jačanje međunarodne saradnje doveo je do intenziviranja prekograničnih ekonomskih odnosa. Poslednjih decenija dolazi do značajnog umanjenja pravnih barijera u razmeni na prostoru Evropske unije. Ideja je da se do jedinstvenog evropskog tržišta dođe kroz afirmaciju principa četiri slobode (sloboda kretanja ljudi, kapitala, roba i usluga). Organi Unije, na osnovu akata o njenom osnivanju, počeli su poslednjih godina da sprovode mere kako bi se omogućilo državljanima jedne države članice da stiču i koriste nepokretnosti na teritoriji drugih država članica. Ove mere su izazvale značajne otpore u novim članicama Unije, kao i u zemljama- -kandidatima za članstvo.

Srbija je objavila svoju ambiciju da postane član Evropske unije, i već duže vremena se nalazi u procesu pridruživanja Uniji. Sporazumom o stabilizaciji i pridruživanju između Evropske unije i Srbije, Srbija se obavezala da će do 1. septembra 2017. godine liberalizovati tržište nepokretnosti (uključujući tu i tržište poljoprivrednog zemljišta) za državljane država članica Unije. Srbija u pogledu prava stranaca još uvek ima zakonska rešenja nasleđena iz ranijeg perioda. Redaktori Nacrta Građanskog zakonika RS po ovom pitanju nisu ponudili predlog konačnog rešenja, već su pozvali na široku naučnu i stručnu debatu koja će osvetliti problem iz više uglova. Navodno u cilju ispunjenja preuzetih obaveza, u Srbiji se u avgustu 2017. godine pristupilo izmenama zakonodavstva kojim se reguliše ova oblast.

Vreme je pokazalo da je pitanje liberalizacije tržišta nepokretnosti (pre svega poljoprivrednog zemljišta) za Srbiju je izuzetno važno. Uredništvo Zbornika radova Pravnog fakulteta u Novom Sadu želi da podstakne naučnu debatu na temu prava stranaca da stiču svojinu na nepokretnostima. Želja nam je da ovaj problem osvetlimo iz svih aspekta, uključujući tu pravni, ekonomski, bezbednosni, politički i socijalni aspekt. Naredne stranice biće posvećene analizi spornog pitanja. Autori su pokušali da osvetle problem iz više uglova, te da ukažu na prednosti i mane mogućih pravnih rešenja. Pozivamo sve zainteresovane autore da svoje rukopise koji se bave ovom temom i dalje šalju uredništvu Zbornika radova, kako bi se pomoglo državnim organima da definišu optimalno pravno rešenje ovog problema.

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Originalni naučni rad 347.74:338.48(4)
doi:10.5937/zrpfns51-13658

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THE ACQUSITION OF REAL ESTATE BY TIMESHARING CONTRACT IN EUROPE

Abstract: *Timeshare agreement is a contract that aims to the acquisition of the right to use an accommodation for a period of time on a rotating basis and according to this agreement the consumer, in return for consideration, directly or indirectly acquires the right from the marketer for more than one year to use one or more properties repeatedly for recreation or housing aims for a definite period of time. As for the characteristics of the right of utilization acquired by timeshare agreement, from the aspect of using this right, there is the direct and indirect type: in the first case apart from the title nothing is needed in order to use timeshare, but in the latter case a legal instrument (e.g. membership in an organization) must be applied beside the title in order to live with the right of utilization (the right of utilization is attached to the mentioned legal instrument). The direct right of utilization can be considered as right in rem, contract law and it can be special right of use. The economy prefers the character of right in rem of the timeshare because it is attached to the quality characters (value) of that thing as an article in use. During the regulation of timeshare agreements in Europe the protection of the consumer came into the limelight (see: Scandinavian countries, Benelux states, United Kingdom, Germany, Austria, Hungary, Serbia, Croatia, Bosnia Herzegovina, Montenegro, Romania, Czech Republic, Italy) or the market and tax law aspect became important (see: Greece, Portugal, Spain, France). There is a chaotic situation of timeshare in Europe: similarly to the Hungarian legal situation, in many other European states the private law must face challenges considering the right of use acquired by timeshare agreement, only few countries make a stand for only one legal solution.*

Keywords: *timeshare contract, contracts system, direct and indirect types of timeshare, right in rem, RTU, tenancy of land, group ownership, fractional ownership, European timeshare regulation, nature of right to use.*

1. THE TIMESHARE CONTRACT IN HUNGARY[1]

Timeshare agreement is a contract that aims to the acquisition of the right to use an accommodation for a period of time on a rotating basis and according to this agreement the consumer, in return for consideration, directly or indirectly acquires the right from the marketer for more than one year to use one or more properties repeatedly for recreation or housing aims for a definite period of time.[2]

By the contract the consumer:

- acquires the right of use for a definite aim (recreation/housing) for one year (or for a longer – maybe definite period of time);[3]
- in a definite period of the year which was laid down before (e.g. for a week or for 10 days), repeated annually (in general at the same time, for the same period so in the definite hotel on the same days of the same month every year);
- covering one or more buildings (e.g. hotel) and its rooms and accessories (e.g. tennis court, swimming pool, sauna etc.);
- acquired from the owner of the property (that can be a company too) directly or indirectly from the marketer (if different from the owner) or agency dealing with resales (RDO-Resort Development Organization- a company with membership that deals with secondary selling).[4]

The right of use with a special aim and which can be applied in a special way is not the only one which belongs to the regulation of the timeshare agreement, but also the transfer of the timeshare and the assignment of its application.[5] The transfer of the timeshare can happen in two ways:

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[1] See also: Tekla Papp Röviden a timesharing-szerződésről (Shortly about the timesharing contract) *Európai Jog* (European Law) 4/2006, 24-28.; Tekla Papp The timesharing contract in Hungary and in Europe. *Acta Juridica Hungarica* 12/2008, 483-494.; Tekla Papp Über den Timesharing-Vertrag (About the timesharing conract). *De Iurisprudentia et Iure Publico* 1/2009, http://www.dieip.hu/209_1_05.pdf; Tekla Papp Der Timesharing-Vertrag in Ungarn: eine rechtsvergleichende Analyse (The timesharing contract in Hungary: a comparative law analysis) *Zeitschrift für Gemeinschaftsprivatrecht* 6/2009, 141-147.; Tekla Papp Der Timesharing-Vertrag im 21. Jahrhundert (The timesharing conract in the 21th century). *Debreceni Jogi Műhely* (Legal Workshop of Debrecen) 4/2011, http://www.debrecenijogimuhely.hu/aktualis_szam/2_2011/der_timesharing_vertrag_im_21_jahrhundert; Tekla Papp Az ingatlanra vonatkozó timesharing szerződés néhány jellemzőjéről (About some aspects of the timesharing conract on real estate) *Res Immobiles, Ingatlanjog a gyakorlatban* (Real property law in practice) 12/2011, 11-17.; Tekla Papp Der Timesharing-Vertrag in Ungarn – eine rechsvergleichende Analyse (The timesharing contract in Hungary: a comparative law analysis) *Collected Papers* 9/2009, 393-408.; Tekla Papp Der Timesharing--Vertrag in Ungarn (The timesharing conract in Hungary) *Osteuropa Recht* 6/2011, 154-159.

[2] 141/2011. (VII. 21.) Government decree § 2 (1) 9., 10. points

[3] 114/2010. VJ (Decision of the Office of Economic Competition)

[4] Tekla Papp *Atipikus szerződések* (Atypical conracts) Szeged 2009 84.

[5] Zala Megyei Bíróság Polgári és Gazdasági Kollégiumának 14/2000. sz. véleménye (Opinion of the Civil and Economic Division of the Court of County Zala); EBH 2006. 1519. (Judgement of the Supreme Court); 114/2010. VJ (Decision of the Office of Economic Competition)

- On the one hand, the consumer has the possibility to convert his right to use on the 'timeshare market' run by the company: he can change with another consumer in order to practice the timeshare referring to the real estate of the company at the same place but at different time or at different place but at the same time or at different place and time (that is to say the direct object of the timeshare is transferred mutually between two consumers);
- On the other hand, the consumer can rid of the contract by assignment therefore there will be a change of subject in the position of the person who has the right of use.[6]

The assignment of timeshare means the conversion of timeshare: the members of the exchange organizations dealing with timeshare can choose among the timeshare rights of the organization up to the value of their own right to use (so the character, value and in general the period of this right to use does not change, only the place changes).

If the acquisition of the timeshare is not the only aim of the timeshare agreement but it also contains the assignment of its use and the transfer of the right, this situation can be solved by having more contracts related to one another and the timeshare agreement appears as a part of this system of contracts. The simplest variation of this contracts system can be constructed by the following:

- The company selling the timeshare buys a land by a contract and then it has another company build the hotel (resort) and related installations by a construction contract;
- Then it creates the background for realizing the timeshare: it becomes a member of an exchange organization, it contracts with companies providing subsidiary services (travel, insurance) and secondary sellers (this is how the timeshare can be convertible and transferable);
- The company makes agreements with other companies for different aims that can help its activity (e.g. for the operation of the property, its maintenance, advertisement or for financial administration);
- In the end they conclude the basic contract with the consumer according to which he can have the special right of use.[7]

According to the above mentioned it can be established that the specialty of timeshare agreement is in:

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[6] Petra Jenovai – Tekla Papp – Krisztina Strihó – Ágnes Szeghő *Atipikus szerződések* (Atypical contracts) Ed.: T. Papp, Szeged 2011 145.

[7] Tekla Papp *Opuscula civilia, Magánjogi látlelet, Report on Hungarian Private Law, Befundbericht über das ungarische Privatrecht* Szeged 2013 91-94.; Fővárosi Törvényszék P/2011/14. (Decision of the Municipial Court of Budapest); SZIT Pf.I.20.061/2012/3. (Decision of the High Court of Appeal of Szeged); Csongrád Megyei Bíróság 2.P.21.948/2011/3. (Decision of the Office of Economic Competition); 114/2010. VJ (Decision of the Office of Economic Competition)

- on the one hand the special characteristics of the right of use that can be acquired;
- on the other hand in the system of the contracts that is around the application and disposition of the acquired right of use;
- thirdly in the different services (travel, holiday) available for the consumers.

By the basic contract the direct object of the timeshare agreement is to acquire or transfer the right to use, the indirect object is the right itself according to which the consumer can have,[8] use or exploit (conversion) and dispose of the property (or a part of it) for a definite period annually.[9] The contract referring to the timeshare usage of the properties provides the entitled person the usage, its assignment and the use of this right as a replaceable quota. The right referring to the conversion of use within this exchange system can only open to the members of the system.[10]

As for the characteristics of the right of utilization acquired by timeshare agreement, from the aspect of using this right, there is the direct and indirect type: in the first case apart from the title nothing is needed in order to use timeshare, but in the latter case a legal instrument (e.g. membership in an organization) must be applied beside the title in order to live with the right of utilization (the right of utilization is attached to the mentioned legal instrument).

The direct right of utilization can be considered as right in rem, contract law and it can be special right of use.

The economy prefers the character of right in rem of the timeshare because it is attached to the quality characters (value) of that thing as an article in use.[11]

According to the Government order 141/2011. (21.07.) about contracts referring to the acquisition of timeshare, the timeshare can be a part of the property right.[12]

When analyzing the character of the right of use even the joint ownership can be mentioned according to no. 1 of section 139. of the Hungarian Civil Code[13] but in case of timeshare agreement

- the entitled people don't have the right of the owner at the same time but in turns for a short period of time (special joint ownership sectioned in time);
- the defined proportions of the consumers doesn't refer to the same subject (e.g. different rooms of the hotel) and in general not on the whole subject (but rather on a part or the real property);

[8] 141/2011. (VII. 21.) Government decree § 2 (1) 10., 13. points, §. 12. (1), § 17; Zala Megyei Bíróság Polgári és Gazdasági Kollégiumának 14/2000. sz. véleménye (Opinion of the Civil and Economic Division of the Court of County Zala); BH 1999. 514. (Court Order); BH 2008. 71. (Court Order); FIT 4.Pf.20.559/2012/3. (Decision of the High Court of Appeal of Budapest)

[9] 141/2011. (VII. 21.) Government decree § 2 (1) 10., 13. points

[10] LB Gfv IX. 30.193/2006. (Decision of Supreme Court)

[11] László Drábik – András Fábián *Utazásszervezés és timesharing tevékenység az EU-ban és Magyarországon* (Travel organizing and timesharing activity in the EU and in Hungary) Budapest 2004

[12] 87/2001. Számviteli kérdés (Accounting question): at buying of timeshare the customer doesn't purchase ownership.

[13] Act V of 2013. 5:73. § (1)

- the right of pre-emption (and pre-lease) of the co-proprietors prevents the construction of the above mentioned complex contract system and the transfer and assignment of the timeshare;
- the many co-proprietors makes the operation of the timeshare system very difficult (e.g. for 1 hotel room there are 52 entitled people in week turns, in case of 50 rooms of 1 hotel there are 2600 consumers need to be satisfied by the contract).

The timeshare based on the usufruct can't make the contractual system possible as the transfer of the right of utilization is impossible within the framework of timeshare agreement because the usufruct is non-marketable its utilization can be assigned only;[14] so the entitled could only have the possibility for conversion of the timeshare.

The right of use is not only unsuitable for achieving the goal of the timeshare because, similarly to the usufruct, it is non-marketable but also because the use and utilization 'not exceeding the needs of his own and the family members living together' doesn't adapt to the need of the entitled of the timeshare.[15]

From the aspect of contract law, the lease is not really suitable to indicate how many shades the right of use has in case of timeshare:

- unlike the lease in case of timeshare there is not a permanent and continuous utilization;
- unlike the rental the entitled for timeshare is obligated for a complex consideration with a different deadline;
- the proportion of the burden, costs, expenses between the leaseholder and the lessor and between the company and the consumer is different;
- the leaseholder (a without the permission of the lessor) cannot transfer the right of lease freely and he cannot assign it to another person (sub-lease);
- additional services (see: table 1, in connection with both the company and the consumer) cannot be attached to the lease as a part of the contract in opposition of the complex contractual system of the timeshare.[16]

The Government order[17] referring to timeshare, the financial law[18] and the case law[19] considers timeshare as a special right (that contains elements of property, utilization, contract law, civil law and elements of law of business associations).

Within the group of indirect right of utilization, timeshare applied on condition of association membership is not prevalent in Hungary, but the one based on

[14] § 159 (2) Hungarian Civil Code; Act V of 2013. 5:148.§ (1)

[15] § 165 Hungarian Civil Code; Act V of 2013. 5:159. § (1); PAPP (2009). p. 89.

[16] § 426. (1), § 427 Hungarian Civil Code; Act V of 2013. 6:334. §, 6:335. §; PAPP (2009). p. 89.

[17] 141/2011. (VII. 21.) Government decree § 2 (1) 10. point

[18] 87/2001. Számviteli kérdés (Accounting question)

[19] BH 1999. 514. (Court Order); 14/2000. Zala Megyei Bíróság Polgári és Gazdasági Kollégiumának véleménye (Opinion of the Civil and Economic Division of the Court of County Zala)

the membership in a cooperative society for building and maintenance of holiday apartments is wide-spread. In the apartment owned by the cooperative society the member has the right to use the resort unit temporarily for a fixed period of time every year.[20] By transferring this holiday 'bond' (which is neither a classical share nor a stock) it can be sold and presented, but in order to have this right of utilization he must be a member in the cooperative society.[21]

To have this right that can be used by having a share in the company the consumer needs to buy share within the frame of the contract referring to the utilization of the holiday resort: he compensates the value of the right by buying shares with preferred dividends.[22] From a legal aspect this construction is not secure if the dividend that the consumer as a shareholder gets after the share is the timeshare itself as the share is not a stock incorporating property rights (in this case the utilization of a unit of a resort), but it incorporates membership rights.[23]

With respect to the character of this right of utilization gained by the timeshare agreement the direct types are wide-spread in the practice, but the legislator prefers the indirect form. In my opinion

- in case of direct timeshare the character of right in rem appears stressfully,
- if the basis of the right of utilization is the membership of an organization, the character of the civil legal association is more dominant,
- in both types the services that can be used by the contract also complicate the regulation,
- and the stress is always on the contractual relation of the parties (the company and the consumer).[24]

2. THE TIMESHARE CONTRACT IN THE UNITED KINGDOM

The timeshare in the United Kingdom developed initially for the domestic market, and generally took as a model for this novel multi-ownership holiday concept, the common law incorporated leisure club, with the legal title to the immovable property being vested in trustees.[25]

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[20] Act CXV of 2004. § 40/C. (1)

[21] BH 1998.295. (Court Order); Act CXV of 2004. § 40/C (3), § 40/D (1)

[22] BH 2007.57. (Court Order); 247/1995. VJ (Decision of the Office of Economic Competition); 14/2000.; Zala Megyei Bíróság Polgári és Gazdasági Kollégiumának véleménye (Opinion of the Civil and Economic Division of the Court of County Zala)

[23] Papp (2009) 95-96.

[24] Papp (2009) 86.

[25] Encyclopaedia of Forms and Precedents/TIMESHARE&FOREIGN PROPERTYvol41(1)/Part2:TIMESHARE STRUCTURES IN SELECTED EUROPEAN COUNTRIES/(4)UNITED KINGDOM/(A)Commentary/A: GENERAL/92 Introduction and early historry; Timepoint of download: 2013. 05. 23.

In general, however, the timeshare agreement will give the purchaser the exclusive use of a furnished accommodation for a particular week or weeks every year for an agreed number of years in return for a lump sum. There is also normally an obligation to pay an annual service charge to a management company for the duration of the agreement.[26]

The initial problem of timeshare is to identify any legal form which responds to the commercial idea. Among forms there are: offering of shares in a public limited company, lease, license, club/trustee, company limited by guarantee (it is possible to create a membership system not involving the issue or transfer of shares); no English scheme is known to have attempted to use a freehold form.[27] The timeshare agreement is for the acquisition of a tenancy of land,[28] and entitles one party to the exclusive occupation of immovable property assumed by the contract to be owned by the other for a specified period in return for a sum of money, it follows that they are tenancies of immovable property.[29]

Two types of ownership share with timeshare create the basic structure: group ownership and fractional ownership. Group ownership as an arrangement might involve 12 people buying a holiday home and each person having the use of it a month in each year. Where there are only 4 owners involved, group ownership is known as quartershare. The fractional interest concept is defined as the selling of resort real estate in intervals of more than 1 week (usually referred to as resort timesharing), but in less the whole ownership. Shares or 'fractions' range from a 1/26 (2 weeks of ownership) to a ¼ (3 months of ownership). Limited term fractional ownership products, set up as right-to-use with security of ongoing occupancy rights provided by an independent trustee (a form of club/trustee structure) are now beginning to appear in various parts of Europe.[30]

The timeshare agreement in respect of UK land will depend on the nature of the interest which it represents; may also apply in respect of rights over land which does not include living accommodation, for example shooting or fishing rights.[31] To cover situations where there may be joint proprietors or timeshare schemes of

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[26] HMRC Manuals, BIM60135 Timeshare Schemes; Timepoint of download: 2017. 06. 24.

[27] Keith F. C. Baker *Timeshare '88, The English Viewpoint* Heinonline, Citation: 14 Int'l Legal Prac. 14 1989; Timepoint of download: 2017. 06. 24.

[28] Office of Fair Trading v Lloyds TSB Bank plc and others (2006) 2 All ER 821 (2006) EWCA Civ 268, All England Law Reports; Timepoint of download: 2017. 06. 24.

[29] Jarrett and another v Barclays Bank plc and another, Jones and another v First National Bank plc, Peacock and another v First National Bank plc (1997) 2 All ER 484, All England Law Reports; Letöltés ideje: 2017. 06. 24.

[30] Encyclopaedia of Forms and Precedents/TIMESHARE&FOREIGN PROPERTYvol41(1)/Part2:TIMESHARE STRUCTURES IN SELECTED EUROPEAN COUNTRIES/(4)UNITED KINGDOM/(A)Commentary/I: GROUP AND FRACTIONAL OWNERSHIP/188 Group and fractional ownership; Timepoint of download: 2013. 05. 23.

[31] HMRC Manuals, SDLTM10022-Timeshare; Timepoint of download: 2017. 06. 24.

salmon fishing, with several persons owning fishing right sin the same fishery. „Proprietors" is therefore defined as meaning any person, partnership, company or corporation which is the proprietor of a salmon fishery or which receives or is entitled to receive the rents of such fishery on its own account or as trustee, guardian or factor for any person, company or corporation.[32]

The concept of timeshare in England and Wales is now well established with a large number of developments, both conversion and new build cross the country, but with concentration in favoured tourist locations; additionally the timeshare concept has spread to other forms of leisure such as boating (and fishing). The basic concept is that a development company provides dwelling units and periods of time on boat are sold to purchasers who acquire rights to occupy, sell, let, exchange and bequeath[33] (timeshare interest in houseboat).[34]

In Scotland the timeshare units should be treated for valuation purposes as dwelling houses with the timeshare owners of each unit of accommodation being joint rateable occupiers. The unit of assesment in Scotland therefore each individual timeshare unit – each lodge/flat etc. On the base of the decision of the Lands Valuation Appeal Court there is no any applicability to the rating of timeshare complexes in England and Wales.[35]

3. THE TIMESHARE CONTRACT IN OTHER EUROPEAN COUNTRIES

During the regulation of timeshare agreements in Europe the protection of the consumer came into the limelight (see: Scandinavian countries, Benelux states, United Kingdom, Germany, Austria, Hungary, Croatia, Bosnia Herzegovina, Montenegro, Romania, Czech Republic, Italy) or the market and tax law aspect became important (see: Greece, Portugal, Spain, France).[36]

In connection with the regulation of the timeshare agreement more methods were applied: it was regulated in the Civil Code (The Netherlands, Germany) or it was regulated expansively (Austria, Liechtenstein, Great Britain) and by an act or simply the regulations of the related EU directive were implemented (Belgium, Ireland, Romania) or regulated only occasionally (in the regulations of consumer

[32] Stair Memorial Encyclopedia; Timepoint of download: 2017. 06. 24.

[33] Valuation Office Manuals, Capital Gains & Other Taxes Manual; Timepoint of download: 2017. 06. 24.

[34] Specialist Case Digest, Canaltime Developments Ltd LNB News 22/04/2004 69; Timepoint of download: 2013. 05. 22.

[35] Valuation Office Manuals, Capital Gains & Other Taxes Manual; Timepoint of download: 2017. 06. 24.

[36] http://www.timesharingproblems.org/Timesharing_GB/index.html; Timepoint of download: 2013. 05. 22.

protection, tax law or contracts providing services etc.; Finland, Portugal, Spain, Sweden, Italy, France, Croatia, Bosnia Herzegovina, Montenegro).

There are more legal solutions in Europe for the question of the direct object of the timeshare contract, but in majority the regulations are similar to the regulation of the Hungarian government order. According to the Hungarian regulation, the direct subject matter of timesharing contracts is the transfer of the right-to-use by the marketer to the consumer.[37] The direct object of timeshare agreement in some European countries:

- transfer/acquisition of the right of utilization in Germany, Spain, Italy, Portugal, United Kingdom, Sweden, Finland, Liechtenstein, Romania, Poland;
- assignment of the right of utilization in Holland, Austria, Liechtenstein, Croatia, Montenegro;
- acquiring a proportion of the joint ownership in Belgium;
- ownership right/referring to real estate transfer of other right in Ireland, Greece;
- acquiring the right of utilization by lease contract in Bosnia Herzegovina.[38]

The common feature of the European timeshare regulation is that the direct object of the agreement is merchantable, can be acquired in return for payment and can serve for housing and holiday purpose too (the latter one is extended widespread therefore the time share is often identified as holiday ownership).

The preambles of the directives 94/47/EC and 2008/122/EC indicate that timeshare agreement is not a lease (and its direct object, the right of use, is not a lease right) based on the fact that the right to use is transferable and on its characteristics in connection with time and because of the different payments methods regulated by the two contracts.

The European Court of Justice agrees with the directives: in Klein v. Rhodos Management Ltd. case the Court held that if the timeshare right of an apartment is related to membership rights of a club (conversion, additional hotel services and holiday discount), the basic contract is not a lease. However according to the directive 2006/112/EC about the value added tax system in the MacDonald Resorts Ltd v The Commissioners for Her Majesty's Revenue &Customs case the European Court held that from tax law aspect the services related to the real property (accommodation, right to use temporarily the resort, participation in optional program) – that are provided at the same place where the hotel/resort is located – are considered as leasing the property in question.

The European regulation referring to the direct object (the nature of right to use) of the timeshare contract. In Spain, the so-called escritura system was formed (Owners Community/Club), which is based on holiday ownership (multiple

[37] Papp (2009) 65.
[38] Papp (2013) 119.

ownership), however, in the agreement the word 'propriedad' shall not be used.[39] In Belgium the timeshare-entitled persons are regarded as common owners.[40] German and Austrian law categorizes timeshare as Teilzeitwohnrecht/Teilzeitnutzungsrecht (timeshared holiday ownership/timeshared right-to-use). In both countries, this special right-to-use may appear as property law, association membership and as a company interest, as well. In the Netherlands, timeshare can be property law (ownership, or right-to-use) and personal right as well: association membership or company interest. The Irish and Greek legal definitions mention ownership and other rights (this latter category is not determined). In Portugal the real legal nature, timeshared right-to-use (DRHP, direito real de habitação periódica) and holiday ownership (DRT, direito de habitação turística) are distinguished. In France, the company of shareholders-construction is spread: the timeshare-entitled persons are preference shareholders in the company. For timesharing, the French often, but not appropriately, use the phrase 'Multipropriété' (because those having timeshare are not the owners). In Sweden, Finnland and in Italy, timeshare is regarded as a special right-to-use.[41] Summing up the nature of the direct object of timeshare contract in some European states:

- RTU (special right of use) has the nature of right in rem in Austria, Liechtenstein, Sweden, Finland, Italy, Portugal (DRHP);
- RTU has the character of right in personam: Austria, Liechtenstein, Portugal (DRT);
- right in rem is deeded property in Germany, Spain, Ireland, The Netherlands, Finland, Poland;
- right in rem is fee simple in Belgium, Spain, Germany;
- right in rem is other right (than property right) referring to real estate in Ireland, Poland (usufruct);
- right in personam is an association membership in Germany, The Netherlands, Austria, Liechtenstein, Poland;
- right in personam is a share in company in The Netehrlands, France, Austria, Liechtenstein, Poland, Germany (can be mixed with Treuhand-Model), United Kingdom (mixed with trust);
- lease, leashold (contractual feature) in Germany, Austria.[42]

This short overview demonstrates well the chaotic situation of timeshare: similarly to the Hungarian legal situation, in many other European states the priva-

[39] http://ote.hu/index.nof?o=O&k2=18&nyelvid=1&k1=3; Timepoint of download: 2013. 05. 22.

[40] http://www.timesharingproblems.org/Timesharing_GB/index.html; Timepoint of download: 2013. 05. 22.

[41] http://europa.eu.int/youreurope/nav/hu/citizens/factsheets/at/consumerprotection/timeshares/de.html; Timepoint of download: 2013. 05. 22.

[42] Papp (2013) 121.

te law must face challenges considering the right of use acquired by timeshare agreement, only few countries make a stand for only one legal solution.

* * *

The timeshare-sector – in which more than 4000 companies are working worldwide – went through a profile-exchange:

- on one hand, among the most significant timeshare companies, leading public catering companies appeared (e.g. Four Seasons, Hilton, Ramada, Hyatt),[43]
- on the other hand, exchange companies often provide preferential travel service (insurance, air-ticket, car hire etc.) for their club members,[44]
- thirdly, timeshares connected to holiday-parks and bathhouses became conspicuous.

The expanding timeshare-system became one of the dominant means of tourism, it concretized the opportunity, utilized more often by consumers, because of the flexibility and accordance to the legal regulations.

[43] Drábik – Fábián 14. p.

[44] http://ote.hu/index.nof?o=O&k2=18&nyelvid=1&k1=3; Timepoint of download: 2013. 05. 22.

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Sticanje nepokretnosti ugovorom o tajm-šeringu u Evropi

Sažetak: *Ugovor o tajm-šeringu je ugovor koji ima za cilj sticanje prava na korišćenje smeštaja na određeni vremenski period po principu rotacije. U skladu sa ovim ugovorom, potrošač, u zamenu za naknadu, neposredno ili posredno stiče pravo od trgovca, za jednu ili više godina, da koristi jednu ili više nepokretnosti, u više navrata, u cilju rekreacije ili stambene potrebe, na određeno vreme. U pogledu karakteristika prava korišćenja stečenog na osnovu ugovora o tajm-šeringu, sa aspekta vršenja ovog prava, postoje direktan i indirektan tip: u prvom slučaju, osim pravnog osnova ništa drugo nije potrebno za korišćenje tajm-šeringa, ali u drugom slučaju pravni instrument (npr. članstvo u organizaciji) mora biti primenjen pored pravnog osnova radi njegove koegzistencije sa pravom korišćenja (pravo korišćenja je vezano za pomenuti pravni instrument). Direktno pravo korišćenja može se smatrati stvarnim pravom na tuđoj stvari, obligacionim pravom i može biti posebno pravo upotrebe. Ekonomija preferira opciju prema kojoj tajm-šering ima karakter stvarnog prava na tuđoj stvari s obzirom na to da je povezan sa oznakama kvaliteta (vrednosti) te stvari kao predmeta u upotrebi. Tokom regulisanja ugovora o tajm-šeringu u Evropi, u centar pažnje je došla zaštita potrošača (pogledati: Skandinavske zemlje, zemlje Beneluksa, Ujedinjeno kraljevstvo, Nemačka, Austrija, Mađarska, Srbija, Hrvatska, Bosna i Hercegovina, Crna Gora, Rumunija, Češka republika, Italija) ili je na značaju dobio aspekt tržišta i poreskog prava. (pogledati: Grčka, Portugal, Španija, Francuska). U Evropi je situacija u vezi sa tajm-šeringom haotična: slično pravnoj situaciji u Mađarskoj, u mnogim evropskim zemljama privatno pravo mora da se suoči sa promenama imajući u vidu pravo upotrebe sadržano u ugovoru o tajm-šeringu, samo nekoliko zemalja se odlučilo za samo jedno pravno rešenje.*

Ključne reči: *ugovor o tajm-šeringu, ugovorno pravo, direktni i indirektni tip tajm-šeringa, stvarno pravo na tuđoj stvari, RTU, zakup zemljišta, grupna svojina, delimična svojina, Evropska regulativa o tajm-šeringu, priroda prava upotrebe.*

Datum prijema rada: 19.07.2017.

Originalni naučni rad

341.95:347.235(497.11)“18“
doi:10.5937/zrpfns51-15013

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PRAVO STRANACA DA STIČU NEPOKRETNA DOBRA U SRBIJI XIX VEKA

Sažetak: *Autor u radu vrši istorijskopravnu analizu zakonskih i podzakonskih akata koji regulišu uslove nastanjivanja stranaca u Srbiji, sticanja nepokretnosti i dobijanja državne pomoći i subvencija. Kako se proces kolonizacije odvijao sa nesmanjenim intenzitetom kroz čitav XIX vek, zakonska regulativa o naseljenicima postajala je vremenom sve detaljnija. Po značaju se izdvajaju Zakoni o naseljavanju stranaca iz 1865. i 1880. u kojima su normirani svi aspekti pravnog položaja imigranata u Srbiji, s posebnim osvrtom na pravo sticanja nepokretnih dobara na domaćem tlu. Kao partikularno pravno pravilo pažnju zaslužuje i Uredba o Jevrejima iz 1865. jer su oni predstavljali jedinu etničku skupinu koja je, pored domaćeg stanovništva, mogla steći nepokretnosti, doduše samo u varoši Beograd. Svojinski režim je liberalizovan nakon sticanja nezavisnosti Srbije na Berlinskom kongresu 1878. kroz bilateralne konvencije i trgovinske ugovore koje je Srbija zaključila sa pojedinim zemljama. Ipak, i tada su samo državljani zemalja potpisnica mogli sticati nepokretnosti na teritoriji Srbije, i to pod uslovom uzajamnosti i uz primenu klauzule najpovlašćenije nacije, tako da se o opštepriznatom pravu stranaca da budu sopstvenici kuća i zemlje na domaćem tlu zapravo nikada nije ni moglo govoriti.*

Ključne reči: *Stranci, imigracija, svojinska prava, nepokretna dobra, Srbija XIX veka.*

1. UVOD

Srbija je 30-tih godina XIX veka postala privlačno imigraciono područje. Hatišerifima iz 1830. i 1833. zemlja je dobila status vazalne kneževine sa samostalnom unutrašnjom upravom,[1] što je unelo stabilnost u politički i pravni poredak

[1] Maša Kulauzov, „O građanskim pravima i slobodama u srpskim ustavima i zakonima”, *Zbornik radova Pravnog fakulteta u Novom Sadu* (*Zbornik radova PFNS*) 2/2004, Tom I, 194.

i učinilo je poželjnom za stanovništvo koje je iz susednih turskih oblasti bežalo od zuluma i represalija. Osim bezbednosnih razloga, doseljavanje stranaca uslovljeno je i ekonomskim razlozima, s obzirom na to da su sa ukidanjem feudalizma u Srbiji stvorene pretpostavke za brži ekonomski progres.[2] Veliki neiskorišćeni zemljišni resursi i potreba da se ojača vojni, finansijski i privredni potencijal zemlje, rezultirali su činjenicom da je Srbija vodila vrlo tolerantnu imigracionu politiku, te su srpski vladari počev od kneza Miloša bili izuzetno predusretljivi prema doseljenicima.

2. RESTRIKTIVNE MOGUĆNOSTI STRANACA DA POSTANU VLASNICI NEPOKRETNOSTI NA TLU SRBIJE

To što su srpske vlasti blagonaklono gledale na useljavanje stranaca u Srbiju, nije istovremeno značilo i mogućnost da doseljenici steknu pravo svojine na nepokretnostima. Već je u ukazu iz 1836. godine knez Miloš nedvosmisleno izrazio rešenost da stranci ne mogu biti sopstvenici nepokretnosti u Srbiji, a, ukoliko poseduju „nedvižima dobra" na srpskoj teritoriji, dužni su da ih bez odlaganja prodaju.[3] I pre donošenja ukaza srpski sudovi su, pozivajući se na Hatišerif iz 1833. prema kojem strani podanici nisu mogli biti vlasnici nepokretnih imanja u Srbiji odbijali molbe usmerene u tom pravcu.[4] Ni srpskim podanicima koji bi zatražili otpust iz srpskog podanstva i prijem u strano državljanstvo nije bilo dozvoljeno da budu vlasnici nepokretnosti na tlu Srbije, s obzirom na to da bi i oni, prema tekstu ukaza iz 1836. morali prodati nepokretna dobra na domaćoj teritoriji.[5] Posebnom uredbom posvećenom pitanju srpskog državljanstva precizirano je da se pismeni otpust iz srpskog sažiteljstva i brisanje prijavljenog prebivališta iz opštinskih spiskova moglo dobiti tek nakon što bi podnosilac molbe prodao nekretnine u Srbiji čiji je vlasnik (čl. 13).[6] Prethodnim dokumentom nije bio tako jasno opredeljen redosled koraka za istupanje iz srpskog državljanstva, već je samo u više navrata naglašeno da stranac ne može biti sopstvenik nepokretnosti u Srbiji.

Od doseljenika se očekivalo da stupe u red srpskih podanika tako što će se odreći svog i pokrenuti postupak za sticanje srpskog državljanstva. To je bio *conditio sine qua non* za sticanje nepokretnosti u Srbiji i prvi put je u praksi pomenut

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[2] M. Kulauzov, „Pravila običajnog prava o deobama porodičnih zadruga Južnih Slovena", *Zbornik radova PFNS* 2/2010, 281.

[3] Ukaz od 24. oktobra 1836. godine, *Zbornik zakona i uredaba u Knjažestvu Srbiji*, br. 30/1877.

[4] Ispravničestvo Okružija beogradskog Knjazu 17. avgusta 1835, nav. prema Branko Peruničić, *Beogradski sud 1819-1839*, Istorijski arhiv Beograda, Beograd 1964, 637.

[5] Ukaz od 24. oktobra 1836. godine, *Zbornik zakona i uredaba u Knjažestvu Srbiji*, br. 30/1877.

[6] Uredba o srbskom prirođenju i o odpuštanju Srba iz njinog otečestva od 8. aprila 1842, *Zbornik zakona i uredaba u Knjažestvu Srbiji*, br. 30/1877.

u pregovorima vođenim između srpskih vlasti i saksonskih poslanika 1838. godine. Naime, Srbija je obilovala rudnim bogatstvima i radi njihove eksploatacije pozvani su iskusni rudari iz Saksonije koji su tom prilikom formulisali uslove pod kojima je dve stotine njihovih porodica bilo spremno da se doseli u Srbiju. Pored zajma i poreskih olakšica, imigranti su zahtevali da se za njih opredeli jedan značajan zemljišni fond koji bi bio raspoređen po glavama porodica, tako da svakoj pripadne po sedam dana oraće zemlje (čl. 7).[7] Zauzvrat, oni su se obavezali da prihvate srpsko državljanstvo, ali pod uslovom da nakon pet godina boravka u Srbiji, u pogledu prava i obaveza budu izjednačeni sa domicilnim stanovništvom (čl. 27).[8] Iako pregovori vođeni 1838. nisu dali trajne rezultate niti je pravni položaj saksonskih rudara u Srbiji zakonski regulisan, značajni su jer pokazuju rezolutan stav srpskih vlasti da se strancima ne dozvoli sticanje svojine na nepokretnostima.

Ideja o osnivanju nemačke kolonije u Srbiji postojala je i za vreme vladavine kneza Mihajla Obrenovića i tada je prvi put učinjen predlog u pravcu konkretnijeg opredeljenja teritorije na kojoj bi se kolonisti naselili i karakteristika zemlje koju bi zauzeli. Najpre je Popečiteljstvo finansija izvestilo Knjaza, a on potom i Sovjet, da u Aleksinačkom okrugu ima prostora za kolonizaciju pedeset nemačkih familija,[9] da bi se nakon toga i Popečiteljstvo vnutreni dela obratilo istom adresatu sa obaveštenjem da bi se u Krajinskom okrugu moglo naseliti četrdeset i pet familija, a u Crnorečkom i Gurgusovačkom okrugu po pet.[10] Tom prilikom je i precizirano da bi kolonistima pripale praviteljstvene livade i njive[11], pod kojima su se podrazumevala i nekadašnja turska imanja čiji su vlasnici po odredbama Hatišerifa iz 1833. napustili Srbiju.[12]

Najveći broj doseljenika činili su Crnogorci, koji su tokom čitavog XIX veka prelazili u Srbiju u manjim ili većim grupama. Razlog za ovako intenzivne imigracione procese ležao je u činjenici da je Crna Gora, kao teritorijalno mala i oskudna u plodnoj zemlji patila od agrarne prenaseljenosti. Kolonisti su mahom bili ratari, vrlo slabog imovnog stanja. Srpske vlasti su prema imigrantima bile izuzetno predusretljive jer je državni interes nalagao intenzivnu kolonizaciju slabije nastanjenih oblasti. Došljaci su uglavnom naseljavani u Krajinskom, Aleksinačkom i Gurgusovačkom okrugu pri čemu su uživali niz praktičnih povlastica. Nisu snosili poresku odgovornost prve tri godine od doseljenja, opštine su im pozajmljivale novac za useve, a iz praviteljstvene kase poklanjana im je određena

[7] Zaktevanja Saksonskih poslanika, Arhiv Srbije (u daljem tekstu: AS), fond *Državni savet* (u daljem tekstu: DS), rolna (u daljem tekstu: rn) 438/1838, list (u daljem tekstu: l.) 3.

[8] *Ibid*, l. 6.

[9] Knjaz Sovjetu 9. avgusta 1841, AS, DS, rn 62/1841, l. 21.

[10] Knjaz Sovjetu 12. septembra 1841, AS, DS, rn 62/1841, l. 24.

[11] One na kojima je nosilac prava svojine upravna (izvršna) vlast.

[12] Sovjet Namjesničestvu 29. novembra 1839, *Zbornik zakona i uredaba u Knjažestvu Srbiji*, br. 30/1877.

svota novca za nabavku najnužnijih stvari i stoke.[13] Na lični zahtev doseljenicima je odobravana i pomoć u hrani dok im „posejana hrana ne prispe".[14]

Kao rezultat ovako masovnih migracija 10. maja 1854. doneta je uredba koja je kao partikularno pravno pravilo važila samo za doseljene Crnogorce. Ovom uredbom jednoobrazno je regulisan pravni položaj došljaka iz Crne Gore, koji su mogli računati na pomoć u hrani, 1 cesarski dukat na ime putnog troška i 600 groša čaršijskih iz praviteljstvene kase pozajmljenih beskamatno na 10 godina za nabavku najnužnijeg oruđa za rad i stoke. Povrh toga, kolonisti su bili oslobođeni svih opštinskih i državnih tereta za tri godine (čl. 1, 3-6). U pogledu regulisanja svojinskih odnosa na nepokretnostima, kao najdelikatnijeg i najznačajnijeg pitanja vezanog za kolonizaciju srpskih teritorija, uredbom je propisano da će Popečiteljstvo vnutreni dela opredeliti okrug i srez u kojem će se crnogorske familije naseliti. Njima će biti dodeljivana i opštinska i praviteljstvena zemlja, bez razlike (čl. 2). Naposletku, knez preporučuje da okružno načelstvo podstakne domaće stanovništvo u srezu u kojem će se doseljenici nastaniti da im, kao siromašnim i skromnim ljudima, pruži svu potrebnu bratsku i hrišćansku pomoć, naročito dobrodošlu u početku (čl. 7).[15]

Popečiteljstvo finansija je već iduće godine po donošenju uredbe skrenulo pažnju Sovjetu i knezu na pravne praznine u njoj, u prvom redu u pogledu roka u kojem se doseljenim Crnogorcima mora odrediti mesto njihovog stalnog boravka i vremenskog perioda unutar kojeg se oni mogu odmarati u mestu njihovog prelaska u Srbiju do upućivanja u krajnje odredište. Popečiteljstvo je isto tako smatralo da je korisno da se doseljenicima daje samo opštinska a ne i praviteljstvena zemlja, što je knez uvažio i u navedenom smislu izmenio prvobitni tekst. Noveliranim članom 2 je propisano da se Crnogorcima dodeljuje samo opštinska zemlja, bilo čista, bilo pod šumom – utrina.[16] Predviđeno je da Popečiteljstvo vnutreni dela odmah po donošenju izmena i dopuna opredeli okruge i srezove gde će se Crnogorci naseljavati, i da se oni u njih upućuju posle tri dana odmora.[17]

Plansko naseljavanje Crnogoraca rezultiralo je 1855. godine nastankom Petrovog Sela, crnogorskog naseljeničkog mesta u planini Miroč, pokraj reke Kosovice u Ključu u Negotinskoj krajini.[18] Načalničestvo Krajinskog okruga je na zahtev Popečiteljstva vnutreni dela podnelo pismeno mišljenje u kojem se navodi

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[13] Popečiteljstvo vnutreni dela Knjazu 3. maja 1854, AS, DS, rn 167/1854; B. Peruničić, *Zemljišna svojina u Srbiji 1815-1845*, Privredni pregled, Beograd 1977, 27.

[14] Predstavničestvo Knjažesko Sovjetu 22. februara 1855, AS, DS, rn 118/1855.

[15] Uredba od 10. maja 1854, *Sbornik zakona i uredba i uredbeni ukaza izdani u Knjažestvu Srbiji*, br. 8/1856.

[16] Livada, pašnjak, neobrađeno zemljište, napuštena njiva.

[17] Rešenje od 7. maja 1855, *Sbornik zakona i uredba i uredbeni ukaza izdani u Knjažestvu Srbiji*, br. 8/1856.

[18] Miloš Jagodić, *Naseljavanje Kneževine Srbije 1861-1880*, Istorijski institut – posebna izdanja, knjiga 47, Beograd 2004, 31.

da se u tom mestu može udobno smestiti do sto crnogorskih porodica, s obzirom na to da su dvadeset prethodno naseljenih familija iz Crnorečkog okruga rešenjem iz 1843. raspoređene u druga sela, tako da se stvorio slobodan prostor za naseljavanje u većem obimu.[19] Ovde je najpre naseljeno 30, a potom još 34 familije, ali i pored ovako intenzivne imigracije okružne vlasti nisu bile naročito operativne i efikasne kada je u pitanju dodela zemlje kolonistima. Doseljenici su na parcelaciju zemljišta čekali i po godinu dana, za koje vreme nisu mogli ništa da rade, da bi im potom bila dodeljivana zemlja pod krupnom gorom, koju bi teškom mukom iskrčili i spremili za useve.[20] Iako su doseljenici poticali iz brdskih predela Crne Gore i Hercegovine te se naseljavanje u planinskim oblastima istočne Srbije činilo za njih klimatski najpogodnijim, oni često nisu bili zadovoljni kvalitetom dodeljenog zemljišta. Srpske vlasti su ih, pak, smatrale otpornim i žilavim i samim tim pogodnim za naseljavanje u pograničnim krajevima radi odbrane granica i bavljenja poljoprivredom u planinskim oblastima.[21] Kako je u državnom i privrednom interesu bilo da kolonizovane crnogorske porodice trajno nastane dodeljene im oblasti, okružno načelstvo je u toku nerodnih godina na razne načine nastojalo da destimuliše njihov povratak u zavičaj. Tako je stanovnicima Petrovog Sela tokom velikih suša 1861. i 1862. godine ne samo dodeljena hrana iz opštinskih koševa, već su im i oproštena sva poreska dugovanja.[22] S obzirom na to da je Srbija tokom celog XIX veka vodila imigracionu politiku, pomoć je pružana i prebeglicama koje su na srpsku teritoriju prelazile bez prethodnog sporazuma i putnih isprava,[23] kao i onima koji se nisu nigde trajno nastanili.[24]

Ipak, i pored brojnih poreskih olakšica i novčane pomoći neretko su doseljenici izražavali želju da se vrate u zavičaj. Naročito oni iz Bjelopavlića i Brđana nastanjeni u Kladovu, navodeći da su oni gorski i brdski narodi koji nisu navikli na ravničarsku zemlju bez obzira na to što im je dodeljen značajan zemljišni fond. Naime, kolonistima je bilo namenjeno, pored placeva za kuće, još po tri lanca oraće i dva lanca zemlje za livade, i povrh toga još i jedan lanac branika[25] radi

[19] Sovjet Knjazu 22. juna 1855, AS, fond *Ministarstvo inostrani dela – Vnutreno odeljenje* (u daljem tekstu: MID-V), 1855, fascikla (u daljem tekstu: f.) II, 200.

[20] Popečiteljstvo finansija Sovjetu 24. marta 1861, AS, DS, rn 471/1861.

[21] Đoko D. Pejović, *Crna Gora u doba Petra I i Petra II: osnivanje države i uslovi njenog razvitka*, Narodna knjiga, Beograd 1981, 423-426.

[22] Državni sovjet ministru finansija 4. februara 1865, AS, DS, rn 48/1865.

[23] Na predlog knjaževskog predstavnika, popečitelja inostrani dela, Knjaz je odobrio iz praviteljstvene kase Crnogorcima iz Vasojevića prebeglim na Goliju u Užičkom okrugu 214 cvancika dnevno u toku mesec dana. – Knjaz Sovjetu 7. avgusta 1861, AS, DS, rn 982/1861.

[24] Na predlog ministra finansija Sovjet je došljacima iz Crne Gore Marku Đorđeviću i njegovom sinu Jovanu Markoviću koji su najpre došli u Kragujevac, da bi potom prešli u Cerovac u Smederevskom okrugu, pa zatim u Čačanski okrug, i na kraju se vratili u Kragujevac zbog slabog imovnog stanja oprostio sve danke i prireze od Mitrova dne 1862/3 do Đurđeva dne 1865. – Državni sovjet ministru finansija 8. aprila 1867, AS, DS, rn 164/1867.

[25] Zabran, ograđeni deo šume.

nužnog uživanja. Iako je zemlja bila izdašna i po obimu i po kvalitetu, oni su gotovo jednoglasno izrazili želju da se vrate u otečestvo. Nekolicina njih zatražila je da ih nasele u planinskim predelima istočne Srbije, u Petrovom Selu, ali je Popečiteljstvo vnutreni dela tim povodom zauzelo stav da ne postoji privredni interes da se toliki broj ljudi nastanjuje u neplodnim planinskim predelima, oskudnim u obradivoj zemlji. Stoga je odlučeno da se Crnogorci otprave o sopstvenom trošku tamo odakle su i došli, nakon što vrate praviteljstveno blagodejanije[26] koje im je dato kao potpora za naseljavanje.[27] Jedino nije bilo rešeno da li ono obuhvata pored 600 čaršijskih groša i jedan cesarski dukat koji im je dat na ime putnog troška kada su dolazili u Srbiju, i da li se pomenutim Crnogorcima mogu vizirati pasoši preko Turske, i to Niša.[28] Policajno odelenje rešilo je da se zagranični pasoši mogu Crnogorcima izdavati preko Niša i Skadra za Boku Kotorsku.[29]

Osim toga što im nisu odgovarala svojstva dodeljene zemlje Crnogorci se često nisu ni osećali dobrodošlo u kolonizovanim krajevima, što je isto tako bio razlog za povratak u zavičaj. Iako su srpske vlasti u više navrata apelovale na domicilno stanovništvo da koloniste primaju kao svoju braću, žitelji pojedinih sela su izričito zahtevali od lokalnih predstavnika vlasti da ne naseljavaju Crnogorce u njihovim mestima.[30] I sami srpski organi su bili svesni problema koje bi stvorio suživot domaćeg i doseljenog stanovništva pa su dosledno insistirali na tome da neka mesta ostanu etnički čista.[31]

Još veći kolonizacioni poduhvat od onog sa Crnogorcima sproveden je sa banatskim življem, za koje je predviđeno da se najvećim delom, čak 150 familija nasele u Kladovu Krajinskog okruga, a ostale u Đupriji, Aleksinačkom i Požarevačkom okrugu. Za katastarsko premeravanje i parcelaciju zemljišta namenjenog imigrantima opredeljena je suma od 50 talira.[32] Kolonistima je najpre pozajmljeno 2700 forinti srebra 1857. godine, a dve godine kasnije još 5000 forinti srebra kako bi mogli da dovrše započete kuće, koje bi služile kao sredstvo obezbeđenja zajma.[33]

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[26] Dobročinstvo.

[27] Sovjet Knjazu 22. aprila 1855, AS, MID-V, 1855, f. II, 200.

[28] Načalnik Ekonomičeskog odelenja Policajnom odelenju 25. januara 1857, AS, fond *Ministarstvo unutrašnji dela – Policajno odelenje* (u daljem tekstu: MUD-P), 1857, f. I, 114, l. 1.

[29] Odelenje Policajno Odelenju Ekonomičeskom 9. februara 1857, AS, MUD-P, 1857, f. I, 114, l. 2.

[30] Tako su žitelji sela Bulečna sreza Paraćinskog okruga Ćuprijskog molili Njegovu Svetlost Knjaza da se Crnogorci u njihovu brezovinu ne dosele, pa je Knjažesko predstavničestvo po kneževoj zapovesti poslalo Popečiteljstvu vnutreni dela predmetnu molbu na dalji postupak. – Zastupnik Knjaževskog predstavnika i Popečitelja inostrani dela Popečiteljstvu vnutreni dela 21. aprila 1860, AS, MUD-P, 1860, f. IV, 64, l. 1.

[31] Zato je Sovjet 1855. odbio predlog Načalničestva okruga Krajinskog da se u Petrovo Selo vrati 20 familija koje su tu najpre bile doseljene a potom raspoređene u druga mesta, uz argumentaciju da bi takvo rešenje, iako možda pravednije po otečestvene porodice, stvorilo niz praktičnih problema. – Sovjet Knjazu 22. juna 1855, AS, MID-V, 1855, f. II, 200.

[32] Popečitelj vnutreni dela Sovjetu 3. avgusta 1857, AS, DS, rn 541/1857.

[33] Popečitelj vnutreni dela Sovjetu 12. februara 1859, AS, DS, rn 68/1859.

Za razliku od Banaćana koji su sistematski i planski naseljavani, Popečiteljstvo finansija izveštava 1861. Sovjet da je u poslednje dve – tri godine povećan broj prebeglica iz Turske koje je Knjaževsko praviteljstvo na sve moguće načine nastojalo da odvrati od prebegavanja insistirajući na garancijama od pograničnih turskih vlasti da će povratnici biti dobro primljeni i da neće zbog bekstva trpeti štetne posledice. Iako je Porta proglasila opštu amnestiju, niko od begunaca se nije vratio već su i dalje masovno prebegavali u Srbiju zajedno sa ženama, decom i pokućstvom. Stoga je Popečiteljstvo predložilo Sovjetu da im se ustupi opštinska zemlja za naseljavanje u opštinama udaljenim od granice. Kolonisti bi bili oslobođeni od svih opštinskih i državnih tereta prve dve godine, a ustupljenu zemlju ne bi mogli zadužiti ni prodati petnaest godina.[34] Rešeno je da se svakoj familiji doseljenika osim kućnog placa dodeli još dva do šest jutara zemlje u zavisnosti od broja članova porodice, a povrh toga i hrana iz opštinskih koševa i novac za nabavku oruđa za rad i za gradnju kućâ. Novac bi bio pozajmljen izbeglicama iz Turske iz opštinske kase, prve tri godine beskamatno, a iznos bi opredelila nadležna vlast zajedno sa dotičnim kmetovima i opštinarima, s tim što on svakako ne bi prelazio 500 groša čaršijskih.[35] Prebeglice su 1863. oslobođene svih poreskih obaveza i opštinskih prireza za još godinu dana.[36]

Posedovanje zemlje, međutim, nije bilo neophodan uslov za oslobođenje od obaveza prema državi. Sovjet je 1865. na predlog Načelničestva okruga Šabačkog oprostio sav dugovani danak i školski prirez izbeglicama iz Bosne za protekle dve godine od kada su se nastanili u Šapcu. Oni su kao nadničari obrađivali tuđu zemlju i tako izdržavali svoje porodice jer nisu imali nikakvog svog imanja, te su im zbog vrlo teškog materijalnog stanja otpisani svi dugovi.[37]

Doseljenici su mogli uživati beneficije na srpskoj teritoriji jedino ukoliko su pokrenuli postupak za prijem u srpsko sažiteljstvo. Za sve vreme trajanja migracionih procesa srpske vlasti su dosledno insistirale na tome da stranci ne mogu biti vlasnici nepokretnosti na tlu Srbije. Zato je 1855. odbačena inicijativa za osnivanje nemačkih ili slovenskih naseobina, o čemu je, zbog hitnosti i značaja pitanja raspravljao Ministarski savet. On je zaključio da bi strane naseobine donele Srbiji više štete nego koristi, s obzirom na to da bi došljaci, zahvaljujući svojim sredstvima, trudu i znanju stekli velike baštine i stvorili srpski proletarijat lišivši domicilno stanovništvo imanja, a Srbiju prednosti koje uživa od ravnomerno raspodeljenih nepokretnih dobara. Dakle, i tom prilikom je istaknuto da, iako postoji potreba za naseljavanjem retko nastanjenih oblasti, ona nikako ne može ugroziti opredeljenje da samo srpski žitelji mogu biti sopstvenici nepokretnih dobara.[38]

[34] Popečiteljstvo finansija Sovjetu 1. aprila 1861, AS, DS, rn 439/1861.
[35] Knjaz Državnom sovjetu 16. oktobra 1861, AS, DS, rn 439/1861.
[36] Državni sovjet Popečitelju finansija 2. avgusta 1863, AS, DS, rn 269/1863.
[37] Državni sovjet 21. avgusta 1865, AS, DS, rn 370/1865.
[38] Sovjet Knjazu 31. oktobra 1855, AS, MID-V, 1855, f. III, 150.

Stav da stranci ne mogu biti vlasnici nepokretnosti u Srbiji nedvosmisleno je zauzet i u sudskoj praksi povodom tužbi koje su odbijane kao neosnovane ukoliko je strani državljanin nastojao da dokaže svojinsko pravo na nekretnini koja se nalazila na domaćoj teritoriji.[39]

Prvi akt zakonske snage kojim je na jedoobrazan način normiran pravni položaj došljaka u Srbiji je Zakon o naseljenju stranaca donet 1865. godine. Već u čl. 1 propisano je da, bez izuzetka, strani zemljedelci koji bi se hteli nastaniti u Srbiji moraju najpre stupiti u srpsko sažiteljstvo i o tome dobiti uverenje od ministra unutrašnjih dela. Zbog čestih sukoba između pridošlica i domicilnog stanovništva, predviđeno je da se kolonisti doseljeni u većim grupama od 10 do 50 porodica ne nastanjuju u već postojećim opštinama i selima, već da obrazuju nove opštine ili osnivaju nova naselja (čl. 3). Svaka familija dobila bi do tri jutra čiste zemlje i zemlje za krčenje, s tim što bi se, ako je kuća zadružna, na svakog oženjenog zadrugara dodala još trećina gore označenog prostora zemlje. Pored toga, svakoj porodici pripala bi i kuća, najnužniji alat, oruđe za rad i stoka, pomoć u hrani i 120 groša u gotovom novcu (čl. 6), a bili bi i oslobođeni od svih državnih tereta za pet godina, dok bi opštinske terete morali odmah snositi, i vojnu službu odmah vršiti u vanrednim okolnostima (čl. 11). Na svoj dodeljenoj imovini imigranti su imali plodouživanje prvih petnaest godina, da bi tek po proteku tog roka postali pravi sopstvenici svih svojih dobara. Za vreme tog petnaestogodišnjeg perioda titulari ovlašćenja nisu mogli imanje prodati niti zadužiti, ali nije bilo isključeno nasleđivanje poseda, pod uslovom da deca preuzmu prava i obaveze svog oca (čl. 7 i 10).[40]

Nakon što je Srbija dobila teritorijalno proširenje na Berlinskom kongresu, javila se potreba za donošenjem novog Zakona o naseljavanju koji bi normirao uslove pod kojima se srpsko i strano stanovništvo može nastanjivati u novooslobođenim predelima. Strani sažitelji koji su želeli da se nastane u Srbiji morali su najpre stupiti u srpsko podanstvo i o tome pribaviti rešenje ministra finansija (čl. 4). Svaka porodica doseljenika – zemljoradnika dobijala je do 4 hektara zemlje za obradu i dve hiljade kvadratnih metara za kućno zemljište, s tim što je, ukoliko je kuća zadružna, imala pravo na dodatnih 2 hektara obradive zemlje po svakoj muškoj glavi starijoj od 16 godina. Zanatlije su dobijale samo po 1 hektar zemlje za obradu, i povrh toga još i zemljište i potrebnu građu za kuću (čl. 5). Način sticanja svojine i nasleđivanja dobijenog zemljišta nije promenjen u odnosu na pret-

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[39] Tako je povodom jednog vlasničkog spora između austrijskog podanika Dimitrija Lazarevića i njegove žene Cvete, gde se žena pozivala na to da joj je knez Miloš dozvolio da bude sopstvenik kuće, Sovjet izvestio kneza Aleksandra Karađorđevića da žena sledi državljanstvo muža, i da stoga knez Miloš nije imao nikakav interes da njoj kao stranoj državljanki dâ da bude vlasnica kuće, s obzirom na to da stranci ne mogu biti vlasnici nepokretnosti na tlu Srbije. – Sovjet Knjazu 18. oktobra 1855, AS, MID-V, 1855, f. III, 113.

[40] Zakon o naseljenju stranaca od 10. februara 1865, *Zbornik zakona i uredba izdani u Knjažestvu Srbiji*, br. 18/1865.

hodni zakon (čl. 6). Došljaci bi bili oslobođeni od svih državnih, sreskih i okružnih tereta osim školskog prireza za tri godine, dok bi, kao i po prethodnom zakonu, opštinske terete morali odmah snositi i vojnu dužnost odmah vršiti ukoliko nastupe vanredne okolnosti (čl. 7).[41] Zapravo je novi Zakon o naseljavanju iz 1880. u velikoj meri reprodukovao prethodni, i donet je u prvom redu sa ciljem da se pravno uredi nastanjivanje u pripojenim okruzima.

3. LIBERALNIJI REŽIM STICANJA NEPOKRETNOSTI U SRBIJI

Odstupanje od rigidnog stava da su srpski državljani isključivi nosioci prava svojine na nepokretnostima usledilo je najpre kroz proširenje svojinskopravnih ovlašćenja onih kategorija stanovnika koje su već mogle biti sopstvenici nepokretnih dobara. U Srbiji su to od stanovnika koji nisu pravoslavne veroispovesti bili jedino Jevreji. Oni su mogli posedovati nekretnine u unutrašnjosti beogradskog šanca, ali su 1856. zatražili, pozivajući se na činjenicu da je Porta proglasila načelo ravnopravnosti svih žitelja i slobodu verozakona, da se prošire njihova vlasnička prava. U tom smislu molili su Knjaza da im dozvoli sticanje nepokretnosti i u selima u unutrašnjosti Srbije, kako bi mogli zidati kuće i obrađivati zemlju, jer ne mogu svi da žive u Beogradu.[42] Kako su zemaljski interesi i političke okolnosti nalagale hitno rešenje ovog pitanja, molba Jevreja je vrlo brzo uzeta u pretres, i, nakon što je Upraviteljstvo varoši Beograda dostavilo Popečiteljstvu vnutreni dela spisak svih Jevreja nastanjenih u Beogradu, Knjaz im je odobrio ista prava u predgrađima kao i u unutrašnjosti beogradskog šanca. Njihov zahtev da im se dozvoli sticanje i slobodno raspolaganje nepokretnostima izvan beogradske varoši nije usvojen.[43]

Popečiteljstvo finansija, Državni sovjet, Narodna skupština i Knjaz razmotrili su 1861. Uredbu o Jevrejima i tom prilikom su svi vrhovni organi vlasti jednoglasno ocenili da pomenuta uredba treba da ostane na snazi, i da i ubuduće ne treba dozvoliti Jevrejima nastanjivanje i sticanje nepokretnosti u unutrašnjosti Srbije. Ukoliko su neki od pripadnika jevrejske veroispovesti po slovu ranije važećih propisa postali vlasnici nepokretnih dobara u unutrašnjosti neće im biti oduzeta već stečena prava, jer bi to bilo i nezakonito i nepravično, a svakako ne bi bilo ni u duhu proklamovanog principa neprikosnovenosti privatne svojine.[44]

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[41] Zakon o naseljavanju od 3. januara 1880, *Zbornik zakona i uredaba izdanih u Knjažestvu Srbiji*, br. 35/1880.

[42] Knjaževski predstavnik Popečitelj inostrani dela Sovjetu 16. februara 1856, AS, DS, rn 682/1856.

[43] Knjaz Sovjetu 30. oktobra 1856, AS, DS, rn 682/1856.

[44] Knjaz Državnom sovjetu 4. novembra 1861, AS, DS, rn 496/1861.

Sva ograničenja svojinskih prava Jevreja u Srbiji ukinuta su odredbama Berlinskog kongresa. Naime, kao rezultat žalbi jevrejske zajednice, davanje nezavisnosti Srbiji bilo je uslovljeno priznavanjem pune verske, političke i pravne jednakosti pripadnicima svih konfesija (čl. XXXIV i XXXV).[45] Kako su sudovi i dalje primenjivali ranije važeće restriktivne propise i odbijali da potvrđuju tapije Jevrejima na nepokretna dobra, ministar pravde je bio prinuđen da interveniše 1884. i pozove sudove na poštovanje maksime *lex posterior derogat legi priori*. Pri tome se on osvrnuo i na to da je Srbija u međuvremenu zaključila bilateralne konvencije i međunarodne ugovore sa gotovo svim najvažnijim evropskim državama, čak i sa SAD,[46] koje su ratifikacijom u Skupštini dobile zakonsku snagu, i u kojima je predviđeno da državljani države potpisnice imaju pravo da pribavljaju nepokretna dobra u Srbiji pod istim uslovima pod kojim i domaći državljani i državljani najpovlašćenijeg naroda.[47] I u narednom periodu Srbija je nastavila da zaključuje trgovinske ugovore sa stranim zemljama gde je predviđeno da državljani druge strane ugovornice slobodno stiču nepokretnosti i raspolažu njima na tlu Srbije pravnim poslovima *inter vivos* i *mortis causa*, na bazi reciprociteta i uz primenu klauzule najpovlašćenije nacije.[48]

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[45] Članci Ugovora Berlinskog od 1/13. jula 1878. odnosni na Srbiju, *Zbornik zakona i uredaba izdanih u Knjažestvu Srbiji*, br. 33/1878.

[46] Čl. 3 Konvencije o konsulstvu i o nastanjivanju između Srbije i Italije od 28. oktobra (9. novembra) 1879, *Zbornik zakona i uredaba izdanih u Knjažestvu Srbiji*, br. 35/1880; Čl. I Ugovora o prijateljstvu i o trgovini između Srbije i Velike Britanije od 26. januara (7. februara) 1880, *Zbornik zakona i uredaba izdanih u Knjažestvu Srbiji*, br. 35/1880; Čl. II i III Ugovora o trgovini između Srbije i Austro-Ugarske od 24. aprila (6. maja) 1881, *Zbornik zakona i uredaba u Kraljevini Srbiji*, br. 37/1882; Čl. I i II Trgovinskog ugovora između Srbije i Ujedinjenih Država Američkih od 2/14. oktobra 1881, *Zbornik zakona i uredaba u Kraljevini Srbiji*, br. 38/1883; Čl. I i II Trgovinskog ugovora između Srbije i Grčke od 19. maja 1882, *Zbornik zakona i uredaba u Kraljevini Srbiji*, br. 38/1883; Čl. II i III Trgovinskog ugovora između Srbije i Nemačke od 25. decembra 1882. (6. januara 1883.), *Zbornik zakona i uredaba u Kraljevini Srbiji*, br. 39/1883; Čl. 2 i 3 Ugovora o prijateljstvu, trgovini i plovidbi između Srbije i Francuske od 18. januara 1883, *Zbornik zakona i uredaba u Kraljevini Srbiji*, br. 39/1883.

[47] Raspis ministra pravde svima prvostepenim sudovima od 24. maja 1884, *Zbornik zakona i uredaba u Kraljevini Srbiji*, br. 40/1884.

[48] Čl. 4 i 7 Trgovinskog ugovora između Srbije i Belgije od 5/17. januara 1885, *Zbornik zakona i uredaba izdatih u Kraljevini Srbiji*, br. 41/1885; Čl. II i III Zakona o trgovinskom ugovoru između Srbije i Austro-Ugarske od 28. jula (9. avgusta) 1892, *Zbornik zakona i uredaba u Kraljevini Srbiji*, br. 49/1895; Čl. II i III Zakona o ugovoru između Srbije i Nemačke o trgovini i carini od 20. decembra 1892. (1. januara 1893.), *Zbornik zakona i uredaba u Kraljevini Srbiji*, br. 49/1895; Čl. 2-4 Zakona o trgovinskom i plovidbenom ugovoru između Srbije i Rusije od 15. oktobra 1893, *Zbornik zakona i uredaba u Kraljevini Srbiji*, br. 49/1895; Čl. 1 i 4 Trgovinskog ugovora između Srbije i Bugarske od 16. februara 1897, *Zbornik zakona i uredaba u Kraljevini Srbiji*, br. 52/1899; čl. II Zakona o trgovinskom ugovoru između Srbije i Austro-Ugarske, *Zbornik zakona i uredaba u Kraljevini Srbiji*, br. 63/1910.

4. ZAKLJUČAK

Kroz celu istoriju Srbije XIX veka mogućnosti stranaca da stiču nepokretnosti bile su i ostale krajnje restriktivno postavljene. Za sve vreme dok je Srbija imala status vazalne kneževine prva i neophodna pretpostavka da stranci postanu sopstvenici zemalja i kuća na domaćem tlu bila je prijem u srpsko podanstvo. Svaka inicijativa za osnivanje stranih naseobina na domaćem tlu ocenjena je štetnom po državne i strateške interese i stoga odbačena, iako bi naseljavanje stranaca iz razvijenijih zemalja nesumnjivo ubrzalo privredni rast. Tek nakon Berlinskog kongresa na kojem je Srbija stekla suverenitet, nezavisnost i međunarodno priznanje zaključene su konvencije i ugovori sa pojedinim državama putem kojih su strani državljani stekli pravo da poseduju nepokretnosti u Srbiji. Međutim, i ta mogućnost je uvek bila uslovljena uzajamnošću i nije bila predviđena u odnosima sa svim državama sa kojima je Srbija uspostavila bilateralne odnose.[49] Iako je pravni položaj stranaca bio regulisan u dva navrata zakonskim aktima 1865. i 1880, ni u jednom od ova dva dokumenta nije, prilikom regulisanja svojinskih odnosa, bila predviđena mogućnost da stranci postanu sopstvenici nepokretne imovine na tlu Srbije. To pitanje nikada nije regulisano unutrašnjim pravnim aktima donošenim od strane srpske skupštine, već samo završnim aktima međunarodnih kongresa i bilateralnim konvencijama, uz ispunjenje određenih uslova i klauzula, tako da se ni ne može govoriti o opštepriznatom pravu stranaca da budu sopstvenici nepokretnosti u Srbiji XIX veka.

[49] Ilustracije radi, Konvencija o nastanjivanju i konsulstvu između Srbije i Švajcarske od 4/16. februara 1888. uopšte ne pominje mogućnost da državljani zemalja ugovornica stiču nepokretnosti na teritoriji druge države potpisnice konvencije. – *Zbornik zakona i uredaba u Kraljevini Srbiji*, br. 43/1888. Isto tako ni Trgovinska i konsularna pogodba između Srbije i Holandije od 5/17. oktobra 1881, *Zbornik zakona i uredaba u Kraljevini Srbiji*, br. 37/1882, kao ni Zakon o trgovinskom ugovoru između Srbije i Rumunije od 19. februara (3. marta) 1890, *Zbornik zakona i uredaba izdatih u Kraljevini Srbiji*, br. 46/1891, Trgovinska konvencija između Srbije i Crne Gore od 19. decembra 1895, *Zbornik zakona i uredaba izdatih u Kraljevini Srbiji*, br. 50/1899 ni Zakon o trgovinskom ugovoru između Srbije i Turske od 15/28. maja 1906, *Zbornik zakona i uredaba u Kraljevini Srbiji*, br. 61/1909 ne pominju tu mogućnost.

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Right of Foreigners to Acquire Real Estate in XIX Century Serbia

Abstract: *Immigration of rural population from neighboring countries into the Princedom of Serbia started immediately upon the ending of the war period after the Serbian Revolution and had taken place with various intensities in the following decades. Serbian authorities tried to regulate this immigration by adoption of two general legal acts concerning all farmers – foreign citizens who wanted to settle in Serbia. These were Settlement of Foreigners Act introduced on February 27, 1865 and Settlement Act enacted on January 15, 1880. As they were passed under various historical conditions, they differed regarding the aims that had to be reached, but at the same time, as they treated the same subject – settlement, they had certain similarities too. According to both documents, settlers would receive from the Government certain amount of municipal land, assistance in cattle, tools and money, as well as interest-free loans from the local authorities, but only if they apply for Serbian citizenship. Foreigners could not own real property until Serbia gained full independence in 1878. Still, even then, limitations for real property acquisition of foreigners in Serbia were significant. Foreign citizens could obtain immovable property only if their country had signed billateral convention or trade agreement with Serbia that allowed such possibility, and if requirement of reciprocity and Most-Favoured-Nation treatment were fulfilled.*

Keywords: *Foreigners, immigration, property rights, real estate, XIX century Serbia.*

Datum prijema rada: 13.09.2017.

Originalni naučni rad

347.232:712.24]:341.222(439)
doi:10.5937/zrpfns51-13620

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CROSS-BORDER ACQUISITION OF THE OWNERSHIP OF AGRICULTURAL LANDS AND SOME TOPICAL ISSUES OF THE HUNGARIAN LAW

***Abstract**: While Serbia is working on a new EU-conform land law, the EU law concerning the cross-border acquisition of agricultural lands cannot be considered as a static phenomenon. Namely, the issue is quite controversial among the EU's institutions and Member States. Evidence of this is the high number of infringement procedures launched by the EU Commission against the Member States joined the EU in 2004 or afterwards (hereinafter referred to as New Member States). However, it is worth stressing that the debate is not merely a New-Member-State-issue but a general one, and there are numerous uncertainties which may affect even the old Member States' land law regimes. That is the reason (or one of the most important reasons) why the European Parliament adopted a report on the state of play of farmland concentration in the EU in 2017. It seems that nowadays land issues have also become one of the topical questions of the EU, which questions could be raised because the EU is in a kind of the crisis. The EU should redefine itself and its goals, furthermore, it also should determine a new structure in numerous parts of life. The European Council for Rural Law (more usually known as the CEDR from its French name „Comité Européen de Droit Rural"), a think-tank which regularly provides assistance and advice to the institutions of the European Union, also dealt with the cross-border land law issues of the EU; namely, in a commission (COM II) concerning rural areas of the CEDR Congress (Potsdam, 2015) and at the conference on the 60th anniversary of the CEDR (Brussels, 2017). In a Hungarian conference (Budapest, 2017), the legal experts were gathered by the Hungarian Association for Agricultural Law and the Public Law Sub-Commission of the Hungarian Academy of Sciences in order that they could present the possible ways of the improvement for the EU and its Member States. With regard to this development, the present article focuses*

on the EU's main rules concerning the acquisition of agricultural lands, the infringement procedures against Hungary (hereinafter referred to as Hungarian cases), the report of the European Parliament and the general conclusions of the Budapest conference. The Hungarian cases are relevant not merely for Hungary as the European Commission has expressed its concerns about the most of regulations of the Hungarian land law in comparison with other concerned New Member States. Taking the low numbers of the CJEU cases (concerning land law) into consideration, the Hungarian cases might be significant for the whole of the EU and its future.

***Keywords**: land law – farmland – agricultural land – acquisition of ownership.*

The present article[1] may be regarded as a continuation of the author's article published in the 4/2016 issue of the *Zbornik Radova*.[2] The present article especially focuses on the European challenges which Hungary faced when it adopted new rules connected to the acquisition of the ownership of agricultural lands. In the opinion of the author, the present paper might be interesting for the legal experts in Serbia as well, taking into consideration the topical amendment of the Serbian[3] land law.[4]

After a short theoretical determination of the so-called 'cross-border acquisition of agricultural lands', the present article particularly deals with the European Union (hereinafter referred to as EU) law and its aspects concerning the cross-border acquisition of agricultural lands. Because of the special importance of the topical infringement procedures launched by the European Commission against Hungary regarding its national land law (hereinafter referred to as the Hungarian cases), the Hungarian cases are analysed in detail as well. Beside infringement procedures at the European Commission and at the Court of Justice of the EU (hereinafter referred to as CJEU), there are also certain preliminary rulings at the CJEU regarding the Hungarian land law. The last event in connection with the Hungarian cases is the publication of the opinion[5] of the advocate general at the CJEU (hereinafter referred

[1] EMBERI ERŐFORRÁSOK MINISZTÉRIUMA Supported by the ÚNKP-17-4-III. New National Excellence Program of the Ministry of Human Capacities.

[2] See János Ede Szilágyi, Acquisition of the ownership of agricultural lands in Hungary, taking the EU's and other countries's law into consideration. *Zbornik radova Pravnog fakulteta, Novi Sad,* 4/2016, 1437-1451.

[3] Cf. Luka Baturan, Economic Analysis of the Ban on Foreigners to Acquiring Property Rights on Agricultural Land in Serbia. *Economic of Agriculture,* 3/2013, 479-491; Luka Baturan, The ban on Foreigners Acquiring Property Rights on Agricultural and Forest Land in Serbia and Other Regional Countries. *Zbornik radova Pravnog fakulteta, Novi Sad,* 2/2013, 515-531.

[4] In the present article, *land law* means the legal provisions of a state which determine the ownership and the use of agricultural and forestry lands.

[5] Joined cases C-52/16 and C-113/16, opinion of advocate general Saugmandsgaard Øe delivered on 31 May 2017.

to as opinion of advocate general). Although, the opinion of the advocate general does not bind the CJEU in its decisions, it may exert an influence on the final decisions of the CJEU. It is for this reason that the opinion of the advocate general is assessed in the article as well. In 2017, the adoption of the report of the European Parliament concerning farmlands (hereinafter referred to as report of the European Parliament) was an absolute surprise and a real progressive initiative in connection with land law. In a certain sense, it can be regarded as a counter-opinion in connection with the opinion of the advocate general. Therefore the report[6] of the European Parliament is also detailed in the paper. At the end of this article, some proposals concerning the possible amendment of the EU law are presented. These proposals were determined at a conference organised by the Hungarian Association for Agricultural Law in cooperation with the Public Law Sub-Commission of the Hungarian Academy of Sciences in Budapest in June 2017. The participants and speakers of the conference concentrated on the Hungarian cases, the practice of the European Commission and the report of the European Parliament.

1. THE THEORETICAL DETERMINATION OF THE SO-CALLED CROSS-BORDER ACQUISITION OF AGRICULTURAL LANDS AND FORESTS IN A GENERAL SENSE AND IN THE EU

Nowadays, beside inland land *transfer*,[7] also *cross-border acquisition* plays a more and more important role in the ownership and/or the use of agricultural lands and forests (hereinafter together referred to as cross-border acquisition). Nevertheless, it is worth emphasizing that the distinction between internal and cross-border acquisitions cannot be exact. In this paper, *in a general sense*, cross-border acquisition primarily means the situation in which citizens and legal entities of a country (hereinafter referred to as 'foreigners' or 'investors') gain the ownership or long-term use of an agricultural land or forest situated in another country (hereinafter referred to as 'target' country or area). It is worth emphasizing that the EU law has absolutely different regulatory regimes concerning the ownership of agricultural lands and the usage of agricultural lands. *In connection with the EU law*, this paper mainly concentrates on the acquisition of the ownership of agricultural lands and forests.

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[6] European Parliament, *Report on the state of play of farmland concentration in the EU: how to facilitate the access to land for farmers*, A8-0119/2017, 30 March 2017.

[7] Cf. Article 4 (1) l)-n) of Regulation (EU) 1307/2013. According to Article 4 (1) n) of Regulation (EU) 1307/2013, the category of 'transfer' includes also the inheritance as well: "*'transfer' means the lease or sale or actual inheritance or anticipated inheritance of land or payment entitlements or any other definitive transfer thereof; it does not cover the reversion of entitlements upon expiry of a lease.*"

The *goals* of the acquisition of agricultural lands can be various: (a) to produce agricultural products, (b) to speculate on the land market, (c) others, (d) the combination of points (a)-(c).

In a wider sense, the situation in which *foreigners establish legal entities in the target country* and gain the lands of the target country may be regarded as cross-border acquisition as well. In the EU law, this interpretation of a cross-border acquisition could become quite difficult due to the forms of the European Cooperative Society (SCE, namely *Societas Cooperativa Europaea*)[8] and the European Company (SE, namely *Societas Europaea*)[9]. As regards legal entities, there are two elementary issues. First, the traceability of the real ownership (investor) background of the legal entities is always complicated (e.g. difficulties in connection with offshore companies). Second, the number of legal entities might easily be multiplied. The solution of both issues is tightly connected to the proper registration of the affected legal entities and their investors (ownership background). Otherwise, it is worth noticing that in the EU law, the 'cross-border' element with regard to land acquisitions is typically assessed in the procedure of the CJEU.

2. THE EUROPEAN UNION LAW CONCERNING THE CROSS-BORDER ACQUISITION OF THE OWNERSHIP OF AGRICULTURAL LANDS

The EU law does not prohibit Member State measures restricting the acquisition of agricultural lands by entities from outside of the EU or the European Economic Area (EEA). Nonetheless, inside the EU and the EEA, the EU law, on the one hand, requires the implementation of the four EU freedoms of the internal market (in connection with the acquisition of agricultural lands, the free movement of persons and capital are applicable) and, on the other hand, it prohibits the discrimination on the basis of nationality.[10] In connection with the interpretation of these rules, *Csák-Kocsis-Raisz* emphasize that "*EU Laws do not regulate the ownership of agricultural land directly, however, the judicial practice formed by the principles of the Treaty on the Functioning of the European Union (TFEU) sets frames and orientations for the legislation and implementation of laws.*"[11]

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[8] Council regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE).

[9] Council regulation (EC) No 2157/2001 on the Statute for a European company (SE).

[10] Ágoston Korom, A termőföldek külföldiek általi vásárlására vonatkozó 'moratórium' lejártát követően milyen birtokpolitikát tesz lehetővé a közösségi jog. *Európai Jog*, 6/2013, 7-16.

[11] Csilla Csák – Bianka Kocsis – Aniko Raisz, Vectors and indicators of agricultural policy and law from the point of view of the agricultural land sector. *Journal of Agricultural and Environmental Law (JAEL)*, 19/2015, 38.

The concerned rules of the Treaty on the Functioning of the European Union (TFEU) are especially the free movement of persons and capital[12] (Articles 49 and 63 of the TFEU; hereinafter referred to as '*negative integration rules*' or '*negative integration model*') and an objective ("*to ensure a fair standard of living for the agricultural community*") of the Common Agricultural Policy (CAP) of the EU (i.e. Article 39 (1) point b) of the TFEU; hereinafter referred to as '*positive integration rules*' or '*positive integration model*').[13] According to *Ágoston Korom*,[14] beside the anti-discrimination rules, the EU law determines the competence of its Member States to adopt their national land law in the intersection of the negative and positive integration rules. The mentioned TFEU rules contain rather general provisions, therefore, the CJEU has an important role to interpret them and to help assess the national land laws of the Member States.[15] As regards the negative integration rules, according to the practice of the CJEU, full compliance with the EU law can be ensured by the national law (a) if the public interest is pursued by the national law (i.e. objectives in the public interest) and (b) if the measure of the national law cannot be exchanged for less restrictive measures (i.e. the principle of proportionality). As regards the *objectives in the public interest*, the CJEU regards the objectives of national agricultural land policy such as (a1) to preserve a permanent agricultural community, (a2) that the land should belong to persons wishing (and being capable) to farm it, (a3) the possibility to counteract speculative land acquisition, (a4) etc. to be conform with the TFEU and to pursue an objective in the public interest. The *restrictive measures accepted* by the jurisdiction of the CJEU are (b1) the procedure of prior authorisation for the acquisition of agricultural land,[16] (b2) the system of prior declaration,[17] (b3) the provision for a higher tax on the resale of land occurring shortly after acquisition,[18] (b4) the requirement of a substantial minimum duration for leases of agricultural land,[19] (b5) etc.

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[12] It is worth noticing that, according to Annex I of Council directive 88/361/EEC, investments in real estate on national territory by non-residents are part of the capital movements in the EU.

[13] About distinction between the negative and positive integration models and rules of the EU, see Ágoston Korom, Az új földtörvény az uniós jog tükrében, in: *Az új magyar földforgalmi szabályozás az uniós jogban* (ed.: Ágoston Korom), Nemzeti Közszolgálati Egyetem, Budapest, 2013, 14.

[14] Korom (2013), 14.

[15] See furthermore 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. *JAEL*, 9/2010, 52-55.

[16] See Case C-213/04 Ewald Burtscher v Josef Stauderer [2005] ECR I-10309, paragraph 57; and Case C-452/01, paragraphs 41-45.

[17] See Case C-213/04, paragraphs 44, 52-54, 59-62.

[18] See Case C-370/05, paragraph 39.

[19] See Case C-370/05, paragraph 39.

2.1. The discrimination and the European Commission's infringement procedures against the New Member States

The present article tries to find an answer to the question whether the EU Commission's investigation regarding the land law of the New Member States may be considered discriminatory or not.

The antecedents of the European Commission's infringement procedures against the New Member States are the followings. At the time of their accessions, on the basis of their Accession Treaties of 2003, 2005 and 2012, (since 2004) the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovakia, (since 2007) Romania, Bulgaria and (since 2013) Croatia (i.e. the New Member States) were each granted a *transitional period*[20] for maintaining existing legislation restricting the acquisition of the *ownership*[21] of agricultural lands and forests, by *derogation* from the freedom of capital movements. After the transitional period had expired, numerous new Member States adopted new land laws including restrictive measures. Typically, the legislation of Old Member States provided a role model for the New Member States (the French and Austrian models were quite popular among them). In 2015, the EU Commission launched infringement procedures against some of the New Member States; namely Bulgaria, Hungary, Latvia, Lithuania and Slovakia. In the opinion of the European Commission, some provisions of these Member States may be considered as the violation of the free movement of capital and the freedom of establishment, and, therefore, this situation discourages cross-border investment in the land market of the New Member States.

In connection with these measures of the European Commission, the CEDR Congress COM II Conclusion noted: "*In cases when the EU Commission initiated infringement proceedings against the New Member States because of such Member State-restrictions that already exist in Old Member States, the action of the EU Commission can raise concerns, and may be regarded discriminative*".[22] Some representatives of the European Parliament interpreted the situation similarly, therefore they raised several questions in their so-called 'questions for written answer to the Commission'.[23] Namely, for example: "*Given the Commission's*

[20] In connection with the transitional period, *László Fodor* expressed a quite critical opinion. In his opinion, it is a double standard applied against the new member states. Its pseudolatry nature is hidden among other things that the subsidies given to equalize the price of the lands during these 7 years were much lower than had been for the earlier member states; László Fodor, Kis hazai földjogi szemle 2010-ből, in: Az európai földszabályozás aktuális kihívásai (ed.: Csák Csilla), Novotni Alapítvány, Miskolc, 2010, 124.

[21] Namely, there are generally no restrictions on the *lease* of agricultural lands by foreigners.

[22] Published by János Ede Szilágyi, Conclusions, *JAEL*, 19/2015, 92 (this part of the Conclusions was adopted).

[23] See: Question for written answer to the Commission by Norbert Erdős, *Infringement proceedings relating to landholding policy in the new Member States*, P-005558-15, 8 April 2015; Question for written answer to the Commission by Norbert Erdős, *Legal effect of the accession*

discretionary scope regarding the launch of infringement proceedings, does the Commission consider that this situation is compatible with the fundamental principle of equal treatment — which is also applied in EC law — and with the provisions on the prohibition of discrimination laid down in the Commission's Code of Good Administrative Behaviour?"[24] In its answer, the European Commission referred to the end of the transitional period provided in the Accession Treaties of the New Member States as a rightful reason to launch infringement procedures merely against the New Member States: "*The current systematic check of agricultural laws by the Commission in six countries has its roots in the Treaties of Accession, whereby these countries were granted temporary derogations from the free movement of capital for agricultural land. With the expiry of these derogations in 2014, Member States had to check the restrictions for investments from other EU Member States on their land markets against the justification criteria as set out in the Treaty on the Functioning of the European Union and against the principle of proportionality. ... The Commission has carried out an assessment of these new land laws and has opened infringement procedures against the countries where the rules are not in line with EC law.*"[25] The answer of the European Commission raised the question whether the expiry of these derogations provide a lawful title to assess only the New Member States' land law. Taking the answers of the European Commission into consideration, *Ágoston Korom* noted that the European Commission could not reassuringly prove its right to assess only the New Member States' national land laws on the basis of the expiry of derogations. Citing the answers of the European Commission, Korom also drew the attention to the situation that the European Commission's standard practice could not prove such a doubtful Commission's procedure either.[26] Essentially, *Ildikó Bartha* also made a similar conclusion with regard to the answers of the European Commission.[27] The opinion of the author of the present paper is that although Korom's interpretation is quite vigorous, he could not find either a justified and reasonable legal title for the European Commission (in its answers) to confirm its right to assess the EU-law-conformity of national land laws merely in connection with the New Member States.

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treaties of the new Member States, E-013450-15, 2 October 2015; Question for written answer to the Commission by Norbert Erdős, *Equal treatment among the Member States in the area of property policy*, E-002940-16, 12 April 2016; etc.

[24] Question for written answer to the Commission by Pál Csáky, *Application of the fundamental principle of equal treatment*, E-013351-15, 30 September 2015.

[25] Answer given by Lord Hill on behalf of the Commission, P-005558/2015, 13 May 2015.

[26] Ágoston Korom, Gondolatok az új tagállamok birtokpolitikájával kapcsolatban – transzparencia és egyenlő elbánás, in: *Honori et Virtuti* (ed.: Gellén Klára), Pólay Elemér Alapítvány, Szeged, 2017, 264.

[27] Ildikó Bartha, Földindulás – A földforgalom-szabályozás tagállami és uniós joga. *Jogtudományi Közlöny*, 9/2017, in press.

2.2. The Hungarian cases and the opinion of advocate general

At the time of the expiry of the transitional period, the Hungarian legislator had to reassess the national land law regime (which was highly analysed and presented by numerous authors; e.g. *Csák*,[28] *Nagy*,[29] *Prugberger*,[30] *Tanka*[31]), and adopted an absolutely new one (which was outstandingly analysed and presented by numerous authors; e.g. *Bányai*,[32] *Bobvos*,[33] *Csák*,[34] *Hornyák*,[35] *Kurucz*,[36] *Nagy*,[37] *Olajos*[38]) in and after 2013. However, numerous aspects of the new Hungarian

[28] *Csilla Csák* perspicaciously analysed the previous Hungarian land law regime in respect of the EU law: Csák Csilla, Die ungarische Regulierung der Eigentums- und Nutzungsverhältnisse des Ackerbodens nach dem Beitritt zur Europäischen Union. *JAEL*, 5/2010, 20-31.

[29] Beside the land law regime other legal fields play an important role, for example within the regulatory framework of financial law the tax regulation as it was pointed out by *Zoltán Nagy*: Csilla Csák, Zoltán Nagy, Regulation of obligation of use regarding the agricultural land in Hungary. *Zbornik radova Pravnog fakulteta, Novi Sad*, 2/2011, 541-550; and Zoltán Nagy, A termőfölddel kapcsolatos szabályozás pénzügyi jogi aspektusai, in: *Az európai földszabályozás aktuális kihívásai* (ed.: Csák Csilla), Miskolc, Novotni Kiadó, Miskolc, 2010, 187-198.

[30] Tamás Prugberger, Szempontok az új földtörvény vitaanyagának értékeléséhez és a földtörvény újra kodifikációjához. *Kapu*, 6-7/2012, 62-65.

[31] Endre Tanka, *Nem én kiáltok, a föld dübörög*, Kairosz, Budapest, 2011.

[32] Krisztina Bányai, Theoretical and practical issues of restrains of land acquisition in Hungary. *JAEL*, 20/2016, 5-15.

[33] Pál Bobvos, Erika Farkas Csamangó, Péter Hegyes, Péter Jani, A mező- és erdőgazdasági földek alapjogi védelme, in: *Számadás az Alaptörvényről* (ed.: Balogh Elemér), Magyar Közlöny Lap- és Könyvkiadó, Budapest, 2016, 31-40.

[34] Csilla Csák, Zsófia Hornyák, Bianka Kocsis, The altering Hungarian regulation of transactions in agricultural lands, in: *Current questions and european answers on the field of law and justice in Romania and Hungary* (ed.: Christian Dumiriu Mihes, Diana Cirmaciu), Editura Pro Universitaria, Bucuresti, 2016, 86-94.

[35] *Zsófia Hornyák* prudently drew the attention to the importance of a new succession regime concerning agricultural law: Zsófia Hornyák, Die Regeln der Erbfolge auf der Basis einer Verfügung von Todes wegen im landwirtschaftlichen Grundstückverkehr. *JAEL*, 21/2016, 4-16. Previously, she comprehendingly assessed the relationship between the Swiss, the Austrian and the (new) Hungarian land regime: Zsófia Hornyák, Die Voraussetzungen und die Beschränkungen des landwirtschaftlichen Grunderwerbes in rechtsvergleichender Analyse. *CEDR Journal of Rural Law*, 1/2015, 88-97.

[36] Mihály Kurucz, Gondolatok a magyar földforgalmi törvény uniós feszültségpontjainak kérdéseiről, in: *A Magyar Tudomány Napja a Délvidéken 2014* (ed.: József Szalma), VMTT, Novi Sad, 2015, 120-173.

[37] *Zoltán Nagy* and his company rationally presented the new legislation in a general sense: Klaudia Holló, Zsófia Hornyák, Zoltán Nagy, Die Entwicklung des Agrarrechts in Ungarn zwischen 2013 und 2015. *JAEL*, 19/2015, 56-64.

[38] *István Olajos* and *Szabolcs Szilágyi* analysed the new legislation in a general sense: István Olajos, Szabolcs Szilágyi, The most important changes in the field of agricultural law in Hungary between 2011 and 2013. *JAEL*, 15/2013, 93-110. *István Olajos* exceedingly presented the first judgements of the Hungarian Constitutional Court: István Olajos, Die Entscheidung des Verfassungsgerichts über die Rolle, die Entscheidungen und die Begründetheit der Gründen der Stellungnahmen der örtlichen Grundverkehrskommissionen. *Agrar- und Umweltrecht*, 8/2017,

land regime were contested by the European Commission and even by private persons. These disputes resulted in the different cases. The European Commission launched two infringement procedures against Hungary. Besides, private persons also sued the Hungarian authorities in connection with the new law at the Hungarian courts (e.g. in *Szombathely*),[39] and, after that, the Hungarian courts submitted requests for a preliminary ruling.

As far as the infringement procedures are concerned, one of them is a general and comprehensive infringement procedure, as the European Commission assessed the new Hungarian land law regime as a whole in detail (hereinafter referred to as comprehensive infringement procedure). Besides, there is a special infringement procedure as well, which concerns national transitional rules on usufruct (hereinafter referred to as usufruct infringement procedure). As to the comprehensive infringement procedure, this legal case was perfectly presented by *Tamás Andréka* and *István Olajos*.[40] "*In the comprehensive case, the EU Commission launched its so-called pilot procedure with regard to certain legal institutions which were later, during the negotiations with the Hungarian government found to be in compliance with the EU regulations. Such EU-conform legal institutions are (a) the procedural role of local commission, (b) land acquisition limit of farmers and land possession limit of farmers and agricultural producer organizations, (c) the system of pre-emption right and the right of first refusal, and (d) the regulation on the term of leasehold. The even presently going infringement procedures, the following national measures' compliance are questioned by the Commission: (a) complete ban on the acquisition of land by domestic and foreign legal entities, (b) proper degree in agricultural or forestry activities, (c) proper agricultural or forestry practice abroad, (d) obligation on the buyer to farm the land himself, (e) impartiality in prior authorisation for the sale of lands. Among the questioned institutions, the ban on legal entities is the bone of the present land acquisition regime, and, according to Tamás Andréka and István Olajos, the aim of this institution is to avoid the uncontrollable chain of ownership which would be in contradiction with keeping the population preserving ability of the country, since it would be impossible to check land maximum and the other acquisition limits.*"[41]

284-291. *István Olajos* focused on the practical dimensions of the new Hungarian land regime and outstandingly concentrated on the most controversial issues of them: István Olajos, Földjogi kiskáté. *Miskolci Jogi Szemle*, spec. ed. 2/2017, 409-417.

[39] First, *Anikó Raisz* drew the attention to the importance of the Szombathely cases; see Anikó Raisz, Topical issues of the Hungarian land-transfer law. *CEDR Journal of Rural Law*, 1/2017, 74.

[40] Tamás Andréka – István Olajos, A földforgalmi jogalkotás és jogalkalmazás végrehajtása kapcsán felmerült jogi problémák elemzése. *Magyar Jog*, 7-8/2017, 422-424.

[41] The thoughts of Andréka and Olajos were summarized and translated by: Anikó Raisz, Topical issues of the Hungarian land-transfer law. *CEDR Journal of Rural Law*, 1/2017, 74.

As for the usufruct infringement procedure, the subject of this case has numerous similarities with the preliminary ruling mentioned above. Because of the released opinion of the advocate general in connection with the preliminary ruling (i.e. the preliminary ruling is in an advanced status in comparison with the usufruct infringement procedure), the paper presents the essential aspects of the legal background of these cases (i.e. the usufruct infringement procedure and the Szombathely case) under the details of the preliminary ruling. According to the controversial transitional rules of Hungary, the concerned Hungarian authorities had to cancel the registration in the property register of the usufructuary rights in agricultural land on the basis of a national legislation prescribing the extinction of the usufructuary rights and rights of use in productive land in the absence of proof that those rights were created between close members of the same family. According to the opinion of the advocate general, the advocate general considered that the "*legislation and the cancellation decisions taken on the basis thereof are contrary to the free movement of capital. In fact, the requirement that such rights must have been created between close members of the same family gives rise to effects which are indirectly discriminatory against nationals of other Member States and cannot be justified by any of objectives put forward by the Hungarian Government.*"[42] In my opinion, the most interesting aspects of the opinion are the followings.

First, the advocate general merely referred to the '*negative integration rules*' of the TFEU, and the advocate general did not take the '*positive integration rules*' into consideration. According to my interpretation, this argument of the advocate general considered agricultural land as merely an economic good, and considered the acquisition of agricultural lands only as a commercial issue. In the opinion of *Tamás Andréka*, if the interpretation of the CJEU in connection with the EU law's aspects of cross-border acquisition moves toward this excessively negative integration model as well, all EU countries which apply restrictions on the land market will be forced to cancel their land-market measures in ten years.[43]

Second, the opinion of the advocate general interpreted the Hungarian national rules concerning usufructuary rights as a simple lease contract. Namely, the specialities of the usufruct were absolutely neglected, or the legal substances of the usufruct and the lease were confused in the opinion. That is the reason why the advocate general's arguments concerning the existence of indirect discrimination are quite unjustified and unreasonable. In Hungary, the typical parties of a usufructuary right are relatives. However, the advocate general interpreted this speciality of the usufruct as a condition which does not establish a formal distinc-

[42] Joined cases C-52/16 and C-113/16, opinion of advocate general Saugmandsgaard Øe delivered on 31 May 2017, para. 4.

[43] Tamás Andréka opinion was communicated at the Conference of the Hungarian Association for Agricultural Law in Budapest on 1 June 2017.

tion by reference to origin, nevertheless, it is more easily satisfied by nationals of Hungary than by those of other Member States.[44]

2.3. The report of the European Parliament

As opposed to the advocate general's opinion presenting an excessively negative integration model (i.e. agricultural lands are merely economic goods), the European Parliament adopted a report representing the positive integration model after certain antecedent.[45] Answering the aforementioned, as well as having regard to the infringement proceedings against the New Member States, on 27th April 2017 the European Parliament adopted the report[46] on farmland concentration. The European Parliament warns of the phenomenon of land grabbing[47] in the EU.[48] Besides, the EP took into consideration the followings in the report: (a) "*land is on the one hand property, on the other a public asset, and is subject to social obligations*";[49] (b) "*land is an increasingly scarce resource, which is non-renewable, and is the basis of the human right to healthy and sufficient food, and of many ecosystem services vital to survival, and should therefore not be treated as an ordinary item of merchandise*";[50] (c) "*sufficient market transparency is essential... and should also extend to the activities of institutions active on the land market*"[51]; (d) "*the sale of land to non-agricultural investors and holding companies is an urgent problem throughout the Union, and whereas, following the expiry of the moratoriums on the sale of land to foreigners, especially the new Member States have faced particularly strong pressures to amend their legislation,*

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[44] Joined cases C-52/16 and C-113/16, opinion of advocate general Saugmandsgaard Øe delivered on 31 May 2017, para. 71-81.

[45] János Ede Szilágyi, Anikó Raisz, Bianka Kocsis, New dimensions of the Hungarian agricultural law in respect of food sovereignty. *JAEL*, 22/2017, in press.

[46] European Parliament, *Report on the state of play of farmland concentration in the EU: how to facilitate the access to land for farmers*, Committee on Agriculture and Rural Development A8-0119/2017, 30.03.2017 (hereinafter referred to as EP 2007).

[47] Definition of land grabbing according to the European Economic and Social Committee: *„There is no internationally recognised single definition of land grabbing. Land grabbing is generally understood to mean a process of large-scale acquisition of agricultural land without consulting the local population beforehand or obtaining its consent. Ultimately, this diminishes the scope of the local population to manage a farm independently and to produce food. The owner also has the right to use the resources (land, water, forest) and the profits arising from their use. This can lead to a situation in which established agricultural land use is abandoned in favour of other activities*; European Economic and Social Committee: Opinion: *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, 2.2.

[48] EP 2017, point AM and page 14.

[49] EP 2017, point G.

[50] EP 2017, point J.

[51] EP 2017, point P.

as comparatively low land prices have accelerated the sale of farmland to large investors";[52] (e) "*farmland areas used for smallholder farming are particularly important for water management and the climate, the carbon budget and the production of healthy food*";[53] (f) "*there is a substantial imbalance in the distribution of high-quality farmland, and whereas such land is decisive for the quality of food, food security and people's wellbeing*";[54] (g) "*small and medium-sized farms, distributed ownership or properly regulated tenancy, and access to common land… encourage people to remain in rural areas and enable them to work there, which has a positive impact on the socio-economic infrastructure of rural areas, food security, food sovereignty and the preservation of the rural way of life*";[55] (h) "*farmland prices and rents have in many regions risen to a level encouraging financial speculation, making it economically impossible for many farms to hold on to rented land or to acquire the additional land needed to keep small and medium-sized farms viable*";[56] (i) "*differences among the Member States in farmland prices further accentuate concentration processes*";[57] (j) there are numerous findings concerning speculations[58] and abuse[59]; (k) "*limited companies are moving into farming at an alarming speed; whereas these companies often operate across borders, and often have business models guided far more by interest in land speculation than in agricultural production*".[60]

With regard to the abovementioned, the EP (a) "*recognises the importance of small-scale family farms for rural life*",[61] and "*considers that local communities should be involved in decisions on land use*".[62] (b) The European Parliament "*calls for farmland to be given special protection with a view to allowing the Member States, in coordination with local authorities and farmers' organisations, to regulate*

[52] EP 2017, point Q.
[53] EP 2017, point S.
[54] EP 2017, point T.
[55] EP 2017, point V.
[56] EP 2017, point AB.
[57] EP 2017, point AC.
[58] "*the purchase of farmland has been seen as a safe investment in many Member States, particularly since the 2007 financial and economic crisis; whereas farmland has been bought up in alarming quantities by non-agricultural investors and financial speculators*"; EP 2017, point AJ; and "*the creation of speculative bubbles on farmland markets has serious consequences for farming, and whereas speculation in commodities on futures exchanges drives up farmland prices further*"; EP 2017, point AL.
[59] "*a number of Member States have adopted regulatory measures to protect their arable land from being purchased by investors; whereas cases of fraud have been recorded in the form of land purchases involving the use of 'pocket contracts', in which the date of the conclusion of the contract is falsified; whereas, at the same time, large amount of land has been acquired by investors*"; EP 2017, point AK.
[60] EP 2017, point AQ.
[61] EP 2017, point 14.
[62] EP 2017, point 18.

the sale, use and lease of agricultural land in order to ensure food security...".[63] (c) Furthermore, the European Parliament – among others – calls on (c1) "*the Commission to establish an observatory service for the collection of information and data on the level of farmland concentration and tenure throughout the Union*";[64] (c2) "*the Commission, on this basis, to report at regular intervals to the Council and Parliament on the situation regarding land use and on the structure, prices and national policies and laws on the ownership and renting of farmland, and to report to the Committee on World Food Security (CFS)...*".[65]

The report of the European Parliament proves that the positive integration model also has an importance for the whole of the European Union and not only for the New Member States.

2.4. The possible reforms of the EU law concerning the cross-border acquisition of the ownership of agricultural lands

Stimulated by the uncertainties observed in connection with the EU law concerning acquisition of agricultural lands, the COM II's general reporter (*János Ede Szilágyi*) of the CEDR Congress submitted a proposal in which the possible ways of the EU law's improvement were formally analysed. According to the Conclusions of the COM II, "*The question may be solved in different ways; here, we draw the attention to four possible solutions: [a] The EU ceases to apply the four fundamental freedoms with regard to the land policy of the MSs. This step would mean in a way the easing of the integration. [b] Those MSs which introduced restrictions in their land market, liberalize the rules of their land market or introduce more liberal rules. Obviously, this may severely hurt the interests of the citizens of these MSs, and may lead to land-grabbing with regard to the land markets of the new MSs. [c] The debate may be solved in a simple political way: i.e. the case may be forgotten, e.g. based on a political background-deal. In this case, there is no guarantee that the question would not arise later again, or that someone (basically anyone) does not bring the question in front of the CJEU in the frame of a preliminary procedure, basically circumventing the background-deal of the politicians (i.e. of the EU Commission and the given MSs). [d] We move in the direction of further regulation, even modifying the primary legislation of the EU if necessary. This may cease the uncertainty and deepen the integration; on the other hand, it may be interpreted as giving up a certain part of the sovereignty.*"[66] In an unaccepted part of the Conclusions of the COM II, the general reporter

[63] EP 2017, point 38.

[64] EP 2017, point 2.

[65] EP 2017, point 8.

[66] Published by János Ede Szilágyi, Conclusions. *JAEL*, 19/2015, 93 (this part of the Conclusions was adopted).

elaborated a possible way how to develop the EU legislation toward the positive integration model. In the opinion of the general reporter, the agricultural land is not a typical object of a commercial transaction, and, therefore, the principles of the freedom of the capital and of the free movement of persons shall not apply without restrictions in the case of agricultural land. For providing this special status of agricultural lands, the general reporter could imagine the amendment of the EU legislation (even of the Treaties of the EU). Otherwise, the general reporter would provide a liberty for the Member States whether they endeavour to apply special rules in the transaction of agricultural lands or not. The general reporter would detail the definition of the 'agro-productional use of agricultural lands' and the admissible public interest objectives which can be called up when restricting the free movement of capital and persons with regard to agricultural lands. The general reporter would also regulate more precisely the applicable measures which may be considered as proportional restrictions. Among these measures, the general reporter would pay a special attention to the regulations concerning the acquisitions by legal entities.[67]

Inspired by the adoption of the report of the European Parliament, the participants of a conference organised by the Hungarian Association for Agricultural Law in cooperation with the Public Law Sub-Commission of the Hungarian Academy of Sciences (Budapest, 2017) also dealt with the possible development opportunities of the EU law concerning the acquisition of agricultural lands (especially the ownership-acquisition). *Mihály Kurucz* determined several conceptions how to amend the EU law in order that the EU can fulfil the objectives defined in the report of the European Parliament. One of these concepts is about the *renationalization* of the Common Agricultural Policy of the EU. According to this concept, Member States could regain their absolute competence and freedom to regulate their own land market in exchange for the EU agricultural and rural development financial supports (i.e. the Member States would lose these supports). His other concept would handle the situation, beyond the negative integration rules of the EU, via stricter rural development and environmental protection regulations adopted by the EU. It could be a smart *indirect regulation* in connection with the land transfer. *Tamás Andréka* also proposed more concepts. One of them is a remarkable movement from the free movement of capital *towards the right of establishment*. According to another Andréka's concept, EU legislators should integrate *land-acquisition into the Common Agricultural Policy*. The concept of *Ágoston Korom* is not a real concept of the amendment of the EU law. Namely, in the opinion of Korom, the present legal framework of the EU is acceptable, nevertheless, the European jurisprudence should rethink the *scientific background* of the

[67] Published by János Ede Szilágyi, Conclusions. *JAEL*, 19/2015, 94-95 (this part of the Conclusions was not adopted).

issue, create a new system and communicate this to the European Commission. In my opinion, the Comprehensive Economic and Trade Agreement (CETA) also contains a useful solution. Namely, the scope of the CETA extends to the transfer of agricultural lands as well, and therefore the CETA rules concerning investments (e.g. market access, national investment) are applicable to the acquisition of agricultural lands. Despite this scope of the CETA, the parties (i.e. the concerned countries, e.g. the Member States of the EU) have the right to take reservations concerning cross-border acquisition of agricultural lands. It means that countries may maintain their existing measures, and – in certain cases – adopt new or more restrictive measures that are not conform with the CETA rules (e.g. Hungary took these kinds of reservations). Accordingly, the *CETA's reservation-mechanism* could also be used in the EU law.

Conclusions

In my opinion, the abovementioned situation proves that the EU law concerning cross-border acquisition of agricultural lands and the related jurisdiction of the CJEU are not static phenomena. The Member States of the EU have the competence to constitute their national land law regimes in a dynamically changing frame of the EU law. Finally, the Member States have to equilibrate between the positive and negative integration models of the EU law. Nevertheless, the report of the European Parliament created a new situation in the uncertainties, and it can be regarded as an explicit step toward the positive integration model.

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Határon átívelő tulajdonszerzés termőföldön és egyes időszerű kérdések a magyar jogban

Összefoglaló: *Miközben Szerbia az unióhoz történő felzárkózása miatt éppen arra törekszik, hogy földjogát EU-konformmá tegye, látni kell azt, hogy maga az EU joga sem statikus a határon átnyúló földszerzések vonatkozásában. A kérdéskör ugyanis nagyon is aktuális az EU-n belül. Ezt támasztja alá az, hogy az Európai Bizottság tömegesen indított kötelezettségszegési eljárásokat a 2004-ben illetve az azt követően csatlakozott tagállamokkal (új tagállamok) szemben. Tévedés ugyanakkor azt hinni, hogy ezen ügyek pusztán az új tagállamok problémái lennének, és hogy a többi, régi tagállam esetén immáron nincsenek is kérdések. Ezt támasztja alá az Európai Parlament 2017-es jelentése is a földkoncentráció tárgyában. Úgy tűnik tehát, hogy a napjainkban több ponton is reformra szoruló Európai Unió a földjog, különösen annak határon átnyúló aspektusai vonatkozásában is újragondolást érdemel. A kérdéssel foglalkozott az Európai Agrárjogi Tanács is, amely az EU szerveinek tanácsadó testülete. Így a CEDR 2015-ös potsdami kongresszusának II. munkabizottságában a vidéki területek kapcsán, illetve a CEDR 60. évfordulóján. Magyarországon a szakértők pedig 2017-ben azért gyűltek össze, hogy – több más mellett – vázolják egy lehetséges továbblépés lehetőségeit. Jelen cikk e folyamatokhoz illeszkedve mutatja be az EU jogának földszerzésekre vonatkozó főbb előírásait, a magyar kötelezettségszegési eljárásokat, az Európai Parlament jelentését, és a budapesti konferencia legfőbb felvetéseit. A magyar ügyek nem csak Magyarország számára bírnak jelentőséggel, ugyanis a magyar földjog az, amely kapcsán a legtöbb aggodalmat fogalmazott meg az Európai Bizottság. Vagyis a magyar ügyek igencsak lényegesek az egész Európai Unió joga és jövője szempontjából.*

Kulcsszavak*: földjog – mezőgazdasági földek – tulajdonszerzés.*

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Prekogranično sticanje svojine na poljoprivrednom zemljištu i pojedini problemi mađarskog prava s tim u vezi

Sažetak: *Budući da Srbija radi na usklađivanju svojih propisa o poljoprivrednom zemljištu sa pravom Evropske unije, treba imati u vidu da pravo Evropske unije u vezi sa prekograničnim sticanjem poljoprivrednog zemljišta nije statičan fenomen. Naime, reč je o problemu koji je poprilično kontroverzan među institucijama i državama članicama Evropske unije. O ovome svedoči značajan broj postupaka po tužbi zbog neispunjenja obaveza koje Evropske komisije pokreće protiv država članica koje su Evropskoj uniji pristupile počev od 2004. godine (u daljem radu označene kao nove države članice). Međutim, treba napomenuti i to da se ova debata ne tiče isključivo novih država članica, nego je opštijeg karaktera, jer postoje brojna otvorena pitanja koja se takođe mogu ticati starih država članica. To je razlog (ili jedan od najistaknutijih razloga) zbog kog je Evropski parlament u 2017. godini usvojio izveštaj o stanju koncentracije poljoprivrednih površina u Evropskoj uniji. Deluje da su problemi u vezi sa zemljištem dobili na značaju u Evropskoj uniji, što se može dovesti u vezu sa činjenicom da je Evropska unije u svojevrsnoj krizi. Ona bi trebalo da redefiniše svoju organizaciju, ciljeve i, povrh toga, da drugačije uredi brojne oblasti života. Evropski savet za ruralno pravo (poznatiji kao CEDR po francuskom nazivu Comité Européen de Droit Rural) je svojevrsna „think-tank" organizaciji koja pruža podršku i savete institucijama Evropske unije. Ona se između ostalog, bavi i prekograničnim aspektima zemljišnog prava na nivou Evropske unije. To je, pre svega došlo do izražaja na kongresu održanom u Potsdamu 2015. godine i konferenciji održanoj u Briselu 2017. godine povodom šezdesetogodišnjice CEDR. Na mađarskoj konferenciji koja je 2017. godine održana u Budimpešti, okupili su se eksperti mađarskog Udruženja za poljoprivredno pravo i predstavnici mađarske Akademije nauka zaduženi za oblast javnog prava u cilju predstavljanja mogućih poboljšanja za Evropsku uniju i njene države članice. S tim u vezi, u članku su predstavljena osnovna pravila u vezi sa sticanjem poljoprivrednog zemljišta, postupak po tužbi zbog neispunjenja obaveza protiv Mađarske (u daljem radu označeni kao mađarski slučajevi), izveštaj Evropskog parlamenta i opšti zaključci budimpeštanske konferencije. Mađarski slučajevi nisu bitni samo za Mađarsku, budući da je Evropska komisija izrazila zabrinutost o najvećem broju odredaba mađarskog*

zemljišnog prava koje su poznate i u ostalim novim državama članicama. Imajući u vidu mali broj slučajeva u vezi sa zemljišnim pravom koji su do sada bili raspravljeni pred Sudom pravde Evropske unije, mađarski slučajevi bi mogli biti od značaja za celu Evropsku uniju i njenu budućnost.

Ključne reči: *zemljišno pravo – poljoprivredno zemljište – sticanje svojine.*

Datum prijema rada: 18.09.2017.

Originalni naučni rad

336.2:351.823.1(439)
doi:10.5937/zrpfns51-13797

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THE HUNGARIAN TAX REGULATION ON THE LAND AND AGRICULTURAL ACTIVITY[1]

Abstract: *This study examines the Hungarian tax law regulations regarding agricultural activities and the tax law status of arable land. The examination focuses on three tax categories since the scope of this study does not make it possible to perform a thorough examination of all the tax categories as well as these three tax categories focus the most on the special status of arable lands and food production. The three tax categories – Personal Income Tax, Value Added Tax and Levy – depict the sector's tax law specialties. The most significant regulations can be found on the field of Personal Income Tax since rhis tax category offers possibilities to diversely regulate the agricultural activities. The Value Added Tax and Levy mostly helps the agricultural activities with special regulations, tax exemptions and tax benefits.*

Keywords: *tax, Personal Income Tax, Value Added Tax, Levy, agricultural entrepreneur, small-scale agricultural producer, tax exemption, tax benefits.*

1. INTRODUCTORY THOUGHTS

The legal literature regarding the agrarium considers tax law regulations as a part of the so called agricultural financial law'. According to Ede János Szilágyi „the two big parts of the agricultural financial system are agricultural taxing and agricultural financing „The agricultural financing as a part can be further separated into special agricultural loan and agricultural financial aid.[2] It must be

[1] The described article was carried out as part of the EFOP-3.6.1-16-2016-00011 "Younger and Renewing University – Innovative Knowledge City – institutional development of the University of Miskolc aiming at intelligent specialisation" project implemented in the framework of the Szechenyi 2020 program. The realization of this project is supported by the European Union, co-financed by the European Social Fund.

[2] Szilágyi János Ede: Agricultural and rural development finances and agricultural risk management rules, in: Szilágyi János Ede (SZERK.): Agrárjog. Miskolc, 2017, Miskolci Egyetemi Kiadó, 236-237.P.

noted that the state's role is significant not only related to agricultural taxing but at the other two parts of agricultural financing though this role's effect varies greatly. Regarding the agricultural loan Csilla Csák notes that *„ the state's presence takes place in establishing and operating the loaning system depending on how the sector's profitability and the bank's loaning costs relate to each other... [;] in our country ... the financing and within it the loaning system's establishing, as well as establishing and operating the agricultural financing all presume the neccessity of the state's intervention*.[3] Regarding the agricultural financial aid – similar to other countries of the European Union – the defining role is not the member state's but the European Union's since „after joining the European Union the role of national financial aid underwent a significant change, manifesting in a smaller amount than that of agricultural- and regional development aid financed by the European Union."[4] Focusing to the basics by Csaba Lentner in agriculture we find long production processes, high capital requirements, strong fluctuations of earnings, becasue of the sector depend on special biological factors, climate and weather, so goverments and banks use special financing, support and tax policies.[5]

Regarding the agricultural taxing it can be determined that the Hungarian tax law regulations treat agricultural activities and arable lands as well as similar taxable persons in a special way. We can find significant differences in the regulations of different tax categories since each tax law treats this field differently due to its own nature. Generally speaking most tax laws aim for its regulations to be as general as possible and to enforce fair competition.[6] In addition to these the

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[3] Csák Csilla: International models of the agriculture institutional system, in: Csák Csilla (SZERK.) : Ünnepi tanulmányok Prugberger Tamás Professzor 70. születésnapjára. Miskolc, 2007, Novotni alapítvány, 83. P.

[4] Szilágyi (2017): Op. cit. 238. p.

[5] Lentner, Csaba: Dilemmas of Hungary's Agricultural Future Contrasted with Historical Backrground and Developed Market Economy Models. In. On the Eve of the 21st Century: Challenges and responses. Edited by Erzsébet Gidai, Budapest, 1998., Akadémiai Publishing House, pp. 175-185., Lentner, Csaba: Az agrárfinanszírozás kérdőjelei Magyarországon: az Amerikai Egyesült Államok, Kanada, Új-Zéland követhető modellek? In. Gazdálkodás, 1992, 36. évfolyam, 2. szám, pp. 70-72., Lentner, Csaba: A magyar agráfinanszírozás jellemzői az EU csatlakozás küszöbén. In. Gazdálkodás, 2004., 48. évfolyam, 1. szám, pp. 69-78., Lentner, Csaba: Magyar mezőgazdaság a pénzügypolitika csapdájában: A mezőgazdaság európai uniós támogatási rendszerének kritikája. In. Fejlesztési stratégiák, Finanszírozási Alternatívák. Edited by Katona, Klára – Schlett, András, 2014. Pázmány Press, pp. 247-261.

[6] In Hungary, the ownership-acquisition of agricultural lands is limited. See: Csilla Csák – Bianka Enikő Kocsis – Anikó Raisz, Vectors and indicators of agricultural policy and law from the point of view of the agricultural land structure. *Journal of Agricultural and Environmetal Law*, 2015, 19. szám, 32-43. p. Zsófia Hornyák, Die Voraussetzungen und die Beschränkungen des landwirtschaftlichen Grunderwerbes in rechtsvergleichender Analyse, *CEDR Journal of Rural Law*, 2015, 1. szám, 91-97. p. Jakab Nóra – Szilágyi János Ede: New tendencies in connection with the legal status of cohabitees and their children in the agricultural enterprise in Hungary. *Journal of Agricultural and Environmetal Law*, 2013, 15. szám, 52-57. Olajos István: Die Entscheidung des

legislator prefers those taxable persons who engage in agricultural activities or are owners of arable lands.[7] The legislator took into account the sector's special qualities; the sector's great costs, receipt for these costs is not always available (self-employment, using self-producted materials), a big part of the taxable persons engage in agricultural activities as additional activity so the income from these activities is negligible, the sector requires high amount of tools and is time-consuming, investments pay off in a longer run; the state considers this sector a significant, strategic one so it does not subject great taxes to nor the one engaging in agricultural activities, nor the consumer (apart from excise goods). Regarding the definition of agricultural activities Csilla Csák notes that in the European Union the task of determining this definition is in the member state's authority, accordingly „the definition of agricultural activity is not uniform in the member states. In Hungary it is defined in single legislative processes, from the visual angle of domains of regulation. According to this from different aspects, different definiteness can be observed, for example: tax law, environmental protection, support, land-property etc."[8]

In the light of the above the tax law seeks to place the sector in a vantage point with its own devices. Such tools can be providing certain taxable persons special tax arrangements and legal status, providing special tax arrangements for products produced by agricultural activities and for the activity itself, defining

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Verfassungsgerichts über die Rolle, die Entscheidungen und die Begründetheit der Gründen der Stellungnahmen der örtlichen Grundverkehrskommissionen, *Agrar- und Umweltrecht*, in press. Raisz Anikó: Topical issues of the Hungarian land-transfer law. *CEDR Journal of Rural Law*, 2017, 1. szám, 70-72. p. Szilágyi János Ede: Acquisition of the ownership of agricultural lands in Hungary, taking the EU's and other countries' law into consideration, *Zbornik Radova Pravni Fakultet Novi Sad*, 2016, 4. szám, 1444-1448. p.; Szilágyi János Ede: Das landwirtschaftliche Grundstückverkehrsgesetz als erster Teil der neuen ungarischen Ordnung betreffend landwirtschaftlichen Grundstücken, *Agrar- und Umweltrecht*, 2015, 2. szám, 46-50. p.

[7] Csák Csilla: The Hungarian National Report on the legal forms of agricultural undertakings, with attention to traditional and industrial cultivation. *Journal of Agricultural and Environmetal Law*, 2010, 8. szám, 21. p.; Csilla Csák's statement does not contradict Ede János Szilágyi's observation, that the „European Union's regulations provide a definition of agricultural activities; Szilágyi János Ede: Változások az agrárjog elméletében? *Miskolci Jogi Szemle*, 2016, 1. szám, 38. p. Ede János Szilágyi did the thorough analysis of the changes of the definition of agricultural studies in the light of the relevant legislation and case law: Szilágyi János Ede: The Dogmatics of Agricultural Law in Hungary from an Aspect of the EC Law. *European Integration Studies*, 2009, 1. szám, 48-49. p.; Szilágyi János Ede: Az agrárjog dogmatikájának új alapjai – útban a természeti erőforrások joga felé? *Jogtudományi Közlöny*, 2007, 3. szám, 118-119. p.

[8] Regarding the evaluation of tendencies of agricultural tax law see István Olajos- Anikó Raisz: The Hungarian National Report on Scientific and Practical Development of Rural Law in the EU, in States and Regions and in the WTO. *Journal of Agricultural and Environmetal Law*, 2010, 8. szám, 45-46. p.; Szilágyi János Ede: The Hungarian National Report on Legal Incentives and Legal Obstacles to Diversification for Farmers. *Journal of Agricultural and Environmetal Law*, 2010, 8. szám, 11-12. p.

separate tax rates, providing tax exemptions, the imposition of tax-deductible discounts and the provision of tax benefits.

The scope of the study does not allow it to analyze all the tax categories related to agricultural law, thus I will touch upon three tax categories – Personal Income Tax, Value Added Tax and Levy – outlining their cardinal points. At the same time, I must note that the Hungarian agricultural literature (Raisz-Szilágyi) has already paid special attention to corporate tax, but its importance is less relevant with regard to its specialties. The study only covers Hungarian legal regulation.

2. SPECIAL REGULATIONS OF THE PERSONAL INCOME TAX RELATED TO AGRICULTURAL ACTIVITIES AND ARABLE LANDS

From an agricultural law perspective the personal income tax addresses the sector's issues the most. Most private individuals perform agricultural cultivation not as a private entrepreneur but as an additional source of income which is especially important for the people living in rural areas. The sector's other particularity is their high cost and their questionable verification. Even though the agriculture as a sector demands great costs, these costs manifest in self-performed tasks or self-producted crop, actions which the taxpayer does not have bills for.

In the light of the above, the Act CXVII of 1995 on Personal Income Tax specially addresses the income of those private individuals who perform agricultural cultivation. The aforementioned law establishes the category of small-scale agricultural producers as well as agricultural smallholders, defines tax exemptions as well as provides discounts on income, establishes special small-cale agricultural flat-rate costs, provides tax relief for small-scale agricultural producers, and as a special tax rule it creates the option of flat-rate taxation.

The Act CXVII of 1995 on Personal Income Tax defines such incomes which can be disregarded when determining earnings.[9] These are called non-taxable items, within its regulations the aforementionted Act regulates tax-free incomes.[10] There are several tax exemptions related to the agricultural area, such as the income from the transfer of a cooperative business share obtained in the course of the realization of the cooperative business, the annuity obtained for land, the income from the transfer and lease of land, and the payment of land. It is also clear from the list that tax law exempts land income in particular from personal income tax.

The Act provides tax exemption up to a maximum of 10000 HUF for pensioners for the income received by a retired member of a cooperative from the

[9] Szakács Imre: *Az adózás nagy kézikönyve*. Budapest, 2008, KJK-Kerszöv, 772-775. p.

[10] Act CXVII of 1995 on Personal Income Tax . 7. § (1) a., and Schedule No 1. to Act CXVII of 1995

transfer of his business share in the cooperative acquired as an allocated asset as part of a life annuity contract concluded with the cooperative in which he/she is a member,[11] Similarly income received under a life-annuity contract concluded pursuant to the Act on National Land Reserves and the Government Decree on the Purchase of Arable Land by the State in Exchange for Life Annuity.[12]

Another preferred area of income from land is tax exemption for income from land transfer and leasing. The Act contains strict requirements as a condition of exemption,.[13] By principle only income below 200,000 HUF is tax-free for the sale of agricultural land if the buyer uses the agricultural land for a period of at least 5 years as a private entrepreneur or sells the land to a registered agricultural cooperative so the agricultural cooperative can rent the land for at least 10 years. The income is also tax-exempt if the transfer is made to a private individual for land consolidation purposes or municipal government for a social land program specified in a separate law or for the benefit of the National Land Fund.[14]

It is important to also point out that if a private individual sells the arable land to private entrepreneur engaged in animal husbandry, or to a small-scale agricultural producer and they use it for at least 5 years, or sells it to an employee of a agricultural cooperative and the cooperative rents the land for at least 10 years, the income is tax-free regardless of the income limit. This type of total tax exemption applies when the share ownership is terminated and for the purpose of land consolidation, as well as for the benefit of the National Land Fund.

The proceeds from the leasing of the land will be tax-exempt if the lease term is five years on the basis of the contract based on the lease of the land. If the contract is terminated without a reason beyond the contracting parties, the taxpayer must pay the tax with interest.

The tax exemption for land allocation concerns the narrower range of private individuals. The Act provides tax exemption for land not exceeding 6,000 m2.[15]

While ensuring the tax exemption, the personal income tax law provides favorable taxing conditions for taxpayers engaged in agricultural activities**.**[16]

Specific rules apply to small-scale agricultural producers and agricultural smallholders, the rules which apply to agricultural producers also apply to family estate farmers and their contributing family members and extend to the private

[11] Schedule No 6. to Act CXVII of 1995. 7.1.

[12] Schedule No 1. to Act CXVII of 1995 7.14. The definition of arable land is not defined separately by the law, but it makes a refererence in paragraph 3, point 51, that agricultural and forestry land is defined in the Act CXXII of 2013 as arable lands.

[13] Schedule No 6. to Act CXVII of 1995. 9.5.1.-9.5.4. pont.

[14] Act LXXXVII of 2010 The National Land Fund is part of state treasury assets, and aims to manage the land owned by the state. This includes all land owned by the state and the related property rights.

[15] Schedule No 1. to Act CXVII of 1995 8.12., 8.13.

[16] Szakács (2008): Op. cit. 762. p.

individuals who engage in agricultural production and are registered in the customer registration system maintained by the agricultural and regional development aid.

Small-scale agricultural producer[17] means a private individual above the age of 16 who is not a private entrepreneur but possesses a small-scale producer license and is engaged in activities aimed at producing the listed products on his own farm.

Own farm shall mean the entitlement of the private individual who is actually conducting the production activities to dispose over the equipment (including leased equipment), the organization of production and – with the exception of cultivating sowing seeds under contract and breeding, fattening, and tending livestock under contract – the use of the results of production.[18]

Tax law also provides the definition of small-scale producer license: small-scale producer license means an official document issued and validated pursuant to the provisions of a government decree designed to register the income generated by small-scale agricultural activities; the license shall contain: a) the particulars of the small-scale agricultural producer, b) all of the other information prescribed in the government decree that is necessary for discharging tax liability.[19]

According to the personal tax law special taxation conditions are granted only to private individuals engaged in agricultural production, an important element of the concept of small-scale agricultural producer is the activity or the product to which this activity is directed.

Small-scale agricultural production activities include the growing of plants, orchards, breeding of animals, and processing of products at an individual's farm, if this occurs using base materials which are themselves produced at the farm, the collection of certain agricultural products at an individual's own farm which does not violate the law, and forestry activities conducted in an individual's own forest area, if, in respect of all of the aforementioned activities, the product produced or the activity falls under either of the categories listed in Act CXVII of 1995 on Personal income tax law.[20]

The concept of agricultural smallholder covers a narrower concept within the concept of a small-scale agricultural producer. Agricultural smallholder means any small-scale agricultural producer whose revenue from such activities does not exceed 8 million forints – 26230 euro – in a tax year. The special category is important because it provides better tax conditions for the individual.

The income from small-scale agricultural producer activities is one type of income derived from self-employment activities[21] within the aggregate taxed

[17] Hadi László (szerk.): *Az új adójog magyarázata 2010*. Budapest, 2010, HVG-ORAC Kft., 871. p.; Act CXVII of 1995 on Personal Income Tax 3. § 18.

[18] Act CXVII of 1995 on Personal Income Tax 3. § 18. a.

[19] Act CXVII of 1995 on Personal Income Tax 3. §. 18. b.

[20] Schedule No 6. to Act CXVII of 1995.

[21] Act CXVII of 1995 on Personal Income Tax 8. §. The rate of tax in the year of 2017 is 15%, in principle, for all income subject to personal income tax.

earnings, so income is determined by itemized expense accounting or 10 per cent expense ratio.[22]

Small-scale agricultural producers (including agricultural smallholders using flat-rate taxation) with revenues less than 600,000 forints annually from such activities shall not be required to consider income from such revenues, while if revenues exceed the above amount, income shall be determined based on all revenues included.[23]

Small-scale agricultural producers using itemized expense accounting may deduct the following from their income from such activities[24]**:** a) if employing workers with at least 50 per cent disability, the monthly wages paid to each such employee, not to exceed the prevailing monthly minimum wage in effect on the first day of the month; with respect to apprentice training of vocational school students on the basis of apprenticeship agreement, as described by law, 24 per cent of the prevailing minimum wage for each student and for the month and any fraction thereof, or 12 per cent of the prevailing minimum wage for the month and any fraction thereof if the apprentice training is provided under a cooperation agreement concluded with the vocational school. A small-scale agricultural producer (for the purposes of this Section hereinafter referred to as ‚employer') providing further and continuous employment to a vocational school graduate who has successfully completed the professional examination or to a previously unemployed person, or a person released from imprisonment within 6 months from the date of release, or a person released on parole, if not using flat-rate taxation, may deduct the amount of social security contribution paid during such employment, not to exceed a period of 12 months, from the revenues produced by such activities, regardless of whether such amounts can otherwise be claimed as expenses in the case of itemized expense accounting.

Agricultural smallholders using itemized expense accounting may claim 40 per cent of the revenues from such activities, deducted as smallholders' expense allowance, over and above verified expenses. In this case losses may not be deferred until, if so intended, such smallholders' expense allowance is claimed**.**[25]

In addition to the special cost accounting and income reduction rules, the legislator also provides the taxpayer with a tax break for the small-scale

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[22] Itemized cost accounting means that the taxpayer is entitled to deduct from his income the maximum amount of his income. 'Expense' according to Act CXVII of 1995 on Personal income tax 4. § (3); Only expenses directly connected to gainful activities, actually paid during the tax year exclusively for the purpose of gainful activities and for pursuing the activities, which are duly substantiated shall be recognized as expenses.

[23] Act CXVII of 1995 on Personal Income Tax 23. §.

[24] Act CXVII of 1995 on Personal Income Tax 21. §.

[25] Act CXVII of 1995 on Personal Income Tax 22. § (6)

agricultural producer in the amount corresponding to the tax on his income from this activity,[26] but this amount can not exceed 100,000 forints (327 euros). The two tax breaks are collectively referred to as small-scale agricultural producers' tax breaks.

Furthermore, the law also favors agricultural smallholders by giving them the option of flat-rate taxation which in essence means that no substantive cost declaration has to be made instead it is based on the smallholders income.[27] The basis is the flat-rate income which is calculated by subtracting the expense ratio determined by the Personal Income Tax and expressed in a precentage of income Act from the smallholders overall income.[28]

This results in an extremely low tax base for agricultural smallholders, generally 15% (expense ratio of 85%) and 6% for breeding and production of animal products (expense ratio of 94%).

Agricultural activities may be conducted by the taxpayer as a private entrepreneur as well but in this case he shall be subjected to the general rules with the exception of flat-rate taxation since that is also an option for private entrepreneurs conducting non-agricultural activites.

Special legislation has been in the Personal Income Tax Act within income from property transfer proceeds from the transfer of property reclassified agricultural land. By building residential parks, more and more land is being constructed so that land is extracted from agricultural cultivation and investors re-classify it as building land. This process jeopardizes the amount of arable lands, on the other hand, investors can gain extra profit as they can earn a substantially higher price for building land. The process has also attracted the attention of the legislator and has therefore introduced rules for taxing the extra profits.**[29]** The law does not increase the tax rate, but sets special rules for its tax base and as the tax base increases, the amount of tax will also increase. In this case, the tax base is the usual return (the portion of the income that exceeds the deductible costs) and the amount exceeding the normal return threefold. Thus, the standard rate of the tax base is increased by three times the extra profit. This rule also applies where the taxable person sells his share in a company which has property and the shareholder obtains a foreign exchange gain. In this case, the tax base will be the normal amount and twice the amount gained from the exchange rate.[30]

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[26] Act CXVII of 1995 on Personal Income Tax 39. § (1), Szakács (2008.): Op. cit., 852-853. p.

[27] Act CXVII of 1995 on Personal Income Tax 50-57. §

[28] Act CXVII of 1995 on Personal Income Tax 53. §

[29] Act CXVII of 1995 on Personal Income Tax 62/A§.

[30] Szokásos hozam az Szja törvény alapján az ingatlan átruházás esetén a levonható költségek 0,3 százalékának a tulajdonban tartás naptári napjaival megszorzott összege.

3. SPECIAL REGULATIONS OF THE VALUE ADDED TAX RELATED TO AGRICULTURAL ACTIVITIES AND ARABLE LANDS

Act CXXVII of 2007 (VAT Act) contains regulations on Value Added Tax specific to the different types of taxes. VAT is by definition a general, consumer-type tax.[31] General, because – with certain exceptions – it applies to the sales and import of every product and service including acquisitions within the borders of the European Union. Consumer-type, because ultimately it weighs on the consumer or the end user.

There are no specific requirements toward taxable persons: the VAT applies to every person or organisation with legal capacity conducting economic activities with no regard to its location, aim or result. Economic activity shall mean a long-term, regularly conducted activity within the framework of business operations with the objective of or resulting in financial profits including especially agricultural activities.[32]

A wide range of bases of assessment are regulated by the VAT Act, its scope covers the inland sales of products and providing services, product import and product acqusition within the European Community.[33]

VAT is sectorneutral, the agricultural sector is also subject to the general rules and the law only mentions agricultural products and agricultural activites in special exceptions. The VAT Act regulates the agricultural sector with its participants and the consumers of agricultural products through special provisions.

This specialty manifests in the tax rates and the special legal status of agricultural producers.

The rate of VAT affects the consumer price of products putting the burden on the end consumers. Providing tax benefits for basic food products is in some cases necessary for the central budget to prevent them from becoming impossible to pay for by low income consumers.

The Act defines three types of tax rates.[34] The general tax rate of 27% and the reduced rates of 5% and 18%. These rates apply to different types of products and services. The general rate isn't specified by the Act, it is a collective rate which has to be applied to each transaction for which the legislator doesn't provide reduced tax rates.[35]

The 5% tax rate apply to herbal drugs and among others to domestic swine, cattle, sheep, goat and their meat, poultry meat eggs and milk. The 18% tax rate

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[31] Földes Gábor: *Adójog*. Budapest, 2004, Osiris Kiadó, 244. p.
[32] VAT Act 5. § (1) and 6.§ (1)
[33] VAT Act 2. §.
[34] VAT Act 82. § (1)-(2)
[35] Szakács (2008): Op. cit. 97. p.

applies to milk products, grain and products made using these. Reduced tax rates therefore apply only to a limited circle of agricultural products.

Tax exemption is, however, more beneficial for the end consumer since VAT won't be applied and therefore won't be present as a price increasing factor. It is also favorable for low-income taxpayers since it exempts them from certain tax obligations and administrative burdens. Tax exemption is a special form of tax reduction. Generally there are two types of exemptions in tax law: personal and subject-based exemptions.[36] VAT uses similary categories with the addition of inland sales and transportation since Hungary joining of the European Union.

In the case of personal exemptions legal requirements have to be met to be granted exemption. It is favorable since it exempts the taxable person from administrative burdens and certain tax obligations. Taxable persons choosing personal exemption are for instance not obligated to pay VAT. Furthermore it is important to highlight the taxable persons inability to exercise his right of tax deduction while under the cover of personal exemption.[37] (This is not always financially favorable for the taxable person since he won't be entitled to tax deductions and returns.)

While personal exemption is optional providing the taxable person the choice of paying taxes under the general rules subject-based exemption is obligatory by law.[38] Subject-based exemption is tied to the basis of assessment. It applies to every taxable person in cases of the sales of products, providing services and product imports listed by the Act. Like personal exemption subject-based exemption grants tax exemption to the taxable person while preventing tax deductions and returns.[39]

From the wide range of subject-based exemptions a select few types of products and services related to agricultural law should be highlighted.[40] These include the supply of a building or parts of a building and the land on which it stands that is supplied before the first occupation or the elapsed period after first occupation, between the operative date of the occupancy permit of the relevant authority and the date of supply is less than two years and the supply of land or part of land which has not been built on excluding the leasing or renting of a building site.

Taxpayers in the agricultural sector are subject to the general rule but different types of special activities are provided with an option for special taxation method. This section focuses on the rules of taxation applied to producers conducting agricultural activities (agricultural producers). The special regulations benefit the taxpayers in two areas: the taxpayer is exempted from tax obligations and the related administrational burdens, through the compensational charges

[36] Földes (2004): Op. cit., 138. p.
[37] VAT Act 187. § (2)
[38] Földes (2004): Op. cit. 257. p.
[39] Földes (2004): Op. cit. 257-258. p.
[40] VAT Act 86. § (1) j-l., (2) Tax exemption based on the specifics of the activity.

gain „special budget assistance" which helps covering VAT costs related to their acquisitions.[41] Agricultural activities are not subject to taxes but they don't allow for tax deduction and taxpayers have no return or accounting obligation regarding these activities. The law grants agricultural producers special legal status and also provides a legal definition from a VAT perspective.

A taxable person conducting agricultural activities shall mean one who fully or partially conducts agricultural activities, is qualified as microentrepreneurship or self-employment by the special law, is established inland or otherwise has their place of residence or habitual residence inland. Agricultural activity shall mean the production or processing of products listed by the VAT Act and services provided with the use of instruments of self-owned businesses.[42]

Compensational charges offset non-deducable taxes in cases of purchases from the conductor of the agricultural activity. Compensational charges are part of the consideration but not the buying price and have to be paid after the transaction by the buyer. [43] The rate of the compensational charge is determined by the VAT Act at 12% for plants and herbal products, at 7% for livestock and animal products and also for providing services. Therefore compensational charges provide additional income for taxable persons conducting agricultural activities and the option to pass on VAT of acquisitions.

Compensational charges weigh only on the end consumer since the recipient has the option to deduct the VAT.

4. SPECIAL LEVY REGULATIONS RELATED TO AGRICULTURAL ACTIVITIES AND ARABLE LAND

Legislation acknowledges the problem of the dual nature of arable lands: it shouldn't simply be regarded as property since it is also a tool of production and thus a source of livelihood for the farmer. Subsequently levies favor transfer of property (be it free of charge or onerous) to preserve the continuity of management.[44] The law prefers furthermore the free of charge transfer of necessary tools of farming along with the arable land.

In cases of gift and inheritance levies (free of charge transfers of property) tax law preference manifests in the form of tax exemptions and benefits. Transfers

[41] VAT Act 197-253. §

[42] VAT Act 198. § a-c. Sections I and II of Appendix 7 of the Act list all the products and services in the field of agricultural activities (e.g. living plants, livestock, animal products, food products from the processing of agricultural products, field work, packing and storage of agricultural products).

[43] VAT Act 201-202. §.

[44] Act XCIII.of 1990 on

of arable lands (like with all other forms of property) are exempt from levies if the acquirer is the lineal relative or the surviving spouse of the deceased.[45]

Preferences for arable lands have a more narrow range and regulations operate with the method of full exemption instead. The inheritor of the arable land or its intangible property gains the benefit of having to pay only half the amount of the regular inheritance levy. If the inheritor is registered as a family estate farmer, he's only obligated to pay a quarter of the original amount. A similar regulation is in effect regarding the gifting of arable lands and their intangible properties: the amount of the levy to be paid is halved.

The transfer of property is fully exempt from levies in several cases of the gifting and inheritance of arable lands and their intangible properties. The transfer of management rights to the manager of state-owned environmentally protected areas is exempt. The law also exempts the inheritor if he transfers the inherited arable lands to a fellow inheritor registered as a family estate farmer. Furthermore, acquiring arable lands and their intangible properties by gifting is also exempt if the acquirer is a private entrepeneur, small-scale agricultural producer, family estate farmer and if the acquisition takes place as a requirement for homestead conveyancing support.

Unique types of homestead conveyancing exemptions can be found in the regulations of gifting and the free of charge transfer of intangible property. Private entrepeneurs, small-scale agricultural producers or family estate farmers are exempted from the levy if they acquire the arable land, the homestead, buildings or movable property items necessary for agricultural production from close relatives.[46]

The latter type of exemption applies to onerous tranfers of these types of properties, too. Generally transfers of property may only benefit from full exemptions rules of reduced levies and other preferences do not apply. Exempt is, however, the acquisiton of leasehold, acquisiton of property through voluntary land exchange for the purpose of land consolidation and the establishment of usufruct and use rights. The Levies Act grants levy exemption for the onerous acquisition of arable land by farmers if the legal requirements are met. These requirements include an obligation to use the land for agricultural or forestry purposes as a private entrepreneur, small-scale agricultural producer or family estate farmer for 5 years 12 months after the emergence of the levy payment obligation. It is also required to refrain from transferring the property or establishing any intangible property rights on it.[47] Should the requirements be violated the law sanctions the acquirer by doubling the amount of the levy.[48]

[45] Levies Act 16.§ (1) i. and 17.§ (1) p.
[46] Levies Act 16.§(6)-(7), 17.§(1).f., h., q., 17.§(3)
[47] Levies Act 26.§ (1) n., p., s., e.
[48] Levies Act 26.§ (18)

5. SUMMARY

Food production and rural development are strategic objectives of every government due to constant population growth and the increase of food product prices. A large part of the funds of the European Union flow into these sectors. It is important, however, for the legislator to help keeping the sector stable and provide access to quality food products for low income consumers.

It is easy to see while overviewing tax law regulations that the highest tax preferences are granted to agricultural producers, family estate farmers, and small-scale entrepreneurs. Small-scale agricultural producers conduct agricultural activities to secure additional income by using their own tools and workforce while practicing another (main) profession. These small farms are a highly important source of income for the rural population and fill a significant role in certain segments of food production, e.g. fruit and vegetable production and small-scale livestock production.

The tax law system of Hungary has been shifting from income taxes towards turnover taxes reducing income tax rates while increasing the rates for consumer taxes. (The rate of the personal income tax is 15% for private citizens and 9% for companies. The general rate of VAT is 27% but in some cases special rates apply.) Tax rates for food products had therefore have to be changed: by reducing them prices for food products also decreased.

The significance of the Levies Act lies in making it possible for relatives to conduct agricultural activities on gifted or inherited lands without high tax burdens and ensuring that arable lands are acquired by professional producers with the intent of agricultural production instead of investors through exemptions and preferences.

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Mađarsko poresko zakonodavstvo o zemljištu i poljoprivrednoj delatnosti

Sažetak: *Predmet ovog rada je mađarsko poresko zakonodavstvo koje se odnosi na poljoprivrednu delatnost i obradivo zemljište. Rad se fokusira samo na tri poreska oblika, kako zbog obima rada, tako i zbog činjenice da oni u najvećoj meri odražavaju specijalni status obradivog zemljišta i proizvodnje hrane. Ta tri poreska oblika su: porez na dohodak, porez na dodatu vrednost i posebna naknada. Najznačajnija za ovu oblast je regulativa posvećena porezu na dohodak, jer ovaj poreski oblik nudi mogućnosti za raznoliko regulisanje poljoprivredne delatnosti, dok je preostala dva poreska oblika uglavnom potpomažu specijalnom regulativom i poreskim oslobođenjima i olakšicama.*

Ključne reči*: porez; porez na dohodak; porez na dodatu vrednost; naknada; poljoprivrednik-preduzetnik; „mali" poljoprivrednik; poresko oslobođenje; poreske olakšice.*

Datum prijema rada: 14.09.2017.

Pregledni članak 349.412.22:341.95(498)
doi:10.5937/zrpfns51-15062

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ACQUIRING LAND OWNERSHIP RIGHTS IN ROMANIA BY FOREIGN CITIZENS

Abstract: *The present paper deals with the subject of the acquisition of land ownership in Romania by foreign citizens. It presents the legal problems involved matter in relation to the legal regime drawn by the three essential laws in the field, Law 312/2005, Law 18/1991 and Law 17/2014, to which are added the constitutional provisions regarding this subject. The legal regime under which land in Romania can be acquired by foreign citizens is presented depending on the fact that the foreign citizens are members of the European Union or they are foreign citizens belonging to third countries. Also, an important place in this study is reserved to the explaining of the meaning of the term reciprocity in this matter and to the functioning mechanism of the preemption right in connection with the acquisition of land ownership right in Romania by foreign citizens.*

Keywords*: acquisition of land ownership in Romania, foreign citizens, agricultural land, immovable property, preemption right, reciprocity, Romanian-Turkish Agreement.*

1. INTRODUCTION

All lands in Romania, irrespective of their destination, the holder, the title on which they are owned and their belonging to the public domain or to the private domain, constitutes the land fund of Romania, pursuant to art. 1 of the Land Fund Law no. 18/1991.

According to land use, they are categorized in art. 2 of Law no. 18/1991, in the following categories:

„a) Agricultural land, namely: agricultural arable land, vineyards, orchards, vineyard nurseries, fruit trees, hop and mulberry trees, pastures, hayfields, greenhouses, solariums, ponds and the like, those with forest vegetation, if they are not a part of forestry arrangements, wooded pastures, agrozootechnical constructions and facilities, fish farming and land improvements, technological and agricultural roads, warehouse platforms and storage facilities that serve the needs of agricultural production and non-productive land that can be arranged and used for Agricultural production;

b) Land with a forestry purpose, such as: wooded or crop land, forestry production or management, land for afforestation and non-productive land – rocks, abrupt, boulders, ravines, ravines, torrents – if included in the forestry arrangements;

c) Land permanently under water, such as: minor watercourses, lake's basins at maximum containment levels, bottom of inland maritime and territorial seas;

d) Urban land of urban and rural localities on which are located the constructions, other settlements of the localities, including agricultural and forest lands;

e) Land for special purposes such as those used for road, rail, naval and air transport, construction and associated facilities, construction and hydrotechnical, thermal, power and natural gas transmission, telecommunications, mining and petroleum operations, quarries and heaps of any kind, for defense needs, beaches, reservations, natural monuments, archaeological and historical sites, and others like these."

The lands belonging to the public domain are those affected by public utilities and the legal regime applicable to them is that of the public property right. These lands are inalienable, imprescriptible and not subjected to forced execution. They cannot be entered into the civil circuit except under the conditions provided by law, by decommissioning them of the public domain.

The lands subject to the right of private property are in the civil circuit and, irrespective of whether it belongs to natural or legal persons governed by private law or public law, in principle, have a free movement regime, that is, they can be acquired by anyone without restrictions. However, the principle of the free movement of private property is subject, at the moment, to legal limitations justified by ensuring the security of the civil circuit.

The current legislation[1] only provides for minimum restrictions on the acquisition of the right to private property or the exercise of the private property

[1] Starting with 1947, the political regime established in Romania imposed restrictive regulations on private property, many of which referred to the legal circulation of land. By successive laws, it was mainly intended to legislate the authentication of legal acts relating to land, to obtain prior administrative authorization for alienation property right, to limit the acquisition of agricultural land by inheritance only to direct or collateral relatives up to the third degree, including spouses. Subsequently, the land without construction, property of the natural or legal

right on the land, in order to allow the securing of land transactions, as well as a better knowledge of Romania's land stock and better exploitation of it

2. LEGAL RESTRICTIONS ON FREE MOVEMENT OF LAND

The Romanian Constitution stipulates in art. 44 par. (2), second thesis, the fact that foreign citizens and stateless persons may acquire the right to private ownership of land only in the conditions resulting from the joining of Romania to the European Union and other international treaties to which Romania is a party, on a reciprocal basis, and by legal inheritance**.**

In our attempt to determine the content of the notion of reciprocity, a *sine qua non* condition for the acquisition of land ownership by third-country nationals, we feel it would be useful to do this by referring to a concrete example in this matter. For this reason, we will focus our attention on the provisions of the Agreement between the Government of Romania and the Government of the Republic of Turkey on the Promotion and the Safeguarding of Investments[2], thus trying to discover the way in which such a normative act is drafted and how, in this matter, the conditions of reciprocity can be expressed and understood.

Desiring to develop the existing economic cooperation relations between the two countries and to encourage the creation of favorable conditions for the investments of the Romanian investors on the territory of the Republic of Turkey and of the investors from the Republic of Turkey on the territory of Romania, the two States have signed this Agreement which, among other conferred rights, grants to the signatory parties, subject to the conditions imposed by this Agreement, the prerogative to acquire ownership of the immovable property in the territory of each of the signatory States.

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persons in the urban and urban areas became unavailable and the subject of expropriation (Law No. 19/1968), and by Laws 58/1974 and 59/1974 all categories of land were removed from the civil circuit. The lands in the buildable perimeter of urban and rural settlements could be acquired only through legal inheritance, their acquisition through legal acts between living persons being forbidden. If the constructions were alienated, their land was lawfully transferred to state ownership. Since December 1989, these laws have been abolished, and, regarding this matter, land law regulations being Law no. 18/1991 regarding the land fund, Law no. 54/1998 on the legal circulation of land, which repealed the articles referring to the legal circulation of land under Law no. 18/1991, Law no. 247/2005 on property and justice reform, as well as some adjacent measures, which by art. 8 of Title X repealed Law no. 54/1998. As for Title X of Law no. 247/2005 regarding the legal circulation of land, it was repealed by Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code. See E. Chelaru, *Legal Circulation of Land*, Edit. All Beck, Bucharest, 1999, p. 48,142; C. Bîrsan, V. Stoica, *Evolution of legislation on the circulation of buildings, II*, in Law no. 6/1990, p. 45 49; D. Chirică, *The Consequences of the Post-revolutionary Legislative Changes on the Movement of Private Property*, in Law no. 6/1991, p. 25 27; E. Chelaru, *Civil Law. The Rigts in rem*, ed. 3 a, Ed. C.H. Beck, Bucharest, 2009, p. 123, 180.

[2] Published in the Official Monitor of Romania and in force since February 23rd, 2009.

Thus, as announced in the title of the Agreement, the essential condition to be taken into consideration by the parties is that the acquisition of ownership of immovable property is to be done for the purpose of investing in the territory of the other country. In this regard, according to art.1 of the Agreement, investment term means, in accordance with the national laws and regulations of the contracting party hosting the investment, any assets and includes, but is not limited to those listed, the right of the parties to "movable and immovable property and rights such as mortgages, guarantees and pledges or similar ownership rights ". Considering the content of this normative text, we can see that the parties are given the right to acquire real estate ownership in the territory of the other country, and, as long as the text does not explicitly stipulate what kind of immovable property is referring to, the interpretation can be made in the sense that the parties are offered the opportunity to acquire real estate (immovable property), constructions and land, either inside or out of town, of the urban area.

Together with the essential condition allowing the acquisition of ownership of immovable property, that is, its acquisition for investment purposes, the Agreement also sets out other rules that parties must obey in order to exercise the rights granted by it.

In this regard, we can distinguish between the following guidelines: acquiring ownership of immovable property will be done in accordance with the national laws and regulations of the state in which acquisition takes place (Article 2, paragraph 1); The acquisition of property will take place without prejudice to the measures adopted by the European Union; Investment by investors of either contracting party will always be fair and equitable and will enjoy adequate protection in the territory of the other contracting party; No contracting party shall, through unreasonable or discriminatory measures, affect the management, maintenance, use, possession, extension or administration of such investments (Article 2 (2)); Each contracting party shall grant to its investors in the territory of the other contracting party treatment no less favorable than that it accords to its investors or investors of a third state, whichever is the more favorable (Article 3 (1)).

As it can be seen, the optics of the clauses stipulated in the Agreement is a general one, to which the parties must relate, and the effective acquisition of the property right is to be achieved in compliance with the requirements and rigidities found in national laws of the state where the immovable property in which the acquisition takes place.

Therefore, considering the provisions of the Romanian-Turkish Agreement and also the constitutional provisions of art. 44 par. 2[3], we find that the central

[3] "Private property is guaranteed and protected equally by law, regardless of the holder. Foreign citizens and stateless persons may acquire the right to private land ownership only in the conditions resulting from the joining of Romania to the European Union and other international

idea, namely, the premise of the existence of the right to acquire land ownership, is the requirement of reciprocity.

In trying to delineate this requirement, it is obvious that reciprocity refers to the fact that each state must recognize in favor of the other the prerogative of acquiring in its territory the right to ownership of land. Furthermore, in order to exercise this prerogative, each state may establish one or more common conditions, such as the acquisition of property for the purpose of investment found in the Romanian-Turkish Agreement, these conditions being imposed by both States, and, in case of non-fulfillment, the right to acquire land ownership cannot be exercised in a valid way. Next, the following common point which characterizes reciprocity is that the exercise of the rights granted to the citizens of the two states should benefit of a fair and equitable treatment, on the basis of which the other party will not have a less favorable legal status than that applied to a third state which is part of an agreement that regulates on the same matter.

Another important provision in terms of reciprocity is that, for the purpose of exercising the right conferred by the Agreement, the parties of each state are required to respect the national laws and regulations of each state regarding the conditions to be met in order to acquire ownership of the land. From this last requirement, to which reciprocity refers to, results two essential aspects: the first is that by complying to the law and national regulations by the parties, as they are naturally subject to the same legal rules as the citizens of each of the states, they will not benefit from more favorable treatment, neither in comparison with them, nor with European citizens; the second refers to the idea that, by enforcing national law and regulations, the parts of third states will not be subject to a more severe legal regime than that imposed on the citizens of the signatory states. On the other hand, regarding the condition of observing the national law of each state, we believe that reciprocity is limited to the actual content of the national provisions, in the sense that the laws and regulations of each state must not have provisions that outline a legal regime identical to that of the other State in the matter of acquiring land ownership, and it is even possible for the stipulations in the national laws of one of the states to be more severe or more restrictive than those provided for in the national regulations of the other state. Thus, reciprocity is limited to compel the parties to that the acquisition of land ownership will be done in accordance with the general and special provisions found in national law. So, reciprocity does not require that national regulations from the signatory states should create the same legal regime. One last aspect that we consider to be mentioned and also what is presented in close connection with the idea of reciprocity is, as it results from the lines of the Romanian-Turkish Agreement, that, whatever

treaties to which Romania is a party, on the basis of reciprocity under the conditions provided by organic law, as well as through legal inheritance."

the stipulations to be applied mutually between the parties, they must be in compliance with the rights and measures drawn from the quality of the Romanian state as a Member State in the European Union, thus respecting the rights granted to the European citizens in this matter.

a) Land acquisition in Romania by foreign citizens, stateless persons and foreign legal persons under Law no. 312/2005

The normative act regulating the way in which foreign citizens, stateless persons and foreign legal persons acquire ownership of land in Romania is Law no. 312/2005[4].

According to art. 3 of the Law no. 312/2005, "The citizen of an EU Member State, the stateless person domiciled in a Member State or in Romania and the legal person established under the law of a member state may acquire ownership of the land under the same conditions as those provided for by law for Romanian citizens and for Romanian legal persons ". According to art. 1 paragraph (2) of Law no. 312/2005, "The provisions of the present law do not apply to the acquisition of land ownership by foreign citizens and stateless persons by legal inheritance", in which case the provisions of the common law in matters of inheritance shall apply.

Regarding the testamentary heirs, the provisions applicable to them are those of the Art. 3 of the Law no. 312/2015, given the fact that this is the rule in the matter of acquiring the right of ownership by foreign citizens and stateless persons.

Exceptions to the rule in Art. 3 of the Law no. 312/2005 are stipulated in Art. 4, which states that the acquisition of the right of ownership over the lands can be achieved by foreign citizens and stateless persons residing abroad only by establishing residence in Romania and in art. 5, which restricts the acquisition of land not by the quality of the land but by the nature of the land, referring to agricultural land, forests and forest land.

Thus, according to art. 4 of the Law no. 312/2005, "The citizen of a non-resident Member State in Romania, a non-resident stateless person in Romania domiciled in a Member State, as well as a non-resident legal person constituted in accordance with the legislation of a Member State, may acquire the ownership of land for secondary residences, respectively secondary offices, at the expiration of 5 years period from the date of Romania's joining the European Union ".

Acquisition of the land must be done for the purposes of establishing residence in Romania by foreign nationals of Member States and stateless persons domiciled in Member States. Legal entities established in an EU Member State

[4] Law no. 312/2005 was published in the Official Monitor of Romania, Part I, no. 1008 of November 14th, 2005.

may acquire land in Romania for the establishment of a secondary offices. This means that if the purpose of establishing a residence in Romania for individuals or a secondary establishment offices for legal persons is not met, foreign citizens, stateless persons and foreign legal persons cannot, currently, acquire land in Romania.

Although, at the first reading of the law would result that foreign citizens in the Member States and stateless persons domiciled in a Member State cannot acquire the right to land ownership in Romania for 5 years from the date of Romania's joining the EU, and at the end of the 5 year period, providing that a residence in Romania has been established, interpretation in the doctrine and judicial practice in our country was made in the sense that that foreign citizens and stateless persons domiciled in a Member State can acquire ownership of land in Romania, from the date of joining the EU, if they are resident in Romania. Thus, it would mean that the only condition for becoming a landowner in Romania for this category of citizens is linked to the quality of the resident. In our opinion, this interpretation does not comply with the letter of the law and we do not consider that this was the intention of the legislator, since it provided expressly the possibility of the acquisition of land ownership by citizens of the Member States only for the purposes of establishing their residence in Romania, 5 years from the date of Romania's joining the EU. The interpretation given to this law by practitioners of law in Romania takes out the meaning of the provision of a 5-year period, since requires only the quality of resident in Romania in order to acquire ownership of land.

The fact that Art. 4 of the Law no. 312/2005 had to be interpreted in the sense that we have shown is proven by the exception stipulated in art. 5 of the Act, which refers to a certain category of land, agricultural ones, forests and forest lands. Thus, according to art. 5 par. (1) of Law no. 312/2005, "A citizen of a Member State, a stateless person domiciled in a Member State or in Romania, and a legal person, constituted under the law of a Member State, may acquire the right to property on agricultural land, forests and forestry land upon completion of a 7 year term from the date of Romania's joining the European Union ". By exception, according to par. (2) of the same article, "The provisions of paragraph (1) shall not apply to self-employed farmers who are: a) nationals of Member States or stateless persons domiciled in a Member State who establish their residence in Romania; B) stateless person with domicile in Romania ". As a result, the latter may acquire ownership of these special purpose land even from the date of Romania's joining the European Union if they prove that they are independent farmers and establish their residence in Romania or, in the case of stateless persons who do not have their domicile Member States, if they establish their domicile in Romania.

Proof of the status of independent farmer shall be made with documents issued, as the case may be, by the competent authorities "in the Member State or that of origin" or by the certificate issued by the competent authorities in Romania.

These persons are required to keep the purpose in which the acquired land is used land for a period of 7 years, calculated from the date of Romania's joining the European Union.

Therefore, regarding these special-purpose land, self-employed farmers who, being citizens or stateless persons domiciled in a Member State, establish their residence in Romania, as well as stateless persons residing in Romania, may acquire the right to ownership of land as of the date of joining the EU, provided that the land use category is kept for 7 years from the date of the joining. If the legislator had intended to admit the acquisition of any land from the date of Romania's joining the EU by foreign citizens in the Member States and stateless persons who have their domicile in a Member States, but residing in Romania, he would have stipulated it expressly, as he did in the case of farmers, regarding agricultural land, forests and forest land.

Those who are not farmers, in order to acquire ownership of agricultural land, forests and forest lands must obtain residence in Romania and must wait for the 7 year period from the date of acquisition to pass. This period of time expired on 1 January 2014.

Therefore, at the present time, the 5-year period applicable to the acquisition of land other than agricultural, forest and forest land has expired, as well as the 7 years applicable to these special categories of land.

Thus, the only condition currently required for the acquisition of land in Romania by foreign citizens or stateless persons domiciled in an EU Member State or the European Economic Area, namely the one referring the purpose of such acquisition, that is establishing a residence in Romania.

It is necessary to distinguish between the right of residence of foreign citizens and stateless persons and the quality of resident in Romania.

Regarding the right of residence on the territory of Romania, art. 11 from Government Emergency Ordinance no. 102/2005 on the free movement on the territory of Romania of the citizens of the member states of the European Union, the European Economic Area and the citizens of the Swiss Confederation[5], the citizens of the European Union who enter Romania have the right of temporary residence for a period of up to 3 months from the time of their entry into the country, and if they are looking for a job, they have the right to reside for a period of up to 6 months from the date of entry, no other additional formalities required.

The right of residence on Romanian territory is granted for a period longer than 3 months if the persons in question are in one of the following situations: A) they have the status of a worker; B) they have means of subsistence for them and their family members, usually the minimum guaranteed income in Romania, and

[5] O.U.G. no. 102/2005 was republished in the Official Monitor of Romania, Part I, no. 774 of 2 November 2011.

health insurance; C) are enrolled in an accredited Romanian educational or training institution, have health insurance and have means of support for them and their family members, usually the minimum guaranteed income in Romania; D) they are family members of a citizen of the European Union meets one of these conditions or of a Romanian citizen domiciled or residing in Romania (Article 12 of the Ordinance).

Family members who are not citizens of the European Union can benefit of the right of residence for more than 3 months if they accompany or join the European Union citizen who meets one of the conditions laid down by law.

It follows that the right of residence implies a certain period in which the person in question lived on the territory of Romania and met the registration formalities with the competent authorities, a simple entry on the Romanian territory not being enough[6]. We consider that the intention of the legislator was to allow the acquisition of land in Romania only to those who are to establish secondary residences on the territory of Romania[7].

Regarding the foreign legal person, the special law does not explain what we need to understand through the secondary establishment of the legal person. In the case of Romanian legal persons, the provisions of art. 227 The Romanian Civil Code stipulates that its registered office shall be established according to the constitutive act or the statute, and depending on the object of activity, the legal person may have several secondary offices for branches, territorial offices and work points. Also, art. 227 par. (2) The second sentence of the Romanian Civil Code makes reference, regarding the establishment of the Romanian legal person's office, to the provisions of art. 97 Romanian Civil Code, which regulates the chosen place of residence of the natural person, and which may be established upon the conclusion of a certain legal act, in writing, in order to exercise the rights and obligations arising from that act.

The foreign legal person, established in the country of origin, may have secondary offices for the carrying on of the activity, under the conditions stipulated in its constitutive documents, in compliance with the foreign law regulations

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[6] In the same regard, E. Chelaru, *Civil Law. The main rights in rem*, op. cit., p. 179 180. For the opinion that the physical presence in Romania of a foreign citizen or a stateless person residing in a Member State of the European Union is sufficient for him / her to be able to acquire ownership of the land under the same conditions as Romanian citizens, see C. Drăguşin, D. Birlog, *Acquisition of the right to land ownership by foreign citizens, stateless persons and foreign legal persons after Romania's accession to the European Union*, in Law no. 6/2007, p. 23 27.

[7] For Romanian citizens, the residence is the place where the individual declares that he / she has his / her secondary residence (Article 88 Civil Code), Unlike his / her domicile, which is the place where the individual declares that he / she has his / her main residence (art. 87 Civil Code). Also, the provisions of Art. 86 para. (2) Romanian Civil Code, according to which a natural person cannot have at the same time more than one domicile (home) and one residence, even when he has several dwellings.

under which it was constituted and which is applicable to it. The provisions of private international law provide in art. 2582 The Romanian Civil Code, that the foreign legal persons constituted for lucrative purposes, validly constituted in the state whose nationality they have, are fully recognized in Romania, and non-profit legal persons can be recognized in Romania, on the basis of the Government's prior approval, by a court order, subject to reciprocity, if they are validly constituted in the state whose nationality they have and if the statutory purposes they pursue do not contravene the social and economic order in Romania.

According to art. 2580 Romanian Civil Code, the organic status of the foreign legal person is governed by its national law, and the organic status of the branch established by the legal person in another country is subject to the national law of the legal person.

Foreign citizens, stateless persons and foreign legal persons belonging to third countries cannot acquire ownership of land under more favorable conditions than those applicable to those in member states of the European Union. In addition, foreign citizens and stateless persons may acquire land in Romania in the conditions resulting from the international treaties to which Romania is a party and on the basis of reciprocity.

b) Acquisition of land ownership by foreign citizens by restitution of land rights under Law no. 18/1991

With the revision of the Romanian Constitution, the question was whether the heirs, foreign citizens of a deceased author, may or may not acquire ownership of the land by way of restitution after that author, through Law no. 18/1991 (land fund law).

Some authors[8] have expressed the opinion that foreign citizens cannot acquire ownership by restitution under Law no. 18/1991 for the following arguments:

- the subject of the Law no. 18/1991 is the land fund of Romania;
- regulating the way in which restitution works, including that regarding the entitled persons, is the legislator's choice, in accordance with the purpose of the law;
- the constitutional review on October 29, 2003, which allows the acquisition by foreign citizens and stateless persons of the ownership of land by way of legal inheritance, concerns an acquisition under the conditions of the common law, and Law no. 18/1991 republished is a special law that has as its recipients only the Romanian citizens;

[8] For details regarding this opinion and the succession of regulations in the matter, see Simona Kovacs, "The Right of Foreign Citizens to Reconstruct the Land Ownership as the Owners' Heroes," Journal of the Judges Forum, available online at: http://www.forumul judecatorilor.ro/index.php/2009/11/dreptul-cetatenilor-straini-la-reconstituirea-dreptului-de-proprietate-asupra-terenurilor-in-calitate-de-mostenitori-ai-autorului-lor/

- art. 48 of the Law no. 18/1991 was the subject of the objection of unconstitutionality which was rejected, so only those who prove their status as Romanian citizens (their or their author), on the date when the law of reparation came into force, can acquire ownership of land by way of legal inheritance;

- only if the author died after the constitutional review (after 29.10.2003), his heirs can acquire land ownership by restitution, because the applicable law is that from the date of the inheritance, so only after 29.10.2003 ownership of land by way of legal inheritance can acquired by foreign citizens.

In another opinion, it is thought that nowadays foreign citizens can acquire land ownership by way of restitution, but only as heirs, and not in their own name.

Art. 47 of the Law no. 18/1991, in its original form (in force on 20.02.1991), shows that persons who are foreign citizens and who do not have their domicile in Romania, by acts between living persons cannot acquire land ownership rights (without distinction as to what kind of legal or testamentary inheritance), with the obligation to alienate them within one year from the date of acquisition, under the sanction of their free transfer to state ownership. After the republishing of the law, in art. 48, which remained in force even after the abrogation of art. 66-73 of the Land Fund Act through Law no. 54/1998, now abrogated, the possibility for Romanian citizens, irrespective of their domicile (in the country or abroad), to apply for the restitution of the property right, *for the lands owned by them*, was granted.

The provisions of art. 68 of Chapter V (Legal Circulation of Land) of Law no. 18/1991, which stipulated that natural persons who are foreign citizens and do not have their domicile in Romania, cannot acquire land by acts between living persons and if they acquire land in ownership by inheritance they are required to alienate them within 1 year from the date of the acquisition under the sanction of their free transfer in state property, was abrogated by Law no. 54/1998 on the legal circulation of land.

The provisions of art. 3 of the Law no. 54/1998, in force since 02.06.1998, stipulated that "(1) foreign citizens and stateless persons cannot acquire land ownership. (2) Natural persons having Romanian citizenship and domicile abroad may acquire in Romania, by legal acts between living persons and by inheritance, lands of any kind ".

Law no. 54/1998 was abrogated by art. 8 of Title X of Law no. 247/2005, which provided that in title X, art. 3, that foreign citizens and stateless persons may acquire ownership of land in Romania under the conditions provided by the special law.

However, the special law on the reestablishment of the right of ownership is Law no. 18/1991 as it was republished in 1998 and then amended in 2005. Acquiring ownership of a land by reconstitution under the Land Fund Laws is an acquisition based either on the status of the former owner of the applicant (hence an acquisition in his own name) or as the heir of the former owner (hence an acquisition as heir).

And Law no. 18/1991 did not refer, from June 1998, as a result of the abrogation of art. 68, to the acquisition of ownership of land by foreign citizens by of inheritance. But the Constitution of Romania, during this period (1998-2003), that is, until its revision in 2003, prohibited foreign citizens and stateless persons from acquiring ownership of land in Romania. This means that foreign citizens could not acquire even as legal heirs of their author, Romanian citizen, the ownership of the land by means of restitution, under Law no. 18/1991.

It was considered, however, that only art. 48 of the Law no. 18/1991 – special law to Law no. 54/1998-, which referred only to the acquisition of ownership in its own name and allowed it only to the Romanian citizens, regardless of their domicile. Thus, it was expressly stated that only Romanian citizens domiciled abroad or former Romanian citizens who have regained their Romanian citizenship may apply for the restitution of the right to property for agricultural land or forest land only within the limits of certain maximum areas provided by law.

Law no. 312/2005 cannot be considered as a special law for land subject to the restitution of private property rights because it refers to land which is already in the civil circuit and not to land entering the civil circuit by the restitution of the ownership right by issuing of the property title by the competent authorities of Romania.

After the revision of the Constitution in 2003, which by art. 44 par. 2 guarantees and equally protects the right of ownership, regardless of the holder, and expressly stipulates that foreign citizens and stateless persons may acquire the right of private ownership of land by legally inheritance, the provisions of art. 3 par. 1 of Law 54/1998 were declared unconstitutional[9]. Obviously, it was about the inheritances that were opened after the revised Constitution entered into force, that is, after 29.10.2003. They also concerned situations where these lands were included in the succession, that is, the title of restitution had been issued on behalf of the author of the Romanian citizen. Following the revision of the Constitution, foreign citizens may acquire ownership of the restituted land in favor of their author, without having to alienate it within one year of the date of acquisition, as regulated in Art. 68 of Law no. 18/1991, before it was abrogated. Foreign citizens will have this right, regardless of the date of their author's death, the former owner, provided that the reconstitution falls within the scope of the revised Constitution (to be pending on 29.10.2003 or that the proceedings have been initiated after that date, under the Law No 247/2005)[10].

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[9] Decision no. 408 / 07.10.2004 of the Romanian Constitutional Court.

[10] This is also the point of view expressed by Simona Kovacs in the article entitled "The *Right of Foreign Citizens to Reconstruct the Land Ownership as Heirs to Their Authors*", Judicial Review Magazine, available online at http://www.forumuljudecatorilor.ro/index.php/2009/11/dreptul-cetatenilor-straini-la-reconstituirea-dreptului-de-proprietate-asupra-terenurilor-in-calitate--de-mostenitori-ai-autorului-lor/.

c) Restrictions on the acquisition of the right to property required by the exercise of the pre-emption right. Common law regulation

The right of pre-emption is the right arising from a law[11] or contract that confers upon its beneficiary, the preemptor, priority in purchasing a good. In the current Civil Code, the right of pre-emption is regulated in the art. 1730-1740 C. civ.

As a legal nature[12], the right of pre-emption is a potestative right which implies the correlated obligation of the passive subject, that is, the seller-owner, to respect the pre-emption, meaning to allow the preemptor to accept the offer of sale, in which case the potestative right is exercised in a positive manner, or the refusal of this offer, in which case the pre-emption right is exercised in a negative manner.

As far as its legal characters are concerned, the preemption right is, according to art. 1739 C. civ., indivisible and inalienable, being a right constituted *intuitu personae*. The preemption right is extinguished at the death of the preemptor, except when it has been constituted for a certain period. In the latter case, the term shall be reduced to 5 years from the date it started, if a longer term has been stipulated.

The provisions of the Civil Code concerning the pre-emption are suppletive/ not mandatory, applying only if by law or contract it is not stated otherwise and only in the case of the sale contracts concluded after the entry into force of the current Civil Code, and in the case of conventional pre-emption, only for the agreement concluded after the entry into force of the new Civil Code.

The existence of a pre-emption right, legal or contractual, is a restriction on the freedom of the owner to dispose of his property because he has to fulfill certain formalities, either prior to sale or after the sale of the good, to a third party, in order to ensure the priority of buying to the preemptor.

The vendor may either notify his offer for sale to the preemptor, which can accept it within no more than 30 days in the case of immovable property, or sell directly to a third party the good for which there is a preemption right, but only under the condition precedent the preemption right is not exercised by the preemptor.

In this second situation, art. 1732 C.C. provides for the obligation of the seller to immediately notify the preemptor of the content of the contract concluded with a third party, the notification can be made even by the third party.

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[11] For the disclosure of the various preemption cases found in special laws, see G. Boroi, C.A. Anghelescu, B. Nazat, *Civil Law. Rights in rem*, Edit. Hamangiu, 2013, p. 37 and 38.

[12] Regarding the legal nature of the right of pre-emption as a potestative right, see I. Negru, D. Corneanu (I), A.G. Ilie, M. Nicolae (II), *Discussions on the legal nature of the preemption right*, in Law no. 1/2004, p. 22 64; D. Chirică, *Civil Law Treaty. Special contracts*. Volume I. Sale and Exchange, Ed. C.H. Beck, Bucharest, 2008, p. 100; E. Chelaru, *Preemption right regulated by Law no. 54/1998*, in the Law no. 8/1998, p. 19 et seq. In the sense that the right of preemption is a real right, see Gh. Beleiu, *The preemption right regulated by Law no. 18/1991 of the Land Fund*, in Law no. 12/1992, p. 3 13; L. Pop, *Rights in rem*, Ed. S.C. Cordial Lex, Cluj Napoca, 1993, p. 75; I. Adam, The *Legal Regime of the Remediation and Acquisition of Real Estate Land and Buildings*, Ed. Europa Nova, Bucharest, 1996, p. 76

The notification must include the surname and forenames of the seller, the description of the good, the charges imposed on it, the terms and conditions of the sale, and the place where the good is located.

If the preemptor decides to exercise his preemption right, he will communicate his sales agreement to the seller, and the communication must be accompanied by the price placed at the disposal of the seller.

Sale based on the preemption right has the character of a real agreement, the preemptor's consent being doubled by the actual price placed at the seller's disposal. The aim of the legislator was to avoid the abuse of rights which the preemptor might be tempted to practice[13].

The mechanism of exercising the preemption right on the basis of a contract with a third party under the condition precedent of the positive non-exercise of the preemption right by the preemptor is considered to be a balanced one, designed to prevent any fraud of the seller or third party's interests by the preemptor[14]. By the mechanism provided by the legally presumed condition precedent affecting the sale to a third party, the preemptor will not need to seek a nullity of the sale for an immoral cause, an action for the inopposability of the selling or an action for subrogation to the third party's place in the contract[15].

The condition precedent of not exercising the preemption that affects the sale of the property to a third party is more than this, it becomes an essential element of the validity of the contract, the existence of which is presumed by law. The presumption of the existence of the condition precedent will also apply if the preemption right arises as the result of the parties' agreement[16].

When, upon receiving of the notification, the preemptor communicates to the seller his sales agreement and proof that the price was placed at the disposal of the vendor, the condition precedent will not be fulfilled, and the sale to a third party is considered never to have been accomplished. If the potestative preemption right is exercised in its negative form, in the form of refusal of the offer, the sale to the third party is reinforced by the fulfillment of the condition precedent.

It has been considered[17] that the fact that the preemption price is placed at the vendor's disposal by accepting the seller's offer is likely to put him under the shelter of untimely or abusive acceptance of the offer by an insolvent preemptor.

Also, the fact that the sale to the preemptor is a real contract, by placing the price at the vendor's disposal, makes the preemptor unable to rely on the payment terms granted by the seller to the third party.

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[13] See J. Goicovici, *Sale under preempton right, in the regulation of the new Civil Code*, in P.R. no. 5/2012, p. 31.

[14] *Ibidem*.

[15] *Idem*, p. 33-34.

[16] *Ibidem*.

[17] See J. Goicovici, *loc. cit*., p. 34.

In the case of the exercise of the preemption, the good-faith third party, who was unaware of the existence of a conventional preemption right because it did not become opposable through the Land Registry, will be able to promote against the seller warranty claim for eviction.

For the first time, through art. 1734 C. civ., is imperatively regulated the contest between the preemptors and it was taken into account the legal or conventional nature of the preemption, the publicity of the conventional preemption through the registration in the Land Registry if it relates to a real estate, or through the certified date of the act, when the good is mobile.

Thus, in the case of a contest between the beneficiaries of the legal preemption right and those of the contractual preemption rights, the beneficiary of the legal preemption right will have priority.

When there are several beneficiaries of legal preemption rights, the seller has the freedom to choose any of them.

In the case of the existence of several beneficiaries of conventional preemption rights, when the property is immovable, priority will be given to the person who first registered the right in the Land Registry, and if the good is mobile, it will be preferred to the beneficiary of the conventional preemption right whose contract has the oldest certified date.

The parties cannot disregard the applicable competition rules according to the law and cannot by convention set another priority of the preemptors. Such a clause is considered by law to be unwritten and thus free from any legal effectiveness.

Regarding the land from the forest fund, the Civil Code regulates expressly, by the provisions of art. 1746, the fact that these privately owned land can be sold with due respect for the preemption rights of co-owners or neighbors. Naturally, it is about neighbors who have the property of the land which is bordering the land that is being sold.

In the Forestry Code[18], as amended by Law no. 60/2012, stipulates that in the event that the land to be sold is close to the public property of the state or of the territorial administrative units, the exercise of the preemption right of the state or of the territorial administrative units, within the stipulated term, prevails over the neighbors' pre-emption right. Consequently, in this particular case, the priority order of purchase will be the following: co-owners, state or territorial administrative units and neighbors.

In order to exercise the pre-emption, the seller has the obligation to notify all the preemptors, through the judicial executor or the notary, in writing, of the intention to sell, showing the asking price for the land to be sold.

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[18] The Forestry Code of 19 March 2008 was published in M. Of. no. 238 of March 27, 2008 and completed several times, the last addition being by Law no. 60/2012, published in M. Of. no. 255 of 17 April 2012.

If the co-owners or neighbors of the fund, other than the forest manger of the forests of the public property, do not have their domicile or offices known, the announcement of the offer for sale shall be recorded at the City Hall or, where applicable, the municipalities City Halls within which the land is located and displayed in the same day, at the Town Hall, through the care of the secretary of the local council.

Beneficiaries of the preemption right must make a written statement of purchase intention and communicate the acceptance of the offer of sale or, if necessary, register it at the City Hall where it was displayed, within 30 days of the communication of the offer of sale or, where applicable, from its display at the City Hall.

If none of the preemptors express their intention to purchase within the timeframe, the sale of the land is free.

Failure by the seller to perform the pre-emption procedure or sell the land at a lower price or under more favorable conditions than those shown in the sale offer renders the sale void.

The provisions on the exercise of the preemption right, as presented above, will apply only to the sales contracts concluded after the entry into force of the Civil Code[19].

d) Acquisition of the right to property on the agricultural land outside of built-up areas (extra muros – latin), under the conditions provided by the Law no. 17/2014

As it turns out of the title of this normative act and of the article art. 1 of this, one of the main purposes of the Law no. 17/2014 regarding certain measures for regulating the sale and purchase of *extra muros* agricultural land and amending Law no. 268/2001 on the privatization of commercial companies owning public and private property of the state with agricultural destination and the establishment of the Agency of State Domains[20] is to determine the conditions under which the *extra muros* agricultural land[21] may be subject to a sale-purchase contract.

The main points of interest of this normative act concern, on the one hand, the subjects of law which may be parties to a sale-purchase contract having as object an *extra muros* agricultural land and to which its provisions apply, and on the other hand, the technical conditions which they must observe in order for such a contract to be validly concluded.

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[19] For an evolution of the regulation of preemption right in the case of forest land, see E. Chelaru, *Civil Law. ..., op. cit*., 2009, p. 172 175; E. Chelaru, *Preemption Right Regulated by the Forestry Code*, in Law no. 6/1997, p. 15 29.

[20] Published in the Official Monitor, Part I no. 178 of 12.03.2014; enter into force on 11.04.2014.

[21] The provisions of the present law apply exclusively to *extra muros* agricultural land, those within *muros* being expressly excluded through art. 2 par. 1 of the Law.

With regard to the legal subjects to which these legal rules are addressed, the law establishes two legal regimes according to the categories of persons wishing to be parties to a purchase contract for *extra muros* agricultural land.

In this regard, the first category of persons and the legal regime applicable to them can be derived from the content of art. 2 par. 2. Thus, according to it, "The provisions of the present law apply to Romanian citizens, respectively citizens of a Member State of the European Union, of the States which are party to the Agreement on the European Economic Area (EEA) or of the Swiss Confederation, and of stateless persons domiciled in Romania, in a Member State of the European Union, in a State which is a party to the ESEE or the Swiss Confederation, as well as to legal persons of Romanian nationality, respectively of a Member State of the European Union, of the states that are party to the ESEE or Of the Swiss Confederation.

From the reading of this legal text it can be inferred that the *extra muros* agricultural land of Romania can be acquired, in compliance with the provisions of this Law, under the same conditions both by the Romanian citizens and by the foreign citizens. The only condition that foreign citizens in this category have to fulfill in order to benefit from the same legal regime as the Romanian citizens is to be a citizen of a Member State of the European Union, of the states that are party to the Agreement on the Economic Space European or Swiss Confederation. *extra muros* agricultural land May also be acquired under the same conditions as Romanian citizens, by stateless persons if they are domiciled in Romania, in a Member State of the European Union, in a State party to the ESEE or in the Swiss Confederation. At the same time, from the same normative text and under the same conditions stipulated by the Law, *extra muros* agricultural land can be acquired by Romanian and foreign legal persons, provided that the latter have the nationality of a member state of the European Union , States which are party to the ESEE or the Swiss Confederation.

The second category of persons and the legal regime applicable to them are found in the third paragraph of Art. 2 of the Law. According to this, "a third-country national and a stateless person domiciled in a third country, as well as legal persons having the nationality of a third State, may acquire the right to property on *extra muros* agricultural land under the conditions laid down in international treaties on the basis of reciprocity, under the terms of this law."

From the content of this normative text there are three essential aspects, namely the existence of an international treaty signed by the states to which the persons concerned belong and which grant them the right to buy *extra muros* agricultural land in the territory of the other state, this right to be granted under conditions of reciprocity, and in order to acquire the land, the conditions stipulated by the present Law are to be met.

First of all, in order to be able to purchase *extra muros* agricultural land in Romania, citizens of a third state, stateless persons residing in a third country and

legal persons having the nationality of a third state, respectively all those persons which cannot be found among the persons listed in the previous paragraph, will be able to acquire the right to property on *extra muros* agricultural land, providing that there is an international treaty between the states to which the persons in question belong to, expressly states this possibility and the general requirements that have to be met.

Secondly, in order for the prerogative of the acquisition of *extra muros* agricultural land to exist, it is necessary for the international treaty to establish it on a reciprocal basis. That reciprocity, in the light of those presented in the section devoted to the delimitation of the meaning of this notion, must be understood as a necessary and binding condition in the treaty on which the right of each of the persons of the signatory states to be able to acquire in the other state *extra muros* agricultural land through a sale-purchase contract is based on.

In order for a citizen from a third country to be able to buy such land on Romanian territory, it is necessary for Romanian citizens to be given the legal opportunity to purchase *extra muros* agricultural land in the third country. In other words, the impossibility of one of the persons in question to acquire *extra muros* agricultural land in the other state will automatically prohibit the purchase of such land by the other person of the other state.

Thirdly, in order for the interested persons, namely citizens from third countries, to be able to exercise validly and effectively the right to acquire *extra muros* agricultural land in Romania, they must obey and comply with the provisions of Law no. 17/2014, which aims at establishing the necessary conditions that the parties to a contract for sale-purchase of *extra muros* agricultural land must fulfill for its valid conclusion.

Thus, it follows from the combined interpretation of paragraphs 2 and 3 of Art. 2 of the Law, that both categories of persons, provided by the two normative texts, in order to acquire such a land through a sale-purchase contract, must comply with the special rules imposed by the national law, and the conditions of reciprocity that grants the right of third-country nationals to acquire *extra muros* agricultural land in Romania cannot be expressed in such a manner as to allow them to circumvent, to avoid the provisions of Law no. 17/2014. The interpretation of the two paragraphs must lead us to the idea that, whatever the content of the reciprocal conditions found in the international treaty, they cannot confer on third-country nationals a more favorable legal status than that of nationals of a Member State of the Union European Union, of one of the States which are party to the Agreement on the European Economic Area (EEA) or of the Swiss Confederation.

Also, from the final sentence of paragraph 3, namely that requiring third-country nationals to comply with the conditions of Law no. 17/2014 in order to be able to validly acquire *extra muros* agricultural land in Romania, we must

understand that, subject to reciprocity, they cannot be required more severe or more restrictive conditions than the Romanian citizens and the others listed in par. 2 of art. 2 of the Law, the latter being, in their turn, also compelled to observe the provisions of Law 17/2014.

Synthesizing these latest ideas, we conclude that, in the case of citizens from a third state, they, in the presence of reciprocity clauses stipulated in the international treaty signed by Romania with a third state, will be able to acquire *extra muros* agricultural land on the territory of Romania, provided that they comply with the provisions of Law 17/2014, thus benefiting from the same legal status as the Romanian citizens, who are also subject to the same legal provisions in the matter.

Once we have reviewed the issues regarding the categories of persons to whom the provisions of the law apply, we continue with its second point of interest, namely the technical, substantive and formal conditions to be observed by the parties to a contract sale-purchase of *extra muros* agricultural land in Romania.

In this regard, according to art. 4 par. 1 of the Law, "The transfer, by sale, of the *extra muros* agricultural land shall be done in compliance with the substantive and form conditions provided by the Law no. 287/2009 on the Civil Code and the preemption right of the co-owners, lessees, neighbors and the Romanian state, through the Agency of State Domains, in this order, at an equal price and under equal conditions." So, having this provisions into consideration, the substantive and formal conditions to be complied with in the case of the sale of a *extra muros* agricultural land, these are the general provisions laid down in this regard by the Civil Code in Title IX, Chapter I, of the sale-purchase contract in conjunction with the other normative texts of the Civil Code, which regulates the transfer of the land[22].

Among these conditions, we also find that complying with the right of preemption. As it results from the previously normative text, the beneficiaries of the preemption right are[23], in this order, the co-owners, the lessees, the neighbors and the Romanian state. Along with the general legal regime which the Civil Code draws, in the art. 1730-1740, this Law provides for some special, derogatory provisions which the parties must obey in this matter.

Thus, according to art. 6 of the Law, in order to inform the preemptors of the intention to dispose of the agricultural land, the seller records, at the Town Hall within the territorial-administrative unit where the land is located, an application requesting the display of the offer for sale of the *extra muros* agricultural land. The application shall be accompanied by the offer for sale of the agricultural land and the supporting documents stipulated by the methodological norms for

[22] We take into consideration the requirements imposed by the Land Registry provisions in the Civil Code.

[23] An overview of the preemption right has already been made in a previous section, reason for which, within this section, we will limit ourselves to presenting only the specific provisions characteristic of the preemption right stipulated by Law 17/2014.

the application of this Law. Next, within one working day of filing the application, the City Hall is requested to display the offer for sale for 30 days and, when applicable, on its website. Also, the mayor's office has the obligation to send to the structure within the central department of the Ministry of Agriculture and Rural Development, and its territorial structures, a file containing the list of preemptors, the copies of the display request, the offer for the sale and the supporting documents, in within 3 working days from the date of filing the application. Following the registration of the submitted file, the central structure and the territorial structures of the Ministry of Agriculture and Rural Development have the obligation to display on their own sites the offer of selling the *extra muros* agricultural land for 15 days.

On the other hand, in accordance with the provisions of Art. 7 of the Law, the beneficiary of the preemption right must within the 30 days express his written intention to purchase, communicate the acceptance of the seller's offer and register it at the City Hall where it was displayed, following that the City Hall shall display, within 24 hours from the registration of the acceptance of the offer of sale, the data provided for in the methodological norms for the application of this Law, as well as send them for display on the site to the central structure, respectively the territorial structures of the Ministry of Agriculture and Rural Development, depending on the situation.

In the event of a competition between same rank preemptors or higher and lower rank preemptors, the solution is provided by the contents of paragraphs 2, 3 and 4 of Art. 7 of the Law. Thus, if, within 30 days, more preemptors of different rank express their written intention of buying, at the same price and under the same conditions, the seller will choose, in accordance with the provisions of art. 4 of the Law, the potential preemptor buyer and will communicate his name to the City Hall. This choice will be made in compliance with the provisions of art. 4 of the Law, which, in their turn, refer to the legal regime of the preemption right outlined in the Civil Code, the rules for solving the conflict between preemptors being found in art. 1734. If several preemptors of the same rank express their written intention of purchasing and no other superior ranking preemptor accepts the offer at the same price and under the same conditions, the one who will choose between them will be the seller and will communicate the name of the chosen one to the City Hall. The last hypothesis of conflict found in the art. 7 of the Law is the one which, within 30 days, a lower-ranking preemptor offers a higher price than the one in the sale offer or in relation to that offered by the other preemptors of higher rank who accepted the offer. Under this circumstance, the seller may resume the procedure with senior (higher rank) preemptors, registering the offer for sale with the new highest price.

If, within the period of 30 days set for the preemption right, none of the beneficiaries of this right has the intention to buy the land, the sale of the land is

free, complying with the provisions of this Law and the methodological norms and followed by the fact that the vendor will notify the City Hall in writing of this. However, the sale will be free, provided that it is executed in accordance with the terms of the sale offer made in order to observe the preemption right, under the condition of absolute nullity, the sale cannot be carried out on more advantageous terms than the ones in the offer and not for a lower price.

The supervision of the application and observance of the preemption right is carried out by the central structure, respectively by the territorial structures of the Ministry of Agriculture and Rural Development at the place of the immovable property, as the case may be, within 5 working days after receiving the data and the documents requested by art. 6 and 7 of the Law. If, following the verification, it is found that the rules imposed by the preemption right have been respected, the permit required to conclude the sale-purchase contract will be issued and if no preemptor expresses his intention to purchase by submitting the offer in the time limit provided in the present law, the issuing of the permit is not necessary. In the latter hypothesis, the sales contract will be concluded on the basis of the certificate issued by the City Hall.

In conclusion, subject to the conditions stipulated by the present Law, the categories of persons, both natural and legal, Romanian and foreign, mentioned in this normative act, will be able to acquire validly the ownership right over the *extra muros* agricultural land on Romania's territory.

e) Restrictions on the acquisition of the ownership right related to the form of the act of the transfer of land

Article 1244 of the Romanian Civil Code provides that "Except for other cases provided by law, must be concluded by authenticated document, under sanction of absolute nullity, the agreements which transfer or constitute real rights and that are to be entered in the Land Registry."

Although the marginal name of art. 1244 C. civ. is the "Form Required for entering in the Land Registry", the intention of the legislator was that the authentic form be a condition of validity of any act by which real rights on immovable property are created or transferred, and not a condition of opposability to third parties. This is because, through art. 885 par. (1) C. civ., the entering of the contract in the Land Registry is given a constitutive effect of right: "Subject to contrary legal provisions, the real rights over the buildings found in the Land Registry are acquired both between the parties and towards third parties, only by entering them in the Land Registry, based on the act or fact that justified the entering."

The fact that technical impediments in finalizing the cadastral works in every territorial administrative unit determined the postponement of the application of the provisions of art. 885 par. (1) Romanian Civil Code, in the sense that, by art. 56

of the Law no. 71/2011 for its implementation, the entering in the land register is made only for the purpose of being opposable to third parties, without having the constitutive effect of right, should not lead us to the idea that the authentic form of the transfer of land with or without construction or just construction, has become only a condition of opposability to third parties. It is true that in order to make an entry in the Land Register the real right constituted or transferred it is necessary either a authentic document (authenticated by a notary), either a judicial decision or an administrative document, when the law so provides. Undoubtedly, by the provision of art. 56 of the Law no. 71/2011, the intention of the legislator was not to suppress the authentic form of constitution or transfer of immovable goods, so that the interpretation of these provisions must take into account the spirit of the law and not just the letter of the text.

Under these circumstances, any conventional transfer of a real right of immovable property entered in the Land Registry or about to be entered, land with or without construction, or only construction, and any contract constituting a dismemberment of the right ownership of an immovable property registered or to be entered in the Land Register must be completed in authentic form.

Failure to comply with this formal requirement of the translative or constitutive contract of real right results in the sanction of absolute nullity. On the basis of the same reasoning, the option pact concerning the transfer of ownership of real estate must be concluded in authentic form.

Authentic form is not mandatory in the case of bilateral promises to sell a land, regardless of its nature, that is to say, if the parties bind themselves to conclude at a certain term the translative property contract.

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Sticanje prava svojine na zemljištu od strane stranih državljana u Rumuniji

Sažetak: *Rad se bavi sticanjem prava svojine na zemljištu od strane stranih državljana u Rumuniji. U radu su izloženi pravni problemi u ovoj materiji u vezi sa pravnim režimom koji je uspostavljen sa tri ključa zakona, Zakonom 312/2005, Zakonom 18/1991 i Zakonom 17/2014, kao i u vezi sa ustavnim odredbama koje se tiču ove problematike. U Rumuniji se pravni režimi za sticanje prava svojine na zemljištu od strane stranih državljana razlikuju u zavisnosti od toga da li se radi o državljaninu države članice Evropske unije ili o strancu iz neke treće zemlje. U istraživanju je pažnja posvećena i objašnjenju pojma uzajamnosti u ovoj materiji i funkcionisanju mehanizma prava preče kupovine u kontekstu sticanja prava svojine od strane stranaca u Rumuniji.*

Ključne reči: *sticanje prava svojine na zemljištu u Rumuniji, strani državljani, poljoprivredno zemljište, nepokretnosti, pravo preče kupovine, uzajamnost, Rumunsko-turski sporazum.*

Datum prijema rada: 18.09.2017.

Pregledni članak 349.412.22:341.95
doi:10.5937/zrpfns51-15015

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PRAVA STRANACA DA STIČU PRAVO SVOJINE NA NEPOKRETNOSTIMA

Sažetak: *U ovom radu ćemo govoriti o pravima stranaca da stiču pravo svojine na nepokretnim stvarima kako u Republici Srbiji, tako i u zemljama u okruženju, prije svega u bivšim jugoslovesnkim republikama. Tema je aktuelna prije svega što je u Republici Srbiji u procesu donošenja Građanski zakonik Srbije, te treba predložiti rješenje koje bi bilo najadekvatnije za datu situaciju. Posebnu pažnju ćemo posvetiti poljoprivrednom zemljištu u Srbiji, odnosno Zakonu o poljoprivrednom zemljištu. S obzirom da je Republika Srbija, država kandidat za članstvo u Evropskoj uniji, a Sporazumom o stabilizaciji i pridruživanju je predviđeno da trebe da se usklade propisi sa pravom Evropske unije i da se prema ovom Sporazumu Srbija obavezala da će od septembra 2017. godine otvoriti tržište nepokretnosti za državljane zemalja članica, posebno ćemo istražiti ovo pitanje. U radu ćemo koristiti istorijski, uporednopravni i pozitivnopravni metod. Posebnu pažnju ćemo posvetiti sudskoj praksi u ovoj oblasti.*

Ključne reči: *pravo, stranac, nepokretnosti, svojina, zemlja.*

1. UVOD

U antičkim državama strancima je negirana mogućnost imanja građanskih prava ili se odnosila na pojavu kvazi stranog elementa ili je pak izuzetno priznavana u vidu davanja privilegija i međunarodnim ugovorima. Ovo negiranje prava strancima nalazi se i u Justinijanovom kodeksu i u „Manu“ zakonu, koji je važio u Indiji, stranci su bili ne samo iza parija, nego i iza izvjesnih životinja (slona, konja, itd.). Prema zakonu od XII tablica stranac je „*hostis*“. Strancu se u Rimu ne priznaje ni „*ius connubi*“ (koji je osnov porodičnih prava) niti „*ius commercii*“ (koji je osnov imovinskih prava, niti pravo na *legis-actio)*. U antičkoj Grčkoj postojali su ugovori „isopolitije“ kojima su bila priznatima strancima država ugovornicama

izvjesna građanska prava kao na primjer bilo je priznavano pravo na zaključenje braka, na zaključenje ugovora, na sticanje svojine na određenim stvarima.

U srednjem vijeku u periodu feudalizma strancima je izuzetno priznavano da se pojavi kao subjekt građanskopravnih odnosa. U srednjem vijeku do apsolutizma nepriznavanje građanskih prava strancima vršeno je u ovom periodu pomoću sljedećih instituta i običaja: „*foris maritagium*“, *ius albanagli*“, „*ius naufragii*“, i „lične represalije.“ U srednjem vijeku u periodu od stvaranja apsolutističkih monarhija, ukidaju se djelimično gore navedeni instituti i običaji. U novom vijeku, u periodu od francuske revolucije do I svjetskog rata, sticanje svojine stranaca nad nekretninama uglavnom podliježe određenim uslovima, odnosno razlikuju se apsolutno rezerisana, relativno rezervisana i opšta prava. U Srbiji pravila o strancima nalaze se u čl. 45 i 47 Srpskog građanskog zakonika iz 1844. Posebno je značajan rad Instituta za međunarodno pravo gdje je donesena jedna Deklaracija o međunarodnim pravima čovjeka. Poslije II svjetskog rata posebno je značajan rad Organizacije Ujedinjenih Nacija – OUN, koja je donijela opštu deklaraciju o pravima čovjeka. Generalna skupština OUN je 16. 12. 1966 donijela rezoluciju, pomoću koje je usvojila i stavila na potpis: Međunarodni pakt o građanskim i političkim pravima, Međunarodni pakt o ekonomskim, socijalnim i kulturnim pravima i Fakultativni protokol Međunarodnog pakta o građanskim i političkim pravima. U Jugoslaviji do II svjetskog rata materija o građanskim pravima stranaca nije bila jedinstveno regulisana.[1]

Kada je u pitanju bivša država Jugoslvija, razlikuju se dva perioda: prvi, poslije narodne revolucije, u kojem stranci mogu sticati svojinu na nepokretnostima ako su dobili odobrenje nadležnog organa (Predsjednika privrednog savjeta) i drugi period poslije sprovođenja nacionalizacije. U ovom drugom periodu pravo sticanja stranaca nad nekretninama pravnim poslovima *inter vivos* (ugovor o prodaji, poklonu, razmjeni) je tretirano kao apsolutno rezervisano pravo. Ovo pravo postaje relativno rezervisano donošenjem Zakona o prometu zemljišta i zgrada iz 1954. godine, a naročito donošenjem Uredbe o sticanju prava na zgradama, stanovima i zemljištima od strane stranih državljana i stranih pravnih lica (od 31. 12. 1962. godine), odnosno uslovljeno je dobijanjem posebnog odobrenja od Sekretarijata za turizam i trgovinu SIV-a i saglasnosti Saveznog sekretarijata za unutrašnje poslove. Izmjenama Zakona o prometu zemljišta i zgrada[2] predviđaju se posebna pravila za strana diplomatska i konzularna predstavništva i specijalizovane agencije OUN i za strane državljane, koji imaju naročite zasluge za Narodno oslobodilačku borbu naroda Jugoslavije.[3]

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[1] Mihajlo Jezdić, *Međunarodno privatno pravo* II, Naučna knjiga, Beograd 1982, 25-34.

[2] *Sl. list SFRJ*, br. 43/65, 57/65 , 17/67 i 11/74.

[3] Mihajlo Jezdić, *Međunarodno privatno pravo* II, Naučna knjiga, Beograd 1982, 51–52.

2. STICANJE PRAVA SVOJINE NA NEKRETNINAMA OD STRANE STRANACA

Stranci uglavnom stiču pravo svojine na nekretninama pod uslovom uzajamnosti, odnosno reciprociteta.[4] Vidovi reciprociteta razlikuju se prema načinu nastanka i prema pravnoj sadržini uzajamnosti. U međunarodnim odnosima, prema načinu nastanka, poznata su tri vida reciprociteta: diplomatski, zakonski i faktički. Diplomatska uzajamnost nastaje na osnovu međunarodnog ugovora kada se dvije države ili više međusobno obavezuju da će dati državljanima druge strane ugovornice prava koja su pomenuta ugovorom. Zakonski reciprocitet nastaje kada se uzajamnost uspostavlja na zakonskom nivou. Odnosno, o faktičkom reciprocitetu govorimo kada se sticanje određenih prava od stranaca faktički se obezbjeđuje u praksi.

Prema svojoj pravnoj sadržini uzajamnost može biti: formalna, materijalna i efektivna. Formalna postoji kada domaća i strana država izjednačuju strance i državljane u pogledu uživanja određenih prava. Materijalni reciprocitet znači da treba strancu pružiti ona prava koja naš državljanin ima u strančevoj državi. [5] I na kraju, efektivna uzajamnost će postojati onda kada stranac može uživati određena prava u istoj mjeri u kojoj ta prava može uživati i domaći državljanin u strančevoj državi.[6]

Retorzija će postojati u slučaju kada jedna država naređuje svojim organima da ne postupe po normama o pravima stranaca i sukobu jurisdikcija koje je ona propisala, već da postupe na identičan ili sličan način kako postupa i strana država prema domaćim državljanima ili domaćim sudskim odlukama ili zamolnicama domaćih sudova.[7]

Kada je u pitanju sticanje prava svojine na nekretninama stranaca smatraju se u kao relativno rezervisana prava, a u nekim zemljama kao i apsolutno rezervisana prava, mada postoji tendencija da se širi krug zemalja koje proglašavaju nacionalni tretman.[8]

Ovo rješenje se opravdava ekonomskim (površina i namjene, te inflatorne tendencije), političko – bezbjedonosnim (suverenost, pogranične oblasti i zone

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[4] Strano fizičko lice je inostrani državljanin, bilo da ima prebivalište u zemlji ili inostranstvu. Neće se smatrati stranim fizičkim licem bipatrid. Nav. prema: Maja Stanivuković, *Svojina i druga stvarna prava stranaca na nekretninama u Jugoslaviji*, Zbornik radova Pravnog fakulteta u Novom Sadu, 1-3/1996, 223-235.

[5] Tibor Varadi, Bernadet Bordaš, Gašo Knežević, Vladimir Pavić, *Međunarodno privatno pravo*, Pravni fakultet Univerziteta u Beogradu, Centar za izdavaštvo i informisanje, Beograd 2012, 215-216.

[6] Mihailo Jezdić, *Međunarodno privatno pravo I, Uvod u međunarodno privatno pravo i opšti elementi formiranja i primjene normi međunarodnog privatnog prava*, Naučna knjiga, Beograd 1980, 215-218.

[7] Mihailo Jezdić, 218.

[8] Država New York, Belgija, Francuska. Nav. prema: Tibor Varadi, Bernadet Bordaš, Gašo Knežević, Vladimir, Pavić, 464 – 465.

stacioniranja vojnih jedinica), socijalnim, nacionalnim i rasnim razlozima. [9]S obzirom da je Srbija kandidat za članstvo u Evropskoj uniji postoji tendecija da se ukinu ograničenja koja se prema strancima postavljaju u pogledu sticanja nekretnina. U nekom zemljama, npr. u Meksiku stranci ne mogu da kupuju nekretnine u pograničnom pojasu širokom 100 kilometara, odnosno u pojasu od 50 kilometara od morske obale. U Brazilu propisi predviđaju da stranci ne mogu steći nekretninu u područjima od vitalnog značaja za bezbjednost, bez saglasnosti nacionalnog savjeta za odbranu. Isto tako u Švedskoj su 1975. godine pooštreni propisi za sticanje nekretnina od strane stranaca. U Norveškoj se predviđaju ograničenja, ali ona ne važe za strance koji imaju domicil u Norveškoj. U Švajcarskoj je predviđen godišnji kontigent odobrenja za sticanje nepokretnosti. U Rusiji stranci ne mogu kupovati zemlju u pograničnim oblastima Ruske Federacije. U ponekim državama *USA* predviđaju se ograničenja za neke zemlje: te tako u Pensilvaniji limit iznosi 2.000 ha i Južnoj Karolini 200.000 ha, a u Distriktu Kolumbija stranac može da kupi nekretninu ako ima stalno prebivalište na teritoriji. Neke države *USA* su ograničile vlasništvo nad poljoprivrednim zemljištima od strane stranaca, stanovnika drugih država ili poslovnih subjekata, posebno korporacija.[10] U Liberiji se to pravo oduzima necrnačkom stanovništvu.[11] U Mađarskoj poslije pristupanja EU (2004) pored strogih uslova zemlju mogu steći građani država članica EU, ali drugi stranci ne mogu.[12]

U Hrvatskoj kada je u pitanju sticanje prava svojine na nekretninama pravnim poslovima *inter vivos* za strana fizička i pravna lica traži se pored uzajamnosti i saglasnost ministra nadležnog za poslove pravosuđa Hrvatske, ako zakonom nije drugačije određeno.[13] Strana fizička i pravna lica mogu pod pretpostavkom uzajamnosti, sticati na temelju nasljeđivanja vlasništvo nad nekretninama na području Republike Hrvatske.[14]

Kada je u pitanju zakonski bračni imovinski režim sa stranim elementom razlikujemo tri osnovna režima. Jedan je sistem regulisanja ove materije na osnovu

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[9] Vid. više:, Slavoljub V. Carić, *Pravo svojine stranaca na nepokretnosti,* doktorska disertacija, Beograd 2006, 74-84.

[10] Država *New York*, Belgija, Francuska. Navedeno prema: Tibor Varadi, Bernadet Bordaš, Gašo Knežević, Vladimir, Pavić, 465 – 466; Janoš Silađi, „*Sticanje prava svojine na poljoprivrednom zemljištu u Mađarskoj, s posebnim osvrtom na pravo Evropske unije i prava drugih zemalja", Zbornik radova Pravnog fakulteta u Novom Sadu,* 4/2016, 1441.

[11] Tibor Varadi, Bernadet Bordaš, Gašo Knežević, *Međunarodno privatno pravo,* DOO „Forum – izdavačka djelatnost" Novi Sad 2001,452.

[12] Čila Čak, Zoltan Nađ, „*Prava upotrebe poljoprivrednog zemljišta u Mađarskoj*", *Zbornik radova Pravnog fakulteta u Novom Sadu*, 2/2011, 546.

[13] čl. 356, st. 2, Zakon o vlasničkim i drugim stvarnim pravima, *Narodne novine Republike Hrvatske*, br. 91/96, 68/98, 137/99, 22/00, 73/00, 114/01, 79/06, 141/06, 146/08 i 38/09, 153/09, 143/12, 152/14 i 81/2015.

[14] čl. 356, st. 1, Zakon o vlasničkim i drugim stvarnim pravima Hrvatske.

principa ravnopravnosti muškarca i žene. Drugi sistem zasniva se na pricipu diskriminacije prema polu i prihvaćen je od većine kapitalističkih zemalja. Prema trećem sistemu, bitna je autonomija volje stranaka.[15] U zemljama gdje vlada princip ravnopravnosti muškarca i žene, a koji imaju državljanstvo iste strane države primjenjuje se nacionalno pravo. U većini država supruzima je dozvoljeno da svoje imovinske odnose sporazumno odrede. Tako npr. u Engleskoj supruzima se dopušta potpuna dispozicija u uređivanju međusobnih imovinskih odnosa, u Francuskoj, Švajcarskoj dozvoljava se supruzima samo opcija između zakonom predviđenih režima, dok u trećim (npr. Rusija, nekadašnji Sovjetski Savez) ostavlja se samo mogućnost povećanja udjela supruga u zajedničkoj imovini. Kada je u pitanju forma imovinskog bračnog ugovora ocjenjuje se prema pravilu *locus regit actum,* gdje je u nekim zemljama obaveznog, a u nekim zemljama fakultativnog karaktera. Kada je u pitanju sadržina imovinskobračnog ugovora većina država predviđa ista pravna pravila kolizionog karaktera, kao i u slučaju kada je u pitanju zakonski imovinski bračni režim sa stranim elementom.[16]

3. STICANJE PRAVA SVOJINE NA NEKRETNINAMA U BOSNI I HERCEGOVINI

Pravni propisi o pravima stranaca nalaze se i u čl. 57 Ustava Republike Srpske.[17] Prema Zakonu o stvarnim pravima[18] čl. 1, st. 2 stvarna prava su: pravo svojine, pravo građenja, založno pravo, pravo stvarne i lične službenosti i pravo realnog tereta.

Prema čl. 14, st. 1 i 2 ZSP: „ Nepokretnost je sve što je na površini zemljišta, iznad ili ispod njega izgrađeno, a namijenjeno je da tamo trajno ostane, ili je u nepokretnost ugrađeno, njoj dograđeno, na njoj nadograđeno ili bilo kako drugačije s njom trajno spojeno i dio je te nepokretnosti sve dok se od njega ne odvoji. Trava, drveće i plodovi sastavni su dio zemljišta, dok se od njega ne odvoji.“ Prema čl. 135, st. 1 i 2 Nacrta Građanskog zakonika Srbije nepokretne su one stvari koje se ne mogu premjestiti sa mjesta na mjesto bez povrede njihove suštine. Nepokretnosti su zemljišne parcele, a zgrade ili drugi građevinski objekti koji su

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[15] Mihajlo Jezdić, Milan Pak, *Međunarodno privatno pravo*, III, Naučna knjiga, Beograd 1980, 105-107.

[16] Mihajlo Jezdić, Milan Pak, 109 – 110.

[17] *Sl. glasnik Republike Srpske*, br. 3/92, 06/92, 8/92, 15/92 i 19/92. http://www.narodnaskupstinars.net/sites/default/files/upload/dokumenti/ustav/cir/ustav_republike_srpske.pdf, 19. septembar 2017. godine. Prema čl. 57, st. 5 Ustava Republike Srpske:“ Zakonom se može, izuzetno, kada to zahtijeva opšti društveni interes, utvrditi u kojim djelatnostima, odnosno područjima, strano lice ne može osnovati vlastito preduzeće.“

[18] Zakon o stvarnim pravima Republike Srpske – ZSP, *Sl.glasnik Republike Srpske*, br. 124/2008, 3/2009, 58/2009, 95/2011, 60/2015 i 18/2016 – Odluka Ustavnog suda.

izgrađeni kao trajni objekti su priraštaji zemljišta. Prema čl. 23, st. 1 ZSP pravo svojine se stiče na osnovu pravnog posla, zakona, odluke suda ili drugog organa i nasljeđivanjem.[19]

Kada je u pitanju sticanje svojine stranih lica u Republici Srpskoj odredbe ZSP[20] primjenjuju se i na strana fizička i pravna lica (u daljem tekstu:strana lica), osim ako je gore pomenutom odredbom zakona ili međunarodnim ugovorom nije drugačije određeno. Kada su u pitanju nepokretnosti u Republici Srpskoj strana lica stiču pravo svojine pod uslovom reciprociteta, ako zakonom ili međunarodnim ugovorom nije drugačije određeno.[21] Kada su u pitanju ograničenja svojine za strana lica, ono ne može biti vlasnik nepokretnosti na području koje je radi zaštita interesa i bezbjednosti Republike, odnosno Bosne i Hercegovine, zakonom proglašeno područje na kojem strana lica ne mogu imati pravo svojine.[22] U slučaju da je strano lice steklo pravo svojine na nepokretnosti prije nego što je područje na kojem nepokretnosti leži proglašeno područjem iz čl. 16, st. 1 ZSP, prestaje pravo na nepokretnostima, a strano lice ima pravo na naknadu prema propisima o eksproprijaciji.[23] Pravo na ovu naknadu pripada i stranom licu koje bi nasljeđivanjem steklo nepokretnosti na tom području.[24] Posebnim zakonom će se odrediti na kojim nepokretnostima strana lica ne mogu sticati pravo svojine.[25]

U Republici Srpskoj prema čl. 68, st. 1 Zakona o poljoprivrednom zemljištu[26] kada je u pitanju poljoprivredno zemljište u svojini Republike prodaje se samo u izuzetnim slučajevima i to pravnim i fizičkim licima koji imaju registrovanu poljoprivrednu djelatnost ili mjesto prebivališta na teritoriji Bosne i Hercegovine, ako postoji interes za Republiku, i to posredstvom javnog oglasa. Prema ovoj odredbi znači kao kupci se mogu javiti i domaći i strani državljani, pod uslovom prebivališta na teritoriji Bosne i Hercegovine.[27]

U Federaciji BiH ova materija je regulisana Zakonom o stvarnim pravima u (daljem tekstu: ZSPFBiH).[28] Prema glavi tri, čl. 15 ovog zakona: „(1)Odredbe ovoga zakona primjenjuju se i na strane fizičke i pravne osobe, osim ako je zakonom ili međunarodnim ugovorom drugačije određeno.(2) Strane osobe stiču pra-

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[19] http://www.paragraf.rs/kk/images-kk/gradjanski_zakonik_republike_srbije.pdf, 13. 09. 2017.
[20] ZSP, čl. 15, st. 1.
[21] ZSP, čl. 15, st. 2.
[22] ZSP, čl. 16, st. 1.
[23] ZSP, čl. 16, st. 2.
[24] ZSP, čl. 16, st. 3.
[25] ZSP, čl. 16, st. 4.
[26] *Sl. glasnik Republike Srpske*, br. 93/06, 86/07, 14/10 i 5/12.
[27] U Crnoj Gori strano lice ne može imati pravo svojine na poljoprivrednom zemljištu. Milica Dragičević, „*Stvarnopravni položaj stranih lica u državama s teritorije bivše Jugoslavije*“, *Pravna riječ,* Udruženje pravnika Republike Srpske, Banja Luka, godina VIII, br. 29/2011, 178; Izvještaj Komisije za izradu građanskog zakonika, Pravni život, br. 11/2007, 178.
[28] Službene novine Federacije BiH, br. 66/13 i 100/13.

vo vlasništva na nekretnini u Federaciji pod uvjetom reciprociteta, izuzev kada se pravo stiče naslijeđivanjem ako zakonom ili međunarodnim ugovorom nije drugačije određeno. Pretpostavlja se da postoji reciprocitet. Listu zemalja s kojima ne postoji reciprocitet objavljuje Federalno ministarstvo pravde, uz prethodno pribavljeno mišljenje Ministarstva vanjskih poslova Bosne i Hercegovine, svake godine najkasnije do 31. januara. (3) Strane osobe koje nemaju državljanstvo Bosne i Hercegovine ne smatraju se stranim osobama prema ovom zakonu ako su rođeni u Bosni i Hercegovini ili su njihovi potomci."

Kada su u pitanju ograničenja prava svojine prema čl. 16 ZSPFBiH:" (1) Strana osoba ne može biti vlasnik nekretnine na području, koje je radi zaštite interesa i sigurnosti Federacije, zakonom proglašeno područjem na kojem strane osobe ne mogu imati pravo vlasništva.(2) Ako je strana osoba stekla pravo vlasništva na nekretnini prije nego što je područje na kojemu nekretnina leži proglašeno područjem iz stava 1. ovog člana, prestaje pravo vlasništva na toj nekretnini, a strana osoba ima pravo na naknadu prema propisima o eksproprijaciji."

Možemo primijetiti da su uslovi za sticanje prava svojine na nekretninama pravnim poslovima *inter vivos* znatno pooštreni, u odnosu na raniji zakon koji reguliše vlasničke odnose, jer se kao uslov traži uzajamanost te se za strance javlja kao relativno rezervisano pravo. Kada je u pitanju nasljeđivanje prema čl.3, st.2 Zakona o nasljeđivanju u Federaciji BiH[29] stranci su u nasljeđivanju ravnopravni s državljanima Bosne i Hercegovine.

4. STICANJE PRAVA SVOJINE STRANACA NA NEKRETNINAMA U SRBIJI

U Repulici Srbiji sticanje prava svojine na nekretninama je regulisano: Ustavom[30], čl. 82-85b Zakona o osnovnim svojinskopravnim odnosima[31], čl. 1 Zakona o poljoprivrednom zemljištu[32] i Zakonom o nasljeđivanju. Prema čl. 85, st. 1 Ustava strana fizička i pravna lica mogu steći svojinu na nepokretnostima, u skladu sa zakonom ili međunarodnim ugovorom. Prema čl. 82a ZOSPO: „Strana fizička i pravna lica koja obavljaju djelatnost u Saveznoj Republici Jugoslaviji mogu, pod uslovom uzajamnosti, sticati pravo svojine na nepokretnostima na teritoriji Savezne Republike Jugoslavije koje su im neophodne za obavljanje te djelatnosti. To znači da ova prava strana lica mogu sticati pod uslovom uzajamnosti i u slučaju da nekretnina služi obavljanju te djelatnosti. Strano fizičko lice koje ne obavlja

[29] *Sl. novine Federacije BiH, br.* 80/2014.

[30] *Sl. glasnik Republike Srbije*, br. 98/2006.

[31] *Sl. list SFRJ*, br. 6/80 i 36/90, *Sl. list SRJ*, br. 29/96 i *Sl. glasnik RS*, br. 115/2005 – dr. zakon.

[32] Zakon o poljoprivrednom zemljištu –ZPZ, *Sl. glasnik RS,* br. 62/2006, 65/2008 – dr. zakon, 41/2009, 112/2015 i 80/2017.

djelatnost u Saveznoj Republici Jugoslaviji može, pod uslovima uzajamnosti, sticati pravo svojine na stanu i stambenoj zgradi kao i državljanin savezne Republike Jugoslavije. Izuzetno od odredaba st. 1 i 2 ovog člana, saveznim zakonom može se predvidjeti da strano fizičko pravno lice ne mogu sticati pravo svojine na nepokretnostima koje se nalaze na određenim područjima u Saveznoj Republici Jugoslaviji." Prema čl. 82v, st. 1 ZOSPO: "Ugovor o sticanju prava svojine na nepokretnosti u smislu člana 82a ovog zakona može se ovjeriti ako su ispunjeni uslovi za sticanje prava svojine iz tog člana." Prema čl, 82g ZOSPO: „Organ nadležan za upis prava na nepokretnostima dužan je da podatke o izvršenom upisu prava svojine stranog lica iz člana 82a i 82b ovog zakona, u roku od 15 dana od izvršenog upisa, dostavi saveznom organu nadležnom za poslove pravde, koji o tome vodi evidenciju."[33] Kada su u pitanju diplomatska i konzularna predstavništva stranim državama, kao i organizacijama i specijalizovanim agencijama OUN mogu se uz prethodnu saglasnost saveznog organa nadležnog za poslove pravde, prodavati zgrade i stanovi za službene potrebe, kao i građevinska zemljišta u svrhu izgradnje takvih zgrada. Podaci o sticanju svojine od strane stranaca upisuju se u registar te dostavljaju Ministarstvu pravde koje o tome vodi evidenciju.

Kada je u pitanju sticanje prava svojine na nepokretnostima nasljeđivanjem, od strane stranih fizičkih lica na teritoriji SRJ, mogu ih stihati pod uslovima uzajamnosti kao i državljanin SRJ.[34] Prema čl. 7 Zakona o nasljeđivanju Srbije[35]: „Strani državljani u Republici Srbiji imaju, pod uslovom uzajamnosti, isti nasljedni položaj kao i domaći državljani, ako međunarodnim ugovorom nije drukčije određeno." Reciprocitet između Srbije i neke druge države može da postoji: na osnovu međunarodnog ugovora (diplomatski reciprocitet) ili na bazi priznavanja faktičkog prava na nasljeđivanje (faktički reciprocitet). Bilateralne konvencije u pogledu nasljeđivanja postoje sa sljedećim državama: Albanija, Austrija, Belgija, Bugarska, bivša ČSSR, Grčka, Francuska, Holandija, Japan, Luksemburg, Mađarska, Poljska, Rumunija, SAD, bivša SSSR, Španija, Švedska i Velika Britanija. Poseban problem predstavljaju apatridi jer nisu državljani nijedne zemlje. Prema čl. 13 Konvencije o pravnom položaju lica bez državljanstva koju je Jugoslavija ratifikovala 1959. godine : „Države ugovornice će tretirati lica bez državljanstva na što je moguće povoljniji način, a u svakom slučaju na način koji neće biti nepovoljniji od onog pod istim okolnostima predviđen za strance uopšte." Na kraju se može zaključiti da je pravo stranaca da nasljeđuju u Srbiji relativno rezervisano pravo, pod uslovom formalnog reciprociteta. Po načinu nastanka reciprocitet može biti: diplomatski ili faktički, i

[33] Prema čl. 82d ZOSPO strana fizička i pravna lica mogu prenositi pravo svojine pravnim poslom na domaće lice, kao i na strano lice koje može sticati pravo svojine.Prema čl. 85b ZOSPO odredbe ovog zakona primjenjuju se i na strana fizička i pravna lica, ako saveznim zakonom nije drukčije određeno.

[34] Čl. 82b, ZOSPO.

[35] *Sl. glasnik Republike Srbije*, br. 46/95, 101/2003 – Odluka USRS i 6/2015.

njegovo postojanje se pred našim sudovima pretpostavlja. Apatridi imaju pravo nasljeđivanja u Srbiji kao opšte pravo.[36]

Prema čl. 1, st. 4 Zakona o poljoprivrednom zemljištu:“ Vlasnik poljoprivrednog zemljišta ne može biti strano fizičko, odnosno pravno lice, osim ako ovim zakonom nije drugačije određeno u skladu sa Sporazumom o stabilizaciji i pridruživanju između Evropskih zajednica i njihovih država članica, sa jedne strane, i Republike Srbije, sa druge strane („Službeni glasnik RS- Međunarodni ugovori, br. 83/08 i 12/14).“[37] To znači da stranci mogu organizovati poljprivrednu proizvodnju na zemljištu koje su uzeli u zakup. Međutim stranci mogu da steknu svojinu poljoprivrednog zemljišta, putem domaćeg privrednog društva u stranom vlasništvu. Poljoprivredno zemljište je zemljište koje se koristi za poljoprivrednu proizvodnju i predstavlja dobro od opšteg interesa.[38] Kada je u pitanju šumsko zemljište prema Zakonu o šumama[39] stranci mogu steći pravo svojine na šumskom zemljištu u privatnoj svojini.[40]

U Srbiji kada je u pitanju promet poljoprivrednog zemljišta u državnoj svojini prema čl 72 Zakona o poljoprivrednom zemljištu – ZPZ ako je u pitanju poljoprivredno zemljište u državnoj svojini ne može se otuđiti osim pod uslovima predviđenim ovim zakonom. Prema čl. 72a ovog zakona: „Poljoprivredno zemljište u državnoj svojini fizičko lice može steći teretno pravnim poslom pod uslovima propisanim ovim zakonom, osim u oblasti administrativne linije prema Autonomnoj pokrajini Kosovo i Metohija. Poljoprivredno zemljište u državnoj svojini fizičko lice može steći ako: „1) je državljanin Republike Srbije; 2) ima registrovano poljoprivredno gazdinstvo u aktivnom statusu najmanje tri godine ili je nosilac porodičnog poljoprivrednog gazdinstva u aktivnom statusu najmanje tri godine; 3) ima uslove/mehanizaciju/opremu za obavljanje poljoprivredne djelatnosti; 4) u svojini ima najviše do 30 ha poljoprivrednog zemljišta; 5) ima prebivalište u jedinici lokalne samouprave u kojoj se prodaje poljoprivredno zemljište u državnoj svojini najmanje pet godina; 6) u posljednje tri godine nije izvršilo otuđenje više od 3 ha poljoprivrednog zemljišta u svom vlasništvu, osim u slučajevima u kojima je utvrđen javni interes; 7) ukupna površina koju će fizičko lice imati u svojini nakon kupovine državnog poljoprivrednog zemljišta ne prelazi 40

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[36] Tibor Varadi, Bernadet Bordaš, Gašo Knežević, *Međunarodno privatno pravo,* DOO „Forum – izdavačka djelatnost“ Novi Sad, 449 – 450.

[37] Luka Baturan, „*Economic analysis of the ban on foreigners acquiring property rights on agricultural land in Serbia*“, *Economics of Agriculture,* 3/2013, 487.

[38] Danica Popov, „*Zaštita, uređenje i korišćenje poljoprivrednog zemljišta u Republici Srbiji“, Zbornik radova Pravnog fakulteta u Novom Sadu*, 3/2014, 68.

[39] *Sl. glasnik Republike Srbije*, br.30/10.

[40] Luka Baturan,“ *Prenos prava svojine na poljoprivrednom i šumskom zemljištu na strana lica u Srbiji i drugim zemljama regiona,“Zbornik radova Pravnog fakulteta u Novom Sadu*, 2/2013, 516, 518.

ha.“ Prema čl. 72v, st. 1 ZPZ poljoprivredno zemljište u državnoj svojini koje je predmet prodaje utvrđuje Ministarstvo na prijedlog jedinice lokalne samouprave.[41]

Kada je u pitanju poljoprivredno zemljište u privatnoj svojini prema čl. 72đ, st. 1-3 ZPZ:“ Državljanin države članice Evropske unije poljoprivredno zemljište u privatnoj svojini, polazeći od Sporazuma, može steći pravnim poslom uz naknadu ili bez naknade pod uslovima propisanim ovim zakonom. Poljoprivredno zemljište u privatnoj svojini lice iz stava 1. ovog člana može steći ako: 1) je najmanje deset godina stalno nastanjeno u jedinici lokalne samouprave u kojoj se vrši promet poljoprivrednog zemljišta; 2) obrađuje najmanje tri godine poljoprivredno zemljište koje je predmet pravnog posla uz naknadu ili bez naknade; 3) ima registrovano poljoprivredno gazdinstvo u aktivnom statusu kao nosilac porodičnog poljoprivrednog gazdinstva, u skladu sa zakonom kojim se uređuje poljoprivreda i ruralni razvoj bez prekida najmanje deset godina; 4) ima u vlasništvu mehanizaciju i opremu za obavljanje poljoprivredne proizvodnje. Predmet pravnog posla iz stava 1. ovog člana može da bude poljoprivredno zemljište u privatnoj svojini ako: 1) nije poljoprivredno zemljište koje je u skladu sa posebnim zakonom određeno kao građevinsko zemljište; 2) ne pripada zaštićenim prirodnim dobrima; 3) ne pripada ili se ne graniči sa vojnim postrojenjem i vojnim kompleksom i ne nalazi se u zaštitnim zonama oko vojnih postrojenja, vojnih kompleksa, vojnih objekata i objekata vojne infrastrukture, niti pripada i ne graniči se sa teritorijom Kopnene zone bezbednosti. Predmet pravnog posla iz stava 1. ovog člana ne može da bude poljoprivredno zemljište u privatnoj svojini koje se nalazi na udaljenosti do 10 km od granice Republike Srbije.“[42]

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[41] Prema čl. 72v, st. 2 – 9 ZPZ: „Nadležni organ jedinice lokalne samouprave opredeljuje površine za prodaju poljoprivrednog zemljišta u državnoj svojini, i to počevši od najmanjih katastarskih parcela, i objavljuje javni poziv za prikupljanje ponuda uz saglasnost Ministarstva. Javni poziv obavezno sadrži broj katastarske parcele i početnu tržišnu vrijednost. Javni poziv se objavljuje na oglasnoj tabli jedinice lokalne samouprave i mjesne zajednice, na internet portalu jedinice lokalne samouprave, dnevnom listu i službenom glasilu jedinice lokalne samouprave. Nadležni organ jedinice lokalne samouprave razmatra ponude i ako su ispunjeni svi uslovi predviđeni ovim zakonom donosi odluku o prodaji uz prethodnu saglasnost Ministarstva. Ako se više fizičkih lica prijavi za isto poljoprivredno zemljište u državnoj svojini prednost ima lice koje ima pravo preče kupovine ako prihvati najvišu ponuđenu cijenu, a ako se ne prijavi nijedno fizičko lice koje ostvaruje pravo preče kupovine poljoprivrednog zemljišta u državnoj svojini, prednost ima lice koje je ponudilo najvišu cijenu. Tržišnu vrijednost za poljoprivredno zemljište u državnoj svojini koje je predmet prodaje utvrđuje Ministarstvo finansija – Poreska uprava za svaku jedinicu lokalne samouprave. Bliže uslove, način i postupak za utvrđivanje tržišne vrijednosti propisuje ministar nadležan za poslove finansija uz saglasnost ministra nadležnog za poslove poljoprivrede. Protiv odluke o prodaji poljoprivrednog zemljišta u državnoj svojini može se uložiti žalba Ministarstvu u roku od 15 dana od dana donošenja odluke.“

[42] Prema čl. 72đ, st. 4-11 ZPZ:„Lice iz stava 2. ovog člana može steći u svojinu najviše do 2 ha poljoprivrednog zemljišta u privatnoj svojini, ako su ispunjeni uslovi propisani ovim zakonom. Ispunjenost uslova iz st. 2-4. utvrđuje ministar nadležan za poslove poljoprivrede. Odredbe stava 4. ovog člana ne primjenjuju se u slučaju povraćaja imovine koja se vrši u skladu sa zakonima ko-

Na osnovu svega rečenog razlikujemo, kada je u pitanju poljoprivredno zemljište u Srbiji dvije situacije. U prvoj riječ je o prometu poljoprivrednog zemljišta u državnoj svojini, i u prometu poljoprivrednog zemljišta u privatnoj svojini. Kada je u pitanju prvi slučaj, strani državljani ne mogu sticati pravo svojine na poljoprivrednom zemljištu u državnoj svojini. Kada je u pitanju sticanje prava svojine na poljoprivrednom zemljištu u privatnoj svojini, državljanin države članice Evropske unije mogu steći pravo svojine uz naknadu ili bez naknade pod uslovima predviđenim ZPZ.

Prema nacrtu Zakonika o svojini i drugim stranim pravima, koji je završen jula 2006. godine, predviđa se kao uslov za sticanje stvarnih prava stranacama na nekretninama pravnim poslovima *inter vivos* materijalna uzajamanost, koju uvtrđuje sud odnosno drugi nadležni organ, prema čl. 36, st. 2 Nacrta. Prema čl. 34, st. 1 Nacrta strano lice ne može steći pravo svojine na sljedećim nepokretnostima: 1. poljoprivredno zemljište; 2. šuma i šumsko zemljište; 3. nepokretno kulturno dobro; 4. nepokretna stvar koja se nalazi na području na kome strano lice, radi zaštite i interesa i bezbjednosti zemlje, ne može imati pravo svojine.[43]

5. ZAKLJUČAK

Kada govorimo o sticanju prava svojine na nekretninama u uporednom pravu su prihvaćena različita rješenja. Ova materija je uglavnom regulisana međunarodnim ugovorima, Ustavom, zakonima koji regulišu stvarnopravne odnose, nasljeđivanje i poljoprivredno zemljište. S obzirom da je Republika Srbija kandidat za članstvo u Evropskoj uniji, Sporazumom o stabilizaciji i pridruživanju ona se obavezala da će od septembra 2017. godine otvoriti tržište nepokretnosti za državljane zemalja članica EU. Kada je u pitanju poljoprivredno zemljište u privatnoj svojini prema čl. 72đ, st. 1-3 ZPZ državljanin države članice Evropske unije poljoprivredno zemljište u privatnoj svojini, može steći pravnim poslom uz naknadu ili bez naknade pod uslovima propisanim ovim zakonom. Međutim, ovdje se postavlja pitanje diskriminacije, odnosno šta je sa ostalim strancima, koji nisu državljani država članica Evropske unije, jer oni nisu izričito navedeni te ne

jima se uređuje vraćanje oduzete imovine bivšim vlasnicima. Dužina perioda propisana u stavu 2. tač. 1)-3) ovog člana utvrđuje se počevši od dana početka primjene ovog zakona. Republika Srbija ima pravo preče kupovine poljoprivrednog zemljišta u privatnoj svojini koje je predmet pravnog posla iz stava 1. ovog člana. Pravo preče kupovine odobrava Vlada na prijedlog Komisije. Komisiju iz stava 10. ovog člana obrazuju zajednički ministar nadležan za poslove poljoprivrede i ministar nadležan za poslove finansija. Ministar nadležan za poslove poljoprivrede i ministar nadležan za poslove finansija sporazumno propisuju uslove, rok, način i postupak prava preče kupovine. Pravni posao iz stava 1. ovog člana kojim se vrši promet poljoprivrednog zemljišta u privatnoj svojini zaključen suprotno odredbama ovog zakona, ništav je."

[43] Milica Dragičević, 172.

mogu steći pravo svojine na poljoprivrednom zemljištu, osim ako to pitanje nije regulisano međunarodnim ugovorom.

Kada je u pitanju sticanje prava svojine na nepokretnostima pravnim poslovima *inter vivos* ta prava su priznata kao relativno rezervisana prava koja se mogu sticati pod određenim uslovima. Kao uslov u skoro svim ovim zemljama se traži uzajamnost, a u nekim zemljama pored uzajamnosti ispunjenje i dodatnog uslova, kao na primjer u Hrvatskoj i saglasnost ministra nadležnog za poslove pravosuđa Hrvatske, ako zakonom nije drugačije određeno.

Kada je u pitanju sticanje prava svojine na nepokretnostima putem nasljeđivanja skoro u svim zemljama se traži reciprocitet kao uslov, dok izuzetak u tom slučaju predstavlja Federacija BiH. Na kraju možemo zaključiti da je sticanje svojine stranih lica na nepokretnostima priznato najčešće kao relativno rezervisano pravo, dostupno strancima pod određenim uslovima. Ovdje se može primijetiti različiti pravni režim za strance koji nisu državljani država članica i EU i onih koji jesu, jer to vodi ka diskriminaciji, te bi bio pravičniji sistem prema kojem bi postojala ista pravila za sva strana lica.

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Rights of the Parties to Reduce the Right of the Right to Real Estate

Abstract: *In this paper we will talk about the rights of foreigners to acquire the right of ownership in immovables both in the Republic of Serbia and in the countries in the region, primarily in the former Yugoslav republics. The topic is topical primarily in the Republic of Serbia in the process of adoption of the Civil Code of Serbia, and it is necessary to propose a solution that would be most suitable for the given situation. We will pay special attention to agricultural land in Serbia, that is, the Law on Agricultural Land. Considering that the Republic of Serbia, the candidate country for EU membership, and the Stabilization and Association Agreement stipulates that the regulations with the law of the European Union should be harmonized and that under this Agreement, Serbia has committed itself to open the market in September 2017 immovable property for the citizens of the Member States, we will specifically explore this issue. In this paper we will use the historical, comparative and positive method.*

Keywords: *right, alien, immovable, property, land.*

Datum prijema rada: 13.09.2017.

Originalni naučni rad 349.412(439)
doi:10.5937/zrpfns51-14099

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THE REGULATION OF AGRICULTURAL LAND OWNERSHIP IN HUNGARY AFTER LAND MORATORIUM

Abstract: *Arable land is one of the most valuable natural resources of the country, which shall comprise the nation's common heritage; the responsibility to protect and preserve them for future generations lies with the State and every individual – we can read it in the Section (1) of Article P) of the Fundamental Law of Hungary. The new Act on the transaction of land (Act CXXII of 2013 on Transactions in Agricultural and Forestry Land), which was adopted by the Parliament on 21 June 2013, serves the realization of these purposes, and regulates the essential and dominant elements of land acquisition after the moratorium on land. The regulation formulates such legal institutions, substantive and procedural rules, which are able to guarantee the interest of the country. In the framework of the study we will present and analyze the EU's expectations and principles, and on the other hand, the Hungarian solutions concerning to transaction of land.*

Keywords*: agricultural land, forest land, property rights, foreigners rights.*

1. HUNGARIAN REGULATION BY VIRTUE OF EC/EU CONTRACTS

Hungary – before the accession to the EU-arranged the requirements for fulfilling the conditions of the accession and the derogation conditions including the question of land moratorium in the framework of EC/EK contracts. On the basis of the Act of Accession (Article 24) of 2003 Hungary could differ from EU law transitionally in the issue of arable land. According to the Act of Accession Hungary could have maintained in force for seven years from the date of its accession to the EU- the prohibitions contained in law adapted on the acquisition of arable land by natural persons who are non-residents or non nationals of Hungary

and by legal persons. A national of any Member States or a legal person established in another Member State can not be treated less favourably in the respect of the acquisition of arable land than enjoyed on the date of sign of the Act of Accession. An exceptional rule was drafted of the derogation under which the nationals of another Member State who wishes to settle down in Hungary as a self-employed farmer and have been living in Hungary legally for at least 3 years and do agricultural activities, other rules and procedure can not be applied to them than to Hungarian citizens. Considering these European Union commitments the former Act of Agricultural Land (Act LV of 1994) was amended on the acquisition of ownership by foreigners and two categories were established: acquisition of ownership by a) a national of a Member State b) non-EU national. Nationals of a Member State could acquire land ownership in the same manner with the Hungarian citizens during the period of moratorium, whether they fulfilled specific conditions: they have lived in Hungary for 3 years and have done agricultural activities and wish to maintain agricultural activities in the future. Other foreigners –as a rule- could not acquire land ownership in Hungary.

The Act of Accession (Annex X) provided opportunity for the extension of transitional period. If there is sufficient evidence that, upon expiry of the transitional period (2011), there will be serious disturbances or a threat of serious disturbances on the agricultural land market of Hungary, the Committee, at the request of Hungary, shall decide upon the extension of the transitional period for up to a maximum of three years. On this basis Hungary initiated the extension of the seven years moratorium for up to three years in accordance with the authorisation in 2/2010. (II. 18.) Parliamentary Decision. In support of the serious disturbances on the agricultural land market Hungary put forward the following arguments: a) Community agricultural support given for Hungary will reach the average of old Member State only from 2013; b) the average land prices in Hungary are far behind the land prices of the majority of Member States which threaten with serious disturbances on the post-2011 agricultural land market; c) land consolidation process started after the change of regime has not been finished yet.[1]

Hungary received three-year more moratorium until 30 April, 2014 as a result of a Commission Decision[2] – on the basis of the Hungarian arguments- but this extension may not be extended further. The expiry of land moratorium means that from this date farmers of the Member States can also acquire the ownership of arable lands in Hungary under the rules applicable to Hungarian farmers. In the category of foreigners different regulation can not be maintained for nationals of a Member State. As for the membership of the EU from 1 May, 2014 (expiry of land moratorium)

[1] See Csák Csilla-Nagy Zoltán: Regulation of Obligation of Use Regarding the Agricultural Land in Hungary *ZBORNIK RADOVA PRAVNI FAKULTET (NOVI SAD)* 45.:(2) *pp. 541-549.* (2011) Collected papers. Novi Sad, Szerbia 2011

[2] Commission Decision, 2010/792/EU

Hungary had to abolish the different Hungarian and European Union prohibitions and restrictions related to the acquisition of arable land by nationals of Member States.[3]

2. LEGAL BACKGROUND OF THE ACQUISITION OF AGRICULTURAL LANDS

2.1. EU rules

EU law does not contain direct regulation on land ownership of Member States, its regulation essentially falls within the competence of the Member States. However, EU law sets out principles and regulatory approaches in primary and secondary law and in the case-law of the European Court of Justice which shall be taken into consideration by the Member States. Despite the fact Member States are entitled to regulate the ownership independently, their regulation may not infringe the fundamental rights of the EU. Provisions of the Treaty on the Functioning of the European Union state the principle of non-discrimination (Article 18), right of establishment (Article 49), free movement of capital (Article 63) including investment in real estate.[4] On the basis of the interpretation of case-law of the European Court of Justice (ECJ) national law can not distinguish between nationals of the EU based on their nationality. According to the principle of freedom of movement for persons and capital, the principle of national treatment shall be respected and restrictive provisions comply with EU law only if they pursue public interest and restrictive provisions can not be replaced by other provisons -less restrictive for the freedom of movement for capital. Legal public interests are e. g. maintaining of rural population, ensuring the life and cultivation of agricultural land by their owners, the CAP's objectives, etc. Restrictive national provisons based on established practice are e. g. transfer of the ownership of arable land under a prior administrative permission, the requirement of residence, prior declaration system, higher taxation on land sale shortly after acquisition, the requirement of longer minimum period for lease contract of agricultural land, etc.[5]

[3] Comprehensive analysis of regulation before the accession period can be found Csilla Csák – János Ede Szilágyi: Legislative tendencies of land ownership acquisition in Hungary, Agrarrecht Jahrbuch 2013, 2013, 215-233.

[4] 88/361/ EEC Council Directive, see also Commission Decision, 2010/792/EU, Hunagrian regulation had to take into account other requirements too such as human rights, e. g. right to property, see Anikó Raisz, Földtulajdoni és földhasználati kérdések az emberi jogi bíróságok gyakorlatában, in: Csilla Csák (ed.): Az európai földszabályozás aktuális kihívásai, Novotni Alapítvány, Miskolc, 2010, 241-253.; András Téglási, Az alapjogok hatása a magánjogi viszonyokban az Alkotmánybíróság gyakorlatában az Alaptörvény hatálybalépését követõ elsõ három évben, Jogtudományi Közlöny, 2015/3, 148-157.

[5] Financial law provisions and agrimonetary analisation related to land ownership issues can be found in studies of Zoltán Nagy: Nagy Zoltán: A termőfölddel kapcsolatos szabályozás pénzügyi

According to the case-law of ECJ a land policy which promotes and maintains the establishment of small and medium sized holdings by equitable distribution of agricultural lands is essentially in accordance with the objective of increasing the farmers' quality of life of Common Agricultural Policy.

The legislation of Member States place great emphasis on the regulation of the possible acquisition within strict framework. However, margin of Member States' holding policy is uncertain in many points from EU law aspect. The uncertainty –inter alia- may derive from the fact that such a Member State policy, in accordance with the Common Agricultural Policy "supported" by the ECJ's practice, which aim is the equitable distribution of agricultural lands, the reduction of speculation pressure and the maintenance of rural population, essentially raises the incompatibility between the applied measures and economic fundamental freedoms. Analyzing the new practice of the European Court of Justice we can conclude that even if the preservation of local communities is a "public interest" recognized by EU law, however, the applied measures are not equivalent to the principle of proportionality. The intent of new Member States (and their farmers) is to establish a fair distribution, viable holdings becomes significantly difficult compare to the old Member States (and farmers resident in there) which results beside de jure equal treatment de facto different treatment and margin.[6]

Therefore, Hungary after the end of land moratorium (2014) provided the acquisition of the ownership of arable land by nationals of Member States according to the regulatory conditions applicable to Hungarian people without making any distinction between the acquisition by nationals and nationals of Member States. Furthermore, in the Hungarian regulation –taking advantage of the use of restrictive provisions- cogent substantive and procedural conditions of land acquisition are found which we will introduce in detailed follows below:

2.2. The basis of national legislation

The condition of holding structure and the development directions are fundamentally determined by substantive and procedural law regulating the ownership and use of conditions of agricultural lands (holdings) and by the priority of agricultural financing and rural development in connection with the customised-tool system of agricultural policy. The two areas are closely linked to each

jogi aspektusai, in: Csák Csilla (edit.): Az európai földszabályozás aktuális kihívásai, Miskolc, Novotni Alapítvány, 2010, 187-197.; Nagy Zoltán: A mezőgazdasági tevékenységet végzők adójogi szabályozása egyes jövedelemadóknál, Publicationes Universitatis Miskolcinensis Sectio Juridica et Politica, Miskolc University Press, Miskolc, Tomus XXIII/2 (ann. 2005), 333-349.

[6] László Fodor explained his position about the period of land moratorium: „it is double standard used by the EU at the expense of Member States. The fake being of land moratorium, inter alia lies in the fact that the possibility of 7 years given for closing land prices is and was derogated by lower subsidy level (compared to former Member States).

other but focus on partly different problem areas and focal points. The target areas of Common Agricultural Policy a) viable food production, b) sustainable management of environmental resources, c) balanced development of rural areas. The regulation determining the ownership and use of conditions and framework also aims to achieve these objectives. The direction of new legislation (from 2014) is to develop a viable holding structure and to maintain rural population. The following land policy objectives were defined in the Act on Transactions in Agricultural and Forestry Land:

- enhancement of villages with a view to maintaining populations level and to enhancing the income potential
- development of agricultural community and within it of family partnerships, local businesses
- diversification of dual structure
- creating the conditions of sustainable land use
- promoting the operation of newly developed farming structure
- viable and economically feasible land size
- eliminating the consequences of fragmented estate structure.

In Hungary two opposite processes can be observed in the structure of holdings: on one hand fragmentation (fragmented estate structure), on the other hand land concentration. Fragmentation is basically due to the fact that there is no specific inheritance regulation for agricultural holdings and land.[7] Establishing the sui generis inheritance system and increasing the number of young farmers, who are local resident and do agricultural activities, may help to achieve the objectives. It is necessary to mention the acquiring party herein, the scope and way of acquisition.

Arable land is one of the most valuable natural resources which comprise the nation's common heritage; responsibility to protect and preserve them for the future generations lies with the State and every individual-as we can read in the first paragraph of Article P) of Fundamental Law. The new land transaction *adopted by the Parliament on 21 June 2013* (*Act CXXII of 2013 on Transactions in Agricultural and Forestry Land).*

In addition, beside the new land transaction act – pursuant to paragraph 2, Article P of Fundamental Law- which is the first step in the regulation of social

[7] Several people argue for introducing the special regulation of agricultural land (and holdings) (e. g. Csák, Hornyák, Prugberger, Szilágyi); lásd Zsófia Hornyák, Földöröklési kérdések jogösszehasonlító elemzésben, in: Szabó Miklós (ed.): Miskolci Egyetem Doktoranduszok Fóruma: ÁJK szekciókiadványa, ME TNRT, Miskolc, 2016, 131-135.; Zsófia Hornyák – Tamás Prugberger, A föld öröklésének speciális szabályai, in: Juhász Ágnes (ed.), Az új Ptk. öröklési jogi szabályai, Novotni Alapítvány, Miskolc, 2016, 58.) Hornyák analyzes inheritance of land in comparisation: Zsófia Hornyák, Grunderwerb in Ungarn und im österreichischen Land Vorarlberg, JAEL, 2014/17, 68.; and Zsófia Hornyák, Die Voraussetzungen und die Beschränkungen des landwirtschaftlichen Grunderwerbes in rechtsvergleichender Analyse, CEDR Journal of Rural Law, 2015/1, 96.

conditions affecting agricultural land, two other implementing acts will regulate this area, namely the act on agricultural operations and agricultural production. The rules concerning the organization of integrated agricultural production and on family farms (act on agricultural production) and other agricultural factories (act on agricultural factories) have not adopted yet. These future acts may include further specific provisions on the conditions of land ownership and land use. The area of agricultural affairs will be completely regulated with the adoption of these acts. Complementing these acts and enforcing the land transaction act the Parliament adopted the *Act CCXII of 2013 (act on land) on certain provisions and transitional legislation correlating to the Act CXXII of 2013 on Transactions in Agricultural and Forestry Land* in the beginning of December 2013. Furthermore, it should be taken account of the fact that the different provisions of forest Act and the Act on National Land Fund shall be also applied with respect to their scope. The new complex system of land regulation is based on –a different level of regulation- further implementing regulations. In addition to specific regulation, the provisions of Civil Code and the Act on the General Rules of Administrative Proceedings and Services also shall be applied. Therefore, a multi-level and complex regulation system of acquisition of arable land was established. In this study we would like to introduce the regulatory direction of agricultural land ownership without an explanation of each details.[8]

3. ACQUISITION OF AGRICULTURAL LAND

The ownership of land may be optained by specific people covered by the Act, way of the means and procedure and subject to the size limitations. In this study we will analyze the substantive rules of acquisition ignoring procedural rules and focus on who (personal limit), what (territorial limit) and how (right of disposition) can acquire. Special rules of transaction in land (prohibitive and restrictive provisions) shall not be applied to the acquisition by way of intestate succession, expropriation or through auction for the purpose of indemnification (exceptions to the general rule).

[8] Detailed information of new land acquisition regulation found: János Ede Szilágyi, Das landwirtschaftliche Grundstückverkehrsgesetz als erster Teil der neuen ungarischen Ordnung betreffend landwirtschaftlichen Grundstücken, Agrar- und Umweltrecht, 2015/2, 44-47. Csilla Csák – Bianka Enikő Kocsis – Anikó Raisz, Vectors and indicators of agricultural policy and law from the point of view of the agricultural land structure, JAEL, 2015/19, 32-43.; Nóra Jakab – János Ede Szilágyi, New tendencies in connection with the legal status of cohabitees and their children in the agricultural enterprise in Hungary, JAEL, 2013/15, 52-57.; István Olajos – Szabolcs Szilágyi, The most important changes in the field of agricultural law in Hungary between 2011 and 2013, JAEL, 2013/15, 101-102.; Klaudia Holló – Zsófia Hornyák – Zoltán Nagy, Die Entwicklung des Agrarrechts in Ungarn zwischen 2013 und 2015, JAEL, 2015/19, 56-64.

3.1. Personal limit

Different categories of people entitled to the acquisition of land can be differentiated. As a general rule, the ownership of land may be required by domestic natural persons and EU nationals. The State (a), church (b), mortgage loan company (c) and municipal government (d) may require ownership of legal persons under special objectives and conditions without restricting the size of the land. Expect for these, legal persons may not acquire the ownership of land, furthermore, foreign natural persons (non EU nationals), other states and their provinces, municipalities and their bodies are excluded from acquisition. Current legislation is similar to the former regulation of arable land as it excludes the acquisition of legal persons and foreign natural persons.

3.2. Territorial limit

Analyzing the acquisition of land by natural persons it shall be stated that the Hungarian regulation distinguishes two personal groups and according to it establishes the territorial limit. The category of farmers and non farmers create two separate groups.

The new Act introduced the concept of *farmer. Farmer* shall mean any domestic natural person or EU national registered in Hungary, who has a degree in agricultural or forestry activities as provided for in decree, or, in the absence thereof, who has been verifiably engaged in the pursuit of agricultural and/or forestry activities, and other secondary activities in his/her own name and at his/her own risk in Hungary continuously for at least three years, and has verifiably produced revenue by such activities. Or revenue did not materialize because the completed agricultural or forestry investment project has not yet turned productive, or verifiably holds membership for at least three years in an agricultural producer organization in which he/she has at least a 25 per cent ownership share, and who personally participates in agricultural and forestry operations, or in agricultural and forestry operations and the related secondary activities. It means that agricultural activity is the condition of the farmer's concept.

As for the rule of land acquisition limit the size of land that may be acquired by a farmer may not exceed 300 hectares (the land acquisition limit may be exceeded in certain cases). Non farmers (other than farmers) may acquire the ownership of maximum 1 hectare (earlier they could acquire 300 hectares).

3.3. Restriction of the right of disposition

Two legal institutions shall be mentioned in connection with the restriction of the right of disposition: one of which is the institution of preemption rights introduced by the former Act and the other is the approval by the competent authority as a new institution.

3.3.1. Preemption rights

Preemption rights is not a new institution in relation to the transition of agricultural land, the former Act LV of 1994 on Arable Land also regulated the substantive rules of transition and the implementation decree of the Act regulated the procedural rules. However, the new system has other regulatory principles in relation to the group of entitled people and the rank of them and in relation to the exercise of procedural system. Preemtion rights arises in the sale of land. However, there are certain cases when the right of preemption shall not apply to any sales transaction e.g. between close relatives, joint owners of a land, concerning to subsidy, municipal purposes, etc.

Without the rank of holders of preemtion rights it can be stated that Hungarian State is still in the first place. The farmer using the land (who has been using the land of the transaction for 3 years) has a preferred place in the rank. The regulation of preemption rights –summarizing the advantages and disadvantages of the right- can be characterized as follows:

- determination of the rank is very complicated, chiselled, which raises interpretation problems during the application in many cases. It is quite complicated for certain land registered as e. g. forest, vineyard when further special legal provisions are also applicable
- the number of people entitled for preemtion rights is wide that weakens the position of the customer
- the relationship between pre-emption order and landholding policy exists and justified. On the basis of preemption rights system the purpose of the legislator remains the prevention of fragmented estate, the establishment of healthy structure of land holdings, the promotion of land acquisition by people who can and who are capable to cultivate the land
- the procedure of pre-emption rights exercise slows and increases the process of the acquisition and transaction of land.

3.3.2. Approval by the competent authority

The new regulation introduced serious administrative burden and strong state control of land. One of its manifestations is that the approval of administrative agricultural authority is required for the acquisition of land as a general rule. Land transaction can be classified into three groups from the aspect of authority approval: (1) acquisition of the land by sales contract (2) acquisition by other way (e.g. adverse possession, acquisition by the way of testamentary disposition, acquisition through auction or tendering as part of an enforcement or liquidation procedure, or local government debt consolidation procedure), (3) transfer of ownership eights for which the approval of the competent authority is not required.

As a general rule, the approval of the competent authority is required for the transfer of ownership (in the case of land use agreement) but the approval of agricultural administration autority is not required:

- for State, church, mortgage loan company, municipal government acquisitions
- for the alienation of land owned by the State or by any municipal government
- for the transfer of ownership of land by way of a gift
- for transactions of ownership between close relatives
- for transfers of ownership between joint owners, if it results in the termination of joint ownership
- for sales transactions by way of conveyance to another farmer in conformity with the relevant legislation, as a precondition for subsidy
- for acquisitions within the framework of authorization of parcel reconfiguration.

The agricultural administration authority (authority) checks the eligibility of the land buyer, the compliance of ownership acquisition limit, circumstances for validating the contract of sale (possibility of so called pocket contracts) and conditions of acquisition.[9] The authority also checks the conditions and restrictions of acquisition and the observation of prohibitions after the acquisition of the land and during this time period the authority experiences that the owner or the land user breaks the rule will be advised concerning the infringement and instruct them in writing to restore compliance within the time limit prescribed. If the owner or the land user fails to comply with the notice, the agricultural administration body shall impose a default penalty. The forint amount of the default penalty shall be calculated based on the gold crown value of the land at the time of acquisition, multiplied by twenty thousand. Exemption from payment of the default penalty shall not be granted. The default penalty may be imposed repeatedly if the infringement prevails and if the obligor fails to eliminate the infringement in six months time, the agricultural administration body shall move to provide for the regulatory use of the land. It has no effect on ownership rights and in this situation the use of the land will be transferred.

4. CLOSING THOUGHTS

The special natural and financial characters of land ownership are on one hand the finite good being of the land (land as a natural object is limited and can not be propagated and can not be replaced), its indispensability, its renewable

[9] All of it see István Olajos: Az Alkotmánybíróság döntése a helyi földbizottságok szerepéről, döntéseiről, és az állásfoglalásuk indokainak megalapozottságáról, Jogesetek Magyarázata, 2015/3, 17-32.; és István Olajos, Die Entscheidung des Verfassungsgerichts über die Rolle, die Entscheidungen und die Begründetheit der Gründen der Stellungnahmen der örtlichen Grundverkehrskommissionen, Agrar- und Umweltrecht, 2017/8.,284-291.

feature, its special risk-sensitivity and its low profit, which create the special social feature of land ownership.[10] These circumstances justify the enforcement of public interest against ownership rights. The Constitutional Court has already stated that the legal treatment of land ownership due to its specificity is different from other property subjects that are justified in some respects.[11] On the other hand in the case of land ownership issues it can not be ignored that one of the essential factors of state sovereignty is the land acquisition of the state. These two aspects also support the importance of this area and the reasonableness of strict regulation.[12]

The Acts regulate provisions taken to eliminate speculative contracts made for circumventing the rules of acquisition. The instruments of these provisions are the preemption rights, the introduction of authority approval and the new crimes of Criminal Code introduced during its amendment which proposed criminal penalties for lawyers, notaries, etc. involved in these transaction in the case of illegal land acquisition

It is well known that the new land transaction act had and has a lot of national and union criticism until today. It is very important like in the case of every law how the problems will be dealt by the domestic case law.[13] Legislation is not always clear and can not regulate all situations occurring in life that would require further legislative solutions. By way of introduction the regulation of agricultural land is not complex, further legal requirements will supplement the current regulation which may change some regulatory subjects in certain situations.

[10] 35/1994. (VI. 24.) Constitutional Court Decision

[11] 16)1991. (IV. 20.) Constitutional Court Decision, Constitutional Court Decision 1991.62., 64/1993. (XII. 22.) CCD, CCD 1993. 381.

[12] Ede János Szilágyi pointed out the meaning of land-grabbing within the EU. Published: János Ede Szilágyi, Conclusions, JAEL, 2015/19, 91-92., 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, JAEL, 2010/9, 48-51., 55., 59-60.

[13] Tamás Andréka – István Olajos, A földforgalmi jogalkotás és jogalkalmazás végrehajtása kapcsán felmerült jogi problémák elemzése, Magyar Jog 2017/7-8.,410-424.

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Uređenje prava svojine na poljoprivrednom zemljištu u Mađarskoj nakon ukidanja zemljišnog moratorijuma

Sažetak: *Obradivo zemljište je jedno od najvrednijih prirodnih resursa zemlje, koje treba tretirati kao zajedničko nacionalno nasleđe. Država, ali i svaki pojedinac odgovorni su za njegovu zaštitu i očuvanje za buduće generacije, što nalaže Deo (1) člana P) Osnovnog zakona Mađarske. Novi Zakon o prometu zemljišta (Zakon CXXII iz 2013. godine o prometu poljoprivrednog i šumskog zemljišta), koji je Skupština usvojila 21. juna 2013. godine, nastoji da obezbedi ostvarenje ovih ciljeva, uređujući suštinske i ključne elemente sticanja prava svojine na zemljištu nakon ukidanja moratorijuma u pogledu sticanja prava svojine na zemljištu. Zakon predviđa materijalnopravna i procesnopravna rešenja koja bi trebalo da osiguraju interese zemlje. U okviru istraživanja, biće, s jedne strane, predstvaljena i analizirana očekivanja i principi Evropske unije, dok će s druge strane biti reči o mađarskim rešenjima o prometu zemljišta.*

Ključne reči: *poljoprivredno zemljište; šumsko zemljište, pravo svojine, prava stranaca.*

Datum prijema rada: 09.10.2017.

Originalni naučni rad 336.226.11]:341.645.5:061.1EU
doi:10.5937/zrpfns51-15048

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DISKRIMINATORNI PORESKI TRETMAN PRENOSA NEPOKRETNOSTI SA STANOVIŠTA POREZA NA KAPITALNE DOBITKE U PRAKSI SUDA PRAVDE EVROPSKE UNIJE

Sažetak: *Predmet analize ovog rada je praksa Suda pravde Evropske unije koja se odnosi na porez na kapitalne dobitke fizičkih lica koji nastaju prenosom uz naknadu nepokretnosti. Cilj je da se utvrdi da li i pod kojim uslovima u ovoj oblasti ograničenje osnovnih sloboda može da bude opravdano postojanjem javnog interesa.*

Ključne reči*: poreska diskriminacija; porez na kapitalne dobitke fizičkih lica; Sud pravde Evropske unije.*

1. UVODNA RAZMATRANJA

U okvirima Evropske unije stvoreno je jedinstveno tržište, koje podrazumeva realizaciju četiri osnovne slobode – slobode kretanja robe, ljudi, usluga i kapitala. Pošto je u okviru polja primene Ugovora o funkcionisanju Evropske unije (u daljem tekstu: UFEU) zabranjena svaka diskriminacija na osnovu državljanstva, države članice će retko kada svojim nacionalnim merama, pa i poreskim, praviti razliku između svojih državljana i državljana drugih članica,[1] pa se uglavnom diskriminatorni poreski tretman vezuje za rezidentstvo.[2]

[1] Jedino kada je u pitanju sloboda kretanja kapitala, zabranjena su ograničenja, ne samo između članica, nego i između članica i trećih zemalja. Vid. čl. 63 Consolidated Version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union* C 326/49 of 26 October 2012.

[2] Pojam rezidentstvo označava trajno ili privremeno fizičko prisustvo nekog lica na određenoj teritoriji. Primera radi, rezidentima se smatraju lica koja na teritoriji određene države imaju prebivalište, koja u njoj borave tokom određenog vremenskog perioda i sl. Vid. Dejan Popović, *Poresko pravo*, Pravni fakultet u Beogradu, Beograd 2011, 219-223.

Sticanje nepokretnosti od strane državljana jedne države članice na teritoriji druge članice, kada su u pitanju fizička lica, se može posmatrati u kontekstu slobode kretanja ljudi i slobode kretanja kapitala. Dakle, u kontekstu slobode kretanja i nastanjivanja, koja svoj specifičan izražaj nalazi u slobodi kretanja radnika i slobodi osnivanja,[3] fizička lica, državljani jedne članice, mogu da stiču nepokretnosti na teritoriji druge, nezavisno da li u njoj obavljaju određenu delatnost (kao zaposleno ili samozaposleno lice). Osnov za razmatranje sticanja nepokretnosti od strane fizičkih lica u kontekstu slobode kretanja kapitala nalazi se u Aneksu Direktive 88/61/EES, koja propisuje da prekogranična kretanja kapitala uključuju i investicije u nepokretnosti na teritoriji država članica od strane nerezidenata.[4] Sloboda kretanja kapitala, koja pokriva slučajeve vlasništva nad nepokretnostima, ali i njihovo upravljanje,[5] obuhvata, dakle, i pravo državljana država članica da stiču, koriste i raspolažu nepokretnostima na teritoriji druge članice.

U kontekstu ove dve slobode, načelno, nisu dopuštene nacionalne mere, koje sprečavaju ili odvraćaju državljane, odnosno rezidente jedne države članice da stiču nepokretnosti na teritoriji druge države članice. Važno je naglasiti i da nacionalne poreske mere mogu imati takvo dejstvo na sticanje nepokretnosti. Porez na kapitalne dobitke fizičkih lica je najbolji primer za to.

2. ULOGA SUDA PRAVDE EVROPSKE UNIJE U STVARANJU PORESKOG PRAVA EVROPSKE UNIJE

Poresko pravo Evropske unije se stvara putem:

- Pozitivne integracije, koja podrazumeva harmonizaciju putem direktiva i koordinaciju putem obavezujućih i neoobavezujućih akata (preporuke, saopštenja i sl.);
- Međunarodnih ugovora koje zaključuje Evropska unija;[6]
- Negativne integracije, koja se manifestuje kroz zabranu ponašanja koje vodi narušavanju četiri osnovne slobode, i to putem prakse Suda pravde Evropske unije (u daljem tekstu: Sud pravde), koji stavlja van snage odredbe nacionalnog zakonodavstva koje predstavljaju prepreku za njihovu realizaciju.[7]

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[3] Vid. Judgment of the Court (Second Chamber) of 26 October 2006, Case C-345/05.

[4] Council Directive of 24 June 1988 for the Implementation of Article 67 of Treaty, *Official Journal of the European Communities* L 178/5 of 8 of July 1988.

[5] Primera radi ova sloboda bi mogla da bude dovedena u pitanje i u situacijama kada obveznik na teritoriji druge države članice ima komercijalnu imovinu koju iznajmljuje. Vid. *Case Law Guide of the European Court of Justice on Articles 63 et seq. TFEU – Free Movement of Capit*al, European Commission, Brussels 2016, 10.

[6] U kontekstu oporezivanja poseban značaj ima Ugovor o EEA, zaključen sa državama članicama EFTE. Vid. Lukasz Adamczyk, „The Sources of EU Law Relevant for Direct Taxation", *Introduction to European Tax Law on Direct Taxation* (eds. Michael Lang *et al*.), Linde, Wien 2010, 23, 28-29.

[7] *Ibid*.

2.1. Poreska diskriminacija i restrikcija

Da bi se bolje razumela uloga Suda pravde u stvaranju poreskog prava Unije i načini na koje poreske mere mogu dovesti u pitanje funkcionisanje unutrašnjeg tržišta Unije, neophodno je razmotriti pojmove poreske diskriminacije i restrikcije.

Za poresku diskriminaciju svojstveno je da se dve uporedive situacije tretiraju sa poreske tačke gledišta na nejednak način, odnosno jedna od njih se tretira nepovoljnije od druge. Dakle, njena dva konstitutivna elementa su uporedivost i nejednakost u tretmanu („test uporedivosti" i „test nepovoljnosti").[8]

Iako se u poreskoj literaturi sreću različite podele poreske diskriminacije,[9] najznačajnija je podela na direktnu i indirektnu. Direktna poreska diskriminacija je zasnovana na državljanstvu, a indirektna na nekom drugom kriterijumu diferencijacije, poput rezidentstva,[10] koji vodi istom rezultatu.[11]

Restrikcija, sa druge strane, postoji ako se određene mere primenjuju jednako i na domaće i na inostrane situacije, ali suštinski dovode ometanja intrakomunitarne trgovine,[12] odnosno prepreka su proklamovanim slobodama. Dok odredbe UFEU koje se odnose slobodu kretanja lica zabranjuju samo diskriminaciju zasnovanu na državljanstvu, odredbe o slobodi kretanja robe, usluga i kapitala zabranjuju i svaki vid njihove restrikcije, tj. ograničenja. Međutim, u praksi Suda pravde zabrana restrikcije se primenjuje u odnosu na sve četiri slobode.[13]

UFEU sadrži stavke koje opravdavaju diskriminatorne nacionalne mere (javna politika, javno zdravlje i javna sigurnost).[14] Zbog svoje prirode, retko kada mogu da budu osnov za opravdanje diskriminatornih nacionalnih poreskih mera. Pored toga, Sud pravde je razvio praksu po kojoj nacionalne restriktivne mere mogu opstati ukoliko su ispunjeni određeni uslovi (eng. *rule of reason concept*), i to: ona se mora primenjivati na nediskriminatoran način, njeno postojanje mora nalagati javni interes, mora biti podesna za ostvarivanje cilja koji joj se pridaje i, ujedno, mora biti poštovan princip proporcionalnosti.[15] U dosadašnjoj praksi, Sud

[8] Niels Bammens, *The Principle of Non-Discrimination in International and European Tax* Law, IBDF, Amsterdam 2011, 524.

[9] Ilija Vukčević, *Uticaj sudske prakse Suda pravde Evropske unije na oblast oporezivanja: Usklađenost sistema direktnog oporezivanja Crne Gore osnovnim slobodama*, doktorska disertacija, Pravni fakultet u Beogradu, Beograd 2013, 134-160.

[10] Stav Suda pravde je da će ovaj kriterijum delovati posebno na štetu poreskih obveznika koji su državljani drugih država članica.

[11] Vid. Vanessa E. Englmair, „The Relevance of the Fundamental Freedoms for Direct Taxation", *Introduction to European Tax Law on Direct Taxation* (eds. Michael Lang *et al*.), Linde, Wien 2010, 52.

[12] N. Bammens, 531.

[13] Ben Terra, Peter Wattel, *European Tax Law*, Kluwer Law International, Alphen aan den Rija 2008, 43.

[14] Vid. čl. 52 Consolidated Version of the Treaty on the Functioning of the European Union.

[15] Vid. B. Terra, P. Wattel, 33-34.

pravde je opravdavao postojanje restriktivnih nacionalnih poreskih mera potrebom da se obezbedi: fiskalna kontrola, kohezija fiskalnog sistema, sprečavanje poreske evazije, princip teritorijalnosti, uravnotežena raspodela poreskih jurisdikcija i neutralizacija u drugoj državi.[16] Dakle, iako je javni interes prilično apstraktna kategorija, Sud pravde je odredio njegovo značenje na terenu oporezivanja.[17]

Važno je naglasiti da je linija razgraničenja između indirektne diskriminacije i restrikcije vrlo maglovita.[18] Tome je doprinela i praksa Suda pravde. Naime, iako bi se *rule of reason* test morao primenjivati samo na restriktivne mere, Sud pravde nije dosledan, pa tako i mere koje predstavljaju indirektnu diskriminaciju opravdava sa pozivom na to da su „prošle" ovaj test,[19] tako da bi se, u suštini, odnos između poreske diskriminacije i restrikcije mogao posmatrati i kao odnos između užeg i šireg pojma.

3. POREZ NA KAPITALNE DOBITKE OD NEPOKRETNOSTI KAO MOGUĆI IZVOR DISKRIMINACIJE U ČLANICAMA UNIJE

Pošto su neposredni porezi u nadležnosti država članica, moguće je da, prilikom propisivanja osnovnih elemenata poreza na kapitalne dobitke,[20] koji nastaju prenosom uz naknadu nepokretnosti, države članice ustanove takva pravila koja imaju diskriminatorni ili restriktivni karakter.

3.1. Poreska osnovica i poreske stope kao mogući izvor diskriminacije

Prilikom propisivanja načina utvrđivanja osnovice poreza na kapitalne dobitke fizičkih lica, države članice mogu da naruše pravila koja se odnose na četiri „velike" slobode. U ovom kontekstu treba spomenuti portugalsko zakonodavstvo koje je propisivalo da se kod rezidenata oporezuje samo 50% ostvarenog kapitalnog dobitka, odnosno samo se polovina ostvarenog kapitalnog dobitka uključivala u osnovicu globalnog poreza na dohodak, dok se kod nerezidenata oporezivao celokupni kapitalni dobitak, i to po posebnoj proporcionalnoj stopa od 25%.

U slučaju povodom kojeg je najviši administrativni sud Portugala tražio od Suda pravde prethodno mišljenje, radilo se u tome da je rezident Nemačke nasle-

[16] Vid. V. E. Englmair, 66-72.

[17] Vid. Cvjetana Cvjetković, „Razmena informacija u oblasti neposrednog oporezivanja u pravu Evropske unije i praksi Evropskog suda pravde", *Zbornik radova Pravnog fakulteta u Novom Sadu* 3/2014, 355.

[18] N. Bammens, 533.

[19] B. Terra, P. Wattel, 44; N. Bammens, 532.

[20] Kapitalni dobici se mogu definisati kao prihodi koji nastaju uvećanjem vrednosti pojedinih prava iz sastava obveznikove imovine, odnosno kao razlika između između prodajne i nabavne cene određenih sredstava, u ovom kontekstu nepokretnosti.

dio nepokretnost u Portugalu, čijim otuđenjem je ostvario kapitalni dobitak. Portugalske vlasti su oporezovale celokupni kapitalni dobitak, dodajući tu sumu drugom oporezivom dohotku ostvarenom na tlu Portugala. Poreski obveznik je iskoristio odgovarajuća pravna sredstva, pa je tako slučaj došao pred najvišu sudsku instancu, koja je tražila ispitivanje saglasnosti navedene odredbe sa većim brojem sloboda. Međutim, Sud pravde je utvrdio da treba sprovesti ispitivanje samo u kontekstu slobode kretanja kapitala.

Jasno je da su odredbe portugalskog zakonodavstva pravile razliku između rezidenata i nerezidenata u pogledu utvrđivanje osnovice poreza na dohodak. Pošto nisu bili ispunjeni uslovi iz čl. 65 UFEU,[21] bilo je neophodno utvrditi da li je reč o uporedivim situacijma. Uprkos tome što je portugalska strana negirala postojanje uporedivosti,[22] i, samim tim, isticala da je njihov različit tretman opravdan, Sud pravde je odlučio da se nerezidentni i rezidentni poreski obveznici, koji su ostvarili kapitalne dobitke otuđenjem nasleđene nepokretnosti u Portugalu, nalaze u uporedivim situacijama, kao i da je ispunjen „test nepovoljnosti", jer se nerezidenti, za razliku od rezidenata, podrgavaju oporezivanju celokupnog kapitalnog dobitka.

Što se tiče argumenata portugalske strane, istaknuto je da različit tretman u pogledu utvrđivanja poreske osnovice mora biti tumačen u vezi sa opštim sistemom oporezivanja dohotka, tj. u svetlu različitih stopa za rezidente i nerezidente. Drugim rečima, portugalska strana je tvrdila da se spornim mehanizmom nastoji olakšati rezidentima, koji su podvrgnuti progresivnoj stopi, za razliku od nerezidenata, koji plaćaju porez po proporcionalnoj stopi. Portugalske vlasti su se pozvale i na to da navedeno rešenje nalaže javni interes, i to potreba za očuvanjem fiskalne kohezije.

Ideja koja stoji u osnovi principa kohezije jeste postojanje uske veze između poreske olakšice koja se pruža poreskom obvezniku, u određenom trenutku, i poreskog tereta nametnutog istom poreskom obvezniku, u okviru istog poreza, u nekom kasnijem trenutku, odnosno postojanje direktne veze između odobrene poreske pogodnosti i njenog potiranja naknadnim oporezivanjem. Dakle, odustaje se od

[21] Treba imati u vidu da neće svako razlikovanje rezidenata i nerezidenata biti u nesaglasnosti sa slobodom kretanja kapitala. Naime, čl. 65 UFEU propisuje da odredbe o slobodi kretanja kapitala ne dovode u pitanje pravo članica da primenjuju poresko zakonodavstvo koje pravi razliku između rezidentnih i nerezidentnih poreskih obveznika, sve dok ono ne predstavlja sredstvo proizvoljne diskriminacije ili prikrivenog ograničenja ove slobode. Povodom ovog pitanja, stav Suda pravde je da ovaj član treba tumačiti restriktivno, odnosno njegov stav je da zakonodavstvo koje pravi razliku između poreskih obveznika, u zavisnosti od njihovog prebivališta ili mesta investiranja kapitala, nije automatski u saglasnosti sa pravom Unije. Vid. Judgment of the Court (First Chamber) of 15 July 2004, Case C-443/06.

[22] Sud pravde je u nekim ranijim odlukama istakao da situacije rezidenata i nerezidenata nisu uporedive i da činjenica da članica uskraćuje nerezidentima neke pogodnosti koje imaju rezidenti nije sama po sebi diskriminatorna, ako postoje objektivne razlike između situacija rezidenata i nerezidenata, tj. ako oni nisu u uporedivim situacijama. Vid. Judgment of the Court of 14 February 1995, Case C-279/93.

poreskog zahteva u jednom trenutku, ali samo ako će taj zahtev biti realizovan u nekom kasnijem trenutku.[23] U ovom slučaju portugalska strana se pozvala na to da postoji direktna veza između pogodnosti koja se odobrava rezidentima (u osnovicu ulazi samo 50% ostvarenog kapitalnog dobitka) i njenog potiranja (njihovo podvrgavanje progresivnim poreskim stopama), na šta je Sud pravde odgovorio da, u svakom slučaju, pogodnost koju uživaju rezidenti premašuje nepovoljnost, tj. da ne postoji direktna veza između odobrene poreske pogodnosti i njenog potiranja putem oporezivanja. Posebno treba naglasiti da je portugalska strana zanemarila da se potiranje poreske pogodnosti mora vršiti u okviru istog poreza.

Dakle, mišljenje Suda pravde je bilo da sloboda kretanja kapitala isključuje nacionalnu legislativu koja u pogledu transakcije iste vrste dovodi do toga da su rezidenti druge države članice izloženi većem poreskom opterećenju u odnosu na ono kojem su izloženi rezidenti države u kojoj se nalazi nepokretnost.[24]

U kontekstu poreskih stopa trebalo bi spomenuti rešenje koje je postojalo u Španiji. Naime, u njoj su rezidenti bili podvrgnuti različitim stopama, u zavisnosti od toga da li je bilo reč o kratkoročnim ili dugoročnim kapitalnim dobicima.[25] Dugoročni su bili podvrgnuti proporcionalnoj stopi od 15%, a kratkoročni progresivnim stopama, od 15% do 45%.[26] Sa druge strane, za kapitalne dobitke nerezidenata bila je predviđena jedinstvena proporcionalna stopa od 35%, pa je traženo ispitivanje saglasnosti navedenog rešenja sa slobodom kretanja kapitala.

Španska strana je tvrdila da nije reč o uporedivim situacijama, da navedena mera nema restriktivan karakter, a da, ukoliko ima, takvo rešenje nalaže javni interes. Naime, istaknuto je da je za utvrđivanje uporedivosti neophodno uzeti u obzir celokupan dohodak obveznika, a ne samo onaj ostvaren u jednom tipu transakcija, pa se u tom smislu španska strana pozvala i na činjenicu da nerezidenti imaju mogućnost izbora istog poreskog tretmana kao i rezidenti, ako barem 75% dohotka ostvare na tlu Španije, odnosno istaknuto je da nepostojanje jedinstvenog seta pravila za obe kategorije obveznika nije dovoljno za izvođenje zaključka o uporedivosti situacija, tim više, jer prihod koji ostvare nerezidenti na teritoriji države izvora je samo jedan deo njihovog dohotka. Imajući u vidu praksu Suda pravde, Španija se pozvala i na to da su članice slobodne da obaveze preuzete osnivačkim ugovorima izvrše zaključujući ugovore o izbegavanju dvostrukog oporezivanja, a kako ih Španija ima sa skoro svim članicama, prema njihovim tvrdnjama, španska legislativa nije ograničavala slobodu kretanja kapitala.

Što se tiče uporedivosti, Sud pravde je istakao da španski argument koji se odnosi na opšti sistem oporezivanja dohotka može opstati samo kada su u pitanju

[23] I. Vukčević, 208-209.

[24] Judgment of the Court (Fourth Chamber) of 28 September 2006, Case C-443/06.

[25] Podela je izvršena u zavisnosti od toga da su nastali raspolaganjem sredstava koja su u obveznikovom vlasništvu više od godinu dana ili ne.

[26] Kapitalni dobici su ulazili u osnovicu globalnog poreza na dohodak.

kratkoročni kapitalni dobici rezidenata, jer su samo oni podvrgnuti progresivnoj stopi. Osim toga, istaknuto je da je (zbog postojanja ugovora o izbegavanju dvostrukog oporezivanja i eventualne primene metode izuzimanja sa progresijom), moguće da dohodak nerezidenata ostvaren u Španiji bude uzet u obzir prilikom određivanja visine marginalne progresivne poreske stope u zemlji njegovog rezidentstva, pa su, samim tim, rezidenti i nerezidenti u uporedivoj situaciji. Dakle, navedena odredba je prošla „test uporedivosti". Što se tiče „testa nepovoljnosti", kod dugoročnih kapitalnih dobitaka, on je, nesumnjivo, ispunjen, jer su rezidenti podvrgnuti proporcionalnoj stopi od 15%, a nerezidenti stopi od 35%. Međutim, i kratkoročni kapitalni dobici su prošli „test nepovoljnosti", jer su nerezidenti podvrgnuti proporcionalnoj stopi od 35% bez obzira na veličinu ostvarenog kapitalnog dobitka, dok su rezidenti podložni takvoj stopi samo ako njihov ukupan dohodak dostiže određeni prag.

Kao što je prethodno i istaknuto, španska strana je navela da je, u svakom slučaju, restrikcija (ako se utvrdi njeno postojanje opravdana prirodom fiskalnog sistema i potrebom da se obezbedi njegova kohezija.

Naime, porez koji plaćaju rezidenti je periodični porez, čija visina zavisi od sposobnosti plaćanja, a porez koji plaćaju nerezidenti je neperiodični porez, koji ne vodi računa o ukupnoj ekonomskoj snazi, pa nije moguće za njega predvideti progresivne stope. Istaknuto je da nema razloga da se na nerezidente primeni povoljnije oporezivanje u slučaju dugoročnih kapitalnih dobitaka, jer im je već kroz primenu proporcionalne stope obezbeđen prvilegovani tretman. U tom pogledu istaknuto je da su kratkoročni kapitalni dobici rezidenata podvrgnuti stopi koja se kreće u rasponu od 15%, pa do, čak, 45%, dok se isti takvi dobici nerezidenata oporezuju pojedinačno, i to po proporcionalnoj stopi, pa se ne može reći da su rezidenti sistematski podvrgnuti povoljnijem tretmanu. Osim toga, prema tvrdnjama španske strane, postojala je direktna veza između poreske pogodnosti koja se odobrava rezidentima i štete koju bi oni pretrpeli da nema tog mehanizma kojim se eliminiše kumulativni efekat progresivnih stopa na kapitalni dobitak, posebno na onaj stvaran tokom većeg broja godina. Dakle, prema stavovima španske strane, kada su u pitanju dugoročni kapitalni dobici postoji direktna veza između poreske pogodnosti (stopa 15%) i nepovoljnosti (progresivne stope koja se primenjuje na ukupan dohodak), a kod kratkoročnih kapitalnih dobitaka pogodnost (nisu podvrgnuti stopi od 35%) se anulira primenom progresivne stope koja se primenjuje na ukupan dohodak.

Međutim, Sud pravde je istakao da se navedeno rešenje ne može opravdati potrebom da se obezbedi kohezija fiskalnog sistema, jer nije ustanovljeno postojanje direktne veze između poreske pogodnosti i njenog potiranja putem određene fiskalne dažbine, tako da je navedena odredba u suprotnosti sa slobodom kretanja kapitala. Naime, iako je španska strana oporezivanje dugoročnih kapitalnih dobitka po proporcionalnoj stopi pripisala potrebi da se izbegne „kažnjavanje" rezidenata, treba imati u vidu da prihod koji uživa privilegovani tretman nije podložan pro-

gresivnoj stopi, pa ne postoji direktna veza između poreske pogodnosti koje uživa taj prihod i njenog kasnijeg potiranja. Što se tiče argumenata koje je istakla španska strana povodom kratkoročnih kapitalnih dobitaka, čak i da je tako, ne može se isključiti da su rezidenti, i pored toga što se kapitalni dobici uključuju u osnovicu globalnog poreza, i dalje blaže oporezivani od nerezidenata, jer će visina stope zavisiti od visine njegovih ostalih prihoda.[27]

3.2. Poreske olakšice kao mogući izvor diskriminacije

Poreske olakšice u sistemu poreza na kapitalne dobitke se, po pravilu, vezuju za slučajeve rešavanja stambenog pitanja, odnosno slučajeve kada obveznik novac ostvaren prodajom jednog sredstva „zameni" (eng. *replacement asset rollover*) za neko drugo sredstvo, u ovom kontekstu za drugu nepokretnost.[28] Problem može da nastane kada se ta „zamenska" nepokretnost nalazi na teritoriji druge članice.

Primera radi, do intervencije Suda pravde, u Portugalu je bilo propisano da se kapitalni dobici nastali prenosom uz naknadu nepokretnosti neće oporezovati ako se sredstva ostvarena prodajom, u zakonom propisanim rokovima, iskoriste za kupovinu stalnog mesta stanovanja obveznika ili člana njegove porodice, ali samo ako se i „novo" stalno mesto stanovanja nalazi na tlu Portugala.

Sud pravde je ispitivao saglasnost navedene odredbe u odnosu na slobodu kretanja lica, koja svoj specifični izražaj nalazi u osnivanja i slobodu kretanja radnika,[29] i utvrdio je da u odnosu na ove slobode ona ima restriktivan karakter, tj. da u najmanju ruku ima odvraćajuće dejstvo na poreske obveznike koji žele da prodaju nepokretnost na tlu Portugala, kako bi se nastanili u nekoj drugoj državi članici.

Portugalske vlasti su tvrdile da se navednom odredbom ne ograničavaju prethodno spomenute slobode, ali i da su one, u svakom slučaju, opravdane razlozima javnog interesa, a posebno potrebom da se očuva kohezija fiskalnog sistema i pravo na stanovanje. Čini se da se Portugal u ovom slučaju prilično neuverljivo pozvao na argument fiskalne kohezije, tvrdeći da se sredstvima od prodaje jedne nepokretnosti kupuje druga, tako da i kupljena i prodata imovina imaju istu funkciju, kao i da postoji direktna korelacija, za isti porez i za istog obveznika, između odobrene poreske pogodnosti i poreskog tretmana. Međutim, zanemarena je činjenica da nepokretnost kupljena u drugoj članici može da bude korišćena kao glavno mesto stanovanja i da tako „zameni" transferisanu imovinu i funkciju

[27] Judgment of the Court (First Chamber) of 6 October 2009, Case C-562/07.

[28] *Taxation of Capital Gains of Individuals – Policy Considerations and Approaches*, OECD, 2006, Paris, 110-111.

[29] Prema dotadašnjoj praksi Suda pravde, sloboda kretanja radnika i sloboda osnivanja imaju dva cilja. Prvi je da obezbede stranim državljanima i kompanijama tretman koji imaju i državljani i kompanije države izvora, a drugi je da država porekla ne ometa svoje državljane da prihvate i obavljaju poslovne aktivnosti u drugoj članici. Pošto je utvrđena nesaglasnost sa ovim slobodama, Sud pravde nije ispitivao saglasnost ove odredbe sa slobodom kretanja kapitala, iako ona nesumnjivo postoji.

koju je ona imala. Utvrđeno je i da ne postoji direktna veza između odobrene poreske pogodnosti i njenog potiranja putem docnijeg oporezivanja. Naime, poreski obveznik koji sredstva reinvestira u glavno mesto stanovanja na tlu Portugala ostvaruje poresku pogodnost koja se neće anulirati, odnosno nema poreza na kapitalne dobitke u budućnosti, osim ukoliko se kapitalni dobitak ne realizuje. Pri tome treba imati u vidu da do njegove realizacije i potiranja poreske pogodnosti neće doći sve dok poreski obveznik kupuje „novo" glavno mesto stanovanja, tj. u slučaju prodaje i tog „novog" mesta stanovanja i kupovine „novijeg", i tako unedogled, on može da računa na navednu poresku olakšicu.

Portugal se pozvao i na to da se navedenom odredbom ide u pravcu realizacije prava na stanovanje, koje je ustavno pravo, kao i da bi se suprotnim rešenjem finansirala stambena politika drugih članica. Čak i da takvi argumenti opravdavaju ograničenje zagarantovanih sloboda, njome se ne udovoljava principu proporcionalnosti. Naime, Sud pravde je istakao da bi se pravo na stanovanje moglo ostvariti i bez nametanja zahteva da se sredstva reinvestiraju na nacionalnoj teritoriji, kao i da je u kontekstu njegovog ostvarivanja nebitno da li se navedenom nacionalnom merom finansira stambena politika u drugoj članici. Zbog svega prethodno navedenog, Sud pravde je, odlučio da razlozi javnog interesa ne mogu biti opravdanje za restriktivan karakter navedene odredbe.[30]

Slična odredba je postojala i u švedskom poreskom sistemu, tako da je i odluka Suda pravde bila manje-više zasnovana na istim argumentima.[31]

3.3. Prebijanje kapitalnih gubitaka i kapitalnih dobitaka

U najvećem broju poreskih sistema postoji mogućnost prebijanja kapitalnih gubitaka sa kapitalnim dobicima. Problem može da nastane kada su kapitalni gubici nastali u jednoj državi članici, a kapitalni dobici u drugoj.

Upravo povodom ovog pitanja zatraženo je prethodno mišljenje od Suda pravde. Naime, radilo se o tome da je u istoj poreskoj godini finski rezident ostvario kapitalni gubitak prodajom nepokretnosti u Francuskoj i kapitalni dobitak prodajom hartija od vrednosti u Finskoj, pa je zatražio njihovo prebijanje. Važno je naglasiti da u Francuskoj nije ostvario drugi prihod od kojeg bi mogao da odbije taj gubitak, niti je tamo stekao drugu imovinu prilikom čijeg eventualnog prenosa bi mogao nadoknaditi taj kapitalni gubitak. Finske poreske vlasti mu nisu odobrile prebijanje, pa je slučaj došao pred najviši administrativni sud.[32]

[30] Judgment of the Court (Second Chamber) of 26 October 2006, Case C-345/05.

[31] Judgment of the Court (Eighth Chamber) of 18 January 2007, Case C-14/06.

[32] Iako se Vrhovni administrativni sud Finske u zahtevu za donošenje odluke o prethodnom pitanju pozvao na neke ranije predmete u kojima nije dopušteno prebijanje, istaknuto je da se ovaj slučaj ipak razlikuje po tome što nije reč o obvezniku koji obavljanja profesionalnu delatnost, pa se ne može smatrati da će obveznik u državi u kojoj se nalazi nepokrenost kasnije ostvariti dohodak od kojeg bi mogao odbiti taj gubitak.

Što se tiče pravnog okvira, u finskom pravu kapitalni dobici su, kao prihodi od kapitala, bili podvrgnuti proporcionalnoj stopi. Važno je naglasiti i to da je ono dopuštalo međusobno prebijanje kapitalnih gubitaka i kapitalnih dobitaka nastalih na finskom tlu, kao i da je u njemu, kao unilateralna mera za izbegavanje dvostrukog oporezivanja, bila predviđena metoda izuzimanja sa progresijom. Bilo je i propisano da će se prilikom utvrđivanja dohotka ostvarenog u drugoj državi uzeti u obzir gubici i kamate povezane sa sticanjem ili očuvanjem dohotka. Sa druge strane, ugovor o izbegavanju dvostrukog oporezivanja između Francuske i Finske je pravo oporezivanja kapitalnog dobitka nastalog otuđenjem nepokretnosti dodelio državi gde se nepokretnost nalazi. U spomenutom ugovoru bilo je i propisano da će se u slučajevima kada pravo oporezivanja pripada Finskoj, ono sprovesti po stopi koja odgovara ukupnom iznosu oporezivog dohotka utvrđenog u skladu sa finskim zakonodavstvom.

Od Suda pravde je zatraženo mišljenje o tome da li je u saglasnosti sa slobodom kretanja kapitala rešenje da se poreskom obvezniku ne dozvoli prebijanje kapitalnih gubitaka nastalih prenosom nepokretnosti, koja se nalazi u drugoj članici, sa kapitalnim dobicima od pokretnih stvari oporezivih u državi rezidentstva, ako se to dozvoljava ukoliko je nepokretnost locirana u državi rezidentstva.

Uprkos postojanju drugačijih argumenata, Sud pravde je istakao da razlike u tretmanu u pogledu mogućnosti odbijanja kapitalnih gubitaka nastalih prodajom nepokretnosti, u zavisnosti od toga gde je nepokretnost locirana, ne mogu biti opravdane pozivom na različitost situacija. Kako je „test nepovoljnosti" nesumnjivo ispunjen, preostaje da se utvrdi da li je restrikcija opravdana razlozima javnog interesa, i to potrebom: da se zaštiti uravnotežena raspodela poreskih jurisdikcija među članicama, da se obezbedu kohezija fiskalnog sistema, da se spreči dvostruko uzimanje u obzir kapitalnih gubitaka i poreska evazija.

Argument uravnotežene raspodele poreskih jurisdikcija među članicama znači da se konačni gubici, koje više nije moguće iskoristiti u inostranoj jurisdikciji moraju uzeti u obzir od strane države rezidentstva.[33] U ovom slučaju, da nema ugovora o izbegavanju dvostrukog oporezivanja, Finska bi imala pravo da sprovede oporezivanje kapitalnih dobitaka nastalih otuđenjem nepokretnosti u Francuskoj, ali njegovo prisustvo, zajedno sa finskim pravom, dovodi do toga da se taj kapitalni dobitak ne oporezuje u Finskoj, niti se na drugi način uzima u obzir. Kada bi se priznalo da se gubici nastali prodajom nepokretnosti u drugoj članici priznaju u državi u kojoj boravi, nezavisno od raspodele prava oporezivanja koja je dogovorena među članicama, poreskom obvezniku bi se omogućilo da slobodno odabere članicu u kojoj je uzimanje u obzir navedenih gubitaka sa poreske tačke gledišta

[33] Ovaj argument je prvobitno razvijen u kontekstu mogućnosti prebijanja gubitaka inostrane filijale. Reč je o tome da je nužno da se na privredne delatnosti poreskog obveznika sa sedištem u jednoj od članica primene poreska pravila te države, kako u pogledu dobiti, tako i u pogledu gubitaka. Vid. I. Vukčević, 216.

najpovoljnije. Dakle, nepriznavanjem prebijanja gubitaka omogućuje se očuvanje ravnoteže između prava na oporezivanje dobiti i mogućnosti odbijanja gubitaka, kao i uravnotežena raspodela poreskih jurisdikcija među članicama.

Argument potrebe izbegavanja dvostrukog uzimanja u obzir gubitaka se ne može prihvatiti, jer se gubici koji nastanu u Francuskoj ne mogu odbiti ni od ukupnog dohotka, ni od kapitalnog dobitka ostvarenog prodajom druge imovine.

Argument borbe protiv poreske evazije, do koje bi moglo doći prenošenjem gubitaka u članicu u kojoj je njihov tretman najpovoljniji, ne može opstati, jer je reč o opštoj pretpostavci poreske evazije, tj. nisu u pitanju iskučivo veštački aranžmani koji ne odražavaju ekonomsku realnost.[34]

Što se tiče argumenta potrebe očuvanja fiskalne kohezije, on se može prihvatiti, jer u finskom poreskom sistemu postoji direktna povezanost između neoporezivanja dobiti i nemogućnosti prebijanja gubitaka. Naime, u Finskoj su prihodi od kapitala podvrgnuti proporcionalnoj stopi, pa kada su na osnovu ugovora oporezovani u drugoj članici, ti prihodi ni na koji način ne utiču na poresku stopu ili osnovicu, tj. nisu obuhvaćeni nijednim oblikom oporezivanja u Finskoj. Stoga, finski sistem odražava logiku ravnoteže.

Dakle, Sud pravde je utvrdio da legislativa u pitanju može da bude opravdana razlozima javnog interesa, i to potrebom da se obezbedi uravnotežena raspodela poreskih jurisdikcija među članicam i potrebom da se obezbedi kohezija fiskalnog sistema, kao i da je navedena mera podesna za to. Što se tiče principa proporcionalnosti, iako je obveznik isticao da ova odredba prekoračuje ono što je nužno za ostvarivanje ciljeva koji su njome postavljeni, jer je gubitak konačan, tj. definitivan,[35] takvog stava nije bio Sud pravde. Za razliku od nekih ranijih slučajeva u kojima je ovaj organ utvrdio da principu proporcionalnosti nije udovoljeno, jer država izvora nije iskoristila dostupne mogućnosti za odbitak tih gubitaka, ovde takva mogućnost, zbog francuskih propisa, nije ni postojala. Kada bi se odlučilo da Finska mora dozvoliti prebijanje kapitalnih gubitaka, ona bi se obavezala da snosi negativne posledice koje proizilaze iz primene poreskog zaknodavstva države na čijoj teritoriji se nalazi nepokretnost. Naime, slobodno kretanje kapitala ne znači da se države članice moraju prilagođavati poreskim pravilima drugih članica, jer odluke u pogledu ulaganja u inostranstvo za obveznike mogu da budu manje ili više nepovoljne, pa navedna odredba ne prekoračuje ono što je nužno za ostvarivanje ciljeva koji su njime postavljeni.

Zbog svega prethodno navedenog, Sud pravde je istakao da poreski propis u pitanju nije u suprotnosti sa slobodom kretanja kapitala.[36]

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[34] O ovom argumentu više: Cvjetana Cvjetković, „CFC zakonodavstvo u Eropskoj uniji, *Zbornik radova Pravnog fakulteta u Novom Sadu* 3/2015, 1289-1293.

[35] Sud pravde je istakao da činjenica da su gubici u Francuskoj konačni nije od uticaja na ocenu da li je udovoljeno principu proporcionalnosti

[36] Judgment of the Court (First Chamber), of 7 November 2013, Case C-322/11.

4. ZAKLJUČNA RAZMATRANJA

I povodom poreza na kapitalne dobitke fizičkih lica Sud pravde donekle preuzima ulogu nacionalnog zakonodavca, uklanjajući odredbe diskriminatornog i restriktivnog karaktera iz poreskih sistema država članica. Naime, pošto se neposredni porezi nalaze u njihovoj nadležnosti, moguće je da se rešenjima na terenu poreza na kapitalne dobitke fizičkih lica spreče ili odvrate rezidenti jedne države članice da stiču, koriste i raspolažu nepokretnostima na teritoriji druge članice, čime se dovodi u pitanje ostvarivanje slobode kretanja lica i kapitala. Kao što je u radu i prikazano, to se može postići na različite načine: propisivanjem različitog načina utvrđivanja poreske osnovice i različitih poreskih stopa za rezidente i nerezidente, propisivanjem pravila da se poreska olakšica za kapitalne dobitke može ostvariti samo ako se novo glavno mesto stanovanja nalazi u istoj državi kao i prethodno, nedozovoljavanjem da se kapitalni gubici od nepokretnosti, koji su nastali u jednoj članici, prebiju sa kapitalnim dobicima od pokretnih stvari, koji su nastali u drugoj članici, itd. Dakle, iako se države članice prilikom regulisanja osnovnih elemenata poreza na kapitalne dobitke ne moraju prilagođavati poreskim propisima drugih članica, one svojim rešenjima ne smeju dovesti u pitanje realizaciju zagarantovanih sloboda, osim ako to nije u javnom interesu, pa i po cenu gubitka vlastitih poreskih prihoda.

Analiza nekoliko sudskih odluka u ovoj oblasti je pokazala da Sud pravde, shodno svojoj pređašnjoj praksi, dozvoljava opstanak nacionalnih poreskih mera koje predstavljaju indirektnu diskriminaciju, ukoliko su prošle *rule of reason* test. Ono što je svojstveno manje-više za sve analizirane slučajeve je činjenica da države članice, kao opravdanje za diskriminaciju u ovoj oblasti, najčešće koriste argument potrebe za obezbeđivanjem kohezije fiskalnog sistema. Čini se da su se neke od njih pozvale na ovaj argument više forme radi, potpuno ispuštajući iz vida suštinu ovog argumenta, tj. činjenicu da se anuliranje odobrene poreske pogodnosti mora vršiti u okviru istog poreza, odnosno da nepogodnost ne može proisticati iz opšteg sistema oporezivanja.

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Discriminatory Tax Treatment of Transfer of Real Estate from the Aspect of Capital Gains Tax in the Practice of the Court of Justice of the European Union

Abstract: *In this paper the author analyzes the practice of the Court of Justice of the European Union related to the capital gains tax which is payable by residents of Member States in the case of sale of real estate. The aim of the paper is to determine whether and under what conditions restriction of the freedoms guaranteed by the primary law of the Union in this area may be justified by the reasons of public interest.*

Keywords*: tax discrimination; capital gains tax; Court of Justice of the European Union.*

Datum prijema rada: 17.09.2017.

Originalni naučni rad

349.412.22:341.95(497.11)
doi:10.5937/zrpfns51-15238

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PRAVO STRANIH LICA DA STIČU SVOJINU NA POLJOPRIVREDNOM ZEMLJIŠTU U SRBIJI NAKON ZAKONSKIH NOVELA IZ 2017. GODINE

Naraštaj jedan odlazi i drugi dolazi, a zemlja stoji uvijek.

Stari zavjet – Knjiga propovjednikova, 1:4.

Sažetak: *Ovaj rad predstavlja multidisciplinarnu analizu, kojom se uz pomoć ekonomske, pravne i politikološke metodologije u najopštijem pokušava pronaći odgovor na pitanje kako treba regulisati pravo stranaca da stiču svojinu na poljoprivrednom zemljištu u Srbiji. Poseban akcenat stavljen je na nova rešenja Zakona o poljoprivrednom zemljištu iz 2017. godine. Cilj rada je da se utvrde alokativni efekti i efekti na blagostanje ekonomskih subjekata koje generišu različita pravna rešenja, zatim da se ispita da li su nova pravna rešenja adekvatno uklopljena u pravni sistem Srbije, te da se odrede politički faktori koji su doveli do uvođenja ovih zakonskih novela. Zaključeno je da će postojećim pravnim rešenjem biti narušena efikasnost alokacije resirsa, pa shodno tome blagostanje ekonomskih subjekata neće biti uvećano u dovoljnoj meri. Takođe, pravna analiza je pokazala da su zakonske novele u suprotnosti sa međunarodnim pravom, pravom Evropske unije ali i samim Ustavom Republike Srbije. Na kraju je izveden opšti zaključak da je najbolje rešenje i sa političkog, i sa ekonomskog i sa pravnog aspekta ukidanje svih ograničenja kod prenosa prava svojine na poljoprivrednom zemljištu prema državljanima Evropske unije (a verovatno i prema državljanima i ostalih zemalja), čime bi se otklonila neustavna i kontradiktorna pravna rešenja iz pravnog sistema Republike Srbije, omogućila bi se efikasnija alokacija resursa i povećanje blagostanja i domaćih i stranih državljana, i otklonila bi se preraspodela resursa ustanovljena u korist određenih društvenih grupa koja su na štetu i domaćih i stranih državljana.*

Ključne reči: *poljoprivredno zemljište, prava stranaca, nepokretnosti, pravo svojine, Zakon o poljoprivrednom zemljištu.*

UVOD

Srbija se Sporazumom o stabilizaciji i pridruživanju obavezala da će do 1. septembra 2017. godine omogućiti državljanima EU da pod jednakim uslovima kao domaći državljani stiču svojinu na poljoprivrednom zemljištu. Sa približavanjem isteka roka, pojačan je i pritisak javnosti na srpske vlasti da preuzetu obavezu na neki način izbegnu ili prolongiraju dalje u budućnost. Pod izgovorom da postupa u skladu sa preuzetim obavezama, Narodna skupština Republike Srbije u avgustu 2017. godine po hitnom postupku usvaja zakonske novele kojima se formalno državljanima EU osigurava isti tretman kao i domaćim državljanima, kada je sticanje prava na poljoprivrednom zemljištu u pitanju. Pravne norme kojima se reguliše pravo državljana EU da stiču svojinu na poljoprivrednom zemljištu u Srbiji predstavljaju **predmet ovog istraživanja**.

Tri cilja su postavljena u ovom radu. Prvi je da se utvrde alokativni efekti koje nova pravna rešenja generišu, kao i efekti na blagostanje ekonomskih subjekata. Drugi je da se ispita da li su nova pravna rešenja adekvatno uklopljena u pravni sistem Srbije. Treći cilj je da se odrede politički faktori koji su doveli do uvođenja ovih zakonskih novela.

Pomenute zakonske novele po svojoj prirodi generišu više pravnih, političkih i ekonomskih efekata. Da bi se dobila potpunija slika kada su one u pitanju, u radu je korišćeno više različitih **metoda** koji odgovaraju navedenim naučim disciplinama. Od ekonomskih metoda, tu su pre svega metodi neoklasične i neoinstitucionalne ekonomske teorije, teorije blagostanja i teorije transakcionih troškova. Za analizu procesa donošenja političkih odluka korišćen je metod teorije javnog izbora, dok je za pravnu analizu korišćen normativni metod.

S obzirom na tri definisana cilja postavljene su i **tri posebne hipoteze**. Prema prvoj posebnoj hipotezi, zakonskim novelama iz 2017. godine dodatno se narušava efikasnost alokacije resursa (koja je i prethodnim rešenjem bila narušena), čime je umanjen rast blagostanja učesnika razmene. Druga posebna hipoteza je da su zakonske novele koje su predmet ovog rada u suprotnosti sa međunarodnim pravom, pravom Evropske unije ali i samim Ustavom Republike Srbije. Posmatrano sa aspekta pravne tehnike koja je korišćena, ova rešenja su takođe veoma loša. Treća posebna hipoteza je da su nova rešenja doneta pod uticajem pojedinih društvenih grupa, a ne u opštem interesu građana Srbije. Nakon sprovedene analize, pokazaće se da je najbolje rešenje i sa političkog, i sa ekonomskog i sa pravnog aspekta ukidanje svih nepotrebnih ograničenja prodaje poljoprivrednog zemljišta državljanima EU, što predstavlja **opštu hipotezu** ovog istraživanja.

Ova analiza predstavlja logički nastavak nekoliko autorovih već objavljenih radova[1] ili diskusija sa naučnih skupova[2], kao i doktorske disertacije[3] u kojoj su obrađivani pojedini aspekti problema pravnog okvira kojim se reguliše prenos prava svojine na nepokretnostima.

1. PRAVNO REŠENJE DO ZAKONSKIH NOVELA IZ 2017. GODINE

Srbija je 2008. godine potpisala i ratifikovala **Sporazum o stabilizaciji i pridruživanju sa Evropskom unijom**.[4] Sporazum je stupio na snagu 2013. godine. Tu je navedeno da će odmah nakon stupanja na snagu Sporazuma društva kćeri privrednih društava iz Unije imati pravo sticanja i uživanja svojinskih prava[5] na nepokretnostima, pod istim uslovima kao i srpska privredna društva.[6] Isto tako, Srbija se obavezala da će izmeniti svoje zakonodavstvo koje se odnosi na sticanje svojine na nepokretnostima, kako bi državljanima članica Evropske unije osigurala isti tretman kao i svojim državljanima u roku od četiri godine od dana stupanja na snagu Sporazuma.[7] Primena navedene odredbe počinje 1. septembra 2017. godine.

[1] Luka Baturan, Economic analysis of the Ban on Foreigners Acquiring Property Rights on Agricultural Land in Serbia. *Ekonomika poljoprivrede*, vol. LVIII, No. 4, Naučno društvo agrarnih ekonomista Balkana, Institut za ekonomiku poljoprivrede, Beograd, 2013, 479-491; Luka Baturan, Prenos prava svojine na poljoprivrednom i šumskom zemljištu na strana lica u Srbiji i drugim zemljama regiona. *Zbornik radova,* Pravni fakultet Univerziteta u Novom Sadu, god. 47, br. 2, Novi Sad, 2013, 515-531.

[2] Luka Baturan, Kreiranje pravnog okvira radi efikasnog korišćenja poljoprivrednog zemljišta. *Zbornik sažetaka „Teorijski i praktični problemi stvaranja i primene prava (EU i Srbija),* Pravni fakultet Univerziteta u Novom Sadu, 2016, 199-201; Luka Baturan, Liberalizacija prava stranaca da stiču svojinu na poljoprivrednom zemljištu u kontekstu SSP-a i privatizacije PKB-a. *Ekonomske, socijalne i razvojne posledice prodaje poljoprivrednog zemljišta u Srbiji.* Institut ekonomskih nauka, Beograd, 2017, 158-170.

[3] Luka Baturan, *Ekonomska analiza pravnog režima za prenos prava svojine na nepokretnostima u Republici Srbiji* (doktorska disertacija). Pravni fakultet Univerziteta u Beogradu, 2016, 173-218. Disertacija nije objavljena ali je dostupna na internet sajtu: https://uvidok.rcub.bg.ac.rs/bitstream/handle/123456789/1720/Doktorat.pdf?sequence= 1&isAllowed=y.

[4] Zakon o potvrđivanju Sporazuma o stabilizaciji i pridruživanju između Evropskih zajednica i njihovih država članica, sa jedne strane, i Republike Srbije, sa druge strane, *Sl. glasnik RS – Međunarodni ugovori,* br. 83/2008 (u daljem tekstu: Sporazum o stabilizaciji i pridruživanju).

[5] U ovom istraživanju će biti korišćen u srpskom pravu određeniji pojam „imovinska prava", umesto (u ekonomskoj analizi prava u Srbiji češće korišćenog) pojma „svojinska prava". Ipak, u pitanju je samo terminološka razlika, ali nikakve suštinske nepodudarnosti u značenju ovih pojmova nema. Više o ovoj dilemi: L. Baturan (2016 – doktorska disertacija), *op. cit,* 18, fn. 8.

[6] „Nakon stupanja na snagu ovog sporazuma društva kćeri privrednih društava Zajednice imaće pravo sticanja i uživanja svojinskih prava na nepokretnostima kao i srpska privredna društva (...). Četiri godine nakon stupanja na snagu ovog sporazuma, Savet za stabilizaciju i pridruživanje utvrdiće mogućnost proširivanja navedenih prava na ogranke privrednih društava Zajednice." Sporazum o stabilizaciji i pridruživanju, čl. 53, st. 5, tč. b i v.

[7] „Po stupanju na snagu ovog sporazuma Srbija će da dopusti državljanima država članica Evropske unije da stiču svojinu nad nepokretnostima u Srbiji, uz potpunu i celishodnu primenu

Ustav Republike Srbije propisuje da „strana fizička i pravna lica mogu steći svojinu na nepokretnostima u skladu sa zakonom ili međunarodnim ugovorom."[8] **Zakon o osnovama svojinskopravnih odnosa** propisuje specifičan režim sticanja svojine na nepokretnostima za strana fizička i pravna lica. Poljoprivredno zemljište[9] prema tom zakonu ne predstavlja nikakav izuzetak.[10] Međutim, **Zakon o poljoprivrednom zemljištu** izričito propisuje da „vlasnik poljoprivrednog zemljišta ne može biti strano fizičko ili pravno lice".[11]

Ipak, i pored izričite zabrane propisane Zakonom o poljoprivrednom zemljištu, stranci su i do sad uspevali da indirektno pribave velike površine obradivog zemljišta, osnivanjem pravnog lica u Srbiji.[12] Prema Zakonu o spoljnotrgovinskom poslovanju, pravna lica (ili ogranci pravnih lica) koje imaju sedište, odnosno koji su registrovani u Srbiji smatraju se domaćim licima.[13] Dakle, indirektno preko domaćeg pravnog lica stranci mogu sticati pravo svojine na poljoprivrednom zemljištu. Naravno, to pravo svojine će biti upisano na domaće pravno lice, koje je pak u svojini stranog lica.[14] Prema istraživanju objavljenom u Večernjim novosti-

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postojećih postupaka. U periodu od četiri godine od stupanja na snagu ovog sporazuma Srbija će postepeno usklađivati svoje zakonodavstvo koje se odnosi na sticanje svojine na nepokretnostima u Srbiji kako bi državljanima članica Evropske unije osigurala isti tretman kao i svojim državljanima." Sporazum o stabilizaciji i pridruživanju, čl. 63, st. 2. Za razliku od Srbije, u Sporazumima sa Crnom Gorom nije predviđen prelazni period za prilagođavanje crnogorskog zakonodavstva, Bosna i Hercegovina je dobila prelazni period od šest godina, a Hrvatska sedam, s tim što se on može produžiti za još tri godine. L. Baturan (2013), *op. cit,* 515-531.

[8] Ustav RS, čl. 85 (svojinska prava stranaca), st. 1.

[9] Poljoprivredno zemljište jeste zemljište koje se koristi za poljoprivrednu proizvodnju (njive, vrtovi, voćnjaci, vinogradi, livade, pašnjaci, ribnjaci, trstici i močvare) i zemljište koje se može privesti nameni za poljoprivrednu proizvodnju. Zakon o poljoprivrednom zemljištu, *Sl. glasnik RS* br. 62/2006, 65/2008, 41/2009, 112/2015, 80/2017, čl. 2, st. 1.

[10] Ranko Keča, *Zemljišno pravo i pravni režim poljoprivrednog zemljišta.* Pravni fakultet Univerziteta u Novom Sadu, Novi Sad, 1993, 34.

[11] Zakon o poljoprivrednom zemljištu, čl. 1, st. 4. Slična zabrana postoji i u Crnoj Gori, Federaciji BiH i Hrvatskoj, zemljama koje su takođe nasledile pravnu tradiciju SFR Jugoslavije. Za razliku od njih, u Republici Srpskoj nema slične zabrane. L. Baturan, 2013, *op. cit,* 515-531.

[12] Isti problem postoji i u Mađarskoj čiji pravni sistem takođe ometa funkcionisanje tržišta poljoprivrednog zemljišta. Videti: Csilla Csák, Bianka Enikő Kocsis & Anikó Raisz, Vectors and indicators of agricultural policy and law from the point of view of the agricultural land structure. *Journal of Agricultural and Environmental Law,* No.19, CEDR Hungarian Association of Agricultural Law, 2015, 32-43.

[13] Zakon o spoljnotrgovinskom poslovanju, *Sl. glasnik RS*, br. 36/2009, 36/2011, 88/2011, čl. 3.

[14] Videti: Maja Stanivuković, Svojina i druga stvarna prava stranaca na nepokretnostima u Jugoslaviji. *Zbornik radova,* Pravnog fakulteta u Novom Sadu, god. 30, br. 1-3, 1996, 226-227. I Carić primećuje da se najčešći način izigravanja restriktivnih normi o pravu svojine stranaca na nepokretnostima svodi na to „da jedno strano lice, ispunjavanjem određenih uslova, stekne atribute domaćeg lica. Ovde se radi obično o pravnim licima i u suštini se i ne radi o klasičnom izigravanju, jer se pravno lice ispunjavanjem određenih uslova (osnivanje, registracija, premeštanje sedišta), kvalifikuje ne više kao strano već kao domaće pravno lice, za koje ne važe restrikcije koje se odnose na strano pravno lice." Slavoljub V. Carić, *Pravo svojine stranaca na nepokretnostima.* Beograd, 2006, 119.

ma[15], stranci su kupili najmanje 23.850 „prvoklasnih" hektara zemlje u Vojvodini, gde se i nalaze najveće površine poljoprivrednog zemljišta visokog kvaliteta.[16]

2. PRAVO STRANACA DA KUPUJU POLJOPRIVREDNO ZEMLJIŠTE IZ UGLA NEOKLASIČNE EKONOMSKE TEORIJE I TEORIJE BLAGOSTANJA

Na ovom mestu će se sa aspekta neoklasične ekonomske teorije i teorije blagostanja analizirati alokativni efekti dva tipična (teoretska) pravna rešenja. Prema prvom rešenju stranci su apsolutno izjednačeni u sticanju poljoprivrednog zemljišta sa domaćim državljanima, dok je prema drugom rešenju ovo pravo rezervisano isključivo za domaće državljane. Na osnovu te analize, u poglavlju 4 će se sagledati efekti zakonskih novela donetih 2017. godine iz ugla neoinstitucionalne teorije.

Ponudu poljoprivrednog zemljišta na određenoj teritoriji čini njena ukupna površina, i ona je fiksna, odnosno neelastična: promena cene ne utiče na promenu površine zemljišta na tržištu.[17] Pravne norme kojima se reguliše sticanje prava svojine na poljoprivrednom zemljištu ne utiču na njegovu ponudu u domaćoj zemlji. Prodavcima je isključivi cilj postizanje što više cene za svoj resurs.

Zato alokacija resursa pre svega zavisi od tražnje, koja će biti stavljena u fokus analize. Poljoprivredno zemljište predstavlja prirodni resurs koji se koristi u procesu proizvodnje (faktor proizvodnje, resurs). Tražnja za svim faktorima proizvodnje, uključujući i poljoprivredno zemljište, derivirana je iz tražnje za proizvodima i uslugama koji se iz tih faktora dobijaju u procesu proizvodnje.[18] Ukupna **tražnja** za poljoprivrednim zemljištem predstavlja zbir pojedinačnih, individualnih tražnji.[19] „Prema teoriji proizvodnje, cena zemljišta koju je proizvođač spreman da plati za jednu jedinicu zemljišta jednaka je graničnom proizvodu te jedinice, tj. povećanju vrednosti proizvodnje do kojeg je dovelo angažovanje te, dodatne jedinice zemljišta. Ovo je posledica ponašanja proizvođača koji, u cilju maksimizacije profita, izjednačava granične prihode i granične troškove."[20]

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[15] Đ. Vukmirović, Stranci srpsku zemlju kupovali od preprodavaca, *Večernje novosti*, 8. avgust 2013. godine.

[16] L. Baturan (2013), *op. cit,* 529; L. Baturan (2016 – doktorska disertacija), *op. cit,* 217.

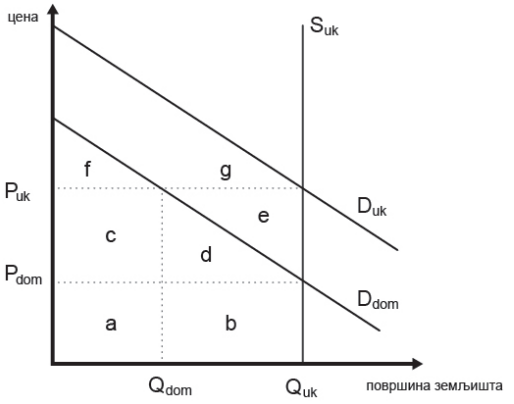
[17] A. W. Evans, The Property Market: Ninety per cent Efficient. *Department of Economics Discussion Paper,* Series C, Vol. 67, 1991, 68.

[18] Koviljko Lovre & Ivan Lovre, Akvizicije poljoprivrednog zemljišta u međunarodnim razmerama: implikacije na prehrambenu sigurnost i ruralno siromaštvo. *Ekonomske, socijalne i razvojne posledice prodaje poljoprivrednog zemljišta u Srbiji.* Institut ekonomskih nauka, Beograd, 2017, 39.

[19] Paul A.Samuelson & William D. Nordhaus, *Economics (Ekonomija, prevod),* Mate doo, Zagreb, 2000, 243. Branko Bjelić, *Principi ekonomije*. Ekonomski fakultet Univerziteta u Novom Sadu, 2011, 385.

[20] Boris Begović, *Ekonomika urbanističkog planiranja.* Centar za ekonomske studije, Beograd, 1995, 185.

Na Grafikonu[21] je predstavljen **model ponude i tražnje** poljoprivrednog zemljišta pri različitim pravnim rešenjima. Kriva *Suk* predstavlja ukupnu ponudu poljoprivrednog zemljišta u jednoj zemlji. Ona je vertikalna jer je ponuda neelastična: ponuda zemljišta je gotovo fiksna (na nivou *Quk*) i ne zavisi od promene cene.[22]



Grafikon: *Alokativni efekti i efekti na blagostanje na tržištu poljoprivrednog zemljišta*

Kada je pravo svojine na poljoprivrednom zemljištu **rezervisano isključivo za domaće državljane**, ukupna tražnja poljoprivrednog zemljišta jednaka je zbiru tražnji isključivo domaćih državljana. Konkurencija stranih kupaca isključena je pravnom normom (zakonski monopol), pa je svo poljoprivredno zemljište alocirano isključivo domaćim državljanima. Zbog manje tražnje je i cena niža.

Na Grafikonu, tražnja isključivo domaćih državljana je predstavljena krivom *Ddom*, pa je cena uspostavljena na nivou *Pdom*. Prirast blagostanja koji ostvare domaći vlasnici zemljišta (prodavci) predstavlja polje a + b, dok domaći kupci ostvaruju prirast koristi predstavljen poljem *c* + *d*.

Kada su **stranci pravno izjednačeni sa domaćim državljanima**, ukupna tražnja poljoprivrednog zemljišta jednaka je zbiru tražnji svih ekonomskih subjekata, bez obzira na njihovo državljanstvo.[23] Eliminisan je zakonski monopol domaćih kupaca, kakav postoji u prethodnom slučaju.

Nova tražnja predstavljena je na Grafikonu krivom *Duk*. Usled veće tražnje, cena poljoprivrednog zemljišta formira se na višem nivou, *Puk*.[24] Domaćim drža-

[21] P.A. Samuelson & W.D. Nordhaus (2000), *op. cit.,* 243; B. Bjelić (2011), op.cit., 385; L. Baturan (2013), *op.cit.,* 483; L. Baturan (2016 – doktorska disertacija), *op. cit,* 186.

[22] Lovre i Lovre ne dovode u pitanje stav da je elastičnost ponude bliska nuli (od 0,05 na kratak rok do 0,15 na dugi rok), ali ekonomski model koji nude predstavljen je kao da to nije slučaj. K. Lovre & I. Lovre (2017), 40.

[23] James R. Mason Jr., „Pssst, Hey Buddy, Wanna Buy a Country?" An Economic and Political Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate. *Vanderbilt Journal of Transnational Law*, Vol. 27, No. 2, 1994, 474.

[24] Dragica Božić, Natalija Bogdanov & Miladin Ševarlić, *Ekonomika poljoprivrede*, Poljoprivredni fakultet Univerziteta u Beogradu, 2011, 60.

vljanima na kraju razmene biće alociran samo deo poljoprivrednog zemljišta (*Qdom*), dok će stranci u procesu razmene prisvojiti ostatak koji predstavlja razlika *Quk – Qdom*.

Prirast koristi koji ostvaruju prodavci predstavlja polje $a + b + c + d + e$. Domaći kupci ostvaruju višak koji predstavlja polje *f*, a inostrani kupci višak koji predstavlja polje *g*. Položaj lica koja ne učestvuju u razmeni („treća lica") ostaje naravno nepromenjen.[25]

Iz ovog neoklasičnog modela jasno proizlazi da je optimalno rešenje u kome su stranci pravno izjednačeni sa domaćim državljanima. Resursi će u tom slučaju biti alocirani onim ekonomskim subjektima koji ih najviše vrednuju, a društveno blagostanje je u tom slučaju maksimizovano.

3. ZAKONSKE NOVELE I NORMATIVNA PRAVNA ANALIZA

Vlada je na svojoj 9. sednici održanoj 4. avgusta 2017. godine, uputila Narodnoj skupštini Predlog da se po hitnom postupku usvoji Zakon o izmenama i dopunama Zakona o poljoprivrednom zemljištu, uz propratno obrazloženje.[26] Neposredno pre toga, 28. juna 2017. godine svoj predlog je uputilo i troje poslanika opozicije.[27] Zakon o izmeni i dopunama Zakona o poljoprivrednom zemljištu usvojen je na sednici Narodne skupštine 28. avgusta 2017. godine, i primenjuje se od 1. septembra 2017. godine.[28]

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[25] U domaćoj literaturi se navodi da „ne postoje evidencije da su ruralna ekonomija i životni standard ruralne populacije poboljšani u državama u kojima su ostvarene obimne akvizicije poljoprivrednog zemljišta." K. Lovre & I. Lovre (2017), 37. Ovo samo po sebi nije sporno, ali se ne može prihvatiti ocena da libalizacija pravnog režima „predstavlja potencijalnu opasnost za ruralnu populaciju" jer „proizvodne metode na velikom posedu obeshrabruju tradicionalne metode proizvodnje koje koristi veliki broj malih farmera" (*Ibid.,* 48). Tržišna cena poljoprivrednih proizvoda se formira na specifičan način, a u uslovima globalizacije zavisi u velikoj meri od kretanja na međunarodnom tržištu, tako da će za svakog proizvođača („malog farmera") biti mesta, pod naravno pod uslovom da su mu rezultati proizvodnje pozitivni, odnosno veći od troškova. Dakle, oni mogu da nastave da se bave poljoprivrednom proizvodnjom, jer neće biti ugroženi konkurencijom. Međutim, oportunitetni trošak njihovog poslovanja može biti povećan. Sa druge strane, ako ulaskom stranih proizvođača poraste tražnja za zakupom zemljišta, onda će postojećim vlasnicima koji imaju nisku produktivnost biti isplativije da zemljište daju u zakup, a da žive od rente. U svakom slučaju, vrednost zemljišta će biti uvećana usled veće tražnje, čime će i njihov izbor postati veći. (L. Baturan (2017), doktorska disertacija). Inače, u citiranom delu teksta nije najjasnije da li se kritikuju samo velike međunarodne akvizicije, ili pojava ukrupnjavanja zemljišnih poseda sama po sebi.

[26] Predlog Zakona o izmeni i dopunama Zakona o poljoprivrednom zemljištu. Vlada Republike Srbije, zvanični internet sajt: http://www.srbija.gov.rs/vesti/dokumenti_pregled.php?id=298752.

[27] Predlog Zakona o izmenama i dopunama Zakona o poljoprivrednom zemljištu, br. 01 320-1854/17 od 28. juna 2017. godine.

[28] Zakon o izmeni i dopuni Zakona o poljoprivrednom zemljištu, Sl. Glasnik RS, br. 80/2017 od 29.8.2017. godine.

Razlog zbog koga se zakonodavac odlučio na donošenje zakonskih novela 2017. godine svakako je obaveza koju je Srbija prihvatila Sporazumom o stabilizaciji i pridruživanju. Prema slovu Sporazuma, Srbija će izmeniti svoje zakonodavstvo koje se odnosi na sticanje svojine na nepokretnostima, kako bi državljanima članica Evropske unije osigurala *isti tretman kao i svojim državljanima* u roku od četiri godine od dana stupanja na snagu Sporazuma. Kao razlog za donošenje novela **u zvaničnom obrazloženju predloga** izmena i dopuna Zakona je navedeno da se njima ispunjava obaveza preuzeta Sporazumom sa EU. Ovo se vidi i iz novog čl. 1 st. 4 Zakona o poljoprivrednom zemljištu, koji sada glasi: „Vlasnik poljoprivrednog zemljišta ne može biti strano fizičko, odnosno pravno lice, osim ako ovim Zakonom nije drugačije određeno u skladu sa Sporazumom o stabilizaciji i pridruživanju između Evropskih zajednica i njihovih država članica, sa jedne strane, i Republike Srbije, sa druge strane".[29]

Međutim, već iz (novog) člana 72đ Zakona o poljoprivrednom zemljištu koji nosi naziv „uslovi za promet poljoprivrednog zemljišta u privatnoj svojini" vidljivo je da su **državljani EU formalno i suštinski diskriminisani** u odnosu na domaće državljane, s obzirom da oni za razliku od domaćih državljana moraju da ispune veći broj uslova prilikom sticanja poljoprivrednog zemljišta. Ovi uslovi, koji moraju biti ispunjeni kumulativno, suštinski predstavljaju barijere njihovom ulasku na tržište poljoprivrednog zemljišta u Srbiji. Poljoprivredno zemljište površine preko 2 hektara državljanin EU može steći ako je najmanje deset godina stalno nastanjen u jedinici lokalne samouprave u kojoj se vrši promet poljoprivrednog zemljišta, ako najmanje tri godine obrađuje poljoprivredno zemljište koje je predmet pravnog posla uz naknadu ili bez naknade, ako ima registrovano poljoprivredno gazdinstvo u aktivnom statusu kao nosilac porodičnog poljoprivrednog gazdinstva najmanje deset godina i ako u vlasništvu ima mehanizaciju i opremu za obavljanje poljoprivredne proizvodnje. Prilikom kupoprodaje poljoprivrednog zemljišta državljaninu EU Republika Srbija ima pravo preče kupovine.[30]

Treba, međutim, napomenuti da ova norma ne diskriminiše samo državljane EU. Njome se ograničavaju i prava domaćih državljana (vlasnika poljoprivrednog zemljišta) da svoje pravo prodaju državljanima EU (pretpostavlja se po većoj ceni), što se nikako ne sme gubiti iz vida.

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[29] Zakon o izmeni i dopunama Zakona o poljoprivrednom zemljištu, čl. 1.

[30] Iz drugog razloga je zanimljivo postaviti pitanje kakva je funkcija prava preče kupovine koje je ustanovljeno u korist Republike Srbije? Šta će Republici Srbiji poljoprivredno zemljište u svojini? Hoće li se Republika Srbija baviti poljoprivrednom proizvodnjom, kao u vreme socijalističke privrede? O besmislenosti uvođenja prava preče kupovine u korist Republike Srbije u postupku restitucije, videti: Luka Baturan: Ekonomska analiza instituta prava preče kupovine u Zakonu o vraćanju oduzete imovine i obeštećenju. *Zbornik radova*, god. 49, br. 4, Pravni fakultet u Novom Sadu, 2015, 1961-1970; Stefan Samardžić, *Dosadašnja primena Zakona o vraćanju oduzete imovine i obeštećenju*. Ministarstvo pravde RS i GIZ, Novi Sad, 2015, str. 38-40 (neobjavljena građa). L. Baturan (2016 – doktorska disertacija), *op. cit,* 138-172.

Prema Ustavu Republike Srbije zakoni i drugi opšti akti ne smeju biti u suprotnosti sa potvrđenim međunarodnim ugovorima i opšteprihvaćenim pravilima međunarodnog prava. Prema Ustavu Republike Srbije, spoljna politika Republike Srbije počiva na opštepriznatim principima i pravilima međunarodnog prava.[31] Jedno od osnovnih načela međunarodnog prava jeste i obaveza postupanja **u dobroj veri**.[32] Svaki ugovor na snazi vezuje članice i one treba da ga dobronamerno izvršavaju.[33] Kako je član 72đ Zakona o poljoprivrednom zemljištu direktno u suprotnosti sa prethodno citiranim članom 63 st. 2. Sporazuma o stabilizaciji i pridruživanju, Srbija je usvajanjem zakonskih novela 2017. godine direktno prekršila ovo načelo međunarodnog prava. Nažalost, stvarnost je takva da činjenica da Srbija ne postupa u dobroj veri, ne izaziva nikakve društvene ili političke potrese u zemlji. U tom smislu, jedino međunarodni politički pritisak može dovesti do ispunjavanja preuzete obaveze.

Međutim, ovde je značajan i član 194 Ustava Republike Srbije, prema kome zakoni i drugi opšti akti doneti u Republici Srbiji ne smeju biti u suprotnosti sa potvrđenim **međunarodnim ugovorima** i opšteprihvaćenim pravilima međunarodnog prava.[34] Da je srpski zakonodavac želeo da ispuni preuzetu obavezu, dovoljno je bilo da – ne učini ništa. Prema Ustavu Republike Srbije, potvrđeni međunarodni ugovori sastavni su deo pravnog poretka Republike Srbije i neposredno se primenjuju.[35] Time bi odredbe Sporazuma o stabilizaciji i pridruživanju kao potvrđenog međunarodnog ugovora neposredno derogirale čl. 1 st. 4 Zakona o poljoprivrednom zemljištu, u pogledu državljana EU nakon 1. septembra 2017. god.[36]

Evropska unija je daleko odmakla u procesu stvaranja **Jedinstvenog evropskog tržišta,** mada on još uvek nije okončan**.** Ugovorom o funkcionisanju Evropske unije, Evropski parlament, Savet i Komisija su dobili potrebne nadležnosti, kako bi se na teritoriji Unije ostvarila slobode kretanja lica, usluga i kapitala. Ovo između ostalog podrazumeva uspostavljanje prava državljana jedne države članice

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[31] Ustav Republike Srbije, čl. 16 (međunarodni odnosi) st. 1.

[32] „Bez savesnosti, poštenja i dobronamernosti ni jedan pravni sistem ne može da funkcioniše. Zato, pravo nalaže pošteno, savesno , pažljivo i dobronamerno ponašanje. (...) Načelo savesnosti, poštenja i dobronamernosti je jednako važno ili je još važnije u međunarodnom poretku. Međunarodni sud u *Nuclear Tests* kaže da je načelo savesnosti jedno od osnovnih načela kojima se uređuje stvaranje i izvršavanje pravnih obaveza. Ono zahteva da izjavljena volja bude saglasna stvarnoj volji. Načelo dobronamernosti je otelotvoreno u pravilu *pacta sund servanda* (...) Dobronamernost zahteva da se obaveze savesno izvršavaju. Suprotno je ovom načelu svakako otvoreno ili prikriveno delovanje države koja ima za cilj da onemogući izvršavanje preuzete obaveze.“ Rodoljub Etinski, *Međunarodno pravo.* Pravni fakultet u Novom Sadu, 56-57.

[33] Bečka konvencija o ugovornom pravu, čl. 26 (Pacta sunt servanda).

[34] Ustav RS, čl. 194 (hijerarhija domaćih i međunarodnih pravnih akata), st. 5.

[35] Ustav RS, čl. 16 (međunarodni odnosi) st. 2.

[36] Takođe, odredbe Sporazuma o stabilizaciji i pridruživanju derogiraju i odredbe Zakona o osnovama svojinskopravnih odnosa kojima se uređuju prava stranaca na ostalim vrstama nepokretnosti.

da stiču i koriste zemljište i zgrade koje se nalaze na teritoriji druge države članice.[37] Funkcija Jedinstvenog evropskog tržišta je da omogući efikasnu alokaciju resursa unutar granica EU kroz otklanjanje barijera razmeni između država članica.

Ako je za utehu, ne odnosi se ovo samo na Srbiju. Organi EU su imali dosta problema dok su privoleli nove **članice iz Centralne i Istočne Evrope** da prihvate pravila Jedinstvenog tržišta.[38] U maju 2017. god. je Evropska komisija apelovala na Bugarsku, Mađarsku, Letoniju, Litvaniju i Slovačku da prihvate pravila EU o prekograničnim investicijama, da bi u junu 2016. godine iz istog razloga prijavila Mađarsku Evropskom sudu pravde.[39]

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[37] Ugovor o funkcionisanju Evropske unije, čl. 50, st. 2, tč. e. Priredio: Milutin Janjević, *Konsolidovani uovor o Evropskoj uniji – od Rima do Lisabona.* Službeni glasnik, Beograd, 2009, 77.

[38] Više o ponašanju novih istočnoevropskih i centralnoevropskih članica Unije u vezi sa pravilima o prekograničnim investicijama u poljoprivredno zemljište, videti: Review of the transitional measures for the acquisition of agricultural real estate set out in the 2003 Accession Treaty. Brussels, 16.7.2008., COM(2008) 461 final. Evropska komisija, zvanični internet sajt: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52008DC0461; Peter Sparkes, *European Land Law*, Portland (USA), Hart Publishing, 2007, 76-79; *Real Property Law and Procedure in the European Union – General Report,* European University Institute Florence / European Private Law Forum, Deutsches Notarinstitut Würtsburg, 2005, 83; Casimir Dadak, The Case for Foreign Ownership of Farmland in Poland, *The Cato Journal*, vol. 24, No. 3, Cato Institute, 2004, 277-294; Tatjana Josipović, *Pravni promjet nekretnina u Europskoj uniji – Prilagodba hrvatskog pravnog poretka europskom*. Zagreb, Narodne novine, 2003; Olga Jelčić, *Poljoprivredno zemljište – korištenje, prenamjena i raspolaganje,* Hrvatska gospodarska komora – Sektor za trgovinu, Šesnaesti forum poslovanja nekretninama, 2011, 1-18; L. Baturan (2013), *op. cit*; Xiaojing Qin, Foreigners' Right to Acquire Land under International. *Manchester Journal of International Economic Law,* Vol. 8, No. 1, 2011, 90-91; Mihály Kurucz, Critical analyses of arable land regulation in Hungary. *Journal of Agricultural and Environmental Law,* No.3, CEDR Hungarian Association of Agricultural Law, 2007, 17-47; János E. Szilágyi, The Accession Treaties of the New Member States and the national legislations, particularly the Hungarian law, concerning the ownership of agricultural land. *Journal of Agricultural and Environmental Law*, No. 9, CEDR Hungarian Association of Agricultural Law, 2010, 48-60; István Olajos & Szabolcs Szilágyi: The most important changes in the field of agricultural law in Hungary between 2011 and 2013. *Journal of Agricultural and Environmental Law,* No.15, CEDR Hungarian Association of Agricultural Law, 2013, 93-110; Bianka Enikő Kocsis, The new Hungarian land transfer regulation from the aspect of examination of the European Union. *Journal of Agricultural and Environmental Law,* No.16, CEDR Hungarian Association of Agricultural Law, 2014, 95-110; C. Csák, B.E. Kocsis & A. Raisz, 2015, *op.cit.,* 32-43; Krisztina Bányai, Theoretical and practical issues of restraints of land acquisition in Hungary. *Journal of Agricultural and Environmental Law,* No.20, CEDR Hungarian Association of Agricultural Law, 2016, 5-15; János E. Szilágyi, Sticanje prava svojine na poljorivrednom zemljištu u Mađarskoj, s posenim osvrtom na pravo Evropske unije i prava drugih zemalja. *Zbornik radova*, god. 50, br. 4, Pravni fakultet u Novom Sadu: 2016, 1437-1451; Csilla Csák & Zoltán Nagy, Regulation of Obligation of Use Regarding the Agricultural Land in Hungary, *Zbornik radova,* god. XLV, br. 2, Pravni fakultet u Novom Sadu, 2011, 541-550; Sándor Somogyi, Zemljišna politika Mađarske u sklopu prijema u Evropsku uniju, *Zbornik radova,* br. 40, Naučni institut za ratarstvo i povrtarstvo, Novi Sad: 2004, 23-34.

[39] Commission of the European Treaties. Press Release. Free mouvement of capital: Commission refers Hungary to the Court of Justice of the EU for failing to comply with EU rules on

Evidentno je da donošenje novela iz 2017. godine ne može **dugoročno ništa promeniti.** Srpske vlasti će, pre ili kasnije, morati da izjednače prava državljana EU sa pravima domaćih državljana kada je sticanje prava svojine na nepokretnostima, uključujući tu i poljoprivredno zemljište. Jedino pitanje koje ostaje nerešeno je da li će to učiniti zakonodavna vlast pod pritiskom Evropske unije, ili sudske vlasti u odgovarajućim postupcima.

Na kraju ovog odeljka treba napomenuti i da je šteta što su prethodne četiri godine propuštene, a da se nije prišlo sistemskom rešavanju ovog problema, već su izmene i dopune Zakona o poljoprivrednom zemljištu donete u hitnom postupku. Čak i da je zakonodavac ostao pri stavu da je potrebno državljane EU onemogućiti u sticanju prava svojine na poljoprivrednom zemljištu, onda je ovu materiju makar trebalo izmestiti iz Zakona o poljoprivrednom zemljištu (kojim se „uređuje *planiranje, zaštita*, *uređenje* i *korišćenje* poljoprivrednog zemljišta, nadzor nad sprovođenjem ovog Zakona i druga pitanja od značaja za *zaštitu*, *uređenje* i *korišćenje* poljoprivrednog zemljišta kao dobra od opšteg interesa“)[40] i **premestiti u Zakon o osnovama svojinskopravnih odnosa** kojim se (između ostalog) reguliše pravo svojine stranaca na stvarima, pa (trebalo bi) i na poljoprivrednom zemljištu.

4. ZAKONSKE NOVELE IZ UGLA NEONSTITUCIONALNE EKONOMSKE TEORIJE

Početnu tačku ekonomske analize prava čini **Kouzova teorema**.[41] Ona polazi od pretpostavke da će zainteresovane strane uvek postići optimalnu alokaciju resursa kroz razmenu prava, pod uslovom da su imovinska prava jasno definisana i prenosiva, a troškovi transakcije ne postoje ili su zanemarivi, bez obzira na inicijalnu raspodelu tih prava. Kada su zakonske novele iz 2017. god. u pitanju, ni jedna pretpostavka Kouzove teoreme nije ispunjena.

Da bi rezultat razmene bio optimalan, **imovinska prava** moraju biti definisana, jasna i unapred poznata svim stranama jer neodređenost prava stvara neizvesnost subjektima na tržištu, te predstavlja barijeru razmeni. Zakonskim novelama iz 2017. god. uneta je totalna zbrka u pravni poredak Srbije. Dok prema Zakonu o potvrđivanju Sporazuma o stabilizaciji i pridruživanju (koji se prema Ustavu neposredno primenjuje), državljani EU imaju pravo da ravnopravno sa srpskim

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the rights of cross-border investors in agricultural land. Brussels, 16 June 2016. Evropska komisija, zvanični internet sajt: http://europa.eu/rapid/press-release_IP-16-2102_en.htm. Sajtu pristupljeno 22. avgusta 2017. god.

[40] Zakon o poljoprivrednom zemljištu, čl. 1 (predmet), st. 1. Kurziv L.B.

[41] Ronald H. Coase, The Problem of Social Cost, *Journal of Law and Economics,* Vol. 3, 1960, 1-44. Videti još: Steven G. Medema & Richard O. Zerbe Jr., The Coase Theorem. *Encyclopedia of Law and Economics,* Edward Elgar and University of Ghent, 1999, 836-892.

državljanima stiču pravo svojine na poljoprivrednom zemljištu, dotle im se Zakonom o poljoprivrednom zemljištu to pravo relativizuje većim brojem uslova koji bi suštinski trebalo da ih u tome spreče.

Da bi se alokacija resursa u skladu sa Sporazumom o stabilizaciji i pridruživanju realizovala, prodavci (po pravilu domaći državljani) i kupci (državljani EU) moraju od Ustavnog suda tražiti da im omogući ostvarenje ovog prava. Sudski postupak sam po sebi proizvodi brojne transakcione troškove. Takođe, neizvesnost povodom ishoda ovog spora predstavlja rizik od gubitka, pa se u tom smislu očekivano umanjenje koristi usled eventualnog gubitka spora računa u transakcione troškove.

Sa druge strane, alokacija u skladu sa članom 72đ Zakona o poljoprivrednom zemljištu stvara **prohibitivno visoke transakcione troškove**. Da bi stekao svojinu na poljoprivrednom zemljištu, državljanin EU mora deset godina da ima prebivalište u određenoj lokalnoj samoupravi, da isto toliko godina ima registrovano poljoprivredno gazdinstvo sa mehanizacijom i opremom za obavljanje poljoprivredne proizvodnje itd. Ovi uslovi pojedinačno nemaju nikakvu funkciju osim da strance spreče u nameri da uopšte prisvoje poljoprivredno zemljište. Zašto strani državljanin ne bi mogao da investira u poljoprivredno zemljište, i da ga nakon toga izdaje u zakup!? Ili zašto ne bi mogao da živi u susednom gradu ili opštini, već mu je dozvoljeno da pribavi zemljište samo na teritoriji one opštine na kojoj ima prebivalište čak deset godina!?[42] Ili zašto prilikom obrade zemljišta ne bi mogao da koristi usluge domaćih poljoprivrednika koji raspolažu mehanizacijom!?

Jedan od retkih kvalitetnih predloga koji se može naći u uporednopravnoj literaturi odnosi se na ukidanje potrebe za apostilom u prometu poljoprivrednog zemljišta. U obrazloženju predloga je navedeno da ta obaveza nepotrebno povećava (transakcione) troškove prometa,[43] što je nesumnjivo tačno. Njenim ukidanjem smanjili bi se nepotrebni transakcioni troškovi ugovornih strana.

Zato se bez dileme može zaključiti da pravni okvir uspostavljen zakonskim novelama iz 2017. godine **ne može da omogući optimalnu alokaciju** poljoprivred-

[42] U jednoj analizi Instituta ekonomskih nauka (o kojoj će kasnije biti više reči), u kojoj se takođe kao uslov za sticanje poljoprivrednog zemljišta navodi posedovanje poljoprivrednog gazdinstva (doduše njihov predlog u tom smislu je opšti i nediskriminatoran, mada takođe sporan), u obrazloženju se navodi da „registracija gazdinstva omogućava veliki broj beneficija, kao što je pristup subvencijama, dobijanje kredita itd. Ovo je klasičan primer neefikasne pravne norme koja se brani paternalističkim razlozima. Da li se pojedincu isplati da poseduje poljoprivredno gazdinstvo ili ne – to će najbolje znati jedino taj pojedinac, i nema nikakve potrebe da bude ovim uslovljen. Ukoliko želi beneficije, on će registrovati gazdinstvo; u suprotnom neće. Jovan Zubović i drugi: *Analiza pravnog i institucionalnog okvira tržišta poljoprivrednog zemljišta, procena ekonomskih efekata liberalizacije tržišta poljoprivrednog zemljišta i preporuke za izmene domaćeg zakonodavnog i institucionalnog okvira i njihovu adekvatnu primenu.* Institut ekonomskih nauka Beograd, 2016, str. 28. Institut ekonomskih nauka, zvanični internet sajt: http://www.ien.bg.ac.rs/images/stories/doc/rg4_fina_seio.pdf. Sajtu pristupljeno 22. avgusta 2017. godine. U daljem tekstu: Analiza IEN.

[43] Analiza IEN, 76.

nog zemljišta. Na osnovu prethodne analize nedvosmisleno proizlazi zaključak da pravo svojine na poljoprivrednom zemljištu mora biti dostupno državljanima EU (ali isto tako i državljanima ostalih država bez izuzetka); da pravne norme koje ovu materiju regulišu moraju biti jasno definisane i eksplicitne, kao i da transakcioni troškovi koji proizlaze iz pravnog posla moraju da budu što je moguće niži.

5. ZAKONSKE NOVELE IZ UGLA TEORIJE JAVNOG IZBORA

Pitanje na koje treba odgovoriti je i **u čijem je interesu** ograničavanje prava strancima da stiču svojinu na poljoprivrednom zemljištu, odnosno **ko snosi troškove** od ovakvog rešenja. U potrazi za odgovorima na ova pitanja biće korišćen metod teorije javnog izbora[44].

Za zabranu strancima da stiču svojinu na poljoprivrednom zemljištu najviše su zainteresovani oni **domaći ekonomski subjekti koji trenutno kupuju** poljoprivredno zemljište. U prvom redu, to su veliki i srednji poljoprivredni proizvođači u Srbiji. Njihov je interes što restriktivnije pravno rešenje prema strancima, koje bi im ograničilo inostranu konkurenciju i osiguralo monopolski položaj na tržištu. Time bi oni i dalje bili u poziciji da otkupljuju zemljište kao proizvodni resurs po cenama nižim od ravnotežnih, ostvarujući pritom monopolski ekstraprofit. Nakon što prisvoje velike površine poljoprivrednog zemljišta u Srbiji po niskim cenama, oni će sačekati liberalizaciju do koje kad-tad mora doći. Očekivani rast cena nakon liberalizacije, ali i zbog povećanih subvencija iz agrarnog budžeta EU, neminovno će dovesti i do porasta vrednosti njihovog zemljišta kojeg sada jeftino kupuju. Njihova ekonomska moć je velika, kao i njihov ekonomski interes. Oni su prvi otpočeli proces lobiranja, i uspeli su da postignu širok društveni konsenzus o potrebi da se u pravnom sistemu što je duže moguće zadrže ograničenja koja se odnose na strance.[45]

Da je ograničenje strancima da stiču svojinu na poljoprivrednom zemljištu rezultat zalaganja interesnih grupa, saglasni su i autori Analize IEN. Prilikom analize poljskih pravnih rešenja se na jednom mestu navodi: „Neobično dug *grace*

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[44] Eng. *Public Choice Theory.* Više o tome: Ludwig Van de Hauwe, Public Choice, Constitutional Political Economy and Law and Economics. *Encyclopedia of Law and Economics,* Edward Elgar and University of Ghent: 2000, 603-659; Charles K. Rowley, *Public Choice Theory.* The International Library of Critical Writtings in Economics. Aldershot, Edward Elgar, 1993; Charles K. Rowley Public Choice and the Economic Analysis of Law. *Law and Economics,* Kluver Academic Publishers, Boston: 1989, 123-174; Daniel A. Farber, Philip P. Frickey, *Law and Public Choice: A Critical Introduction*. University of Chicago Press, Chicago: 1991; Enrique Garcia Viñuela & Publo Vasquez Vega, Financing Political Parties: A Public Choice Approach. *Economia delle Scelte Pubbliche,* No. 2-3, 1996, 139-153; Denis C. Mueller *Public Choice.* Cambridge University Press, Aleksandra Jovanović, *Teorijske osnove ekonomske analize prava.* Pravni fakultet Univerziteta u Beogradu: 2008.

[45] L. Baturan (2013), *op. cit,* 486.

– *period* od 12 godina, može se objasniti, snažnim uticajem jake interesne grupe organizovanih zemljoradnika i njihovim kontinuiranim pritiskom na Vladu ove zemlje".[46]

Naspram njih se nalaze **prodavci poljoprivrednog zemljišta**, koji se najčešće ni ne bave primarno poljoprivrednom proizvodnjom. To su po pravilu domaći državljani – vlasnici malih parcela, ali i restitutivni poverioci kojima je vraćeno poljoprivredno zemljište oduzeto posle Drugog svetskog rata. Vrlo heterogeni, međusobno nepovezani i neorganizovani, ne predstavljaju respektabilan politički faktor u smislu lobiranja, posebno u odnosu na velike poljoprivredne proizvođače i veleposednike.[47]

Međutim, ne treba iz vida izgubiti ni interes spoljnih faktora. Na prvom mestu, tu su **državljani EU**, koji su takođe pogođeni ovom novelom. Njihove interese zastupaju tela i institucije Unije, a koji će sigurno izvršiti politički pritisak na Srbiju (i druge istočnoevropske zemlje) da ispuni obaveze preuzete Sporazumom o stabilizaciji i pridruživanju.

Poslednjih godina veoma važnu ulogu u političkom i ekonomskom životu Srbije igraju **investitori iz arapskih zemalja.** Postoje ozbiljne indicije da su oni uspeli da obezbede političku podršku, kako bi u postupku privatizacije preostalih poljoprivrednih kombinata došli u svojinu poljoprivrednog zemljišta.[48]

Postojanje različitih pravnih rešenja i stalna opasnost od propasti posla odgovara investitorima koji su skloniji rizicima. Takođe, tu spadaju i oni koji prethodno obezbede političku podršku.[49] Kada se različita pravna rešenja stave u korelaciju sa ekonomskim subjektima kojima oni najviše pogoduju, može se zaključiti da zakonske novele iz 2017. godine **najviše pogoduju poslednjoj interesnoj grupi, kao i političkim subjektima koji su na vlasti** u Srbiji. Sa jedne strane, predstavnici aktuelne političke vlasti izbegli su da primene odredbe Sporazuma o stabilizaciji i pridruživanju, izlazeći na taj način u susret političkim zahtevima najvećeg dela populacije u Srbiji. Paralelno sa tim, podvlači se da je nesporno da pravna lica koja su registrovana u Srbiji mogu bez ikakvih ograničenja da stiču svojinu na poljoprivrednom zemljištu, bez obzira na činjenicu da su u vlasništvu inostranih državljana.[50] Domaći kupci, kojima bi apsolutna zabrana sticanja pra-

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[46] Analiza IEN, str. 28

[47] L. Baturan (2013), *op. cit,* 487.

[48] Videti npr: Dimitrije Boarov, Čija je naša zemlja? *Vreme,* br. 1151, 24. januar 2013.; Radmilo Marković, Presušile najave. *Vreme,* br. 1289, 17. septembar 2015.

[49] L. Baturan (2013), *op. cit,* 487; L. Baturan (2016 – doktorska disertacija), *op. cit,* 218.

[50] „Još jedna stvar koju želim da kažem, priča se dosta o pravnim licima, strana pravna lica ne mogu uopše da budu u prilici da kupe poljoprivredno zemljište. To piše u Zakonu. Postavljaju se pitanja od pojedinaca – šta u situaciji kada je reč o pravnim licima koja su srpska, dakle osnovala su ih druga lica, ali ona se osnivaju po Zakonu o privrednim društvima, i to su srpska pravna lica. Oni plaćaju ovde dobit, sve svoje poreske obaveze ispunjavaju ovde. *To su privredni subjekti*

va svojine na poljoprivrednom zemljištu najviše pogodovala, nisu dobili mnogo, jer ih zakonske novele iz 2017. godine neće zaštititi od inostrane konkurencije. Može se u nastavku privatizacije preostalih velikih poljoprivrednih kombinata poput beogradskog PKB-a očekivati značajno rasipanje resursa radi obezbeđenja političke podrške (tzv. traganje za rentom).[51]

Zahvaljujući velikom broju kontradiktornih propisa, onemogućena je slobodna konkurencija na tržištu poljoprivrednog zemljišta: domaći vlasnici svoju imovinu ne mogu da prodaju kome žele; kupci – državljani EU su ograničeni zakonskim novelama; državljani trećih zemalja ne mogu uopšte da stiču svojinu. Ukoliko se želi postići **efikasna alokacija resursa**, onda se zakonskim normama mora obezbediti jednakost svih ekonomskih subjekata na tržištu.

Po ovom pitanju Srbija nije izuzetak. U sličnom problemu nalaze se bivše socijalističke zemlje, u kojima biračko telo posebno osetljivo na potencijalni uticaj stranaca. Teser to objašnjava na sledeći način: „Komunistička manipulacija nacionalnim simbolima da bi se legitimisala nacionalnizacija zemljišta i imovine vodila je u postkomunistički skepticizam prema pitanju može li uopšte strano vlasništvo biti u nacionalnom interesu. Ovo je samo jedan od mnogo epifenomena koji su proizašli iz 50-godišnjeg de fakto gubitka suvereniteta, perioda koji je uticao na pojačanu osetljivost vlasti i stanovništva na pitanja mogućnosti kontrole svih delova državne teritorije.“[52]

Napuštanje loših (neefikasnih) pravnih rešenja omogućiće i postizanje održivog **rasta bruto domaćeg proizvoda**, na korist svih članova zajednice. Porast efikasnosti proizvodnje predstavlja jedan od mikroekonomskih faktora za rast bruto domaćeg proizvoda, prema modelu Soloua. Verovatno se može očekivati

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koji su privredni subjekti Republike Srbije. (kurziv L.B.)“ Branislav Nedimović, ministar poljoprivrede, šumarstva i vodoprivrede na sednici Narodne skupštine, prilikom obrazloženja predloga Zakonskoh novela. Privremene stenogramske beleške, Narodna skupština Republike Srbije, četvrto vanredno zasedanje, 24. avgust 2017. godine, 01 broj 06-2/152-17. Internet sajt: http://www.otvoreniparlament.rs/transkript/7443?tagId=66557.

[51] L. Baturan, (2017), *op.cit.*

[52] Lynn M. Tesser, East-Central Europe's new Security Concern: Foreign Land Ownership. Communist and Post-Communist Studies, Vol. 37, 2004, 214. Videti takođe: Alexi Gugushvili, „Money can't buy my land“: Foreign Lland ownership regime and public opinion in a transition society. *Land Use Policy,* No. 55, 2015, 142-153. U srpskoj pravnoj teoriji, Rikalović se poziva na nacionalni interes kada se protivi „iznošenju zemljišta na strana tržišta“ (sic!) u cilju zaštite nacionalnog interesa. Naravno, ne objašnjava se koji je to nacionalni interes u pitanju i kako bi to on bio povređen. Gojko Rikalović, *Privatizacija i zemljišne reforme u poljoprivredi.* Viša poslovna škola, Novi Sad: 2003, 154. Takođe, može se sresti i stav da će prodajom poljoprivrednog zemljišta strancima država u kojoj se to zemljište nalazi „izgubiti suverenitet nad značajnim delom svoje zemlje“. Slavoljub Vukićević, Danica Stepić, Danilo Savović, Svojinskopravna ovlašćenja stranaca na poljoprivrednom zemljištu u Republici Srbiji, *Ekonomika poljoprivrede,* god. LVIII, br. 4, Naučno društvo agrarnih ekonomista Balkana, Institut za ekonomiku poljoprivrede, Akademija ekonomskih nauka Bukurešt, Beograd: 2011, 542.

da će novi proizvođači doneti i nova znanja i tehnologije u oblasti poljoprivredne proizvodnje, čime će se doprineti i poboljšanju drugog faktora ekonomskog rasta, a to je unapređenje kvalifikacione strukture radnika. Liberalizacija će omogućiti i direktan priliv direktnih stranih investicija u zemlju.[53] Rast investicija predstavlja makroekonomski faktor rasta bruto domaćeg proizvoda zemlje. Rast stranih investicija znači i devizni priliv u zemlju.[54] To bi dalje dovelo do povećanja izvoza poljoprivrednih proizvoda, ili do smanjenja uvoza, što su takođe faktori koji dovode do ekonomskog rasta.[55]

6. POLEMIČKI OSVRT NA ANALIZU IEN

Sa približavanjem roka za ispunjenje obaveze iz Sporazuma o stabilizaciji i pridruživanju, u Srbiji se postepeno objavljuju ozbiljniji radovi[56] koji se bave problematikom imovinskih prava stranaca na poljoprivrednom zemljištu, a u kojima se dominantno zastupa stav da ne bi trebalo postupiti po preuzetoj obavezi, ili makar ne odmah. U tom smislu, posebno je značajna već citirana **Analiza IEN** iz Beograda. Osnovni cilj Analize koji su autori postavili jeste da se utvrdi „op-

[53] Generalni izostanak kontrole nad vlasništvom predstavlja jednu od osnovnih mera za privlačenje direktnih stranih investicija. Đorđe Popov, Podsticaji i kontrola inostranih investicija. *Zbornik radova,* god. 42, br. 3, Pravni fakultet u Novom Sadu, 2008, 43. I Stanivuković konstatuje da je „kupovina nepokretnosti po svojoj prirodi samo jedan vid ulaganja stranog kapitala". M. Stanivuković (1996), *op.cit.,* 226.

[54] Đorđe Popov, Značaj inostranih investicija za privrednu stabilnost Srbije. *Zbornik radova*, god. 42, br. 1-2, Pravni fakultet u Novom Sadu, 2008, 29-44. I prema Prokopijeviću, strano „ulaganje u nepokretnine bi povećalo cene ovih resursa i donelo značajan dotok kapitala, što bi dalje podstaklo finansijska tržišta i ekonomski razvoj." Miroslav Prokopijević, *Evropska unija – uvod.* Službeni glasnik, Beograd, 2009, 572. Videti još i: Mason (1994), *op. cit,* 470-473.

[55] „Efekat liberalizacije tržišta poljoprivrednog zemljišta u Republici Srbiji trebalo bi da utiče na ostvarivanje jednog ili više od sledećih pet ciljeva: 1) povećanje produktivnosti poljoprivrednih gazdinstava; 2) ukrupnjavanje parcela kroz povećanje korišćenog poljoprivrednog zemljišta po poljoprivrednomgazdinstvu; 3) povećanje izvoza poljoprivrednih proizvoda; 4) povećanje priuštivosti poljoprivrednog zemljišta za državljane Republike Srbije; 5) povećanje cene poljoprivrednog zemljišta." Analiza IEN, 82. Pogledati još: K. Lovre & I. Lovre (2017), *op.cit*., 36; Petar Đukić, Održivo gospodarenje zemljišnim resursima u svetlu odocnelih ekonomskih reformi. *Ekonomske, socijalne i razvojne posledice prodaje poljoprivrednog zemljišta u Srbiji.* Institut ekonomskih nauka, Beograd, 2017, 64.

[56] Na Institutu ekonomskih nauka u Beogradu održana je 23. februara 2017. godine konferencija na temu „Ekonomske i socijalne posledice prodaje poljoprivrednih preduzeća i zemljišta u Srbiji", gde se moglo čuti dosta zanimljivih stavova. Nažalost, Zbornik sa konferencije postao je dostupan tek kada je pisanje ovog rukopisa bilo skoro završeno, a rok za predaju skoro istekao. Na Institutu ekonomskih nauka je u okviru projekta „Analitička podrška pregovorima sa EU" izrađena posebna analiza na ovu temu (vidi fn. 43). Za razliku od Srbije, u drugim državama koje imaju slične probleme vodeći naučni časopisi obiluju radovima na ovu temu. Videti npr. poslednja godišta mađarskog časopisa *Journal of Agricultural and Environmental Law* (mađ. Agrár- és Környezetjog) na zvaničnom internet sajtu: http://epa.oszk.hu/html/vgi/kardexlap.phtml?id=1040; uporediti: Ekonomika poljoprivrede, internet sajt: http://scindeks.ceon.rs/journaldetails.aspx?issn=0352-3462.

timalni institucionalni i zakonski okvir u oblasti poljoprivrednog zemljišta, dok je poseban akcenat stavljen na istraživanje vezano za liberalizaciju tržišta poljoprivrednog zemljišta",[57] a što odgovara i cilju ovog rada. U Analizi je data uporedna analiza različitih pravnih rešenja, kao i brojnih statističkih podataka za četiri nove članice EU (Poljska, Slovenija, Mađarska, Hrvatska i Rumunija). Zatim je dat indeks priuštivosti poljoprivrednog zemljišta, koji predstavlja odnos cene poljoprivrednog zemljišta i bruto dodate vrednosti po zaposlenom u sektoru poljoprivrede u određenoj zemlji u posmatranoj godini.[58] Na osnovu toga je dat predlog da se liberalizacija odloži,[59] da se uvedu opšta ograničenja kod prodaje poljoprivrednog zemljišta,[60] kao i tri alternativna modela uređenja prava stranaca na poljoprivrednom zemljištu[61] uz procenu njihovih socio-ekonomskih efekata.[62]

Dve su najvažnije zamerke Analizi IEN. Prva se tiče **ekonomske metodologije** koja je korišćena prilikom analize. Stavljajući na stranu činjenicu da bi u poljoprivredno zemljište trebalo da mogu da investiraju ne samo poljoprivrednici već i sva druga fizička i pravna lica,[63] nije uopšte sporno da je poljoprivredno zemljište u Srbiji dostupnije građanima Danske nego Srbije: pri datoj ceni ekonomskog dobra, pojedinci sa višim dohotkom mogu da priušte veću količinu tog dobra.[64] Problem je što indeks priuštivosti poljoprivrednog zemljišta ne može dati odgovor na pitanje „koji je optimalni institucionalni i zakonski okvir[65] u oblasti poljoprivrednog zemljišta", a koji su autori postavili kao osnovni cilj Analize IEN. Eventualna sugestija koja bi iz ovog indeksa možda mogla da proizađe je da bi trebalo sačekati sa liberalizacijom dok se odnos cene poljoprivrednog zemljišta

[57] Analiza IEN, 8.

[58] Analiza IEN, 67. Zaključeno je da je indeks priuštivosti poljoprivrednog zemljišta u Srbiji 3,4h manji nego u EU28, dok je u poređenju sa nemačkim, francuskim, belgijskim, italijanskim, danskim ili holandskim indeksom razlika čak 5,1 do 11,7h na štetu na poljoprivrednika iz Srbije. Analiza IEN, 69, 71.

[59] Analiza IEN, 73.

[60] Analiza IEN, 74-75

[61] Analiza IEN, 76-78.

[62] Analiza IEN, 80-83.

[63] Ekonomsko uređenje u Republici Srbiji počiva na tržišnoj privredi, otvorenom i slobodnom tržištu, slobodi preduzetništva, samostalnosti privrednih subjekata i ravnopravnosti privatne i drugih oblika svojine. Ustav RS, čl. 82 (osnovna načela ekonomskog uređenja). Suprotno: Szilágyi, János Ede: Conclusions – Commission II, XXVIII. European Congress on Rural Law – 9-12 September 2015, Potsdam, Germany, German Society for Agricultural Law. Objavljeno u: *Journal of Agriculture and Environmental Law*, Vol. X, No. 19, 2015, 91.

[64] Isto tako je građanima Holandije, Nemačke ili Danske dostupniji i kragujevački automobil, pa da li je to argument da treba ograničiti njihov izvoz!?

[65] Prema stanovištu neoinstitucionalne ekonomske teorije, optimalni institucionalni okvir je onaj koji može da omogući optimalnu alokaciju resursa. Kako se optimalna alokacija odvija isključivo na savršenom tržištu (osim u slučajevima kada postoji tzv. "market failure"), institucionalni okvir treba da minimizuje transakcione troškove, spreči nastanak monopola, pojavu eksternih efekata itd., kako bi se uslovi poslovanja na realnom tržištu maksimalno približili idealnom tržištu.

i dohotka poljoprivrednika u Srbiji ne izjednači sa onim u EU, mada nije jasno zašto bi se to moralo čekati – i šta ako se to nikad ne desi?

Osnovni problem sa metodologijom korišćenom u Analizi IEN je i što se ne uzima u obzir činjenica da je poljoprivredno zemljište prirodni resurs, a ne potrošno dobro. Što je cena proizvodnje nekog proizvođača niža, to će cena koju će moći da izdvoji za neki resurs (zemljište) veća. Takođe, cena zavisi i od tržišta (poljoprivrednih) proizvoda: što proizvođač za svoj proizvod može ostvariti višu cenu, spreman je da izdvoji i više novca za pribavljanje poljoprivrednog zemljišta u svojinu. Dakle, cena koji su pojedinci spremni da plate za kupovinu poljoprivrednog zemljišta uopšte ne zavisi od njihovog dohotka s obzirom na postojanje tržišta zajmovnog kapitala, već od efikasnosti njihove proizvodnje.[66]

Druga zamerka Analizi IEN odnosi se na **predložena rešenja i zaključke, koji uopšte ne proizlaze čak ni iz korišćene (ekonomske) metodologije**, već je upravo suprotno. U samoj analizi se konstatuje sledeće: „U Srbiji postoji značajan prostor za dalje tehničko- tehnološko unapređenje poljoprivredne delatnosti. S obzirom da je visina BDV po zaposlenom u sektoru poljoprivrede, šumarstva i ribarstva, pokazatelj konkurentnosti i efikasnosti poljoprivredne proizvodnje, očekivano je da zemlje koje imaju visoku vrednost ovog indikatora, imaju veći stepen tehnološke opremljenosti i veću ekonomsku snagu, a samim tim i veću mogućnost da kupuju poljoprivredno zemljište.“[67] Takođe, (ispravno) se pretpostavlja „da bi sa liberalizacijom tržišta poljoprivrednog zemljišta u Srbiji, sa inostranim investitorima došlo i do izraženijeg tehničko-tehnološkog transfera u poljoprivredi i striktnijeg pridržavanja načelima dobre poljoprivredne prakse, što bi uticalo na rast prinosa i vrednosti poljoprivredne proizvodnje, a u krajnjoj liniji i na rast udela BDV sektora poljoprivrede u ukupnom BDV.“[68] Ako će liberalizacija tržišta dovesti do poboljšanja ekonomskih indikatora („tehničko-tehnološko unapređenje, rast prinosa, rast vrednosti poljoprivredne proizvodnje i rast BDP-a“), onda nije jasno zbog čega se predlažu pravna rešenja kojima se dodatno pooštravaju uslovi za raspolaganje zemljištem?[69]

Takođe su pogrešni i **zaključci koji slede iz pravne analize**. Naime, u zaključku se konstatuje da se „još uvek nisu u potpunosti stekli uslovi za nesmetanu i neograničenu prodaju poljoprivrednog zemljišta strancima, usled neuređenih imovinsko pravnih odnosa,[70] koji ne garantuju minimum pravne sigurnosti domaćim i stranim

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[66] Videti: Begović (1995), op. cit., 185.

[67] Analiza IEN, 69

[68] Analiza IEN, 68

[69] Analiza IEN, str. 74-75 (Opšti uslovi kod prometa poljoprivrednog zemljišta, koji su predloženi za sve predložene modele prodaje). Zatim: model 1 (odložena potpuna liberalizacija), tačka g; Model 2 (uslovljena liberalizacija), tačke a i b; model 3 (pravno sigurna liberalizacija), tačke a i b. Analiza IEN, str. 77-78.

[70] Izgleda da pod pojmom „pravne neuređenosti“ autori podrazumevaju situaciju kada oko određene parcele poljoprivrednog zemljišta postoje nerešeni imovinski odnosi između različitih lica.

licima, potencijalnim kupcima."[71] Nakon nabrajanja prava koja Republika Srbija Ustavom jemči ekonomskim subjektima (čl. 3, 11, 18, 19, 58, 97), zaključuje se da „Republika Srbija ne može garantovati sigurnost u sticanju i očuvanju imovinskih prava stranaca".[72] Ni ovaj zaključak se ne može prihvatiti. Naime, na osnovu čl. 4 i čl. 142-152 Ustava, u Srbiji je formirana cela jedna grana vlasti – sudska vlast. Funkcija sudova kao samostalnih i nezavisnih državnih organa je da „štite slobode i prava građana, zakonom utvrđena prava i interese pravnih subjekata i da obezbeđuju ustavnost i zakonitost.[73] Primera radi, kada je na zemljištu koje pripada zadruzi ili privrednom društvu u katastru upisana društvena svojina koja je prestala da postoji, ili kada je imovina stečajnog dužnika upisana kao imovina Republike, ili kada jedinica lokalne samouprave oduzme pravo korišćenja zemljišta od subjekta privatizacije, ili kada iz bilo kog drugog razloga stanje iz katastra ne odgovara faktičkom stanju,[74] Republika Srbija preko svog (ruku na srce nesavršenog) sudskog sistema štiti prava lica koja su ih stekla na osnovu Ustava, zakona i drugih opštih akata, opšteprihvaćenih pravila međunarodnog prava i potvrđenih međunarodnih ugovora.[75] Ne može se izvući generalni zaključak da država nije sposobna da garantuje i štiti imovinska prava samo zato što se u nekim slučajevima vanknjižno stanje ne poklapa sa stanjem upisanim u katastru, ili zato što u pojedinim slučajevima postoji sukob po pitanju individualnih prava subjekata na konkretnom zemljištu.

Na osnovu iznetog sledi da zaključci Analize IEN ne mogu izdržati proveru ni ekonomske ni pravne teorije. Međutim, oni **ne mogu izdržati ni proveru najosnovnijih logičkih metoda** zaključivanja – neposrednog zaključivanja i dedukcije, korišćenih u Analizi IEN.[76] Naime, tu se navodi da „usled neuređenih imovinsko pravnih odnosa koji ne garantuju minimum pravne sigurnosti *domaćim i stranim licima, potencijalnim kupcima*, Republika Srbija ne može garantovati sigurnost u sticanju i očuvanju imovinskih prava *stranaca*" (sic!). Ukoliko se taj stav prihvati, onda se primenom logičkog metoda mora zaključiti da isto tako Republika Srbija ne može garantovati sigurnost u sticanju i očuvanju imovinskih prava ni domaćim državljanima! Ako zbog toga treba zabraniti strancima da kupuju poljoprivredno zemljište, onda se to mora zabraniti i domaćim državljanima („dok se odnosi ne urede")!

ZAKLJUČAK

Na kraju, može se zaključiti da su hipoteze koje su postavljene u Uvodu u potpunosti potvrđene. Primenom metodologije ekonomske analize prava pokazano

[71] Analiza IEN, str. 78-79.
[72] Analiza IEN, str. 78-79.
[73] Zakon o uređenju sudova, *Sl. Glasnik RS,* br. 116/2008, čl. 1 st. 1.
[74] Primeri „pravne neuređenosti" preuzeti iz Analize IEN.
[75] Zakon o uređenju sudova, čl. 1 st. 2.
[76] Analiza IEN, 10.

je da se zakonskim novelama iz 2017. godine narušava efikasnost alokacije resursa (koja je prethodnim rešenjem već bila narušena). Delimično je onemogućena konkurencija inostranih investitora, među kojima verovatno ima i onih koji su zbog efikasnije proizvodnje spremni da za poljoprivredno zemljište ponude i veću cenu. Rezultat je da će poljoprivredna proizvodnja biti suboptimalna, sa svim negativnim efektima koji dalje iz toga proizlaze. Efikasnost alokacije je dodatno narušena i transakcionim troškovima koji nastaju ovim zakonskim novelama. Posledica je i nedovoljno uvećanje blagostanja ekonomskih subjekata, jer za svoje resurse ne mogu dobiti odgovarajuću cenu.

Dokazano je i da su zakonske novele u suprotnosti sa međunarodnim pravom, pravom Evropske unije ali i samim Ustavom Republike Srbije. Srbija je prihvatila određenu obavezu Sporazumom o stabilizaciji i pridruživanju, koju sada pokušava da izbegne. Posmatrano sa aspekta pravne tehnike, ova rešenja su takođe veoma loša.

Zakonske novele iz 2017. godine donete su pod političkim pritiskom domaće javnosti, ali u partikularnom interesu određenih društvenih grupa. Očekivano je da u narednom periodu otpočne i politički pritisak organa EU, naravno u interesu njihovih investitora.

Potvrda sve tri posebne hipoteze pokazuje da je najbolje rešenje i sa politikološkog, i sa ekonomskog i sa pravnog aspekta ukidanje svih ograničenja kod prenosa prava svojine na poljoprivrednom zemljištu prema državljanima Evropske unije (a verovatno i prema državljanima i ostalih zemalja). Time bi se otklonila neustavna i kontradiktorna pravna rešenja iz pravnog sistema Republike Srbije, omogućila bi se efikasnija alokacija resursa i povećanje blagostanja i domaćih i stranih državljana, i otklonila bi se preraspodela resursa ustanovljena u korist određenih društvenih grupa koja su na štetu i domaćih i stranih državljana.

Prva šansa je da do otklanjanja ovih zakonskih rešenja dođe u procesu pridruživanja Srbije Uniji, brisanjem spornih članova Zakona o poljoprivrednom zemljištu i (eventualno) korekcijom rešenja iz Zakona o osnovama svojinskopravnih odnosa. Druga šansa je da se greške isprave donošenjem novog Građanskog zakonika Republike Srbije, ako ikad bude donet.

Na kraju, iako je to iz samih hipoteza nesporno, trebalo bi i eksplicitno napomenuti: ovaj rad se ne izjašnjava o pitanju da li bilo koji pojedinac treba da proda zemljište ili ne treba, već o tome kakav pravni okvir treba da bude da bi alokacija resursa bila optimalna. Što se tiče ponašanja pojedinca, pretpostavka ekonomske teorije (na kojoj se i ovaj rad zasniva) jeste da se pojedinac ponaša kao *homo oeconomicus*, dakle na način da na dugi rok sa datim resursima maksimizuje svoje sopstvene koristi. Pravni okvir treba to i da mu omogući.

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Right of Foreigners to Acquire Property on Agricultural Land in Serbia after Law on Agricultural Land Amendments from 2017

Generations come and generations go,
but the land remains forever.
Old Testament – Ecclesiastes, 1:4

Abstract: *This paper presents a multidisciplinary analysis, which tries in the most general way to find an answer to the question of how to regulate the right of foreigners to acquire property on agricultural land in Serbia using economic, law and political methodology. A special accent was put on the new legal norms of the Law on Agricultural Land from 2017. The aim of the paper is to determine the allocative effects and effects on the welfare that generate different legal norms, then to examine whether new legal norms are adequately integrated into the Serbian legal system, and to determine the political factors which led to the introduction of these legal norms. It was concluded that the new legal solution would decrease the efficiency of the allocation of resources, and accordingly, the welfare of economic entities will not be sufficiently increased. Also, legal analysis has shown that legal novelties are in collision with the international law, European Union acquis communautaire, but also the Constitution of the Republic of Serbia. Finally, a general conclusion was reached that the best solution from the political, economic and legal point of view would be the elimination of all ownership transfer restrictions of agricultural land to EU citizens (and probably towards other foreigners). This would allow a more efficient allocation of resources and an increase in the welfare of both domestic and foreign citizens, and elimination of redistribution which had been established in the particular interest of lobby groups too.*

Keywords: *agricultural land, rights of foreigners, real estate, property rights, Law on Agricultural Land.*

Datum prijema rada: 07.10.2017.

PRAVNI FAKULTET UNIVERZITETA U NOVOM SADU
ZBORNIK RADOVA

Štampa:

„Sajnos“, Novi Sad
Tiraž: 200 primeraka

2017