

Bence UDVARHELYI*
Unlawful acquisition of agricultural and forestry land in the criminal law**

1. Introductory remarks

It is without doubt that agricultural and forestry land (according to the former terminology: arable land) is one of the most important *national resources* of Hungary. Accordingly, agricultural and forestry land enjoys enhanced protection, which is enshrined at the highest legal level in Hungarian law. According to paragraph 1 of Section P of the *Fundamental Law of Hungary*, “*natural resources, particularly arable land, forests and water resources, as well as biological diversity, in particular native plant and animal species and cultural values shall comprise the nation’s common heritage; responsibility to protect and preserve them for future generations lies with the State and every individual*”.

As an important mean for the protection of agricultural land, the Hungarian legislator has imposed restrictions on the acquisition of the ownership of agricultural and forestry land since 1994. Naturally, simultaneously with the establishment of these restrictions, the attempts to circumvent them also appeared. The legal transactions which intend to violate or circumvent the restrictions regarding to the acquisition of the land ownership are called “*pocket contracts*” in the common language.

2. The definition of the pocket contracts

A pocket contract means a contract or other legal transaction which are concluded in order to violate or circumvent the restrictions regarding to the acquisition of the ownership of agricultural and forestry land.¹ The name reflects the key feature of pocket contracts: instead of real contracts, “supplementary solutions” are elaborated

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¹ Bányai Krisztina: A zsebszerződések elleni küzdelem új eszközei, *Ügyészek Lapja*, 2013/6, 200; Bányai Krisztina: A zsebszerződések ügyészi szemmel, *Új Magyar Közigazgatás*, 2014/1, 62; Bányai Krisztina: *A magyar mezőgazdasági föld tulajdoni és használati forgalmának jogi korlátai és azok kijátszása*, PhD dissertation, Miskolc, 2016, 212.

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which quickly disappear in the pockets of the people concerned. Therefore, the real contractual will cannot be recognized.²

Historically, pocket contracts emerged not in connection with the limitations of the acquisition of land ownership but in connection with the *compensation process*. The compensation of persons who were unjustly deprived of their land between 1939 and 1989 did not take place in accordance with contemporary economic conditions. Therefore, the compensation tickets were received by persons who had only historical connection to the arable land, who were too old to cultivate the land and who did not possess the necessary expertise. These people often tried to get rid of their compensation tickets at a significantly lower price. The compensation ticket was then used by another person – often without the ability to acquire the ownership of the arable land – which resulted that the land was not received by the unfairly deprived previous landowners. Between 1990 and 1994, both domestic and foreign persons could acquire the ownership of the land by this method, because there were no limitations in connection with the acquisition of the land property at this time.³

The *privatization of the arable land* started after the change of regime. In the beginning, however, as it was mentioned, there were no legal restrictions in connection with the acquisition of the ownership of arable land. The *Act on Arable Land*⁴ entered into force on the 27th June 1994 was the first legislation which imposed restrictions on the acquisition of land ownership,⁵ which indirectly led to the growth of the number of pocket contracts.

3. Restrictions relating to the acquisition of the ownership of agricultural and forestry land

The scope of the *Act on Arable Land* entered into force on the 27th June 1994 covered *any means of the acquisition of the ownership right of arable land*.⁶ However, there were some exceptions: the acquisition of ownership by intestate inheritance, adverse possession, building in, expropriation, and in the course of auction with the purpose of compensation.⁷

² Kozma Ágota: Zsebszerződések veszélyei, *Magyar Jog*, 2012/6, 352; See further: Jójárt László: Tulajdonszerzési tilalmak és korlátozások a termőföldre és azok ellenőrzése, *Magyar Jog*, 2010/12, 737-738.

³ Olajos István – Szalontai Éva: Zsebszerződések a termőföld-tulajdonszerzés területén, *Napi Jogász*, 2001/7, 3-4.

⁴ Act LV of 1994 on Arable Land (hereinafter referred as AL Act).

⁵ About the constitutionality of the restrictions in connection with the acquisition of land ownership see: Kozma 2012, 351; Lányiné Toldi Judit: Harc a zsebszerződések ellen – közjogi korlátok és közjegyzői közreműködés a termőfölddel kapcsolatos jogügyletekben, *Közjegyzőké Közlönye*, 2013/2, 17-19.

⁶ Arable land: is that plot of land which is registered in the outskirts of a settlement in the land register in the branch of cultivation of plough-land, vineyard, orchard, meadow, reeds and forest or as fish-pond (Point a) of Section 3 of the AL Act.

⁷ Section 4 of the AL Act.

According to the original version of the Act, the ownership of the arable land can only be acquired by *domestic private persons*. A domestic private person may acquire the ownership of arable land only up to the measure that arable land of not more than 300 hectares or of the value of 6000 Gold Crowns be in his ownership.⁸ *Domestic legal entities and unincorporated organizations* – with the exception of the Hungarian State, local governments, forest-owners' and pasture-owners' associations and public foundations – could not acquire the ownership of arable land. Ecclesiastic legal entities could acquire the ownership of arable land only on the basis of will or a contract of donation, support or caring.⁹ As a general rule, *foreign private or legal persons* could not acquire ownership of arable land, however, foreigners could acquire ownership of a homestead¹⁰ formed as an independent real property (plot of land) with a surface of not more than 6000 m².¹¹

The *accession of Hungary to the European Union*, however, made it necessary to amend the regulations relating to the acquisition of land ownership of foreigners. The cornerstone of the European Union, the four freedoms (the free movement of goods, capital, services and persons) and the prohibition of discrimination in connection with this also affects the transaction of agricultural and forestry land, as Member States cannot make unjustified differences between their own nationals and other EU citizens in connection with the acquisition of arable land.¹² Therefore, Act XXXVI of 2004 entered into force on the 1st May 2004 amended the Act on Arable Land. According to this modification, the provisions pertaining to resident private individuals had to be applied to the *EU national* who wishes to settle in Hungary to independently engage in agricultural production, and who has been legitimately residing in Hungary for at least three consecutive years and is pursuing agricultural activities.¹³ EU nationals were required to provide proof of eligibility for acquiring title of ownership in the form of official certificates (an official certificate issued by the immigration authority, an authorization to reside, an official certificate issued by the agricultural administration body), and they also had to be required to provide guarantees for future commitments fixed in a private document of full probative force or in a public document.¹⁴

It can be seen that this modification of the Act on Arable Land allowed the nationals of other EU Member States to acquire the ownership of arable land under certain conditions, but it did not make a full equality between domestic and national individuals.

⁸ Subsection 1 of Section 5 of the AL Act.

⁹ Subsection 1-2 of Section 6 of the AL Act.

¹⁰ Homestead: is a complex of dwelling and economic buildings, group of buildings built in the outskirts of a settlement with the purpose of agricultural production (plant cultivation and animal husbandry, as well as related processing of products and storage of produces) and of the land belonging thereto under an identical topographical lot number (Point b) of Section 3 of the AL Act).

¹¹ Subsection 1 of Section 7 and Section 8 of the AL Act.

¹² Bányai 2014, 62; Bányai 2016, 212.

¹³ Subsection 2 of Section 7 of the AL Act.

¹⁴ Section 8/A of the AL Act.

However, this was not necessary because the *Accession Treaty*¹⁵ allowed Hungary to maintain the restrictions on the acquisition of land ownership of non-Hungarian natural and legal persons for seven years from the date of accession.¹⁶ In 2011, using the possibility provided by the Accession Treaty, Hungary initiated the extension of the land ownership acquisition moratorium for a further three years,¹⁷ which was accepted by the European Commission.¹⁸ The moratorium of land acquisition therefore ended on the 30th April 2014.

Due to the end of the moratorium, the comprehensive review of the regulation relating to the acquisition conditions for land ownership became necessary by 2014. The result of this revision was the *Act CXXII of 2013 on Transactions in Agricultural and Forestry Land* entered into force on the 1st May 2014.¹⁹

¹⁵ Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union [OJ L 236, 23.9.2003, p. 17-32] Annex No. X. Point 3 Subsection 2.

¹⁶ See further: Korom Ágoston: *Az új földtörvény az uniós jog tükrében, Jogegyenlőség vagy de facto más elbírálás?*, in: Korom Ágoston (edit.): *Az új magyar földforgalmi szabályozás az uniós jogban*, Budapest, Nemzeti Közszerkesztési Intézet, 2013, 11-24; Fodor László: *Kis hazai földjogi szemle 2010-ből*, in: Csák Csilla (edit.): *Az európai földszabályozás aktuális kihívásai*, Miskolc, Novotni Kiadó, 2010, 115-130; Tanka Endre: *Az uniós tagállam területét alkotó föld tulajdonára és használatára érvényes közhatalmi szabályozás közösségi jogalapja*, *Európai Jog*, 2010/5, 27-31.

¹⁷ Decision of the Parliament No. 2/2010 (II.18.) on the necessity of the extension of the prohibition relating to the acquisition of agricultural land ownership by non-Hungarian natural persons and legal persons.

¹⁸ Commission Decision 2010/792/EU of 20 December 2010 extending the transitional period concerning the acquisition of agricultural land in Hungary [OJ L 336, 21.12.2010, p. 60-61.]

¹⁹ Act CXXII of 2013 on Transactions in Agricultural and Forestry Land (hereinafter referred as TAFI Act). It should be noted, however, that in addition to the Act on Transactions in Agricultural and Forestry Land, other acts also contain provisions in connection with the acquisition of land ownership. These are, for example, Act CCXII of 2013 on certain provisions and transitional regulations in connection with Act CXXII of 2013 on Transactions in Agricultural and Forestry Land and Act VII of 2014 on the exploration and prevention of legal transactions aiming at the circumvention of the legal provisions restricting the acquisition or the use of agricultural land.

According to the Act on Transactions in Agricultural and Forestry Land, the ownership of land²⁰ can only be acquired by *domestic natural persons*²¹ and *EU nationals*^{22,23}. Ownership acquisition rights exist on condition that the acquiring party undertakes in the contract for the transfer of ownership, or in a statement executed in a private document representing conclusive evidence or in an authentic instrument, not to permit third-party use of the land, and to use the land himself, and in that context to fulfill the obligation of land use, and agrees not to use the land for other purposes for a period of five years from the time of acquisition.²⁴ Similarly to the Act on Arable Land, the Act on Transactions in Agricultural and Forestry Land also *maximize the size of the land* which can be acquired. However, the maximum is defined in a more differentiated way than in the previous act. The land acquisition limit is 300 hectares in case of a farmer²⁵ and one hectare in case of persons other than farmers, while the land possession limit is 1200 hectares in case of a farmer or an agricultural producer organization and 1800 hectares in case of operators of animal farms and producers of seeds for varieties of agricultural and horticultural plant species.²⁶ However, it is an important innovation of the Act, that

²⁰ Agricultural, forestry land shall mean any parcel of land, irrespective of where it is located (within or outside the limits of a settlement), registered in the real estate register as cropland, vineyard, orchard, garden, meadow, permanent pasture (grassland), reed bank or forest or woodland, including any parcel of land shown in the real estate register as non-agricultural land noted under the legal concept of land registered in the National Register of Forests as forest (Point 17 of Section 5 of the TAFI Act).

²¹ Domestic natural person shall mean Hungarian nationals (Point 2 of Section 5 of the TAFI Act).

²² EU national shall mean a national of any Member State of the European Union, a person holding a citizenship in a Member State that is a party to the Agreement on the European Economic Area, and the nationals of other States enjoying similar treatment under international agreement, excluding domestic natural persons (Point 17 of Section 24 of the TAFI Act).

²³ Subsection 1 of Section 10 and Subsections 1-3 of Section 16 of the TAFI Act.

²⁴ Section 13 of the TAFI Act.

²⁵ 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 the decree adopted for the implementation of this Act, or, in the absence thereof, who:

a) 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 for the - completed - agricultural or forestry investment project has not yet turned productive, or

b) 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 (Point 7 of Section 5 of the TAFI Act).

²⁶ Subsection 2 of Section 10 of the TAFI Act.

the contracts for the transfer of ownership – with some exceptions²⁷ – shall be *approved by the agricultural administration body*.²⁸

According to the Act on Transactions in Agricultural and Forestry Land, ownership of land may not be acquired by *third-country natural persons; foreign states*, including their provinces, local authorities, and the bodies thereof; and *legal persons*.²⁹ – with the exception of the listed church, or the internal legal entities thereof, the mortgage loan company and the municipal government of the community.³⁰

4. Criminal law consequences of the pocket contracts circumventing the prohibitions and restrictions regarding to the acquisition of land ownership

The law intends to fight against contracts which intend to violate or circumvent the prohibitions and restrictions regarding to the acquisition of land ownership by the means of the *civil law* and the *administrative law*.³¹ However, it also has to be stated that pocket contracts can also have *criminal consequences* in some cases. Henceforward, we intend to analyze the criminal law implications of pocket contracts in details.

Until 2013, the Hungarian criminal law did not contain a separate criminal offence which prohibited the contracts violating the restrictions of the acquisition of land ownership. According to the *Criminal Code of 1978*,³² these contracts were punished under several criminal offences, e.g. intellectual forgery of public documents,³³ failure to comply with the obligation to supply economic data³⁴ or crime in respect of foreign exchange^{35,36} If a person, who received money from a person who is not able to acquire the ownership of agricultural land, did not spend this money for land purchase, embezzlement³⁷ or fraud³⁸ could be assessed.³⁹

²⁷ Section 59 of the TAFL Act.

²⁸ Subsection 1 of Section 7 of the TAFL Act. The detailed rules relating to the approval is contained by Sections 23-36 of the TAFL Act.

²⁹ Subsection 1 of Section 9 of the TAFL Act.

³⁰ Subsection 2 of Section 11 of the TAFL Act.

³¹ See further: Bányai Krisztina: Színlelt vagy leplezett? A „zsebszerződésekkel” kapcsolatos gyakorlati nehézségek ügyészi szemmel, *Ügyészek Lapja*, 2012/5-6, 125-126; Bányai 2013, 203-206; Bányai 2014, 67-70; Bányai 2016, 223-226, 229-234; Hornyák Zsófia: A magyar földforgalmi rezsim előírásainak ellenőrzése és szankcionálási rendszere, in: Csák Csilla – Hornyák Zsófia – Kocsis Bianka Enikő – Olajos István – Kókai-Kunné Szabó Ágnes – Szilágyi János Ede: *Agrárjog. A magyar agrár- és vidékfejlesztési jogi szabályozás lehetőségei a globalizálódó Európai Unióban*, Miskolci Egyetemi Kiadó, Miskolc, 2017, 109-114; Lányiné 2013, 23-25.

³² Act IV of 1978. on the Criminal Code (hereinafter referred as Previous CC).

³³ Point c) of Subsection 1 of Section 274 of the Previous CC.

³⁴ Section 299 of the Previous CC.

³⁵ Section 309 of the Previous CC. The crime in respect of foreign exchange was incorporated into the Criminal Code with Act LII of 1996 entered into force on the 15th August 1996 and was repealed by Act XCIII of 2001 from the 1st January 2002.

³⁶ Olajos – Szalontai 2001, 7-9.

³⁷ Section 317 of the Previous CC.

³⁸ Section 318 of the Previous CC.

³⁹ Bányai 2016, 227.

The *current Criminal Code*⁴⁰ entered into force on the 1st July 2013 created an independent criminal offence (*unlawful acquisition of arable land*)⁴¹ which is regulated in Article XXXIII (*criminal offenses against public confidence*). This criminal offence criminalizes any person who enters into an invalid contract for the acquisition of ownership of arable land, or of usufructuary rights or rights of use for arable land by way of circumventing the applicable statutory prohibition or restriction as well as the attorneys, legal counsels or notary publics who participate in the conclusion of this contracts.

The criminal offence was amended by Act VII of 2014 which entered into force on the 2nd May 2014. On the one hand, the modification adapted the criminal offence to the new conceptual system of the adopted Act on Transactions in Agricultural and Forestry Land. Therefore, the name of the criminal offence was altered to *unlawful acquisition of agricultural and forestry land*.⁴² On the other hand the Criminal Code criminalized another conduct, i.e. the use of agricultural and forestry land, or the collection the proceeds thereof, under an agreement entered into for disguising an invalid contract the perpetrator has concluded with the objective of circumventing the

⁴⁰ Act C of 2012 on the Criminal Code (hereinafter referred as CC).

⁴¹ Section 349 of the CC.

(1) Any person who enters into an invalid contract:

a) for the acquisition of ownership of arable land;

b) for the acquisition of usufructuary rights or rights of use for arable land;

by way of circumventing the applicable statutory prohibition or restriction, is guilty of a felony punishable by imprisonment between one to five years.

(2) Any attorney, legal counsel or notary public who participates in the conclusion of a contract described in Subsection (1) shall be punishable in accordance with Subsection (1).

(3) The penalty may be reduced without limitation for the criminal offense referred to in Subsection (1) if the perpetrator confesses the act to the authorities first hand and unveils the circumstances of the criminal act.

⁴² Section 349 of the CC.

(1) Any person who enters into an invalid contract:

a) for the acquisition of ownership of agricultural and forestry land;

b) for the acquisition of usufructuary rights or rights of use for agricultural and forestry land;

by way of circumventing the applicable statutory prohibition or restriction, is guilty of a felony punishable by imprisonment between one to five years.

(2) Any person who uses agricultural and forestry land, or collect the proceeds thereof, under an agreement entered into for disguising an invalid contract he has concluded with the objective of circumventing the statutory prohibition or restriction:

a) for the acquisition of ownership of agricultural and forestry land;

b) for the acquisition of usufructuary rights or rights of use for agricultural and forestry land;

is guilty of a felony punishable by imprisonment not exceeding three years, insofar as the act did not result in a more serious criminal offense.

(3) Any attorney, legal counsel or notary public who participates in the conclusion of a contract described in Subsection (1) shall be punishable in accordance with Subsection (1).

(4) The penalty may be reduced without limitation for the criminal offense referred to in Subsections (1) and (2) if the perpetrator confesses the act to the authorities first hand and unveils the circumstances of the criminal act.

statutory prohibition or restriction for the acquisition of ownership of agricultural and forestry land, or of usufructuary rights or rights of use for agricultural and forestry land.

According to the justification of the Ministry, the *protected legal interest* of the criminal offence is twofold: on the one hand, the *public confidence in the reality of contracts relating to agricultural land* and on the other hand the social interest relating to the enforcement of legal norms concerning the sale and use of agricultural and forestry land, and indirectly the *protection of Hungarian land*.⁴³

The *object* of the criminal offence is the *agricultural and forestry land* whose definition can be found in the Act on Transactions in Agricultural and Forestry Land.⁴⁴

The criminal offence has three different type of conducts. The *first conduct* is the *entering into an invalid contract*. Under entering into a contract, the legal transactions of the civil law (such as the signing of a sales contract, the conclusion of a gift contract) have to be understood.⁴⁵ According to the justification of the Ministry of the Criminal Code, an invalid contract means any contract that is considered null and void under the civil law. According to the regulation of the Hungarian Civil Code,⁴⁶ any contract which is incompatible with the law or that was concluded by circumventing the law shall be null and void, unless the relevant legislation stipulates another legal consequence.⁴⁷ Furthermore, a sham contract shall also be considered as null and void, and if such contract is intended to disguise another contract, the rights and obligations of the parties are to be adjudged on the basis of the disguised contract.⁴⁸ Therefore, according to the provisions of the civil law, the contracts which are violating or circumventing the prohibitions and restrictions regarding to the acquisition of the ownership of agricultural and forestry land have to be considered as null and void. Besides the Civil Code, the Act on Arable Land also stipulated that a contract violating the restriction of acquisition of ownership shall be null and void.⁴⁹ Similar provision can be found in the currently effective Act on Transactions in Agricultural and Forestry Land, which states that any contract concluded in violation of the restrictions and/or prohibition provided for in this Act on the acquisition of ownership of land or land use rights shall be null

⁴³ See: Belegi József: A közbizalom elleni bűncselekmények, in: Kónya István (edit.): *Magyar Büntetőjog. Kommentár a gyakorlat számára*, Budapest, HVG-ORAC Kiadó, 2015, 1312; Belovics Ervin: A közbizalom elleni bűncselekmények, in: Belovics Ervin – Molnár Gábor Miklós – Sinku Pál: *Büntetőjog II. Különös rész. A 2012. évi C. törvény alapján*, HVG-ORAC Kiadó, Budapest, 2012, 548; Kőhalmi László: A közbizalom elleni bűncselekmények, in: Polt Péter (edit.): *Új Btk. kommentár, 6. kötet, Különös rész*, Budapest, Nemzeti Közszolgálati és Tankönyvkiadó, 2013, 150; Mezőlaki Erik: A közbizalom elleni bűncselekmények, in: Karsai Krisztina (edit.): *Kommentár a Büntető Törvénykönyvhöz*, Budapest, Complex Kiadó, 2013, 728; Sántha Ferenc: A közbizalom elleni bűncselekmények, in: Görgényi Ilona – Gula József – Horváth Tibor – Jacsó Judit – Lévay Miklós – Sántha Ferenc – Váradi Erika: *Magyar büntetőjog – Különös rész*, Budapest, Wolters Kluwer Kft., 2013, 490.

⁴⁴ Point 17 of Section 5 of the TAFL Act.

⁴⁵ Kőhalmi 2013, 151.

⁴⁶ Act V of 2013 on the Civil Code.

⁴⁷ Section 6:95 of the Civil Code.

⁴⁸ Subsection 2 of Section 6:92 of the Civil Code.

⁴⁹ Section 9 of the AL Act.

and void.⁵⁰ Furthermore, the Act also stipulates that if a contract or any contract term pertaining to the acquisition of ownership of land or land use rights is annulled, the whole contract shall be null and void.⁵¹ It means that the rules of the Civil Code relating to the partial invalidity⁵² do not apply.

The conclusion of an invalid contract, however, does not necessarily mean the perpetration of the criminal offence by itself. The invalid contract must be directed to a specific purpose i.e. to the *acquisition of ownership of agricultural and forestry land* or to the *acquisition of usufructuary rights or rights of use for agricultural and forestry land*.⁵³ The method of the perpetration is the *circumvention of the applicable statutory prohibitions or restrictions*. As it was already mentioned, the detailed rules and the related prohibitions and restrictions related to the acquisition of the ownership of agricultural and forestry land are contained in the Act on Transactions in Agricultural and Forestry Land. In this respect, this criminal offence can be considered as a so-called “*framework criminal offence*”,⁵⁴ since the prohibition in the CC is filled with content by the provisions of a separate law, the Act on Transactions in Agricultural and Forestry Land.

In practice, pocket contracts concluded with the circumvention of the statutory prohibitions and restrictions may take various forms. The best-known methods include the contracting using an intermediary (strawman), the withdrawal of agricultural land from cultivation, the manipulation with the right of preemption, and the sales contracts without date.⁵⁵ In her works, Krisztina Bányai distinguishes three categories of pocket contracts:

(a) *Contracts concluded between the landowner and a foreign person during the existence of the restrictions relating to the acquisition of land ownership, which are leading to or are suitable for the acquisition of ownership* and which result in immediate or future ownership of the land for the foreigner despite the aforementioned restrictions. Firstly, this group includes sales contracts which aim directly at the transfer of the ownership of land, which are submitted to the land register during the existence of the moratorium of land acquisition and which can even be registered due to an erroneous decision. The classical case of this type is the hidden, concealed contracts without date which “remain in the pocket or in the drawer” and wait for a favorable change in the legal environment and for the lifting of the restrictions of land ownership acquisition. Secondly, this category also includes contracts which do not aim directly at the transfer of ownership but the mortgage assuring the contract and the principal can subsequently result in the acquisition of land ownership by a foreign person. Thirdly, the preliminary contracts have to be mentioned, in which the parties undertake to conclude a contract for the transfer of land ownership after the termination of the prohibitions relating to the acquisition of land ownership. Fourthly, this group includes all other contracts, legal

⁵⁰ Subsection 1 of Section 60 of the TAFL Act.

⁵¹ Subsection 3 of Section 60 of the TAFL Act.

⁵² Section 6:114 of the Civil Code.

⁵³ Belovics 2012, 548.

⁵⁴ See: Belegi 2015, 1313.

⁵⁵ Sántha 2013, 490.

transactions and contractual clauses which result the acquisition of land ownership. These transactions can take various forms from the acquisition of land ownership by a maintenance contract through the establishment of forest or pasture holdings to the acquisition of the land ownership through a contribution to a business organization.

(b) *Contracts concluded between the landowner and a foreign person, which do not aim at the acquisition of property, but only to the transfer of the right of use and the right of beneficial enjoyment for the foreigner.*

(c) *Sales contracts concluded between the landowner and a third party (strawman) who is not restricted in the acquisition of the land ownership.* In case of these contracts, the capital of a foreign person stays behind the strawman and the buyer implicitly acts for the interests of the foreigner. The price is given by the person restricted in the acquisition of the land ownership, the name of the strawman is registered and the use of the land is provided to the foreigner by other legal transactions such as the establishment of a mortgage. In practice, this type causes perhaps the most complex problems, as the transaction usually cannot be legally and formally attacked.⁵⁶

Naturally, the abovementioned categorization cannot be considered as an exhaustive list, since the perpetrators seek to circumvent the legal provisions by many other methods or by the combination of these types.⁵⁷

The *second conduct*, enacted by Act VII of 2014, is the *use of agricultural and forestry land and the collection of the proceeds thereof, under an agreement entered into for disguising an invalid contract.* The reason of the criminalization of these conducts was the recognition that the contracting parties seeking to circumvent the restrictions relating to the acquisition of land ownership could be aware that the contract they have concluded would be ineffective because of nullity and that their conduct would be considered as a criminal offense as well. These adverse consequences could be avoided if the parties conclude a different contract which formally does not aim at the acquisition of the land ownership or the right of use, and thereby conceal their real purpose. However, the disguising contract – as it could be seen above – is also null and void according to the provisions of the Civil Code.⁵⁸

Subsection 2 of Section 349 of the Criminal Code does not criminalize the conclusion of the sham contract by itself, this type of conduct has only civil law consequences. The conduct is only punishable if the contract is performed, i.e. if the agricultural and forestry land is used or the proceeds thereof is collected under the disguising contract. It is indifferent that the sham contract has been concluded before

⁵⁶ Bányai 2014, 63-64; Bányai 2016, 214.

⁵⁷ About the different types of pocket contracts aiming at circumventing the prohibitions and restrictions relating to the acquisition of land ownership see: Prugberger Tamás: A mező- és gazdasági földingatlan tulajdonának, használatának-hasznosításának és jogátruházásuk szabályozásának lehetőségei az uniós jog tükrében, in: Csák Csilla (edit.): *Az európai földszabályozás aktuális kihívásai*, Miskolc, Novotni Kiadó, 2010, 238-239; Csák Csilla – Prugberger Tamás: A termőföldek megszerzésére irányuló egyes jognyilatkozatok érvényessége, in: Pusztahelyi Réka (edit.): *A magánjogi kodifikáció eredményei, POT XV. tanulmánykötet. Polgári jogot oktatók XV. Országos Találkozója 2009. június 12-én elhangzott előadások szerkesztett anyaga*, Novotni Alapítvány, Miskolc, 2010, 8-17; Kozma 2012, 353-357; Olajos – Szalontai, 2001 5-6.

⁵⁸ Belegi 2015, 1313-1314., Hornyák 2017, 115-116.

or after the entry into force of the Act (2nd May 2014). The basis of the punishment is that the use of land or collection of the proceeds begins after the 2nd of May 2014 or that the previous use or collection continues after this date. In that regard, therefore, we cannot speak about the retroactive effect of this criminal offence.⁵⁹

The crime is a so-called “*subsidiary offence*” which means that it can only be committed insofar as the act did not result in a more serious criminal offence.

The *third conduct* of the criminal offence is the participation in the *conclusion of an invalid contract* for the acquisition of ownership of agricultural and forestry land or for the acquisition of usufructuary rights or rights of use for agricultural and forestry land by way of circumventing the applicable statutory prohibition or restriction. Any activity that plays a role in the creation of an invalid contract can be considered as participation, i.e. providing of information, legal counseling, drafting or countersigning of the contract.⁶⁰

The criminal offence does not contain any result the perpetrators is required to achieve; therefore, the unlawful acquisition of agricultural and forestry land is a so-called “*immaterial crime*”. The offence is *completed* by the execution of the defined conducts (i.e. by entering into an invalid contract, by using agricultural and forestry land, or collecting the proceeds thereof, and by participating in the conclusion of an invalid contract). The *preparation of the offence is not punishable*, the *attempt* of the crime is not conceptually excluded. Attempt of the criminal offence can be ascertained if the contract has been signed by at least one contracting party but has not been signed by all parties.⁶¹ In the case of participation in the conclusion of a contract, the attempt has no practical significance.⁶²

In case of the Subsections 1 and 2, the *subject* of the offence can be *everybody*. However, the commission of first conduct *necessarily requires more perpetrators*, since a contract can only be concluded at least by two persons.⁶³ In this case all persons who concluded the contract can be held liable as a *direct perpetrator*. The perpetrator of the third conduct needs to have a personal qualification, the direct or joint perpetrator can only be *attorney, legal counsel or notary public* in this case.⁶⁴

All three conducts of the criminal offence can only be committed *intentionally*. Negligent conducts are not punishable. Subsection 1 of Section 349 of the CC also contains a *purpose*; therefore, it can only be committed with *direct intent (dolus directus)*. In this case, the purpose of the perpetrator is the *acquisition of the ownership, usufructuary rights or rights of use of agricultural and forestry land*.⁶⁵ The perpetrator is required to know that the object of the contract is agricultural and forestry land, that the contract aims at the

⁵⁹ Belegi 2015, 1314.

⁶⁰ Belovic, 2012, 548-549; Kőhalmi 2013, 152; Mezőlaki 2013, 729.

⁶¹ Belegi 2015, 1313.

⁶² Mezőlaki 2013, 729.

⁶³ Section 6:58 of the Civil Code: A contract is concluded upon the mutual and congruent expression of the *parties'* agreement intended to give rise to obligations to perform services and to entitlements to demand services.

⁶⁴ Belovics 2012, 549; Mezőlaki 2013, 729.

⁶⁵ Mezőlaki 2013, 729; Sántha 2013, 491.

acquisition of the ownership, the usufructuary rights or rights of use of agricultural and forestry land, and that the contract circumvents the applicable statutory prohibition or restriction. In case of Subsection 2 of Section 349, the perpetrator must also be aware that the agricultural and forestry land is used or the proceeds thereof is collected under an agreement concluded for disguising an invalid contract. The perpetrator of the criminal offence under Subsection 3 of Section 349 must be aware that the contract is invalid due to the circumvention of the prohibitions or restrictions relating to the acquisition of ownership. Because of the lack of the special purpose, however, the latter two conducts can be committed with *direct* and with *indirect intent (dolus eventualis)* as well.

Subsection 4 of Section 349 of the CC provides for a *possibility for the reduction of the penalty without limitation*. On this basis, penalty may be reduced without limitation for the criminal offense if the perpetrator confesses the act to the authorities first hand and unveils the circumstances of the criminal act. The reduction without limitation applies only to perpetrators who committed criminal offences under Subsections 1 and 2 of Section 349, while the attorneys, legal counsels or notary publics who participated in the conclusion of a contract are excluded from this possibility. The confession has to be made at the time when the authorities have not yet received any notification or complaint in connection with the criminal offense. The awareness of the criminal offence means an official information that is sufficient to initiate an investigation against at least one concrete person. The mere suspicion without concrete facts is not sufficient. The awareness of the authorities, however, is an objective circumstance, therefore it is indifferent whether the perpetrator knew about it or not. A further requirement of the possibility for the reduction of the penalty is that the perpetrator must unveil the circumstances and all relevant details of the criminal offence, including the identity of the other persons involved in the offense.⁶⁶

In principle, the *number of the criminal offense committed* orientate to the number of contracts concluded. However, if the perpetrator acquires the ownership of more land in one contract, the number of the criminal offense committed orientate to the number of the land acquired. If the perpetrator participates in the conclusion of the contract more than once (e.g. legal counseling, then drafting or countersigning of the contract), only one criminal offence is committed.⁶⁷ If the perpetrator intends to register the acquired ownership or other rights of use into the land register on the basis of the invalid contract concluded, he commits *intellectual forgery of public documents*.⁶⁸ next to this criminal offence as well.⁶⁹

⁶⁶ Mezőlaki 2013, 730.

⁶⁷ Mezőlaki 2013, 730.

⁶⁸ Point c) of Subsection 1 of Section 342 of the CC

⁶⁹ Sántha 2013, 491.

5. Final remarks

Agricultural and forestry land is considered as a *fundamental national resource of Hungary*, therefore *statutory prohibitions and restrictions concerning the acquisition of their ownership are constitutionally justified*. Since 1994, the Hungarian legislator has imposed restrictions on the acquisition of land ownership, however, their scope has changed significantly in the past almost 25 years. Initially the legislator only allowed the acquisition of the land ownership for domestic natural persons with some restrictions, while foreign natural or legal persons could not acquire ownership of land. In 2004, the legislator extracted the nationals of EU Member States from the concept of foreigner, however, their right to acquire land ownership was more limited than those of the domestic citizens. However, after the expiry of the moratorium of land acquisition in 2014, Hungarian citizens and EU nationals are entitled to acquire land ownership under the same conditions, but the size of the obtainable land is still limited.

Simultaneously with the introduction of prohibitions and restrictions on the acquisition of land ownership, the attempts to circumvent them also appeared. Generally *pocket contracts* mean contracts whereby the ownership of the land is acquired by persons who are not entitled to acquire land ownership or when the extent of obtainable land exceeds the limits prescribed by the legislator.⁷⁰ Pocket contracts can primarily be sanctioned by means of *civil law* and *administrative law*, but the special importance of the protected value requires the application of *criminal penalties* as well.

The effective Hungarian Criminal Code criminalizes in a separate criminal offence with the name of *unlawful acquisition of agricultural and forestry land* the conclusion of an invalid contract by way of circumventing the applicable statutory prohibitions or restrictions, the participation in the conclusion of such a contract and, since the amendment in 2014, the use of the agricultural and forestry land and the collection of its proceeds under an agreement entered into for disguising an invalid contract. However, after five years of the entry into force of the Criminal Code it has to be stated, that the criminal offence *does not have significant judicial practice*. Even in cases where the criminal offence could have presumably been ascertained, the perpetrators were charged not with unlawful acquisition of agricultural and forestry land but with other criminal offences, e.g. misappropriation of funds, fraudulent bankruptcy, capital investment fraud, breach of accounting regulations or forgery of public documents.⁷¹ In the judicial practice several difficulties emerged mainly due to the problem of the adjudication of the nullity of the contracts. The criminal offence remains silence in the question whether the contract in question must be declared null and void by a civil court before the criminal proceedings or the criminal judge is required to adjudicate in this civil law question during the criminal procedure. Both of these solutions would have serious disadvantages. If the nullity of the contract concerned had to be ascertained by a civil court in advance, it would entail the prolongation of the criminal

⁷⁰ Kozma 2012, 352.

⁷¹ See for example: Decision No. 3.B.448/2010/53. of the Tribunal of Tatabánya, Decision No. 26.B.7/2011/210. of the Tribunal of the Capital, Decision No. Bf.11/2013/6. of the Court of Appeal of Győr.

proceedings which would not be in line with the purpose of the legal institution. However, if the nullity of the contract had to be determined in criminal proceedings, the criminal judge should rule on a matter which is far from his jurisdiction, and to which the criminal judges – similarly to the adjudication of the civil law claims – are extremely reluctant.⁷²

Therefore, it can be stated that so far, the criminal offence has not reach its aims as hoped, although we do not think that it has to be abolished. However, the development of an appropriate judicial practice is indispensable, since only this makes criminal law appropriate to provide a sufficient deterrence to the criminal offenders.

⁷² Bányai 2016, 227-228.