

Leasehold Payments from the Perspective of the Hungarian Chamber of Agriculture*

FEKETE, KRISTÓF BENEDEK**

ABSTRACT In this study, the author presents and analyses the proportionality examination of leasehold contracts in the light of recent legislative changes from the viewpoint of the Hungarian Chamber of Agriculture, in this framework, the paper also deals with the practice of the agricultural administrative bodies. Starting from the relevant constitutional and statutory provisions, the study describes, through pragmatic examples, the obligations and possibilities of the Hungarian Chamber of Agriculture regarding the disproportionality of leasehold payments, as well as its emerging practice. The study concludes that the Hungarian Chamber of Agriculture is real support for agricultural administrative bodies in their procedures for determining the disproportionality of leasehold payments and that their decisions can reflect the value and interests of agriculture, as enshrined in law.

KEYWORDS leasehold contract, amendment of leasehold contract, disproportionate leasehold payment, preemptive leasehold right, decision of the agricultural administrative body

1. Introduction

According to Paragraph (2) of Article P) of the Fundamental Law of Hungary, the use of arable land – which as a natural resource constitutes the common heritage of the nation, and the protection, maintenance, and preservation of which for future generations is the duty of the state and of all¹ – shall only be laid down based on limits and conditions set out in a cardinal Act. Accordingly, Act CXXII of 2013 on Transactions in Agricultural and Forestry Land (hereinafter: the Land Act), taking Act V of 2013 on the Civil Code (hereinafter: the Civil Code) as background provision, incorporates these

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** PhD student, University of Pécs, Faculty of Law, Doctoral School of Law.

¹ See Paragraph (1) of Article P) of the Fundamental Law of Hungary.

requirements, in which process the Hungarian Chamber of Agriculture, Food and Rural Development (shortly: Hungarian Chamber of Agriculture, hereinafter: HCA or Chamber) has a prominent role.

As a result of the amendment² to the Land Act, from 1 July 2022, the Chamber shall make a declaration to the Agricultural Administrative Body (hereinafter: AAB) during its proceedings in connection with the non-proportionality of leasehold contracts. In the event of such a declaration, the Chamber will have the status of a client in the said procedure and will have the right to bring an action in an administrative lawsuit against a decision of the AAB approving or refusing a leasehold contract.³

This paper aims to present the practice of the Chamber and the AAB concerning the assessment of the lack of value of the leasehold payments, based on the recent legal environment of the leasehold contracts in Hungary.

2. Examination phases of the leasehold contract

The authority approval of a leasehold contract can be divided into three parts: (i) a preliminary examination phase, (ii) a publication phase, and (iii) a post-publication examination phase.⁴

a) In the case of leasehold of agricultural land, according to the rules in force, the leasehold contract must first be submitted to the AAB, which, in its preliminary examination, will examine it solely on its content and formal requirements regarding its compliance with conditions for validity and entry into effect,⁵ and will decide within 15 days for the refusal of approval of the leasehold contract, or – adopt a ruling declaring the contract fit for public disclosure and – order the publication of the contract. However, if the leasehold

² See Subsection (3) of Section 90 of Act CL of 2021.

³ See Subsection (2b) of Section 53 of the Land Act.

⁴ The Land Act does not use these terms, here they are used according to the criteria of each procedural phase, for easier distinction. Cf. Zoltán Szilvás, Diána Farkas, and Zoltán Gósz, *Földügyi szabályok változása* (Budapest: Nemzeti Agrárgazdasági Kamara, 2022), 27.

⁵ For test criteria see Paragraph (2) of Article 51 of the Land Act, and Paragraph (2a) of Article 53 of Act CCXII of 2013 on Certain Provisions and Transitional Arrangements related to Act CXXII of 2013 on Transactions in Agricultural and Forestry Land (hereinafter: the Land Act2). It should be noted that, according to the wording of the Land Act, there is no question of “*entry into effect*”: not only ex-post but also ex-ante. The entry into effect means that the legal effect of the regulations of the law in question has been or is having a legal effect. The examination of compliance with the conditions laid down in the act is not an entry into effect because it does not yet have legal effect. Sociologically, it is possible to examine how many contracts have been submitted that have not complied with the requirements, which of these requirements have not been met, etc., but this is not the issue here, but whether the contract has been submitted under the legal requirements. If not, there is no approval. This is a formal legal control, not the entry into effect of the legislation.

contract is not one of the contracts subject to approval by the AAB, it must be sent only to the notary of the municipality competent.⁶

b) The AAB communicates its interim decision to the lessor and the lessee under the leasehold contract and sends the leasehold contract to the notary of the municipality competent where the land is located. The notary then publishes the leasehold contract through a notice on the government portal (www.hirdetmenyek.gov.hu) to the holders of the right of first refusal for lease. Compared to the previous practice, the notary will only communicate the leasehold contract to the holders of the right of first refusal for lease after the suitability for publication has been established by the AAB. The holder of the right of first refusal may be, within a preclusive period of fifteen days from the first day of disclosure, entitled to declare whether to accept the leasehold contract or waive his right of first refusal for lease.⁷ The notary prepares a list of the legal statements received, within eight days after the deadline prescribed for the submission of statements, and sends it to the AAB together with the original of the leasehold contract and with the legal statements, accompanied by a notice of confirmation sent by the body operating the government portal concerning publication and removal.⁸

c) From among the documents sent by the notary, the AAB concerned examines and verifies the declaration(s) of acceptance first of all, solely based on content and formal requirements, and if it detects a problem of compliance with the legal requirements, it considers that the holder of the right of first refusal for lease has not exercised his preemptive leasehold right.⁹ Once again, the AAB has 15 days to examine the documents sent by the notary upon receipt and to decide whether to refuse the leasehold contract. If it does not refuse to approve the pre-leasehold contract and several holders of the right of first refusal for lease have submitted a statement of acceptance, the AAB will rank the holders

⁶ An improvement compared to the previous requirements is that only the documents proving the holders of the right of first refusal for lease, which are not contained in a public register, need to be attached to the statement of acceptance submitted. See Szilvás, and Farkas, and Gósz, "Földügyi szabályok változása," 29.

⁷ See Subsection (3) of Section 49 of the Land Act.

⁸ See Section 50 of the Land Act.

⁹ See Subsection (3)-(4) of Section 51 of the Land Act. Such, if the AAB considers that the statement of acceptance (i) does not comply with the requirements relating to formalities; (ii) is not that of the holder of the right of first refusal for lease; (iii) is that of the holder of the right of first refusal for lease, however, it does not support the legal basis for the right of first refusal for lease, or it contains no information as to the act underlying the right of first refusal for lease, the documents underlying the right of first refusal for lease have not been attached, or that the right of first refusal for lease is not based on the act indicated, or on the ranking determined by law, it does not contain the statutory commitments and statements prescribed by law relating to the ranking for the right of first refusal for lease designated by the holder of the right of first refusal; or (iv) is that of the holder of the right of first refusal for lease, however, it does not contain the statements of the holder of the right of first refusal with the required content. See Subsection (5) of Section 51 of the Land Act.

of the right of first refusal for lease in the order established by the act and draw up a list of them.¹⁰ If more than one lessee is in the same ranking, it is the lessor who decides with whom he wishes to contract.

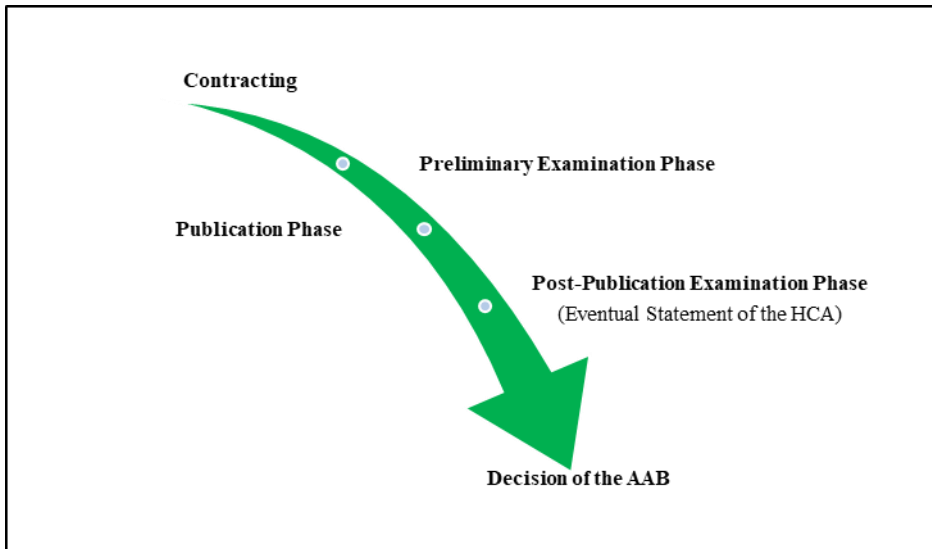


Figure 1 – Examination phases of the leasehold contracts (own ed.)

Under the new rules, as can be seen from Figure 1, the Chamber can make a statement on the disproportionality of the leasehold payments at the post-publication examination phase, but before the decision of the AAB, and if it considers that there is a disproportionality, it can indicate it to the AAB, which must take note of this indication.

3. Examination of the disproportion of the leasehold payment

The examination of leasehold contracts is in principle a matter for the competent AAB, which may be supplemented by any declaration by the HCA that it considers certain leasehold payments to be disproportionate. To establish this, the Chamber will conduct an ex officio interim procedure and will then take a statement, which it will communicate to the AAB. Thus, based on a teleological interpretation, the Land Act itself imposes an objective obligation on the Chamber to notify the AAB of all disproportionate leasehold contracts. However, the practical implementation of this may be problematic for several reasons.

¹⁰ See Subsection (6)-(7) of Section 51 of the Land Act.

3. 1 Detection of disproportionate leasehold payments

The first issue to be addressed is the detection of the contracts in question. On the one hand, the Chamber's objective internal information provides an approximation of the average municipal/district leasehold payments, which of the so-called contract monitoring software categories according to the leasehold payment, depending on the leasehold payments may be of concern, i.e., excessive.¹¹ On the other hand, in practice, it is the farmers themselves who report to the Chamber that they have observed an excessive level of leasehold contract, as they know and understand the local conditions best. The Chamber can therefore intervene accordingly.

3. 2 Aspects of the examination of a leasehold contract considered to be disproportionate

*According to an earlier amendment¹² of the Land Act, it is no longer necessary to examine whether the disproportionate value of the consideration under the leasehold contract was such as to keep the pre-lessee away since *ipso iure the disproportionality in value is in itself a ground for refusal*. Under the Paragraph g) of Subsection (1) of Section 53 of the Land Act, from 1 January 2022, the AAB will refuse to approve a leasehold contract if the consideration fixed in the leasehold contract (leasehold payment) and the value of other forms of charges fixed in the leasehold contract is disproportionate.*

Accordingly, the amount of the leasehold payment shall be considered disproportionate if the land in question offers no advantageous characteristics that would justify any deviation from locally customary leasehold payment. Such advantageous characteristics are named in Paragraph (2a) of Section 53 of the Land Act as

- a) the location of the land,
- b) the quality of the land [gold crown (hereinafter: GC) value],
- c) possibility of irrigation,
- d) capacity of the soil to be cultivated, and
- e) whether it can be accessed from public roads.

a) When the land is inspected by the Chamber, its geographical location (within or outside the limits of a settlement, and allotment garden), its type of land registered, and the shape of the parcel of land (e.g. wide slab or so-called narrow belt) must be determined. The relationship of the parcel of land to other parcels of land whether the cropland is adjacent to other cropland or bordered

¹¹ The program shows the leasehold contracts in three bands. A green band shows the lowest contracts, a *yellow band* shows the medium-high contracts, and a *red band* shows the high, exaggerated contracts. Note that the program differentiates based on information provided by the Chamber, which is updated periodically.

¹² See Subsection (1) of Section 90 of Act CL of 2021.

by forest land or stream) and its distance from the nearest settlements should be considered.

b) The quality of the land is primarily defined in terms of its GC value, which is accordingly emphasized by the act. Consequently, it is useful to compare the GC value per hectare of land as recorded in the real estate register with the values of the usual land in the area and to decide whether the land value is the same as the usual land values in the area or, if different, in what direction.

c) In terms of the possibility of irrigation, the land is considered to be above average if it is connected to a ditch, a canal, a river, or other water abstraction system that provides direct irrigation and, given its size, can be economically supplied with water, hence the irrigability of the land is feasible. In my view, if an area has a direct connection to an irrigation facility in terms of irrigability, this can only be taken into account if it is effectively feasible (e.g. in many cases this could not be taken into account in the 2022 drought period, as water supply to some areas was not guaranteed).

d) The aspects of the capacity of the soil to be cultivated show a very rich image. Accordingly, the cultivability of the land is essentially determined by its topography and slope, as well as by the quality of the soil and its attributes (nutrient content). At this point, it is also necessary to consider what crops can be grown on the land and whether, given the size and location of the parcel of land, it is viable to practice precision farming¹³ or whether the land can only be cultivated conventionally.

e) The accessibility of the land by public road does not require further explanation. It is necessary to examine the length and quality of the road that is necessary to reach the land (e.g. the land can be reached from Pécs by the 1200 m long road called “X”), which means that the accessibility of the real estate can be classified as average or not, depending on this and of course considering the characteristics of the area.

On the grounds that the second sentence of Subsection (2a) of Section 53 of the Land Act uses the phrase “may”, the Chamber may also examine a broader scope (e.g. it may take into account, on the basis of the facts known to the public and its best knowledge, the locally or peripherally customary leasehold payment concerned, or statements made by those holders of the right of first refusal for lease who would otherwise have taken a statement of acceptance for the contract advertised but have been deterred from exercising that right by the

¹³ Precision farming is “[a] set of technical, informatical, information technology and cultivation technology applications that make production and farm machinery management more efficient”, and, like conventional farming, aims to produce high-quality and safe food by making most efficient use of available resources (inputs, water, fuel, etc.) through the application of digital technologies. See Szilvia Erdeiné Késmárki–Gally, “A precíziós gazdálkodás jelentősége a mezőgazdaság versenyképességében,” *Multidiszciplináris kihívások, sokszínű válaszok*, no. 2 (2020): 44-45.; Tímea Gál, Lajos Nagy, Lóránt Dávid, László Vasa, and Péter Balogh, “Technology Planning System as a Decision Support Tool for Dairy Farms in Hungary,” *Acta Polytechnica Hungarica* 10, no. 8 (2013), 231–244.

unrealistically high rent), although in my view, it must address these points in its statement. It should also be pointed out that in the case of a deviation from the average leasehold payment, the reason for this must always be justified in the contract, with the burden of proof of the proportionality of the rent being on the lessor, at the request of the AAB, during the procedure for the approval of the leasehold contract.¹⁴

Under the Land Act, uncertain future events and circumstances within the lessee's discretion and contingent upon his or her willingness to undertake risks may not be taken into account.¹⁵ Thus, for instance, it is not possible to take into account in this context the fact that the road network development plans foresee an improvement in the accessibility of the land concerned in two years, or a possible change in the type of land registered.¹⁶ It must be stressed that the above lists are not exhaustive but illustrative, i.e. it was not possible or appropriate to lay down all the cases in the act, and the various examples will be gradually developed in practice.

3.3 "Accepted leasehold payment"

a) In examining the disproportionality of the leasehold contract, the Chamber may take the opinion that the leasehold payment is proportionate. In such a case, it will inform the AAB, which, if it considers that the content and formal requirements of the leasehold contract are in order, will establish a ranking in the light of any statements of acceptance and approve the leasehold contract with the one which is higher in ranking. In the event of equal ranking, the lessor shall approve the leasehold contract at his discretion.

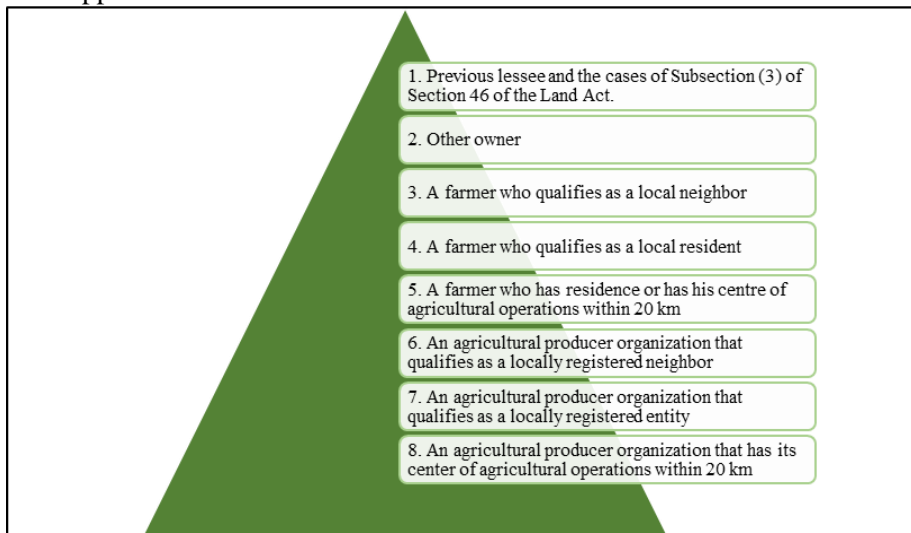


Figure 2 – Ranking of holders of the right of first refusal for lease (own ed.)

¹⁴ See the third and fourth sentences of Subsection (2a) of Section 53 of the Land Act.

¹⁵ See Subsection (2a) of Section 53 of the Land Act.

¹⁶ See Szilvás, Farkas, and Gósz, "Földügyi szabályok változása," 31.

b) Pertaining to the disproportionality of the leasehold payment, in the event that the Chamber takes the opinion that the leasehold payment is disproportionate, several situations may arise.

ba) In the most obvious case, the AAB will find the Chamber's statement to be well-founded and, after reviewing it, will also conclude that the leasehold payment is disproportionate. In such cases, it refuses to approve the leasehold contract. [However, in a possible remedy procedure, the judge, after consulting the forensic expert, may decide to consider the refusal of the leasehold contract on the ground of leasehold payment as unjustified interference with the freedom of contract, since the lessor has an interest in being able to leasehold the land at the highest possible price. This can occur in particular where the Chamber interferes “impersonally” with the freedom of contract because of a leasehold contract that is perceived to be high, where, for example, there is not even an opposing party (e.g., a holder of the right of first refusal for lease who is kept out by the high price).^{17]}

bb) In case the Chamber observes a higher price than the locally customary (average) lease charges, it will contact the AAB to await the Chamber's statement in the leasehold contract approval procedure. It is important to note, however, that if a statement of acceptance of the leasehold contract is submitted in the posting procedure (either alone or in several persons), the leasehold payment will not be considered disproportionate. The practice that seems to emerge from the examination of leasehold contracts is that if a contract is suspended but is considered to be excessive, but is applied for, the local farmers are accepting and legitimizing the price. What is more, if they have made a statement of acceptance and the AAB has approved it with the holder of the right of first refusal for lease, it does not even examine the merits of the Chamber's sign. This, moreover, would not be reasonable or justified in the light of the previous points.

bc) It may also be the case that the parties have entered into a leasehold contract for a disproportionate amount for which there are other applicants, so that it is not considered disproportionate in the light of the above, but, for instance, the lessee under the contract reaches the land acquisition limit. In such a case, it is considered as if the contract had not been concluded, and consequently, no further application can have any legal effect.¹⁸ Similarly, a leasehold contract where the leasehold payment is paid in advance is null and void, as the

¹⁷ This also includes the practice whereby, as in the case of a contract of sale, a statement may be made by someone who is prevented from making a statement of acceptance by the disproportionately high leasehold payment, but who would, in each case, have already made a statement at the normal market price in the locality. This is particularly relevant where no statement of acceptance is made for a contract, as an additional aspect is the absence of the pre-lessee, which is “proven” to be caused by the disproportionate value.

¹⁸ Cf. Decision No. 2.K.700.739/2021/6. of the Pécs Regional Court.

provisions of Subsection (2) of Section 50 of the Land Act² exclude this.¹⁹ Without giving further examples, it must be seen that the material defect in the contract “overshadows” the position of the Chamber (the client's statement) by “merely” indicating to the contracting parties that they will, in addition to the leasehold payment, most probably be rejected.

c) It may be added that to agree on or to continue to apply for a high leasehold payment is not “without risk” for the following reasons. It is perfectly natural for the lessor to want to leasehold payment his land at the highest possible price, but it may be the case that, for example, two or three times the local average (e.g., HUF 300 000-450 000/ha instead of HUF 150 000/ha for arable land). In such a case, it is reasonable to think that this high leasehold payment is intended to keep out those with the holders of the right of first refusal for lease, as there is little chance that even an above-average property can be farmed profitably. It is much more likely that a high price is agreed 'on paper', with a much lower leasehold payment being met in the background. In addition to being illegal, this is risky because, on the one hand, the lessor may demand contractual performance, which would break the background agreement, and on the other hand, it would distort the reputation of the real management, or the agreed leasehold payment would be included in the locally customary lease charges. It should be noted, thus, that a leasehold payment can only be accepted if it is verily paid, otherwise, it will be merely hypothetical.

3. 4 Changing the leasehold payment by amendment of the contract

There are two ways of changing the leasehold payment by amending the contract, so generally, there are two cases to be discussed.

a) If the contract amendment is to increase the leasehold payment, there are also two options. The first is for contracts of not more than 10 years, and the second is for contracts of 10 years or more.

aa) If the leasehold contract has been concluded for a period not exceeding 10 years, the change of the leasehold payment makes the leasehold contract subject to publication, therefore all the procedures described above apply, meaning that the holders of the right of first refusal for lease may also apply for it.²⁰

ab) If, however, the leasehold contract is concluded for a period of 10 years or more, Section 50/A of the Land Act² provides for a procedure for amending the leasehold payment without publication.

¹⁹ In the official approval of the leasehold contract, the AAB must primarily decide based on the provisions of the Land Act and the Land Act² on a leasehold contract, the provisions of the Civil Code are only secondary. Thus, if the contract contains cogent provisions on a contractual term, an agreement by the parties to the contrary is liable to circumvent the provisions of the Land Act². See Point [36]–[37] in the Reasoning of Decision No. Kfv.II.37.695/2021/6. of the Curia of Hungary.

²⁰ See Section 39 of the Land Act.

Under the Land Act², either party may request an amendment of the leasehold contract after 5 years from the conclusion of the contract, and every 5 years thereafter, in order to adjust the leasehold payment to the locally customary lease charge applicable at the time of the initiation, provided that at least 5 years of the leasehold term remain.²¹ In any such request, the market leasehold payment must be determined on the basis of a forensic expert's opinion.²² Furthermore, if the leasehold payment established differs by 20% or more from the leasehold payment under the leasehold contract, the opposing party is entitled to terminate the leasehold contract by the end of the marketing year within a time limit of 30 days from the date of receipt of the request.²³ In event that the opposing party does not agree with the request, but there is no possibility of termination or does not wish to terminate the contract, it may, within 30 days of receipt of the request, ask the court to determine the market leasehold payment; otherwise the leasehold payment is considered to be amended to the extent indicated in the request.²⁴ If the court also takes the view that the leasehold payment differs by at least 20% from the previous leasehold payment, the opposing party is entitled, *mutatis mutandis*, to 30 days' notice of termination from the date on which the court's decision becomes final.²⁵

b) If the amendment to the contract is aimed at reducing the leasehold payment, it must be approved by the AAB,²⁶ unless the reduction is based on a court decision.²⁷ With the focus on reducing the leasehold payment, a substantial change in market conditions must be credibly demonstrated, except in the case of a reduction based on a court decision.²⁸ It should be stressed that, in the case of a reduction in the rate of the leasehold payment, the AAB will only examine the legal conformity of the newly established rate.²⁹ The question may be raised whether a subsequent reduction of a rate which may appear excessive but which, because of further applications, is nevertheless deemed acceptable, does not circumvent the act. In such a case, the AAB may refuse to approve the contract amendment if it considers that the subsequent reduction of the leasehold payment would result in an imbalance in value because the original, much higher leasehold payment was only agreed to keep other holders of the

²¹ However, this is conditional on at least 5 years remaining on the leasehold contract. See Subsection (1) of Section 50/A of the Land Act².

²² See Subsection (2) of Section 50/A of the Land Act².

²³ See Subsection (3) of Section 50/A of the Land Act².

²⁴ The court determines the market leasehold payment for the starting date indicated in the request. See Subsection (4) of Section 50/A of the Land Act².

²⁵ See Subsection (3) of Section 50/A of the Land Act².

²⁶ The contract amending the leasehold contract, or the leasehold contract consolidated with the amendments (hereinafter: amended contract) shall be sent to the lessee for approval by the MISZ within 8 days of its signature. See Subsection (2) of Section 50/A of the Land Act².

²⁷ See Subsection (1) of Section 58 of the Land Act.

²⁸ See Subsection (1a) of Section 58 of the Land Act.

²⁹ See Subsection (3b) of Section 58 of the Land Act.

right of first refusal for lease away.³⁰ The principle of administrative silence should also be highlighted here, meaning that if the AAB does not take a decision within 30 days of receipt of the amended contract or does not notify the contracting parties of the extension of the deadline, in such a case, the approval of the amended contract shall be deemed to have been approved on the day following the expiry of the said deadline.³¹ Provided that the AAB refuses to approve the amended contract within that period, it shall, in its decision to that effect, specify the deadline, the provisions and the legal provision by which the parties must amend the contract to obtain approval.³²

c) The specific case of amendment of the leasehold contract is laid down in Subsection (7) of Section 50/A of the Land Act², according to which, where the leasehold contract has been concluded with the previous pre-lessee replacing the lessee under the leasehold contract, the new lessee may take the initiative previously expressed, irrespective of the duration of the leasehold contract and for the first time within 6 months of contracting. In such a case, the court fixes the market leasehold payment retroactively from the date of entry into force of the contract.

4. Summary

It should be stressed that the starting point for the examination of leasehold contracts is that the Chamber is not involved in the procedure as a public authority but as a client. Accordingly, it may make a client statement, as described above, but the AAB must take this into account in any event, although it may depart from the Chamber's position in its decision. Based on what is known so far, the AAB has in all cases taken into account the statement of the Chamber, but there may be exciting lessons to be learned in the future if the AAB takes a different position from the Chamber or if its decision is "tested" in court. Important lessons may be drawn in the future from the related judicial practice, which is also still to be clarified and which, in time, will be evaluated in the light of what has already been said.

³⁰ Cf. Zsolt Orlovits, László Kovács, Tibor Csegődi, Márton Balázs Battay, István Cseszlai, and Balázs Györffy, *Földforgalmi szabályozás* (Budapest: Nemzeti Agrárgazdasági Kamara, 2015), 69.

³¹ In this case, the AAB shall, at the request of the lessee, endorse the amended contract by Subsection (2) Section 55 of the Land Act. See Subsection (3)-(4) of Section 58 of the Land Act.

³² The decision must contain a warning that, in the event of the expiry of the time limit without a result, the leasehold contract shall continue to have the same content as the original contract between the contracting parties. See Subsection (5) of Section 58 of the Land Act.