

EU's Rules on Alien Land Ownership in the Context of the EU Single Market

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ABSTRACT: This article examines EU's rules on alien land ownership in the context of its single market. As the free movement of goods simply involves cross-border transfer of goods, without any movement of nationals, the issue of land ownership does not arise in that case. Therefore this article will examine the rules on alien land ownership in the context of EU free movement of people, services and capital. It suggests that the implementation of the EU's Principles on the freedom of people, services and capital has guaranteed the elimination of all restrictions applied to EU nationals in respect of land ownership, while on the other hand the EU has in certain ways allowed member states to maintain restrictions against nationals of non-EU members in respect of the acquisition of real estate. Furthermore, as the exceptional rules on the free movement of people, services and capital, the member states can adopt the transitional measures on real estate investment providing for the differential treatment for foreign nationals and residents after its accession to the EU. The member states are also entitled to taking discriminatory measures on the grounds of public policy, public security or public health as long as the proportionality requirement is fulfilled.

Key Words: Alien Land Ownership; EU Single Market; Transitional Measures; General Derogations

I. INTRODUCTION

This article examines EU's Rules on alien land ownership in the context of its single market. As the separate economies of the member states have become integrated into a single EU economy, the EU has been at the forefront of creating transnational regulation and legislation, the objectives of which are the free movement of goods, capital, services, and people—the EU four freedoms—within its 27 member states, which excludes the UK. As the free movement of goods simply involves cross-border transfer of goods, without any movement of nationals, the issue of land ownership does not arise in that case. Therefore this article will examine the rules on alien land ownership in the context of EU free movement of people, services and

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capital. It will first consider the way land ownership is regulated in the context of EU single market law with respect to the free movement of people, services and capital. It then moves on to explore the EU transnational legislation involving the member states' national regulatory regime and general derogation rules involving public policy, public security or public health and their impact on land ownership by foreigners. Finally it concludes.

II. RULES ON ALIEN LAND OWNERSHIP IN THE CONTEXT OF FREE MOVEMENT OF PEOPLE, SERVICES AND CAPITAL

2.1 Rules on Alien Land Ownership within the Sphere of Free Movement of People

2.1.1 Treaty

TFEU Article 45 establishes the principle of free movement of workers within the EU.¹ According to Article 45(3), freedom of movement of workers entails the right “to stay in the Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action”.

Access to housing and ownership of property are regarded as a corollary of freedom of movement for workers and an essential aspect of their residence in another member state. As a result, they are covered by the prohibition of discrimination against workers in member states, as laid down in Article 45 of TFEU.²

2.1.2 Regulation

Furthermore, according to Regulation (EU) No 472/2011 on freedom of movement for workers within the EU, a worker who is a national of one member state and employed in the territory of another member state should “enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership of the housing he needs”.³ The worker “may, with the same right as nationals, put his name down on the housing lists in the region in which he is employed, where such lists exist, and shall enjoy the resultant benefits and priorities.”⁴ Access to housing and the ownership of property, as set out in these provisions, is a corollary of both freedom of labor movement and of capital movement and is thus covered by the general prohibition of discrimination laid down in Article 18 TFEU.

2.1.3 The Directive and Its Implementation⁵

Directive 2004/38 on the rights of citizens of the EU and their family members to move and reside freely within the territories of the member states gives all EEA (European Economic Area) citizens the right to free movement and residence across the EEA, as long as they are not an undue burden on their country of residence and hold comprehensive health insurance.⁶

¹ Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), 30 March 2010 OJ C83 47, Article 45.

² See Article 9(1), Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on Freedom of Movement for Workers within the Union, 27 May 2011 OJ L141 1 (hereinafter “Regulation (EU) No 492/2011”), (previously Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on Freedom of Movement for Workers within the Community, 19 October 1968 OJ L257 2); see also Sparkes, P., *European Land Law*, (Hart Publishing 2007), pp.49-56.

³ See 2011 Article 9(1) Regulation (EU) No 492.

⁴ *Ibid.*, Article 9(2).

⁵ The EU legislation covers agreements, directives, regulations and decisions, among which regulations are directly applicable to member states and take effect without the need for implementation. With regard to directives, member states are required to transpose and implement EU law in their own national legal system.

⁶ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States, 30 April 2004 OJ L158 77, Article 7(1).

2.1.4 Case Law

In the case of *Commission EC v. Germany*,⁷ the Court of Justice of the European Communities declared that the provisions of German law, by granting only persons liable to unlimited taxation of income a property subsidy on owner-occupied dwellings, placed other persons at a disadvantage and therefore constituted an obstacle to the rights guaranteed under Articles 18, 39 and 43 of the Treaty Establishing the European Community (EC).⁸ Article 18 lays down in general terms that every citizen of EU has the right to move and reside freely within the territories of the member states, while specific rules are set out in Article 39 with regard to freedom of movement for workers, and in Article 43 with regard to freedom of establishment.⁹ It is clear that differential treatment between nationals or residents and others, regarding whether or not they are entitled to the property subsidy, impedes such freedoms.

Although there is a well-established case law of allowing such differential treatment if it is found to be in the public interest, in this case, according to the Court, the proposed objective of ensuring an adequate supply of housing, claimed by Germany, did not justify such differentiation, as the objective could be more easily achieved if the advantaged group of persons chose to establish their residence in another member state rather than in Germany.¹⁰

2.2 Rules on Alien Land Ownership within the Sphere of Freedom of Establishment and Freedom to Provide and Receive Services

Article 49 TFEU prohibits restrictions on the freedom of establishment in member states, and according to Article 50(2)(e), this means that the European Parliament, Council and Commission are required to carry out certain duties, including enabling a national of one Member State to acquire and use land and buildings situated in the territory of another Member State, in so far as this does not conflict with the principles laid down in Article 39(2).

Accordingly, the right of establishment is considered to guarantee the right to real property, for the nationals of member states of the EU.

The General Programme for the Abolition of Restrictions on Freedom of Establishment and the General Programme for the Abolition of Restrictions on Freedom to Provide Services, with a view to implementing the provisions of TFEU, state that restrictions on the acquisition, use and disposition of real property by foreign nationals constitute a hindrance to freedom of establishment and free movement of services, as they may limit or impose conditions on the power of the nationals of member states to exercise their treaty rights effectively. Therefore such restrictions fall within the scope of those measures those have to be abolished.¹¹

In the case of *Commission v. Italy*, Italy's government contended that there was no direct link between the pursuit of occupations by non-nationals and their right of social housing or reduced-rate mortgage loans as the latter only limited the facility relating to the exercise of the rights enshrined in the provisions of the Treaty Establishing the European Economic Community (EEC Treaty).¹² Therefore, it claimed, making Italian nationality a requirement for being allocated social housing could not be regarded as an infringement of treaty rules with respect to the right of establishment and freedom to provide services.¹³ However, the Court stated there was a link as social housing could alleviate a person's financial burden and

⁷ Case C-152/05, *Commission EC v. Germany* [2008] I ECR 39 (hereinafter "*Commission EC v. Germany*").

⁸ See Consolidated Version of the Treaty Establishing the European Community (EC Treaty), 24 December 2002 OJ C 325 33, Articles 18, 19, 39 and 43.

⁹ *Commission EC v. Germany*, supra note 7, paras. 17-31.

¹⁰ Ibid.

¹¹ General Programme for the Abolition of Restrictions on Freedom of Establishment, 15 January 1962 OJ L2 36, Title III(A); General Programme for the Abolition of Restrictions on Freedom to Provide Services, 15 January 1962 OJ L2 32, Title III(A); see also Sparkes, P., *European Land Law*, (Hart Publishing 2007), pp.44-9 and pp.56-61.

¹² Case 63/86, *Commission EC v. Italy* [1988] ECR 29; Treaty Establishing the European Economic Community is adopted on 27 March 1957.

¹³ *Commission EC v. Italy*, *ibid.*, para. 10.

thus make the pursuit of occupation in a member state easier. Therefore, it said, any restriction in this regard must be regarded as an obstacle to the pursuit of the occupation itself.¹⁴

In the case of *Commission v. Greece*,¹⁵ the Court found that certain provisions in Greece's national legislation, both in the Presidential Decree of 22 to 24 June 1927, which prohibits foreigners from acquiring real property, with the exception of mortgages, in the border regions of the country, and Emergency Law No 1366 of 2 to 7 September 1938, which allows only Greek nationals to conclude legal acts relating to immovable property in the designated regions are an infringement of its treaty obligations. In particular, the Court held that such measures are incompatible with the exercise of freedom of establishment and the freedom to provide services, as guaranteed by the EEC Treaty and further articulated in the two General Programmes mentioned above.¹⁶

2.3 Rules on Alien Land Ownership within the Sphere of the Free Movement of Capital

2.3.1 Rules Applied to EU Nationals

In the EU the basic rule on the free movement of capital is contained in what is now Article 63(1) TFEU. The Article states:

All restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

While the treaty provisions do not define the movement of capital, the nomenclature annexed to Directive 88/361 provides a non-exhaustive list of transactions that constitute it.¹⁷ Investments in real estate are listed under Category II, and are interpreted as broadly covering not only "purchases of buildings and land and the construction of buildings", but also "rights of usufruct, easements and building rights".¹⁸ In the case of *Konle*, the Court said that the Austrian rule from 1996, which requires prior authorization for the acquisition of land, is liable to constitute a restriction on the free movement of capital if it cannot be justified under the exceptions to the provisions.¹⁹

2.3.2 Rules Applied to Non-EU Nationals

The wording of Article 63 gives the impression that it applies not only to the prohibition of all restrictions between member states but also those between member states and third countries. However, the remaining provisions on the free movement of capital have foreseen the possibility of specific restrictions and safeguard measures against third countries, which makes capital movement to or from non-EU members less liberalized than that within the union.²⁰

Firstly, the provision adopted under Article 64(1) TFEU allows lawful restrictions on capital movement to or from third countries, if they were already in existence on 31 December 1993, to continue to apply, commonly known as a grandfather clause. Secondly, according to Article 64(2), the European Parliament and the Council are only required to endeavor to achieve the objectives of free movement of capital between member states and third countries, to the greatest extent possible. Thirdly, the council is empowered under Article 64(3) to

¹⁴ Ibid., para. 16.

¹⁵ Case 305/87, *Commission EC v. Greece* [1989] ECR 1461.

¹⁶ Ibid., para. 22.

¹⁷ Council Directive 88/361/EEC 24 June 1988 for the Implementation of Article 67 of the Treaty, 24 June 1988 OJ L178 5, Annex I, Category II.

¹⁸ Ibid., Category II and Explanatory Notes.

¹⁹ Case C-302/97, *Konle v. Austria* [1999] I ECR 3099, para. 39.

²⁰ Craig, P. and G. d. Burca, *EU Law: Text, Cases and Materials*, (Clarendon Press 1998), p.725.

adopt measures which may constitute a step backwards as regards the liberalization of the movement of capital to or from third countries, if they act in accordance with the special legislative procedures, and only after consulting the European Parliament. Such restrictions against capital movement to and from non-EU members are reinforced by Article 66 TFEU, which requires the Council to take safeguard measures in exceptional circumstances with regard to third countries, if the movement of capital to or from those countries causes, or threatens to cause, serious difficulties for the operation of the economic and monetary union, as long as such measures do not continue for more than six months, and the measures are strictly necessary. Against this backdrop, measures adopted by member states to restrict the movement of capital to and from third countries for the purpose of real estate investment may be considered permissible under the current EU rules.

III. TRANSITIONAL MEASURES AND GENERAL DEROGATION PROVISIONS WITH RESPECT TO ALIEN LAND OWNERSHIP

3.1 Transitional Measures

Within the framework of the EU law, the principles of free movement of capital and the prohibition of discriminatory treatment on the ground of nationality apply equally to the acquisition of immovable property by the nationals or residents of other member states.²¹

On the other hand, such provisions do not exclude the applicability of the transitional provision on real estate investment laid down in the transitional measures reserved by member states providing for the differential treatment for foreign nationals and residents. An examination of the transitional provisions maintained by member states in relation to the freedom of capital indicates that the provisions on real estate restriction are the dominant, in most cases even the only, measure laid down by member states in the sector of free movement of people, services and capital on transitional measures.

Two types of transitional measures are adopted with regard to real estate investment as referred to in the transitional measures of member states, namely, measures on secondary residences and measures on agricultural and/or forestry land.

As to the acquisition of secondary residence, Sweden, Norway, Finland, Austria and Cyprus all adopt transitional measures to maintain their existing legislation regarding secondary residences for five years from the date of accession.²² The five countries, apart from Cyprus' later accession of 2003, all joined the EU in 1995.

²¹ Article 49 TFEU.

²² Article 114, Title V: Transitional Measures Concerning Sweden, Act Concerning the Conditions of Accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the Adjustments to the Treaties on which the European Union is Founded, (1985) OJ C241; Article 34, Title III: Transitional Measures Concerning Norway, Act Concerning the Conditions of Accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the Adjustments to the Treaties on which the European Union is Founded, (1985) OJ C241; Article 87, Title IV: Transitional Measures Concerning Finland, Act Concerning the Conditions of Accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the Adjustments to the Treaties on which the European Union is Founded, (1985) OJ C241; Article 70, Title III: Transitional Measures Concerning Austria, Act Concerning the Conditions of Accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the Adjustments to the Treaties on which the European Union is Founded, (1985) OJ C241; List 3, Annex VII List referred to in Article 24 of the Act of Accession: Cyprus, Act Concerning the Conditions of 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 and the Adjustments to the Treaties on which the European Union is Founded, (2003) OJ L236 819.

All of them provide the application of transitional measures on secondary residences for a term of five years, but no specific references are stipulated accordingly with respect to the provisions of “existing legislation”.

Hungary and Poland, with a later accession in 2003, provide more specific measures on secondary residences in terms of the nationality criterion. It is clear in the Act of Accession of Hungary and Poland that both of them may maintain their existing legislation regarding secondary residences for five years from the date of accession. However both member states exclude from the application of the preceding restrictive provisions nationals of the member states of the EU and EEA who have been legally resident in Hungary or Poland at least for four years continuously to which the national treatment shall be granted.²³

It is apparent that the before mentioned restrictive provisions apply only to persons who, as a national of the EU or EEC, have either not resided in Hungary and Poland or taken up fixed residence at Hungary and Poland but for a period of less than four years. It must however be noted that, in that regard, Czech Republic asserts, in its Act of Accession 2003, the five-year reservations on secondary residences apply only to nationals of EU with a residence at Czech Republic, irrespective of particular durations relating to their residing.²⁴ Bulgaria and Romania, in their Act of Accession 2005 on transitional provisions, extend the application of such measures not only to nationals of EU without residing in Czech Republic, but also to those of EEC.²⁵

Self-employed farmers could be exempted from the provisions on agricultural land contained in the transitional measures of states if the conditions are fulfilled. Nationals of member states who seek an exemption from the transitional measures and equal treatment with nationals of Estonia, Latvia, Lithuania or Slovakia as the self-employed farmers are subject to the provisions of “legally resident and active in farming in [these countries] for at least three years continuously”.²⁶ While Bulgaria and Romania, in their Act of Accession of

²³ List 3(1), Annex X: List referred to in Article 24 of the Act of Accession: Hungary; Act Concerning the Conditions of 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 and the Adjustments to the Treaties on which the European Union is Founded; Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, (2003) OJ L236 848; List 4(1), Annex XII: List referred to in Article 24 of the Act of Accession: Poland, Act Concerning the Conditions of 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 and the Adjustments to the Treaties on which the European Union is Founded, (2003) OJ L236 878.

²⁴ List 2(1), Annex V: List referred to in Article 24 of the Act of Accession: Czech Republic, Act Concerning the Conditions of 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 and the Adjustments to the Treaties on which the European Union is Founded, (2003) OJ L236 805.

²⁵ List 3(1), Annex VI: List referred to in Article 23 of the Act of Accession: Transitional Measures, Bulgaria, Act Concerning the Conditions of Accession of the Republic of Bulgaria and Romania and the Adjustments to the Treaties on which the European Union is Founded, (2005) OJ L157 282; List 3(1), Annex VII List referred to in Article 23 of the Act of Accession: Transitional Measures, Romania, Act Concerning the Conditions of Accession of the Republic of Bulgaria and Romania and the Adjustments to the Treaties on which the European Union is Founded, (2005) OJ L157 315.

²⁶ List 3, Annex VI: List referred to in Article 24 of the Act of Accession: Estonia, Act Concerning the Conditions of 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 and the Adjustments to the Treaties on which the European Union is Founded, (2003) OJ L236 814; List 3, Annex VIII: List referred to in Article 24 of the Act of Accession: Latvia, Act Concerning the Conditions of 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 and the Adjustments to the Treaties on which the European Union is Founded, (2003) OJ L236 826; List 4, Annex I: List referred to in Article 24 of the Act of Accession: Lithuania; Act Concerning the Conditions of 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 and the Adjustments to the

2005, contain only a residence requirement and are not coupled with the term of residences and farming activities to ensure the attainment of the alleged objective of farming by nationals of other member states seeking an establishment as self-employed farmers in the member state.²⁷

Apart from the requirement on nationality and residence laid down in the transitional measures of member states, transitional measures involved are also found to contain measures with a system of prior authorization for transactions on real estate property (in Poland, Hungary and Slovakia),²⁸ measures on capital transfer relating to purchase of real estate purchase (in Portugal)²⁹ and measures involving the repatriation of the proceeds from the liquidation of real estate investment (in Greece).³⁰

3.2 General Derogations

Articles 45(3), 52(1), 65(1)(b) TFEU establish the general derogation rules that the free movement of persons, the right of establishment and the free movement of capital should not prevent member states from taking measures that are justified on the grounds of public policy, public security or public health (the public health exception applies only in the context of the free movement of persons and freedom of establishment). However, in order for the contested measures to be justified, they must comply with the

Treaties on which the European Union is Founded; Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, (2003) OJ L236 839; List 3, Annex XIV: List referred to in Article 24 of the Act of Accession: Slovakia, Act Concerning the Conditions of 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 and the Adjustments to the Treaties on which the European Union is Founded; Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, (2003) OJ L236 917; List 3(2), Annex X: List referred to in Article 24 of the Act of Accession: Hungary; Act Concerning the Conditions of 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 and the Adjustments to the Treaties on which the European Union is Founded; Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, (2003) OJ L236 848.

²⁷ List 3(3), Annex VI: List referred to in Article 23 of the Act of Accession: Transitional Measures, Bulgaria, Act Concerning the Conditions of Accession of the Republic of Bulgaria and Romania and the Adjustments to the Treaties on which the European Union is Founded, (2005) OJ L157 282; List 3(2), Annex VII List referred to in Article 23 of the Act of Accession: Transitional Measures, Romania, Act Concerning the Conditions of Accession of the Republic of Bulgaria and Romania and the Adjustments to the Treaties on which the European Union is Founded, (2005) OJ L157 315; List 2(2), Annex V: List referred to in Article 24 of the Act of Accession: Czech Republic, Act Concerning the Conditions of 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 and the Adjustments to the Treaties on which the European Union is Founded, (2003) OJ L236 805.

²⁸ List 4(2), Annex XII: List referred to in Article 24 of the Act of Accession: Poland, Act Concerning the Conditions of 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 and the Adjustments to the Treaties on which the European Union is Founded, (2003) OJ L236 878; List 3(2), Annex X: List referred to in Article 24 of the Act of Accession: Hungary; Act Concerning the Conditions of 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 and the Adjustments to the Treaties on which the European Union is Founded; Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, (2003) OJ L236 848; List 3, Annex XIV: List referred to in Article 24 of the Act of Accession: Slovakia, Act Concerning the Conditions of 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 and the Adjustments to the Treaties on which the European Union is Founded; Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, (2003) OJ L236 917.

²⁹ Article 225, Title II: Transitional Measures Concerning Portugal, Act Concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese and the Adjustments to the Treaties, (1985) OJ L302 23.

³⁰ Section 1 Capital Movement, Chapter 2 Capital Movements and Invisible Transactions, Part Four Transitional Measures, Act Concerning the Conditions of Accession of the Hellenic Republic to the European Communities, (1979) OJ L291.

following proportionality requirements:

- a) the measure must be suitable for the desired objectives;
- b) the measure must not go beyond what is necessary in order to attain it.

In the Case *Criminal Proceedings v. Festersen*,³¹ Denmark has laid down in its agricultural regulations the requirement that the acquirer has to take up fixed residence on an agricultural property for eight years before he can acquire the property. In the case, Denmark argued that the requirement, made in the public interest, sought, firstly, to preserve one of the traditional forms of owner-occupancy, secondly, to preserve a permanent agricultural community in accordance with town and country planning measures, and thirdly, to ensure the reasonable appropriation of the land by “resisting pressure on land”.³²

The Court argued that, although the residence requirement does facilitate the pursuit of a public interest objective and is consistent with the common agricultural policy set out in the EU treaty, it goes beyond what is necessary to attain this objective.³³ It was thus not an appropriate and necessary measure. In light of the first aim, the Court stated that the presence of a restriction on the duration of residence only, and no other restrictions, such as the amount of land owned by foreigners, indicated that the measure in question did not in fact aim to ensure the attainment of the claimed objective of preserving the traditional farming practice of owner-occupancy. As regards the second aim, the Court stated that “the objective of preserving an agricultural community cannot be met where the acquisition is made by a farmer who is already resident on another farm”.³⁴ Therefore, again, the measure did not appear to be proportionate to the objective claimed by Denmark. Finally, the third aim was based on the logic that the residence requirement could reduce the number of potential acquirers of agricultural land and, as a result, the pressure on agricultural land could be reduced.³⁵ However, this requirement constitutes a violation of the right of an acquirer to freely choose his place of residence, as guaranteed by the European Convention on Human Rights.³⁶ On these grounds, the Court came to the conclusion that national legislation insisting upon a residence requirement in order to acquire an agricultural property should be precluded through the introduction of Article 56 of the EC Treaty, and that national treatment on real estate acquisition, in the real sense, should be applied among member states.³⁷

In another case *Ospelt v. Schlosse Weissenberg Familienstiftun* regarding Austria’s national rules that require the prior authorization of nationals of other member states before they can acquire farmland, the Court stated that, Article 73b of the EC Treaty, with respect to freedom of movement of capital, in conjunction with Articles 73c, 73d, 73f and 73g, does not automatically preclude the acquisition of agricultural land being made subject to the granting of prior authorization.³⁸ According to the Court:

Unlike supervision measures aimed at preventing construction of secondary residences after the transfer of

³¹ Case C-370/05, *Criminal Proceedings v. Festersen* [2007] I ECR 1129 (hereinafter “*Criminal Proceedings v. Festersen*”).

³² *Ibid.*, para. 27.

³³ *Ibid.*, para. 30.

³⁴ *Ibid.*, para. 32.

³⁵ *Ibid.*, para. 33.

³⁶ Article 2(1), Protocol No. 4 to European Convention on Human Rights (1950).

³⁷ *Criminal Proceedings v. Festersen*, supra n. 31, para. 48.

³⁸ Case C-452/01, *Ospelt v. Schlosse Weissenberg Familienstiftung* [2003] I ECR 9743.

building plots, which may be subsequent to the transaction without detracting from that objective... national provisions such as the VGVG [Vorarlberg Land Transfer Law] can achieve their objectives only if the agricultural use for which the plots were intended is not irretrievably impaired. In those circumstances, the very principle underlying a system of prior authorization cannot be disputed. ...³⁹

However, it is also made clear that the establishment of prior authorization for the acquisition of farmland have to show that, firstly, the objective of public interest is being pursued in a non-discriminatory way, and secondly, the measures are appropriate and necessary for the purpose of achieving the aim in view.⁴⁰

In the case *Alfredo Albore v. Italy*, a preliminary ruling was made regarding the authorization requirement for nationals of other member states, prescribed in Italian law, for the acquisition of property situated in areas designated as being of military importance.⁴¹ The Court said that it was clear from the objective of the legislation that the measure could be regarded as having been adopted in relation to public security, a principle which is set forth in Article 56 of the EC Treaty.⁴² Article 56(1) states that:

The provisions of this Chapter and the measures ... shall not prejudice the applicability of legislative and administrative provisions which lay down special treatment for foreign nationals and which are justified by reasons of public order, public safety and public health.

However, the court declared that mere reference to the requirement of public security could not justify the derogations with regard to freedom of establishment and the freedom of movement of capital.⁴³ For the establishment of such derogations, it said, two conditions had to be met. Firstly, the principle of proportionality should be observed to ensure the measure was appropriate and necessary to achieve the objective pursued.⁴⁴ Secondly, such measures should not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments.⁴⁵ Thus, it ruled, unless the application of non-discriminatory treatment would expose the state concerned to “real, specific and serious risks” to its military interests, and such treatment could not be replaced by less restrictive measures which would have the same effect, then the national treatment principle enshrined in the EC Treaty could have the effect of deterring the national legislation of a member state, even if it were justified on the grounds of national security.⁴⁶

IV. CONCLUSION

The paper provides a general review of the EU's rules on alien land ownership in the context of the EU single market. It suggests that the implementation of the EU's Principles on the freedom of people, services and capital has guaranteed the elimination of all restrictions applied to EU nationals in respect of land ownership, while on the other hand the EU has in certain ways allowed member states to maintain restrictions against nationals of non-EU members in respect of the acquisition of real estate. Furthermore, as the exceptional rules on the free movement of people, services and capital, the member states can adopt the

³⁹ Ibid., para. 45.

⁴⁰ Ibid., para. 34.

⁴¹ Case C-423/98, *Alfredo Albore v. Italy* [2000] I ECR 5965.

⁴² Ibid., para. 18.

⁴³ Ibid., para. 19.

⁴⁴ Ibid.

⁴⁵ Ibid., para. 20.

⁴⁶ Ibid., para. 22.

transitional measures on real estate investment providing for the differential treatment for foreign nationals and residents. The member states are also entitled to taking discriminatory measures on the grounds of public policy, public security or public health as long as the proportionality requirement is fulfilled.