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WHAT ANSWERS CAN BE LEARNED FROM THE JUDGEMENTS IN THE CALI APARTMENTS¹ AND THE VISSER CASES IN RELATION TO THE JUDGEMENT IN THE KOB SIA CASE²?

HOW CAN THE MEMBER STATES' MARGIN OF APPRECIATION CHANGE
IN TERMS OF LAND POLICY?

ABSTRACT Prior to the judgement in the KOB Sia case, the Member States' margin of appreciation in land policy determined by EU law used to be defined by the primary legal provision concerning the free movement of capital, while the autonomy set forth in Article 345 TFEU in terms of the cases related to ownership did not play a significant role. The applicability of the free movement of capital required a cross-border situation, and it was recognised, at least in principle, by the case-law of the Court of Justice of the European Union that the land policy goals, such as the promotion of the creation of small and medium-sized farms and the alleviation of speculative pressure of agricultural land, are in line with the objectives mentioned in the primary law concerning the Common Agricultural Policy (CAP), which focuses on the preservation of the farmers' quality of life. Following the CJEU's judgement in the KOB Sia case, instead of the free movement of capital, the freedom of establishment and the services directive have been applied. Unfortunately, the national regulation at issue implemented direct discrimination on grounds of nationality. Therefore, the dogmatics of the new case-law was not revealed. In any case, the services directive includes no provisions concerning land policy and the relevant case-law gives priority to secondary EU legal acts over the provisions of primary law. Nonetheless, within the scope of the application of the services directive, the case-law recognises also public interest not included in the provisions of the directive. Even though the margin of appreciation in land policy became uncertain as a result of the legal development that arose from the judgement in the KOB Sia case, we are not completely left without clues. We shall juxtapose the judgements within

¹ Court of Justice of the European Union, C-724/18.

² Court of Justice of the European Union, C-206/19.

the scope of application of the primary law and the directive, with particular regard to the requirement of a cross-border situation, the “strictness” of the applied EU control, and the particularities of the assessment of agricultural lands.

KEYWORDS: Member States’ margin of appreciation in land policy, legal development in the KOB Sia case, freedom of establishment and the services directive instead of the free movement of capital, the role of a positive form of integration, requirement of a cross-border situation, applicability of less strict control criteria

SŁOWA KLUCZOWE: margines oceny państw członkowskich w polityce gruntowej, rozwój w sprawie KOB Sia pod kątem prawnym, swoboda przedsiębiorczości i dyrektywa usługowa zamiast swobodnego przepływu kapitału, rola pozytywnej formy integracji, wymóg sytuacji transgranicznej, możliwość zastosowania mniej rygorystycznych kryteriów kontroli

INTRODUCTION

This study examines the Member States’ margin of appreciation in land policy. In the CJEU’s judgement in the KOB Sia case, unlike in the previous case-law, the freedom of establishment and the services directive are applied instead of the free movement of capital.

Unfortunately, the judgement provides no answers regarding how the Member States’ margin of appreciation will change in terms of regulation compared to the previous case-law of the CJEU concerning the free movement of capital, as the national regulation at issue in the KOB Sia case implemented direct discrimination on grounds of nationality and, therefore, it was not examined any further.

In order to get an answer to the question of how the structure of EU control has changed depending on whether the primary legal provisions, such as the free movement of capital, or freedom of establishment and Directive 123/2006 are applied, we have selected and juxtaposed the CJEU judgments most closely related to land policy. In addition to the comparison of the EU control applied in the scope of the directive and of the primary law, we shall also examine issues relevant to the land policy of the Member States, such as whether the requirement of a cross-border element should also be applied to the scope of the directive, and whether land policy can maintain its exceptional position among operations related to immovable property enjoyed within the scope of the primary law, which allowed the application of prior official authorization only in this area within the scope of application of EU law. However, the directive has been taken into account by the case-law only to the extent that the primary legal provisions of the free movement of capital are to be applied instead of the freedom of establishment.

MEMBER STATES' MARGIN OF APPRECIATION IN LAND POLICY PRIOR TO THE KOB SIA CASE

Member States' margin of appreciation in land policy means³ the set of laws of a given Member State that apply to the transfer of ownership and use of agricultural lands and forest property, and, where applicable, agricultural farms, with the exception of municipal and state-owned land, which we do not intend to deal with in this study. First, it should be pointed out that no secondary EU legal act applied to this area. In the case of Member State transactions related to immovable property, the 1988 directive implementing the free movement of capital was applied as a governing EU legal act in the case-law of the CJEU even after its repeal by the Treaty of Amsterdam.⁴

However, the fact that free movement of capital was applied did not mean that immovable property, or even agricultural land, qualified as "capital" in the strict meaning of the word, in the sense that according to EU law, national regulations could only take the interests of capital into account and that no public interest beyond economic interests⁵ could be asserted.

As we will see, according to the case-law of the CJEU, various social public interests can be asserted in the field of immovable property, provided that they are not aimed at asserting economic interests.⁶

According to the settled case-law, the freedom of establishment applied⁷ if economic activities were carried out on a permanent basis in the territory of another Member State. On the other hand, the free movement of capital applies if in the given case, the capital investment function comes to the fore. Such cases can be: cross-border share purchases, or – according to the settled case-law – the purchase of immovable property or agricultural land in another Member State, and – in the Segro case⁸ and in the Commission v. Hungary case⁹ – the free movement of capital applied also in terms of a Hungarian regulation terminating the usufruct rights concerning agricultural lands.

³ J.E. Szilágyi, H. Szinek, *Egyes közép-európai országok nemzeti földjoga, és az Európai Unió sajátosságai*, Publicationes Universitatis Miskolciensis, Sectio Juridica et Politica, 2023, Vol. 4, issue 2, p. 149.

⁴ Court of Justice of the European Union, C-370/05.

⁵ In fact, the restriction of fundamental economic rights based on economic interests is prohibited.

⁶ Court of Justice of the European Union, C-400/08.

⁷ Court of Justice of the European Union, C-400/08.

⁸ Court of Justice of the European Union, C-52/16.

⁹ Court of Justice of the European Union, C-235/17.

As regards both the free movement of capital and the freedom of establishment, within the framework of negative integration, in its settled case-law, the CJEU examines whether the national legislation at issue contains direct or, as we can see in the judgment in the *Segro* case, indirect discriminatory provisions.

If the CJEU finds that the national regulation at issue does contain provisions that implement direct or indirect discrimination against the legal entities of other Member States, the next step is to examine whether the national regulation at issue is aimed at acceptable social or other public interests, or at economic interests prohibited in this context.

In order to maintain negative integration, that is, the internal market, the CJEU applies additional criteria in this regard, which can be interpreted as a mistrust on the part of the “EU legal order” in terms of whether the national regulation at issue is indeed aimed at the goal pursued by the given Member State. Therefore, in addition to the prohibition of direct discrimination, the EU legal order applies additional criteria to “filter out” potentially covertly protectionist measures: the principle of proportionality, in application of which it is to be examined whether the applied national measure exceeds the extent necessary to achieve the given goal and whether the regulation at issue can be considered suitable to achieve that goal, and whether the given regulation can be replaced by other provisions that are less restrictive in terms of the objectives set forth in the founding treaties. In the following part, we shall give examples of judgments related to immovable property and agricultural land in the scope of the freedom of establishment and the free movement of capital.

Among the judgments related to immovable property, we should point out the judgment in the *Konle* case.¹⁰ Instead of agricultural lands, the decision that concerned the Republic of Austria applied to real property: the goal of the national legislature was to preserve a permanent population independent of the tourist sector by introducing a scheme for prior authorization. Incidentally, the CJEU found the objective to be in line with EU law, but assessed the instrument at issue, the prior authorization system, as an excessive restriction.

In the *Festersen and Ospelt* cases, the CJEU specifically examined the Member States’ margin of appreciation in land policy, that is, the compatibility of national laws with EU law, where the national laws made the acquisition of ownership and – secondarily – the use of agricultural land subject to certain conditions. In these judgements, the CJEU found that the concerned scheme of prior authorization is compatible with EU law because agricultural land is considered a special asset, and the land policy objectives of the Member States are also in line with the objectives of the CAP focusing on increasing farmers’ quality of life.

¹⁰ Court of Justice of the European Union, C-302/97.

In the judgment rendered in the *Commission v. Spain* case,¹¹ in the scope of the application of the freedom of establishment – that is, a primary EU legal provision – the CJEU basically applied the same control mechanism as in the field of the free movement of capital.

Even though the judgements in the *Segro*¹² and the *Commission v. Hungary*¹³ cases were decisions concerning agricultural land, they cannot be considered CJEU rulings of land policy nature in a classical sense, that is, they were not determined by the case-law concerning the Member States' margin of appreciation in terms of the regulation of land policy. This argument is supported, *inter alia*, by the fact that in its judgement in the *Segro* case, the CJEU itself found that the Hungarian legislation at issue was not aimed at land policy objectives.¹⁴

As for the Member States' margin of appreciation in land policy: indeed, the CJEU recognized that agricultural land can be considered a special asset and that land policy goals, such as the promotion of the creation of small and medium-sized farms and the alleviation of speculative pressure of agricultural land, are in line with the objectives of the CAP focusing on the preservation of the farmers' quality of life.¹⁵ However, despite this,¹⁶ in the *Festersen and Ospelt* cases, that is, the most important CJEU decisions from the point of view of the Member States' margin of appreciation in land policy leeway, the negative form of integration – the free movement of capital – proved to be stronger than the objective of the CAP focusing on increasing the farmers' quality of life. In this case-law, the CJEU's most important objective proved to be the screening of national measures that are contrary to the internal market. Typically, the case-law under examination did not address the

¹¹ The decision will be discussed in detail below.

¹² Court of Justice of the European Union, C-52/16.

¹³ Court of Justice of the European Union, C-235/17.

¹⁴ Court of Justice of the European Union, C-52/16.

¹⁵ Court of Justice of the European Union, C-452/01.

¹⁶ See the relevant literature: J.E. Szilágyi, H. Szinek, *Egyes közép-európai*; Csák Cs., *The Regulation on Agricultural Land Ownership in Hungary after the Moratorium*, Zbornik Radova 2017; Hornyák Zs., *A mezőgazdasági föld, mint természeti erőforrás. Pro Publico Bono*, Magyar Közigazgatás, 2017, No. 4; M. Kurucz, *Gondolatok a magyar földforgalmi törvény uniós feszültségpontjainak kérdéseiről*, [in:] J. Szalma (ed.), *A Magyar Tudomány Napja a Délvidéken 2014*, Újvidék, 2015; J.E. Szilágyi, *Az európai jog és a magyar mezőgazdasági földek szabályozása*, Agrár és környezetjog 2017, Vol. 23, Zs. Hornyák, *Legal frame of agricultural land succession and acquisition by legal persons in Hungary*, Journal of Agricultural Law, 2021, Vol. 16, No. 30; J.E. Szilágyi, *A magyar földforgalmi szabályozás új rezsimje és a határon átnyúló földszerezések*, Miskolci Jogi Szemle, 2017, special edition 12; J.E. Szilágyi, *Conclusions*, Journal of Agricultural and Environmental Law, 2015, I. Olajos, *Földjogi kiskaté-kérdés felelet a magyar földjog aktuális kérdéseiből*, Miskolci Jogi szemle, 2017, Vol. 12, special edition 2.

manner in which the goals that also promote the objectives of the CAP should or can be implemented.

In practice, this case-law may make long-term national regulation in the field of land policy rather difficult. The fact that Member States relatively rarely encounter such problems in practice is largely due to the fact that the European Commission does not typically initiate infringement proceedings¹⁷ in this area and individual lawsuits based on EU law are also seldom initiated by farmers in other Member State.

To summarize the case-law of the CJEU prior to the KOB Sia case, we can ascertain that even though the Member States' margin of appreciation in terms of regulation is far from satisfactory, the EU legal order, at least in principle, allows for nation regulation in line with the CAP objectives,¹⁸ and the case-law recognized the specific nature of the area, including the applicability of schemes of prior authorization.

CONCLUSIONS REGARDING THE LEGAL DEVELOPMENT ARISING FROM THE KOB SIA CASE

The judgement rendered in the KOB Sia case¹⁹ shows significant legal development concerning the Member States' margin of appreciation in land policy: in the case of the national legislation at issue concerning the acquisition of ownership of agricultural land,²⁰ in derogation from the decade-long case-law of the CJEU, the freedom of establishment and Directive 132/2006 was applied instead of the primary law on the free movement of capital and the 1988 directive implementing the free movement of capital, which have been treated as governing law in the CJEU's case-law.²¹ As already mentioned, the national measure at issue implemented direct discrimination on grounds of nationality, thus, the judgment reveals nothing regarding the EU control structure applied in the scope of application of the directive. Our starting point is that the judgment remains consistent in that from now on, in the area of land policy, the freedom of establishment will be applied instead of the free movement of capital.

¹⁷ As mentioned above, the judgement in the *Commission v. Hungary* case cannot be considered a decision of land policy nature.

¹⁸ Obviously, provided that the national legislation at issue meets further criteria related to the negative form of integration.

¹⁹ Court of Justice of the European Union, C-206/19.

²⁰ See: Á. Korom, *How the KOB SIA case altered the Member States' margin of appreciation: with particular attention to the judgement's possibly consistent characteristics and the relevant provisions of Directive 123/2006*, *Journal of Agricultural and Environmental Law*, 2023, Vol. 18, issue 35.

²¹ Court of Justice of the European Union, C-370/05.

Since the structure of EU control for agricultural land was not revealed in the judgement, we shall juxtapose the CJEU's case-law developed within the scope of the application of the directive and on the basis of primary law. This juxtaposition shall be our point of reference in assessing the extent to which the structure of the EU control exercised on the basis of primary law and within the scope of the application of the directive differs outside the field of land law. We strove to select the most relevant decisions from these judgments.

Among the judgments under examination, we shall juxtapose the aforesaid *Commission v. Kingdom of Spain* judgement, in which the freedom of establishment was applied, and the judgment in the *Visser* case, in which the services directive was applied. Both decisions are related to restrictions concerning retail chains. The judgment in the *Konle* case shall also be compared with the judgment in the *Cali Apartments* case: in the first case, the free movement of capital, while in the second case, the services directive was applied. The key question is whether a scheme of prior authorization can be introduced within the framework of the EU legal order based on the public interest goals of the Member States related to housing and the utilization of immovable property. The third comparison focuses on whether a cross-border element can be required for the applicability of EU law in individual legal disputes, both within the scope of the application of primary law and the directive.

RESTRICTION OF RETAIL CHAINS IN THE VISSER AND THE COMMISSION V. KINGDOM OF SPAIN CASES

In this regard, in the *Commission v. Kingdom of Spain* case,²² the CJEU examined the national regulation at issue based on the primary law, that is, the free movement of capital, while in the judgment in the *Visser* case, the CJEU based its judgement on the freedom of establishment and the services directive. Previously, the judgments of the CJEU concerning land policy were based on the free movement of capital, not the freedom of establishment. The comparison of the two practices can provide a clue as to possible changes in the Member States' margin of appreciation in land policy, as it may reveal the possible differences with regard to the EU control criteria.

In the judgment in the *Commission v. Kingdom of Spain* case,²³ the European Commission essentially grouped its objections to the national regulations at issue around three axes: restrictions on the location and size of large-scale retail establish-

²² Court of Justice of the European Union, C-400/08.

²³ Court of Justice of the European Union, C-400/08.

ments, conditions for obtaining the special retail license required for starting such establishments, and certain aspects of the procedure for issuing such license.

According to the Commission's reasoning, by the national legal regulation, the Spanish state gives preference to economic operators established in Spain, because the owners of small and medium-sized commercial stores are mostly Spanish, while the owners of large-scale retail establishments affected by national legal restrictions are mostly established in other Member States.

According to the interpretation of the CJEU,²⁴ a national regulation that makes the establishment of an undertaking from another Member State conditional on the issuance of prior authorization is considered a restriction of the freedom of establishment, as it may interfere with the exercise of the concerned undertaking's freedom of establishment.

Based on the established case-law, in the absence of discrimination on the grounds of nationality, the freedom of establishment can be limited by referring to non-economic reasons related to public interest, on the condition that the measure is suitable for achieving the desired goal and meets the criteria established by the principle of proportionality, that is, it does not exceed the extent necessary to achieve the goal.²⁵

For several reasons, the CJEU found²⁶ that the regulation at issue is not suitable for justifying the restriction of the freedom of establishment. The Spanish government intended to justify the restriction of the freedom of establishment on the grounds of zoning and environmental protection.²⁷ The CJEU found that such restriction was not justified due to the lack of necessity and sufficient evidence provided by the Spanish government and based on the result of the proportionality analysis.²⁸

On the other hand, in the judgment in *Visser case*,²⁹ the question referred to preliminary ruling was whether it is contrary to the relevant provisions of Directive 2006/123 that the zoning rules of a local government decree prohibit retail trade in goods other than bulky goods in areas outside the centre of a given settlement. The provisions of the zoning plan prohibited the retail trade in goods such as footwear and clothing outside the city centre.

²⁴ Court of Justice of the European Union, C-400/08, paragraphs 58-72.

²⁵ Court of Justice of the European Union, C-260/04, C-96/08.

²⁶ Court of Justice of the European Union, C-400/08, paragraphs 80-86.

²⁷ According to the Spanish government, by restricting the opening of large-scale retail establishments to residential centres and by restricting larger commercial establishments, the regulation can prevent "unnecessary" driving and the resulting road construction and deterioration of the urban environment.

²⁸ Court of Justice of the European Union, C-400/08, paragraphs 83-86.

²⁹ Court of Justice of the European Union, C-31/16.

It is worth examining the most important findings of Advocate General Maciej Szpunar, which we consider most relevant for the purpose of this paper. The Advocate General examined the national regulations at issue based on Article 14 (5) and Article 15 of Directive 2006/123. The purpose of Article 14 of Directive 2006/123 is to provide the “so-called black list” of requirements which Member States can under no circumstances enact. The “black list” seeks to ensure the systematic and swift removal of certain restrictions on the freedom of establishment, regarded by the EU legislature and the case-law of the CJEU as adversely affecting the proper functioning of the internal market.³⁰ The General Advocate’s opinion recalled that, *inter alia*, Article 14 (5) of Directive 2006/123 prohibits making establishment subject to an economic test applied on a case-by-case basis: in this regard, it should be noted that even though the economic element of the national regulation at issue is mentioned in the interpretation of the Advocate General, it does not fall within the scope of this paper, since the economic element does not have an excess weight, nor is it related to the previous cases concerning the freedom of establishment.³¹

The opinion further examined whether the national regulation is compatible with the provisions of Article 15 of the Directive, specifically whether the territorial restriction complies with the provisions of Article 15 (3). Overall, the Advocate General found the national restriction at issue to be compatible with the said provisions: he ruled out the possibility of – direct or indirect – discrimination on the grounds of nationality.³²

In support of the argument that the national regulation at issue is related to public interest, the Advocate General put forward the following: on the one hand, the protection of the urban environment is mentioned as a reason related to public interest in the provisions of the directive.³³ On the other hand, the Advocate General argues that it can be in the interest of a city to maintain and preserve the vitality and original character of its centre, and regulating which shops can be set up there can constitute part of this policy.³⁴ The intention of a city to influence the flow and volume of the traffic inside and outside its territory was also raised as an argument.³⁵ Perhaps the most important argument of the Advocate General in the framework of the negative form of integration is the following: according to these arguments, the national measure at issue is not aimed at an economic interest that

³⁰ Advocate General’s Opinion, C-31/16, paragraph 140.

³¹ *Ibid.* paragraph 141.

³² *Ibid.* paragraphs 143-146.

³³ Article 4(8) of Directive 2006/123.

³⁴ Advocate General’s Opinion, C-31/16, paragraph 147.

³⁵ *Ibid.*

is unacceptable from the point of view of EU law, that is, the purpose and effect of the measure at issue is not the protection of certain retailers against other retailers. Rather, it is more related to urban policy and cultural policy, which the directive also recognizes as being related to the public interest.³⁶

In a footnote, the motion referred to the ruling in the *Commission v. Kingdom of Spain* case,³⁷ pointing out the factual difference that the Spanish law systematically excluded certain types of retail stores. According to the opinion of the Advocate General, the regulations examined in this case do not, in contrast, prevent the opening of retail establishments in the city, since, *inter alia*, there is a sufficient number of affordable business premises available.³⁸

It is especially interesting in comparison to the aforementioned *Commission v. Kingdom of Spain* judgement, that in the same opinion, the Advocate General stressed that shopping centres outside the city centre have a self-reinforcing effect. Once some shops are outside the town centre and inhabitants take their cars there, that location also becomes more attractive to other shops which hitherto settled in the town centre. The only way to avoid the negative consequences of increased traffic and empty inner cities is thus to restrict the possibilities for service providers to settle outside the city centre.³⁹

According to the interpretation of the CJEU, the requirements defined by the national regulations must be evaluated in the light of the requirements defined by Articles 14 and 15 of the Directive.⁴⁰ With regard to Article 14, the CJEU did not “object to the examined national regulation”,⁴¹ which, *inter alia*, prohibits Member States from making the right to service activity subject to a case-by-case examination that assumes the existence of an economic need or a market demand.

Article 15 of Directive 2006/123 sets forth that Member States are to examine whether one or more of the listed requirements apply.⁴² If the answer is affirmative, they must comply with the conditions established by the principles of non-discrimination, necessity and proportionality.⁴³ It is for the acting national court to assess whether the criteria described above apply.⁴⁴

³⁶ *Ibid.*

³⁷ Advocate General’s Opinion, C-31/16, footnote 135.

³⁸ Advocate General’s Opinion, C-31/16, paragraph 149.

³⁹ Advocate General’s Opinion, C-31/16, paragraph 148.

⁴⁰ Court of Justice of the European Union, C-31/16, paragraph 126.

⁴¹ Court of Justice of the European Union, C-31/16, paragraphs 127-128.

⁴² Court of Justice of the European Union, C-31/16, paragraph 132.

⁴³ *Ibid.*

⁴⁴ Court of Justice of the European Union, C-31/16, paragraph 133.

With regard to the condition of necessity defined in Article 15 (3) of Directive 2006/123, the ban implemented by the national regulations seeks to preserve the viability of the city centre of the settlement in question for zoning purposes, to avoid vacant business premises.⁴⁵ The CJEU agreed⁴⁶ with the opinion of the Advocate General⁴⁷ regarding that – in accordance with the provisions of Directive 2006/23⁴⁸ – the aim of the national measure at issue is to protect the urban environment and, as such, it can be considered a suitable reason to justify the territorial restriction.

LACK OF A CROSS-BORDER ELEMENT

Also, in the judgment in the *Visser* case,⁴⁹ a question referred to preliminary ruling aimed at whether the provisions of Chapter III of Directive 2006/123⁵⁰ should be interpreted as meaning that the said provisions are to be applied also in the absence of a cross-border element.

According to the interpretation of the CJEU, the provisions of Directive 2006/123 either do not refer to a cross-border element, or based on the case-law, they should be interpreted⁵¹ as meaning that the full implementation of the internal market for services requires not only the removal of obstacles that may hinder service providers in another Member State, but also those they may encounter in their own Member State, as those may jeopardize their competitiveness.⁵²

The CJEU found that it must be accepted, contrary to what was argued by the German government, that the scope of that Directive is capable of extending, in certain cases, beyond what is strictly laid down in the provisions of the FEU Treaty relating to the freedom of establishment and the free movement of services, which, however, according to the judgement in the *Rina Services* case,⁵³ is without prejudice to the obligation of the Member States to apply the provisions of the Directive in compliance with the rules of the FEU Treaty.

In accordance with the interpretation of the CJEU, the preparatory works of Directive 2006/123 show that the provisions of Chapter III apply also in purely

⁴⁵ Court of Justice of the European Union, C-31/16, paragraph 134.

⁴⁶ Court of Justice of the European Union, C-31/16, paragraph 135.

⁴⁷ Advocate General's Opinion, C-31/16, paragraph 147.

⁴⁸ Article 4(8) of Directive 2006/123 interpreted in the context of Recital 40 of the Directive.

⁴⁹ Court of Justice of the European Union, C-31/16, paragraph 98.

⁵⁰ In the relevant opinion of Advocate General Maciej Szpunar.

⁵¹ Court of Justice of the European Union, C-340/14.

⁵² Court of Justice of the European Union, C-31/16, paragraphs 99-105.

⁵³ Court of Justice of the European Union, C-593/13.

internal situations. The preparatory works reveal that the amendment proposals aimed at rewording Article 2 (1) of the Directive in such a way that its scope is applied only in cross-border situations were not accepted in the European Parliament.⁵⁴

During the hearing, the Dutch government argued that the legal basis of Directive 2006/123 is Article 53(1) TFEU and Article 62 TFEU, while the CJEU argued, *inter alia*, that in these articles, contrary to Article 49 TFEU and Article 65, no cross-border element is mentioned at all.⁵⁵

As already mentioned, a cross-border element is required as a general rule for the application of the primary legal provisions, that is, the freedom of capital and freedom of establishment. We know of relatively narrow scope of exceptions to this general rule, including that referenced in the judgment in the *Hans Reisch* case.⁵⁶ The judgment concerned the Austrian licencing system for building plots, which lacked a cross-border element. In his related opinion, Advocate General M. L. A. Geelhoed suggested that the CJEU should nonetheless answer the question raised in the proceedings regarding the legal dispute related to the purely internal situation.⁵⁷

Despite the problem of reverse discrimination, it seems that the cross-border element is not necessary if the provisions of Chapter III of Directive 2006/123 apply. That element was a requirement in the vast majority of cases concerning the freedom of establishment and the free movement of capital.

SCHEMES OF PRIOR AUTHORIZATION IN THE CASE OF AGRICULTURAL LAND

As already mentioned, in the judgment in the *Konle* case,⁵⁸ the CJEU examined the compatibility of an Austrian law with primary law, that is, with the free movement of capital. In the interpretation of the CJEU, the scheme of prior authorization introduced by the Republic of Austria can be justified by regional development goals and by the intent to preserve the permanent population in the given area independent of the tourist sector. According to the case-law, such measures are to meet the following conditions: first, that the measures at issue are not applied in a discriminatory manner, and second, the objective pursued by the measure cannot be attained by means of a less restrictive measure.⁵⁹

⁵⁴ Court of Justice of the European Union, C-31/16, paragraph 108.

⁵⁵ *Ibid.* paragraph 109.

⁵⁶ Court of Justice of the European Union, C-515/99.

⁵⁷ Advocate General's Opinion, C-515/99, paragraph 134.

⁵⁸ Court of Justice of the European Union.

⁵⁹ Court of Justice of the European Union, C-302/97, paragraph 40.

According to the interpretation of the CJEU, it is indisputably very difficult for the applicant to prove beyond doubt the future use of the immovable properties at issue. Consequently, the CJEU found that the public administration bodies had too wide a discretion regarding the probative value of the information provided by the applicant.⁶⁰

According to the CJEU's interpretation, the second condition, according to which the national measure at issue meets the conditions imposed by EU law if it cannot be replaced by another less restrictive provision, was not met in the case,⁶¹ because – according to the case-law⁶² – a scheme of prior authorization restricting the free movement of capital can be replaced by a properly applied prior notification system that is suitable for achieving the same objective.⁶³

A procedure simply involving a declaration does not in itself enable the aim pursued by the national legislation. Therefore, the application of a further sanction system may be necessary: for example, an infringement of national legislation on secondary residences may be penalised by a fine, the unlawful use of land may be terminated by compulsory sale or by the reinstatement in the land register of the entries prior to the acquisition of the property.⁶⁴

In the judgment in the Cali Apartments SCI case,⁶⁵ *inter alia*, the CJEU examined whether a national regulation, which requires prior authorization in terms of rental fees is compatible with Article 9 (1) b. and c. of Directive 2006/123 as regards the short-term letting of residential premises in settlements where rental pressure is particularly severe.

As the CJEU recalled, pursuant to Article 9(1) of Directive 2006/123, Member States may make access to a service activity or the exercise thereof subject to an authorisation scheme only if that scheme does not discriminate against the provider in question and is justified by an overriding reason relating to the public interest, and the objective pursued by that scheme cannot be attained by means of a less restrictive measure, in particular, because an *a posteriori* inspection would take place too late to be genuinely effective.⁶⁶ In essence, these criteria are the codification of the case-law developed in the scope of the application of primary law, in respect of which the judgment in the Konle case can be referenced in particular.

⁶⁰ *Ibid.* paragraph 41, apart from that, the Court criticised other factors related to the discrimination on the grounds of nationality.

⁶¹ Court of Justice of the European Union, C-302/97, paragraph 42.

⁶² Court of Justice of the European Union, C-358/93, C-163/94.

⁶³ Court of Justice of the European Union, C-302/97, paragraph 44.

⁶⁴ *Ibid.* paragraphs 46-47.

⁶⁵ Court of Justice of the European Union, C-724/18.

⁶⁶ Court of Justice of the European Union, C-724/18, paragraph 63.

The goal pursued by the regulation, the right to housing, is one of the overriding reasons relating to public interest in the case-law of the CJEU, classified as grounds related to the protection of the urban environment and social policy objectives.⁶⁷ In this context, the CJEU refers to the judgment⁶⁸ in the *Serviatius* case,⁶⁹ in which the CJEU, again, recognized that the pressure on the real estate market can also be considered public interest if the given market is characterized by a housing shortage.⁷⁰

Especially since short-term letting has a significant impact on rents, the regulation at issue is to be considered an overriding public interest without any doubt, and it should also be highlighted that the regulation excludes the owner's permanent residence from its scope, as it does not contribute to rents growth and the regulation only applies in a limited geographic area.⁷¹

The CJEU accepted – essentially without justification – the argument of the City of Paris that a system based on *ex post* control and sanctions would not be suitable for achieving the goal pursued by the regulation, as it only gives the authorities the opportunity to intervene *a posteriori*. Such a system would not enable those authorities to put an immediate and effective end to the rapid conversion trend which is creating that shortage.⁷²

The permanence of case-law is of particular importance in EU law: in addition to the judges of the European Union, a permanent staff ensures that the case-law does not change in an unjustified manner. Nonetheless, the difference between the *Konle* and *Cali Apartments SCI* judgments is striking. Both regulations applied to immovable property instead of agricultural land, and a scheme of prior authorization was introduced in both cases. However, while in the *Konle* judgment, the CJEU found that the scheme of prior authorization does not comply with the criteria laid down by EU law, since the goal sought to be achieved by the regulation can be achieved with a prior notification obligation, it “did not object to the prior authorization obligation” in the judgement rendered in the *Cali Apartments SCI* case. It should be pointed out that the EU control applied as regards the schemes of prior

⁶⁷ *Ibid.* paragraph 67.

⁶⁸ In this case, again, a scheme of prior authorization was introduced, in connection with the construction of social rental apartments that promote housing, the public interest of which follows an analogy with the judgments in the *Festersen* and *Konle* cases. The CJEU admitted that the *ex post* control is not effective, but at the same time, due to the too wide and inadequately limited discretion of the authorities, the regulation did not meet the criteria set by the free movement of capital.

⁶⁹ Court of Justice of the European Union, C-567/07.

⁷⁰ Court of Justice of the European Union, C-724/18, paragraph 68.

⁷¹ *Ibid.* paragraphs 69-73.

⁷² *Ibid.* paragraph 74.

authorization within the scope of application of Directive 2006/123/EC does not differ from the control exercised within the scope of application of the free movement of capital.

A question arises, what could be the reason for the scheme of prior authorization in the Cali Apartments case to have eventually passed the filter of EU law? The CJEU did not actually justify the need for a scheme of prior authorization, it limited itself to finding that a subsequent inspection would not put an immediate and effective end to the rapid conversion trend which was creating that shortage.

A question arises as to whether an apartment conversion required for a short-term apartment rental, or the construction of an apartment in the Konle or Serviatus case, can justify the application of a scheme of prior authorization. From the aspect of private individuals or economic operators making the investment, a real estate investment is definitely considered a more important investment than the conversion of an existing apartment for the purpose of short-term expenditure. In this regard, precisely in these two cases, the application of a scheme of prior authorization can be better justified. In the Konle and Serviatus cases, the public interest underlying the scheme of prior authorization can be grasped in objective reasons, that is, the maintenance of a permanent population independent of the tourist sector or the transfer of the resources at issue to solving the housing problems in the Netherlands. As opposed to that, the goals to be protected in the Cali Apartments case are on the one hand objective, such as the achievement of social diversity not detailed in the judgment, while on the other hand, as a subjective goal, the regulation promotes the right of individuals to housing. In the latter case, difficulties may arise in that regard, which would be difficult to address with a scheme of prior notification and *a posteriori* control.

In the judgements rendered in the Konle and Serviatus cases, another instrumental factor may have been the fact that the Member States' margin of appreciation related to the authorization scheme was not adequately limited, while in the judgement in the Cali Apartments case, the CJEU found that the Member States' margin of appreciation was properly circumscribed. In the latter ruling, the condition imposed by the regulation, according to which in some cases the conversion of an apartment to short-term rental requires long-term rental of other apartments, can only be properly fulfilled within the framework of a scheme of prior authorization.

The fact that the application of a scheme of prior authorization is not restricted by EU law to agricultural land definitely undermines the specifics and exceptional status of land policy. It is also clear from the judgment that, from the aspect of public interest, municipal interests, or as the CJEU put it in the judgment, "municipal

public interests” have caught up with the land policy that promotes the objectives of the CAP.

SUMMARY

It is clear that prior to the *KOB Sia* case, the free movement of capital applied to agricultural land. The Member States’ margin of appreciation in land policy was at the intersection of the positive and negative form of integration, that is, the free movement of capital – as a provision of primary law – applied among the fundamental economic freedoms.

Although the CJEU exercised strict control in terms of national land policy measures and examined such measures in accordance with that in its case-law, it nonetheless recognized, at least in principle,⁷³ that the land policy targets, such as the promotion of the creation of small and medium-sized farms and the alleviation of speculative pressure of agricultural land, are in line with the objectives of the CAP focusing on the preservation of the farmers’ quality of life. To a large extent, this – and the specific nature of agricultural land – explains the fact that according to the case-law prior to the *KOB Sia* judgment, Member States could only introduce prior authorization in the case of agricultural land among the operations related to immovable property, while in other areas only the requirement of prior notification was found to be in line with the criteria of EU law. It was largely a common opinion in the legal literature that, despite the fact that the case-law of the CJEU allowed for regulation in the case of agricultural land in principle, the relevant case-law rather showed the predominance of internal market provisions. However, this case-law did not actually introduce obstacles to prevent the Member States from regulating land ownership. This is largely due to the fact that the European Commission has not initiated infringement⁷⁴ procedures in this area,⁷⁵ and judgments resulting from preliminary ruling procedure were also seldom rendered.

In the judgment in the *KOB Sia* case – as already mentioned – the CJEU did not examine in detail the compatibility of the national legislation with EU law, since the national measure at issue implemented a direct discrimination on the grounds of

⁷³ In this paper, we do not touch upon the fact that, in practice, the positive form of integration is often pushed into the background.

⁷⁴ In fact, the judgement in the case *Commission v. Hungary* did not concern the Member States’ margin of appreciation in land policy or the changes thereof, but rather the termination of the derogation period and the measures taken during that period.

⁷⁵ Although the European Commission launched a comprehensive investigation in the 2000s, this investigation, to our knowledge, did not reach the CJEU.

nationality. Therefore, the only conclusion we can draw is that from now on, instead of the free movement of capital, the freedom of establishment and the provisions of the so-called services directive will apply in the case of agricultural land.

In terms of how the Member States' margin of appreciation in land policy may have changed, we can find a clue among the decisions deemed relevant by the CJEU in the scope of the application of the directive. In that regard, we examined the judgments in the Cali Apartments and Visser cases in particular.

In the judgement rendered in the Cali Apartments case, the CJEU found that a scheme of prior authorization is compatible with EU law not only in the case of agricultural land, but also of other immovable property. This decision definitely undermines the exceptional, specific position of agricultural lands, particularly in relation to the implementation of the objectives set forth by the CAP. There may be several reasons underlying the decision: it can be interpreted as meaning that the public interest related to urban areas, embodied in the protection of the tenant, has "caught up" in importance to agricultural land and that social diversity, which is not defined in more detail, is also instrumental.

It should be mentioned that the legislator seems to have paid attention to the development of the Member States' margin of appreciation according to the criteria of EU law in the scope of the negative integration. Another factor that may have influenced the "decision" of the CJEU is the fact that objective reasons are pushed into the background compared to the subjective rights of legal entities, just like in the Konle and Cali Apartments cases, where the CJEU found that the protection of tenants from higher rents is more pressing than the interest of the given settlement to maintain a permanent population independent of the tourist sector.

If the cross-border element will no longer be required by the EU legal order in legal disputes related to the area of land policy, this will have a very serious impact, in the sense that it may give rise to many more legal disputes through the preliminary ruling procedure system. And more legal disputes may reduce the Member States margin of appreciation in terms of regulation.

It is probably the judgement rendered in the Visser case that gives rise to most questions: at first glance, it seems that EU law applies significantly stricter control in the primary law – that is, in relation to the freedom of establishment – than within the scope of the application of the Directive. If this weaker control were to appear in the land policy as well, it could somewhat offset the elimination of the requirement of a cross-border element.

However, the judgment in the Visser case allows for additional questions: are the apparently less strict control criteria really due to the fact that the CJEU based its judgement on the Directive instead of the primary law? The regulations of both

concerned Member States show significant similarities: by limiting retail activity, they sought to promote environmental protection goals through avoiding unnecessary driving and to preserve the traditional functions of the city centre, in which retail plays an important role. In the *Visser* case, both the CJEU and the Advocate General classified these objectives as acceptable and proportionate, and the Advocate General also pointed out that the objectives in question cannot be achieved by any other measure.

However, we can also discover differences in the regulations of the two Member States: from a certain point of view, the Spanish regulations can be considered as a scheme of prior authorization, unlike the regulations examined in the main proceedings of the *Visser* case. In addition, the Spanish regulation also took economic reasons into account and was suitable for keeping out certain retail businesses away.

Another key factor may lie in the arguments of the Commission put forward in relation to the Spanish regulation, namely that in the Spanish Kingdom there are no large-scale retail chains described in the regulation, therefore, the regulation is not aimed at the public interest related to the referenced environmental and urban policy arguments, but at prohibited economic practices incompatible with the internal market.

Neither can we overlook the fact that the decision concerning Spain is a judgment resulting from an infringement procedure, while the *Visser* judgment is a ruling that resulted from a preliminary ruling procedure. Consequently, in the decision concerning Spain, the CJEU could not decide in favour of the seemingly less strict solution by referring the assessment of the adequacy of the national legislation at issue to the jurisdiction of the acting national court.

It follows from the aforesaid statements that the less strict nature of the EU control applied in the *Visser* judgment was in fact not due to the fact that the Directive was applied by the CJEU instead of the primary law.

After juxtaposing the judgements examined in this study with regard to the change in the Member States' margin of appreciation in land policy, we can draw the following conclusions, provided that the judgment in the *KOB Sia* case becomes consolidated, that is, the directive and not the free movement of capital will apply in the field of land policy: based on CJEU's judgements under examination, no definite conclusion can be drawn as to whether the applied EU control criteria will be stricter or perhaps more lenient, that is, whether the Member States' margin of appreciation in the regulation related to land policy will change within the scope of application of the Directive.

The admissibility of a scheme of prior authorization in the judgment in the *Cali Apartments* case indicates that the specific nature of agricultural land in the

EU legal system is decreasing in the field of regulation of agricultural land, and that the public interest related to urban areas and the improvement of the situation of tenants are as important as the objectives of the CAP focusing on the quality of life of farmers.

Nonetheless, the fact that, based on the latest case-law of the CJEU, the EU legal order no longer requires a cross-border situation will, in all probability, result in more legal disputes as regards the compatibility of national land policy rules with EU law. And that will most likely lead to a decrease in the Member States' margin of appreciation to regulate.⁷⁶ In any case, with intelligent regulation, the Member States can still significantly increase their margin of appreciation in terms of the regulation related to land policy. In any case, with intelligent regulation, the Member States can still significantly increase their margin of appreciation in terms of the regulation related to land policy: as we have seen in the judgments rendered in the Cali Apartments and Visser cases, regulation designed in accordance with the criteria required by EU law, especially the appropriate development of the Member States margin of appreciation, can be considered a key aspect in asserting the public interest objectives defined by each Member State within the framework of EU law.

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⁷⁶ If the negative integration remains predominant in the case-law within the scope of the application of the directive. As already mentioned, it has not had a major impact so far, inter alia, because the European Commission does not typically initiate infringement proceedings in this area and individual lawsuits are also seldom initiated: the mobility of farmers is typically low, therefore, they do not tend to initiate such lawsuits in other Member States.

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