

Michał Giżewski
University of Warsaw

RESTRICTIONS ON TRADING IN AGRICULTURAL LAND AND EUROPEAN UNION LAW

1. POLISH LAW

30 April 2016 saw the entering into force of the Act of 14 April 2016 on the Suspension of Sale of Land of the Agricultural Property Stock of the State Treasury and on Amending Numerous Acts¹. The amendments pertained to, *inter alia*, the Act of 11 April 2003 on the Formation of the Agricultural System², and introduced a variety of alterations thereto, thus restricting significantly the freedom of trading in agricultural land. The Act was enacted by virtue of the lapse of the 12-year transition period as regards acquiring agricultural and forest land. Acquisition of land by foreigners is for many, especially the new, Member States of the EU a highly sensitive subject for both economic and historical reasons. Poland, under Annex XII to the Accession Treaty, could retain its restrictions on the acquisition of land by non-residents³. The Treaty laid down that “in no instance may nationals of the Member States or legal persons formed in accordance with the laws of another Member State be treated less favourably in respect of the acquisition of agricultural land and forests than at the date of signature of the Accession Treaty”.

The Act on the Formation of the Agricultural System begins with a preamble which discloses the *ratio legis* of the Act's provisions. The principal aims are: protection and development of family farms which, pursuant to the Polish Constitution, are the foundation of the agricultural system of Poland. To better understand the motives of the legislator it is relevant to quote from the reasons appended to the 2016 draft bill: “Agricultural land is the most important means of production of food and realizing the fundamental duty of feeding the entire population. Circumstances and characteristics which allow for agricultural use

¹ Polish Official Journal of laws of 2016, item 585.

² Polish Official Journal of laws of 2016, item 2052, as amended.

³ B. Bacia, A. Zawidzka, *Swoboda przepływu kapitału i usługi finansowe w Unii Europejskiej*, Warszawa 2011, p. 33

of land are neither stable nor permanent. Civilizational progress, urbanistic processes and climate change lead to a marked reduction of the agricultural property stock by changes to their legal purpose, degradation of productive characteristics or utter devastation of the environment. This is why agricultural land shall be considered a finite public good and as such be subjected to extraordinary legal regulation. Legal protection should be quantitative, aimed at maintaining the current level of agricultural stock and the productive characteristics of soil as well as reviving the characteristics lost beforehand. Consequently, the protective profile dominates the provisions governing the principles and methods of trading in agricultural land. In the light of the above, it is necessary to institute an appropriate legal regime whereby a proper distribution of agricultural land as a finite legal good is ensured.

1 May 2016 marked 12 years of Poland's membership in the European Union. Section 4.2 of Annex XII to the Accession Treaty allowed Poland to maintain in force for twelve years from the date of accession the rules laid down in the Act of 24 March 1920 on the Acquisition of Real Estate by Foreigners, regarding acquisition of agricultural and forest land by foreigners. There is a threat that after that date land hitherto subjected to the transition period may be of fervent interest for investors from other EU Member States, especially those where agricultural land is proportionately more expensive and where there are harsh restrictions on trading in agricultural land as regards foreigners and citizens who are not farmers. Such restrictions are in force in, *inter alia*, France, Germany and Denmark. Moreover, as food security is increasingly more endangered and the worldwide agricultural property stock is shrinking, interest in agricultural land may receive a boost as a purchase could represent a beneficial investment. The above concerns are compounded by the fact that Polish farmers are discriminated against as they receive far lower direct payments from the EU than the average, which makes it so that Polish farmers will be unable to compete, when it comes to purchasing agricultural land, with better subsidized EU farmers. The 2016 Act intends to strengthen the protection of agricultural land in Poland by shielding it from the danger of speculative purchases by domestic and foreign investors where such purchases do not further the public interest that lies in using such land for agricultural purposes. Previously, in no way did the law counteract speculative purchases of agricultural land nor guarantee that land bought would have been used for agricultural purposes⁴.

The Act contains several provisions whose compliance with EU law is doubtful. First, the right to purchase agricultural land is reserved for individual farmers, that is, under Article 6(1) of the Act, an owner, perpetual usufructuary, owner-like possessor or lessee of agricultural land whose joint area does not exceed 300

⁴ Reasons appended to the draft bill of 4 March 2016 on the suspension of sale of land of the Agricultural Property Stock of the State Treasury and on amending numerous acts, Sejm paper No. 293.

ha, who has agricultural qualifications and has resided for at least 5 years in the district where at least one of the agricultural parcels forming part of the farm in question is located, and who runs the farm by themselves. Among the persons exempted from those restrictions are: a family member of the seller, a local government authority, the State Treasury, legal persons operating on the basis of the provisions concerning the relations between the Catholic Church and the Republic of Poland, the relations between the state and other churches and religious associations, and national parks. The restrictions do not apply, moreover, to land that is subject to succession or a bequest (Articles 151 and 231 of the Civil Code⁵) and during a restricting process as part of rehabilitation proceedings. The Act also envisages an exception where a purchase of agricultural land may go through provided the Chief of the Agricultural Property Agency authorizes it. To that end, however, several conditions must be met: it must be proven that the entities exempted from purchasing restrictions cannot buy the land in the immediate case; a warranty for the running of proper agricultural activity must be given, and the purchaser must undertake to reside, for 5 years from the day the land is bought, within the territory of the locality where the land being purchased is situated. The buyer must also commit to running a farm, on the parcel of land purchased, for at least 10 years since the date of purchase. Where the buyer is a natural person, the farm must be run personally. Within the prescribed period it is illegal to dispose of the land, e.g. by selling it to another, except where a court authorizes such a disposal by virtue of fortuitous circumstances. By force of law, a purchase of agricultural land in breach of the foregoing restrictions is ineffective.

2. LAW OF THE EUROPEAN UNION

It is a common description in the literature that “The free movement of capital is one of the pillars of the internal market. (...) It is to ensure access to capital and a possibility of investment thereof in circumstances as beneficial as possible – for investors may offer their disposable capital in whichever Member State they please, where they need not fear administrative nor legal obstacles”⁶. The free movement of capital is enshrined in Article 63 of the Treaty on the Functioning of the European Union (hereinafter: TFEU). The Article prohibits any and all restrictions on the free movement of capital between the Member States and between them and non-EU states. Trading in land is a significant element of the

⁵ Polish Official Journal of Laws of 2017, item 459.

⁶ A. Zawidzka-Łojek, *Swoboda przepływu kapitału*, (in:) A. Zawidzka-Łojek, R. Grzeszczak (eds.), *Prawo materialne Unii Europejskiej: swobodny przepływ towarów, osób, usług i kapitału, podstawy prawa konkurencji*, Warszawa 2013, p. 303.

free movement of capital (see Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty). The free movement of capital covers investments in land abroad conducted by non-residents within the territory of a Member State as well as investments in land abroad by residents.

EU law admits introducing certain restrictions on the free movement of capital. Under Article 65 TFEU the Member States may apply relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested, and take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information. The Article also includes a classic reference to public order and security⁷. The latter notion is present in the CJEU's judgment in *Albore*⁸. The Court considered the compatibility with EU law of Italian legislation which released Italians, to the exclusion of foreigners, from the duty to obtain a permission to acquire land located in an area considered strategic for reasons of state security. The Court held that the provisions in issue violated the the free movement of capital, were discriminatory against non-Italian EU citizens, disproportionate, and therefore in breach of Article 65 TFEU. No instruments or procedures prescribed may be used to arbitrarily discriminate nor to covertly restrict the the free movement of capital. The member States must not implement protectionist policies⁹. "Article 63 TFEU has introduced a clear and unconditional prohibition on restrictions of the free movement of capital, it does not require implementation, and it equips individuals with rights they can assert before courts. Finally, not only does it have vertical, but also horizontal direct effect"¹⁰. Vertical direct effect makes it possible for citizens to assert their rights against states, whilst horizontal direct effect extends this right to cover claims against other natural and legal persons.

In the *Ospelt* case¹¹, the CJEU examined a requirement to obtain a permission to purchase agricultural and forest land. An Austrian regulation necessitated that a purchaser of land prove they will retain its agricultural character. Mrs Ospelt intended to transfer the ownership of her land to a foundation uninvolved in agricultural activity. The Court held that the requirement is not, in and of itself, inconsistent with the free movement of capital, however the duty to cultivate the

⁷ *Ibidem*, p. 324.

⁸ Judgment of the Court of Justice of the European Union of 23 July 2000 in Case C-423/98 *Alfredo Albore*.

⁹ A. Zawadzka-Łojek, *Swoboda przepływu...*, p. 324.

¹⁰ M. Daulenov, *Przepływ osób, usług, towarów i kapitału w umowach międzynarodowych Unii Europejskiej*, Toruń 2016, p. 293.

¹¹ Judgment of the Court of Justice of the European Union of 23 September 2003 in Case C-452/01 *Ospelt*.

farmland personally goes beyond what is indispensable to retain the agricultural character of the land.

Another important judgment in the realm of land trade was rendered in the case of *Festersen*¹². The CJEU held that “the residence requirement, particularly since it is coupled in this case with a condition that residence be maintained for eight years, to which the acquisition of agricultural properties of less than 30 hectares is made subject by the national legislation at issue in the main proceedings does not appear to be a measure which is proportionate to the objective pursued and therefore constitutes a restriction to the the free movement of capital which is incompatible with Article 56 EC”. Domestic provisions laying down a duty to reside on given land, intended to prevent the purchase of land for speculative purposes, correspond with an aim conducive to the general interest of a Member State. The residence duty interferes not only with the principle of the free movement of capital but also with the right to freely choose one’s place of residence as codified in Article 2(1) of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR). Pursuant to Article 6(3) of the Treaty on the European Union, “the Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law”¹³. It appears that the residence duty goes beyond what is necessary to achieve the set goal, therefore it is disproportionate. The CJEU noted also that Article 56(1) EC (now Article 63 TFEU) prohibits those restrictions on the the free movement of capital that are capable of discouraging non-residents from investing in the EU Member State in question or residents from purchasing land in other Member States. An instrument restricting the the free movement of capital may be permissible only if it serves the general interest, is applied in a non-discriminatory manner and follows the rules of proportionality, namely is appropriate for the ensuring of the realization of the goal pursued and does not go beyond what is necessary to achieve it.

3. CONCLUSIONS

As shown above, many of the provisions of the Polish Act on the Formation of the Agricultural System may be compared to the legislation of other Member States restrictive of trading in agricultural land that have already been scruti-

¹² Judgment of the Court of Justice of the European Union of 25 January 2007 in Case C-370/05 *Festersen*.

¹³ Judgment of the Court of Justice of the European Union of 27 June 2006 in Case C-540/03 *European Parliament v Council of the European Union*, para 36.

nized by the CJEU. The principle of primacy mandates that domestic laws be consistent with the relevant EU standards, and past considerations of the CJEU facilitate an assessment whether Polish laws meet this condition. Primacy of EU law, established primarily in the CJEU's case law (e.g. *Rewe-Zentral AG*¹⁴, *Van Gend & Loos*¹⁵) binds all national authorities and covers all domestic legislative enactments. As EU law is to be accorded priority over national law, the Member States shall ensure the effectiveness of the former and, where inconsistencies arise, apply the EU standard.

An analysis of the compatibility of Polish restrictions on the purchase of agricultural land must start by asserting that the mere definition of an "individual farmer" is questionable. First, the duty to reside, for at least 5 years, in the district where at least one of the agricultural parcels forming part of the farm in question, was featured, in a similar form, in *Festersen*. Since such a requirement interferes not only with the principle of the free movement of capital but also with the right to freely choose one's place of residence, it breaches the principle of proportionality.

Analogous conclusions may be drawn as regards the duty to personally run the farm. As held in *Ospelt*, this requirement is not essential to maintain the agricultural character of land. Suppose a farmer owns a large farm, e.g. of 250 ha, and naturally requires the help of other people to run it. Doubts are not dispelled by Article 6(2) of the 2016 Act which defines "personal running of a farm" as: (1) personal work on the farm; (2) making all decisions in respect of undertaking agricultural activity by the farm. First, it is unclear, judging by the wording of the Act, whether these conditions must be met jointly or alternatively. Second, interpretation of the terms used is uncertain.

Another duty concerns having to run the farm, to which a purchased parcel of land belongs, for at least 10 years following the purchase. As noted above, during that time the parcel may not be sold. Of course, whilst the instrument may successfully realize the goals it pursues, it completely defies the principle of the free movement of capital as the parcel in issue is exempted from trade for a relatively long period of time. Regardless, another charge against the regulation may be its potential incongruity with the right to property, guaranteed by Article 64 of the Polish Constitution and Article 17 of the Charter of Fundamental Rights of the European Union. Article 31(3) of the Constitution holds that any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Importantly,

¹⁴ Judgment of the Court of Justice of the European Union of 20 February 1979 in Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*.

¹⁵ Judgment of the Court of Justice of the European Union of 5 February 1963 in Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*.

such limitations shall not violate the essence of freedoms and rights. The Charter breaks down the right to property into rights to use, own and dispose of property. Limitations may be imposed only in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. Exclusion of the possibility of disposing of one's property appears to violate the essence of the right to property. Whilst it is true that the limitations are in accordance with the public interest, even so it is difficult to deny that they go too far. The goal pursued here was preventative, i.e. the legislator intended to prevent a hypothetical situation, projected to eventuate following the lapse of the 12-year transition period, from materializing. One must realize that the restrictions attach not only to the purchase of agricultural land by foreign persons, but also they hamper agricultural or other business activity carried out by Polish entities.

The Act on the Formation of the Agricultural System envisages a scenario where a court may permit a sale of land before the 10-year period elapses, due to fortuitous events. Similarly to the circumstances present on the facts of *Festersen*, the wording of the Act seems too general. The Danish agricultural legislation authorized the Minister for Food, Agriculture and Fisheries to permit the sale of agricultural land where the residence requirement was unfulfilled, however only under "extraordinary circumstances". It was the CJEU's assessment that this was excessively broad a description as lack of clarity impedes individuals in their recognition of the rights and duties applicable thereto, which, in turn, constitutes a violation of the principle of legal security: "Although the Danish legislation on agriculture does not discriminate between Danish nationals and nationals of the other Member States of the European Union or the European Economic Area the fact nevertheless remains that the residence requirement which it imposes and which may be waived only with the authorisation of the minister responsible for agriculture restricts the the free movement of capital"¹⁶.

I will turn my attention now to the provision which authorizes the purchase of agricultural land by persons other than those enumerated in the 2003 Act following the issuance of a permission by the Chief of the Agricultural Property Agency. A permission is granted by means of an administrative decision. The requirements attached to the obtainment of the permission may be assessed subjectively, according to the individual circumstances of the buyer (e.g. a warranty of the proper running of the farm). In fact, some may prove very difficult or even impossible to meet (e.g. asserting that there was no possibility of selling the land in issue to any of the entities listed in the Act). This state of affairs may give grounds to discriminatory treatment and trigger doubts in the context of the principle of legal certainty.

¹⁶ *Festersen*, para 25.

It should be noted that a number of EU Member States have attempted to institute restrictions on trading in agricultural land. Denmark's regulations are considered one of the strictest: "purchase of agricultural land larger than 30 ha by a natural person is possible provided that: the buyer is at least 18 years old; they are a citizen of Denmark, an EU or EFTA Member State, and, pursuant to the regulations in force therein, they are authorized to purchase land in Denmark; the buyer or their spouse or children, at the time of purchase of land in Denmark, do not own or co-own any agricultural property abroad; if the buyer owns agricultural land in their country of origin, they must sell it before being able to purchase land in Denmark; the buyer must be a permanent resident of Denmark; they must move to Denmark within 6 months of the purchase; they must have completed agricultural studies and possess qualifications recognized by the Ministry of Agriculture; the buyer must manage the land on their own, personally. Agricultural land may also be purchased by companies. The following requirements must then be met: shares entitling to a majority of votes and at least 10% must be in the hands of a natural person meeting the requirements to buy agricultural land for their own benefit, however the duty to manage the land personally attaches not to that person but to the company (except where land is bought for special purposes, such as social, educational, experimental or scientific; the rest of shares belongs to family members of the principal shareholder, a pension fund, or an insurance company (in case of a joint-stock company – all shares are registered).

In Germany, sale of forest and agricultural land is subjected to administrative control. Permissions for the sale of agricultural land are granted by a general administrative authority or a district-level body, depending on the state concerned. This is applied by analogy to exchanges, donations, agreements and testamentary matters related to agricultural land. A permission is not issued if: the sale results in an irrational division of agricultural land; the sale of part or all of land comprising a farm brings about its division that makes the running of the farm financially unsustainable; the division of land reduces the area of any parcel concerned below 1 ha; the land price differs markedly from the prices offered on the local market"¹⁷.

4. CONSEQUENCES

It must be reminded that the principle of the free movement of capital is not absolute and it allows exceptions. However, such exceptions must be proportion-

¹⁷ Reasons appended to the draft bill of 4 March 2016 on the suspension of sale of land of the Agricultural Property Stock of the State Treasury and on amending numerous acts, Sejm paper No. 293.

ate and non-discriminatory. To violate these rules could subject Poland to liability by virtue of a breach of Community law. “The notion of a breach by a Member State of their Treaty obligations is very broad and encompasses every instance of non-compatibility of national law with EU law both when it comes to enactment and application of law”¹⁸. “It is the European Commission that monitors the application of EU law by the Member States as part of its function of the guardian of the Treaties under Article 17 TEU, an authority which has exclusive competence as regards lodging complaints before the Court by virtue of Article 258 TFEU”¹⁹. If the Commission assumes that the administrative proceedings have failed, it may take a given matter to the Court, whose judgment the Member State concerned must implement. In an extreme case, where a Member State neglects this obligation, the Commission may require that the Court impose a financial penalty on the State.

Tortious liability of the State Treasury is relevant here as, under Article 417¹ § 1 of the Polish Civil Code²⁰, one may demand redress of damage caused by the issuance of a normative act that contradicts the Constitution, a ratified international treaty or a statute. Availability of a compensatory claim depends on a prior establishment of incompatibility during the appropriate proceedings (the Constitutional Court is the fundamental authority competent to issue such a ruling). Poland’s accession to the EU is momentous as ever since EU law is in force also domestically and should the domestic legislator violate it, the victim has a compensatory claim. The CJEU has held that a claim in tort lies only where a national legislator has violated a law intended to accord rights to individuals. The EU provisions which establish the principle of the free movement of capital may be used by individuals to assert their rights²¹. CJEU’s judgments take precedence over national courts’ determinations. Although the CJEU tends to refrain from adjudicating upon the compatibility of domestic laws with EU law before a domestic court hands down their opinion, it accepts prejudicial questions concerning the bindingness of Community law. In the light of the above, as well the principle of ensuring complete effectiveness of EU law, the requirement to go through pre-trial proceedings before a case is considered by a court does not apply to cases of incompatibility of Polish law with EU law. Support for this conclusion may be found in Article 417¹ § 1 of the Polish Civil Code where EU law, as a category separate from international treaties, is not mentioned²².

¹⁸ A. Sikora, *Skargi o stwierdzenie uchybienia prawu unijnemu przez państwo członkowskie (art. 258, 259 oraz 260 TFUE)*, (in:) A. Zawidzka-Lojek, A. Łazowski (eds.), *Instytucje i porządek prawny Unii Europejskiej*, Warszawa 2015, p. 237

¹⁹ *Ibidem*, p. 235.

²⁰ Polish Official Journal of Laws of 2017, item 459.

²¹ Z. Radwański, A. Olejniczak, *Zobowiązania – część ogólna*, Warszawa 2016, p. 228.

²² J. Kremis, (in:) E. Gniewek, P. Machnikowski (eds.), *Kodeks cywilny. Komentarz*, Warszawa 2013, p. 741.

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Summary

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BIBLIOGRAPHY

- Bacia B., Zawadzka A., *Swoboda przepływu kapitału i usługi finansowe w Unii Europejskiej*, Warszawa 2011
- Daulenov M., *Przepływ osób, usług, towarów i kapitału w umowach międzynarodowych Unii Europejskiej*, Toruń 2016
- Kremis J., (in:) E. Gniewek, P. Machnikowski (eds.), *Kodeks cywilny. Komentarz*, Warszawa 2013
- Radwański Z., Olejniczak A., *Zobowiązania – część ogólna*, Warszawa 2016
- Sikora A., *Skargi o stwierdzenie uchybienia prawu unijnemu przez państwo członkowskie (art. 258, 259 oraz 260 TFUE)*, (in:) A. Zawadzka-Łojek, A. Łazowski (eds.), *Instytucje i porządek prawny Unii Europejskiej*, Warszawa 2015
- Zawadzka-Łojek A., *Swoboda przepływu kapitału*, (in:) A. Zawadzka-Łojek, R. Grzeszczak (eds.), *Prawo materialne Unii Europejskiej: swobodny przepływ towarów, osób, usług i kapitału, podstawy prawa konkurencji*, Warszawa 2013

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SŁOWA KLUCZOWE

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