Ágoston KOROM*

Requirements for the cross border inheritance of agricultural property Which acts of the primary or secondary EU law can be applied in the case of agricultural properties' inheritance?**

Abstract

Regulation 650/2012/EU does not substantially affect the powers of Member States with regard to the inheritance of agricultural property, but Member States are not exempted from the EU control mechanism on fundamental economic freedoms in this area. Article 345 of TFEU, according to settled practice, prevails as private autonomy which, in principle, may not extend to national rules on the succession of agricultural property. Most of the CJEU decisions in this area concern to inheritance duties, where the CJEU exercises special control.
The practice developed by the CJEU in the case of other real estate operations in the Member States may apply to the rules of the Member States on the succession of agricultural real estate, taking into account that, in addition to the free movement of capital and property rights guaranteed by Article 17 of the Charter, in the legal developments in the KOB Sia case the freedom of establishment and Directive 2006/123 may be applied in certain circumstances.
Keywords*:* EU rules on inheritance of agricultural property, applicability of Regulation 650/2012/EU, inheritance of real estates, free movement of capital, freedom of establishment, Directive 2006/123

1. Introduction

In our view, Regulation 650/2012/EU on inheritance is a significant step; it does not settle all uncertain situations and decisively influences member states' margin of appreciation. There are no CJEU judgments about member states' inheritance regulations on agricultural property.

To answer the question raised in the title, we will examine and categorize case law on property, agricultural property, and inheritance of property.

Member states' transactions on the property can be categorized; first, we examine CJEU decisions concerning the free movement of capital. The judgment in the Segro case and Commission/Hungary – that the Member State attempted to justify by stepping up against the misuses – can be divided. We analyze CJEU decisions on secondary property, in which the free movement of capital was applied as part of the negative integration form.

Ágoston Korom: Requirements for the cross border inheritance of agricultural property. Which acts of the primary or secondary EU law can be applied in the case of agricultural properties' inheritance? *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2022 Vol. XVII No. 33 pp. 63-74, https://doi.org/10.21029/JAEL.2022.33.63

* dr. jur., PhD, LLM, assistant professor, Department of Civil Law, Faculty of Law, Károli Gáspár University of the Reformed Church, email: korom.agoston@kre.hu.
** *This study has been written with the support of the Agricultural Ministry.*

https://doi.org/10.21029/JAEL.2022.33.63

After the legal development of the Kob Sia decision, in the case of agricultural property, the CJEU applied freedom of establishment and Directive 2006/123 instead of the free movement of capital.

Next, we examine the decisions related to inheritance duties in which the free movement of capital was applied.

2. Common EU provisions about the EU control on the free movement of capital

Any measure of Member States that considers the internal market's operation belongs to the EU control mechanism under the negative integration form. The CJEU case law determined which fundamental freedom should be applied to Member States' transactions.[1]

The CJEU primarily applies the free movement of capital in the case of transactions of immoveable property if it examines Member States' measures related to the free movement of capital.[2]

It should be determined that in the case of the inheritance of agricultural property, EU law provisions shall be applied in line with the negative integration form related to economic freedoms.

At the beginning of the integration, the free movement of capital was subordinated to other fundamental freedoms until the 1980s; the Single European Act and the Directive of 1988 released the free movement of capital.[3] The Treaty of Amsterdam repealed the Directive; nevertheless, it continued to be influential because of CJEU's case law.[4] It should be mentioned that the scope of the Directive is not limited; therefore, other operations – which are not enumerated in the Directive's Appendix – also belong to the free movement of the capital.

Article 345 of the TFEU, on the autonomy of property, does not justify the restrictions imposed by the Member States; this is the decade-long practice of the CJEU.[5] This only means private law autonomy to Member States,[6] including public law aspects related to the property register and differences in ownership transport applied by specific codes.

In general, a cross-border element is essential to the free movement of property; however, the CJEU's case law is not entirely consistent with this: in the Reisch case,[7] the CJEU applied the free movement of the capital without a cross-border element, in order to eliminate the potential restricting measures.

[1] See: Korom 2013, 11–25.
[2] Ibid.
[3] Pertek 2005, 131–135.
[4] CJEU, C-370/05.
[5] CJEU C-52/16, C-370/05.
[6] Dubouis & Blumann 2012, 650.
[7] CJEU C-515/99.

Furthermore, it is still a question of when the general principles of EU law and the relevant provisions of the Charter are applied in cases related to the operation of the property. However, the CJEU applied Article 17 of the Charter in the Commission v. Hungary case in contrast to the Segro case. This means that in this context, the Member State implements EU law.

The EU requirements on the restitution of property should also be mentioned as a unique case of Member States' transactions related to immovable property. It should be emphasized that similar cases were not brought before the CJEU However, questions for written answers about the restitution of property were raised, and the European Commission's answers can serve as guidance to bring clarity to the issue.[8] In general, EU law does not require Member States to give back the properties confiscated before the Member State acceded or paid any compensation. Despite this, if Member States decide after their accession – within the scope of ratione temporis – to introduce measures related to property restitution, the measures are a movement of capital according to the Commission, and in general,[9] the prohibition of discrimination based on citizenship will be applied.

Furthermore, according to the European Commission, if Member States[10] introduce in the scope of ratione temporis measures on the restitution of property, they shall consider the requirements set by the general principles of EU law and the ownership rights of the Charter of Fundamental Rights of the European Union's Article 17.

3. Land policy measures introduced by the Member States

In this area, we highlight the judgments in the Ospelt[11] and Festersen cases,[12] where the Court of Justice of the European Union examined the targets of the land policy in light of the free movement of capital.[13] We will return to the Kob Sia judgment and the related changes later.

In the Ospelt case, the CJEU examined an Austrian[14] rule: this specific regulation created a prior authorization system for the ownership and use of agricultural lands and forests. In CJEU's interpretation, the rule's goals, such as preserving the rural population and farming establishments, were legitimate. The CJEU mentioned that besides these goals, the rational use of agricultural lands and prevention of speculation in the land market were in line with, following the numbering of used then – Article 39 of the

[8] Of course, the CJEU has the monopoly of the EU law's authentic interpretation in this area. If there is no CJEU decision, the European Commission – as an EU entity – can influence the Member State's public authorities or courts with its statements. In particular, the court of the last instance should turn to the CJEU for a preliminary ruling.
[9] Question for written answer: E-011857/2013.
[10] Question for written answer: E-004016/2020.
[11] CJEU C-52/01.
[12] CJEU C-370/05.
[13] See: Kurucz 2015; Szilágyi 2018; Szilágyi 2015; Szilágyi 2017a; Szilágyi 2017b.
[13] CJEU C-452/01.
[14] CJEU C-452/01.

Founding Treaties, which, among other things, promotes the living standards of farmers. This means addressing the common agricultural policy's goals, besides the fundamental freedoms, thus, acknowledging the negative integration from the positive integration in the Member States' land policy. The CJEU adds that this article emphasizes agriculture's specific characteristics, social aspects, and existing natural and structural differences.

From these goals, the CJEU also concluded that the prior authorization system related to agricultural lands is in accordance with EU law. By contrast, EU law only allows prior notification in other areas. However, according to the CJEU, cultivation by the acquirer and local residency cannot be systematically required.

In the Festersen case,[15] Danish regulation restricted the acquisition of agricultural property, among others, by requiring ex-posts living in areas where criminal sanctions can be punished. This legislation did not comply with EU law according to the CJEU.

It should be noted that the CJEU stated that member states are allowed to introduce restrictions to prevent speculation and preserve rural populations. However, in practice, it is not easy for Member States to regulate this issue. This is because the negative integration form – related to fundamental freedoms – dominates case law, which is stronger than the public interest of the Member State. The principles developed by the CJEU also make it more difficult to justify Member States' restrictive measures or create a vague environment for Member States to regulate, as this case underlies these.

4. Restrictions related to secondary properties

In the judgment[16] of the Konle case, the CJEU examined Austrian rule on secondary properties, primarily in light of the free movement of capital. The Member State aimed to regulate the building plots to achieve rural development objectives because few building plots were in the area. The objectives are acceptable, but the introduced prior authorization system does not seem to be an appropriate and necessary means to meet these goals.

The CJEU's judgment[17] in the Ewald Burtscher case should also be mentioned. The Member State's regulation violated the free movement of capital, and thus EU law. The regulation annulled a property transaction in a secondary residency only because of a statement's late submission about the acquisition of the property.

5. The CJEU's case law on sanctioning misuse

In the judgment of the Segro case, the CJEU[18] examined the regulations of the seven- and three-year derogation period[19] on the acquisition of agricultural property and

[15] CJEU C-370/05.
[16] CJEU C-302/97.
[17] CJEU C-213/04.
[18] CJEU, C-52/16.
[19] The primary law allows Hungary to maintain the regulation existing on the signature of the Treaty of Accession, which – among others – does not allow other Member State's residents to acquire agricultural property.

the prevention of its circumvention in light of the free movement of capital. The particular rule of the Member State reserved the acquisition of usufruct rights of agricultural properties for close relatives. Moreover, it requires the annulation of these rights for legal persons and those who cannot provide close relatedness without provisions to compensate for economic loss.

The CJEU's judgment in commission/Hungary[20] is fascinating. Technically, the European Commission started an infringement procedure related to a similar regulation, in which incompatibility was decided in a preliminary ruling by the CJEU. The CJEU also examined regulations in light of the ownership rights set in Article 17 of the Charter.

However, the regulation concerned agricultural properties and the judgments mentioned above cannot be regarded as part of the case law on land policy.

6. Judgment[21] in the Vlaams Gewest case

A Belgian resident designated a Dutch resident as a specific legatee of her will. This included a forest area concerned with sustainable cultivation requirements set by Dutch authorities in light of Dutch law. It should be mentioned that Belgian law should be applied to inheritance.

When the Belgian resident passed away, the Dutch resident asked the Belgian authorities to exempt him from inheritance duties because the inheritance law made the forest areas, approved by the Flemish authorities, cultivated in line with sustainability requirements, free from the inheritance duty. The applicant's submission was refused, because the area could be found in another Member State. The concerned person brought the case to the Belgian courts because, from his point of view, this regulation violated the free movement of capital as it excluded the properties from tax exemption, that are in another Member State. The Belgian court decided that the concerned area was part of a sustainable management plan that met the requirements of Belgian inheritance rules.

The CJEU opined that inheritance rules belong to the free movement of capital if there is a cross-border element that cannot be disputed.[22] The CJEU pointed out the cross-border characteristics of environmental protection, which require the member states' shared responsibility. [23] However, this discrimination cannot be justified.

7. Judgment[24] in the XY/Finanzgericht Düsseldorf case

In this judgment, the CJEU decided on, among others, whether discrimination in the case of taxes on the transfer of immovable property is against the free movement of capital. The Member State's rule imposed more taxes on inheritance if foreign persons were concerned than inheritances that concerned at least one resident.

[20] CJEU C-235/17.
[21] CJEU C-679/17.
[22] Ibid. paras 16–17.
[23] Ibid. paras 25–26.
[24] CJEU C-394/20.

According to the case law, Member States' measures that limit the value of inheritances that belong to other Member States' residents are against the free movement of capital.[25] The CJEU decided based on its specific case law of tax related to the justification of restrictions by referring to the public interest.

8. Judgment[26] in the Serviatus case

Through this judgment, the CJEU examined the Member State's regulation of properties in an area of building policy and general economic interest in light of the free movement of capital.

In this case, a housing organization was concerned that it did not receive prior authorization to an investment in another Member State. The questions raised to the CJEU, among others, are intended to determine whether a housing organization shall gain prior authorization to invest in property building in another Member State.

Transactions related to the investment, use, or divestment of property located in another Member State belong to the free movement[27] of capital.[28] Case law considers all provisions in this case that can prevent persons from investing in property located in another member state, for instance, by requiring prior authorization.[29]

The CJEU referred to the case law on introducing prior authorization and concluded that these measures could restrict[30] the free movement of capital, even if the prior authorization does not discriminate whether an organization intends to invest[31] in its own or some other Member State.

The Dutch government justified the imposed restrictions on the housing policy objectives. The authorized organization should invest in projects representing housing policy interests, facilitating disadvantaged Dutch citizens to access housing by increasing supply. In general, the CJEU acknowledged that these measures serve the public interest and can justify the restriction of the free movement of capital.

The CJEU finds a prior authorization system's establishment reasonable for these purposes; however, the Member State's provision was not compatible with EU law because of the control of the negative integration form and the too broad margin of appreciation of the Member State's authorities.

9. Judgment in the UM/Finanzamt Villach case[32]

The judgment is particularly examined in the light of Regulation 650/2012/EU, agreements on the transfer of ownership rights in case of passing away, and the choice

[25] Ibid. para 32.
[26] CJEU C-567/07.
[27] According to the state of EU law development.
[28] CJEU C-567/07 para 20.
[29] Ibid. paras 21–22.
[30] Ibid.
[31] Ibid. paras 23–27.
[32] CJEU C-277/20.

of the applicable law. The case concerned land in Austria's territory, but succession proceedings started in Germany.

In the first question of the preliminary ruling, the CJEU gives an extensive interpretation of the agreement as to succession's definition in the Regulation, which takes the first step towards a more uniform EU system,[33] as it interprets all forms of property transfer extensively by inheritance. In contrast, the CJEU more narrowly interprets the other forms of transfers, which are not inheritance, as donations.[34] However, if donation becomes effective when the deceased passes away, it belongs in the scope of the regulation.[35]

10. Judgment in the Commission/Greece case[36]

In the procedure launched by the Commission, it was objected that the Member State's regulation does not allow exemption from inheritance duties for those who do not have permanent residence in Greece. The regulation has similar provisions for property acquired by the deceased's spouse and child. The Commission referred to case law; according to this, property inheritance is a movement of capital.[37]

The Greek government justified the free movement of capital's restriction with several arguments: the CJEU found the government's argument that persons who do not have permanent residency only live in the property for specific periods or use the property in other ways to be irrelevant. The CJEU also does not accept the government's point that exemption from duties is a condition of the heir's relationship with Greek society.

11. Judgment in the Staatssecretaris van Economische Zaken case[38]

The concerned person was a Dutch tax resident who owned land in the United Kingdom and intended to donate it to his son. According to Dutch law, donations such as this are entirely or partially free from duties if the property is in Dutch territory.

According to the case law, provisions on the free movement of capital shall be applied in deciding the tax requirements of the property's donation, except if all elements of the transaction are concentrated in one Member State.[39] The exception of duties related to inheritance law requiring that the property be in the Member State is also part of the case law.[40] A similar approach is followed on matters of donation.

[33] Ibid. para 33.
[34] Ibid. para 34.
[35] Ibid. para 35.
[36] CJEU C-244/15
[37] Ibid. paras 8–9.
[38] CJEU C-133/13.
[39] Ibid. para 18.
[40] Ibid. para 20.

The aim of the concerned regulation of the Member State is to prevent tax exemption in the case of inheritance, breaking up traditional Dutch lands, or damaging their unique character while using them to pay taxes. Thus, the rule aimed to preserve the Member States' beauty, which[41] includes[42] cultural history and heritage protection targets.

In the CJEU's interpretation, those who intend to donate a similar property in a different Member State cannot be considered someone in a comparable situation to those who would like to donate property in another Member State.

12. A paradigm shift in the judgment of the "KOB" SIA case

KOB is an agricultural company that belongs to German citizens and conducts agricultural activity in Latvia. Moreover, the Directorial Council consists of German citizens.

More companies which belong to German owners have a share in the company. The KOB contracted a sales contract of approximately 10-hectare of agricultural land in 2018 and requested the approval of the Member State's authorities, which was refused. The company turned to Latvian courts because the conditions of the authorization system are discriminative on citizenship and, among others, are not compatible with the freedom of establishment.

It should be emphasized that Latvian regulation allows legal persons to acquire agricultural properties. If the legal person is directed or represented by another Member State's citizen, Latvian law sets two more requirements to acquire the ownership of agricultural lands. The other Member State's citizen should be registered by the Latvian authorities, which, among others, includes that she/he intends to stay for more than three months in the Member State and have a general knowledge of the Latvian language, enough to hold a conversation.

Article 345 of the TFEU technically does not challenge this:[43] it is a decade-long practice that ownership autonomy cannot justify the derogation[44] from fundamental freedoms, but makes the Member State's regulation possible in the area.

The question raised before the CJEU is whether freedom of establishment or the free movement of capital should be applied. According to the CJEU's consistent case law, the free movement of capital should be applied in the case of properties. If the CJEU examined a member state's regulation in light of the free movement of capital, it should not be examined in light of the freedom of establishment. From this perspective, freedom of capital can be considered the most potent fundamental freedom. However, in this case, the CJEU referred to the Van der Weegen[45] judgment of 2018, according to which the CJEU only examines a Member State's rule in light of one fundamental freedom,

[41] Similar buildings or buildings built before 1850 are surrounded by parks or gardens and are under the regulation of heritage protection.
[42] Ibid. paras 24–25.
[43] CJEU C-206/19.
[44] Dubouis & Blumann 2012, 650.
[45] CJEU C-580/15.

if the others are secondary to this. In this light, the purpose of the particular regulation should be examined, as pointed out by the CJEU in the KOB judgment. The CJEU adds to the same judgment that the analyzed regulation belongs to the free movement of capital and contains the continuous agricultural use that belongs to the freedom of establishment, because it is considered a permanent economic activity in another member state.

According to the CJEU's interpretation, the KOB SIA case cannot be determined in light of the Member State's examined legislation's purpose if the freedom of establishment or the free movement of capital[46] is applied decisively.[47] For this reason, the CJEU examined[48] the case's factual basis[49] to determine which fundamental freedom should be applied.

The CJEU decided that freedom of establishment should be applied and not the free movement of capital because an economic company can acquire agricultural land in Latvia under the conditions that its representative or member proves their residency in a Member State and has a certain knowledge of the Latvian language.[50]

In the case of Van des Weegen et al., referring to the judgment of June, 2017, opined that, in cases where a Member State's measure considers more than one fundamental freedom, it should be examined in the light of one fundamental freedom if the circumstances of the case indicate that the other freedoms are secondary. The CJEU concluded that compared to other cases – like the judgment in the Segro case[51] – the case primarily belongs to the freedom of establishment, so the Member State's regulation shall be examined in light of this fundamental freedom.[52]

It should be mentioned that the CJEU mentioned the judgment in the Segro case[53] related to its case law on the free movement of capital, in which the member state referred to land policy objectives but the CJEU did not accept that. Furthermore, this decision is closer to the expiration of the derogation period on the land market for Member States, which acceded in 2004, and to the termination of usufruct rights than the range of the Member State's land policy. The CJEU did not mention the Festersen judgment, in which the concerned person purchased land for agricultural use.

The CJEU decided on the exclusive application of the freedom of establishment. However, it did not focus on the application of Article 18 of the TFEU, so freedom of establishment was strengthened compared to the former impactful position of the free movement of capital.

[46] CJEU C-206/19, para 25.
[47] The CJEU adds that from the documents, the concerned person intended agricultural lands to use. The Member State's regulation is about the acquisition of agricultural land and aims to provide its continuous cultivation.
[48] CJEU C-206/19, para 25.
[49] CJEU C-375/12.
[50] CJEU C-206/19, para 26.
[51] CJEU C-52/16
[52] CJEU C-206/19, paras 27–28.
[53] From the community's perspective united by law, the CJEU's case law's consistency is essential. The CJEU puts a particular emphasis on this. From this view, the development mentioned above is not justified. See: Vauchez 2019; Navel, 2021.

The Court recalls its former case law; according to this,[54] the Member States' measures introduced in areas subjected to comprehensive EU harmonization should be decided in light of the secondary EU Act and not the primary law. Thus, case law indicates[55] that provisions of the Directive 2006/123 should be applied. Attention should be raised to the fact that primary law has a more powerful position in EU law than secondary law; the primary law gives the authorization to adopt secondary law measures.

The examined directive would draw a requirement to the Member State's legislator if it introduced an authorization system in the case of particular services. Therefore, it lists prohibited requirements for member states and introduces complete harmonization related to specific provisions of the Directive.

The Court finds that these criteria cannot be justified by Article 14 of Directive 2006/123 and the general system of the Directive related to the Member State's requirements.[56] This is demonstrated by the Rina Services[57] and others and Commission/Hungary[58] judgments.

The additional requirements examined by Latvian regulation can be applied to other Member States' citizens. Therefore, the provisions are against Articles 9, 10, and 14 of Directive 2006/123. For this reason, the CJEU added that the rule's compatibility with EU Law should not be examined in light of the free movement of capital.[59]

13. Conclusion

Regulation 650/2012/EU primarily concerns the authority in inheritance, the Member State's applicable law, the acceptance of the decision in inheritance cases, and the introduction of the European inheritance certificate. The related CJEU case law aspired to develop a unified EU system in the issues considered by the regulation. However, this secondary law act does not substantially influence Member States' margin of appreciation of inheritance, namely, in the case of agricultural properties.

This does not mean that the Member States' rules on the inheritance of agricultural properties are free from fundamental freedoms from EU control in the form of negative integration. As we have seen above, the control developed by the CJEU is applied in the case of all regulations considering the internal market, and the question remains as to which fundamental freedom is applied.

It should be mentioned that there are relatively few CJEU judgment on Member States' rules about agricultural property. However, this does not mean that internal market law would not be applicable. We do not know the CJEU's judgment on the inheritance of agricultural property. The examined CJEU judgments consider transactions related to property or inheritance duties. A specific control mechanism in this area can be derived from primary law and Member States' fiscal sovereignty.

[54] Ibid. para 30.
[55] CJEU C-205/07, para 33.
[56] Ibid. para 38.
[57] CJEU C-593/13.
[58] CJEU C-179/14.
[59] CJEU C-206/19, para 41.

The presented case law allows us to conclude that Member States' private law autonomy derived from Article 345 of the TFEU does not prevent the CJEU from examining Member States' rules or other decisions on the inheritance of agricultural property. It seems relatively clear that Member States cannot exclude other Member States' citizens from inheritance; thus, direct discrimination against citizenship is prohibited.

Other measures that do not realize direct discrimination based on citizenship and restrict fundamental freedoms would certainly be examined in light of the free movement of capital, and if agricultural use occurs in light of the freedom of establishment and the criteria set by Directive 2006/123. Nevertheless, we can undoubtedly conclude this after the first relevant judgment of the CJEU.

Bibliography

1. Dubouis L & Blumann C (2012) *Droit matériel de l'Union européenne*, Montchrestien, Paris.
2. Korom Á (2013) *Az új földtörvény az uniós jog tükrében: Jogegyenlőség vagy de facto más elbírálás? in Az új magyar földforgalmi szabályozás az uniós jogban*, NKE, Budapest.
3. Kurucz M (2015) Gondolatok a magyiar földforgalmi törvény uniós feszültségpontjainak kérdéseiről, in: Szalma J, ed, *A Magyar Tudomány Napja a Délvidéken 2014*, Újvidék: Vajdasági Magyar Tudományos Társaság.
4. Navel L (2021) *L'argument de continuité jurisprudence de la Cour de justice de L'union européenne*, Bruylant, Bruxelles.
5. Pertek J (2005) *Droit matériel de L'Union européenne*, PUF.
6. Szilágyi J E (2015) Következtetések (II. Bizottság), *Agrár- és Környezetjog*, 10(19).
7. Szilágyi J E (2017a) A magyar földforgalmi szabályozás új rezsimje és a határon átnyúló tulajdonszerzések – kérdések a nemzetközi és az európai jog szemszögéből, *Miskolci Jogi Szemle*, 2017.
8. Szilágyi J E (2017b) Az Egyesült Államok és szövetségi államainak mezőgazdasági földtulajdon szabályozása a határon átnyúló földszerzések viszonylatában, *Miskolci Jogi Szemle,* 2017/2. különszám.
9. Szilágyi J E (2018) Mezőgazdasági földjog: Soft law a sof law-ban, Avagy a FAO önkéntes iránymutatása megváltoztathatja-e az uniós jog értelmezési kereteit földforgalmi kérdésekben?, *Iustum Aequum Salutare,* 2018/4.
10. Vauchez A (2019) *Le travail politique du droit, in Le role politique de la Cour de justice de L'Union européenne,* Bruxelles: Bruylant, Bruxelles.