OPINION OF ADVOCATE GENERAL STIX-HACKL
delivered on 3 October 2006 [1]

I — Introduction

1. By means of the two questions referred by its order of 5 October 2005 the Danish Vestre Landsret (Western Regional Court) essentially wishes to ascertain whether it is compatible with the Treaty provisions on freedom of establishment (Article 43 EC) and the free movement of capital (Article 56 EC) for a Member State to lay down as a condition for acquiring an agricultural property the requirement that the acquirer take up fixed residence on that property.

2. The background to this reference is a criminal case brought against Mr Uwe Kay Festersen, a German national, for breach of the obligation to take up fixed residence within six months on the property he acquired.

3. Amongst the Court's case-law on conditions imposed on the acquisition of property in national legal provisions, the judgment in the *Ospelt* [2] case in particular is of decisive importance here, since, like the present case, it specifically concerned the conditions for the acquisition of agricultural land.

II — The applicable Danish legal provisions relating to the acquisition of agricultural property

4. The *landbrugslov*, as amended in 1999, is applicable to the facts in the main proceedings (Codified Law No 598 of 15 May 1999, hereinafter: Law on agriculture).

5. According to Paragraph 2 of the Law on agriculture, agricultural properties are subject to an agricultural-use obligation, and a property is to be regarded as agricultural property if it is registered as such in the land register.

1 — Original language: German.

2 — Case C-452/01 [2003] ECR I-9743.

6. According to Paragraph 7 of the Law on agriculture an agricultural property must be maintained as an independent business and always be provided with an appropriate residential building, from which the residents farm the land.

7. The conditions for the acquisition of agricultural property are laid down in the following extract from Paragraph 16 of the Law on agriculture:

'1. Title to an agricultural property which is situated in an agricultural zone and has an area exceeding 30 hectares may be acquired if:

...

(4) the acquirer takes up fixed residence at the property within six months after acquisition,

...

2. Title to an agricultural property which has an area not exceeding 30 hectares may be acquired if the acquirer fulfils the requirements of subparagraph 1(1) to 1(4) ...'

8. There is no obligation to farm the land in person in the case of agricultural property below 30 hectares.

9. It follows from Paragraph 18b(1) and Paragraph 4 of Decree No 627 of 26 July 1999 relating to training and residence requirements in connection with the Law on agriculture (hereinafter: Decree No 627), that the residence requirement should be understood as requiring the person subject to it to have a fixed and permanent residence on the relevant property, which also constitutes his principal residence for tax purposes. The person subject to the requirement must at the same time be registered for that purpose in the local authority's register as residing at the property. According to Paragraph 4(2) of Notice No 627 the acquirer must fulfil the residence requirement for eight years from the acquisition of the property.

10. Exceptions to the residence requirement are possible in certain cases. Thus Paragraph 18 of the Law on agriculture provides:

'1. Without prejudice to the cases covered by Paragraphs 16, 17 and 17a, title to an agricultural property in an agricultural zone may be acquired only with the authorisation of the Minister for Food, Agriculture and Fisheries.

...

4. The Minister may authorise the acquisition of an agricultural property, if

(1) the acquisition is for the purposes of a use within the meaning of Paragraph 4 (1)(1) and it is expected that the property will be used for the relevant purpose in the near future,

(2) the acquisition is for business purposes relating to a non-agricultural use which is otherwise to be regarded as desirable taking into account the general interests of society,

(3) the acquisition is for particular purposes, including use for scientific, training, general social, health or general recreational purposes,

(4) the acquisition is in connection with the creation of water meadows, the restoration of the environment or similar circumstances, or

(5) other special circumstances mitigate in its favour ...'

11. Paragraph 62 of a circular relating to the Law on agriculture provides in relation to this:

'Authorisation under Paragraph 18 of the Law [on agriculture] for the acquisition of agricultural property with an exemption from the residence requirement for an indefinite period may be granted only in exceptional cases (see Paragraph 16(1)(4) of the Law on agriculture). This applies for example in cases where due to the characteristics of the site it is physically impossible to fulfil the residence requirement for a large part of the year. The provision must be applied restrictively.'

III — Facts, main proceedings and questions referred

12. The defendant in the main proceedings, the German national Uwe Kay Festersen, became the owner of a property in southern Jutland with effect from 1 January 1998. It consists of an area of 0.24 hectares situated in an urban zone with buildings on it and a piece of meadow land of an area of 3.29 hectares situated in an agricultural zone. The whole property is registered as agricultural property in the land register.

13. Since Mr Festersen did not take up fixed residence on the agricultural property as required by the Law on agriculture, on 8 September 2000 the Jordbrugskommission for Sønderjyllands Amt (Agricultural Committee for Southern Jutland; 'the Committee') requested him to comply with the applicable law. As he did not do so, the Committee warned him again on 16 July 2001.

14. On 12 June 2003 Mr Festersen took up residence at the property in question and has been registered in the register as resident there since 12 September 2003.

15. In the meantime Mr Festersen had been charged at the Ret Gråsten (Gråsten Local Court). He was convicted by the Ret Gråsten's judgment of 18 August 2003 as he had not complied with the Committee's request of 8 September 2000. A fine in the sum of DKK 5 000 was imposed as a punishment. In addition a coercive penalty payment in the sum of DKK 5 000 was imposed for each subsequent month commenced after 1 December 2003 in which he failed to comply with the Committee's request of 8 September 2000.

16. In the main proceedings the Vestre Landsret must decide on Mr Festersen's appeal against the Ret Gråsten's judgment.

17. In those proceedings the parties disagree as to whether the residence requirement under the Law on agriculture is compatible with Community law and the extent to which the judgment in the *Ospelt* case [3] is applicable to the present case. The national court considers that the outcome of the criminal proceedings pending before it is thus, in the light of this case-law, dependent inter alia on the interpretation of Article 43 EC on the freedom of establishment and of Article 56 EC on the free movement of capital.

18. Consequently the Vestre Landsret, Denmark, has referred the following two questions for a preliminary ruling:

'(1) Do Article 43 EC and Article 56 EC preclude a Member State from laying down as a condition for acquiring an agricultural property the requirement that the acquirer take up fixed residence on that property?

(2) Does it matter, as regards the answer to Question 1, that the property cannot constitute a self-sustaining unit and that the property's residential building is situated in an urban zone?'

3 — Cited in footnote 2.

IV — Response to the questions referred

A — *The first question referred*

19. By its first question the referring court would like to ascertain whether Community law, and in particular the free movement of capital and the freedom of establishment guaranteed in the EC Treaty, precludes a residence requirement, such as is provided for in the Law on agriculture in relation to the acquisition of agricultural property.

20. Mr Festersen submits that this is the case, whilst the Danish and Norwegian Governments and the Commission substantially agree that the provision in question is compatible with Community law. The Commission has merely raised doubts regarding the principle of proportionality due to the very limited possibilities for exceptions to be made in the Law on agriculture; on the basis of the *Ospelt* judgment [4] the Commission assumes that the residence requirement in question is consistent with Community law, provided that the obligation is not imposed in every case of the acquisition of agricultural property.

21. In the present case the Court is able to build on a whole line of judgments concerning the conditions for the acquisition of land in various Member States, although they predominantly concerned national regulations for the acquisition of building land, which pursued specific town and country planning objectives in a broader sense, like the prevention of second homes. [5]

22. However, of greater relevance for the present case are the judgments in the even earlier *Fearon* case [6] and in particular in the *Ospelt* case, [7] which has been extensively debated by the parties. They concerned provisions or conditions relating to the acquisition of agricultural property, which were intended to protect specifically agricultural interests of a general nature, such as the preservation of a particular agricultural production and population structure.

23. However, caution is required even in relation to a generalisation of the decision in the *Ospelt* case or its transferability to the present case because the details of the Member States' rules on the acquisition of land differ in terms of their actual form and the aims they pursue, and in the present case

4 — Cited in footnote 2.

5 — See Case C-302/97 *Konle* [1999] ECR I-3099; Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157; Case C-300/1 *Salzmann* [2003] ECR I-4899; and Case C-213/04 *Burtscher* [2005] ECR I-10309.

6 — Case 182/83 [1984] ECR 3677.

7 — Cited in footnote 2.

compatibility with Community law is determined, as the parties have agreed in their submissions, primarily by an assessment of proportionality, and thus depends on the specific relationship between the measures taken and the objective pursued.

24. It should also be noted that in the majority of the judgments mentioned above procedural law or formal conditions relating to the acquisition of property were reviewed as to their compatibility with Community law, in particular the requirement for prior authorisation. However in the *Ospelt* judgment the substantive requirements of the relevant provision governing the acquisition of agricultural land were also examined, including an obligation to cultivate the land in person and, as previously in the *Fearon* case, a residence requirement. [8]

25. In contrast, in the present case the procedure as to the acquisition of the land is not in dispute. The Danish Law on agriculture does not lay down an obligation to obtain authorisation, at least in relation to the acquisition of property under 30 ha, with which the present case is concerned. Neither is it necessary to examine the compatibility of the obligation to farm the land in person laid down in the Law on agriculture, because this also applies only to property of an area in excess of 30 ha and therefore does not apply to the facts at issue in the main proceedings. A mere obligation to farm applies to plots of land under 30 ha.

26. Accordingly, it is first necessary to define the criteria for reviewing the compatibility of the residence requirement in the Law on agriculture with Community law.

27. The first basic point to make is that national legal provisions governing property acquisition must of course comply with all the EC Treaty provisions on the fundamental freedoms, even if so far the Court has referred only to the free movement of capital and the freedom of establishment in relation to such national provisions. [9]

28. A different question, which the parties have also raised, is which fundamental freedom or freedoms is or are relevant or

8 — See *Ospelt* (cited in footnote 2), paragraphs 46, 49, 51 and 54, and *Fearon* (cited in footnote 6), paragraphs 9 and 10.

9 — See inter alia *Fearon* (cited in footnote 6), paragraph 7, *Konle* (cited in footnote 5), paragraph 22, *Reisch* (cited in footnote 5), paragraph 28, *Ospelt* (cited in footnote 2), paragraph 24, and *Burtscher* (cited in footnote 5), paragraph 39.

applicable in the specific case. To date at any rate the Court has consistently considered provisions relating to the acquisition of property in the context of the free movement of capital, even if the referring court, like for instance in the *Konle* case, also referred to the freedom of establishment. [10] In that context the Court pointed out that the exercise of the right to acquire real estate in the territory of another Member State, to use it and to dispose of it represents a necessary complement to the freedom of establishment and that the movement of capital includes procedures whereby people make investments in real estate in the territory of a Member State where they do not reside. [11]

29. An exception to that approach was made in the earlier *Fearon* case, which however had a clear connection to freedom of establishment on the basis of the facts of the case.

30. In the present case the order for reference and pleadings do not indicate the context and the purpose of the acquisition of the property by Mr Festersen and whether he actually fulfils the conditions in order to come within freedom of establishment or the freedom of movement for workers. However, in view of the fact that the very aim of the provision in question, as will be explained below, is to prevent mere investment and speculation in property and to that extent comprises a restriction on the free movement of capital, it seems to me that free movement of capital should be the primary review criterion also in the present case. Furthermore I share the Commission's view that the following considerations, and in particular the review of proportionality, also apply in relation to the freedom of establishment.

31. It is not in dispute that the provision in question, which provides for a residence requirement as a condition of the acquisition of immovable property, restricts, by its very purpose, the free movement of capital and judging by the objectives of the Law on agriculture this is, as mentioned above, in part even intended.

32. However, according to established case-law such measures may nevertheless be permitted provided that they pursue in a non-discriminatory way an objective in the public interest and observe the principle of proportionality, that is to say, they are

10 — See *Konle* (cited in footnote 5), paragraph 39 et seq.

11 — See *Konle* (cited in footnote 5), paragraph 22, and *Reisch* (cited in footnote 5), paragraphs 29 and 30.

appropriate for ensuring that the aim pursued is achieved and do not go beyond what is necessary for that purpose. [12]

33. First of all as regards the reqirement for an objective in the public interest, the Law on agriculture is based on a whole bundle of agricultural policy measures. According to the referring court and the Danish Government, the Law on agriculture is based on the old principle of Danish agriculture, according to which farms are to be occupied and worked as far as possible by the owners. Property speculation is to be avoided and in view of the shortage of agricultural land it is to be ensured that the real farmers can acquire the agricultural land which serves as their basis of production. Excessive mergers in the field of agricultural property should be prevented and a stable settlement of rural areas maintained. Finally, the Danish Government has referred — even if only as an additional argument, as it emphasised at the hearing, — to the fact that the measure in question is also related to the prevention of second homes and accordingly serves to implement Protocol No 16 to the EC Treaty on the acquisition of property in Denmark.

34. In the *Ospelt* case the Court recognised that agricultural policy objectives like preserving agricultural communities, maintaining a distribution of land ownership which allows the development of viable farms and sympathetic management of green spaces and the countryside as well as encouraging a reasonable use of the available land by resisting pressure on land, and preventing natural disasters are social objectives. [13] In doing so the Court referred to the fact that those objectives are consistent with the objectives of the common agricultural policy which, inter alia, aims to ensure a fair standard of living for the agricultural community and, in the formulation of which, account must be taken of the particular nature of agricultural activity. [14]

35. In the light of the foregoing I consider that the objectives pursued by the provision in question should also be regarded as legitimate objectives in the public interest which could justify restrictions on fundamental freedoms. In particular, as regards the principle that the land should where possible belong to those who work it ('farmland in farmers' hands'), the Court has already regarded this objective as legitimate in the *Fearon* case. [15] Finally, according to established case-law, restrictions on establishing second homes in order to maintain, in pursuance of town and country planning

12 — See to that effect *Konle* (cited in footnote 5), paragraph 40, Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 33, *Reisch and Others* (cited in footnote 5), paragraph 33, *Salzmann* (cited in footnote 5), paragraph 42, *Ospelt* (cited in footnote 2), paragraph 34, and *Burtscher* (cited in footnote 5), paragraph 44.

13 — See *Ospelt* (cited in footnote 2), paragraph 39.

14 — As above, paragraph 40.

15 — *Fearon* (cited in footnote 6), paragraphs 3 and 10.

objectives, a permanent population are basically regarded as contributing to an objective which is in the public interest. [16]

36. Since the objectives of the residence requirement in the Danish rules on the acquisition of agricultural land are accordingly in the public interest, then on the basis of the abovementioned cases it is necessary to examine whether this objective is being pursued in a non-discriminatory way, that is, to be precise, whether or not it is in reality about '(Danish) farmland in Danish hands'. Mr Festersen takes this view and refers, in relation to this, to certain statements in 1963 in the context of the parliamentary debates on Denmark's accession to the Community.

37. I agree with the Commission that those elements of political debate, the weight and actual impact of which are ultimately difficult to assess, are not decisive for the purposes of determining the discriminatory nature of the measure in question, but that this measure should ultimately be judged according to its objective content and its effects. Thus, on the basis of the line of cases including inter alia, the *Ospelt* case, it must be stated that the residence requirement in question, which was imposed in the context of statutory rules on the ownership of agricultural land and with the agricultural policy objectives which have been described, indisputably makes no distinction between Danish nationals and nationals of other Member States and it is therefore not, a priori, discriminatory in nature. [17]

38. The more problematic question is whether or not the Law on agriculture is applied in a discriminatory manner. Amongst the reasons why the Court found the relevant measures to be inadmissible in the *Konle* and *Salzmann* cases was the fact that those measures allowed the competent administrative authorities considerable latitude which may be akin to a discretionary power, and consequently there was the risk of discrimination. [18]

39. As the Danish Government has submitted, the exemptions from the residence requirement provided for in Paragraph 18 of the Law on agriculture are significantly restricted by the circular on the Law on agriculture and they must be applied restrictively. In my opinion, latitude akin to a discretionary power does not therefore exist. Further, it must be borne in mind that some flexibility through — albeit narrowly defined

16 — Cf. *Konle* (cited in footnote 5), paragraph 40, *Reisch* (cited in footnote 5), paragraph 34, and *Salzmann* (cited in footnote 5), paragraph 44.

17 — *Ospelt* (cited in footnote 2), paragraph 37; see also *Burtscher* (cited in footnote 5), paragraphs 48 and 49.

18 — See *Salzmann* (cited in footnote 5), paragraphs 46 and 47, and *Konle* (cited in footnote 5), paragraph 41.

— exceptions is plainly necessary in regard to the proportionality of the restrictions caused by the residence requirement. Finally, Mr Festersen has not even alleged or demonstrated discrimination in the application of the Law on agriculture.

40. It is therefore not apparent that in the light of the above the residence requirement is applied in a discriminatory manner.

41. Accordingly it is necessary to consider the requirements for the proportionality of the residence requirement.

42. First of all, in my view the basic appropriateness of the residence requirement under the Law on agriculture for promoting the objectives pursued by that measure, considered in their context, should not be denied. The strict residence requirement largely ensures that agricultural land is not suitable for purely speculative or capital investment. As a consequence of that requirement agricultural properties are hardly suitable as weekend residences or free-time residences either. This considerably restricts the attractiveness of these properties, namely to persons who intend to take up long-term residence on these properties and to at least ensure cultivation of the land. As a consequence, the price pressure on agricultural properties is undoubtedly reduced so that a further important objective is promoted, namely that such properties remain within the means of the farmers themselves, and thus contributes to realising the traditional Danish policy that farms should as far as possible be occupied and farmed by the owners.

43. However, it must still be asked whether or not a residence requirement like this one under the Law on agriculture goes beyond what is necessary in order to achieve the objectives pursued or whether the same result could not be achieved by other less restrictive measures. [19]

44. In that regard it must be observed that the farming of agricultural property could be ensured even without the residence requirement. For that purpose the existing agricultural-use obligation would suffice on its own. However the objectives of the Law on agriculture are significantly more far-reaching in that they include the prevention of the use of farms as leisure residences and the associated prevention of price pressure on agricultural property. For agricultural properties would still remain attractive and use-

19 — See inter alia *Reisch* (cited in footnote 5), paragraph 33, and *Ospelt* (cited in footnote 2), paragraph 46.

able as leisure residences because cultivation could be ensured, for example, by means of tenant farmers. Consequently there would be an increased risk that ownership of the basis of their production, agricultural land, would no longer be affordable for farmers.

45. Even removing the residence requirement up to a certain area, say 30 ha, would naturally reduce the effectiveness of the policy which has been described, especially since, according to the Danish Government, approximately 75% of agricultural property comprises areas under 30 ha.

46. The fact, as is apparent from the documents and the parties' pleadings, that a process of concentration is observable anyway in Danish agriculture, in which ever increasing areas are being farmed by ever fewer farmers and which involves a steady thinning out of the rural population, does not in itself mitigate against the proportionality of the residence requirement.

47. Political objectives can rarely be achieved perfectly. As the Danish Government correctly stated, in most cases the government or the legislative body has to reconcile several partially contradictory interests and objectives and weigh them up against each other. Therefore I agree with the Norwegian Government's view that the national legislative body should be allowed a certain amount of discretion for the purposes of this complex balancing of various objectives and in selecting the appropriate means of achieving an objective. In this light, the provision imposing a residence requirement for eight years from the acquisition of the property does not appear to be disproportionate, at least not manifestly so.

48. Finally, the statement in the Court's decision in *Ospelt*, according to which the provisions relating to the free movement of capital forbid an authorisation to acquire agricultural property from being denied 'in every case' where the acquirer does not cultivate the land concerned in person as part of a holding, and does not reside on it, should ultimately be understood in the light of the particular circumstances of that case. For the farm at issue in that case was already farmed by a tenant farmer before the transfer in question to the foundation. The transfer to the foundation would not have changed this situation, as the foundation had undertaken to continue to have the land farmed by the same tenant. Since in that case the Court proceeded on the basis of the objective of the measure in question being to ensure the agricultural use and continued cultivation of land — by farmers or legal persons such as

farming associations — the denial of the authorisation in question on the basis that the foundation had not fulfilled the obligation to cultivate the land itself and on the basis of the residence requirement would have exceeded what was necessary to achieve the stated objective. [20]

49. However, these considerations are not entirely transferable to the present case for the very reason that, as I have already stated, the objectives of the Law on agriculture are not limited to merely ensuring the farming of agricultural land.

50. In the light of the foregoing, the answer to the first question referred must be that the provisions on the free movement of capital do not preclude a residence requirement such as is laid down in the Law on agriculture.

B — *The second question referred*

51. The specific situation and designated use of the two pieces of land acquired by Mr Festersen forms the background to the second question referred. The referring court would like to ascertain whether, in relation to compatibility with Community law, it is relevant that the residence requirement is also applied where the property cannot constitute a self-sustaining unit and the property's residential building is situated in an urban zone.

52. Unlike Mr Festersen, the Danish and the Norwegian Governments and the Commission take the view that those factors are irrelevant as regards the compatibility of the residence requirement under the Law on agriculture.

53. This is right in my view, since the considerations which justify the residence requirement also apply to properties which, although partially within the urban zone, are otherwise designated for use as agricultural land. As the Danish Government stated, such overlaps can frequently be explained by the local settlement structures and the expansion of villages and towns. I do not think that such plots of land should be systematically excluded from the policy pursued by the Law on agriculture for that reason. Likewise it appears to me that the fact that an agricul-

20 — See in particular paragraph 51 of the judgment in *Ospelt* (cited in footnote 2).

tural plot of land is not a self-sustaining unit does not indicate that the interests pursued by the Law on agriculture do not extend to affecting such agricultural plots of land too.

54. Consequently, it is my view that Community law does not preclude a residence requirement as laid down in the Law on agriculture from also applying where an agricultural property does not constitute a self-sustaining unit and the property's residential building is situated in an urban zone.

V — Decision on costs

55. The costs incurred by the Danish and Norwegian Governments and by the Commission are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

VI — Conclusion

56. In the light of the foregoing I propose that the reply to the questions referred to the Court should be:

'The provisions on the free movement of capital do not preclude a residence requirement of the type provided for in the Law on agriculture. This applies regardless of whether an agricultural property can constitute a self-sustaining unit or whether the property's residential building is situated in an urban zone.'