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ECLI:EU:C:2019:432

JUDGMENT OF THE COURT (Grand Chamber)

21 May 2019 (\*)

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(Failure of a Member State to fulfil obligations — Article 63 TFEU — Free movement of capital — Article 17 of the Charter of Fundamental Rights of the European Union — Right to property — National legislation extinguishing, without compensation, the rights of usufruct over agricultural and forestry land acquired by legal persons or by natural persons who cannot demonstrate a close family tie with the owner of the land)

In Case C-235/17,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 5 May 2017,

**European Commission**, represented by L. Malferrari and L. Havas, acting as Agents,

applicant,

v

**Hungary**, represented by M.Z. Fehér, acting as Agent,

defendant,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Prechal (Rapporteur), E. Regan and T. von Danwitz, Presidents of Chamber, A. Rosas, L. Bay Larsen, M. Safjan, D. Šváby, C.G. Fernlund, C. Vajda and S. Rodin, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 9 July 2018,

after hearing the Opinion of the Advocate General at the sitting on 29 November 2018,

gives the following

## **Judgment**

1 By its application, the European Commission requests the Court to declare that, having regard in particular to the provisions in force since 1 January 2013 of termőföldről szóló 1994. évi LV. törvény (Law No LV of 1994 on productive land; ‘the 1994 Law on productive land’), the relevant provisions of mező- és erdőgazdasági földek forgalmáról szóló 2013. évi CXXII. törvény (Law No CXXII of 2013 on transactions in agricultural and forestry land; ‘the 2013 Law on agricultural land’), certain provisions of mező- és erdőgazdasági földek forgalmáról szóló 2013. évi CXXII. törvénnyel összefüggő egyes rendelkezésekről és átmeneti szabályokról szóló 2013. évi CCXII. törvény (Law No CCXII of 2013 laying down various provisions and transitional measures concerning Law No CXXII of 2013 on transactions in agricultural and forestry land; ‘the 2013 Law on transitional measures’) and Paragraph 94(5) of ingatlan-nyilvántartásról szóló 1997. évi CXLI. törvény (Law No CXLI of 1997 on the land register; ‘the Law on the land register’), Hungary, by restricting in a manifestly disproportionate manner the rights of usufruct over agricultural and forestry land, has failed to fulfil its obligations under Articles 49 and 63 TFEU and Article 17 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

### **I. Legal context**

#### **A. European Union law**

##### **1. The Charter**

2 Article 17 of the Charter, entitled ‘Right to Property’, provides, in paragraph 1:

‘Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except 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. The use of property may be regulated by law in so far as is necessary for the general interest.’

3 Article 51 of the Charter, entitled ‘Field of application’, provides in paragraph 1:

‘The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard to the principle of subsidiarity and to the Member States only when they are implementing Union law. ...’

4 Article 52 of the Charter, entitled ‘Scope and interpretation of rights and principles’, provides, in paragraphs 1 and 3:

‘1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

...

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.’

## 2. **The 2003 Act of Accession**

5 Annex X to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33; ‘the 2003 Act of Accession’) is entitled ‘List referred to in Article 24 of the Act of Accession: Hungary’; Chapter 3 of that annex, entitled ‘Free movement of capital’, provides in paragraph 2:

‘Notwithstanding the obligations under the Treaties on which the European Union is founded, Hungary may maintain in force for seven years from the date of accession the prohibitions laid down in its legislation existing at the time of signature of this Act on the acquisition of agricultural land by natural persons who are non-residents or non-nationals of Hungary and by legal persons. 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 than at the date of signature of the Accession Treaty. ...

Nationals of another Member State who want to establish themselves as self-employed farmers and who have been legally resident and active in farming in Hungary at least for three years continuously, shall not be subject to the provisions of the preceding subparagraph or to any rules and procedures other than those to which nationals of Hungary are subject.

...

If there is sufficient evidence that, upon expiry of the transitional period, there will be serious disturbances or a threat of serious disturbances on the agricultural land market of Hungary, the Commission, at the request of Hungary, shall decide upon the extension of the transitional period for up to a maximum of three years.’

6 By Commission Decision 2010/792/EU of 20 December 2010 extending the transitional period concerning the acquisition of agricultural land in Hungary (OJ 2010 L 336, p. 60), the transitional period established in paragraph 2 of Chapter 3 of Annex X to the 2003 Act of Accession was extended until 30 April 2014.

## B. **Hungarian law**

7 Paragraph 38(1) of földről szóló 1987. évi I. törvény (Law No I of 1987 on land) provided that natural persons who did not possess Hungarian nationality or who did possess that nationality

but resided permanently outside Hungary, as well as legal persons whose seat was outside Hungary or whose seat was in Hungary but whose capital was held by natural or legal persons resident or established outside Hungary, could acquire ownership of productive land by means of purchase, exchange or donation only with the prior authorisation of the Minister for Finance.

8 Paragraph 1(5) of 171/1991 Korm. Rendelet (Government Decree No 171/1991) of 27 December 1991, which entered into force on 1 January 1992, precluded the acquisition of productive land by persons not having Hungarian nationality, with the exception of persons in possession of a permanent residence permit and those with refugee status.

9 The 1994 Law on productive land maintained that prohibition of acquisition, extending it to legal persons, irrespective of whether or not they were established in Hungary.

10 That law was amended, with effect from 1 January 2002, by termőföldről szóló 1994. évi LV. törvény módosításáról szóló 2001. évi CXVII. törvény (Law No CXVII of 2001 amending Law No LV of 1994 on productive land), in order also to preclude a right of usufruct over productive land from being created by contract in favour of natural persons not possessing Hungarian nationality or legal persons. Following those amendments, Paragraph 11(1) of the 1994 Law on productive land provided that ‘for the right of usufruct and the right of use to be created by contract, the provisions of Chapter II regarding the restriction on the acquisition of property must be applied. ...’.

11 Paragraph 11(1) of the 1994 Law on productive land was subsequently amended by egyes agrár tárgyú törvények módosításáról szóló 2012. évi CCXIII. törvény (Law No CCXIII of 2012 amending certain laws on agriculture). In the new version resulting from that amendment, which entered into force on 1 January 2013, Paragraph 11(1) provided that ‘the right of usufruct created by a contract shall be null and void, unless it is created for the benefit of a close relation’. Law No CCXIII of 2012 also introduced into the 1994 Law a new Paragraph 91(1), in accordance with which ‘any right of usufruct existing on 1 January 2013 and created, for an indefinite period or for a fixed term expiring after 30 December 2032, by a contract between persons who are not close members of the same family shall be extinguished by operation of law on 1 January 2033’.

12 The 2013 Law on agricultural land was adopted on 21 June 2013 and entered into force on 15 December 2013.

13 Paragraph 37(1) of the 2013 Law on agricultural land maintains the rule that a right of usufruct or a right of use over such land that is created by contract is to be null and void unless it was created for the benefit of a close member of the same family.

14 Paragraph 5(13) of the 2013 Law on agricultural land contains the following definition:

“‘Close member of the same family’ shall mean spouses, direct ascendants and descendants, adopted children, stepchildren, adoptive parents, step-parents, foster parents and brothers and sisters.’

15 The 2013 Law on transitional measures was adopted on 12 December 2013 and entered into force on 15 December 2013.

16 Paragraph 108(1) of that law, which repealed Paragraph 91(1) of the 1994 law on productive land, states that:

‘Any right of usufruct or right of use existing on 30 April 2014 and created, for an indefinite period or for a fixed term expiring after 30 April 2014, by a contract between persons who are not close members of the same family shall be extinguished by operation of law on 1 May 2014.’

17 Paragraph 94 of the Law on the land register provides:

‘1. With a view to the deletion from the land register of rights of usufruct and rights of use (for the purposes of this Paragraph referred to collectively as “rights of usufruct”) extinguished under Paragraph 108(1) of [the 2013 Law on transitional measures], the natural person holding rights of usufruct shall, upon being notified by 31 October 2014 at the latest by the authority responsible for administering the land register, within 15 days of the delivery of such notice, declare, using the form prescribed for that purpose by the Minister, the existence, as the case may be, of a close family relationship with the person shown as owner of the property in the document which served as the basis for registration. Where no declaration is made within the prescribed period, no application for continuation shall be accepted after 31 December 2014.

...

3. If the declaration does not reveal a close family relationship, or if no declaration has been made within the prescribed period, the authority responsible for administering the land register shall of its own motion delete the rights of usufruct from the register within 6 months following the expiry of the deadline for making the declaration and no later than 31 July 2015.

...

5. The authority responsible for administering the land register shall, no later than 31 December 2014, of its own motion delete from the land register any rights of usufruct which were registered on behalf of a legal person or an entity not having legal personality but having the capacity to acquire a registrable right and which has been cancelled pursuant to Paragraph 108(1) of [the 2013 Law on transitional measures].’

## **II. Pre-litigation procedure**

18 On 17 October 2014, the Commission sent a letter of formal notice to Hungary, taking the view that, by adopting the restrictions relating to the right of usufruct over agricultural land, contained in certain provisions of the 2013 Law on transitional measures, including Paragraph 108(1) thereof, Hungary had infringed Articles 49 and 63 TFEU and Article 17 of the Charter. Hungary replied by a letter dated 18 December 2014 in which it disputed those infringements.

19 On 19 June 2015, the Commission issued a reasoned opinion in which it maintained that, by cancelling certain rights of usufruct with effect from 1 May 2014 by means of Paragraph 108(1) of the 2013 Law on transitional measures, Hungary had infringed the provisions of EU law mentioned in the previous paragraph. Hungary replied by letters dated 9 October 2015 and 18 April 2016, in which it argued that there had been no infringements as alleged.

20 In those circumstances, the Commission decided to bring the present action.

## **III. Consideration of the subject-matter of the action**

21 In the form of order sought in its application, the Commission complains that Hungary has ‘restricted’ rights of usufruct over agricultural and forestry land (‘agricultural land’) in breach of EU law, in view of various provisions of national law that it mentions in the form of order sought. However, it follows both from the reasoned opinion and from the contents of the application itself and it is, moreover, common ground between the parties — as was confirmed by the submissions made at the hearing, which the Advocate General outlines in point 39 of his Opinion — that the restriction of rights of usufruct of which the Commission complains in the present case is, more specifically, the restriction arising as a result of the cancellation of those rights by Paragraph 108(1) of the 2013 Law on transitional measures. The other provisions of national law referred to in the form of order sought by the applicant are mentioned therein and in the application itself only as elements of the domestic legislative context of which Paragraph 108 forms part, those elements being essential for a full understanding of the scope of that provision.

22 The Commission’s action thus seeks a declaration that, by adopting Paragraph 108(1) of the 2013 Law on transitional measures (‘the contested provision’) and thereby cancelling, by operation of law, rights of usufruct previously created over agricultural land in Hungary, as between persons who are not close members of the same family, Hungary has failed to fulfil its obligations under Articles 49 and 63 TFEU and Article 17 of the Charter.

#### **IV. The jurisdiction of the Court**

##### **A. Arguments of the parties**

23 Hungary submits, as a preliminary point, that, since the usufruct contracts cancelled by the contested provision circumvented the prohibitions on acquiring ownership of agricultural land that were in force before Hungary acceded to the European Union and were, on that account, void *ab initio* even before that accession, neither the prohibitions thereby infringed, nor their effects, nor, consequently, the subsequent cancellation by the contested provision of the rights of usufruct at issue can be assessed in the light of EU law. In its view, the Court does not have jurisdiction to interpret EU law when the facts of the dispute pre-date the accession of the Member State concerned to the European Union.

24 The Commission argues that EU law applies *ab initio* in new Member States and that, in the present case, the dispute concerns a provision of national law adopted in 2013, which provided for the cancellation, by operation of law, on 1 May 2014 of rights of usufruct still in existence at that time and recorded in the land registers: the dispute does not concern the legality of usufruct contracts concluded before Hungary’s accession to the European Union. Moreover, Hungary explicitly acknowledged, in its reply to the reasoned opinion, there has been no case in which the Hungarian courts have held such usufruct contracts to be void.

##### **B. Findings of the Court**

25 According to settled case-law, the Court has jurisdiction to interpret EU law as regards its application in a new Member State with effect from the date of that State’s accession to the European Union (judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 39 and the case-law cited).

26 In the present case, as the Commission has argued, the rights of usufruct affected by the contested provision were still in existence on 30 April 2014 and were cancelled and subsequently deleted from the land register as a result of that provision, which was adopted nearly 10 years after Hungary’s accession to the European Union, and not by virtue of any national rules that may have

been in force and produced all their effects with regard to those rights of usufruct before the date of that accession.

27 It follows that Hungary's arguments challenging the Court's jurisdiction must be rejected.

## V. Substance

### A. Arguments of the parties

28 The Commission submits, in the first place, that the contested provision is capable of restricting, depending on the particular circumstances of each individual case, both the freedom of establishment and the free movement of capital and, consequently, of infringing both Article 49 TFEU and Article 63 TFEU.

29 In the second place, the contested provision is, in the Commission's view, indirectly discriminatory vis-à-vis nationals of Member States other than Hungary inasmuch as between 1992 and 2002, the creation of a right of usufruct was the only way for such nationals to invest in agricultural land in Hungary and it would moreover have been unusual for those persons to have close relations owning agricultural land, from whom they could have acquired such a right over such land. In those circumstances, the contested provision cannot, so the Commission argues, be justified on the basis of Article 65(1)(b) TFEU or by overriding reasons in the public interest that are recognised by the case-law.

30 In the third place, even if grounds of justification of that kind can be envisaged, those relied on by Hungary are not acceptable here and the contested provision does not satisfy the requirements deriving from the principle of proportionality.

31 As regards, first, the various agricultural policy objectives mentioned in the preamble to the 2013 Law on agricultural land, which the Alkotmánybíróság (Constitutional Court, Hungary) described in judgment No 25 of 21 July 2015 — namely ensuring that productive agricultural land can be owned only by the natural persons who work it and not for the purposes of speculation, preventing the fragmentation of land and preserving a population in rural areas and maintaining sustainable agriculture, as well as creating farms that are viable in size and are competitive — the Commission argues that those objectives do not justify an obstacle to the free movement of capital.

32 In any event, the restrictions at issue are not, in the Commission's view, appropriate, coherent or necessary for the purpose of attaining the objectives invoked.

33 As regards, secondly, the objective of rectifying unlawful situations arising where non-residents acquired rights of usufruct without having the foreign exchange authorisation from the National Bank of Hungary that was required until 16 June 2001 under Law No XCV of 1995 on foreign currency, the Commission argues that such a requirement for authorisation will have given rise, since Hungary's accession to the European Union, to discrimination based on nationality, which is prohibited by EU law. Moreover, Hungary acknowledged during the pre-litigation procedure that no decision of a Hungarian court has held that if a right of usufruct is acquired without a foreign exchange authorisation, that will result in the usufruct being null and void.

34 As regards, thirdly, the objective of cancelling rights of usufruct acquired before 1 January 2002 by non-residents or legal persons who, it is alleged, unlawfully circumvented the prohibition on the acquisition of property by acquiring those rights, the Commission considers that, if a national of a Member State other than Hungary chooses, for the purpose of investing in agricultural land or

establishing himself in Hungary, a legal instrument available under the law of that Member State, that is merely the exercise of the freedoms laid down in Articles 49 and 63 TFEU and therefore cannot be classified as abuse.

35 Moreover, Hungary does not substantiate its claim that all the usufruct contracts affected by the contested provision were improperly concluded. In particular, it does not explain why that may be so in the case of the contracts received from complainants, which the Commission has produced before the Court; nor does it point to any contract that has been declared unlawful by a court. In addition, even if it is accepted that in certain cases the right of usufruct was created in order to circumvent the legislation in force, that finding cannot, in any event, be made general by means of a presumption that any person who created such a right acted with such an intention.

36 In the fourth place, the Commission submits that the contested provision infringes the principles of legal certainty and of the protection of legitimate expectations. The effect of those principles is that, in the event of cancellation of legal instruments enabling their holders to carry on an economic activity, it is not proportionate or justified to provide for a transitional period of only 4½ months, whilst abolishing, at the same time, the transitional period of 20 years laid down less than 1 year previously. It is also contrary to those principles not to provide for any specific compensation allowing the persons concerned to be compensated, under conditions determined in advance, for the loss of the consideration paid, the loss of value of the investments made and the loss of profit.

37 In the fifth place, the Commission maintains that, as the contested provision restricts the freedom of establishment and the free movement of capital and since Hungary relies on overriding reasons in the public interest in order to justify those restrictions, the provisions of the Charter are applicable in the present case.

38 The Commission submits that the contested provision infringes Article 17 of the Charter. Indeed, in its view, the cancellation of the rights of usufruct at issue amounts to a person being deprived of property, within the meaning of that article and also of Article 1 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR').

39 The removal of rights of usufruct to the detriment of thousands of non-Hungarian citizens is not justified here by any permissible reason in the public interest and, even assuming it to be justifiable, that cancellation is not proportionate, account being taken, in particular, of the matters set out above. Nor has the contested provision made provision for the compensation that is required by Article 17 of the Charter, which is intended to ensure that compensation is paid, using efficient procedures, for the loss of *in rem* rights of considerable economic value.

40 Finally, the Commission submits that the persons concerned acted in good faith in using an investment opportunity that the existing legislative framework offered them and that both the practice of the administrative authorities responsible for land registration and that of the judicial authorities confirmed the legality of the rights of usufruct concerned.

41 In its defence, Hungary denies that there was any restriction of the freedom of establishment. It submits that judgment No 25 of 21 July 2015 of the Alkotmánybíróság (Constitutional Court) makes clear that the usufructuaries concerned did not sustain any financial loss, as that court held that, in general, Hungarian civil law affords such persons sufficient opportunity to defend their interests when the parties settle matters between them. Such usufructuaries can also continue to farm the land in future by acquiring, with the owner's agreement, ownership thereof or by entering



into a lease. As to the free movement of capital, Hungary contends that a restriction thereof has not been established, since the contested provision is limited to laying down a condition relating to a family tie with regard to just one of the instruments conferring a right to work arable land, purchase and leasing remaining possible.

42 In addition, Hungary disputes the existence of indirect discrimination based on nationality given that the contested provision applied without distinction to Hungarian nationals and nationals of other Member States, as is shown by the fact that, of over 100 000 persons concerned by the provision, only 5 058 were nationals of other States, including nationals of third States. The fact that the exception relating to the close family tie generally works in favour of Hungarian nationals follows from the fact that the land concerned is located in Hungary and its owners are usually Hungarian. That exception takes into account the fact that parents frequently buy property for their children over which they create a right of usufruct for themselves and the fact that a surviving spouse often inherits such a right.

43 Even if a restriction of the free movement of capital were established, Hungary considers it to be justified, first of all, by the agricultural policy objectives outlined in paragraph 31 above.

44 Next, Hungary argues that the illegality, *ab initio*, of the usufruct contracts at issue has been recognised by the Alkotmánybíróság (Constitutional Court), which stated, in judgment No 25 of 21 July 2015, that the objective of the contested provision was, inter alia, to ensure that the land register reflects legal relationships complying with the new rules applicable to agricultural land and to eliminate the legal effects of a practice by virtue of which the right of usufruct had been applied in a dysfunctional manner.

45 In the event that the parties opt to conclude a type of contract other than that which reflects their true intention, it follows from Paragraph 207(6) of a polgari törvénykönyvről szóló 1959. évi IV. törvény (Law No IV of 1959 establishing the civil code) that the contract is a sham and is null and void.

46 In view of the large number of acquisitions of rights of usufruct said to have been made, using various arrangements, by non-residents in the hope of being able, after Hungary's accession to the European Union or following the removal of legal obstacles, to acquire ownership of the land concerned (acquisitions whose cancellations may be covered by the concept of public policy referred to in Article 65(1)(b) TFEU), the national legislature chose, for reasons of budgetary order and economy of judicial resources, to cancel those rights and remove them from the land register by means of legislation rather than leave them to be challenged piecemeal in the courts.

47 Lastly, Hungary considers that the contested provision is also justified by the aim of bringing to an end the unlawfulness of usufruct contracts concluded without the foreign exchange authorisation required under Law No XCV of 1995.

48 As regards the proportionality of and need for the restriction of the right to property, the Alkotmánybíróság (Constitutional Court) held, in judgment No 25 of 21 July 2015, that the cancellation of the rights of usufruct at issue was not akin to an expropriation, since the rights concerned were contractual in nature and could therefore be restricted, in the general interest, by legislative provisions and since the cancellation in question did not result in the State acquiring a right or in the creation of a new right for another person. It further contends that that measure is in the general interest since the owner's land is freed from encumbrances and is then subject, as a result of social constraints, to obligations concerning productive land.

49 As to the fact that the transitional period is short, the economic operators concerned had no grounds for a legitimate expectation that the previous legislation would be maintained, as it was foreseeable that that legislation would evolve as a result of the expiry of the moratorium on the acquisition of land arising as a result of the 2003 Act of Accession.

50 Hungary further submits that a separate examination of the contested provision in the light of the Charter is not necessary and that, in any event, it is apparent from judgment No 25 of 21 July 2015 of the Alkotmánybíróság (Constitutional Court) that the cancellation of the rights of usufruct at issue is not an expropriation and that it is, in addition, justified by the general interest, whilst the civil law rules enable the former usufructuaries to obtain fair, comprehensive and timely compensation for the losses incurred. Moreover, Article 17 of the Charter is not applicable in the present case since the usufruct contracts that have been cancelled were concluded unlawfully and in bad faith.

## **B. Findings of the Court**

### **1. Article 49 TFEU**

51 As regards the Commission's request for a declaration that Hungary has failed to fulfil its obligations under Article 49 TFEU, it should be noted that, when the right to acquire, use or dispose of immovable property on the territory of another Member State is exercised as the corollary of the right of establishment, it generates capital movements (judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 54).

52 As the Commission has argued, alluding, in this regard, to the case of nationals of Member States other than Hungary who are farming in that Member State and who have to that end acquired, directly or indirectly, a right of usufruct over agricultural land, that right constitutes, in such circumstances, the corollary of the exercise of those nationals' right of establishment.

53 Although the contested provision is therefore capable, *prima facie*, of falling both within the scope of Article 49 TFEU and that of Article 63 TFEU, the fact remains that, in the present case, the restriction of the freedom of establishment arising from the contested provision which the Commission alleges in its action is the direct consequence of the restriction of the free movement of capital of which it also complains in this action. As the first alleged restriction is thus inextricably linked to the second, it is not necessary to consider the contested provision in the light of Article 49 TFEU (see, to that effect, judgments of 4 June 2002, *Commission v Portugal*, C-367/98, EU:C:2002:326, paragraph 56; of 13 May 2003, *Commission v Spain*, C-463/00, EU:C:2003:272, paragraph 86; and of 10 November 2011, *Commission v Portugal*, C-212/09, EU:C:2011:717, paragraph 98 and the case-law cited).

### **2. Article 63 TFEU and Article 17 of the Charter**

#### **(a) The applicability of Article 63 TFEU and the existence of a restriction of the free movement of capital**

54 It should be recalled that capital movements include investments in real estate on the territory of a Member State by non-residents, as is clear from the nomenclature of capital movements set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the [EC] Treaty (an article repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5); that nomenclature still has the same indicative value for the purposes of defining the notion of capital

movements (judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 56 and the case-law cited).

55 That notion encompasses, inter alia, investments in real estate relating to the acquisition of a usufruct over land, as is attested, in particular, by the clarification, contained in the explanatory notes in Annex I to Directive 88/361, that the category of investments in real estate covered by the directive includes the acquisition of rights of usufruct over buildings and land (judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 57).

56 In the present case, the contested provision cancels rights of usufruct that were previously acquired over agricultural land, when the usufructuaries do not satisfy the requirement to which the acquisition of such rights is now subject under national law, namely the existence of a close family tie between the person acquiring the right of usufruct and the owner of the land concerned.

57 It is common ground, moreover, that the usufructuaries affected in this way by the contested provision include a great many nationals of Member States other than Hungary, who have acquired rights of usufruct either directly, or, indirectly, through a legal person created in Hungary.

58 By providing for the extinguishment, by operation of law, of rights of usufruct thus held over agricultural land by nationals of Member States other than Hungary, the contested provision restricts, by virtue of its very subject matter and by reason of that fact alone, the right of the persons concerned to the free movement of capital guaranteed by Article 63 TFEU. Indeed, the contested provision deprives those persons both of the possibility of continuing to enjoy their rights of usufruct, by preventing them, inter alia, from using and farming the land concerned or from letting it to tenant farmers and thereby making money from it, and of the possibility of alienating that right, for example by transferring it back to the owner. That provision is, moreover, liable to deter non-residents from making investments in Hungary in the future (see, to that effect, judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraphs 62 to 66).

**(b) Consideration of whether the restriction of the free movement of capital is justified and of the applicability of Article 17 of the Charter**

59 As is apparent from the Court's case-law, a measure such as the contested provision, which restricts the free movement of capital, is permissible only if it is justified by overriding reasons in the public interest and observes the principle of proportionality, a condition that requires the measure to be appropriate for ensuring the attainment of the objective legitimately pursued and not to go beyond what is necessary in order for it to be attained (see, to that effect, judgment of 11 November 2010, *Commission v Portugal*, C-543/08, EU:C:2010:669, paragraph 83).

60 Such a measure may likewise be justified by the reasons referred to in Article 65 TFEU provided that it complies with the principle of proportionality (judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 77 and the case-law cited).

61 It must also be pointed out in this connection that national legislation is appropriate for ensuring attainment of the objective relied on only if it genuinely reflects a concern to attain that objective in a consistent and systematic manner (judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 78 and the case-law cited).

62 In this case, Hungary has submitted that the contested provision is justified, respectively, by overriding reasons in the public interest that are recognised by the Court's case-law, namely, objectives relating to the rational use of agricultural land, and by grounds envisaged by Article 65

TFEU. As regards the latter provision, Hungary relies, more specifically, on, first, the desire to correct infringements of national legislation concerning exchange controls and, second, the desire to combat abusive purchase practices on grounds of public policy.

63 In addition, it should be borne in mind that the fundamental rights guaranteed by the Charter are applicable in all situations governed by EU law and that they must, therefore, be complied with inter alia where national legislation falls within the scope of EU law (see, in particular, judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 19 to 21, and of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraph 62).

64 That is inter alia the case where national legislation is such as to obstruct one or more of the fundamental freedoms guaranteed by the FEU Treaty and the Member State concerned relies on grounds envisaged in Article 65 TFEU, or on overriding reasons in the public interest that are recognised by EU law, in order to justify such an obstacle. In such a situation, the national legislation concerned can, according to settled case-law, fall within the exceptions thereby provided for only if it complies with the fundamental rights the observance of which is ensured by the Court (see, to that effect, judgments of 18 June 1991, *ERT*, C-260/89, EU:C:1991:254, paragraph 43; of 27 April 2006, *Commission v Germany*, C-441/02, EU:C:2006:253, paragraph 108 and the case-law cited; and of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraph 63).

65 In that regard, as has already been held by the Court, the use by a Member State of the exceptions provided for by EU law in order to justify an impediment to a fundamental freedom guaranteed by the Treaty must be regarded as ‘implementing Union law’ within the meaning of Article 51(1) of the Charter (judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraph 64 and the case-law cited).

66 In this case, as has been stated in paragraphs 58 and 62 above, the contested provision constitutes a restriction of the free movement of capital and Hungary relies on the existence of overriding reasons in the public interest and of the grounds envisaged in Article 65 TFEU in order to justify that restriction. That being so, the compatibility of the contested provision with EU law must be examined in the light both of the exceptions thus provided for by the Treaty and the Court’s case-law, on the one hand, and of the fundamental rights guaranteed by the Charter, on the other hand (see, to that effect, judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraphs 65, 102 and 103), one of which is the right to property safeguarded by Article 17 of the Charter, which the Commission claims has been infringed in this case.

(1) *Whether persons have been deprived of property within the meaning of Article 17(1) of the Charter*

67 Under Article 17(1) of the Charter everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions and no one may be deprived of his or her possessions, except 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. In addition, the use of property may be regulated by law in so far as is necessary in the general interest.

68 In that regard, it should be noted, as a preliminary point, that, as the Court has already stated, Article 17 of the Charter is a rule of law intended to confer rights on individuals (see, to that effect, judgment of 20 September 2016, *Ledra Advertising and Others v Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 66).

69 As regards the substantive conditions set out in Article 17(1) of the Charter, it follows, first, from the Court's case-law that the protection afforded by that provision concerns rights with an asset value creating an established legal position under the legal system concerned, enabling the holder to exercise those rights autonomously and for his or her own benefit (judgments of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, paragraph 34, and of 3 September 2015, *Inuit Tapiriit Kanatami and Others v Commission*, C-398/13 P, EU:C:2015:535, paragraph 60).

70 Contrary to what Hungary argued in that regard at the hearing, it is evident that, inasmuch as rights of usufruct over immovable property such as those at issue permit the usufructuary to use and enjoy that property, they have an asset value and confer on the usufructuary an established legal position, enabling him or her to exercise those rights of use and enjoyment independently, even if the possibility of transferring such rights is limited or precluded under the applicable national law.

71 Indeed, where such rights of usufruct over agricultural land are acquired contractually, a price will, as a rule, be paid. Those rights enable their holders to make use of such land, in particular for economic purposes, or even, depending on the circumstances, to lease the land to third parties; such rights therefore fall within the scope of Article 17(1) of the Charter.

72 According also to the case-law of the European Court of Human Rights relating to Article 1 of Protocol No 1 to the ECHR, which must be taken into account pursuant to Article 52(3) of the Charter in interpreting Article 17 thereof, as the minimum threshold of protection (see, to that effect, judgments of 15 March 2017, *Al Chodor*, C-528/15, EU:C:2017:213, paragraph 37; of 13 June 2017, *Florescu and Others*, C-258/14, EU:C:2017:448, paragraph 49; and of 12 February 2019, *TC*, C-492/18 PPU, EU:C:2019:108, paragraph 57), rights of use or of usufruct over immovable property are to be regarded as 'possessions' that are eligible for the protection guaranteed by Article 1 of that protocol (see, in particular, ECtHR, 12 December 2002, *Wittek v. Germany*, CE:ECHR:2002:1212JUD003729097, §§ 43 to 46; ECtHR, 16 November 2004, *Bruncrona v. Finland*, CE:ECHR:2004:1116JUD004167398, § 78; and ECtHR, 9 February 2006, *Athanasίου and Others v. Greece*, CE:ECHR:2006:0209JUD000253102, § 22).

73 In the second place, contrary to Hungary's contention, the rights of usufruct that were cancelled by the contested provision must be regarded as having been 'lawfully acquired' for the purposes of Article 17(1) of the Charter.

74 In that regard, it should be noted first of all that, as has been stated in paragraphs 8 and 9 above, the legislative amendments made in 1991 and 1994 for the purpose of prohibiting the acquisition of agricultural land by natural persons not possessing Hungarian nationality and by legal persons did not concern the acquisition of rights of usufruct over such land. It was in fact only from 1 January 2002 that the 1994 Law on productive land was amended so as also to preclude a right of usufruct over agricultural land being created by contract in favour of those natural and legal persons.

75 Accordingly, the rights of usufruct covered by the contested provision were created over agricultural land at a time when the creation of such rights was not prohibited by the national legislation in force.

76 Next, Hungary has not established either (i) that the national legislation concerning exchange controls that it invokes was intended to make acquisitions of rights of usufruct by non-residents subject to a foreign exchange authorisation without which such acquisitions would be invalid or (ii) that the rights of usufruct acquired by nationals of other Member States and cancelled by the

contested provision were, under the applicable national law, null and void *ab initio* because the rules applicable to the acquisition of ownership of agricultural land had been circumvented.

77 In that regard, as the Commission noted and as Hungary acknowledged in the pre-litigation stage of the procedure, no judicial decision has found there to be such nullity in the case of rights of usufruct of this kind. On the contrary, the Commission mentioned before the Court a judgment of the Kúria (Supreme Court, Hungary) of 26 January 2010, the grounds of which clearly state that the mere creation of a right of usufruct over a piece of agricultural land does not imply that the parties intended to circumvent the legislation applicable to the sale of such land.

78 Moreover, although it admittedly appears from judgment No 25 of 21 July 2015 of the Alkotmánybíróság (Constitutional Court) that the contested provision sought, at least in part, to eliminate the legal effects of a practice for acquiring agricultural land by virtue of which the right of usufruct had been applied in a ‘dysfunctional manner’, such a finding does not appear to amount to a finding of abuse on the part of all the usufructuaries concerned. That judgment also points out that the contested provision had cancelled the rights of usufruct concerned as regards the future but had not classified any previous conduct as unlawful.

79 Finally, it is undisputed that the rights of usufruct acquired in this way by non-residents were entered as a matter of course in the land registries by the competent Hungarian authorities. As the parties acknowledge, registration of that kind requires that the document concerned be in the form of either a public document or a private document countersigned by a lawyer: under Paragraph 5 of the Law on the land register, the consequence of such registration is that the immovable asset concerned exists until there is proof to the contrary. The Commission also emphasises, without being challenged on this point by Hungary, that, under Paragraph 3 of that law in the version in force until 15 March 2014, such registration established rights.

80 Accordingly, it is not disputed that the persons concerned had generally been able peacefully to enjoy those rights, in their capacity as usufructuaries, and had, in some cases, done so for many years. They drew support, as regards the legal certainty attaching to the instruments creating their rights, from (i) the registration of those instruments at the land registries, (ii) the fact that the national authorities did not bring actions within a reasonable time with a view to seeking a declaration that those instruments were invalid and securing the deletion of their entries in the land registers and (iii) the fact that the existence of the instruments concerned was confirmed by legislation, given that Law No CCXIII of 2012, which was adopted a little more than a year before the contested provision, had provided that those instruments should continue to be valid until 1 January 2033.

81 In the third place, as the Advocate General has noted in points 136 and 157 of his Opinion, the rights of usufruct concerned amount to a fraction of ownership in the sense that they confer on their holders two essential attributes of the right to property, namely the right to use the property concerned and the right to collect the revenue from it. The contested provision cancels all the existing rights of usufruct over the land concerned, with the exception of those rights that were created between close members of the same family. Cancellation of such a kind thus, by definition, deprives the persons concerned — in a compulsory, complete and definitive manner — of those rights of usufruct to the benefit of the legal owners of the land.

82 It follows that the contested provision does not involve restrictions on the use of possessions but rather entails a person being deprived of his possessions within the meaning of Article 17(1) of the Charter.

83 In that regard, Hungary argued at the hearing that it remained possible for the usufructuaries thus dispossessed to continue to enjoy the land concerned by concluding a lease with the landowner. That argument cannot succeed. Indeed, a lease can be concluded only if the owner consents and conclusion of a lease does not restore to the former usufructuary the *in rem* right that was previously his, which is different in nature from the *in personam* right resulting from a lease agreement. It also imposes disadvantages upon him to which he would not have been subject had he retained his right.

84 In addition, by providing that ‘no one may be deprived of his or her possessions’, the second sentence of Article 17(1) of the Charter does not cover solely the taking of property for the purpose of transferring it to a public authority. Thus, contrary to what Hungary has also argued in this regard, the fact that the rights of usufruct concerned are not acquired by a public authority and that their extinction results in full ownership of the land concerned being restored to the owners has no impact whatsoever as regards the fact that the cancellation of those rights results in the former usufructuaries being deprived of the rights.

85 In that regard, it should also be observed that the European Court of Human Rights has held that the compulsory transfer, under a rule of national law, of property as between the owner of that property and the holder of a long lease over it can be regarded as a taking of property for the purposes of the second sentence of the first paragraph of Article 1 of Protocol No 1 to the ECHR (ECtHR, 21 February 1986, *James and Others v. the United Kingdom*, CE:ECHR:1986:0221JUD000879379, §§ 27, 30 and 38), as can the compulsory transfer of an agricultural estate from one person to another for the purposes of the rationalisation of agriculture (ECtHR, 21 February 1990, *Håkansson and Stureson v. Sweden*, CE:ECHR:1990:0221JUD001185585, §§ 42 to 44).

86 It follows from the reasoning set out in paragraphs 69 to 85 above that the cancellation of usufructuary rights brought about by the contested provision constitutes a deprivation of property within the meaning of Article 17(1) of the Charter.

87 Although that provision does not lay down an absolute prohibition on persons being deprived of their possessions, it does, however, provide that such deprivation may occur only where it is 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.

88 As regards those requirements, account must also be taken of the provision made by Article 52(1) of the Charter, under which limitations may be imposed on the exercise of the rights recognised by the Charter, as long as the limitations are provided for by law, respect the essence of those rights and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

89 It follows from a reading of Article 17(1) of the Charter in conjunction with Article 52(1) thereof, first, that when the public interest is invoked in order to justify a person being deprived of his or her possessions, compliance with the principle of proportionality as required by Article 52(1) of the Charter must be ensured with regard to the public interest concerned and the objectives of general interest which the latter encompasses. Secondly, such a reading implies that, if there is no such public interest capable of justifying a deprivation of property, or — even if such a public interest is established — if the conditions laid down in the second sentence of Article 17(1) of the Charter are not satisfied, there will be an infringement of the right to property guaranteed by that provision.

(2) *Grounds of justification and the public interest*

(i) *The justification founded on objectives of general interest related to the farming of agricultural land*

90 As is apparent from paragraphs 31 and 43 above, Hungary submits that, even if the contested provision is held to constitute a restriction of the free movement of capital, that provision — inasmuch as it makes any retention of existing rights of usufruct over agricultural land subject to the condition that the usufructuary be a close family member of the owner of the land concerned — is intended (i) to restrict ownership of agricultural land to persons who farm it and to prevent the land being acquired for purely speculative purposes, (ii) to allow such land to be farmed by new undertakings, (iii) to facilitate the creation of farms that are viable in size and competitive and (iv) to prevent a fragmentation of agricultural land as well as migration from rural areas and depopulation of the countryside.

91 In that regard, it should be observed that the Court has accepted that national legislation may restrict the free movement of capital on the ground of objectives such as those of preserving the farming of agricultural land by means of owner-occupancy and of encouraging a situation where agricultural property is lived on and farmed predominantly by the owners, as well as of preserving a permanent population in rural areas as a planning measure and of encouraging a reasonable use of the available land by resisting pressure on land (judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 82 and the case-law cited).

92 The same is true of the objectives of maintaining a distribution of land ownership which allows the development of viable farms and sympathetic stewardship of green spaces and the countryside (judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 83 and the case-law cited).

93 In the instant case, it must, however, be established, as has been observed in paragraph 59 above, whether the contested provision in fact pursues the legitimate general-interest objectives invoked and whether it is appropriate for ensuring the attainment of those objectives without going beyond what is necessary in order to attain them.

94 In that context, it must also be borne in mind that the reasons that may be invoked by a Member State by way of justification must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State and by specific evidence substantiating its arguments (judgment of 26 May 2016, *Commission v Greece*, C-244/15, EU:C:2016:359, paragraph 42 and the case-law cited).

95 In that regard, it should first be pointed out that the contested provision, inasmuch as it cancels all the existing rights of usufruct over agricultural land with the exception of those held by a close relation of the owner of that land, does not appear appropriate for the purpose of the objectives relied on by Hungary, with which it does not have any direct connection.

96 Indeed, Hungary has not established why the type of title a person has over agricultural land might allow it to be determined whether the person concerned farms the land him- or herself, whether he or she lives close to that land, whether he or she has acquired it for possibly speculative purposes or whether he or she would be likely to contribute to the development of viable and competitive agriculture, in particular by preventing a fragmentation of land.



97 Moreover, as the Court has already held, in paragraph 87 of the judgment of 6 March 2018, *SEGRO and Horváth* (C-52/16 and C-113/16, EU:C:2018:157), the existence of the family tie that is required here between the usufructuary and the owner does is not capable of guaranteeing that the usufructuary will farm the land concerned him- or herself or that he or she has not acquired the right of usufruct at issue for purely speculative purposes. Similarly, it cannot be assumed that a person outside the owner's family who has purchased a right of usufruct over such land would not be in a position to farm that land him- or herself and that the purchase would necessarily have been made for purely speculative purposes, without any intention of cultivating the land.

98 Nor has Hungary established how that requirement for a close family tie might be capable of contributing to the support and development of viable and competitive agriculture, in particular by preventing a fragmentation of land ownership, or of preventing migration from rural areas and depopulation of the countryside.

99 Secondly, the contested provision in any event goes beyond what is necessary in order to attain the objectives invoked by Hungary.

100 Indeed, it is apparent that other measures less restrictive of the free movement of capital than those laid down by the contested provision could have been adopted for the purpose of ensuring that the existence of a right of usufruct over land used for farming does not result in that land ceasing to be farmed. In that regard, it would, for example, have been possible to require the usufructuary to preserve such agricultural use, as the case may be, by actually farming the land concerned him- or herself, under conditions ensuring the viability of that farming (see, to that effect, judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraphs 92 and 93).

101 Hungary has thus failed to establish either that the contested provision genuinely pursues the general-interest objectives related to the farming of agricultural land which it invokes or, in any event, that it is appropriate for securing in a consistent manner the attainment of such objectives and is limited to the measures necessary to that end.

(ii) *The justification deriving from infringement of the national legislation concerning exchange controls*

102 Article 65(1)(b) TFEU states that the provisions of Article 63 TFEU are to be without prejudice to the right of Member States to take all requisite measures to prevent infringements of national law and regulations, to lay down procedures for the declaration of capital movements for the purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security. In accordance with Article 65(3) TFEU, such measures or procedures are not, however, to constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63 TFEU.

103 It should be recalled in that regard that, as a derogation from the fundamental principle of the free movement of capital, Article 65(1)(b) TFEU must be interpreted strictly (judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 96 and the case-law cited).

104 In the present instance, Hungary contends that, since acquisitions of rights of usufruct over agricultural land took place before 1 January 2002 and were made by non-residents, within the meaning of the national legislation applicable at that time with regard to exchange controls, they were subject, under that legislation, to the grant of authorisation by the National Bank of Hungary.

It argues that since foreign exchange authorisations were never sought for such acquisitions, the latter were invalid.

105 In that regard, it must first be observed that, as is apparent from paragraph 76 above, Hungary has not established that the national legislation concerning exchange controls to which it refers was intended to make acquisitions of rights of usufruct by non-residents subject to a foreign exchange authorisation without which such acquisitions would be invalid. Nor has it established that the adoption of the contested provision was driven by a desire to remedy infringements of that national legislation concerning exchange controls.

106 As regards the first of those matters, it should also be noted that, even if the initial validity of certain rights of usufruct cancelled by the contested provision was conditional upon possession of a foreign exchange authorisation, the Commission has produced before the Court extracts from Opinion No 1/2010 of 28 June 2010 and from a judgment (Case BH2000.556), both delivered by the Kúria (Supreme Court); a textual analysis of those documents reveals that, under Paragraph 237(2) of Law No IV of 1959 establishing the civil code, which was in force at the time when the national legislation concerning exchange controls that Hungary invokes was repealed, where a contract has been concluded without the authorisation necessary for the formation of the contract having been obtained, the contract must, as of the date on which such authorisation ceases to be necessary, be regarded as having been definitively and validly formed.

107 As regards the second aspect, it must be recalled that the contested provision provides for the systematic extinguishment of rights of usufruct held over agricultural land by persons who are unable to demonstrate a close family tie with the owner of the land concerned. However, that family-tie criterion is wholly unrelated to the national legislation concerning exchange controls. Moreover, it is undisputed, as is apparent from, inter alia, paragraph 42 above, that the cancellation of rights of usufruct brought about by the contested provision applies not only in the case of non-residents but also in the case of persons residing in Hungary and legal persons established in Hungary, who are not subject to the national legislation concerning exchange controls relied upon.

108 Secondly, and in any event, the cancellation, by operation of law, of rights of usufruct for which there were longstanding entries in the land registers, which took place more than 10 years after that national legislation on exchange controls was repealed, is not a proportionate measure. Indeed, other measures with less far-reaching effects could have been adopted for the purpose of penalising from the outset any infringements of the national legislation on exchange controls, such as administrative fines (judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 106 and the case-law cited).

109 In view of all of the foregoing, Hungary has failed to establish (i) that the national legislation concerning exchange controls that it invokes is such as to have affected the validity of the rights of usufruct concerned by the contested provision, (ii) that the latter was adopted for the purpose of correcting any infringements of that exchange control legislation and (iii) in any event, and on the assumption that the contested provision actually had such an objective, that the cancellation of rights of usufruct effected by that provision was proportionate to that aim and permissible under Article 65 TFEU.

*(iii) The justification founded on the prevention, on the ground of protection of public policy, of practices designed to circumvent national law*

110 As has been recalled in paragraph 102 above, Article 65(1)(b) TFEU provides, inter alia, that the provisions of Article 63 TFEU are to be without prejudice to the right of Member States to take measures which are justified on grounds of public policy or public security.

111 In the present case, Hungary submits that the rights of usufruct cancelled by the contested provision were acquired by circumventing the statutory prohibition that prevented natural persons who were nationals of other Member States and legal persons from acquiring the ownership of agricultural land and that those rights were therefore void *ab initio*, which is why the Hungarian legislature decided to remedy such abuses by statute.

112 In that regard, it should be borne in mind that, so far as concerns the prevention of practices intended to circumvent national law, it is true that the Court has already accepted that a measure restricting a fundamental freedom may, in appropriate cases, be justified where it is designed to combat wholly artificial arrangements, aimed at circumventing the national legislation concerned (judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 114 and the case-law cited).

113 However, in the first place and as has already been stated in paragraphs 76 to 80 above, Hungary has not established that the rights of usufruct affected by the contested provision — namely those that were created, before 2002, over agricultural land by legal persons and by nationals of other Member States — were invalid under the applicable national law because certain rules of national law had been circumvented.

114 In the second place, according to the case-law a justification such as that mentioned in paragraph 112 above is permissible only in so far as it specifically targets artificial arrangements aimed at circumventing the national legislation concerned. This rules out in particular any enactment of a general presumption of abusive practices that would be sufficient to justify a restriction on the free movement of capital (judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraphs 115 and 116 and the case-law cited).

115 In order to comply with the principle of proportionality, a measure pursuing such a specific objective of combating wholly artificial arrangements should, on the contrary, enable the national courts to carry out a case-by-case examination, having regard to the particular features of each case and taking objective elements as its basis, in order to assess the abusive or fraudulent conduct of the persons concerned (see, to that effect, judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 117 and the case-law cited).

116 It must be held that the contested provision does not satisfy any of the conditions set out in paragraphs 114 and 115 above.

117 First, judgment No 25 of 21 July 2015 of the Alkotmánybíróság (Constitutional Court), mentioned in paragraph 78 above, does not contain any finding of abuse on the part of the usufructuaries concerned and states that the cancellation of the rights of usufruct by the contested provision was above all considered necessary for the purpose of achieving fully the national strategic objective pursued by the new legal arrangement put in place, namely that productive land was to be owned solely by the natural persons who work it.

118 Accordingly, it has not been established that the contested provision pursues the specific aim of combating conduct that consisted in the creation of artificial arrangements aimed at circumventing national legislation relating to acquisition of agricultural land.

119 Secondly, and in any event, it cannot reasonably be inferred from the mere fact that the holder of a right of usufruct over a parcel of agricultural land is a legal person or a natural person who does not have the status of close relation of the owner of that land that the conduct of such a person when acquiring such a right of usufruct constituted an abuse. As has been pointed out in paragraph 114 above, the enactment of a general presumption of abusive practices cannot be allowed (see, to that effect, judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 121).

120 Thus, other measures less restrictive of the free movement of capital, such as penalties or specific actions for a declaration of invalidity before the national courts in order to combat any circumventions of the applicable national legislation that are established, could, provided that they comply with the other requirements arising from EU law, be considered for the purpose of combating those abusive practices (see, to that effect, judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 122).

121 In this connection, Hungary's line of argument that is based on budgetary considerations and considerations relating to the efficient use of judicial resources cannot be accepted. It is settled case-law that aims of a purely economic nature cannot constitute overriding reasons in the public interest justifying a restriction of a fundamental freedom guaranteed by the Treaty. The same is true of considerations of a purely administrative nature (judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 123 and the case-law cited).

122 It follows that the restriction on the free movement of capital that is brought about by the contested provision cannot be justified by the desire to combat purely artificial arrangements aimed at circumventing the applicable national legislation concerning the acquisition of agricultural property.

*(iv) Absence of a public-interest ground and of any arrangements for compensation, as referred to in Article 17 of the Charter*

123 As regards the deprivation of property, within the meaning of Article 17 of the Charter, to which the cancellation of the rights of usufruct concerned gives rise, it should be added, taking account of the requirements set out in paragraphs 87 to 89 above which must be met if such deprivation is to be lawful, that the cancellation is provided for by law.

124 Furthermore, although objectives of general interest relating to the farming of agricultural land, such as those mentioned in paragraphs 91 and 92 above, or objectives such as those intended to remedy infringements of national legislation on exchange controls or to combat abusive practices aimed at circumventing applicable national law, may certainly fall within one or more public-interest grounds, within the meaning of that provision, it is, however, apparent from paragraph 101 above that in the present case Hungary has not established either that the cancellation of the rights of usufruct effected by the contested provision genuinely pursues the above-mentioned objectives relating to the working of agricultural land or, in any event, that it is appropriate for attaining those objectives or necessary to that end. Moreover, in view of the findings made in paragraphs 109 and 122 above respectively, a cancellation of rights of usufruct such as that effected by the contested provision cannot be regarded as having been enacted in order to remedy infringements of national law relating to exchange controls or to combat such abusive practices, as those infringements and practices have not been established; nor, in any event, can such a cancellation be considered to satisfy the requirement of proportionality referred to in paragraph 89 above.

125 In any event, the contested provision does not satisfy the requirement laid down in the second sentence of Article 17(1) of the Charter, according to which fair compensation must be paid in good time for a deprivation of property such as the loss of the rights of usufruct concerned.

126 According to the words actually used in that provision, a person may be deprived of his or her property ‘only in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for [its] loss’, meaning that such compensation, which is thus one of the conditions laid down by the Charter if a person is to be deprived of his or her property, must be provided for by law. Accordingly, a rule of national law depriving a person of his or her property must provide, in a clear and precise manner, for that loss to give rise to an entitlement to compensation and for the conditions of that compensation. It cannot but be noted that the contested provision contains no terms ensuring that the usufructuaries who have been deprived of their property receive compensation or laying down the arrangements for such compensation.

127 In that regard, the possibility of referring to the general rules of civil law, which Hungary mentions in its defence, cannot satisfy the requirements arising under Article 17(1) of the Charter. Moreover, even if it were legally possible for a Member State, under that provision, to make private parties responsible for the payment of compensation for deprivations of property which have been caused exclusively by the State itself, a reference of that kind to civil law would in the present case place on the usufructuaries the burden of having to pursue the recovery, by means of procedures that may prove lengthy and expensive, of any compensation which might be payable to them by the landowner. Such rules of civil law do not make it possible to determine easily and in a sufficiently precise and foreseeable manner whether compensation will in fact be able to be obtained at the end of such procedures nor do they disclose the nature of any compensation there may be.

128 In this regard, it should also be noted that, with regard to Article 1 of Protocol No 1 to the ECHR, it is apparent from the case-law of the European Court of Human Rights that that Court considers that, when the possessions of an individual are expropriated, a procedure must exist which ensures an overall assessment of the consequences of expropriation, namely, an award of compensation that is related to the value of the expropriated possession, a determination of the recipients of compensation and any other issues relating to the expropriation (ECtHR, 9 October 2003, *Biozokat A.E. v. Greece*, CE:ECHR:2003:1009JUD006158200, § 29).

129 Having regard to the findings made in paragraphs 123 to 128 above, it must be held that the deprivation of property effected by the contested provision cannot be justified on the ground that it is in the public interest; nor are any arrangements in place whereby fair compensation is paid in good time. Accordingly, that provision infringes the right to property guaranteed by Article 17(1) of the Charter.

### (c) **Conclusion**

130 In view of all the foregoing, it must be concluded, first, that Hungary has not established either (i) that the cancellation effected by the contested provision of rights of usufruct held directly or indirectly by nationals of Member States other than Hungary is intended to secure the attainment of objectives in the general interest that are recognised by the case-law of the Court or mentioned in Article 65(1)(b) TFEU or (ii) that that cancellation is appropriate and coherent, or indeed limited to the measures necessary, for the purpose of seeking to secure such objectives. Secondly, that cancellation does not comply with Article 17(1) of the Charter. Consequently, the restrictions on the free movement of capital thus arising from the deprivation of property acquired using capital protected by Article 63 TFEU cannot be justified.

131 Accordingly, the Court finds that, by adopting the contested provision and thereby cancelling, by operation of law, the rights of usufruct over agricultural land located in Hungary that are held, directly or indirectly, by nationals of other Member States, Hungary has failed to fulfil its obligations under Article 63 TFEU in conjunction with Article 17 of the Charter.

### **Costs**

132 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party must be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the Commission has applied for costs and Hungary has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Grand Chamber) hereby:

- 1. Declares that, by adopting Paragraph 108(1) of mező- és erdőgazdasági földek forgalmáról szóló 2013. évi CXXII. törvénnyel összefüggő egyes rendelkezésekről és átmeneti szabályokról szóló 2013. évi CCXII. törvény (Law No CCXII of 2013 laying down various provisions and transitional measures concerning Law No CXXII of 2013 on transactions in agricultural and forestry land) and thereby cancelling, by operation of law, the rights of usufruct over agricultural and forestry land located in Hungary that are held, directly or indirectly, by nationals of other Member States, Hungary has failed to fulfil its obligations under Article 63 TFEU in conjunction with Article 17 of the Charter of Fundamental Rights of the European Union;**
- 2. Orders Hungary to pay the costs.**

[Signatures]

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\* Language of the case: Hungarian.