Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 31 May 2017[1]

Joined Cases C-52/16 and C-113/16

'SEGRO' Kft.
v
Vas Megyei Kormányhivatal Sárvári Járási Földhivatala (C-52/16)
and
Günther Horváth
v
Vas Megyei Kormányhivatal (C-113/16)

(Request for a preliminary ruling from the Szombathelyi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Szombathely, Hungary))

(References for a preliminary ruling — Article 49 TFEU — Freedom of establishment — Article 63 TFEU — Free movement of capital — Indirect discrimination — Contractual usufructuary rights or rights of use in agricultural land — Prohibition of the acquisition of such rights by persons other than members of the close family of the owner of the agricultural land — Legislation prescribing the cancellation of such rights where that condition not satisfied — No justification — Infringement of national legislation on exchange control — Prevention of abusive practices — Prevention of property speculation — Articles 17 and 47 of the Charter of Fundamental Rights of the European Union — Inapplicability of the Charter of Fundamental Rights of the European Union independently of the question of infringement of the freedoms of movement)

I. Introduction

1. By decisions 25 January 2016 (C-52/16) and 8 February 2016 (C-113/16), received at the Court on 29 January and 26 February 2016, respectively, the Szombathelyi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Szombathely, Hungary) referred to the Court two requests for a preliminary ruling on the interpretation of Articles 49 and 63 TFEU and Articles 17 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2. These requests were submitted in proceedings between 'SEGRO' Kft. and the Vas Megyei Kormányhivatal Sárvári Járási Földhivatala (Vas Region Administrative Department — Sárvár District Property Registry, Hungary) and between Mr Günter Horváth and the Vas Megyei Kormányhivatal (Vas Region Administrative Department, Hungary), concerning decisions on the cancellation of the registration in the property register of the usufructuary rights in agricultural land held by SEGRO and by Mr Horváth.

1 Original language: French.

3. Those cancellation decisions were based on national legislation prescribing the extinction of the usufructuary rights and rights of use in productive land in the absence of proof that those rights were created between close members of the same family.

4. For the reasons which I shall set out below, I consider that that legislation and the cancellation decisions taken on the basis thereof are contrary to the free movement of capital. In fact, the requirement that such rights must have been created between close members of the same family gives rise to effects which are indirectly discriminatory against nationals of other Member States and cannot be justified by any of objectives put forward by the Hungarian Government.

5. Furthermore, as regards Articles 17 and 47 of the Charter, which the referring court considers have been infringed in Case C-52/16 *SEGRO*,[2] I shall propose that the Court should interpret Article 51(1) and (2) of the Charter as meaning that, where national legislation is examined in the light of the freedoms of movement, the breach of a fundamental right guaranteed by the Charter cannot be invoked independently of the question of an infringement of those freedoms.

II. Legal context

A. European Union law

6. The accession of Hungary to the European Union was provided for in a Treaty of Accession[3] ('the 2003 Accession Treaty'), to which was annexed an act setting out the conditions of accession[4] ('the 2003 Act of Accession'), in accordance with Article 1(2) of that Treaty. The Treaty entered into force on 1 May 2004, pursuant to Article 2(2) thereof.

7. Chapter 3 of Annex X to the 2003 Act of Accession is entitled 'Free movement of capital'. Paragraph 2 of Chapter 3 provides:

'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 [2003] 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. …

2 See point 21 of this Opinion.

3 Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and 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, the Slovak Republic, concerning the 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 to the European Union (OJ 2003 L 236, p. 17).

4 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).

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.'

8. By a decision of 20 December 2010, the Commission extended until 30 April 2014 the transitional period concerning the acquisition of agricultural land in Hungary referred to in Annex X, Chapter 3, paragraph 2, of the 2003 Act of Accession. [5]

B. Hungarian law

9. Termőföldről szóló 1994. évi LV. törvény (Law No LV of 1994 on arable land; 'the Law of 1994 on arable land') was amended, with effect from 1 January 2013, in that the creation by contract of usufructuary rights in arable land would in future be permitted only between close members of the same family.

10. On that occasion a new Article 91(1) was inserted into that law, worded as follows:

'Any usufructuary right existing on 1 January 2013 and created, for an indefinite period or for a fixed term ending after 30 December 2032, by contract between persons who are not close members of the same family, shall be extinguished by operation of law on 1 January 2033.'

11. Mező- és erdőgazdasági földek forgalmáról szóló 2013. évi CXXII. törvény (Law No CXXII of 2013 on transactions in agricultural and forestry land; 'the Law of 2013 on arable land') was adopted on 21 June 2013 and entered into force on 15 December 2013. Article 5(13) of that Law contains the following definition:

'"Close member of the same family" shall mean spouses, direct ascendants, adopted children, children and stepchildren, adoptive parents, stepparents, foster parents and brothers and sisters.'

12. Article 37(1) of the Law of 2013 on arable land provides that usufructuary rights in arable land created by contract are to be null and void unless the contract is concluded between close members of the same family.

13. 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, introducing certain provisions and transitional measures concerning the Law of 2013 on arable land; 'the Law of 2013 on transitional measures') was adopted on 12 December 2013 and entered into force on 15 December 2013.

14. Article 108(1) of that law, which repealed Article 91(1) of the Law of 1994 on arable land, states:

'Any usufructuary right or right of use existing on 30 April 2014 and created for an indefinite period or for a definite period expiring after 30 April 2014 by a contract concluded between persons who are not close members of the same family shall be extinguished by operation of law on 1 May 2014.'

5 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).

15. Article 94 of ingatlan-nyilvántartásról szóló 1997. évi CXLI. törvény (Law No CXLI of 1997 on the property register; 'the Law on the property register') provides:

'1. Where a usufructuary right and the right of use (for the purposes of this Article referred to collectively as "usufructuary rights") are extinguished under Article 108(1) of [the Law of 2013 on transitional measures], in order to have them deleted from the property register the natural person holding such rights shall, upon being notified by 31 October 2014 at the latest by the authority responsible for administering the property register, within 15 days of the delivery of such notice, declare, using the form prescribed for that purpose by the Minister, the close 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 property register shall delete the usufructuary rights from the register within six 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 property register shall, by no later than 31 December 2014, to its own motion delete from the property register any usufructuary right registered on behalf of a legal person or an entity not having legal personality but having the capacity to acquire a registrable right which has been cancelled in application of Article 108(1) of [the Law of 2013 on transitional measures].'

III. The main proceedings and the questions referred for a preliminary ruling

A. Case C-52/16

16. SEGRO is a commercial company having its registered office in Hungary; its shareholders are natural persons who are nationals of other Member States and are resident in Germany.

17. Before 30 April 2014, SEGRO acquired usufructuary rights in two parcels of agricultural land in Hungary. Those rights were entered in the property register. The Hungarian Government has stated, in that regard, that the rights at issue in the main proceedings had been created before 1 May 2004.

18. By two decisions dated 10 and 11 September 2014, respectively, the Sárvár District Property Registry cancelled those usufructuary rights from the property register, relying on Article 108(1) of the Law of 2013 on transitional measures and Article 94(5) of the Law on the property register.

19. In the action which it brought before the referring court, SEGRO claimed, in particular, that the abovementioned national provisions infringed the Hungarian Constitution and EU law.

20. The referring court initiated a procedure before the Alkotmánybíróság (Constitutional Court, Hungary), seeking a declaration that those provisions were contrary to the Hungarian Constitution. By judgment No 25 of 21 July 2015, the Alkotmánybíróság found that the provisions in question were incompatible with the Hungarian Constitution and requested the legislature to amend the legislation concerned by no later than 1 December 2015. According to the referring court, that deadline passed without any measure to that effect being adopted.

21. The main proceedings again came before the referring court, which considered, first of all, that the national provisions at issue may deter nationals of other Member States from exercising their right to freedom of establishment (Article 49 TFEU) and the free movement of capital (Article 63 TFEU) by acquiring usufructuary rights in agricultural land in Hungary, owing to the danger that such rights will be cancelled prematurely and without fair compensation. Next, those provisions also entail a disproportionate interference with the right to property of those concerned, which is guaranteed in Article 17 of the Charter. Last, the implicit legal presumption that all private contracts which have established usufructuary rights and rights of use in arable land were entered into in order to evade the restrictions on the acquisition of property infringes the right to an impartial tribunal protected by Article 47 of the Charter.

22. It was in those circumstances that the Szombathelyi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Szombathely) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must Articles 49 and 63 TFEU and Articles 17 and 47 of the [Charter] be interpreted as precluding national legislation such as that at issue in the main proceedings, which — without considering other criteria — imposes the obligation to cancel the registration of the usufructuary rights and rights of use burdening agricultural land, which have been registered in the name of companies or natural persons who are not close family relatives of the proprietor of the land, without at the same time prescribing, in favour of the holders of the extinguished usufructuary rights and rights of use, compensation for the financial losses which, while it cannot be claimed in the context of the settlement of accounts between the parties, does arise from valid contracts?

(2) Must Articles 49 and 63 [TFEU] and Articles 17 and 47 of the [Charter] be interpreted as precluding national legislation such as that at issue in the main proceedings which — without considering other criteria — imposes the obligation to cancel the registration of the usufructuary rights and rights of use burdening agricultural land, which have been registered, pursuant to contracts concluded before 30 April 2014, in the name of companies or natural persons who are not close family relatives of the owner of the land, and at the same time prescribes, in favour of the holders of the extinguished usufructuary rights and rights of use, compensation for the financial losses which, while it cannot be claimed in the context of the settlement of accounts between the parties, does arise from valid contracts?’

B. Case C-113/16

23. Mr Horváth is an Austrian national residing in Austria who before 30 April 2014 acquired usufructuary rights, to be extinguished on his death, in two agricultural plots in Hungary. Those rights were entered in the property register. The Hungarian Government has made clear, in that regard, that the rights at issue in the main proceedings had been created before 1 May 2004.

24. By decision of 12 October 2015, the Vas Region Administrative Department deleted those usufructuary rights from the property register, relying on Article 5(13) of the Law of 2013 on arable land, Article 108(1) of the Law 2013 on transitional measures and Article 94(1) and (3) of the Law on the property register.

25. Mr Horváth brought an action against that decision before the referring court.

26. The referring court wonders whether the requirement of a close relationship between the parties to the contract creating a usufructuary right constitutes covert discrimination against the nationals of the other Member States, since agricultural land belongs mainly to Hungarian nationals. It maintains that that discriminatory effect is all the more obvious because foreign natural and legal persons were previously prohibited from acquiring ownership of such land, so that the proportion of holders of usufructuary rights or rights of usage would be much higher among nationals of other Member States than among Hungarian nationals.

27. It was in those circumstances that the Szombathelyi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Szombathely) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must national legislation such as that at issue in the main proceedings, under which the continuation of usufructuary rights and rights of use created in agricultural land depends on proof of the existence of a close relationship with the person who created the usufructuary rights and rights of use, and under which the usufructuary rights and rights of use are extinguished by operation of law, without any financial compensation, where the holder of the rights cannot establish that close relationship, be regarded as a restriction contrary to Articles 49 and 63 TFEU?

(2) Does national legislation such as that at issue in the main proceedings, under which the continuation of usufructuary rights and rights of use created in agricultural land depends on proof of the existence of a close relationship with the person who created the usufructuary rights and rights of use, and under which the usufructuary rights and rights of use are terminated by operation of law, without compensation, where the owner of those rights cannot prove that close relationship, operate in a genuinely equal manner vis-à-vis the nationals of the Member State concerned and the nationals of the other Member States, having regard to Articles 49 and 63 TFEU?

IV. Procedure before the Court

28. The requests for a preliminary ruling were registered at the Court Registry on 29 January 2016 (C-52/16) and 26 February 2016 (C-113/16) respectively.

29. Written observations were submitted by the Hungarian, Italian, Austrian and Portuguese Governments and by the Commission.

30. The Hungarian Government and the Commission presented their observations at the hearing on 7 March 2017.

V. Analysis

31. By its questions, the referring court seeks to ascertain, in essence, whether Articles 49 and 63 TFEU and Articles 17 and 47 of the Charter must be interpreted as meaning that the national legislation which provides that the usufructuary rights and rights of use in arable land are to be extinguished unless proof is adduced that those rights were created between close members of the same family.

32. All the parties which have submitted observations to the Court, apart from the Hungarian Government, consider that that question must be answered in the affirmative.

33. For the reasons set out below, I propose that the Court's answer to those questions should be that Article 63 TFEU, which guarantees the free movement of capital, precludes such legislation.

A. The admissibility of the requests for a preliminary ruling

34. The Hungarian Government has expressed some doubt as to the admissibility of the requests for a preliminary ruling.

35. In the first place, it points out that the usufructuary rights at issue in the main proceedings were created before the entry into force of the 2003 Accession Treaty and that their creation was, moreover, contrary to the national legislation then applicable. Accordingly, it is not possible to assess, by reference to EU law, the cancellation by the national legislature of those rights, which were unlawfully created before that Treaty entered into force.

36. I recall that, as regards the application of EU law in a new Member State, the Court has jurisdiction to interpret EU law from the date of that State's accession to the European Union. [6]

37. In the main proceedings, it is common ground that the usufructuary rights at issue were deleted from the property register by administrative decisions adopted after 1 May 2004, [7] the date on which the 2003 Treaty of Access entered into force, [8] and their removal was based on legislative provisions adopted after that Treaty had entered into force. [9]

38. To my mind, therefore, it cannot be disputed that the Court has jurisdiction to interpret EU law as regards both the removal decisions and the legislative provisions at issue in the main proceedings, even on the assumption that those rights were created before 1 May 2004.

39. I shall examine below the Hungarian Government's argument that the usufructuary rights were unlawful *ab initio*. [10]

40. In the second place, the Hungarian Government claims that the questions for a preliminary ruling wrongly refer to Article 108(1) of the Law of 2013 on transitional measures. In the Government's submission, the usufructuary rights at issue came to an end on 1 May 2014 pursuant to the abovementioned provision, with the consequence that only the application of Article 94 of the Law on the property register is at issue in the main proceedings.

41. In that regard, it should be borne in mind that, according to settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation or the validity of a rule of EU law, the Court is in principle bound to give a ruling. [11]

6 See, to that effect, judgments of 15 June 1999, *Andersson and Wåkerås-Andersson* (C-321/97, EU:C:1999:307, paragraph 31), and of 10 January 2006, *Ynos* (C-302/04, EU:C:2006:9, paragraph 36).

7 See points 18 and 24 of this Opinion.

8 See point 6 of this Opinion.

9 See points 9 to 15 of this Opinion.

10 See points 90 to 99 of this Opinion.

11 See, in particular, judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 24 and the case-law cited).

42. Accordingly, questions concerning EU law enjoy a presumption of relevance. The Court may refuse to give a ruling on a question referred by a national court only where it is quite obvious that the interpretation, or the determination of validity, of a rule of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [12]

43. The questions submitted in the present cases do not fall within any of the situations identified in that case-law. In fact, it is indisputable that Article 108(1) of the Law of 2013 on transitional measures is of decisive importance in the main proceedings, since it provides that the usufructuary rights established between persons who are not close members of the same family are to be extinguished.

44. In the third place, the Hungarian Government asserts that the referring court has called in question judgment No 25 of 21 July 2015 of the Alkotmánybíróság (Constitutional Court) although its judgments are binding on the referring court.

45. I recall that, as the Court has repeatedly held, national courts have the widest discretion in referring questions to the Court involving interpretation of relevant provisions of EU law, that discretion being replaced by an obligation for courts of final instance, subject to certain exceptions recognised by the Court's case-law. A rule of national law cannot prevent a national court, where appropriate, from using that discretion or complying with that obligation. Both that discretion and that obligation are an inherent part of the system of cooperation between the national courts and the Court of Justice established by Article 267 TFEU and of the functions of the court responsible for the application of EU law entrusted by that provision to the national courts. [13]

46. Accordingly, the rule of national law on which the Hungarian Government relies cannot stand in the way of the referring court's discretion to request the Court to give a preliminary ruling on a question relating to the interpretation of EU law, like those forming the subject matter of the present cases.

47. I infer from the foregoing that the requests for a preliminary ruling are admissible.

B. The applicable freedom of movement

48. Having regard to the observations submitted to the Court, it is necessary to determine whether the national measures at issue in the main proceedings fall within the provisions of the FEU Treaty on the free movement of capital or the provisions on freedom of establishment. The purpose of those national measures is to regulate the creation and maintenance of usufructuary rights and rights of use in agricultural land.

49. I consider that those measures come not within the freedom of establishment enshrined in Article 49 TFEU but within the free movement of capital guaranteed by Article 63 TFEU, for the following reasons.

12 See, in particular, judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 25 and the case-law cited).

13 Judgment of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199, paragraphs 32 and 33 and the case-law cited).

50. To my knowledge, the Court has always held, with one remote exception,[14] that national measures regulating investments in immovable property come within the free movement of capital.[15]

51. According to that case-law, the right to acquire, use or dispose of immovable property on the territory of another Member State generates capital movements when it is exercised.[16]

52. Moreover, capital movements include investments in immovable property on the territory of a Member State by non-residents — as is also 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 (that article was repealed by the Treaty of Amsterdam);[17] that nomenclature still has the same indicative value for the purposes of defining the notion of capital movements enshrined in Article 63 TFEU.[18]

53. In that regard, it is expressly stated in the explanatory notes in Annex I to Directive 88/361 that the category 'investments in real estate' 'also includes *usufructuary rights*, easements and building rights' (emphasis added).

54. Furthermore, to my mind that case-law does not distinguish according to whether the land forming the subject matter of the investments concerned is intended to be used for private or business purposes. In particular, the Court has expressly referred to capital movements generated by the *right to use* real property assets in another Member State, which in my view includes the possibility of using them in connection with an activity which, moreover, is covered by freedom of establishment.[19]

55. In other words, the national measures affecting the investments in real property come within the free movement of capital even where those investments are intended to permit the exercise of the right of establishment in the Member State concerned, whether as a natural person[20] or via a company formed in that Member State.[21]

56. I find confirmation of that interpretation in the explanatory notes set out in Annex I to Directive 88/361, which state that the concept of investments in real estate covers 'purchases of buildings and land and the construction of buildings by private persons *for gain or personal use*' (emphasis added).

14 See judgment of 6 November 1984, *Fearon* (182/83, EU:C:1984:335, paragraph 9). That judgment concerned an Irish company, formed by nationals of other Member States, which was subject to a compulsory acquisition measure on the ground that they had failed to comply with the condition that they reside on the agricultural land. I consider, however, that the solution adopted in that respect in that judgment has been overturned in the more recent case-law of the Court.

15 See, to that effect, judgments of 5 March 2002, *Reisch and Others* (C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99, EU:C:2002:135, paragraphs 28 to 31); of 23 September 2003, *Ospelt and Schlössle Weissenberg* (C-452/01, EU:C:2003:493, paragraph 24); of 25 January 2007, *Festersen* (C-370/05, EU:C:2007:59, paragraphs 22 to 24); and of 1 October 2009, *Woningstichting Sint Servatius* (C-567/07, EU:C:2009:593, paragraph 20).

16 Judgments of 5 March 2002, *Reisch and Others* (C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99, EU:C:2002:135, paragraph 29); of 25 January 2007, *Festersen* (C-370/05, EU:C:2007:59, paragraph 22); and of 1 October 2009, *Woningstichting Sint Servatius* (C-567/07, EU:C:2009:593, paragraph 20).

17 OJ 1988 L 178, p. 5.

18 Judgments of 5 March 2002, *Reisch and Others* (C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99, EU:C:2002:135, paragraph 30); of 25 January 2007, *Festersen* (C-370/05, EU:C:2007:59, paragraph 23); and of 1 October 2009, *Woningstichting Sint Servatius* (C-567/07, EU:C:2009:593, paragraph 20).

19 See point 52 of this Opinion.

20 The judgment of 5 March 2002, *Reisch and Others* (C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99, EU:C:2002:135), concerned rules which permitted the acquisition of land where the purchaser undertook to establish his principal residence or a commercial activity on that land (see paragraph 6 of that judgment). The judgment of 25 January 2007, *Festersen* (C-370/05, EU:C:2007:59), concerned, in particular, the cancellation of the acquisition of an agricultural property by a natural person on the ground that he had not taken up fixed residence on that property.

21 The judgment of 1 October 2009, *Woningstichting Sint Servatius* (C-567/07, EU:C:2009:593), concerned the refusal to authorise investments in immovable property in Belgium envisaged by a foundation established in the Netherlands which wished to use the property in question through Belgian commercial companies (see paragraphs 12 to 14 and 23 and 24 of that judgment).

57. Accordingly, the possible use of the agricultural land at issue in the main proceedings, whether by SEGRO or by Mr Horváth, is not such as to bring the national measures at issue within the scope of freedom of establishment.

58. That interpretation is also supported by the terms of Annex X to the 2003 Act of Accession, which lays down certain transitional measures related to the accession of Hungary to the Union, in application of Article 24 of that act.

59. It should be made clear that those transitional measures, which are not the subject matter of the questions submitted by the referring court, are not applicable in the circumstances of the main proceedings, as the Commission has maintained, since the administrative decisions at issue in the main proceedings were adopted after 30 April 2014, the date of expiry of the transitional period provided for, after an extension, for the acquisition of agricultural land in Hungary referred to in Annex X, Chapter 3, point 2, of the 2003 Act of Accession. [22]

60. Nonetheless, the wording of those measures sheds useful light on the scope of the free movement of capital. In fact, Chapter 3, point 2, of that annex allowed Hungary to maintain in force, on certain conditions and for a transitional period of seven years from the date of accession (extended until 30 April 2014 [23] by the Commission), the prohibitions concerning the acquisition of agricultural land by natural persons who are not resident in Hungary or who do not have Hungarian nationality, and by legal persons.

61. Chapter 3 is entitled 'Free movement of capital'. Thus, the authors of the 2003 Act of Accession expressly considered that the acquisition of agricultural land by natural or legal persons comes under the free movement of capital.

62. It follows from the foregoing that the scope of the national measures at issue in the main proceedings should be examined by reference to the free movement of capital guaranteed in Article 63 TFEU.

63. I would nonetheless observe, as a subsidiary point, that the reasoning set out below may be transposed to freedom of establishment, as regards both the existence of a restriction and the lack of justification for such a restriction.

C. The existence of a restriction of the free movement of capital

64. It now falls to be determined whether the national measures at issue in the main proceedings entail a restriction of the free movement of capital.

65. As a preliminary point, the Hungarian Government has asserted that Article 345 TFEU confers a wide freedom on Member States as regards the terms and the conditions of the acquisition of certain rights relating to ownership, such as a usufructuary right, subject only to the acquisition of such rights not being rendered impossible and to the absence of discrimination.

22 See points 8, 18 and 24 of this Opinion.

23 See point 8 of this Opinion.

66. I recall that while Article 345 TFEU expresses the principle of the neutrality of the Treaties as regards the rules on ownership in the Member States, that neutrality does not however mean that the national measures governing the acquisition of agricultural land are not subject to the fundamental rules of EU law, in particular the rules on non-discrimination, freedom of establishment and free movement of capital. [24]

67. Accordingly, the fact that the measures at issue in the main proceedings may come within Article 345 TFEU cannot preclude the applicability of the FEU Treaty rules on the free movement of capital.

68. Article 63 TFEU provides that all restrictions on the movement of capital between Member States are to be prohibited. That prohibition applies, in particular, to any national measure that discriminates according to the source of the capital. [25]

69. I would emphasise that a finding of discrimination, which represents a more serious breach of the obligations arising under EU law than that resulting from a mere non-discriminatory breach, may have certain implications at the justification stage. [26]

70. To my mind, the national measures at issue in the main proceedings establish indirect discrimination according to the source of the capital, as the Austrian and Portuguese Governments and the Commission have correctly maintained.

71. I recall, in that regard, that the existence of indirect discrimination must be found where even though a condition imposed by national legislation does not establish a formal distinction by reference to origin, it is more easily satisfied by nationals of the Member State concerned than by those of other Member States. [27]

72. Admittedly, a national measure such as Article 108(1) of the Law of 2013 on transitional measures, which provides that usufructuary rights and rights of use are to be extinguished by operation of law unless proof is adduced that the contract establishing such a right was concluded between close members of the same family, does not overtly distinguish according to the source of the capital.

73. However, such legislation establishes covert discrimination by reference to the source of the capital, insofar as the likelihood of being a close member of the family of a person who has granted such a right in Hungarian land will be greater in the case of a Hungarian national than in the case of a national of another Member State. In other words, the condition imposed by Article 108(1) of the Law of 2013 on transitional measures will be more readily satisfied, within the meaning of the case-law cited above, by the group of Hungarian nationals than by the group of nationals of the other Member States.

24 See, to that effect, judgments of 6 November 1984, *Fearon* (182/83, EU:C:1984:335, paragraph 7); of 15 May 2003, *Salzmann* (C-300/01, EU:C:2003:283, paragraph 39); of 23 September 2003, *Ospelt and Schlössle Weissenberg* (C-452/01, EU:C:2003:493, paragraph 24); and of 22 October 2013, *Essent and Others* (C-105/12 to C-107/12, EU:C:2013:677, paragraphs 29 and 36).

25 See, to that effect, judgments of 14 October 1999, *Sandoz* (C-439/97, EU:C:1999:499, paragraph 31); of 4 March 2004, *Commission* v *France* (C-334/02, EU:C:2004:129, paragraphs 24 and 25); and of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraphs 64 and 65).

26 See points 115 to 118 of this Opinion.

27 See in particular, to that effect, as regards residence conditions, judgments of 27 November 1997, *Meints* (C-57/96, EU:C:1997:564, paragraphs 45 and 46); of 24 September 1998, *Commission* v *France* (C-35/97, EU:C:1998:431, paragraph 39); of 11 September 2008, *Petersen* (C-228/07, EU:C:2008:494, paragraphs 54 and 55); and of 5 May 2011, *Commission* v *Germany* (C-206/10, EU:C:2011:283, paragraphs 37 and 38). Such an effect has been recognised with respect to other criteria, notably in the judgment of 12 July 1979, *Palermo Toia* (237/78, EU:C:1979:197, paragraphs 12 to 14), which concerned a national provision under which an allowance for mothers with children depended on the nationality of the children of the recipient mother; in the judgments of 12 September 1996, *Commission* v *Belgium* (C-278/94, EU:C:1996:321, paragraphs 28 to 30), and of 25 October 2012, *Prete* (C-367/11, EU:C:2012:668, paragraphs 29 to 31), which concerned requirements that the persons concerned had studied in the Member State concerned; or in the judgment of 25 October 2007, *Geurts and Vogten* (C-464/05, EU:C:2007:631, paragraphs 21 and 22), which concerned a condition relating to the employment of a certain number of workers in the Member State concerned.

74. That discriminatory effect is reinforced, moreover, by the restrictions on the acquisition of agricultural land that existed before the entry into force of the national measures at issue in the present cases. It is apparent from the explanations provided by the referring court that, in its initial version, the Law of 1994 on arable land had excluded the possibility of foreign persons acquiring the ownership of arable land, although those persons remained free to acquire a usufructuary right or a right of use in such land. In addition, and still according to the referring court, the acquisition by foreign persons of the right of ownership in arable land was, before the entry into force of the Law of 1994 on arable land, subject to authorisation by the Ministry of Finance.

75. Those restrictions reinforced the discriminatory effect of Article 108(1) of the Law of 2013 on transitional measures in two ways.

76. First, those restrictions increase the likelihood that the current owners of agricultural land in Hungary will be of Hungarian nationality. The likelihood of being a close member of the family of a Hungarian landowner is greater in the case of a Hungarian national than in the case of a national of another Member State. Therefore, those restrictions, taken into conjunction with the requirement of being a close family member, operate to the disadvantage of the nationals of the other Member States.

77. Second, those restrictions encouraged nationals of other Member States who wished to invest in agricultural land in Hungary to acquire usufructuary rights or rights of use in such land. Consequently, the extinction of those rights, prescribed in Article 108(1) of the Law of 2013 on transitional measures, is likely to affect a proportionally greater number of nationals of other Member States than of Hungarian nationals.

78. In that regard, the Hungarian Government has claimed that, out of more than 100 000 persons affected by the cancellation of the usufructuary rights and rights of use prescribed in Article 108(1) of the Law of 2013 on transitional measures, the number of foreign nationals, including those of third countries, is only 5 058.

79. That argument, which concentrates solely on the composition of the group of persons affected by that measure, is not relevant for the purposes of assessing the existence of indirect discrimination based on the source of the capital. In fact, the existence of such discrimination must be established on the basis of a comparison of:

– the proportion of Hungarian nationals affected, and

– the proportion of nationals of the other Member States affected.

80. Thus, the existence of indirect discrimination based on the source of the capital must found if it is likely that the proportion — and not the absolute number[28] — of persons affected by the measure at issue is greater among the nationals of other Member States than among Hungarian nationals. On the basis of the arguments set out in points 70 to 77 of this Opinion, I consider that that is indeed the case in the circumstances of the main proceedings.

81. When questioned on this point at the hearing, the Hungarian Government produced no statistics or other material capable of calling that finding in question.

28 In other words, the Hungarian Government's argument must be rejected in that it is based on *absolute* values (referring solely to the composition of the group of affected persons), whereas the existence of indirect discrimination must be based on *relative* values (comparing the proportion of persons affected both among nationals of other Member States and among Hungarian nationals).

82. The Hungarian Government further relied on the possibility, in the event of the extinction of usufructuary rights or rights of usage, that the holder of those rights could demand financial compensation from the other party to the contract. It explained that, in application of the relevant provisions of the Hungarian civil code, that compensation would, in principle, represent the amount of the undue enrichment obtained by the landowner. According to the Hungarian Government, the possibility of such financial compensation was confirmed by judgment No 25 of 21 July 2015 of the Alkotmánybíróság (Constitutional Court).

83. I would point out, in that regard, that the questions submitted by the referring court in Case C-113/16 preclude the possibility of such financial compensation, unlike the questions submitted in Case C-52/16.

84. That said, any possibility that the holder of such rights could demand financial compensation cannot, in accordance with the Commission's submissions, remove the indirect discrimination the existence of which was found above.

85. In fact, notwithstanding that possibility, the national measures at issue in the main proceedings provide for the extinction of usufructuary rights and rights of use created by private persons, and do so against their will. There may be numerous reasons why private contracting parties do not wish such rights to be extinguished, such as the right-holder's intention to retain the enjoyment of the land for reasons specific to him, the prospect of future income for both parties or the fact that the landowner will be unable to pay financial compensation if the rights are extinguished. In other words, the extinction of such rights is likely to entail, for the private contracting parties who established them, inconveniences which the prospect of a possible financial settlement cannot entirely remove.

86. Therefore, insofar as the extinction of those rights, against the will of the private contracting parties who established them, will affect a greater proportion of nationals of other Member States, it must be inferred that that extinction is discriminatory, notwithstanding the possibility that the holder of such rights may demand financial compensation from the other party to the contract.

87. It follows from the foregoing that the national measures at issue in the main proceedings, which provide for the extinction by operation of law of usufructuary rights and rights of use unless proof is adduced that the contract establishing such a right was concluded between close members of the same family, entail a discriminatory restriction of the free movement of capital guaranteed by Article 63 TFEU.

D. The possibility of justifying the restriction of the free movement of capital

88. In essence, the Hungarian Government has put forward three grounds of justification, based, respectively, on breach of the national legislation on exchange control, the prevention of abusive practices and a public-interest objective linked with the use of agricultural land.

89. For the reasons set out below, I consider that none of those grounds is capable of justifying the national legislation at issue in the present cases.

1. Justification based on breach of the national legislation on exchange control

90. Pursuant to Article 65(1)(b) TFEU, Article 63 TFEU is to be without prejudice to the right of Member States to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions.

91. The Hungarian Government has asserted that, notwithstanding that the rights in question were entered in the property register, the acquisition of the usufructuary rights to which the measures at issue in the main proceedings related was unlawful '*ab initio*'. Before 1 January 2002, the acquisition by non-residents of usufructuary rights and rights of use in arable land was subject, under the national legislation on exchange control, to the grant of authorisation issued by the National Bank of Hungary. The National Bank of Hungary indicated that no exchange authorisation had been sought for the purpose of acquiring such rights. Accordingly, the Hungarian State adopted Article 108(1) of the Law of 2013 on transitional measures in order to remedy that irregularity affecting all usufructuary rights or rights of use acquired by non-residents.

92. The Court has consistently held that a penalty affecting the exercise of the freedoms of movement guaranteed by the FEU Treaty must comply with the principle of proportionality. [29]

93. In the present case, I consider that the extinction of the usufructuary rights and rights of use prescribed in the national measures at issue in the main proceedings is disproportionate by reference to the objective of penalising infringements of the national legislation on exchange control.

94. First, the prescribed penalty does not seem to me to be capable of attaining the objective ascribed to it, namely the regularisation of transactions carried out in breach of the rules on exchange control. That penalty — extinction — affects every right which has not been created between close members of the same family, a criterion which does not have the slightest connection with any breach of the rules on exchange control.

95. Second, that penalty seems to me to be disproportionate in terms of its scope. To my mind, an infringement of legislation establishing an administrative control in matters relating to the purchase and sale of foreign currencies cannot be penalised by the extinction of rights established by agreements between private persons, the validity of which, moreover, by reference to the substantive rules is not disputed. It seems to me, in that regard, more appropriate to link the breach of such an administrative control with administrative penalties, and in particular financial penalties.

96. Third, to my mind that penalty also seems disproportionate in the light of its general scope, in that it does not allow those whose rights are extinguished to prove that they observed the national legislation on exchange control.

97. Fourth, I am of the view that that penalty is disproportionate in the light of the requirements of legitimate expectations and legal certainty. In fact, it strikes me as contrary to those requirements that the rights at issue should be extinguished more than 12 years after they were created and after the alleged breach of the national legislation on exchange control took place. [30]

29 As regards the free movement of capital, see, to that effect, judgment of 1 December 2005, *Burtscher* (C-213/04, EU:C:2005:731, paragraph 54 et seq.). As regards freedom of movement for workers, see, to that effect, judgments of 12 December 1989, *Messner* (C-265/88, EU:C:1989:632, paragraph 14), and of 30 April 1998, *Commission* v *Germany* (C-24/97, EU:C:1998:184, paragraph 14). As regards the free movement of goods, see, to that effect, judgment of 2 October 2003, *Grilli* (C-12/02, EU:C:2003:538, paragraph 49). As regards freedom to provide services, see, to that effect, judgment of 12 September 2013, *Konstantinides* (C-475/11, EU:C:2013:542, paragraphs 52 and 57). As regards freedom of establishment, see, to that effect, judgments of 29 February 1996, *Skanavi and Chryssanthakopoulos* (C-193/94, EU:C:1996:70, paragraph 36 and the case-law cited), and of 6 November 2003, *Gambelli and Others* (C-243/01, EU:C:2003:597, paragraph 72).

30 It is apparent from the Hungarian Government's observations that the grant of authorisation issued by the National Bank of Hungary was required until 1 January 2002. In fact, Article 108(1) of the Law of 2013 on transitional measures provides that the usufructuary rights or rights of usage at issue were to be extinguished by operation of law on 1 May 2014.

98. I find confirmation of that reasoning in the judgment in *Burtscher*,[31] which concerned a situation comparable to that in the present case, namely the retroactive annulment of a property transaction because of an infringement of an administrative rule imposing an obligation to make a prior declaration. The Court held that a penalty of invalidity of the property transaction, imposed on the ground that the declaration was submitted late, was disproportionate, for reasons analogous in part to those set out above:

– the scope of the penalty was disproportionate, since the penalty was imposed automatically, irrespective of the reasons for the late submission of the declaration (paragraph 55 of the judgment);

– its degree was also disproportionate, in that, for no reason deriving from the applicable substantive rules, it radically called into question an agreement expressing the intentions of the parties, although other penalties, such as a fine, could effectively penalise the late submission of the declaration at issue (paragraphs 56 to 60 of the judgment); and

– the penalty did not observe the requirements of legal certainty, which are particularly important in relation to property acquisitions (paragraph 56 of the judgment).

99. I infer from the foregoing that the extinction of the usufructuary rights and the rights of use at issue in the main proceedings cannot be justified by the possibility that there was an infringement of the national legislation on exchange control.

2. Justification based on the prevention of abusive practices

100. The Hungarian Government has also claimed that the extinction of the usufructuary rights and rights of use prescribed in the national measures at issue was justified by the desire to combat abusive practices. According to that argument, the contracts at issue in the main proceedings served to circumvent the prohibition of the acquisition of the ownership of arable land imposed on foreign natural persons and on legal persons. The Hungarian Government states, in that regard, that maintaining a right of ownership that is emptied of its substance by the grant of a usufructuary right does not correspond to any economic rationality.

101. In that regard, it is settled case-law that the prevention of abusive practices represents a legitimate reason that may justify a restriction of the freedoms of movement guaranteed by the FEU Treaty. According to that case-law, which was developed mainly in the field of taxation, a national measure restricting the freedoms of movement may be justified where it specifically targets wholly artificial arrangements designed to circumvent the legislation of the Member State concerned.[32]

31 Judgment of 1 December 2005 (C-213/04, EU:C:2005:731). According to the Austrian legislation at issue in that case, a purchaser of land was required to declare within a specific period that the land in question was built on, that the acquisition was not for holiday purposes and that he was, or should be treated as, an Austrian national (paragraphs 6 and 25).

32 See in particular, to that effect, judgments of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 51); of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraph 72); and of 1 April 2014, *Felixstowe Dock and Railway Company and Others* (C-80/12, EU:C:2014:200, paragraph 31).

102. However, since that objective covers only the prevention of purely artificial arrangements, it cannot be relied on in order to justify a national measure based on a general presumption of abusive practices. [33] In order to comply with the principle of proportionality, a measure pursuing that objective must enable the national court to carry out a case-by-case examination, taking into account the particular features of each case, based on objective elements, in order to assess the abusive conduct of the persons concerned. [34]

103. In the context of the main proceedings, the extinction of the usufructuary rights and rights of use in the agricultural land is not appropriate for preventing abusive practices. In effect, it cannot be precluded that an abusive practice, consisting in circumventing the prohibition of the sale of agricultural land to foreign nationals, may have been devised between close members of the same family.

104. In addition, those measures go beyond what is necessary in order to achieve that objective, in that they are based on a presumption of abusive practice covering all rights not created between close members of the same family, independently of the proven existence of a purely artificial arrangement.

105. It follows from the foregoing that those measures cannot be justified by the objective of preventing abusive practices.

3. The existence of justification based on an objective of public interest linked to the use of the agricultural land

106. In order to justify the extinction of the usufructuary rights and rights of use in agricultural land, with the exception of those created between close members of the same family, the Hungarian Government has further claimed that the legislation at issue in the main proceedings pursued an objective of public interest, namely the interest in ensuring that arable land is the property of the natural persons who work it. It is because of that objective, in particular, that the acquisition of the ownership of agricultural land for the purposes of investment or property speculation, that is to say, in order to make a profit from the increase in land values, was prohibited.

107. According to the Hungarian Government, that legislation is also intended to enable arable land to be used by new undertakings, to facilitate the creation of properties sufficiently large to permit viable and competitive agricultural production and to avoid the break-up of agricultural holdings.

108. As the Hungarian Government has correctly maintained, such objectives have already been recognised by the Court as being in the public interest, and in particular the objectives of ensuring that the land belongs to those who work it, preventing land speculation, ensuring a distribution of land ownership which allows the development of viable farms or encouraging a reasonable use of the available land by resisting pressure on land. [35]

33 See in particular, to that effect, judgments of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 50); of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraphs 73 and 79); and of 19 November 2009, *Commission* v *Italy* (C-540/07, EU:C:2009:717, paragraph 58).

34 Judgment of 17 September 2009, *Glaxo Wellcome* (C-182/08, EU:C:2009:559, paragraph 99).

35 See, to that effect, judgments of 6 November 1984, *Fearon* (182/83, EU:C:1984:335, paragraphs 3 and 10); of 23 September 2003, *Ospelt and Schlössle Weissenberg* (C-452/01, EU:C:2003:493, paragraphs 38 to 40); and of 25 January 2007, *Festersen* (C-370/05, EU:C:2007:59, paragraphs 27 and 28).

109. However, and according to settled case-law, a measure restricting the freedoms of movement can be permitted only on condition that it pursues an objective in the public interest, is applied in a non-discriminatory manner and complies with the principle of proportionality, that is to say, that it is appropriate for securing the attainment of the objective pursued and does not go beyond what is necessary in order to attain it. [36]

110. In the light of that case-law, I consider that the fact that they pursue the public-interest objective on which the Hungarian Government relies cannot justify the measures at issue in the main proceedings, for at least two reasons, and possibly for a third.

111. In the first place, those measures, which permit only the usufructuary rights and rights of use established between close members of the same family to be maintained, are not appropriate for pursuing the objectives put forward by the Hungarian Government.

112. In fact, and as the Austrian and Portuguese Governments and the Commission have correctly explained, there is nothing to preclude close members of the owner's family having acquired such rights in agricultural land for purposes linked with property speculation. Conversely, it is equally conceivable that persons who are not close members of the owner's family have acquired such rights in order to carry on an agricultural activity.

113. In other words, the criterion chosen by the Hungarian Government, namely the fact of being a close family relative of the owner, is not appropriate for pursuing the alleged objectives.

114. Nor, in the second place, are the measures at issue in the main proceedings necessary in order to pursue the objectives alleged by the Hungarian Government. Other criteria would permit those objectives to be pursued, while being more respectful of the freedoms of movement. That would be the case of a requirement that the agricultural land would actually be worked either by the holders of the usufructuary rights or the rights of use established in the land, if they are natural persons, or by their shareholders if they are legal persons.

115. In the third place, the measures at issue in the main proceedings are discriminatory in nature, as I stated in points 70 to 86 of this Opinion.

116. That discriminatory nature would suffice, in application of the case-law cited in point 109 of this Opinion, to preclude the justification based on the public-interest objective linked with the use of the agricultural land alleged by the Hungarian Government.

117. I must point out, however, in that regard, that there is a certain inconsistency in the Court's case-law. In fact, the Court has already agreed to examine whether a public-interest objective was capable of justifying measures which it had previously held to be discriminatory. [37]

118. Although I believe that it would be desirable, for reasons of legal certainty, for the Court to clarify its case-law in that regard, it follows in any event from the foregoing that the national measures at issue in the main proceedings cannot be justified by the public-interest objective linked to the use of the agricultural land alleged by the Hungarian Government.

36 Judgments of 5 March 2002, *Reisch and Others* (C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99, EU:C:2002:135, paragraph 33); of 23 September 2003, *Ospelt and Schlössle Weissenberg* (C-452/01, EU:C:2003:493, paragraph 34 and the case-law cited); of 1 December 2005, *Burtscher* (C-213/04, EU:C:2005:731, paragraph 44 and the case-law cited); and of 25 January 2007, *Festersen* (C-370/05, EU:C:2007:59, paragraph 26).

37 See in particular judgment of 25 October 2007, *Geurts and Vogten* (C-464/05, EU:C:2007:631, paragraphs 22 to 24).

E. Articles 17 and 47 of the Charter

119. The referring court has also asked the Court about the compatibility of the national measures at issue in the main proceedings with Articles 17 and 47 of the Charter.

120. In my view there is no need to answer that aspect of the questions referred, since the measures in question are contrary to EU law and entail an unjustified restriction on the free movement of capital, independently of the abovementioned provisions of the Charter.

121. Furthermore, I consider that, in the context of the present cases, the alleged infringement of Articles 17 and 47 of the Charter cannot be examined independently of the question of the infringement of the freedoms of movement.

122. In fact, that aspect of the questions referred raises the delicate issue of the applicability of the Charter for the purposes of assessing national measures such as those at issue in the main proceedings, which do not implement provisions of EU secondary law, but create an unjustified obstacle to the freedoms of movement guaranteed by the FEU Treaty.

123. It should be borne in mind that the Charter's field of application so far as concerns action by the Member States is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing EU law. [38]

124. In that regard, the Court has held that, having regard to the explanations relating to Article 51 of the Charter, which must be given due regard pursuant to Article 52(7) thereof, the concept of implementation provided for in Article 51 confirms the Court's case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union. [39]

125. In the judgment in *Åkerberg Fransson*, [40] the Court held that the fundamental rights guaranteed by the Charter must be observed where national legislation falls within the scope of EU law. It will be recalled that that case concerned not an infringement of the freedoms of movement, but national legislation implementing EU legislation on VAT and Article 325 TFEU. [41]

126. As regards the freedoms of movement, the Court stated in the judgment in *Pfleger and Others* [42] that the use by a Member State of exceptions provided for in EU law in order to justify an obstruction of a fundamental freedom guaranteed by the Treaty must be regarded as implementing EU law within the meaning of Article 51(1) of the Charter.

127. In that regard, and in order to be even more specific, it is settled case-law that, where national legislation is examined by the Court in the light of the freedoms of movement, the fundamental rights protection of which is guaranteed by EU law may be relied on in two situations, which both concern the existence of justification. [43]

38 See, in particular, judgments of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 17), and of 6 October 2016, *Paoletti and Others* (C-218/15, EU:C:2016:748, paragraph 13).

39 See, to that effect, judgments of 30 April 2014, *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraph 32), and of 10 July 2014, *Julián Hernández and Others* (C-198/13, EU:C:2014:2055, paragraph 33 and the case-law cited).

40 Judgment of 26 February 2013 (C-617/10, EU:C:2013:105, paragraph 21).

41 Judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 27).

42 Judgment of 30 April 2014 (C-390/12, EU:C:2014:281, paragraph 36).

43 These two situations are examined together under the title 'The derogation situation' in Lenaerts, K., 'Exploring the limits of the EU Charter of Fundamental Rights', *European Constitutional Law Review*, 2012, pp. 383 to 386.

128. The first situation is where a Member State relies on a ground of justification directly derived from the protection of a fundamental right. This is the '*Schmidberger*'[44] situation, where the fundamental rights are called on to serve as a shield in order to defend the legislation concerned.

129. The second situation concerns the rejection of a ground of justification on which a Member State relies owing to a breach of a fundamental right. This is the '*ERT*'[45] situation, where the fundamental rights cause the loss of a shield raised in order to defend the legislation concerned.

130. On the other hand, to my knowledge the Court has never considered that the alleged breach of a fundamental right could be examined *independently* of the breach of the freedoms of movement. In other words, where the only connection with EU law lies in the existence of a restriction of free movement, the protection of fundamental rights may either serve as justification (the '*Schmidberger*' situation) or lead to the loss of justification (the '*ERT*' situation), but it can never represent an independent ground of incompatibility with EU law.

131. The present cases fall precisely within the last-mentioned situation. The only connection with EU law lies in the existence of a restriction of the free movement of capital.[46] The Hungarian Government has not relied on Articles 17 and 47 of the Charter in order to justify the national measures at issue (the '*Schmidberger*' situation) and the interpretation of those articles is not necessary in order to reject the grounds of justification put forward by that government (the '*ERT*' situation).[47] In reality, the referring court is seeking to ascertain whether those measures infringe Articles 17 and 47 of the Charter *independently* of the breach of the free movement of capital.[48]

132. In those circumstances, and in the light of the case-law cited above, I am inclined to consider that that alleged infringement of Articles 17 and 47 of the Charter cannot be examined by the Court.

133. I must emphasise the scope of that position, consisting in excluding the applicability of the Charter in the specific circumstances of the present case. That position clearly does not concern the acts of the EU institutions (the '*Kadi*'[49] situation), or the acts of the Member States implementing EU legislation (the '*Åkerberg Fransson*'[50] situation).

44 Judgment of 12 June 2003 (C-112/00, EU:C:2003:333). In that case, the Austrian Government, in order to justify a restriction of the free movement of goods resulting from a demonstration which had entailed the closure of a major transit route, had relied on the protection of the demonstrators' rights to freedom of expression and freedom of assembly (see paragraphs 17 and 69 et seq. of that judgment). See also judgment of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union*, knowns as '*Viking*' (C-438/05, EU:C:2007:772, paragraphs 45 and 46).

45 Judgment of 18 June 1991 (C-260/89, EU:C:1991:254). That case concerned, in particular, the potentially discriminatory nature of the concentration in ERT of the exclusive right to broadcast its own programmes and the exclusive right to receive and retransmit programmes from other Member States (see paragraphs 21 to 23 of that judgment). The Court held that Member States can rely on derogations provided for in the Treaty on grounds of public policy, public security and public health only insofar as the national rules at issue are compatible with the fundamental rights the observance of which is ensured by the Court, in particular freedom of expression (see paragraphs 43 to 45 of that judgment). See also judgments of 26 June 1997, *Familiapress* (C-368/95, EU:C:1997:325, paragraphs 24 to 27), and of 30 April 2014, *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraphs 35 and 36).

46 I would point out, in that regard, that it does not seem possible to me to consider that the national measures at issue in the present case 'implement' Directive 88/361, for the following two reasons: (i) that directive, the purpose of which was to implement Article 67 EC, became a dead letter following the repeal of that article by the Treaty of Amsterdam, notwithstanding the illustrative value recognised by the Court to Annex I: see point 52 of this Opinion; and (ii) the obligation infringed by the national measures at issue is laid down in Article 63 TFEU, while Annex I merely establishes a non-exhaustive list of movements of capital.

47 See points 88 to 118 of this Opinion.

48 See point 21 of this Opinion.

49 Judgments of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraphs 281 to 327), and of 18 July 2013, *Commission and Others* v *Kadi* (C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraphs 65 to 69).

50 Judgment of 26 February 2013 (C-617/10, EU:C:2013:105).

134. Nor does it cover national measures which are justified having regard to the freedoms of movement but which breach a fundamental right guaranteed by the Charter (the '*ERT*'[51] situation). In the latter situation, the fundamental rights are applied not independently, but in the context of the justification of a restriction of the freedoms of movement.

135. In reality, the position which I am defending, and which consists in excluding the possibility of examining an alleged infringement of the Charter *independently* of the question of the breach of the freedoms of movement, covers the following two situations: (i) the Charter cannot be applied autonomously where the national measures entail a restriction which is not in any event justified in the light of the freedoms of movement (the situation of the present cases); and (ii) the Charter cannot be applied autonomously when such measures do not entail any restriction of the freedoms of movement (the '*Keck and Mithouard*'[52] situation).

136. In the first situation, which covers the present cases, it is clear that the exclusion of the possibility of applying the Charter autonomously makes no difference in practice, since the national measures at issue are in any event contrary to EU law.

137. Consequently, the real practical impact of the legal position which I defend here is limited to national legislation of the '*Keck and Mithouard*' type. In that situation, to accept that an infringement of the Charter might be examined independently of the infringement of the freedoms of movement would mean that all national legislation, even legislation that does not restrict those freedoms, might be censured in the light of the Charter when it is challenged in a factual situation coming within the scope of those freedoms, that is to say, in any cross-border situation. To take an actual example, that would mean that legislation prohibiting night work in bakeries, which the Court has held did not restrict the free movement of goods,[53] might now be examined in the light of the provisions of the Charter (in particular Articles 15 and 16).

138. To my mind, such an interpretation is difficult to reconcile with Article 6(1) TEU and Article 51(2) of the Charter, which makes clear that the provisions of the Charter do not extend the powers of the Union as defined in the Treaties.

139. In my view, that interpretation must be rejected by excluding the possibility of examining the alleged infringement of the Charter independently of the question of the breach of the freedoms of movement. That was precisely the approach adopted in the judgment in *Pelckmans Turnhout*,[54] where the Court held that the Charter cannot be applied autonomously when the national legislation at issue does not restrict the freedoms of movement.

140. On the other hand, it seems to me that the judgment in *Pfleger and Others*,[55] which concerned national legislation entailing an unjustified restriction of the freedom to provide services, allows doubt to remain as to the possibility of applying the Charter autonomously.

51 Judgment of 18 June 1991 (C-260/89, EU:C:1991:254).

52 Judgment of 24 November 1993 (C-267/91 and C-268/91, EU:C:1993:905).

53 Judgment of 14 July 1981, *Oebel* (155/80, EU:C:1981:177).

54 See, to that effect, judgment of 8 May 2014 (C-483/12, EU:C:2014:304, paragraphs 24 to 26). That judgment concerned national legislation imposing a weekly closing day on traders. See also, to that effect, judgment of 4 October 1991, *Society for the Protection of Unborn Children Ireland*, known as '*Grogan*' (C-159/90, EU:C:1991:378, paragraphs 30 and 31).

55 Judgment of 30 April 2014 (C-390/12, EU:C:2014:281). The same approach was subsequently followed by the Court in the judgment of 11 June 2015, *Berlington Hungary and Others* (C-98/14, EU:C:2015:386, paragraphs 89 to 91).

141. In paragraphs 35 and 36 of that judgment, the Court correctly pointed out that the Charter can be relied on in the assessment of the grounds that are claimed to justify that restriction. However, in paragraphs 57 to 60 of that judgment, the Court agreed to examine the existence of an infringement of Articles 15 to 17 of the Charter *independently* of whether there had been a breach of the freedom to provide services (established in paragraphs 39 to 56 of that judgment).[56] To my mind, that approach allows doubt — which should be removed — to remain as to whether an alleged infringement of the Charter may be examined independently of the question of a breach of the freedoms of movement.

142. Having regard to the foregoing, I propose that the Court's answer to that aspect of the questions referred should be that when the Court examines national legislation by reference to the freedoms of movement, the alleged infringement of a fundamental right guaranteed by the Charter cannot be examined independently of the question of the breach of those freedoms.

VI. Conclusion

143. Having regard to the foregoing, I propose that the Court should answer the questions for a preliminary ruling referred by the Szombathelyi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Szombathely, Hungary) as follows:

Article 63 TFEU must be interpreted as precluding national legislation such as that at issue in the main proceedings, which prescribes that usufructuary rights and rights of use in arable land are to be extinguished unless proof is adduced that those rights were created between close members of the same family, notwithstanding the possibility that the holder of those rights will obtain financial compensation from the other party to the contract.

Article 51(1) and (2) of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that, when the Court of Justice examines national legislation by reference to the freedoms of movement, the alleged breach of a fundamental right guaranteed by the Charter cannot be examined independently of the question of the breach of those freedoms.

56 The Court merely observed, however, after completing its analysis, that an unjustified or disproportionate restriction of the freedom to provide services under Article 56 TFEU was also not permitted under Article 52(1) of the Charter in relation to Articles 15 to 17 of the Charter, so that a separate examination was not necessary. See judgment of 30 April 2014, *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraphs 59 and 60).