Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 29 November 2018 [1]

Case C-235/17

European Commission
v

Hungary

(Action for failure to fulfil obligations — Article 63 TFEU — Free movement of capital — Rights of usufruct over agricultural land — National legislation cancelling, without providing for compensation, the rights which had previously been created for the benefit of legal or natural persons who cannot demonstrate a close family tie with the owner of the land — Jurisdiction of the Court to declare, independently, an infringement of Article 17 of the Charter of Fundamental Rights of the European Union)

I. Introduction

1. By the present action for failure to fulfil obligations, the Commission seeks a declaration from the Court that Hungary — with regard, in particular, to the provisions that have been in force since 1 January 2013 of the termőföldről szóló 1994. évi LV. törvény (Law No LV of 1994 on productive land, 'the 1994 Law on productive land'), the relevant provisions of the 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'), as well as certain provisions of the 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 the [2013 Law on agricultural land], 'the 2013 Law on transitional measures') and, finally, Paragraph 94(5) of the ingatlan-nyilvántartásról szóló 1997. évi CXLI. törvény (Law No CXLI of 1997 on the land register, 'the Law on the land register'), by disproportionately restricting the rights of usufruct and rights of use over agricultural and forestry land [2] — has failed to fulfil its obligations with respect to the freedom of establishment (Article 49 TFEU), the free movement of capital (Article 63 TFEU) and the fundamental right to property (Article 17 of the Charter of Fundamental Rights of the European Union, 'the Charter').

2. The incompatibility of the legislation at issue with the free movement of capital guaranteed in Article 63 TFEU has already given rise to the judgment of 6 March 2018, *SEGRO and Horváth* [3] and has been covered in my Opinion in those two joined cases. [4] Therefore, that issue will not require new submissions on my part since, in accordance with that judgment, the Court has no alternative but to declare that there has been an infringement of EU law in that regard.

1 Original language: French.

2 In the remainder of this Opinion, I shall use, for convenience, first, the terms 'usufruct' or 'right of usufruct' to refer to both rights of usufruct *stricto sensu* and rights of use and, secondly, the expression 'agricultural land' to designate both agricultural land and forestry land.

3 C-52/16 and C-113/16, EU:C:2018:157, 'the judgment in *SEGRO and Horváth*'.

4 Opinion in *SEGRO and Horváth* (C-52/16 and C-113/16, EU:C:2017:410).

3. However, the significance of the present case lies elsewhere. In that judgment, the Court was also asked whether that legislation was compatible with Article 17 of the Charter. However, the Court did not consider it necessary to address that question. The Commission takes the view that, this time, the Court should however rule on that provision and should do so independently of the examination in respect of the freedoms of movement.

4. In this Opinion, I shall explain the reasons why, in my view, *the Court does not have jurisdiction* to give a ruling on Article 17 of the Charter as requested by the Commission. In the alternative, I shall set out the reasons why, in my view, an examination of the legislation at issue in the light of that provision would be superfluous in any case. Finally, in the further alternative, I shall examine that legislation in the light of Article 17 of the Charter, an examination which will lead me to conclude that the legislation at issue is incompatible with the fundamental right to property guaranteed by that article.

II. Hungarian law

A. Legislation on the acquisition of agricultural land

5. The 1994 Law on productive land provides that all natural persons not possessing Hungarian citizenship, with the exception of persons in possession of a permanent residence permit and those whose refugee status has been recognised, and all legal persons, both foreign and Hungarian, are to be prohibited from acquiring agricultural land.

6. That law was amended, with effect from 1 January 2002, by the termőföldről szóló 1994. évi LV. törvény módosításáról szóló 2001. évi CXVII. törvény (Law No CXVII of 2001 amending the [1994 Law on productive land]), in order also to preclude a right of usufruct over agricultural land from being created by contract in favour of natural persons not possessing Hungarian nationality or legal persons. Paragraph 11(1) of the 1994 Law on productive land therefore provided, as a result of those amendments, 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. …'.

7. Paragraph 11(1) of the 1994 Law on productive land was subsequently amended by the egyes agrár tárgyú törvények módosításáról szóló 2012. évi CCXIII. törvény (Law No CCXIII of 2012 amending certain laws on agriculture). In the new version incorporating 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'.

8. Law No CCXIII of 2012 amending certain laws on agriculture also introduced into the 1994 Law on productive land 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'.

9. The 2013 Law on agricultural land was adopted on 21 June 2013 and entered into force on 15 December 2013. Paragraph 37(1) of that law maintains the rule that a right of usufruct or a right of use over such land created by a contract is to be null and void unless it was created for the benefit of a close member of the same family.

10. Paragraph 5(13) of that law defines a 'close member of the same family' as 'spouses, direct ascendants, adopted children, children and stepchildren, adoptive parents, stepparents, foster parents and brothers and sisters'.

11. The 2013 Law on transitional measures was adopted on 12 December 2013 and entered into force on 15 December 2013. Paragraph 108(1) of that law, which repealed Paragraph 91(1) of the 1994 law, 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 concluded between persons who are not close members of the same family shall be extinguished by operation of law on 1 May 2014'.

12. 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.

…'

B. Civil law

13. The provisions of a polgári törvénykönyvről szóló 1959. évi IV. törvény (Law No IV of 1959 establishing the Civil Code, 'the former Civil Code') remained in force until 14 March 2014.

14. Paragraph 215 of the former Civil Code provided:

'(1) If the consent of a third party or approval by the authorities is required in order for a contract to enter into force, the contract may not enter into force until that consent or approval is given, however the parties shall be bound by their statements. The parties shall be relieved from their obligations if the third party or the authority concerned does not make a decision within the time limit that those parties set together.

…

(3) In the absence of the necessary consent or approval, the legal consequences of invalidity shall apply to the contract.

…'

15. Paragraph 237 of the former Civil Code provided:

'(1) If a contract is invalid, the situation that prevailed prior to the conclusion of that contract shall be restored.

(2) If the situation that prevailed prior to the conclusion of the contract cannot be restored, the court may declare the contract applicable until it has given a ruling. An invalid contract may be declared valid if the cause of invalidity can be eliminated, in particular by eliminating the disproportionate advantage where there is a lack of proportionality between the performance required of each of the parties in usurious contracts. In such cases, it will be necessary to order the restitution of any performance outstanding, if need be, without consideration.'

16. The provisions of the a polgári törvénykönyvről szóló 2013. évi V. törvény (Law No V of 2013 establishing the Civil Code, 'the new Civil Code') entered into force on 15 March 2014.

17. Paragraphs 6:110 and 6:111 of the new Civil Code, which are in Chapter XIX thereof, entitled 'Legal consequences of invalidity', are worded as follows:

'Paragraph 6:110 [Declaring a contract valid by court ruling with retroactive effect]

(1) The court may declare an invalid contract valid with retroactive effect to the date of conclusion of the contract if:

(a) the harm resulting from invalidity can be eliminated by an appropriate amendment to the contract; or

(b) the reason for invalidity no longer applies.

(2) If an invalid contract is declared valid, the contracting parties shall each be required to perform their respective obligations as contracted, and shall be liable for any breach of contract subsequent to the declaration of validity as if the contract had been valid since its conclusion.

Paragraph 6:111 [Validity of a contract by actions of the parties]

(1) A contract shall become valid with retroactive effect to the date of conclusion if the parties subsequently eliminate the grounds for invalidity, or if such grounds cease for other reasons and they reconfirm their contractual intent.

(2) If an invalid contract becomes valid, the contracting parties shall each be required to perform their respective obligations as contracted, and shall be liable for any breach of contract subsequent to the validation of the contract as if the contract had been valid since its conclusion.

(3) If the parties subsequently eliminate the grounds for invalidity and agree to validate the contract as regards the future, the performance that has been provided up to that point shall be subject to the legal effects of invalidity.'

III. Facts and pre-litigation procedure

18. In Hungary, the acquisition of agricultural land by foreign nationals has long been subject to restrictions. Law No I of 1987 on land[5] thus provided that foreign natural or legal persons could acquire the ownership of such land by means of purchase, exchange or donation only with the prior authorisation of the Hungarian Government.

5 Paragraph 38(1) of the földről szóló 1987. évi I. törvény (Law No I of 1987 on land), as specified by the 26/1987. (VII. 30.) MT rendelet a földről szóló 1987. évi I. törvény végrehajtásáról (Decree No 26 of the Council of Ministers of 30 July 1987 implementing Law No I of 1987 on land), and subsequently by the a földről szóló 1987. évi I. törvény végrehajtásáról rendelkező 26/1987. (VII. 30.) MT rendelet módosításáról szóló 73/1989. (VII. 7.) (Decree No 73 of the Council of Ministers of 7 July 1989).

19. Subsequently, a government decree,[6] which entered into force on 1 January 1992, precluded any possibility of persons not possessing Hungarian nationality, with the exception of persons in possession of a permanent residence permit and those with refugee status, acquiring agricultural land. The 1994 Law on productive land then extended that prohibition to both foreign and Hungarian legal persons.

20. That legal framework, by contrast, did not impose specific restrictions with regard to the creation of rights of usufruct over agricultural land.

21. However, following an amendment to the 1994 Law on productive land,[7] which entered into force on 1 January 2002, the restrictions on the acquisition of agricultural land were extended to the creation of rights of usufruct over that land. Consequently, neither foreign natural persons nor legal persons were able to obtain such rights.

22. Within the framework of Hungary's accession to the European Union, that Member State benefited from a transitional period authorising it to retain in force for a ten-year period from the date of accession, thus until 30 April 2014, the restrictions on the acquisition of agricultural land. However, that Member State was obliged to permit, after 1 May 2004, Union citizens who had lived and worked in Hungary for 3 years to acquire agricultural land under the same conditions as Hungarian nationals.[8]

23. Close to the end of that transitional period, the Hungarian legislature adopted a new amendment to the 1994 Law on productive land,[9] imposing a general prohibition, from 1 January 2013, on the creation of rights of usufruct over agricultural land, except between close relatives. The 2013 Law on agricultural land, which was adopted at the end of 2013 and entered into force on 1 January 2014, maintained that prohibition.[10]

24. The rules which entered into force on 1 January 2013 stipulated that the rights of usufruct existing on that date and created, for an indefinite period or for a fixed term expiring after 31 December 2032, by a contract concluded between persons who do not have a close family tie, were to be cancelled by operation of law within a transitional period of 20 years. Those rights were therefore meant to be extinguished by operation of law no later than 1 January 2033.

25. However, Paragraph 108(1) of the 2013 Law on transitional measures, which entered into force on 15 December 2013, shortened substantially the abovementioned transitional period. In accordance with the latter provision, the rights of usufruct existing on 30 April 2014 now had to be extinguished by operation of law on 1 May 2014, with the exception of contracts concluded between close relatives.

26. On 17 October 2014 the Commission sent a letter of formal notice to Hungary, taking the view, inter alia,[11] that, by cancelling certain rights of usufruct which had previously been created over agricultural land in that manner, that Member State has 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.

6 Paragraph 1(5) of the a külföldiek ingatlanszerzéséről 171/1991. (XII. 27.) Korm. (Government Decree No 171 of 27 December 1991).

7 Law amended by Law No CCXII of 2001 amending the [1994 Law on productive land].

8 In accordance with Chapter 3, paragraph 2 of 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) and 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).

9 Law No CCXIII of 2012 amending certain laws on agriculture.

10 In accordance with Paragraph 37(1) of that law.

11 In the letter of formal notice, the Commission had also complained that Hungary had authorised, under Paragraph 60(5) of the 2013 Law on transitional measures, with effect from 25 February 2014, the unilateral termination of leases of over 20 years concluded before 27 July 1994. The Commission, it would appear, subsequently abandoned that complaint, which is not mentioned in the reasoned opinion.

27. The Commission, not satisfied with that reply, sent a reasoned opinion on 19 June 2015 in which it maintained that, by cancelling by operation of law, in accordance with Paragraph 108(1) of the 2013 Law on transitional measures, certain rights of usufruct with effect from 1 May 2014, Hungary has infringed the abovementioned provisions of EU law. That Member State replied by letters dated 9 October 2015 and 18 April 2016, arguing that there had been no infringements as alleged.

28. At the same time, the national court that submitted the requests for a preliminary ruling which gave rise to the judgment in *SEGRO and Horváth* had submitted requests to the Alkotmánybíróság (Constitutional Court, Hungary), concerning, inter alia, the compatibility of Paragraph 108(1) of the 2013 Law on transitional measures with the Hungarian Fundamental Law.

29. By judgment No 25 of 21 July 2015, the Alkotmánybíróság (Constitutional Court) held that that provision partially infringed that fundamental law in so far as the national legislature has not provided for a compensation mechanism for the owners of the land over which the cancelled rights of usufruct had been created, and gave the legislature until 31 December 2015 to resolve that issue. That court dismissed the action as to the remainder. The period set for the Hungarian legislature by the Alkotmánybíróság (Constitutional Court) expired without the legislature having adopted the necessary measures.

IV. Procedure before the Court and forms of order sought

30. The present action for failure to fulfil obligations was brought on 5 May 2017.

31. In its application the Commission claims that the Court should:

– declare that, by adopting legislation which restricts the usufruct of agricultural land, Hungary has failed to fulfil its obligations under Articles 49 and 63 TFEU and under Article 17 of the Charter, and

– order Hungary to pay the costs.

32. Hungary contends that the Court should:

– dismiss the action brought by the Commission as unfounded, and

– order the Commission to pay the costs.

33. A hearing was held on 9 July 2018 at which the Commission and Hungary were present.

V. Analysis

A. Admissibility

34. The Hungarian Government did not plead, in its defence or its rejoinder, that the present action for failure to fulfil obligations is inadmissible. Nevertheless, according to the Court's settled case-law, the conditions for the admissibility of an action of this kind are *a matter of public policy*, and therefore the Court must examine them of its own motion. [12]

35. A comparison of the reasoned opinion and the application reveals that, in the second document, the Commission seems to have extended the subject matter of the proceedings, as defined in the first document, in breach of the Court's settled case-law which prohibits such an extension. [13]

36. In that regard, I note that, in that reasoned opinion, the Commission complained that Hungary had *cancelled by operation of law*, under Paragraph 108(1) of the 2013 Law on transitional measures, the rights of usufruct created over agricultural land between persons who are not close relatives and existing on 30 April 2014.

37. By contrast, it is apparent from the form of order sought contained in the introduction to the application, reproduced in point 1 of this Opinion, that, in the action brought before the Court, the Commission refers to a greater number of national provisions than were challenged in the reasoned opinion and some of those provisions do not concern the *cancellation* of pre-existing rights of usufruct over agricultural land, but the *creation* of rights over such land. [14] Moreover, in the head of claim in its application, the Commission does not complain that Hungary has '*cancelled*' the rights of usufruct which had previously been created, but, more generally, that Hungary has '*restricted*' the rights of usufruct over that land.

38. Those factors tend to suggest that, beyond the *cancellation by operation of law*, resulting from Paragraph 108(1) of the 2013 Law on transitional measures, of certain rights of usufruct which existed over agricultural land, the Commission is also seeking a declaration against Hungary to the effect that it *has limited the ability to create such rights in the future for the benefit of close relatives of the landowner only*.

39. On being questioned on that point at the hearing, Hungary stated that, according to its understanding, the action brought by the Commission concerns, in essence, the cancellation by operation of law of rights of usufruct over agricultural land which had previously been created. Hungary considers nonetheless that, in the light of the ambiguity which is explained in the three preceding points of this Opinion, the Commission's application is not presented coherently and intelligibly. The Commission, for its part, has argued that it did not intend to alter the subject matter of the dispute as defined in the reasoned opinion: at issue is solely the cancellation of pre-existing rights of usufruct.

12 See, inter alia, judgments of 9 September 2004, *Commission* v *Greece* (C-417/02, EU:C:2004:503, paragraph 16); of 1 February 2007, *Commission* v *United Kingdom* (C-199/04, EU:C:2007:72, paragraph 20); and of 22 February 2018, *Commission* v *Poland* (C-336/16, EU:C:2018:94, paragraph 42). The case-law of the Court is not static as regards the question of whether the decision of its own motion that there exists an absolute bar to proceeding with an action is optional or obligatory. Nevertheless, both the mandatory nature of public policy rules and considerations relating to the equality of persons before the courts and the equality of arms support the conclusion that it is obligatory (see Clausen, F., *Les moyens d'ordre public devant la Cour de justice de l'Union européenne*, Bruylant, 2018, pp. 455-472).

13 The subject matter of an action brought under Article 258 TFEU is delimited by the pre-litigation procedure provided for in that provision and cannot, therefore, be extended during the judicial proceedings. The Commission's reasoned opinion and the action must be based on the same grounds and pleas, with the result that the Court cannot examine a ground of complaint which was not formulated in the reasoned opinion. See, inter alia, judgments of 9 February 2006, *Commission* v *United Kingdom* (C-305/03, EU:C:2006:90, paragraph 22); of 29 April 2010, *Commission* v *Germany* (C-160/08, EU:C:2010:230, paragraph 43); and of 10 May 2012, *Commission* v *Netherlands* (C-368/10, EU:C:2012:284, paragraph 78).

14 Paragraph 11(1) of the 1994 Law on productive land, in the version in force on 1 January 2013, and Paragraph 37(1) of the 2013 Law on agricultural land concern the creation of (new) rights of usufruct over agricultural land.

40. In my view, the Commission's application is not so ambiguous as to justify its action being considered to be inadmissible in its entirety. Hungary was able to exercise its rights of defence and has even admitted that it understands the essence of the action, namely the cancellation by operation of law, provided for in Paragraph 108(1) of the 2013 Law on transitional measures, of rights of usufruct, created over agricultural land for the benefit of persons who do not have a close family tie with the owner of the land, existing on 30 April 2014. Therefore, I take the view that this action is admissible *in so far as it concerns that one issue* and that, therefore, the remainder is inadmissible.

B. The first complaint (compatibility of the legislation at issue with Articles 49 and 63 TFEU)

41. By its first complaint, the Commission asks the Court, in essence, to declare that Paragraph 108(1) of the 2013 Law on transitional measures is incompatible with the freedom of establishment provided for in Article 49 TFEU and the free movement of capital guaranteed in Article 63 TFEU.

42. In this regard, I would point out that, in the judgment in *SEGRO and Horváth*, the Court was asked whether the legislation at issue was compatible with both of those freedoms of movement. It nevertheless held that that legislation had to be examined solely in the light of the free movement of capital. [15]

43. In the present case, the Commission submits that, this time, the Court must examine the legislation at issue from the perspective of both of the freedoms of movement invoked.

44. According to the Commission, that legislation is capable, depending on the case, of infringing either of those freedoms. In that regard, some of the individuals affected had acquired a right of usufruct over agricultural land in Hungary for speculative purposes, whereas others pursued their economic activity by means of that right. Whilst the first situation falls under the free movement of capital, the second is related to the freedom of establishment. In that context, while, in the judgment in *SEGRO and Horváth*, the Court was able to confine itself, in the light of the circumstances at issue in the cases giving rise to that judgment, to examining that legislation in the light of the free movement of capital only, it cannot do the same in the present case. In the context of the present action for failure to fulfil obligations, which is objective in nature, [16] that legislation must be examined broadly by considering all of the freedoms that may be applied in those different situations.

45. However, the Hungarian Government takes the view that, in the present case, there is no need to adopt a different approach in this regard from that adopted in the judgment in *SEGRO and Horváth*.

46. I share the latter's view. In my opinion, in the present case, the legislation at issue should also be examined only in the light of the free movement of capital guaranteed by Article 63 TFEU.

47. Admittedly, that legislation gives rise to an *accumulation of freedoms of movement which potentially may apply*: [17] on the one hand, an individual who has acquired a right of usufruct over agricultural land for the purposes of carrying out his economic activity may rely on the freedom of establishment provided for in Article 49 TFEU since 'the right to acquire, use or dispose of immovable property on the territory of a Member State is the corollary' of that freedom; [18] on the other

15 See paragraphs 50 to 60 of that judgment.

16 According to the Court's settled case-law, an action for failure to fulfil obligations is objective in nature. It is for the Commission to determine whether it is expedient to take action against a Member State and what provisions the Member State has infringed and the Court must consider whether or not there has been a failure to fulfil obligations as alleged. See, to that effect, judgments of 21 June 1988, *Commission* v *United Kingdom* (416/85, EU:C:1988:321, paragraph 9); of 11 August 1995, *Commission* v *Germany*, (C-431/92, EU:C:1995:260, paragraph 22); and of 8 December 2005, *Commission* v *Luxembourg*, (C-33/04, EU:C:2005:750, paragraph 66).

17 See, to that effect, judgment in *SEGRO and Horváth*, paragraph 55.

18 Judgments of 30 May 1989, *Commission* v *Greece* (305/87, EU:C:1989:218, paragraph 22), and 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).

hand, in accordance with the settled case-law of the Court, national measures governing investments in immovable property fall within the scope of the free movement of capital guaranteed in Article 63 TFEU, even where the intention of those investments is to allow the exercise of an economic activity. [19]

48. However, in such a situation of an accumulation of the applicable freedoms, the Court, in its recent case-law at least, examines whether one of the two freedoms is secondary in relation to the other and may be attached to it. If so, the Court will proceed in accordance with the maxim *accessorium sequitur principale* and examine the legislation at issue solely in relation to the dominant freedom. [20] In that context, the existence of a 'main/ancillary' relationship between the freedoms in question will be assessed not with regard to the situation of the individuals involved in the dispute, but with regard to *the purpose of the national legislation at issue*. [21]

49. In the case of legislation such as Paragraph 108(1) of the 2013 Law on transitional measures, the free movement of capital aspect of that legislation prevails over that of the freedom of establishment. That legislation concerns land ownership and applies generally to usufruct in respect of agricultural land and, therefore, is not limited to situations in which such a right has been created for the purposes of carrying on an economic activity. [22] In that context, any restrictions on freedom of establishment resulting from that legislation are an inevitable consequence of the restriction of the free movement of capital. In other words, any restrictions on the freedom of establishment are *inseparable* from those regarding the free movement of capital. [23]

50. Therefore, there is no need to carry out an independent examination of the legislation at issue in the light of Article 49 TFEU. [24] Contrary to the arguments put forward by the Commission, the objective nature of proceedings for failure to fulfil obligations does not justify the Court abandoning its case-law on an accumulation of the applicable freedoms. In addition to the fact that that would be difficult to reconcile with the requirement that it manages its resources carefully, I note that the Court does not determine the 'main/ancillary' relationship *subjectively*, in the light of the situation of the individuals involved in the dispute, but *objectively*, with regard to the purpose of the legislation at issue. I note, moreover, that the Court has applied that case-law in a significant number of judgments establishing a failure to fulfil obligations. [25]

51. That said, I would point out that, in the judgment in *SEGRO and Horváth*, the Court held that legislation such as Paragraph 108(1) of the 2013 Law on transitional measures not only *restricts* the free movement of capital, but is also capable of being *indirectly discriminatory* on the basis of nationality or the origin of the capital.

19 See, inter alia, 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); and of 25 January 2007, *Festersen* (C-370/05, EU:C:2007:59, paragraphs 22 to 24). See, also, my Opinion in *SEGRO and Horváth*, (C-52/16 and C-113/16, EU:C:2017:410, points 48 to 63).

20 See, inter alia, judgments of 3 October 2006, *Fidium Finanz* (C-452/04, EU:C:2006:631, paragraph 34), and of 17 September 2009, *Glaxo Wellcome* (C-182/08, EU:C:2009:559, paragraph 37).

21 See, inter alia, judgments of 17 September 2009, *Glaxo Wellcome* (C-182/08, EU:C:2009:559, paragraph 36); of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47, paragraph 21); and in *SEGRO and Horváth*, paragraph 53.

22 See, by analogy, judgment of 17 September 2009, *Glaxo Wellcome* (C-182/08, EU:C:2009:559, paragraphs 49 to 52).

23 See, to that effect, judgment in *SEGRO and Horváth*, paragraph 55.

24 Should the Court not share my view, I consider that, in any event, the arguments developed in the judgment in *SEGRO and Horváth* regarding the free movement of capital may be transposed to the freedom of establishment, as regards both the existence of a restriction and the lack of justification.

25 See, among many examples, judgments of 9 June 1982, *Commission* v *Italy* (95/81, EU:C:1982:216, paragraph 30); of 4 June 2002, *Commission* v *Portugal* (C-367/98, EU:C:2002:326, paragraph 56); of 28 September 2006, *Commission* v *Netherlands* (C-282/04 and C-283/04, EU:C:2006:608, paragraph 43); of 8 July 2010, *Commission* v *Portugal* (C-171/08, EU:C:2010:412, paragraph 80); and of 10 May 2012, *Commission* v *Belgium* (C-370/11, not published, EU:C:2012:287, paragraph 21).

52. Moreover, in that judgment, the Court excluded the possibility that that legislation may be justified by the reasons put forward by the Hungarian Government in order to defend it,[26] given in particular that it is disproportionate.

53. Therefore, there is no need, in this Opinion, to elaborate on the compatibility of that legislation with the free movement of capital guaranteed in Article 63 TFEU. In that regard, the Commission's first complaint is undeniably well founded for the reasons given in the judgment in *SEGRO and Horváth*, and I refer the reader to those reasons and to my Opinion in those cases.[27]

54. Admittedly, in its application, the Commission has claimed an infringement of the general principles of EU law of *legal certainty* and *legitimate expectations*, on the ground that, in the context of the cancellation by operation of law of the rights of usufruct in question, the national legislation at issue did not provide for either a transitional period or compensation.[28] However, it is clear from that application that the Commission invokes those principles 'for the sake of completeness', thus merely as additional arguments when analysing the compatibility of the legislation at issue with the freedoms of movement invoked. Since its complaint is well founded on other grounds, there is no need for the Court to rule on the principles in question.[29] At the hearing, the Commission also confirmed that it did not intend to secure an independent examination of those principles and stated that, moreover, the observance of those principles *cannot be assessed independently of the examination in respect of the freedoms of movement*. I share that view completely, as I shall explain later in this Opinion.[30]

C. The second complaint (compatibility of the legislation at issue with Article 17 of the Charter)

55. By its second complaint, the Commission asks the Court, in essence, to declare that Paragraph 108(1) of the 2013 Law on transitional measures is contrary to the right to property guaranteed by Article 17(1) of the Charter.

1. Arguments of the parties

56. The *Commission* submits that the fundamental rights guaranteed by the Charter are applicable where national legislation falls within the scope of EU law. This would be the case where that legislation is such as to obstruct one or more of the freedoms of movement guaranteed by the FEU Treaty and the Member State concerned relies on overriding reasons in the general interest in order to justify such an obstacle.

57. Moreover, although the Court did not address the issue of respect for fundamental rights in the judgment in *SEGRO and Horváth*, it must, in the Commission's submission, decide on this issue in the present case.

26 First, it is a matter of an overriding reason in the public interest that entails limiting the ownership of agricultural land to the persons who work it and preventing the acquisition of such land for purely speculative purposes as well as enabling it to be farmed by new undertakings, facilitating the creation of properties of a size that enables viable and competitive agricultural production and preventing a fragmentation of agricultural land as well as migration from rural areas and depopulation of the countryside. Secondly, the Hungarian Government relies on Article 65 TFEU and, more specifically, the desire to sanction infringements of national legislation concerning exchange controls and the desire to combat abusive purchase practices on grounds of public policy.

27 Opinion in *SEGRO and Horváth* (C-52/16 and C-113/16, EU:C:2017:410, points 31 to 118).

28 See judgment of 11 June 2015, *Berlington Hungary and Others* (C-98/14, EU:C:2015:386, paragraphs 74 to 88 and 92).

29 If necessary, the considerations set out in points 173 to 182 of this Opinion regarding the right to property guaranteed by Article 17 of the Charter can be transposed to those principles.

30 See point 76 et seq. of this Opinion.

58. In that regard, the Commission submits that the right to property guaranteed in Article 17 of the Charter covers the rights of usufruct which have been cancelled by the legislation at issue. That article refers broadly to all rights with an asset value creating, under the legal system, an established legal position enabling the holder to exercise those rights autonomously and for his benefit.

59. As to the interference with that right, the Commission argues that it occurs, in the form of an expropriation, in the event of the elimination, withdrawal or de facto deprivation of property, including where, as in the present case, such elimination concerns only two of the three constituent elements of the property, namely the right of use and of possession.

60. However, according to the Commission, the cancellation at issue in the present case cannot be justified. That cancellation, first, is based on the erroneous general presumption that all usufruct contracts between persons who are not related were concluded for the purpose of evading rules restricting the acquisition of ownership of agricultural land. Secondly, that cancellation was unexpected and unforeseeable, and did not provide for the required transitional period while shortening the twenty-year period previously granted to investors. Moreover, even if it were justified, that cancellation is not proportionate.

61. The *Hungarian Government* for its part submits that a separate examination of the legislation at issue in the light of the Charter is not necessary.

62. In any event, in the first place, it is clear from judgment No 25 of 21 July 2015 of the Alkotmánybíróság (Constitutional Court) that the cancellation by operation of law of the rights of usufruct in question is not comparable to expropriation. Moreover, that cancellation is justified by the general interest. Furthermore, the rules of civil law, which lay down the owner's obligation to reach a solution with the former usufructuary, which may be required immediately when the right of usufruct expires, enable the former usufructuary to obtain fair, comprehensive and timely compensation for the loss incurred.

63. In the second place, the rights of usufruct at issue in the present case cannot be covered by Article 17(1) of the Charter since they have been obtained unlawfully and in bad faith.

2. Analysis

(a) Preliminary remarks

64. The Commission's second complaint is noteworthy. To my knowledge, this is the first time that the institution has sought a declaration from the Court that a Member State has failed to comply with a provision of the Charter.[31] A complaint of that kind had, however, been anticipated. As early as its 2010 Communication on the implementation of the Charter, the Commission had stated that, 'whenever necessary it [would] start infringement procedures against Member States for non-compliance with the Charter in implementing Union law'.[32] Nevertheless, until now, that institution had exercised noticeable restraint.[33]

65. The present case is the first in a series of actions[34] in which the Commission asks the Court, in a first complaint, to rule on whether the legislation of a Member State is compatible with the freedoms of movement guaranteed by the FEU Treaty, then, in a separate complaint, to examine that same legislation under the Charter.

66. There is no doubt that an action of this kind is admissible in the light of Article 258 TFEU.[35] In accordance with that article, the Commission may bring an action for a declaration that a Member State has 'failed to fulfil an obligation under the Treaties'. The obligations in question undeniably include the rights guaranteed by the Charter, the binding force of which is clear from the reference to it in the first subparagraph of Article 6(1) TEU, which confers on it 'the same legal value as the Treaties'.

67. However, the Court has jurisdiction to determine a failure to respect the rights guaranteed by the Charter only if the provisions of the Charter are binding on that Member State in the situation at issue.[36] The present case therefore raises, once again, the question of the Court's jurisdiction to rule on whether or not Member States have respected the fundamental rights recognised in the EU legal order.

68. It is important not to lose sight of the context in which that question arises. In essence, the extent to which the Member States are bound, under EU law, by the requirements regarding the protection of fundamental rights is a constitutional issue, which is delicate and fundamental, concerning the division of powers in the EU. Requiring Member States, in their actions, to respect fundamental rights as provided for in EU law has the effect of limiting the regulatory and policy approaches available in those Member States, while the power of the EU to set the boundaries of what is possible increases

31 Moreover, and unless I am mistaken, in the entire history of the procedure for failure to fulfil obligations, the Commission has made only one application seeking to establish an infringement of a fundamental right recognised in the EU legal order, in the case giving rise to the judgment of 27 April 2006, *Commission* v *Germany* (C-441/02, EU:C:2006:253). Nevertheless, the case-law of the Court contains a few judgments in which fundamental rights are relied on to support an interpretation of the provision of EU law which has allegedly been infringed by the Member State.

32 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union' (COM (2010) 0573 final, p. 10).

33 The Commission's various annual reports on the application of the Charter mention the initiation of a number of pre-litigation procedures concerning inter alia the non-compliance with the Charter by certain Member States. Nevertheless, none of those cases has been brought before the Court. See Łazowski, A., 'Decoding a Legal Enigma: the Charter of Fundamental Rights of the European Union and infringement proceedings', *ERA Forum*, vol. 14, 2013, pp. 573-587, which notes that that restraint by the Commission originated undoubtedly from a strategic choice it had made that was associated with the lack of clarity surrounding the issue of how the Charter is applied in the Member States.

34 See, in addition to the present case, the pending cases *Commission* v *Hungary*, C-66/18 and *Commission* v *Hungary*, C-78/18.

35 The same holds true, in my view, with regard to the fundamental rights which are recognised as general principles of EU law. See Barav, A., 'Failure of Member States to Fulfil their Obligations under Community Law', *Common Market Law Review*, vol. 12, 1975, pp. 369-383, in particular p. 377.

36 Since a procedure for failure to fulfil obligations may be based only on an obligation which is *in force* and *applicable ratione temporis* to the situation at issue, it is obvious that the Court may determine a failure to respect the rights guaranteed by the Charter only *in respect of matters arising after it became binding* — thus after 1 December 2009, the date on which the Treaty of Lisbon entered into force. That is the case here since the present case concerns the effects of Paragraph 108(1) of the 2013 Law on transitional measures, a provision which was adopted and entered into force after that date (see, by analogy, judgment in *SEGRO and Horváth*, paragraphs 38 to 49).

correspondingly. Fundamental rights, therefore, have the potential to be *centralised*.[37] Moreover, institutionally, at issue is the extent to which the *Court of Justice*, as the highest court, has the jurisdiction to take the place of national constitutional courts and the European Court of Human Rights[38] in monitoring the legislation and actions of the Member States in the light of fundamental rights.

69. Undoubtedly mindful of those issues, the drafters of the Charter took care expressly to limit the circumstances in which it applies to national legislation. In accordance with Article 51(1) of the Charter, its provisions are addressed to the Member States 'only when they are implementing Union law'. Moreover, the Charter and the treaties stipulate that the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify the powers and tasks as defined in the Treaties.[39]

70. In its judgment in *Åkerberg Fransson*,[40] the Court held that 'the fundamental rights guaranteed by the Charter must … be complied with where national legislation falls within the scope of European Union law' and that 'situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable', and therefore 'the applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter'. In so doing, the Court confirmed that there was a 'historical continuity'[41] between its case-law regarding whether fundamental rights which are recognised as general principles of EU law may be relied on and the scope of the Charter.

71. In that regard, I note that, in accordance with the case-law of the Court, the situations in which the Member States are bound by the fundamental rights recognised in the EU legal order may ordinarily fall into — at least — two categories.

72. In the first place, as the Court has consistently held since the judgment in *Wachauf*,[42] those fundamental rights are binding on the Member States when they *implement* EU rules, and therefore the Member States must, as far as possible, apply those rules in accordance with those rights.[43]

73. In the second place, in accordance with the case-law arising from the judgment in *ERT*,[44] where, in national legislation, a Member State *derogates* from EU law and relies on a *justification* recognised by that law to defend that legislation, it may have recourse to that justification only if the legislation is compatible with those fundamental rights.

74. The Commission bases its second complaint on that latter line of case-law. In its view, Article 17(1) of the Charter is applicable in the present case since, by the legislation at issue, Hungary has *derogated* from the freedom of establishment and the free movement of capital.

37 See, inter alia, von Bogdandy, A., 'The European Union as a Human Rights Organization? Human Rights and the core of the European Union', *Common Market Law Review*, vol. 37, 2000, pp. 1307-1338, in particular pp. 1316 and 1317, and Dougan, M., 'Judicial review of Member State action under the general principles and the Charter: Defining the "scope of Union Law"', *Common Market Law Review*, vol. 52, 2015, pp. 1201-1246, in particular pp. 1204-1210.

38 'The ECtHR'.

39 See Article 6(1) TEU, Article 51(2) of the Charter, and Declaration concerning the Charter of Fundamental Rights of the European Union annexed to the FEU Treaty.

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

41 Dougan, M., cited above, p. 1206.

42 Judgment of 13 July 1989 (5/88, EU:C:1989:321, paragraphs 17 to 19).

43 That case-law covers both the application of regulations (judgment of 24 March 1994, *Bostock*, C-2/92, EU:C:1994:116) and the transposition of directives (judgment of 10 July 2003, *Booker Aquaculture and Hydro Seafood*, C-20/00 and C-64/00, EU:C:2003:397) or framework decisions (judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198) or even the application of obligations under the treaties (judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936). For a detailed discussion of that line of case-law, see the Opinion of Advocate General Bobek in *Ispas* (C-298/16, EU:C:2017:650, points 32 to 65).

44 Judgment of 18 June 1991 (C-260/89, EU:C:1991:254, paragraphs 43 to 45), 'the judgment in *ERT*'.

75. Nevertheless, the Commission asks the Court to examine whether there has been a possible infringement of the Charter not in connection with a possible justification for the legislation at issue in respect of the freedoms of movement invoked — which is the subject of the first complaint — but *independently* of that question, so as to secure an *independent finding of failure to fulfil obligations under the Charter*. That institution takes the view, in essence, that, where national legislation that derogates from a freedom of movement is also capable of restricting the fundamental rights guaranteed by the Charter, the possible infringement of the Charter must be examined *separately*.

76. I do not share that view. As I concluded in *SEGRO and Horváth*,[45] in accordance with the rule in *ERT*, the question of a potential infringement of a fundamental right guaranteed by the Charter, just like a potential infringement of observance of the principles of legal certainty and legitimate expectations invoked by the Commission in its first complaint,[46] *cannot be examined by the Court independently of the question of the infringement of freedoms of movement*. I therefore consider it necessary, in this Opinion, to set out in greater detail the reasons underpinning my position.

(b) The 'rationale' and the limits of the ERT *case-law*

77. It should be recalled that the case which gave rise to the judgment in *ERT* concerned Greek legislation which granted a national operator a radio and television monopoly. In that context, a number of questions had been referred to the Court with regard to the compatibility of such a monopoly with EU law and with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[47] which guarantees the right to freedom of expression.

78. The legislation at issue gave rise to discriminatory effects to the detriment of broadcasts from other Member States. It was therefore incompatible with the free movement of services contained in Article 59 EC (now Article 56 TFEU), unless it could benefit from one of the justifications expressly provided for in Articles 56 and 66 EC,[48] namely public policy, public security and public health.[49]

79. At that time it was Article 10 of the ECHR that was of interest to the Court. While recalling that it was not for the Court to examine the compatibility of the ECHR with national legislation which does not fall within the scope of EU law,[50] the Court held that, in that case, it had to address the question of fundamental rights.[51]

80. More specifically, in so far as the Hellenic Republic sought to rely on the combined provisions of Articles 56 and 66 EC in order to justify the legislation at issue, the Court held that 'such justification, provided for by Community law' had to be '*interpreted in the light of the general principles of law and in particular of fundamental rights*'. Accordingly, that legislation could fall under the exceptions provided for by those provisions only 'if they are compatible with the fundamental rights the observance of which is ensured by the Court',[52] including the freedom of expression enshrined in

45 C-52/16 and C-113/16, EU:C:2017:410, point 121.

46 See point 54 of this Opinion.

47 Signed in Rome on 4 November 1950 ('the ECHR').

48 More specifically, those justifications are contained in Article 56 EC (now Article 52 TFEU) and are made applicable to the freedom to provide services by the reference in Article 66 EC (now Article 62 TFEU).

49 Judgment in *ERT*, paragraph 26.

50 The expression was used for the first time by the Court a few years earlier in the judgment of 30 September 1987, *Demirel* (12/86, EU:C:1987:400).

51 Judgment in *ERT*, paragraph 42.

52 Judgment in *ERT*, paragraph 43 (emphasis added).

Article 10 of the ECHR, incorporated into Community law as a general principle of law.[53] In other words, respect for fundamental rights was incorporated into the conditions that had to be satisfied in order to be permit reliance on justifications relating to public policy, public security and public health.[54]

81. Prima facie, the *ERT* case-law does not follow a logic which is as obvious as that underlying the judgment in *Wachauf*,[55] with regard to the circumstances in which the Member States implement EU law.

82. The *Wachauf* case-law is fully consistent with the logic which led the Court to recognise fundamental rights as an integral part of the EU legal order:[56] first, individuals must be protected against unlawful intrusions by the European Union into their rights; second, the Member States cannot review EU action in the light of their own constitutional standard without undermining the unity, primacy and effectiveness of EU law. The national standards are therefore rejected but, in return, the Court incorporates the fundamental rights that are inspired by the 'constitutional traditions common to the Member States' in the general principles of law the observance of which it ensures.[57] Since the implementation of the majority of EU policies rests on the Member States, it is necessary to extend the application of fundamental rights recognised in the EU legal order to those States since they are therefore acting as 'agents' of the Union. Where an EU policy is implemented, it is the EU's responsibility to ensure that the Member States do not breach fundamental rights in its name.[58]

83. However, in an '*ERT*' situation, by the national legislation at issue, the Member State concerned is not implementing an EU policy, but *a national policy* which falls within its competence.[59] It simply happens that, in doing so, that Member State happens to 'clash' — deliberately or otherwise — with a rule of EU law, such as the freedoms of movement guaranteed by the FEU Treaty, and seeks to justify itself.[60]

84. That said, in my view, three related, but distinct, legislative bases underpin the *ERT* case-law and make up its 'rationale'.

53 Judgment in *ERT*, paragraph 44.

54 See, to that effect, judgment in *ERT*, paragraph 45.

55 Judgment of 13 July 1989 (5/88, EU:C:1989:321).

56 Approach initiated by the judgments of 12 November 1969, *Stauder* (29/69, EU:C:1969:57); of 17 December 1970, *Internationale Handelsgesellschaft* (11/70, EU:C:1970:114); and of 14 May 1974, *Nold* v *Commission* (4/73, EU:C:1974:51).

57 See, to that effect, judgments of 17 December 1970, *Internationale Handelsgesellschaft* (11/70, EU:C:1970:114, paragraph 3); of 13 December 1979, *Hauer* (44/79, EU:C:1979:290, paragraph 14); of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 60); and of 6 March 2014, *Siragusa* (C-206/13, EU:C:2014:126, paragraphs 31 and 32).

58 Weiler, J.H.H. & Lockhart, N.J.S., '"Taking rights seriously" seriously: the European Court and its fundamental rights jurisprudence — part II', *Common Market Law Review*, vol. 32, 1995, pp. 579-627, in particular pp. 583 and 610.

59 For that reason, the rule in *ERT* is far from being as consensual as the rule in *Wachauf*. Therefore, the Court is regularly invited to abandon the rule in *ERT* (Jacobs, F.G., 'Human rights in the European Union: the role of the Court of Justice', *European Law Review*, vol. 26, 2001, pp. 331-341; Huber, P.M., 'The Unitary Effect of the Community's Fundamental Rights: The *ERT*-Doctrine Needs to be Reviewed', *European Public Law*, vol. 14, 2008, pp. 323-333; Kühn, Z., '*Wachauf* and *ERT*: On the Road from the Centralised to the Decentralised System of Judicial Review', Poiares Maduro, M. & Azoulai, L. (eds.), *The Past and Future of EU Law*, Hart Publishing, Oxford and Portland, Oregon, 2010, pp. 151-161, in particular p. 157) or to apply it with caution (see Weiler, J.H.H., 'Fundamental rights and fundamental boundaries', *The constitution of Europe*, Chapter 3, Cambridge University Press, 1999, which proposes that the Court confine itself to reminding Member States of their obligations under the ECHR, and Snell, J., 'Fundamental Rights Review of National Measures: Nothing New under the Charter?', *European Public Law*, vol. 21(2), 2015, pp. 285-308, in particular p. 306).

60 In accordance with the settled case-law of the Court, even when the Member States are acting within the framework of their exclusive competence, they must, when exercising that competence, comply with EU law and, in particular, the freedoms of movement laid down in the treaties. See, inter alia, judgments of 2 October 2003, *Garcia Avello* (C-148/02, EU:C:2003:539, paragraph 25); of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union* (C-438/05, EU:C:2007:772, paragraph 40); and of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraphs 37 and 38).

85. First of all, the extent to which the Member States may validly derogate from freedoms of movement is undoubtedly a matter of EU law.[61] The scope of that option depends on the interpretation of the provisions of the Treaties relating to such freedoms and cannot be determined by each Member State on the basis of its own values without undermining the effectiveness and uniform application of those freedoms in all Member States. That option must be defined *in the light of the EU's principles and values*.[62]

86. Secondly, the judgment in *ERT* reflects the principle that EU law, including the provisions of the Treaties on freedom of movement, *must always be interpreted in accordance with the fundamental rights the observance of which is ensured by the Court*. If the Court were to take the view, with regard to those freedoms, that national legislation which infringes those fundamental rights is permissible, that would be tantamount to accepting that, contrary to the principle regarding interpretation noted here, the freedoms in question may be interpreted as *tolerating such infringements*.[63]

87. Finally, an analysis in respect of fundamental rights is, in certain circumstances, essential in order to resolve the dispute concerning freedoms of movement. *Some justifications are inextricably linked to questions of fundamental rights*. This is the case, in particular, where, to justify its action, a Member State invokes a ground relating to public security or a fundamental right in its national legal order.[64] Consider, for example, the case giving rise to the judgment in *Society for the Protection of Unborn Children Ireland (SPUC)*.[65] I recall that that case concerned Irish legislation prohibiting the communication of any information about the availability of abortion — which, until recently, was prohibited under the Irish Constitution — in other Member States. If, in that judgment, the Court had taken the view, contrary to what it held, that that legislation constitutes a barrier to the freedom to provide services, the Court should have addressed Ireland's justification, based on the right to life, as established in the Irish Constitution. In that context, it would have been particularly difficult, from the point of view of methodology and legislation, not to weigh that right against freedom of expression.[66]

88. In its subsequent judgments, in particular the judgment in *Familiapress*,[67] the Court extended the *ERT* case-law to situations where a Member State seeks to justify a derogation from the freedoms of movement not by relying on an exception which is expressly provided for in the FEU Treaty — public policy, public security, public health — but by relying on unwritten justifications recognised in the case-law of the Court — known as 'overriding requirements', 'overriding reasons in the public interest' or even 'objectives of general interest'.

61 See Opinion of Advocate General Sharpston in *Pfleger and Others* (C-390/12, EU:C:2013:747, paragraph 45); Tridimas, T., *The General Principles of EU Law*, 2nd Edition, Oxford University Press, 2006, p. 325; Craig, P., 'The ECJ and *ultra vires* action: A conceptual analysis', *Common Market Law Review*, vol. 48, 2011, pp. 395-437, in particular p. 431; Eriksen, C.C. & Stubberud, J.A., 'Legitimacy and the Charter of Fundamental Rights Post-Lisbon', Andenas, M., Bekkedal, T. & Pantaleo, L. (eds.), *The Reach of Free Movement*, Springer, 2017, pp. 229-252, in particular p. 240.

62 See Opinion of Advocate General Van Gerven in *Society for the Protection of Unborn Children Ireland* (C-159/90, not published, EU:C:1991:249, point 31); Weiler, J.H.H. & Fries, S.C., 'A Human Rights Policy for the European Community and Union: The Question of Competences', Alston, P. (ed.), *The EU and Human Rights*, Oxford University Press, 1999, p. 163; and Dougan, M., cited above, p. 1216, which note that the *Wachauf* and *ERT* case-law are, ultimately, connected by the same requirement of the unity and effectiveness of EU law.

63 See Opinion of Advocate General Tesauro in *Familiapress* (C-368/95, EU:C:1997:150, point 26) and Eeckhout, P., 'The EU Charter of Fundamental Rights and the Federal Question', *Common Market Law Review*, vol. 39, 2002, pp. 945-994, in particular p. 978.

64 Situation at issue, in particular, in the judgments of 12 June 2003, *Schmidberger* (C-112/00, EU:C:2003:333), and of 14 October 2004, *Omega* (C-36/02, EU:C:2004:614).

65 Judgment of 4 October 1991 (C-159/90, EU:C:1991:378).

66 See Eeckhout, P., cited above, p. 978 (the example is taken from that article), and von Danwitz, T. & Paraschas, K., 'A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights', *Fordham International Law Journal*, vol. 35, 2017, pp. 1396-1425, in particular p. 1406.

67 Judgment of 26 June 1997 (C-368/95, EU:C:1997:325, paragraph 24).

89. This was a substantial extension, but, in my view, a justified one. There is no need to draw distinctions based on whether a Member State relies on an exception which is expressly provided for in the FEU Treaty or an unwritten justification.[68] In either case, it is relying on a provision of the FEU Treaty which allows that derogation — in the context of unwritten justifications, it is the rule of free movement itself — and the rationale is identical: that provision is '*interpreted in the light of the general principles of law and in particular of fundamental rights*'.[69]

90. It follows from the foregoing considerations that the *ERT* case-law is based on *the interpretation of the provisions of the Treaties relating to free movement in the light of fundamental rights*. The function of the examination of fundamental rights is to establish whether those freedoms of movement have been observed.[70] That case-law allows *a justification* on which a Member State relies to be rejected on account of a breach of a fundamental right recognised in the EU legal order.[71]

91. Thus, under the *ERT* case-law, the question of fundamental rights and that of freedoms of movement are *inextricably linked*. Accordingly, it is not possible, in my opinion, from the point of view of both methodology and legislation, to separate those two questions, as the Commission suggests in the present case.

92. The entry into force of the Charter has not substantially altered that analysis in the judgments delivered by the Court to date. In that regard, I recall that, in its judgment in *Pfleger and Others*,[72] the Court confirmed that the *ERT* case-law continues to apply under the Charter. More specifically, in that judgment the Court held that 'the use by a Member State of exceptions provided for by EU law in order to justify an obstruction of a fundamental freedom guaranteed by the Treaty must … be regarded … as "implementing Union law" within the meaning of Article 51(1) of the Charter'.[73]

93. In the judgments in *Berlington Hungary and Others*,[74] *AGET Iraklis*[75] and *Global Starnet*,[76] delivered in the light of the Charter, the Court applied the *ERT* case-law in full, taking fundamental rights into consideration in the analysis of a possible justification for the national legislation at issue in the light of the applicable freedoms of movement.

94. It is true that, in the judgment in *Pfleger and Others*,[77] the Court separated, in formal terms, the question whether the national legislation at issue was compatible with Articles 15 to 17 of the Charter from the question of freedoms of movement. However, in my view, it is not possible to draw unequivocal conclusions from that judgment. First, the national legislation at issue was capable of being justified with regard to the freedoms of movement since the Court entrusted the referring court with the task of carrying out a proportionality assessment.[78] In that context, a further analysis of that legislation in the light of the provisions of the Charter was justified from the perspective of the *ERT* case-law. Secondly, the Court ruled out the need to carry out a separate examination of those provisions of the Charter *in concreto*, stating that, if the national legislation were to constitute a disproportionate restriction to the freedom to provide services, it would automatically be incompatible

68 See, contra, Besselink, L.F.M., 'The Member States, the National Constitutions and the Scope of the Charter', *Maastricht Journal of European Comparative Law*, vol. 8, 2001, pp. 68-80, in particular p. 77.

69 Judgment of 26 June 1997, *Familiapress* (C-368/95, EU:C:1997:325, paragraph 24). See, to the same effect, Tridimas, T., cited above, p. 326.

70 That functionality is clear from the Opinion of Advocate General Tesauro in *Familiapress* (C-368/95, EU:C:1997:150, point 26): 'I feel that the issue of the compatibility of the national provision under discussion with Article 10 of the [ECHR], which was raised during the course of the procedure, merits a response on the part of the Court. *That is, of course, if the Court comes to the conclusion that the provision in question can be justified on the basis of the mandatory requirements discussed above*'.

71 See my Opinion in *SEGRO and Horváth*, (C-52/16 and C-113/16, EU:C:2017:410, point 129).

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

73 Judgment of 30 April 2014, *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraph 36).

74 Judgment of 11 June 2015 (C-98/14, EU:C:2015:386, paragraphs 74 to 91).

75 Judgment of 21 December 2016 (C-201/15, EU:C:2016:972, paragraphs 61 to 70 and 102 to 103).

76 Judgment of 20 December 2017 (C-322/16, EU:C:2017:985, paragraphs 44 to 50).

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

78 See judgment of 30 April 2014, *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraphs 48 to 55).

with those provisions, and therefore there was no need for a separate examination.[79] Accordingly, as I have stated in my Opinion in *SEGRO and Horváth*,[80] the judgment in *Pfleger and Others*[81] creates, at most, doubt as to whether an alleged infringement of the Charter may be examined independently of the question of a breach of the freedoms of movement.

(c) The considerations which, in my view, should persuade the Court not to go beyond the ERT *case-law*

95. In my opinion, the Commission's second complaint does not follow from the simple logic of the *ERT* case-law. To me, it is a new extension — or even a distortion — of that case-law.

96. The Commission is asking the Court, quite simply, to rule on a fundamental right guaranteed by the Charter, with regard to national legislation which has already been found to be contrary to primary EU law. By accepting or, on the contrary, by declining jurisdiction to rule on the Commission's second complaint, the Court will choose between *two very different approaches* regarding the role of fundamental rights in 'derogation' situations.

97. According to the first *approach* — which follows from the judgment in *ERT* — in 'derogation' situations, the Court does not resolve a fundamental rights issue per se, in the same way as a constitutional court. It addresses an issue of that kind to the extent necessary to ascertain whether a Member State is justified in derogating, in particular, from a freedom of movement. In other words, the Court rules on fundamental rights issues where those issues *fall within the scope of EU law, including its functional dimension*.

98. According to the second *approach* — as suggested by the Commission in the present case — the review of compliance with fundamental rights is separate from the question of conformity with the freedoms of movement. The restriction on those freedoms acts as a *gateway* to the field of application of the Charter. By creating that gateway, the Member State *undertakes to comply with the catalogue of fundamental rights contained therein*, and the Court has jurisdiction to rule independently on whether the national legislation concerned is compatible with each of those rights.

99. For the Commission, in cases such as the present, the laws of the Member States must be examined in the light of the Charter in order to ensure that the rule of law is respected in those States. A finding that the Charter has been infringed in such cases is, for the individuals affected by the laws in question, a realisation of that rule of law. Moreover, to apply the Charter in that manner increases its visibility and gives EU law legitimacy in the eyes of all Union citizens.

100. In my view, the Court should adhere to the first *approach* and should avoid the path that the Commission would like to follow.

101. In the first place, it is important to recall that, in the EU legal order, an aspect of the rule of law which is as important as the promotion of a policy on fundamental rights is the observance of the division of powers between the European Union and the Member States.[82] At issue is the legitimacy, in respect of the fundamental rights the observance of which it ensures, of the Court's intervention in a national policy.

79 See judgment of 30 April 2014, *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraphs 59 and 60).

80 C-52/16 and C-113/16, EU:C:2017:410, point 141.

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

82 See Opinion of Advocate General Sharpston in *Ruiz Zambrano* (C-34/09, EU:C:2010:560, point 162), and Weiler, J.H.H. & Fries, S.C., cited above.

102. To me, from the perspective of a correct division of powers, the more the European Union, within the framework of its competences, has a policy and instruments establishing common rules on a subject, the more legitimate it is for the Union to enforce the observance of fundamental rights as provided for in EU law. However, I would point out that, in a derogation situation, the Member State concerned is acting, hypothetically, in a field where there is no EU instrument unifying, harmonising or even coordinating the issue. That Member State is implementing a national policy which falls within its powers. Important though it may be, only a freedom of movement applies, thus a rule of *negative harmonisation*. In other words, EU law *frames* the Member States' competence to implement their national policy choices, *but that competence is not derived from EU law*[83] *and EU law does not determine how it is exercised.*[84]

103. Nonetheless, as has been noted in points 85 to 87 of this Opinion, the *ERT* case-law has legal foundations: (1) the requirement to ensure the uniform application and effectiveness of freedoms of movement, (2) the obligation to interpret the FEU Treaty, in all circumstances, in a manner that respects fundamental rights and (3) the need to give a ruling on those rights in order to resolve the dispute relating to those freedoms.

104. However, according to the *approach* proposed by the Commission in the present case, those justifications no longer hold: (1) it is hard to maintain that there is a risk to the uniform application and effectiveness of freedoms of movement which should be addressed, since the national legislation is not in any event compatible with those freedoms, (2) it is no longer a matter of interpreting the FEU Treaty in the light of fundamental rights but of applying a fundamental right independently and (3) there is no need to intervene in the field of fundamental rights in order to resolve the dispute relating to those freedoms. This leaves only the argument regarding the 'scope of EU law', which is understood not in its functional dimension but in a purely formal manner: there is a derogation from EU law, therefore the Charter applies. However, I have doubts as to whether that argument is a sufficient legal basis in order to justify the review, by the Court, of a national policy with regard to the fundamental rights the observance of which it ensures.[85]

105. In the second place, the entry into force of the Charter cannot justify extending the Court's jurisdiction in the field of fundamental rights in 'derogation' situations. In that regard, I can only reiterate that the intention of the Charter was precisely not to extend the powers of the Union.[86] An extension of the rule in *ERT* would, moreover, amount to a historic misunderstanding, given the process for adopting that instrument.

106. It should be noted that Article 51(1) of the Charter, in accordance with which the Charter is binding on the Member States only when they are 'implementing' Union law, underwent a drafting process which was heated to say the least, during which it became evident that there were concerns that the Charter would be applied widely by the Court in order to review national legislation.[87] The outcome, as is well known, is ambiguous: on the one hand, the wording of that provision, in its final

83 'Derogation' situations must therefore be distinguished from those where EU legislation allows the Member States a margin of discretion: the application of the Union's fundamental rights in this latter context is fully justified since that discretion forms part of an EU policy (see, to that effect, judgments of 21 December 2011, *N.S. and Others* (C-411/10 and C-493/10, EU:C:2011:865, paragraph 68), and of 9 March 2017, *Milkova* (C-406/15, EU:C:2017:198, paragraphs 52 and 53)) and the EU legislature cannot confer on the Member States a discretion to infringe fundamental rights.

84 I would point out in that regard that, in the present case, no rule of EU law has been implemented, in the strict sense of the term, by the legislation at issue. In particular, it does not originate from the implementation of Annex X to the Act concerning the conditions of accession of, inter alia, Hungary, since that act concerned conditions for the acquisition of property and not usufruct. Nor is it a poor transposition of 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) since, in particular, that directive is no longer in force.

85 See, also, Eeckhout, P., cited above, p. 975.

86 See point 69 of this Opinion.

87 See in particular the Note from the Praesidium of the Convention dated 15 February 2000 (CHARTE 4123/1/00 REV 1) stating that the Charter should apply to the Member States only where they *transpose or apply the law of the Union*, in order to prevent those States from being bound by it when they are acting within their own jurisdiction. Subsequent drafts varied between 'implementing [Union] law' (CHARTE 4149/00 and CHARTE 4235/00) and the 'scope of Union law' (CHARTE 4316/00).

version, appears to exclude 'derogation' situations, but, on the other hand, the explanatory notes which accompany the Charter [88] mention the judgment in *ERT*. Nevertheless, that process clearly shows a desire for caution when applying the Charter to national policies: it applies primarily to institutions, bodies, offices and agencies of the Union and to the Member States 'only' in limited cases. In the light of the words chosen by the drafters of the Charter in Article 51(1) and notwithstanding the explanations relating thereto, such caution is to be exercised *particularly with regard to 'derogation' situations*.

107. In that context, in the judgment in *Åkerberg Fransson*, [89] the Court could legitimately have confirmed the *continuity* of its jurisdiction in the field of fundamental rights [90] and could thereby have ensured a welcome coherence between the scope of the Charter and that of general principles of EU law. However, it would hardly reflect the intention of the drafters of the Charter to go *beyond the practice adopted prior to the Charter* in 'derogation' situations. In particular, I have doubts as to whether examining national legislation in the light of the fundamental rights guaranteed by the Charter unnecessarily in order to resolve the issue of freedoms of movement is consistent with the logic behind the limit established by those drafters in Article 51(1) thereof. It would be even less in line with that logic, for example, to seize the opportunity to obstruct the free movement of goods in order to review national legislation, separately and independently, from the perspective of a fundamental right accorded to workers, such as Article 31 of the Charter ('Fair and just working conditions').

108. In the third place, it should be recalled that, in the European Union, fundamental rights are covered by a multilevel protection system involving national constitutions and the ECHR, to which all the Member States are party. [91]

109. Therefore, the fact that, in 'derogation' situations, the Court does not rule on a fundamental rights issue does not mean, systemically, that there are gaps in the protection of Union citizens' fundamental rights. Those citizens have national remedies at their disposal and, where those remedies have been exhausted, they may bring proceedings before the ECtHR.

110. The Court's intervention in the field of fundamental rights should therefore focus on the areas for which it is genuinely responsible, thus, first and foremost, the actions of the Union itself and of the Member States when they are implementing EU policies. [92] In this field, the Court must fulfil its mandate with the greatest vigour. [93] In 'derogation' situations, by contrast, is it really the responsibility of the EU and the Court to intervene where such intervention is not necessary in order to resolve the issue of freedoms of movement and to ensure the unity and effectiveness of EU law?

88 Explanations relating to the [Charter] (OJ 2007 C 303, p. 17).

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

90 See point 70 of this Opinion.

91 See XXV Congress of the International Federation of European Law (FIDE), introductory statement by J.M. Sauvé, given on 30 May 2012 in Tallinn (Estonia), emphasising the three movements at work in Europe in relation to fundamental rights, namely the expansion of rights, their increasing number of sources and their many interpretations.

92 See point 82 of this Opinion. That review of the implementation of EU policies by the Member States implies monitoring the remedies provided by those States, on the basis of Article 19 TEU, to ensure that, in the fields covered by EU law, individual parties have a real possibility of challenging before the courts the legality of any national measure which implements that law. See, to that effect, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraphs 29 to 37).

93 The Commission's claim that 'whenever necessary it [would] start infringement procedures against Member States for non-compliance with the Charter in implementing Union law', recalled in point 64 of this Opinion, fitted within a context in which the Commission's intention was to ensure that *the Union's action is above reproach when it comes to fundamental rights*, and therefore the Charter must serve as a *compass for the Union's policies and their implementation by the Member States* (see 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union', COM (2010) 0573 final, p. 4).

111. As the supreme interpreter of EU law, the Court must ensure respect for such rights within the sphere of the Union's competence.[94] Unlike national constitutional courts and the ECtHR, the Court does not have a *specific mandate to penalise possible infringements of fundamental rights committed by the Member States*. Therefore, I can only advise it, in 'derogation' situations, to interpret its jurisdiction in this field strictly.

112. All the foregoing considerations prompt me to propose that the Court, principally, should reject the Commission's second complaint.

(d) In the alternative: a separate examination of Article 17 of the Charter is superfluous in the present case

113. If the Court considers that it has jurisdiction to give a ruling on the Commission's second complaint, I conclude, in the alternative, that a separate examination of Paragraph 108(1) of the 2013 Law on transitional measures in the light of Article 17 of the Charter would in any event be *superfluous*.

114. It follows from the case-law of the Court that national legislation which restricts freedoms of movement also restricts the rights enshrined in Article 15 ('Freedom to choose an occupation and right to engage in work'), Article 16 ('Freedom to conduct a business') and Article 17 ('Right to property') of the Charter. Moreover, in so far as that restriction cannot be justified in the context of those freedoms of movement, it is likewise not permitted under Article 52(1) of the Charter,[95] in relation to Articles 15, 16 and 17 thereof.[96]

115. However, the Commission submits that, although a separate analysis under Articles 15 and 16 of the Charter is, in general, not justified — as the content of those articles overlaps with the freedoms of movement guaranteed by the FEU Treaty —, that analysis is necessary in the present case on the ground that Article 17 of the Charter is *broader* in content than the free movement of capital or freedom of establishment.

116. I am not convinced by that argument. First of all, I note that, in the case-law cited in point 114 of this Opinion, the Court did not distinguish between Articles 15, 16 and 17 of the Charter, and for a simple reason in my view: the right to property is an economic right which, like the freedom to choose an occupation and the freedom to conduct a business, is protected under freedoms of movement, and therefore their respective contents overlap, if not completely, to a large extent at least.[97] In particular, as I noted in the context of the analysis of the first complaint,[98] national legislation which restricts access to property, in particular land, or regulates its use amounts to a restriction on the free movement of capital (principally) and the freedom of establishment (secondarily).

117. As regards legislation such as Paragraph 108(1) of the 2013 Law on transitional measures, there is a *complete overlap* between the right to property and the free movement of capital.

94 Opinion of Advocate General Sharpston in *Ruiz Zambrano* (C-34/09, EU:C:2010:560, point 155).

95 According to that provision, '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'.

96 See judgments of 30 April 2014, *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraphs 57 to 60); of 11 June 2015, *Berlington Hungary and Others* (C-98/14, EU:C:2015:386, paragraphs 90 and 91); of 21 December 2016, *AGET Iraklis* (C-201/15, EU:C:2016:972, paragraphs 102 and 103); and of 20 December 2017, *Global Starnet* (C-322/16, EU:C:2017:985, paragraph 50).

97 Kovar, R., 'Droit de propriété', *Répertoire du droit européen*, January 2007, § 4, and Gauthier, C., Platon, S. & Szymczak, D., *Droit européen des droits de l'Homme*, Sirey, 2017, p. 215.

98 See the case-law referred to in point 47 of this Opinion.

118. In the judgment in *SEGRO and Horváth*, the Court held that 'by virtue of its very subject matter', legislation which provides for the extinction of rights of usufruct acquired by contract over agricultural land restricts the free movement of capital, on the grounds that that legislation 'deprives the person concerned both of the ability to continue to enjoy the right which he has acquired … and of the ability to dispose of that right'.[99] However, the same grounds lead to the conclusion that the legislation at issue creates a 'deprivation of property' which is prohibited by Article 17(1) of the Charter.[100]

119. Moreover, in that judgment, the Court held that the legislation at issue cannot be justified, under Articles 63 and 65 TFEU, taking account, in particular, of evidence to demonstrate that that legislation is incompatible with Article 17 and Article 52(1) of the Charter, namely, first, the fact that measures that were less restrictive of the rights of usufruct concerned could have been adopted for the purpose of implementing the objectives pursued by Hungary[101] and, secondly, the lack of an appropriate compensation mechanism for the usufructuaries affected.[102]

120. In other words, the analyses to be carried out in order to establish both an interference with the rights guaranteed by Article 63 TFEU and Article 17 of the Charter and the impossibility of justifying that interference *are based on the same factors, leading to an outcome which is essentially identical*.

121. In that context, the resulting artificiality of a separate examination of the legislation at issue in the light of Article 17 of the Charter in addition to the examination that has already been carried out under Article 63 TFEU is also clear from the fact that, in the context of the second complaint, the parties essentially put forward the same arguments as in connection with the first complaint — or even merely refer to that complaint.

122. I am also unconvinced by the Commission's argument that a separate examination of the legislation at issue in the light of Article 17 of the Charter is essential in order to ensure that individuals are in a better position before the national courts, in particular in any actions for damages brought against the Hungarian State.

123. I very much doubt that any judgment by the Court establishing a failure to comply with Article 17 of the Charter would offer any added value to the individuals concerned. Their interests are already protected by Article 63 TFEU, a provision which has direct effect and may be invoked before the national court. The latter article 'finds fault with' the legislation at issue of for the same defects that are penalised by Article 17 of the Charter — deprivation of property without compensation — and also confers on the individuals concerned a right to fair compensation in the event of such deprivation. In short, the Court would not be failing in its task of safeguarding the rights which individuals derive from EU law by not ruling on the latter article. In particular, as regards possible actions to establish State liability, the conditions provided for by EU law in this field[103] may already be satisfied with regard to the incompatibility of the legislation at issue with Article 63 TFEU. In that context, increasing the number of rules of EU law to be relied on will not enable those individuals to claim a greater harm.

99 Judgment in *SEGRO and Horváth*, paragraphs 62 and 63.

100 See points 157 to 159 of this Opinion.

101 See, first, paragraphs 92 and 106 of the judgment in *SEGRO and Horváth*, and, secondly, point 176 of this Opinion.

102 See, first, paragraph 91 of the judgment in *SEGRO and Horváth*, and, secondly, points 179 to 182 of this Opinion.

103 The rule of EU law infringed must be intended to confer rights on individuals; the breach of that rule must be sufficiently serious; and there must be a direct causal link between the breach and the loss or damage sustained. See judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 51) and, for a recent application, judgment of 4 October 2018, *Kantarev* (C-571/16, EU:C:2018:807, paragraph 94).

124. Nor can such an examination of the legislation at issue in the light of Article 17(1) of the Charter be carried out, in my view, with the sole purpose of enabling the Commission, in possible double infringement proceedings in the future, to request a greater fine or penalty payment from Hungary. Since the freedoms of movement guaranteed by the FEU Treaty are basic rules of primary EU law, an infringement of one of those freedoms is already considered, as such, to be 'serious' for the purpose of calculating financial penalties. [104] I fail to see what a finding of a failure to fulfil obligations in respect of a right to property would add in the present case.

125. Finally, an independent examination of Article 17(1) of the Charter cannot be necessary solely on the ground that proceedings for failure to fulfil obligations are objective and that, therefore, it falls to the Commission to determine which rules have allegedly been infringed by the Member State, and the Court must consider whether or not there has been a failure to fulfil obligations. [105]

126. In that regard, it should be pointed out the procedure established in Article 258 TFEU is designed to obtain a declaration that the conduct of a Member State infringes EU law. The aim of that procedure is to achieve the practical elimination of such infringements and the consequences thereof. [106] In the present case, as I have tried to demonstrate, Article 63 TFEU and Article 17 of the Charter protect the same interests and *penalise the same defects in the national legislation*. Accordingly, an answer from the point of view solely of the former article is sufficient in order to meet that objective.

127. Furthermore, to my knowledge, in preliminary ruling proceedings, the Court does not examine national legislation in the light of the Charter *for the sake of completeness*, where that legislation is already contrary to another rule of EU law. [107] The judgment in *SEGRO and Horváth* is an example of that approach. This, in my view, is a good judicial policy, [108] and, to me, it would be unfortunate if that approach was not adopted in respect of proceedings for a failure to fulfil obligations.

(e) In the further alternative: examination of the legislation at issue in the light of Article 17 of the Charter

128. Should the Court not share my views and choose to examine the legislation at issue in the light of Article 17 of the Charter, I submit the following observations, in the further alternative.

104 See, inter alia, judgment of 30 May 2013, *Commission* v *Sweden* (C-270/11, EU:C:2013:339, paragraph 49). See also the Communication from the Commission 'Application of Article 228 of the EC Treaty' (SEC(2005) 1658), paragraph 16.1: 'To evaluate the importance of the Community provisions breached, the Commission will take into consideration their nature and extent rather than their standing in the hierarchy of norms … *infringements affecting fundamental rights or the four fundamental freedoms protected by the Treaty should be considered as serious and should result in an appropriate financial penalty*' (emphasis added).

105 See the case-law cited in footnote 16 of this Opinion.

106 See judgments of 12 July 1973, *Commission* v *Germany* (70/72, EU:C:1973:87, paragraph 13), and of 16 October 2012, *Hungary* v *Slovakia* (C-364/10, EU:C:2012:630, paragraph 68).

107 See, inter alia, judgments of 6 November 2012, *K* (C-245/11, EU:C:2012:685); of 18 April 2013, *Irimie* (C-565/11, EU:C:2013:250); of 4 July 2013, *Gardella* (C-233/12, EU:C:2013:449, paragraphs 37 to 41); of 5 June 2014, *Mahdi* (C-146/14 PPU, EU:C:2014:1320, paragraph 64); of 4 September 2014, *Zeman* (C-543/12, EU:C:2014:2143, paragraph 39); of 4 February 2015, *Melchior* (C-647/13, EU:C:2015:54, paragraph 29); of 25 June 2015, *Loutfi Management Propriété intellectuelle* (C-147/14, EU:C:2015:420, paragraph 27); and of 10 September 2015, *Wojciechowski* (C-408/14, EU:C:2015:591, paragraph 53).

108 If only because the interpretation of the content of a fundamental right, a highest-ranking provision, which binds inter alia the EU legislature in its legislative competence, is not a trivial exercise.

(1) Preliminary considerations

129. The fundamental right to property has long been one of the general principles of EU law the observance of which is ensured by the Court.[109] That right is now enshrined in Article 17 of the Charter, paragraph 1[110] of which provides that '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'.

130. The explanations relating to the Charter state that, in accordance with Article 52(3) thereof, the right to property recognised in Article 17(1) of the Charter has the same meaning and scope as that guaranteed in Article 1 of Protocol No 1 to the ECHR.[111] Therefore, in order to interpret the former, attention must be paid to the meaning given by the ECtHR to the latter.[112]

131. Having regard to both of those provisions, in the remainder of this Opinion I shall set out the reasons why, in my view, the rights of usufruct which have been cancelled under Paragraph 108(1) of the 2013 Law on transitional measures are 'possessions' (2), which have been 'lawfully acquired' (3), and that the legislation at issue interferes with those rights, consisting of a 'deprivation of property' (4), which cannot be justified (5).

(2) The concept of a 'possession'

132. It should be noted that, in accordance with the case-law of the ECtHR on Article 1 of Protocol No 1 to the ECHR and the case-law of the Court regarding Article 17(1) of the Charter, the concept of a 'possession' protected by the fundamental right to property has an *autonomous meaning*, thus it is independent of classifications used in national law and is not limited to property in the strict sense.[113]

133. According to the ECtHR, in order to determine whether a person has a 'possession', it is necessary to examine whether the circumstances of the case, considered as a whole, conferred on that person title to a 'substantive interest' protected by Article 1 of Protocol No 1 to the ECHR. Therefore, not only 'existing possessions' are protected but also 'assets', including claims in respect of which the applicant can argue that he has at least, under national law, a legitimate and reasonable expectation of obtaining effective enjoyment of a property right.[114]

109 See judgments of 14 May 1974, *Nold* v *Commission* (4/73, EU:C:1974:51), and of 13 December 1979, *Hauer* (44/79, EU:C:1979:290).

110 Article 17(2) of the Charter concerns the protection of intellectual property and, therefore, is not at issue in the present case.

111 That provision, entitled 'Protection of property', states that 'every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'.

112 See 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, paragraph 356), and of 13 June 2017, *Florescu and Others* (C-258/14, EU:C:2017:448, paragraph 49).

113 With regard to the case-law of the ECtHR, see, to that effect, ECtHR, 23 February 1995, *Gasus Dosier- und Fördertechnik GmbH v. Netherlands*, CE:ECHR:1995:0223JUD001537589, § 53; ECtHR, 12 December 2002, *Wittek v. Germany*, CE:ECHR:2002:1212JUD003729097, § 42; and ECtHR, 18 November 2010, *Consorts Richet and Le Ber v. France*, CE:ECHR:2010:1118JUD001899007, § 89. For the case-law of the Court, see, to that effect, judgment of 22 January 2013, *Sky Österreich* (C-283/11, EU:C:2013:28, paragraph 34).

114 See, to that effect, ECtHR, 29 November 1991, *Pine Valley Developments Ltd and Others v. Ireland*, CE:ECHR:1991:1129JUD001274287, § 51; ECtHR, 20 November 1995, *Pressos Compania Naviera S.A. and Others v. Belgium*, CE:ECHR:1995:1120JUD001784991, § 29; and ECtHR, 18 April 2002, *Ouzounis and Others v. Greece*, CE:ECHR:2002:0418JUD004914499, § 24.

134. The Court holds, for its part, that the 'possessions' referred to in Article 17(1) of the Charter are all 'rights with an asset value' creating, under the legal system, 'an established legal position … enabling the holder to exercise those rights autonomously and for his benefit'.[115] Although that test is worded differently from the one provided for by the ECtHR, the interests guaranteed are, in my view, essentially the same.

135. In accordance with the test adopted by the Court, in order to determine whether the rights of usufruct at issue in the present case are protected 'possessions', it must be determined whether two conditions are satisfied, namely, first, whether those rights have an asset value and, secondly, whether an established legal position is created from those rights which enables the holder to exercise them autonomously and for his benefit.

136. With regard to the *first condition*, I note, as does the Commission, that a right of usufruct confers on its holder partial control over something belonging to another person. It enables it to be used (*usus*) and revenue to be collected from it (*fructus*) while the right to dispose of it (*abusus*) remains with the owner — who, as his rights are therefore reduced, is known as the bare owner.[116] To that end, usufruct is traditionally regarded as a fraction of ownership or a *limited ius in rem* which is to be classified as a personal servitude.[117]

137. A right that enables a benefit to be obtained from a thing is undoubtedly, for its holder, an element of wealth and, therefore, has an *asset value*. Moreover, the rights of usufruct at issue in the present case, I would reiterate, concern agricultural land and enable that land to be farmed. Such rights therefore have a *substantial asset value*. In that regard, contrary to what the Hungarian Government appears to suggest, the fact that the usufructs at issue were created by contract and conferred on their holders, by definition, only partial control over the land concerned is irrelevant.[118]

138. That interpretation is not called into question by the argument put forward by the Hungarian Government at the hearing that such rights of usufruct are *non-transferable* and, therefore, according to that government, have no market value.

139. Any legal or contractual restrictions regarding the transferability of those rights of usufruct[119] do not change the fact that they are an asset. In that regard, it is sufficient to note that the rights in question have been *transferred*, under a contractual relationship, by the owners of the land to the usufructuaries. As the Hungarian Government acknowledged at the hearing, the creation of those rights was in return for a *financial consideration*. Those circumstances alone demonstrate that the rights are an asset.[120]

115 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).

116 As regards the right of use, only the *usus* is transferred to the holder and the owner retains the *fructus* and the *abusus*.

117 See, for an account of the nature of usufruct, as provided for historically under Roman law and in the laws of various Member States, Opinion of the Advocate General Jacobs in '*Goed Wonen*' (C-326/99, EU:C:2001:115, points 54 to 56).

118 By way of an example, in the context of Article 1 of Protocol No 1 to the ECHR, the ECtHR has regarded usufructs as 'possessions' (ECtHR, 12 December 2002, *Wittek v. Germany*, CE:ECHR:2002:1212JUD003729097, § 43 and 44, and ECtHR, 16 November 2004, *Bruncrona v. Finland*, CE:ECHR:2004:1116JUD004167398, § 78), other forms of servitude (European Commission of Human Rights, 13 December 1984, *S v. the United Kingdom*, CE:ECHR:1984:1213DEC001074184, pp. 238 and 239), or even a *right in personam* to obtain a benefit from the thing arising from a lease (ECtHR, 24 June 2003, *Stretch v. the United Kingdom*, CE:ECHR:2003:0624JUD004427798, § 35).

119 In that regard, I note that, in many national legal orders, the transfer of a usufructuary right is excluded by law or at least subject to the agreement of the owner. Moreover, as a personal servitude, usufruct is, at most, for life, and therefore it is not transferred to the heirs of the usufructuary on his death, but returns to the owner. See Opinion of Advocate General Jacobs in '*Goed Wonen*' (C-326/99, EU:C:2001:115, point 56).

120 See, by analogy, judgment of 22 January 2013, *Sky Österreich* (C-283/11, EU:C:2013:28, paragraph 35). In other words, the fact that the usufruct cannot be transferred by the usufructuary to a third party does not transform it into a *non-pecuniary right* which has no monetary value.

140. With regard to the *second condition*, it is hardly necessary to recall that, since the usufruct is a right *in rem*, the rights it confers on its holder are *exclusive rights*, thus they are enforceable against all parties.[121] Therefore, the rights of usufruct at issue in the present case clearly create an established legal position which enables those rights to be exercised autonomously and for the benefit of their holders.

(3) The condition that the possessions in question are acquired lawfully

141. I note that, according to the Hungarian Government, the rights of usufruct which have been cancelled by the legislation at issue do not enjoy the protection provided for in Article 17(1) of the Charter on the ground that their acquisition was unlawful and invalid *ab initio* in the light of the applicable provisions of civil law.

142. First, since the rights in question were created before 1 January 2002 for non-residents, under the applicable national legislation concerning exchange controls, the acquisition of those rights by those persons was subject to the grant of authorisation by the authority with responsibility for exchange controls, namely the National Bank of Hungary. Nevertheless, it is apparent from information supplied by the National Bank of Hungary that no exchange authorisation was ever sought in respect of the acquisition of rights of usufruct over agricultural land. Without such authorisation, the usufructs at issue have not been validly created.

143. Secondly, the contracts which created those usufructs were concluded fraudulently, in order to circumvent the statutory prohibition that prevented natural persons not possessing Hungarian nationality and legal persons from acquiring the ownership of agricultural land.

144. In that regard, it follows from the wording of Article 17(1) of the Charter that that provision protects only possessions which have been 'lawfully acquired'. That condition is not contained in the text of Article 1 of Protocol No 1 to the ECHR. Therefore, in my view, it must not be interpreted too broadly — otherwise it will go below the level of protection offered by the latter provision. Accordingly, I take the view that that condition must be considered to be satisfied where the acquisition of the possessions at issue could reasonably be regarded as being valid and lawful, until the interference at issue was introduced, and having regard to the *legitimate expectations* of the holders of those possessions.

145. In the present case, with regard to the acquisition of the rights of usufruct which have been cancelled by the legislation at issue allegedly being invalid *ab initio*, in the first place, I am not convinced that the Hungarian Government has actually demonstrated its proposed interpretation of the rules of civil law.

146. With regard to the fact that the holders of the rights of usufruct which have been cancelled did not obtain authorisation from the authority with responsibility for exchange controls, admittedly, under Article 215(1) and (3) of the former Civil Code, if approval by a public authority is required in order for a contract to enter into force, the legal consequences of invalidity are to apply to that contract if that approval is not obtained.

147. However, first, as the Commission submits, and as the Hungarian Government itself conceded in its response to the reasoned opinion, no judgment by a Hungarian court has considered the lack of exchange authorisation to be a flaw that justifies regarding a usufruct contract to be void *ab initio*.

121 See Opinion of Advocate General Jacobs in '*Goed Wonen*' (C-326/99, EU:C:2001:115, point 56).

148. Secondly, the Commission submits that it follows from the case-law of the Hungarian courts regarding Article 237(1) and (2) of the former Civil Code that, before declaring that a specific contract is void, the court must first ascertain whether the contract in question may be validated, which is the case when the ground for invalidity disappeared after it was concluded, in particular in the event of an amendment to the applicable rules. The obligation to obtain exchange authorisation was repealed from 16 June 2001 in respect of the acquisition of assets.[122] Therefore, even if the contracts which created the usufructs at issue may, at a given time, have been invalid because they lacked such authorisation, those contracts have been validated retroactively from that date.[123] That interpretation of national law seems perfectly reasonable to me.

149. As regards the alleged ground for invalidity concerning a circumvention of the restrictions on the acquisition of agricultural land, again, the Hungarian Government has not mentioned any judgment by a national court which has declared a right of usufruct unlawful on that ground. By contrast, the Commission has relied on a judgment by the Kúria (Supreme Court, Hungary) in which that court took the view, in essence, that the mere creation of a right of usufruct over agricultural land may not, in itself, be regarded as a circumvention of that kind.

150. In the second place, even if the interpretation of the rules of civil law suggested by the Hungarian Government were correct, this would not prevent the usufructs at issue from being regarded as possessions which have been 'lawfully acquired', in the light of the legitimate expectations to which the circumstances may have given rise on the part of the holders of those rights.

151. In that regard, I note that, after the legislative amendments made in 1991 and 1994 for the purpose of preventing natural persons not possessing Hungarian nationality and legal persons from acquiring agricultural land, any person remained free, in all likelihood, to acquire a right of usufruct over such land. It was 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 from being created by contract in favour of those natural and legal persons. The rights covered by the present action are those which were created before that date.

152. Therefore, as the Commission submits, the rights of usufruct at issue were created lawfully — or that is the impression at least — and entered without conditions in the land register by the competent public authorities. That entry is a crucial factor,[124] given its importance in terms of evidence[125] and in terms of the rights in question being enforceable against third parties.[126] Moreover, no party had challenged the lawfulness of those rights until the legislation at issue was adopted — thus potentially for many years.[127]

122 See Paragraph 1 of Decree No 88 of 15 June 2001 implementing Law No XCV of 1995 on foreign currency.

123 Articles 6:110 and 6:111 of the new Civil Code maintain that solution.

124 See, by analogy, judgment in *SEGRO and Horváth*, paragraph 103. See, also, ECtHR, 29 November 1991, *Pine Valley Developments Ltd and Others v. Ireland*, CE:ECHR:1991:1129JUD001274287, § 51, and ECtHR, 22 July 2008, *Köktepe v. Turkey*, CE:ECHR:2008:0722JUD003578503, § 89: 'In 1993, the applicant acquired in good faith the land at issue which, at that time, was classified, indisputably, as agricultural land … and which *was free of any restrictions in the property register, which was the authoritative legal document in Turkey … No irregularity could therefore be held against the applicant with regard to his acquisition of the land*; were that not the case, the General Directorate of Land Registration *would surely not have issued him with the title deed in the prescribed manner …*' (emphasis added).

125 In accordance with Paragraph 5(1) of the Law on the land register, 'it must be presumed unless proved otherwise that property data that is entered in the register exists and property data that has been deleted from the register does not exist'.

126 Paragraph 3 of the Law on the land register, which was repealed with effect from 15 March 2014 by Paragraph 12(a) of Law No CCIV of 2013 amending [the law on the land register], provided until that date that a right comes into existence only when it is entered in that register and that any amendment involves a new entry.

127 See, by analogy, judgment in *SEGRO and Horváth*, paragraphs 109 and 110. See also ECtHR, 23 September 2014, *Valle Pierimpiè Società Agricola S.p.a. v. Italy*, CE:ECHR:2014:0923JUD004615411, § 48 to 51.

153. The Hungarian Government cannot, in that context, refute the existence of legitimate expectations of that kind by arguing that the usufructuaries concerned had acted in bad faith. Bad faith is not presumed, it must be proved.[128] As the Commission submits, that government cannot merely claim *in abstracto*, without any examination of the individual case, that every usufructuary who does not have the status of close relation of the owner of the land, and who has merely made use of the opportunities provided by the existing legal framework, has acted in bad faith.

(4) The concept of 'deprivation of property'

154. Like Article 1 of Protocol No 1 to the ECHR,[129] Article 17(1) of the Charter contains three distinct rules, namely a general rule (first sentence, 'Everyone has the right to own … possessions.'), a rule relating to the deprivation of property (second sentence, 'No one may be deprived of his or her possessions …') and a rule concerning how the use of property is governed (third sentence, 'The use of property may be regulated by law …').

155. As I have stated, the legislation at issue, in my view, creates an interference in the fundamental right to property of the holders of the right of usufruct affected by it, which constitutes a *deprivation of that property* (second sentence of Article 17(1) of the Charter).

156. It follows from the case-law of the ECtHR that a deprivation of that kind exists in the event of a *transfer of ownership* resulting from a *formal expropriation of possessions*.[130]

157. First, by cancelling by operation of law certain pre-existing rights of usufruct over agricultural land, the legislation at issue has indeed *expropriated* the rights in question from the persons concerned. Those persons have effectively been deprived of the right to use (*usus*) and to collect revenue from (*fructus*) the land concerned.[131]

158. Secondly, immediately after the rights of usufruct in question were cancelled, the attributes of ownership that those persons enjoyed over the agricultural land at issue — *usus* and *fructus* — were *transferred* — or, more precisely, returned — to the owners of the land. As the Commission rightly stated, the fact that that transfer did not benefit the State itself, but individuals — the owners — is irrelevant.[132]

159. Therefore, the two components of the deprivation of property — expropriation and transfer — are, in my view, present in this case.

(5) Can such a deprivation of property be justified?

160. A possible justification for the legislation at issue requires, as a preliminary point, clarification as to the methodology to be used.

128 See, to that effect, judgment in *SEGRO and Horváth*, paragraphs 116, 117 and 121.

129 See ECtHR, 23 September 1982, *Sporrong and Lönnroth v. Sweden*, CE:ECHR:1982:0923JUD000715175, § 67; ECtHR, 21 February 1986, *James and Others v. the United Kingdom*, CE:ECHR:1986:0221JUD000879379, § 37; and ECtHR, 12 December 2002, *Wittek v. Germany*, CE:ECHR:2002:1212JUD003729097, § 41.

130 See, to that effect, ECtHR, 23 September 1982, *Sporrong and Lönnroth v. Sweden*, CE:ECHR:1982:0923JUD000715275, § 62 and 63, and ECtHR, 21 February 1986, *James and Others v. the United Kingdom*, CE:ECHR:1986:0221JUD000879379, § 40.

131 See, by analogy, judgment in *SEGRO and Horváth*, paragraph 63.

132 The ECtHR has therefore recognised the obligation imposed on an individual to give his property to another individual as cases of 'property transfer' and thus 'deprivation' (see ECtHR, 21 February 1986, *James and Others v. the United Kingdom*, CE:ECHR:1986:0221JUD000879379; ECtHR, 21 February 1990, *Håkansson and Sturesson v. Sweden*, CE:ECHR:1990:0221JUD001185585; and ECtHR, 10 July 2014, *Milhau v. France*, CE:ECHR:2014:0710JUD000494411).

161. In that regard, in the context of Article 1 of Protocol No 1 to the ECHR, the test to justify a measure creating a deprivation of property consists in assessing, first of all, as stipulated in the provision, whether that deprivation is 'in the public interest' and 'subject to the conditions provided for by law and by the general principles of international law'.

162. Then, in accordance with the requirements laid down in the case-law of the ECtHR, it must be determined whether the national legislature has struck a 'fair balance … between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights', which entails ascertaining whether there is a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions'. [133]

163. In order to determine whether the deprivation of property at issue strikes the requisite fair balance, the Court must examine in particular whether it imposes a 'disproportionate burden' on the individual affected. [134] To assess whether that is the case, the ECtHR takes account of the terms of compensation. [135] According to the settled case-law of that court, without payment of an 'amount reasonably related to its value', [136] a deprivation of property normally constitutes a disproportionate interference, and a total lack of compensation can be considered justifiable under Article 1 only in exceptional circumstances. [137] In addition, in order to fulfil the requirement of proportionality, that compensation must be paid within a reasonable time. [138]

164. In the scheme of the Charter, the situation seems more complicated. First, in accordance with Article 17(1) thereof, a measure creating a deprivation of property may be adopted only (1) in the public interest, (2) by being provided for by law and (3) subject to 'fair' compensation being paid 'in good time' — the latter two elements being a codification of the requirements laid down in the case-law of the ECtHR.

165. Secondly, Article 52(1) of the Charter applies as a 'general derogation clause'. However, in accordance with that provision, any limitation on the exercise of the right to property must (4) be provided for by law, (5) respect the 'essence' of that right and (6) comply with the principle of proportionality, which, in turn, requires that that limitation (a) be necessary and (b) genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

166. Nevertheless, in the light of the requirement, derived from Article 52(3) of the Charter, not to lead to a level of protection which is less than the protection granted by the ECHR, I think it is possible to regroup those multiple conditions as follows:

– the deprivation of property must be provided for by law (conditions (2) and (4)),

133 See, inter alia, ECtHR, 23 September 1982, *Sporrong and Lönnroth v. Sweden*, CE:ECHR:1982:0923JUD000715175, § 69, and ECtHR, 12 December 2002, *Wittek v. Germany*, CE:ECHR:2002:1212JUD003729097, § 53.

134 See, inter alia, ECtHR, 12 December 2002, *Wittek v. Germany*, CE:ECHR:2002:1212JUD003729097, § 54.

135 See, inter alia, ECtHR, 21 February 1986, *James and Others v. the United Kingdom*, CE:ECHR:1986:0221JUD000879379, § 54. It should be noted that Article 1 of Protocol No 1 to the ECHR contains no reference to such compensation. Nevertheless, as the ECtHR held in that judgment, the absence of an obligation to compensate would render the protection of the right of property 'largely illusory and ineffective'. That court has therefore plugged the gap in the provision by holding that the obligation to pay compensation 'derives from an implicit condition in Article 1 of Protocol No 1 read as a whole' (ECtHR, 8 July 1986, *Lithgow and Others v. the United Kingdom*, CE:ECHR:1986:0708JUD000900680, § 109).

136 Article 1 of Protocol No 1 to the ECHR does not guarantee the right to full compensation since legitimate objectives of public interest may call for less than reimbursement of the full market value. Moreover, the ECtHR grants the State a wide margin of appreciation in that domain (ECtHR, 21 February 1986, *James and Others v. the United Kingdom*, CE:ECHR:1986:0221JUD000879379, § 54).

137 See, inter alia, ECtHR, 21 February 1986, *James and Others v. the United Kingdom*, CE:ECHR:1986:0221JUD000879379, § 54; ECtHR, 9 December 1994, *the Holy Monasteries v. Greece*, CE:ECHR:1994:1209JUD001309287, § 71; and 23 November 2000, *the Former King of Greece and Others v. Greece*, CE:ECHR:2000:1123JUD002570194, § 89.

138 See, inter alia, ECtHR, 21 February 1997, *Guillemin v. France*, CE:ECHR:1997:0221JUD001963292, § 54.

– that deprivation must pursue an objective of general interest (conditions (1) and (6.b)),

– that deprivation must be proportionate to that objective (condition (6.a)), and

– compensation reasonably related to the value of the possession must be paid within a reasonable time (conditions (3) and (5) [139]).

167. Therefore, in the present case, the legislation at issue should be examined in the light of those four conditions.

(i) The requirement of legality

168. In accordance with the case-law of the ECtHR, the words 'provided for by law' imply that the terms and conditions of the deprivation of property in question are defined by provisions of national law which are sufficiently accessible, precise and foreseeable. [140]

169. In the present case, the legislation at issue sets out in a manner which is accessible, precise and foreseeable the cancellation of rights of usufruct created over agricultural land for the benefit of persons who do not have a close family tie with the owner of the land. Moreover, the Hungarian law defines precisely those persons who have family tie of that kind. [141] I therefore consider that that first condition is satisfied.

(ii) The existence of an objective of general interest

170. As far as the existence of a reason 'in the public interest' justifying the deprivation at issue is concerned, the ECtHR confers on the States who are parties to the ECHR a wide margin of appreciation. That court respects the national legislature's judgment as to what is 'in the public interest' unless that judgment is 'manifestly without reasonable foundation'. [142]

171. I would point out that the Hungarian Government has invoked three different objectives in order to justify the legislation at issue, namely an agricultural policy objective, the desire to penalise infringements of national legislation concerning exchange controls and the objective of combating abusive purchase practices on grounds of public policy. [143]

172. Given the margin of discretion that the Member States must have in this field, such objectives may, in my view, be regarded as objectives of general interest recognised by the Union, within the meaning of Article 17(1) and Article 52(1) of the Charter.

(iii) The proportionality of the legislation at issue

173. As a general rule, the Court, like the ECtHR, should confer on the national legislature discretion regarding the proportionality of a deprivation of property. [144]

139 In my view, conditions (3) and (5) are intertwined. A measure which entails a deprivation of liberty cannot respect the *essence* of the right to property if it does not provide, in return for that expropriation, fair compensation within a reasonable time — save in exceptional circumstances.

140 See, to that effect, ECtHR, 1 December 2005, *Păduraru v. Romania*, CE:ECHR:2005:1201JUD006325200, § 77.

141 See Paragraph 5(13) of the 2013 Law on agricultural land.

142 See, inter alia, ECtHR, 21 February 1986, *James and Others v. the United Kingdom*, CE:ECHR:1986:0221JUD000879379, § 46; ECtHR, 22 June 2004, *Broniowski v. Poland*, CE:ECHR:2004:0622JUD003144396, § 149; and ECtHR, 14 February 2006, *Lecarpentier and Other v. France*, CE:ECHR:2006:0214JUD006784701, § 44.

143 See footnote 26 of this Opinion.

144 See, by analogy, judgment of 13 June 2017, *Florescu and Others* (C-258/14, EU:C:2017:448, paragraph 57).

174. That said, even if that discretion is taken into account, I take the view that the deprivation of property at issue cannot be regarded as proportionate in the light of the objectives pursued by Hungary.

175. First, in my view, the burden of proving that the cancellation by operation of law of the rights of usufruct concerned is proportionate fell to that Member State. However, it has not really adduced evidence to that effect but, in essence, has merely submitted that the rights of usufruct in question are unlawful.

176. Secondly, and in any event, the Commission has stated that a number of measures that are less drastic than that cancellation by operation of law would have enabled the objectives pursued by Hungary to be achieved. With regard to the agricultural policy objective, it would have been possible to require the usufructuary to preserve the agricultural use of the land concerned, where appropriate, by actually farming it himself, under conditions that ensure that it is viable to farm. As regards the objective of penalising possible infringements of national legislation concerning exchange controls, simple fines would have sufficed. As to the objective of combating abusive purchase practices on grounds of public policy, the cancellation of the rights of usufruct concerned cannot be justified without examining on a case-by-case basis whether they are really fraudulent in nature.[145] Furthermore, in my view, those objectives did not justify cancelling the rights of usufruct in question *by granting such a short transitional period*.[146]

(iv) Compensation procedures

177. I would point out that the legislation at issue does not provide for a specific compensation mechanism for usufructuaries whose property has been expropriated. They may only obtain compensation from the owners of the land under the regulation which results in the extinction of the usufruct, in accordance with the rules of civil law.[147]

178. The Commission and the Hungarian Government disagree as to the specific rules to be applied and the extent of the compensation which the usufructuary may obtain from the owner. The Commission takes the view that Article 5:150(2) of the new Civil Code[148] applies, which provides for reimbursement, when the usufruct is terminated, only for the cost of renovations and extraordinary repairs carried out by the usufructuary which, in principle, are incumbent on the owner. By contrast, the Hungarian Government submits that Article 6:180(1) of that code,[149] on resolving the consequences of it being legally impossible to perform a contract, applies, possibly together with a settlement under Article 5:150(2). In total, according to the Hungarian Government, the usufructuary may obtain compensation that is equivalent to a proportionate share of the monetary consideration

145 See, by analogy, judgment in *SEGRO and Horváth*, paragraphs 92, 93, 106, 121 and 122.

146 I would point out that that transitional period, which was initially fixed at 20 years, was ultimately reduced to 4 months and 15 days (see points 24 and 25 of this Opinion).

147 As indicated in points 29 and 62 of this Opinion, in judgment No 25 of 21 July 2015, the Alkotmánybíróság (Constitutional Court) held that those compensation procedures were compatible with the Hungarian Fundamental Law, provided that the owner, for his part, is entitled to compensation from the State.

148 According to that provision, 'when the usufruct is cancelled, the usufructuary may claim from the owner, under the rules concerning unjust enrichment, reimbursement corresponding to the increase in the value of the property following the extraordinary repairs or renovations carried out at his own expense'.

149 In accordance with that provision, 'if the responsibility for it having become impossible to perform the contract cannot be attributed to either of the parties, the monetary value of the services provided before the time when the contract was terminated shall be compensated. If the other party did not perform the services corresponding to the monetary consideration already paid, that money shall be refunded'. As the Commission observes, it is curious to say the least, given the line of argument put forward by Hungary with regard to the usufruct contracts at issue allegedly being invalid *ab initio*, that it invokes, in that connection, the rules of civil law which apply if it is impossible to perform a contract — assumed to be valid — rather than those concerning *restitutio in integrum* if the contract is invalid.

that he had initially paid for the usufruct and the investments which he has made — tools, planting, etc. — and which improve the property. The Commission contends that, in any event, similar compensation does not cover investments which are not directly quantifiable but have been made by the usufructuary in the expectation of continuing to enjoy the land or lost earnings.

179. In my view, whichever article of the Hungarian Civil Code applies, the compensation procedures provided do not comply with the requirements of Article 17(1) of the Charter — again, despite the discretion that the Member States must be granted in this domain.

180. First of all, the rules of civil law thus relied on place on the usufructuary the burden of pursuing the recovery of compensation payable to him by means of procedures that may prove lengthy and expensive.[150] However, the case-law of the ECtHR would suggest that national legislation which does not pay the necessary compensation *automatically* and which requires the individual concerned to assert his claim in the context of judicial proceedings of that kind does not satisfy the requirements of Article 1 of Protocol No 1 to the ECHR.[151]

181. Moreover, those rules of civil law do not offer the usufructuary the guarantee that he will obtain compensation that is *reasonably related to the value of his possession*.[152] Those rules, at most, enable the usufructuary to recover a proportionate share of the consideration initially paid — which, therefore, does not take account of the actual value of the usufruct on the day on which it was cancelled by operation of law — and the amount of certain investments made in the land. Furthermore, in so far as, in the present case, the possessions which were taken from the usufructuaries were their 'tools', the compensation must necessarily cover that specific loss, which means compensating not only the losses incurred on the date the rights were cancelled, but also a reasonable assessment of the loss of the additional part of the future income which the usufructuaries would have received from farming the land if the rights of usufruct had not been cancelled.[153]

182. Finally, under such compensation procedures, the usufructuary must bear the risk of the owner being insolvent and unable to pay that compensation.[154]

183. In the light of all the foregoing, I take the view that Paragraph 108(1) of the 2013 Law on transitional measures is incompatible with Article 17(1) of the Charter.

VI. Conclusion

184. In the light of all the foregoing considerations, I propose that the Court should declare that:

(1) By cancelling by operation of law, under Paragraph 108(1) of the mező- és erdőgazdasági földek forgalmáról szóló 2013. évi CXXII. törvénnyel összefüggő egyes rendelkezésekről és átmeneti szabályokról szóló 2013. évi CCXII. törvény (Law No CXXII of 2013 on transactions in agricultural and forestry land), the rights of usufruct over and the rights to use agricultural and

150 See, by analogy, judgment in *SEGRO and Horváth*, paragraph 91.

151 See, to that effect, ECtHR, 30 May 2000, *Carbonara and Ventura v. Italy*, CE:ECHR:2000:0530JUD002463894, § 67, and ECtHR, 9 October 2003, *Biozokat A.E. v. Greece*, CE:ECHR:2003:1009JUD006158200, § 29. See also Kjølbro, J.F., *Den Europæiske Menneskerettighedskonvention: for praktikere*, 4th Edition, 2017, p. 1230.

152 See, by analogy, judgment in *SEGRO and Horváth*, paragraph 91.

153 See, by analogy, ECtHR, 12 June 2003, *Lallement v. France*, CE:ECHR:2003:0612JUD004604499, § 10.

154 See, by analogy, judgment in *SEGRO and Horváth*, paragraph 91. As regards Hungary's argument that persons who are deprived of their right of usufruct may continue to enjoy the agricultural land in question by concluding, for example, a tenancy agreement with the owners of the land, it is sufficient to note, as has the Commission, that that solution offers no guarantee to the usufructuary since there is no requirement for land owners to conclude an agreement of that kind.

forestry land which had previously been created for the benefit of legal or natural persons who cannot demonstrate a close family tie with the owner of the land, Hungary has failed to fulfil its obligations under Article 63 TFEU.

(2) The remainder of the action is dismissed.