



Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV

Delivered on 16 September 2021¹

Case C-177/20

‘Grossmania’ Mezőgazdasági Termelő és Szolgáltató Kft

v

Vas Megyei Kormányhivatal

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

(Reference for a preliminary ruling – Principles of EU law – Primacy – Direct effect – Conflict between EU law and national law – Infringement of EU law established by the Court of Justice in a preliminary ruling as well as in an infringement action – Obligations and rights of national administrative authorities and courts – Non-application of the national law to cases which are similar, but not identical, to those at issue in that preliminary ruling – Administrative decision becoming final in the absence of a challenge before the courts – Disapplication or withdrawal of such a decision due to it being contrary to EU law – *Kühne & Heitz* (C-453/00) line of case-law)

1. This case presents the Court with a fundamental Cornelian dilemma in law: whether to give precedence to the principle of legality or the principle of legal certainty. The preliminary reference was submitted by the Győri Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Győr, Hungary) in the context of a decision rejecting the re-registration of the applicant’s cancelled usufruct rights over agricultural land.

I. The facts giving rise to the dispute in the main proceedings and the question referred for a preliminary ruling

2. Grossmania is a commercial company based in Hungary and comprises nationals of Member States other than Hungary. Grossmania held rights of usufruct over immovable properties in Hungary. Those rights were cancelled in the property register pursuant to Paragraph 108(1) of the a mező- és erdőgazdasági földek forgalmáról szóló 2013. évi CXXII. törvénnyel összefüggő egyes rendelkezésekről és átmeneti szabályokról szóló 2013. évi CCXII. Törvény (Law No CCXII of 2013 laying down various provisions and transitional measures concerning Law No CXXII of 2013 on transactions in agricultural and forestry land; ‘the 2013 Law on transitional measures’) and Paragraph 94(5) of the az ingatlan-nyilvántartásról szóló 1997. Évi CXLI. törvény (Law No CXLI of 1997 on the property register; ‘the Law on the property register’). Grossmania did not appeal against the cancellation of its rights of usufruct.

¹ Original language: English.

3. By judgment of 6 March 2018, *SEGRO and Horváth*, (Joined Cases C-52/16 and C-113/16, EU:C:2018:157) ('the judgment in *SEGRO and Horváth*'), the Court held that Article 63 TFEU precluded national legislation, such as that at issue in the main proceedings, under which rights of usufruct which have previously been created over agricultural land and the holders of which do not have the status of close relation of the owner of the land were extinguished by operation of law and were, consequently, deleted from the property registers.

4. As a result, Grossmania applied to the Vas Megyei Kormányhivatal Celldömölki Járási Hivatala (Celldömölk District Registry, part of the Vas Region Administrative Department, Hungary; 'the first-tier administrative authority') to have its rights of usufruct over the properties in question re-registered. By decision of 17 May 2019, it rejected that request, referring in particular to Paragraph 108(1) of the 2013 Law on transitional measures.

5. Grossmania lodged an administrative appeal and, by decision of 5 August 2019, the Vas Region Administrative Department confirmed the above decision. It stated that the application for re-registration was inadmissible in particular on the basis that Paragraph 108(1) of the 2013 Law on transitional measures was still in force. In its view, the judgment in *SEGRO and Horváth* and the judgment of 21 May 2019, *Commission v Hungary (Usufruct Over Agricultural Land)* (C-235/17, EU:C:2019:432) ('the judgment in *Commission v Hungary*') were not applicable to this case.

6. Grossmania brought an administrative law action before the referring court against the decision of 5 August 2019. The referring court points out that there can be no financial compensation for Grossmania as there are no national provisions allowing for such compensation. It refers to case-law of the Alkotmánybíróság (Constitutional Court, Hungary). In that case-law it was held that a situation had been created which was contrary to the Hungarian Fundamental Law because, as regards rights of usufruct and rights of use extinguished pursuant to Paragraph 108 of the 2013 Law on transitional measures, the legislature had not adopted legislation allowing compensation to be awarded for exceptional pecuniary damage which cannot be claimed in the context of a settlement between the parties to the contract but which relates to valid contracts. The Alkotmánybíróság called upon the legislature to rectify that omission, which was contrary to the Fundamental Law, by 1 December 2015. However, over five and a half years later no provision has been adopted in that regard. The referring court points out that the facts in *SEGRO and Horváth* differ from those in the present case in that Grossmania did not bring an action against the administrative decisions cancelling its rights of usufruct.

7. Therefore, the Győri Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Győr) decided to stay proceedings and refer to the Court of Justice the following question for a preliminary ruling:

'Must Article 267 TFEU be interpreted as meaning that, where the Court of Justice, in a decision given in preliminary ruling proceedings, has declared a legislative provision of a Member State to be incompatible with EU law, that legislative provision cannot be applied in subsequent national administrative or judicial proceedings either, notwithstanding that the facts of the subsequent proceedings are not entirely identical to those of the previous preliminary ruling proceedings?'

II. Analysis

A. Brief summary of the arguments of the parties

8. Written observations were submitted by Grossmania, the German, Spanish and Hungarian Governments and the European Commission.

9. Given that all the parties (save for the Hungarian Government) rely on the same case-law and raise arguments which overlap in order to submit that the question must be answered in the affirmative, I will limit myself to referring to their main arguments in my assessment.

10. The Hungarian Government submits, first, that – as the referring court itself observed – the situation in the main proceedings differs from the one underlying the judgment in *SEGRO and Horváth*, given that Grossmania had not appealed the cancellation of its usufruct rights in 2014. It follows from the judgment of 13 January 2004, *Kühne & Heitz* (C-453/00, EU:C:2004:17) ('the judgment in *Kühne & Heitz*') that an administrative authority is only required to re-examine such a decision if the four conditions in paragraph 28 of that judgment are fulfilled. It is not disputed by the parties that this is not the case here. In those circumstances, it is necessary to strike a balance between the principle of legal certainty and the principle of legality under EU law and to ascertain whether the principles of equivalence and effectiveness are observed, so that individuals are able to make claims on the basis of EU law. The Hungarian Government contends that the national rules for actions in force at the relevant time respected those requirements. Secondly, the Hungarian Government argues that, in the near future, national rules will be adopted which will guarantee that – in relation to cancelled rights of usufruct – the interests of the parties concerned will be duly taken into account. This topic is currently the subject of discussions with the Commission.

B. Assessment

1. Preliminary observations

11. This case raises the question whether a judgment of the Court – which declared a national provision (Paragraph 108(1) of the 2013 Law on transitional measures) to be contrary to EU law – prevents the application of that provision to situations, which are comparable to that which gave rise to that judgment, but which are not identical. That question must be answered in the affirmative.

12. This follows *inter alia* from the fact that the obligation imposed on courts of last instance to refer a question for a preliminary ruling has an exception: where 'the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case'.²

² Judgment of 6 October 1982, *Cilfit and Others* (283/81, EU:C:1982:335, paragraphs 13 and 14).

13. In the judgment in *SEGRO and Horváth*, paragraph 129, the Court ruled that Article 63 TFEU precludes a provision such as Paragraph 108(1) of the 2013 Law on transitional measures.³ Despite the fact that the question referred merely mentions the judgment in *SEGRO and Horváth*, it is clear that it is necessary in the present Opinion to take into account also the judgment in *Commission v Hungary*. Indeed, that judgment specifically declared that Hungary had failed to fulfil its obligations, under Article 63 TFEU and Article 17 of the Charter of Fundamental Rights of the European Union ('the Charter'), when it adopted Paragraph 108(1) of the 2013 Law on transitional measures.

14. First, that judgment establishing a breach of obligations is *res judicata* in relation to facts and law decided upon in that judgment. Secondly, 'the finding that a Member State has failed to fulfil its obligations under [EU] law entails, first, an automatic prohibition, on the application, by both the judicial and administrative authorities of that Member State, of the [national measure at issue] and, secondly, an obligation on the part of those authorities to take all appropriate measures to facilitate the full application of [EU] law'.⁴

15. It follows from the foregoing that the Hungarian authorities (including the referring court) are obliged to disapply Paragraph 108(1) of the 2013 Law on transitional measures, which – some two and a half years after the judgment establishing Hungary's breach of obligations – is still maintained in force by the Hungarian legislature.

16. In fact, not only has Hungary failed to act further to those two judgments of the Court, but it has also introduced new provisions which prevent EU law from being given its full effect. Those provisions make the re-registration of usufruct rights more difficult following their unlawful cancellation. I will deal with the new provisions (Subparagraphs 4 and 5 of Paragraph 108 of the 2013 Law on transitional measures) at the end of my Opinion.

2. Is this a 'disapplication of a final national decision' situation?

17. On the basis of the documents before the Court, it may not be necessary to annul the decisions cancelling the usufruct rights. If that is so, then a situation does not arise in which a final national decision must be disapplied.

18. According to the Hungarian Government, Grossmania is in a different factual situation to SEGRO or Horváth who appealed the decisions cancelling their usufruct rights. The Grossmania decisions are *res judicata*, or in other words final national decisions, with the result that it is no longer possible to alter the decisions cancelling Grossmania's usufruct rights.

19. However, contrary to those arguments, it appears that under Hungarian law there is a special procedure, entitled the 'review procedure', which may be requested by the national administration on its own initiative within five years of a decision becoming final.

20. The referring court will therefore need to determine several issues. First, as pointed out by the Commission, it will have to establish whether the competent authority failed to raise the argument that the decisions cancelling Grossmania's usufruct rights had become final decisions. Secondly, it

³ See Leitner, P., 'Enteignung' in Ungarn?, *ecolex*, 2018, p. 680, Guski, R., *Kapitalverkehrs-freiheit vs. Agrarpolitik*, GPR, 3/2019, p. 102, Mok, M.R., *Redactionele aantekening*, *Nederlandse Jurisprudentie*, 2019/68, p. 1090, Petit, Y., *commentaire*, *Droit rural*, n. 466, October 2018, 163, and Ludwigs, M., *Anmerkung*, *EuZW*, Number 8/2018, p. 339.

⁴ Judgment of 19 January 1993, *Commission v Italy* (C-101/91, EU:C:1993:16, paragraph 24).

will have to order the re-registration of Grossmania's cancelled rights or, if necessary, annul the contested decision (which rejected Grossmania's application to have the usufruct rights re-registered). Thirdly, the referring court will have to enjoin the competent authority to carry out a new procedure, that authority being obliged on this occasion to interpret the national rules through the prism of the *effet utile* of EU law. If necessary, in this respect, the administration will have to take advantage of the review procedure referred to above in order to re-register the cancelled rights.

21. Indeed, it follows from the documents before the Court that the Hungarian authorities simply failed to ascertain whether or not the decisions cancelling Grossmania's usufruct rights were final. Nor did they consider how Hungarian law could be applied in conformity with EU law.

22. All the parties have focused on the alleged conflict between the principle of legal certainty and the principles of legality and primacy of EU law, however, it is important first to establish whether in fact such a conflict arises in the case in the main proceedings.

23. I would point out (as does the German Government) that the referring court starts from the premiss that the cancellation of the usufruct rights was made *ex lege* and that, in fact, no legitimate administrative decision was actually taken. This is an element for the referring court to establish, but in such a case we would not be in the *Kühne & Heitz*⁵ and the *i-21 Germany*⁶ situation.

24. In such a case, in accordance with the principle of sincere cooperation (Article 4(3) TEU), 'the Member States are required to nullify the unlawful consequences of a breach of [EU] law' and 'it is for the authorities of the Member State concerned to take the general or particular measures necessary to ensure that [EU] law is complied [with] within that State ... While they retain the choice of the measures to be taken, those authorities must in particular ensure that national law is changed so as to comply with [EU] law as soon as possible and that the rights which individuals derive from [EU] law are given full effect'.⁷

25. Moreover, 'the effects of the principle of the primacy of EU law are binding on all the bodies of a Member State ... Rules of national law, even constitutional provisions, cannot be allowed to undermine the unity and effectiveness of EU law'.⁸

26. First, the Hungarian authorities will need to establish whether the cancelling decisions are final. If they are, then they need to ascertain whether those decisions can be re-examined under national law. Once the Hungarian authorities have completed that assessment, they will need to take account of the *effet utile* and the primacy of EU law.

⁵ This judgment caused much controversy: see Caranta, R., *Case C-453/00, Kühne & Heitz*, CMLR 42, 2005, p. 179, Prechal, S., *Annotation of Kühne & Heitz*, Sociaal-Economische Wetgeving, 2004, p. 278, Katz, D., Une autorité administrative peut être tenue de réexaminer une décision administrative définitive pour prendre en compte une interprétation postérieure de la Cour de justice, JCP A, 2004, p. 707, Peerbux-Beaugendre, Z., Une administration ne peut invoquer le principe de la force de chose définitivement jugée pour refuser de réexaminer une décision dont une interprétation préjudicielle ultérieure a révélé la contrariété avec le droit communautaire, RDUE, 2004, p. 559, and Simon, D., Obligation de réexamen d'une décision administrative définitive. L'autorité d'un arrêt préjudiciel en interprétation postérieur à une décision administrative devenue définitive impose la prise en compte de la demande de retrait de celle-ci, Europe, 2004, p. 66. On the specificity of this case, see Lenaerts, K., and Corthout, T., *Rechtsvinding door het Hof van Justitie*, 55 AA, 2006, pp. 581 and 582.

⁶ Judgment of 19 September 2006, *i-21 Germany and Arcor* (C-392/04 and C-422/04, EU:C:2006:586; 'the judgment in *i-21 Germany*'). See case note by Taborowski, M., *Joined cases C-392/04 & C-422/04*, CMLR 44, 2007, p. 1463.

⁷ Judgment of 21 June 2007, *Jonkman and Others* (C-231/06 to C-233/06, EU:C:2007:373, paragraphs 37 and 38) ('judgment in *Jonkman*').

⁸ Judgment of 21 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 148).

3. *The obligation to disapply national legislation as a consequence of a preliminary ruling of the Court*

27. If, despite the above considerations, it proves necessary for the referring court to address the obligation to disapply national legislation, I would make the following observations.

28. At the outset, all the parties (even the Hungarian Government) agree, in essence, that the Court's interpretation in the judgment in *SEGRO and Horváth* (paragraphs 45 and 46) entails, in the present case, the obligation to disapply the Hungarian legislation as it is contrary to Article 63 TFEU.

29. The preliminary reference procedure is designed to ensure cooperation between national courts and the Court of Justice, with the objective of guaranteeing the primacy and uniformity of EU law. Therefore, as pointed out by the Spanish Government, it is necessary to ensure the binding character of the Court's judgments, otherwise it is not only the protection accorded by EU law that would be jeopardised, but also the coherence of EU law, thus creating discrimination within EU law.

30. Furthermore, even though the referring court is bound by the Court's judgment, the *erga omnes* effects of the Court's judgments are applicable in the entire Union⁹ to equivalent situations.

31. The binding effect of a preliminary ruling given by the Court relates to the interpretation of a rule of EU law and that interpretation 'is purely declaratory, with the consequence that in principle it takes effect from the date on which the rule interpreted entered into force'.¹⁰ That binding effect is *linked with the norm* of EU law at issue. If such binding effect were strictly *limited only to the given situation* that would be contrary to the purpose of the preliminary ruling procedure, which is to guarantee a uniform interpretation of EU law.¹¹

32. The binding character of that interpretation follows from the primacy of EU law, the *Da Costa* and *Cilfit* case-law,¹² the declaratory and retroactive character of the Court's interpretation, and the purpose of the preliminary ruling procedure which is to ensure the unity and consistency (that is, avoiding divergent interpretation), the full effect and the autonomy of EU law.

33. Indeed, in the judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158, paragraph 35), the Court recalled that 'in order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law'. In that context, 'in accordance with Article 19 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the *full application* of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law'.¹³ In particular, 'the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the

⁹ See also judgment of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 38).

¹⁰ Judgment of 12 February 2008, *Kempter* (C-2/06, EU:C:2008:78, paragraph 35). See case note by Simon, D., Europe, April 2008, p. 13.

¹¹ Judgment of 16 January 1974, *Rheinmühlen-Düsseldorf* (166/73, EU:C:1974:3, paragraph 2).

¹² Judgments of 27 March 1963, 28/62 to 30/62, EU:C:1963:6, and of 6 October 1982, 283/81, EU:C:1982:335.

¹³ Emphasis added (*Achmea*, C-284/16, EU:C:2018:158, paragraph 36).

courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties'.¹⁴

34. It follows that 'in the light of the primacy principle, where it is unable to interpret national law in compliance with the requirements of EU law, the national court which is called upon within the exercise of its jurisdiction to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for that court to request or await the prior setting aside of such provision by legislative or other constitutional means'.¹⁵ In that regard, if the national court has doubts, 'even when there is case-law of the Court resolving the point of law at issue, national courts remain entirely at liberty to bring a matter before the Court if they consider it appropriate to do so'.¹⁶ However, clearly, the national court is not obliged to do so if it does not harbour such doubts.¹⁷

4. *The impact of the final character of decisions cancelling rights of usufruct*

35. Next, even though it follows from the foregoing considerations that the judgments in *SEGRO and Horváth* and in *Commission v Hungary* should lead the referring court to disapply the national provisions at issue invoked by the Hungarian authorities in order to reject Grossmania's application seeking re-registration – and indeed the referring court starts on the assumption that it must proceed as such – it follows from the documents before the Court that the referring court's doubts concern rather the existence of administrative decisions (cancelling those rights) which had become final.

36. It is true that it 'is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of [EU] law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and are not framed in such a way as to render impossible in practice the exercise of rights conferred by [EU] law (principle of effectiveness)'.¹⁸

37. However, as the Commission pointed out, given the importance of legal certainty, that principle may not be invoked in order to justify a Member State diminishing the *effet utile* of EU law. It follows from the case-law that 'the Member States have the task of designating the courts and/or institutions empowered to review the validity of a national provision, and of prescribing the legal remedies and the procedures for contesting its validity and, where the action is well founded, for striking it down and, as the case may be, determining the effects of such striking down'.¹⁹

¹⁴ *Achmea*, C-284/16, EU:C:2018:158, paragraph 37 and case-law cited.

¹⁵ Judgment of 6 October 2020, *La Quadrature du Net and Others* (C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraphs 214 and 215).

¹⁶ Judgment of 3 March 2020, *Tesco-Global Áruházak* (C-323/18, EU:C:2020:140, paragraph 46).

¹⁷ Judgment of 19 January 2010, *Küçükdeveci* (C-555/07, EU:C:2010:21, paragraphs 53 and 54).

¹⁸ Judgment of 16 May 2000, *Preston and Others* (C-78/98, EU:C:2000:247, paragraph 31).

¹⁹ Judgment of 4 December 2018, *Minister for Justice and Equality and Commissioner of the Garda Síochána* (C-378/17, EU:C:2018:979, paragraph 34).

38. It appears from the documents before the Court that the Hungarian authorities did not invoke the final character of the decisions cancelling Grossmania's usufruct rights. Whether those decisions are final will depend on the applicable Hungarian procedural rules, but in principle such an omission should lead to those authorities being barred from relying on that final character. It is possible that Hungarian law allows those authorities to waive the right to invoke the final character of those decisions – or, what amounts to the same thing, the national law allows the authorities to reverse such decisions. Indeed, according to the case-law, 'if the applicable domestic rules of procedure provide the possibility, under certain conditions, for a national court [or a national administrative authority] to go back on a decision having the authority of *res judicata* in order to render the situation compatible with national law, that possibility must prevail if those conditions are met, in accordance with the principles of equivalence and effectiveness, so that the situation at issue is brought back into line with EU law'.²⁰ Therefore, the referring court would have to take that into account so as to prevent a breach of the principle of equivalence in this case.

39. It follows, in particular, from the judgment of 4 October 2012, *Byankov* (C-249/11, EU:C:2012:608) ('the judgment in *Byankov*') that 'the Court has already acknowledged that finality of an administrative decision contributes to legal certainty, with the consequence that EU law does not require that an administrative body be, in principle, under an obligation to reopen an administrative decision which has become final' (paragraph 76 of that judgment).

40. However, 'particular circumstances may be capable, by virtue of the principle of sincere cooperation arising from Article 4(3) TEU, of requiring a national administrative body to review an administrative decision that has become final, in particular to take account of the interpretation of a relevant provision of European law which the Court has given subsequently ... It can be seen from the case-law that, in that context, the Court has taken account of the particular features of the situations and interests at issue in order to strike a balance between the requirement for legal certainty and the requirement for legality under EU law'.²¹

41. Moreover, it follows from the case-law that the principle of effectiveness is deduced (as is the principle of equivalence) from the principle of sincere cooperation enshrined in Article 4(3) TEU (judgment in *XC*).²²

42. According to paragraph 23 of the judgment in *XC*, 'the requirements stemming from those principles apply both to the designation of the courts and tribunals having jurisdiction to hear and determine actions based on EU law and to the definition of the procedural rules governing such actions'.

43. Next, paragraph 24 of the same judgment states that 'the observance of those requirements must be analysed by reference to the role of the rules concerned in the procedure viewed as a whole, to the conduct of that procedure and to the special features of those rules before the various national courts'.

44. It follows from the above that the requirement to respect the final character of decisions such as those in the main proceedings must be examined in the light of the principle of effectiveness.

²⁰ Judgment of 11 September 2019, *Călin* (C-676/17, EU:C:2019:700, paragraph 29).

²¹ Paragraph 77 of that judgment. See, on the case-law in relation to national procedural rules, Biondi, A., *The European Court of Justice and certain national procedural limitations: Not such a tough relationship*, 36 CMLR, 1999, p. 1271, and Hoskins, M., *Tilting the balance: Supremacy and national procedural rules*, 21 European Law Review, 1996, p. 365.

²² Judgment of 24 October 2018, *XC and Others* (C-234/17, EU:C:2018:853, 'the judgment in *XC*', paragraph 22).

45. In the present case, it is necessary to apply the judgment in *Byankov*. Indeed, the Court ruled in that case that EU law *precludes* legislation of a Member State under which an administrative procedure that has resulted in the adoption of a prohibition on leaving the territory, which has become final and has not been contested before the courts, may, in essence, not be reopened, in the event of the prohibition being clearly contrary to EU law, and despite the fact that such a prohibition continues to produce legal effects with regard to its addressee.

46. The Court ruled that such a result may not reasonably be justified by the principle of legal certainty.²³

47. As was decided in *Byankov*, I consider (as does the German Government and the Commission) that the principle of legal certainty, which must be balanced against the requirement to comply with EU law, – may not be used by a Member State as a means to avoid applying EU law.²⁴

48. I do not think that Hungary can legitimately invoke, in the present case, the principle of legal certainty whilst it preserves in its legal order provisions which have been declared by the Court to be contrary to EU law some two and a half years ago. Indeed, as the Roman law provided: '*Commodum ex injuria sua nemo habere debet*' (a wrongdoer should not be enabled by law to take any advantage from his actions). Moreover, it would be easy to cut short the argument relating to the principle of legal certainty if the Hungarian authorities had complied with those judgments of the Court and fulfilled their obligations under EU law. In particular, the Hungarian legislature should adopt rules which would allow persons whose usufruct rights were unlawfully cancelled to be compensated, including the possibility to re-register those rights and where that is no longer possible to allow for a corresponding financial compensation. As such steps have not been taken, and as the Commission submitted at the hearing, it is reasonable to assume, in the present case, that the Hungarian authorities are intent on reducing the effects of the Court's judgments.

49. It is true that the judgment in *Byankov* was handed down in a case where respecting the final character of the decision at issue would have resulted in perpetuating the prohibition on leaving the Member State's territory, which was adopted for an unlimited period of time, and thus constituted a breach of the right of free movement under Article 21 TFEU.

50. However, there is a clear parallel between the present case and the case in *Byankov* in so far as in the present case there has been a serious violation of the fundamental right to property under Article 63 TFEU and under Article 17 of the Charter. This is so a fortiori as it appears that this violation is carried out on a grand scale.²⁵

51. Therefore, in the present case, the Court should adopt the same reasoning as was applied in *Byankov* in order to attenuate the importance to be attached to the final character of a decision.

²³ Judgment in *Byankov*, paragraphs 79, 81 and 82.

²⁴ See judgments in *Kühne & Heitz* (paragraphs 25 and 26) and in *Byankov* (paragraph 77).

²⁵ It follows from paragraph 71 of the judgment in *SEGRO and Horváth* that 5 058 nationals from Member States other than Hungary had their usufruct rights cancelled. This cancellation was not accompanied by any form of compensation, thus simply depriving those nationals of their property/investments.

52. Next, it is relevant to examine how to interpret the fact that the Hungarian authorities based their decisions of 17 May 2019 and of 5 August 2019 (rejecting Grossmania's application for re-registration) not on the final character of the cancellation decisions, but rather on the fact that Paragraph 108(1) of the 2013 Law on transitional measures continues to be in force.

53. I consider (as does the Commission) that the Hungarian authorities made an error of law in that respect. However, the error does not merely consist in identifying the wrong legal basis. Instead, I fear that it points to a more serious, systemic problem. Contrary to the arguments made by the Hungarian Government, the Hungarian authorities did not approach the problem through the prism of the principle of legal certainty – they simply ignored the judgments of the Court. This is contrary to the principles of sincere cooperation (Article 4(3) TEU), the primacy of EU law and/or the principle of effectiveness flowing therefrom.

5. Is there an obligation to re-register the rights of usufruct?

54. I agree with Grossmania and the Commission that the re-registration of Grossmania's rights would constitute a logical consequence of their unlawful cancellation. Indeed, in the present case, the holders of usufruct rights, which were cancelled on the basis of Paragraph 108 of the 2013 Law on transitional measures, should be placed in the same situation as if the national legislation at issue had never been adopted. In accordance with the judgment in *Jonkman*, the Hungarian authorities must take all necessary individual or general measures in order to guarantee that rights which individuals derive from EU law are given full effect. That is particularly so in a case such as the present case where not only is there an existing Court precedent, handed down in a preliminary ruling case (which deals with the same legal question), but where, moreover, the Court held that the legislation at issue was unlawful under EU law in the context of an infringement case.

55. However, there may be objective obstacles to such a remedy (for example where after the cancellation of the rights of usufruct, a new owner acquired the land concerned or where the owner of the land and the former holder of those rights enter into a compensation agreement in relation to the cancellation of the rights or another usage right is registered on the land concerned). Then, if no financial compensation is possible, because the Hungarian legislature has not introduced rules in that respect, then as a remedy of last resort, the referring court would have to ascertain whether Grossmania may rely on the *Brasserie du pêcheur and Factortame*²⁶ case-law to require the State to make good damage caused to Grossmania by a breach of EU law attributable to the State.

6. General considerations and criticism of the Court's case-law on the finality of administrative decisions contrary to EU law and their withdrawal

56. The withdrawal of administrative decisions is a legal instrument known, in principle, to the administrative laws of all the Member States.²⁷

²⁶ Judgment of 5 March 1996, C-46/93 and C-48/93, EU:C:1996:79, paragraphs 21, 22, 31 and 36.

²⁷ Ritleng, D., *Le retrait des actes administratifs contraires au droit communautaire*, Bestand und Perspektiven des europäischen Verwaltungsrechts, 2008, p. 237, and Taborowski, M., op. cit., p. 1481. See also Müller, H., *Die Aufhebung von Verwaltungsakten unter dem Einfluss des Europarechts*, Duncker & Humblot, Berlin 2000, and Kovar, R., *Le retrait des actes administratifs nationaux contraires au droit communautaire*, Mél. L. Favoreu, Dalloz 2007. Moreover, in relation to the withdrawal of EU administrative acts, see Lübbig, T., *Die Aufhebung (Rücknahme und Widerruf) von Verwaltungsakten der Gemeinschaftsorgane*, EuZW, 2003, p. 233.

57. Similarly to the approach already defended by Advocates General Léger,²⁸ Ruiz-Jarabo Colomer²⁹ and Bot,³⁰ I consider that the Court should depart from its *Kühne & Heitz* line of case-law. That case-law poses well-documented problems of interpretation, for example, the question raised by the *Bundesverwaltungsgericht* (Federal Administrative Court, Germany) in the case which gave rise to the judgment in *i-21 Germany*. In addition, the judgment in *Kühne & Heitz* has been criticised as casuistic and obscure³¹ in the legal literature.³²

58. First, it is my opinion that in order to safeguard the rights of parties such as Grossmania the approach taken in the judgment of 29 April 1999, *Ciola* (C-224/97, EU:C:1999:212, paragraph 32) (and cases such as *Simmenthal*, *Factortame* and *Larsy*,³³ favouring the primacy of EU law and effectiveness) should be preferred to the approach taken in *Kühne & Heitz*. In *Ciola*, the Court held that the primacy of EU law can be claimed also with respect to individual administrative decisions so that primacy is not pertinent only in conflicts of abstract norms.³⁴ Hence, on balance, the present case shows that the principle of primacy ought to be attributed, in situations such as that in the present case, more weight than the principle of procedural autonomy.³⁵ To paraphrase Tridimas,³⁶ the real issue is not whether my suggested approach erodes the finality of administrative decisions and legal certainty, but whether such undermining effect is outweighed by the need to ensure respect for the rule of law and the effectiveness of EU law. I am firmly of the opinion that here the *Ciola* approach and the need to uphold the rule of law prevails.

59. The *Kühne & Heitz* approach is bound to lead to discrepancies in the protection of individual rights in the various Member States and this is why the application of the *Simmenthal* and *Ciola* line of reasoning should be preferred in order to ensure that the rule of law is upheld.³⁷

60. Secondly, a strong reason why the *Kühne & Heitz* case-law should be departed from by the Court is that according to that case-law the 'existence' of the right to withdraw a national administrative act, which is contrary to EU law, does not stem from EU law, but is at the moment dependent on the national laws of different Member States.³⁸

²⁸ Opinion in *Kühne & Heitz* (C-453/00, EU:C:2003:350).

²⁹ Opinion in Joined Cases *i-21 Germany and Arcor* (C-392/04 and C-422/04, EU:C:2006:181).

³⁰ Opinion in *Kempter* (C-2/06, EU:C:2007:245).

³¹ See further references in Wallerman, A., *Towards an EU Law Doctrine on the Exercise of Discretion in National Courts? The Member States' Self-Imposed Limits on National Procedural Autonomy*, CMLR, 53, 2016, p. 350.

³² As the legal literature points out critically about that judgment, there the Court opened a Pandora's box because, while tinkering with one of the most fundamental principles of legal certainty, that judgment lacks an understandable justification of the adopted view and spreads uncertainty with regard to the interpretation of the four *Kühne & Heitz* conditions. The literature also points out that that judgment causes national courts to have problems with its application (Taborowski, M., op. cit., pp. 1464, 1465 and 1469). For an attempt to fit that judgment into the frame of the principles of supremacy, effectiveness, equivalence and autonomy, see Becker, F., *Application of Community Law by Member States' Public Authorities: Between Autonomy and Effectiveness*, 44 CMLR, 2007, p. 1035.

³³ Judgments of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49); of 19 June 1990, *Factortame and Others* (C-213/89, EU:C:1990:257); and of 28 June 2001, *Larsy* (C-118/00, EU:C:2001:368).

³⁴ See, generally, on these topics Ruffert, M., *The Stability of Administrative Decisions in the Light of EC Law: Refining the Case Law*, Review of European Administrative Law, Vol. 1, No 2, 2008, pp. 127-135.

³⁵ See, in support of the same view, inter alia Ginter, C., and Schasmin, P., *Options Arising from European Union Law to Review Final Judgments and Administrative Decisions: Implications for Future Developments?*, available at researchgate.net, p. 157.

³⁶ Tridimas, T., *General Principles of EU Law*, OUP, 2006, p. 528.

³⁷ This view is also defended by Groussot, X., and Minssen, T., *Res Judicata in the Court of Justice Case-Law: Balancing Legal Certainty with Legality?*, European Constitutional Law Review, 3, p. 401.

³⁸ See also Ritleng, D., op. cit., p. 248.

61. Indeed, I agree with Advocate General Bot when he states that '[Article 4(3) TEU] requires every means potentially available in national procedural law to be used to bring about, if national procedural law so authorises, the review and, as the case may be, the withdrawal of the final administrative decision which is contrary to [EU] law'.³⁹

62. The Court has already recognised the importance of coherence in the area of interim legal protection, when it held that 'the interim legal protection which [EU] law ensures for individuals before national courts must remain the same, irrespective of whether they contest the compatibility of national legal provisions with [EU] law or the validity of secondary [EU] law, in view of the fact that the dispute in both cases is based on [EU] law itself'.⁴⁰

63. Also in *Brasserie du pêcheur and Factortame*, the Court pointed out that 'the conditions under which the State may incur liability for damage caused to individuals by a breach of [EU] law cannot, in the absence of particular justification, differ from those governing the liability of the [EU] in like circumstances. The protection of the rights which individuals derive from [EU] law cannot vary depending on whether a national authority or [an EU] authority is responsible for the damage'.⁴¹

64. Hence, the Court harmonised the regime for the liability of Member States for a breach of EU law and the regime for the non-contractual liability of the Union.⁴²

65. As has been aptly pointed out in the legal literature,⁴³ the requirement of coherence already has some resonance in the area of legal protection of citizens in relation to a question which is not too distant from the issue of the withdrawal of national administrative acts, which are contrary to EU law.

66. Indeed, in *Gereken and Procola*,⁴⁴ the Court held that 'the requirements flowing from the protection of the general principles recognised in the [EU] legal order are also binding on the Member States when they implement [EU] regulations ... Although, as a general rule, the principle of legal certainty precludes a [EU] measure from taking effect from a point in time before its publication, it may exceptionally be otherwise when the purpose to be attained so demands and when the legitimate expectations of the persons concerned are duly respected'.

67. Therefore, as was held in paragraph 24 of that judgment and as is relevant to the issues in the present case, 'likewise, the principle of legal certainty is not infringed by national rules which are applicable retroactively, when the purpose to be attained so demands and when the legitimate expectations of the persons concerned are duly respected'.

68. Similarly, since a coherent approach should be taken to balancing the principle of legality and the principle of legal certainty, that approach should not, in my opinion, vary according to whether what is at stake is the withdrawal of an unlawful EU act or that of an unlawful national act. Hence, the Court should not leave the determination of that approach to the laws of the

³⁹ See his Opinion in *Kempter* (C-2/06, EU:C:2007:245, point 79).

⁴⁰ Judgment of 21 February 1991, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* (C-143/88 and C-92/89, EU:C:1991:65, paragraph 20).

⁴¹ Judgment of 5 March 1996, C-46/93 and C-48/93, EU:C:1996:79, paragraph 42.

⁴² Judgment of 4 July 2000, *Bergaderm and Goupil v Commission* (C-352/98 P, EU:C:2000:361, paragraphs 41 to 44).

⁴³ Ritleng, D., op. cit., p. 252.

⁴⁴ Judgment of 15 July 2004, *Gereken and Procola* (C-459/02, EU:C:2004:454, paragraphs 21 to 24; 'the judgment in *Gereken and Procola*').

Member States in the name of national procedural autonomy.⁴⁵ On the contrary, as was the case in the judgment in *Gerekenens and Procola*, the Court should align the regime of withdrawal of unlawful national administrative acts with that of the unlawful EU administrative acts.⁴⁶

69. Indeed, as was pointed out by Advocate General Ruiz-Jarabo Colomer,⁴⁷ the Court should 'strike a balance between the primacy of [EU] law and legal certainty, ... thus changing the course set by the judgment in *Kühne & Heitz*, ... the rule in which leads to an impasse' and 'reliance on national law, as advocated by the Court of Justice in such cases, raises serious problems, including, in particular, disparities in the protection of rights derived from the [EU] legal order'.⁴⁸

7. New Subparagraphs 4 and 5 of Paragraph 108 of the 2013 Law on transitional measures

70. Finally, even if this is not expressly addressed in the question referred for a preliminary ruling, it follows from the order for reference that the referring court also calls into question Subparagraphs 4 and 5 of Paragraph 108 of the 2013 Law on transitional measures, which were introduced following the Court's judgment in *SEGRO and Horváth*. The referring court clearly considers those subparagraphs to be applicable in the present case (page 11 of the order for reference). Therefore, in order to give that court an answer which is useful for the resolution of the case in the main proceedings, I will address the question of whether EU law opposes national provisions such as those two subparagraphs, under which the proceedings for re-registration of rights cancelled in breach of EU law are stayed pending the conclusion of the investigation by the Public Prosecutor's Office and the resultant judicial proceedings.

71. I agree with the German Government and the Commission that those provisions appear to be contrary to Article 63 TFEU as they (again) adversely affect free movement of capital and deprive EU law of its *effet utile* – this is not only because they seek, by their effects, to hamper effective application of the judgment in *SEGRO and Horváth*, but also because they make it difficult for the holders of rights based on EU law (who were already harmed in an unlawful manner in *SEGRO and Horváth*) to assert their rights.

72. Those new provisions put holders of usufruct rights from other Member States at a disadvantage, at least indirectly, as those provisions cause such holders to continue being deprived – during those proceedings – of their rights of usufruct, which had been withdrawn in breach of EU law. Moreover, it is not clear which requirements are applicable to investors in the context of those proceedings, nor which difficulties they may be facing in that context.

⁴⁵ On the debate about the standing of procedural autonomy in EU law, see Kakouris, K.N., *Do the Member States possess judicial procedural 'autonomy'?*, 34 CMLR, 1997, p. 1389, and Rodríguez Iglesias, G.-C., and Keppenne, J.-P., *L'incidence du droit communautaire sur le droit national*, in *Mélanges en hommage à Michel Waelbroeck*; Vol. 1, Bruylant, 1999, p. 517. See also Bobek, M., *Why There is no 'Principle of Procedural Autonomy' of the Member States*, in de Witte, B., and Micklitz, H.-W., (eds), *The European Court of Justice and the Autonomy of the Member States*, Intersentia, 2011, p. 305.

⁴⁶ See Ritleng, D., *op. cit.*, p. 253.

⁴⁷ See his Opinion in Joined Cases *i-21 Germany and Arcor* (C-392/04 and C-422/04, EU:C:2006:181, points 3 and 67). Galetta, D.U., 'Autotutela decisoria e diritto comunitario', in *Rivista Italiana di Diritto Pubblico*, 2005, pp. 35 to 59, maintains that any reconsideration of an administrative measure which cannot be challenged requires a careful balancing of values. On one side of the scale is the primacy of EU law, underpinned by the principles of legality, equivalence, effectiveness and loyal cooperation. On the other side is legal certainty (p. 50).

⁴⁸ That Opinion cites Coutron, A., 'Cour de Justice, 13 janvier 2004, *Kühne & Heitz NV/Productschap voor Pluimvee en Eieren*', in *Revue des affaires européennes*, 13th year (2003-2004), 3, pp. 417 to 434. Peerbux-Beaugendre, Z., 'Commentaire de l'arrêt de la CJCE du 13 janvier 2004', in *Revue du droit de l'Union européenne*, 3-2004, p. 566. Martín Rodríguez, P., 'La revisión de los actos administrativos firmes: ¿Un nuevo instrumento de garantía de la primacía y efectividad del derecho comunitario? Comentario a la sentencia del TJCE de 13 de enero de 2004, C-453/00, *Kühne & Heitz NV*', in *Revista General de Derecho Europeo*, No 5, October 2004 (www.iustel.com).

73. Furthermore, the introduction of Subparagraphs 4 and 5 appears to breach the principle of sincere cooperation under Article 4(3) TEU. Indeed, in Paragraph 108(4) of the 2013 Law on transitional measures, the Hungarian legislature starts from a premiss or situation (the cancellation of a right *in rem* by application of Subparagraph 1) – which is contrary to EU law – and seeks to maintain that situation in the situations provided for in Subparagraph 5. Yet, the finding of a failure to fulfil obligations in the judgment in *Commission v Hungary* should have led Hungary to remove fully and as soon as possible the illegal situation created by Paragraph 108(1) of the 2013 Law on transitional measures, without further restricting the free movement of capital by way of Subparagraphs 4 and 5 of that provision.

74. As a result, as pointed out by the Spanish Government, in view of the Court's judgments in *SEGRO and Horváth* and in *Commission v Hungary* as well as of the new Subparagraphs 4 and 5 of Paragraph 108 of the 2013 Law on transitional measures, there is no doubt that, in the present case, the fact that Grossmania failed to appeal the decisions cancelling its usufruct rights is in any event not a factual element from which it may be deduced that the hypothesis here is fundamentally different, so as to justify not applying, in the present case, the conclusion at which the Court arrived in the judgment in *SEGRO and Horváth* – which determined, without leaving any margin of discretion in relation to facts, that Paragraph 108(1) of the 2013 Law on transitional measures and Paragraph 94(5) of the Law on the property register are incompatible with EU law.

75. The same conclusion is required by the necessity to ensure a good functioning of the internal market, the objective seeking to avoid divergences of application of EU law between the different Member States so as to guarantee a uniform application of EU law as well as by the considerations concerning the effects *erga omnes* and *ex tunc* of the Court's judgments, the principle of primacy of EU law and the function of national judges to exercise their role as EU law judges.

III. Conclusion

76. I propose that the Court of Justice should answer the question referred for a preliminary ruling by the Győri Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Győr, Hungary) as follows:

1. The referring court must comply with the judgment of 6 March 2018, *SEGRO and Horváth* (C-52/16 and C-113/16, EU:C:2018:157), and must, in order to ensure the *effet utile* of EU law, disapply, of its own motion, national provisions which are, according to the Court's interpretation, contrary to Article 63 TFEU. The duty to ensure the *effet utile* of EU law is binding not only on the court seised of the case, but also on any other national authority. Those authorities must disapply national legal norms which infringe EU law and must apply the national law in a manner which allows an end to be put, as soon as possible, to the contradiction between national law and EU law and which nullifies the legal consequences of an infringement of EU law.
2. Subject to verification by the referring court, Article 63 TFEU should be interpreted as precluding national provisions such as Subparagraphs 4 and 5 of Paragraph 108 of the 2013 Law on transitional measures, in so far as the procedure for re-registration of a right cancelled in breach of EU law is suspended until the conclusion of the investigation by the Public Prosecutor's Office and the resultant judicial proceedings.