Property Rights and the Free Movement of Capital in the Case Law of the CJEU

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Abstract

The analysis of the interaction between the land policies of the Member States and the fundamental economic freedoms would be incomplete without a critical assessment of how the case law of the Luxembourg Court contributes to the articulation between the protection of property rights and the restriction of the free movement of capital. Through the SEGRO ruling, the Court (sitting in the Grand Chamber) had the opportunity to refine its interpretation of the provisions of Article 63 TFEU concerning the free movement of capital, considering that they must be interpreted in the sense that they oppose the Hungarian regulation that provided for the automatic extinction of usufruct rights previously established on agricultural land if the holders were not close relatives of the owner of the land. Later, in Commission v. Hungary, the CJEU upheld the European Commission's action for failure to fulfil obligations considering that the action for failure to fulfill obligations filed by the European Commission was admitted, considering that the measure (disproportionate anyway compared to the pursued objective – agricultural land exploitation) also violated Article 17 of the Charter of Fundamental Rights of the European Union concerning the right to property in the absence of a proper compensation system. Moreover, the ruling Commission v. Hungary is innovative in terms of the autonomous examination of the Charter to establish the incompatibility of the national measure with Article 17 concerning the right to property.

Keywords: *fundamental rights; free movement of capital; rights of usufruct over agricultural land; deletion from the property register.*

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1. Introduction

In the *Oresteia* trilogy, the playwright Aeschylus (himself a participant in the Battles of Marathon and Salamis !) depicts the dilemma faced by the goddess Athena when called upon to adjudicate the dispute between Apollo and the three Furies concerning the fate of the ill-fated Orestes, son of Agamemnon and Clytemnestra. Just like courts checking their jurisdiction, the goddess of wisdom deems that only a

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specially constituted tribunal can provide a good judgment. Thus, the Areopagus is born, which will judge not according to the primitive law of retaliation but according to a procedure governed by the equality of arms as a guarantee of a fair trial.

A task of comparable complexity was entrusted to the Court of Justice of the European Union (CJEU) when it was called upon to rule in the *SEGRO*[2] and *Commission v. Hungary*[3] cases on an ideological stakes related to the mutual constraints between property rights and fundamental economic freedoms. The need for an approach sufficiently well grounded in the legal philosophy of the two institutions becomes even more pressing, given that neither the provisions of the TFEU nor those of the Charter provide the necessary elements for resolving the conflict between fundamental rights and fundamental freedoms. The issue was not entirely unknown to the Court, but the implications of the disputes, through the economic interests involved, proved to be significant.

Scholars have likewise highlighted that human rights law and international investment law[4] approach the protection of property from different perspectives, while the interaction between these two fields - despite their structural differences - has been explored as they share certain common principles[5]. Protection against expropriation in investor-state disputes has received substantial analytical attention[6], with detailed assessments of relevant jurisprudence. *Amicus curiae* submissions in expropriation cases brought before international arbitration have been examined[7], as well as cases

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[2] CJEU (Grand Chamber), 6 March 2018, *SEGRO*, joined cases C-52/16 și C-113/16, ECLI:EU:C:2018: 157.

[3] CJEU (Grand Chamber), 21 May 2019, *Commission v Hungary (Usufruct Over Agricultural Land)*, C-235/17, ECLI:EU:C:2019:432.

[4] Regarding the content, boundaries and principles of international investment law, see Cristina Elena Popa Tache, *Introduction to International Investment Law* (Bucharest: ADJURIS – International Academic Publisher, 2020), 110-131, e-book, available at https://adjuris.ro/introduction-to-international-investment-law/. For the impact of the digital revolution on transnational business and the application of fundamental principles, see Smaranda Angheni, "Visibility of the 'Bona Fides' Principle within the Framework of Company Law. *Affectio societatis*," in *Proceedings of the International Conference of Law, European Studies and International Relations – Good Faith in Law. Good Faith as the Foundation of Legal Equity*, edited by Manuela Tăbăraș, Felicia Maxim, and Mădălina Dinu, 19-24. Bucharest: Universul Juridic, 2024; Cristina Elena Popa Tache and Cătălin Silviu Săraru, "Evaluating Today's Multi-Dependencies in Digital Transformation, Corporate Governance and Public International Law Triad," *Cogent Social Sciences* 10, no. 1 (2024), 2370945, DOI: 10.1080/23311886.2024.2370945.

[5] See Eleni Gavriil, "Protection of Property under Human Rights and International Investment Law: A Case-Law Analysis," *Laws* 13, no. 6 (2024): 1, https://doi.org/10.3390/laws13010006.

[6] Silvia Matúšová and Peter Nováček, "New Generation of Investment Agreements in the Regime of the European Union," *Juridical Tribune* 12, no. 1 (March 2022): 27, DOI: 10.24818/TBJ/2022/12/1.02.

[7] See Fernando Dias Simões, "Public Participation: *Amicus Curiae* in International Investment Arbitration," in *Handbook of International Investment Law and Policy*, ed. Julien Chaisse, Leïla Choukroune, and Sufian Jusoh (Springer, 2021), 1371–1396, https://link.springer.com/referencework entry/10.1007/978-981-13-3615-7_13; Huiping Chen, "The Role of *Amicus Curiae* in Implementing the Human Right to Water in the Context of International Investment Law," *Review of European, Comparative & International Environmental Law* 29, no. 3 (2020): 454-463, https://doi.org/10.1111/re el.12364; Gary Born and Stephanie Forrest, "Amicus Curiae Participation in Investment Arbitration," *ICSID Review – Foreign Investment Law Journal* 34, no. 3 (2019): 626–665, https://doi.org/10.1093/ic sidreview/siz020; Nicolette Butler, "Non-Disputing Party Participation in ICSID Disputes: Faux Amici?,"

where foreign investors have appealed to the ECtHR, claiming violations of their right to property. It is not coincidental that the most visible connection between the two regimes has been noted as the cross-referencing in investment arbitration and human rights courts[8]. At the same time, informed voices have drawn attention to criticisms that the investment arbitration system prioritizes corporate interests to the detriment of state sovereignty, regulatory autonomy, and public welfare[9]. Furthermore, it has been argued that the chilling effect on regulatory sovereignty is tangible, as states become cautious about introducing or enforcing policies aimed at protecting public health, the environment, or social welfare thus undermining the very essence of democratic governance and the ability of states to serve the public interest[10].

It is also true that there are states which, on the contrary, do not hesitate to promote certain public policies through legislative measures that strain their international treaty obligations. This is precisely the case with the Hungarian provisions that provided for the automatic termination of usufruct rights previously established over agricultural land, where the holders were not close relatives of the landowners. A critical assessment of the relationship between the protection of property rights and the restriction of the free movement of capital (justified by this specific public interest in the use of agricultural land) has been insufficiently developed in legal literature, with scholarly interest driven largely by recent jurisprudential developments. Such an analysis proves useful not only for its immediate and pragmatic implications regarding the rules that guide dispute resolution and the achievement of the commercial aims pursued by the parties. Moreover, it enriches the interaction between fundamental rights and fundamental economic freedoms with a new dimension, and illustrates how the right to property remains a contentious issue where human rights and capital flows (in the form of real estate investments) share a common ground for expression.

This is why, as a first step, our study aims to highlight a series of specific cases in which the CJEU has acknowledged that the protection of fundamental rights can justify the adoption of restrictive measures in the area of free movement (Section 2). Subsequently, we will explore the interaction between property rights[11] and

Netherlands International Law Review 66, no. 1 (2019): 143–178, DOI:10.1007/s40802-019-00132-8.

[8] See Silvia Steininger, "What's Human Rights Got to Do with It? An Empirical Analysis of Human Rights References in Investment Arbitration," *Leiden Journal of International Law* 31, no. 1 (2018): 33–58, https://doi.org/10.1017/S0922156517000528.

[9] See Paolo Vargiu, "Down the Rabbit Hole of Investment Arbitration and Ethics," *International Investment Law Journal* 4, no. 2 (2024): 137–153, DOI: 10.62768/IILJ/2024/4/2/02. Regarding the inherent imbalances of investment arbitration, which appear to disproportionately favor investors' rights over those of host states and undermine the host states' ability to effectively regulate in the public interest, see also Gábor Hajdu, "Investment Arbitration and the Public Interest," *Hungarian Yearbook of International Law & European Law* 8, no. 1 (2020): 75–91, doi: 10.5553/HYIEL/266627012020008001005.

[10] Eckhard Janeba, "Regulatory Chill and the Effect of Investor State Dispute Settlements," *Review of International Economics* 27, no. 4 (2019): 1172–1198, https://doi.org/10.1111/roie.12417.

[11] For theoretical and practical developments regarding the right to property, see Corneliu Bîrsan, *Drept civil. Drepturile reale principale în reglementarea noului Cod civil*, [*Civil Law: Principal Real Rights under the Provisions of the New Civil Code*], 2nd edition, revised and updated (Bucharest: Hamangiu,

fundamental economic freedoms, with particular reference to the free movement of capital, given that real estate investments constitute capital movements according to the classification in Directive 88/361/EEC (hereinafter referred to as the Directive of 24 June 1988). In times of a „crisis of integration, of revived nationalism“[12] and of globalization being called into question[13], the CJEU plays a decisive role in ensuring the effectiveness of the free movement freedoms, which constitute the „economic constitution” of the Union. Through the *SEGRO* ruling, the Court had the opportunity to refine its interpretative framework for Article 63 TFEU (concerning the free movement of capital), as the referring court sought to determine whether this provision should be interpreted as opposing Hungarian legislation that provided for the automatic termination of usufruct rights previously established over agricultural land if the holders were not close relatives of the landowners. Subsequently, in *Commission v. Hungary*, in its judgment of 21 May 2019, the Court (again sitting in Grand Chamber) upheld the European Commission's action for failure to fulfill obligations, finding that the measure which *ex lege* and without compensation abolished usufruct rights over agricultural and forestry land acquired by individuals who could not prove a close family relationship with the owner constituted not only a violation of Article 63 TFEU but also of Article 17 of the Charter of Fundamental Rights of the European Union, concerning the right to property.

Our aim is not so much to provide a detailed description of the cases but rather to analyze the added-value elements that can contribute to the debate on the appropriate delineation between the right to property and the restriction of fundamental economic freedoms. Traditionally, the Court’s judicial discourse has been primarily concerned with the fundamental economic freedoms, with the classic tendency being to address fundamental rights merely as justifications ("overriding reasons in the public interest" in the sense of the *Cassis de Dijon* judgment[14]) that can legitimize the adoption of restrictive measures by Member States. The Court’s interpretations in the SEGRO judgment reflect a shift in this traditional approach, as well as the balanced methodology that the CJEU follows through the application of the proportionality test.

In the context of the judgments under analysis, this study therefore aims to highlight the signs of this shift in the Court’s line of reasoning. The novelty of our analysis is closely linked to the fact that these disputes involve indirect discrimination

2015), 51–101; Ovidiu Ungureanu and Cornelia Munteanu, *Tratat de drept civil. Bunurile. Drepturile reale principale* [*Treatise of Civil Law: Assets and Principal Real Rights*] (Bucharesti: Hamangiu, 2008), 107–228.

[12] See Francesca Strumia, "The Family in EU Law after the *SM* Ruling: Variable Geometry and Conditional Deference," *European Papers* 4, no. 1 (2019): 389–393, DOI: 10.15166/2499-8249/296.

[13] Regarding the need for a decolonized human rights regime that imposes human rights obligations on the conduct of transnational entities in the pursuit of human dignity, equality, and freedom, see Shelton T. Mota Makore, Patrick C. Osode, and Nombulelo Lubisi, “Reconstructing the Global Human Rights Order in Pursuit of a Binding Business Human Rights Treaty in the Era of Decolonisation,” *Juridical Tribune* 12, no. 1 (March 2022): 127, https://doi.org/10.24818/TBJ/2022/12/1.08.

[14] CJEC, 20 February 1979, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein***.** C-120/78, ECLI:EU:C:1979:42, para. 8.

based on the origin of capital (adopted to the detriment of investors from other Member States) and also entail an interference with the right to property without adequate compensation. As such, they may serve as a source for a reconfiguration of the traditional conception of fundamental rights as mere exceptions to the freedoms of movement. In the theory of derogations from the freedoms of movement, a conventional distinction is drawn between legal exceptions (provided for by the TFEU and justified on grounds of public order, public morality, public security, etc.) and judicial exceptions, which are materialized in overriding requirements of public interest (with fundamental rights being recognized, *inter alia*, as falling within this category). However, when it comes to interference with the property rights of investors from other Member States, fundamental rights as a justification for restricting the free movement of capital can no longer be viewed solely through the lens of the public interest protected, but also through the particular interests of individuals seeking adequate protection. Likewise, the freedoms of movement serve not only the private interests of actors engaged in commercial exchanges within the internal market but also the public interests that sovereign states seek to uphold.

Our study highlights the core of this renewed paradigm and argues in favor of equal treatment between fundamental rights and the freedoms of movement, particularly in the context of restriction theory. Such a perspective promotes the necessary symmetry in assessing the proportionality of restrictive measures, bearing in mind that the provisions of the EU Charter of Fundamental Rights have the same legal value as the Treaties. At the same time, it lends greater coherence to the application of the proportionality test - especially since, as legal scholarship suggests, the Court should examine "not only the restrictions inflicted by the exercise of the fundamental rights on fundamental freedoms, but also the restrictions caused by the fundamental freedoms on fundamental rights"[15].

After reviewing precedents from the Court's early case law, where the issue of the interaction between Member States' land policies and the free movement of capital was raised (Section 3), we will further develop an assessment of the overriding reason of public interest invoked by the Hungarian state concerning the exploitation of agricultural land to justify the restrictive measure adopted (Section 4). After the national regulation was deemed a disproportionate measure in relation to its intended objective in the *SEGRO* case, the *Commission v. Hungary* ruling is also innovative in its autonomous examination of the Charter of Fundamental Rights of the European Union to establish the incompatibility of the national measure with Article 17 on the right to property (Section 5), an approach that the Court would later uphold in other infringement proceedings initiated against Hungary[16]. The Court's judicial discourse

[15] Tamas Szabados, "Conflicts Between Fundamental Freedoms and Fundamental Rights in the Case Law of the Court of Justice of the European Union: A Comparison with the US Supreme Court Practice," *European Papers* 3, no. 2 (2018): 565, doi: 10.15166/2499-8249/237, available at https://www.europeanpapers.eu/it/system/files/pdf_version/EP_eJ_2018_2_6_Article_Tamas_Szabados_00237.pdf.

[16] For details see Oana Dimitriu, *The Infringement Procedure: Liability of EU Member States* (Bucharest: C.H. Beck Publishing, 2023), 104.

must also be deciphered in the broader context of the rule of law crisis[17] and the deviations observed in some Member States, stemming from „direct attacks on the judiciary or competing models of justice that do not meet the high standards of EU justice“[18].

After evaluating the consequences of post-*SEGRO* and *Commission v. Hungary* (Section 6), the conclusions (Section 7) invite a more realistic approach to the relationship between the provisions regarding the principle of neutrality of the treaties regarding the property regime in Member States (Article 345 TFEU) and the Court's control over national restrictions on real estate investments recognized as capital movements.

2. Materials and Methods

This article undertakes an exploratory research approach regarding the interaction between the right to property and the free movement of capital. The need for a deeper understanding rooted in the legal philosophy of these two institutions becomes even more pressing, given that neither the provisions of the TFEU nor those of the Charter offer sufficient elements for resolving the conflict between fundamental rights and fundamental freedoms.

The study adopts four analytical approaches: (i) a normative one, through the interpretation of relevant legal provisions; (ii) a conceptual one, by analyzing prevailing theories and doctrinal perspectives; (iii) a practical one, by providing commentary on the relevant case law; and (iv) a comparative one, through the examination of rights conflicts in other legal systems.

The normative method applies grammatical, systematic, and teleological interpretations of the relevant provisions, while the conceptual method identifies the current state of academic analysis on the topic and explores the consequences of a proper correlation between the right to property and restrictions on capital movements, with a particular focus on real estate investments. The practical method extracts innovative elements from recent CJEU jurisprudence in support of an equal treatment of fundamental rights and free movement freedoms, including in the context of the obstacle theory. The comparative method identifies similarities and differences with the jurisprudence of the U.S. Supreme Court concerning conflicts between one fundamental right protecting economic activity and another fundamental right.

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[17] Xavier Groussot, Niels Kirst, and Patrick Leisure, "SEGRO and Its Aftermath: Between Economic Freedoms, Property Rights and the 'Essence of the Rule of Law'," *Nordic Journal of European Law* 2, no. 2 (2019): 69–88, DOI:10.36969/njel.v2i2.20370.

[18] Ségolène Barbou des Places, Emanuele Cimiotta, and Juan Santos Vara, "Achmea Between the Orthodoxy of the Court of Justice and Its Multi-Faceted Implications: An Introduction," *European Papers* 4, no. 1 (2019): 7–17, DOI: 10.15166/2499-8249/297.

3. Fundamental Rights and Fundamental Economic Freedoms in EU Law

3.1. From the Jurisprudential Recognition of Human Rights to Their Codification in Treaties

The founding treaties of the European Communities did not include explicit provisions on the respect for fundamental rights. The European Economic Community, established by the Treaty of Rome, fully lived up to its name, as it was a supranational organization with a primarily economic scope and field of competence[19]. This was also the reason why, for quite some time, human rights were not mentioned in the treaties and were considered to be already guaranteed by the European Convention on Human Rights (ECHR) of 1950, signed by the Member States. Therefore, the protection of human rights in the European Community[20] and the EU developed through case law, with the Luxembourg Court playing a key role. Through rulings that have the value of a famous *obiter dictum*, the Court established that „*respect for fundamental rights forms an integral part of the general principles of law, protected by the Court of Justice*"[21], and that they *"are inspired by the constitutional traditions common to the Member States, and their protection must be ensured within the structure and objectives of the Community*"[22], as well as the fact that „in the Member States of the Community, fundamental human rights, «public freedoms», are enshrined and recognized by the state"[23]. Subsequently, the European Parliament expressed its regret that human rights were not mentioned in the founding treaties of the European Communities, which were more focused on the economic dimension. In April 1977, the Joint Declaration on Fundamental Rights was politically endorsed, signed by the Presidents of the European Parliament, the Council, and the European Commission.

With the gradual expansion of the Union's competencies to include policies with a direct impact on fundamental rights, such as those in the field of justice and

[19] For details, see The Protection of Article 2 TEU values in the EU, available online https://www.europarl.europa.eu/factsheets/en/sheet/146/the-protection-of-article-2-teu-values-in-the-eu, accessed on 5 March 2025.

[20] For theoretical and practical developments see Corneliu Bîrsan, *Convenția europeană a drepturilor omului. Comentariu pe articole* [*The European Convention on Human Rights. Commentary on the Articles*], 2nd edn. (Bucharest: CH Beck, 2010), 61–1019; Bianca Selejan-Guțan, *Protecția europeană a drepturilor omului* [*The European Protection of Human Rights*], 6th revised and expanded edition, (Bucharest: Hamangiu, 2023), 389-406; Raluca Bercea, *Protecția drepturilor fundamentale în sistemul Convenției Europene a Drepturilor Omului* [*The Protection of Fundamental Rights in the System of the European Convention on Human Rights*] (Bucharest: CH Beck, 2020), 147-288; Sebastian Spinei, "The Right Principles – What Outcome? Fundamental Procedural Rights and Their Implementation in Romanian Civil Procedure and Other Legal Systems," in *Revisiting Procedural Human Rights: Fundamentals of Civil Procedure and the Changing Face of Civil Justice*, ed. Alan Uzelac and C. H. van Rhee (Cambridge: Intersentia, 2017), 157–178, https://doi.org/10.1017/9781780687346.008.

[21] CJEC, 17 December 1970, *Internationale Handelsgesellschaft mbH/Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, C-11/70, ECLI:EU:C:1970:114, para. 4.

[22] *Idem*, para. 4.

[23] CJEC, 28 October 1975, *Rutili/Ministre de l'intérieur*, C-36/75, ECLI:EU:C:1975:137.

home affairs (JHA), and the creation of a fully functional area of freedom, security, and justice, "the sugar of human rights" - to quote the former French Minister of Foreign Affairs Michel Jobert -begins to breathe into the content of the treaties, which were amended and "humanized" to firmly engage the EU in the protection of fundamental rights. The entry into force of the Maastricht Treaty on November 1, 1993, marks the legislative consecration of fundamental rights through a primary source of law.

Furthermore, according to the *Copenhagen criteria* (European Council 1993), all candidate countries for EU membership must have stable institutions that guarantee respect for human rights and the rule of law. The Amsterdam Treaty (signed on October 2, 1997, and entering into force on May 1, 1999) not only affirmed the „principles" on which the Union is founded (in the Lisbon Treaty, the „values", as listed in Article 2 TEU: respect for human dignity, liberty, democracy, equality, the rule of law, and respect for human rights) but also established a mechanism for sanctioning cases of serious and persistent violations of fundamental rights by a Member State (through the procedure for suspending the rights provided for in the treaties, under the conditions established by Article 7 TEU).

After the European Council in Cologne on June 3-4, 1999, decided **„***to bring together in a charter the fundamental rights in force at the Union level to give them greater visibility*", the preparation and proclamation of the Charter of Fundamental Rights at the European Council in Nice on December 7, 2000, and the identical legal value conferred by Article 6 (1) of the Treaty of Lisbon marked the culmination of this codification process aimed at ensuring the protection of fundamental rights within the EU. Authoritative doctrinal voices have even seen the progress of European integration closely linked to the growing importance of human rights in the European legal order, considering **„**human rights as increasingly important for a Union that is ever closer."[24]

The Charter of Fundamental Rights of the European Union represents the internal protection mechanism that allows for preliminary and autonomous judicial control by the Court of Justice of the European Union (CJEU). However, protection must also be ensured in the external action, which is why the Treaty of Lisbon not only established the obligation to respect fundamental rights within the European Union but also to promote and strengthen human rights in the EU's external actions. Of course, the Charter is based on the European Convention on Human Rights and other European and international instruments and enshrines all civil and political rights, as well as economic and social rights, enjoyed by all persons living in the EU. What makes it innovative, however, is that it includes, among other things, disability, age, and sexual orientation as grounds for prohibited discrimination, as well as rights considered to be cutting-edge, such as the right to access EU documents, protection of personal data[25], and the right to good administration.

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[24] Armin von Bogdandy, "The European Union as a Human Rights Organization? Human Rights and the Core of the European Union," *Common Market Law Review* 37, no. 6 (2000): 1307–1338, https://doi.org/10.54648/315870.

[25] For details see Daniel Mihai Șandru, "Political Advertising: Transparency and Safeguards for the

The rights provided in the Charter are binding on EU institutions, as well as on national governments, who must respect *them when implementing EU legislation* or acting within its scope.

3.2. The Conflict Between Fundamental Rights and Fundamental Economic Freedoms

At a first level, the relationship between fundamental rights and fundamental economic freedoms must be understood from a normative perspective, in the sense that fundamental economic freedoms are enshrined in the provisions of the Treaty on the Functioning of the European Union (TFEU), while fundamental rights are guaranteed through the provisions of the Charter of Fundamental Rights of the European Union (CDFEU). The differences become more apparent when we approach them from a functional perspective: fundamental economic freedoms are closely linked to the achievement and functioning of the internal market (their invocation being conditioned by the existence of a cross-border element), whereas fundamental rights are primarily dedicated to protecting individuals.

Indeed, fundamental economic freedoms mainly aim at eliminating protectionism and promoting economic integration, promoting individual liberty only incidentally, while fundamental rights are dedicated to safeguarding the autonomy of individuals[26]. This classic approach, however, requires some clarifications. Although the freedoms of movement constitute the core of the internal market, five years after the entry into force of the Treaty of Rome, the Court recognized, through the famous *Van Gend en Loos* judgment, the ability of European norms (including those related to fundamental freedoms) to create rights for individuals. The entire legislative arsenal set in motion to remove trade, administrative, technical, or fiscal barriers imposed by Member States through restrictions on the freedoms of movement ultimately serves businesses as direct participants in the European market.

At a deeper level, the interaction between fundamental rights and fundamental economic freedoms invites the examination of situations where the Court's case law has explored reciprocal determinations, the extent of these interdependencies, and, more recently, potential solutions to resolve the conflict between them. Initially, the Court established that when a Member State wishes to derogate from a freedom of movement, national regulations can only benefit from the exceptions established by the treaty provisions if they are in accordance with fundamental rights[27]. In this formulation, fundamental rights enhance the effectiveness of fundamental freedoms, as the required respect for fundamental rights limits the instances in which derogations from fundamental freedoms can be established[28]. Subsequently, situations have emerged in which the very protection of fundamental rights justifies the

Protection of Fundamental Rights," *Romanian Review of European Law*, no. 4 (2023): 86.

[26] Eva Julia Lohse, "Fundamental Freedoms and Private Actors – Towards an 'Indirect Horizontal Effect", *European Public Law* 13, no. 1 (2007): 159–190, https://doi.org/10.54648/EURO2007008.

[27] CJEC, 18 June 1991, *ERT/DEP*, C-260/89, ECLI:EU:C:1991:254, para. 43.

[28] Tamas Szabados, *op. cit*., pp. 563-600.

restriction of fundamental economic freedoms

The *Schmidberger* judgment[29] remains emblematic, as it was the first case in which the respect for fundamental rights was used by Member States to justify a restriction on a freedom of movement[30]. A transport company based in Germany filed a claim for compensation against the Austrian authorities for the damages suffered due to the temporary closure of the Brenner Pass, which was blocked to carry out a demonstration organized by an environmental group protesting the pollution of the Alps caused by heavy traffic on the highway. Resolving the conflict between these two principles - the protection of the free movement of goods and the protection of fundamental rights (specifically, the freedom of assembly and of association) - was expected to be quite problematic, given their equal constitutional value.

After recalling that fundamental human rights are an integral part of the principles of Union law, the Court referred to Article 6 (2) TEU[31], The Court shows that the protection of fundamental rights is "*a legitimate interest, which, in principle, justifies a restriction of the obligations imposed by community law, even in the case of a fundamental freedom such as the free movement of goods*."[32] However, exceptions must be interpreted restrictively; if a member state has the possibility to choose between several measures to achieve the same objective, it must choose the means that restrict fundamental freedoms the least. On another note, the ruling is relevant because it implicitly accepts the supremacy of another source of law in relation to European Union law[33]. The Court ruled that the judicial protection of freedom of expression and assembly can justify restrictions on the free movement of goods, a direction it followed also in *Omega*[34] where it held that the protection of human dignity can justify restrictions on the freedom to provide services.

Professor Takis Tridimas's comments on the relationship between fundamental rights and fundamental economic freedoms, as interpreted in the *Schmidberger* ruling, fall within a more nuanced register of analysis**.** The Court did not qualify freedom of expression and freedom of assembly either as legal exceptions (under former Article 30 of the EC Treaty) or as overriding reasons in the public interest[35], but rather recognized the "legitimate interest" in providing adequate protection for fundamental rights. This reflects the ferment of an autonomous, independent approach to fundamental rights, whose protection within the European legal order has been almost entirely the product of the Court's jurisprudence.

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[29] CJEC, 12 June 2003, C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge împotriva Republik Österreich*, ECLI:EU:C:2003:333.

[30] For detail, see Christopher Brown, "Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria," *Common Market Law Review* 40, no. 6 (2003): 1499–1510, https://doi.org/10.54648/cola2003062.

[31] According to the cited provisions, „*The Union adheres to the European Convention for the Protection of Human Rights and Fundamental Freedoms (...)*".

[32] *Schmidberger,* cit*.,* para. 74.

[33] See Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, 6th ed., trans. into Romanian (Bucharest: Hamangiu, 2017), 792.

[34] CJEC, 14 October 2004*, Omega*, C-36/02, ECLI:EU:C:2004:614, para. 35.

[35] Takis Tridimas, *The General Principles of EU Law* (Oxford University Press, 2006), 338, https://doi.org/10.1093/oso/9780199258062.003.0007.

Despite criticisms that the elevated rhetoric surrounding human rights may not stem from a genuine concern to take them seriously, but rather from a desire to expand the scope and impact of Union law, in reality, the gradual development of judicial standards has been well-grounded, and the impact of the Court's case law has been positive[36].

Later, in the *Laval* case[37], the debate focused on the balance between fundamental social rights and the freedom to provide services, with the solution being relevant to the policy of achieving a social market economy and the method followed by the Court in its attempt to provide a „model for balancing economic and social objectives"[38]. Although, in principle, the protection of workers against social dumping practices may constitute an overriding reason of general interest capable of justifying a restriction on a fundamental economic freedom, in this case, the Court found that the restrictive measures were unjustified in relation to the objective pursued. Specifically, the Court held that the provisions on the freedom to provide services (currently Article 56 TFEU) and Article 3 of Directive 96/71/EC on the posting of workers in the framework of the provision of services must be interpreted as precluding the possibility for a collective organization to attempt, through collective action in the form of blocking construction sites, as in the main proceedings, to compel a service provider established in another Member State to enter into negotiations on the wages to be paid to posted workers. The Laval ruling fueled criticism, as it was symptomatic of a shift in approach regarding the justification of restrictions - from a social, worker-protective perspective to a more liberal one, favoring (economic) freedom as enshrined in the Treaty[39].

Broadening the analysis, a few comparative law remarks on conflict-resolution mechanisms between fundamental rights seem appropriate. Given that the protection of fundamental rights has followed a similar trajectory in both the EU and the US and considering that the Court of Justice of the European Union and the US Supreme Court represent the highest judicial authorities in their respective systems (the former in a regional integration organization, the latter in a federal state) our choice appears natural.

Although fundamental rights are not originally found in the US Constitution but were later enshrined in the Bill of Rights, they initially fell more within the protective and regulatory domain of individual states than under the authority of the federal government, whose powers were seen as more limited. Similarly, the recognition of fundamental rights within the European legal order came at a more consolidated stage

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[36] Takis Tridimas, *op. cit*., pp. 298-369.

[37] CJEC (Grand Chamber), 18 December 2007, *Laval un Partneri*, C-341/05, ECLI:EU:C:2007:809.

[38] Loïc Azoulai, "The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for Its Realization," *Common Market Law Review* 45, no. 5 (2008): 1335–1355, https://doi.org/10.54648/cola2008093.

[39] Anamaria Groza, *Uniunea Europeană. Drept material [European Union. Material Law]* (Bucharest: C.H. Beck, 2004), 99; Gina Orga-Dumitriu. "The Contributions of CJEU in the Name of the Principle of Balancing – A Test of the Role of The Court?". *International conference KNOWLEDGE-BASED ORGANIZATION* Sciendo, 21, no. 2 (2015): 472-478. https://doi.org/10.1515/kbo-2015-0081.

of the integration process[40]. While US law does not operate with the concept of fundamental economic freedoms, commercial activity is nonetheless protected under the Due Process Clause of the Fourteenth Amendment and property rights under the Fifth Amendment. Whereas the application of TFEU provisions on the free movement freedoms presupposes a cross-border element, such a condition is not required in litigation concerning fundamental rights under American law.

US Supreme Court jurisprudence offers limited examples of conflicts between one fundamental right protecting economic activity and another fundamental right. In *PruneYard Shopping Center v. Robins*, the US Supreme Court was called upon to balance the "collision" between property rights and freedom of expression. A group of students sought signatures at the PruneYard Shopping Center to protest a United Nations resolution condemning Zionism. Although the students acted peacefully, they were denied access to the shopping center, and subsequently brought claims before state courts, alleging a violation of their freedom of expression as recognized by the California Constitution.

The California Supreme Court held that the federally protected property rights of the shopping center owner had not been violated. This ruling was affirmed by the US Supreme Court, thus validating the ability of states to adopt, in their own constitutions, higher standards of protection for freedom of expression than those provided by the Federal Constitution, even when this results in limitations on property rights[41].

4. The Land Policy of Member States and the Free Movement of Capital – Jurisprudential Precedents

Long considered the „poor relative of the common market"[42], the free movement of capital was approached cautiously by the drafters of the Treaty of Rome, with the progressive removal of obstacles to capital movements between Member States to take place only „to the extent necessary for the proper functioning of the common market"[43]; this was also the reason why, unlike the other three freedoms of movement, the Court did not recognize the direct effect of Article 67 of the EEC Treaty in the *Casati* ruling. The more „specific nature"[44] of this freedom of movement results not only from the fact that it was completed later than the other three fundamental economic freedoms - namely, through the Maastricht Treaty - but also from the circumstance that the liberalization of capital movements[45] applies even in

[40] Tamas Szabados, *op. cit*., p. 571.
[41] Tamas Szabados, *op. cit*., p. 581-582.
[42] Fabrice Picod et al., *Guide de droit européen des affaires 2021/2022* (Paris: LexisNexis, 2021), 50.
[43] See Article 67 of the Treaty establishing the European Economic Community.
[44] Vladimir Savković, "The Fundamental Freedoms of the Single Market on the Path Towards Horizontal Direct Effect: The Free Movement of Capital – *Lex Lata* and *Lex Ferenda*," *Juridical Tribune* 7, no. 2 (2017): 208–223, available at https://tribunajuridica.eu/arhiva/An7v2/22.%20Savkovic.pdf.
[45] For detailed analysis on the free movement of capital see Augustin Fuerea, *Dreptul Uniunii Europene – principii, acțiuni, libertăți* [*European Union Law – Principles, Actions, Freedoms*] (București: Universul Juridic, 2016), 294–311; Sergiu Deleanu, *Drept european al afacerilor. Piața internă a Uniunii Europene*

relations with third countries[46], this explains the additional challenges encountered at the jurisprudential level[47]; however, the prohibition is not absolute, and more recently, through Regulation (EU) 2019/452, a set of rules was established, creating the legal framework for the examination of foreign direct investments in the European Union, similar legislative measures having also been adopted in the United Kingdom in the post-Brexit period[48]. The regime of exceptions to the free movement of capital follows the same distinction present in the other freedoms, between legal exceptions (such as measures necessary to deter tax fraud, those required for prudential supervision of financial institutions, or for administrative or statistical information purposes, or justified by reasons of public order or public safety) and jurisprudential exceptions. Alongside the continuity of services of general interest or policies in the field of social housing[49], consumer and investor protection, or the protection of the interests of employees and minority shareholders, in the early jurisprudence of the Court, situations were identified in which the land policies of Member States were invoked to justify restrictions on the free movement of capital.

Called upon to examine Tyrolean legislation that conditioned the acquisition of land on prior administrative authorization, the Court acknowledged, in principle, that the objective of spatial planning, as well as the maintenance, in the general interest, of a permanent population and an autonomous economic activity independent of the tourism sector, could justify such a restrictive measure in certain regions. In this case, a German national sought compensation for the damage caused by Austria's violation of European law, as the land legislation of the Tyrol region was considered a breach

[*European Business Law: The Internal Market of the European Union*] (Bucharest: Universul Juridic, 2021), 250–270; Mirela Carmen Dobrilă, *Dreptul european al afacerilor. Principii, politici, piață unică, libertăți, drept european al contractelor* [*European Business Law: Principles, Policies, Single Market, Freedoms, and European Contract Law*] (Bucharest: Universul Juridic, 2019), 203–216; Mihaela Augustina Dumitrașcu and Oana Mihaela Salomia, *Dreptul Uniunii Europene II* [*European Union Law II*] (Bucharest: Universul Juridic, 2020), 168–171.

[46] For developments regarding capital movements after Brexit, as well as the sanction packages adopted against Russia, North Korea, Turkey, and Nicaragua, see Liudmyla Falalieieva and Bohdan Strilets, "Capital Movement Restrictions in EU Law: Retrospective and Modern Approaches, Development Trends," *European Studies* 10, no. 1 (2023): 70–74, DOI: https://doi.org/10.2478/eustu-2023-0003.

[47] Martha O'Brien, "Free Movement of Capital Between EU Member States and Third Countries and the Euro-Mediterranean Agreements: *SECIL*," *Common Market Law Review* 55, no. 1 (2018): 243–263, DOI: https://doi.org/10.54648/cola2018009; Ana Paula Dourado, "EU Free Movement of Capital and Third Countries: Recent Developments," *Intertax* 45, no. 3 (2017): 192–204, DOI:10.54648/TAXI2017016.

[48] See Shaotang Wang, Lingyi Yang, and Guozhen Li, "The UK's Foreign Investment Security Review Mechanism: Characteristics, Origins, and Responses," *Laws* 14, no. 2 (2025): 24, https://doi.org/10.3390/laws14020024. Essentially, the foreign investment security review mechanism that came into effect in January 2022 strengthens the United Kingdom's alignment with the United States, while simultaneously positioning China as a 'competitor'. For the legal aspects of the procedure imposed by an EU – China investment agreement, see Cristina Elena Popa Tache, "The EU - China Road to the Comprehensive Agreement on Investment", *Juridical Tribune* 12, no. 4 (December 2022): 476–494, DOI: 10.24818/TBJ/2022/12/4.03.

[49] CJEU, 8 May 2013, *Libert and Others*, joined cases C-197/11 and C-203/11, ECLI:EU:C:2013:288; for a comprehensive commentary, see Stephanie Reynolds, "Housing Policy as a Restriction of Free Movement and Member States' Discretion to Design Programmes of Social Protection: *Libert*," *Common Market Law Review* 52, no. 1 (2015): 259-280, DOI: https://doi.org/10.54648/cola2015010.

of the principle of free movement of capital. Applying the *Gebhard* test[50], the Court assessed whether the measure was applied in a non-discriminatory manner and whether less restrictive provisions could achieve the same objective[51]. In practice, the legal framework exempted only Austrian nationals from the obligation to obtain authorization for purchasing a developed plot of land and, consequently, from the requirement to demonstrate that the intended acquisition was not for the purpose of establishing a secondary residence. As a result, the national legislation imposed a restriction that discriminated against nationals of other Member States regarding the free movement of capital within the EU. Consequently, the Court deemed the national measure inadequate for achieving its intended objective.

A different conclusion was reached in the *Ospelt* case. Under the Austrian Constitution, federal states (Länder) are empowered to introduce administrative restrictions on land transactions in the general interest of maintaining, strengthening, or creating an agricultural population. In this context, a prior authorization requirement was introduced for the acquisition of agricultural and forestry land, along with the condition that the purchaser must personally cultivate the land as part of an agricultural holding where they also reside. The preservation of a land ownership structure that allows for the development of viable farms, the harmonious maintenance of space and the environment, as well as the promotion of a rational use of available land - while combating land pressure and preventing natural risks - were deemed general interest objectives capable[52] of justifying the restriction adopted by the Member State authorities.

Summarizing the guidelines established by these rulings, a prior administrative authorization regime cannot legitimize discretionary behavior by national authorities that would deprive EU provisions - particularly those related to a fundamental freedom - of their useful effect. Therefore, for a prior administrative authorization regime to be justified, it must be based on objective, non-discriminatory, and pre-established criteria that ensure the system does not lead to an arbitrary exercise of discretion by national authorities[53].

5. Agricultural Land Use – A Restriction on the Free Movement of Capital? The Necessity and Proportionality Test

A new judicial controversy was brought before the Court following legislative amendments in Hungary concerning property and land registry regulations. In 2013, a series of provisions came into force stipulating the automatic termination of usufruct

[50] Regarding the limits of the market access theory and the fact that the *Gebhard* ruling (along with *Gourmet* and *Carpenter*) must be viewed in the context of the introduction of the concept of Union citizenship, forming part of a broader phenomenon in which the Court protects the citizen, see Eleanor Spaventa, "From *Gebhard* to *Carpenter*: Towards a (Non-)Economic European Constitution," *Common Market Law Review* 41, no. 3 (2004): 743, doi: https://doi.org/10.54648/cola2004023.

[51] CJEC, 1 June 1999, *Konle*, C-302/97, ECLI:EU:C:1999:271, para. 40.

[52] CJEC, 23 September 2003, *Ospelt and Schlössle Weissenberg,* C-452/01, EU:C:2003:493, para. 39.

[53] CJEC, 16 May 2006, *Watts*, C-372/04, EU:C:2006:325, para. 116.

rights previously established over agricultural land[54] if the holders were not close relatives of the landowner. Specifically, Article 108(1) of the 2013 Land Act (adopted on 21 June 2013 and effective from 15 December 2013) states: „Any usufruct or use rights existing as of 30 April 2014 and established, for an indefinite period or for a fixed period expiring after 30 April 2014, through a contract concluded between persons who are not close relatives within the same family shall automatically expire on 1 May 2014". It was not the first time that national measures aimed at discouraging foreign investments were brought to the Court's attention, the most notorious example being the well-known jurisprudence regarding golden shares, through which states (minority shareholders) preserved special prerogatives in companies undergoing privatization and operating in sectors of strategic economic interest[55].

5.1. SEGRO – Facts of the Case and Preliminary Questions

SEGRO, a Hungarian company owned by associates residing in Germany, and Mr. Horváth, an Austrian national, acquired usufruct rights over agricultural land in Hungary before 1 January 2002. In September 2014 and October 2015, respectively, the competent land registry offices proceeded ex officio with the deletion of these usufruct rights from the land register, without granting any compensation to the holders. The claimants challenged the deletion decisions before Hungarian courts, invoking violations of the Fundamental Law and EU law. The Constitutional Court dismissed the objection of unconstitutionality concerning the provisions on the extinction of usufruct rights previously acquired by individuals who could not prove a close family relationship with the landowner. The court of first instance considered that the national legislation restricted the rights of nationals of other Member States derived from the free movement of capital, as it could discourage them from exercising these rights by acquiring usufruct over agricultural properties. In both cases, the Administrative and Labor Court of Szombathely referred preliminary questions to the CJEU, seeking clarification, *inter alia*, on whether Article 63 TFEU should be interpreted as opposing the contested legislation, which conditions the retention of usufruct rights on the beneficiary proving a close family relationship with the landowner - who, in most cases, would be a Hungarian national.

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[54] For the forms and conditions in which foreign investors „approach" agricultural land in Romania, see Carmen Tamara Ungureanu, "Foreign Investments in Agricultural Land in Romania. UNIDROIT/IFAD Guide," *Romanian Review of Private Law* 2023, no. 1: 231–248.

[55] Wolf-Georg Ringe, "Company Law and Free Movement of Capital," *Cambridge Law Journal* 69, no. 2 (2010): 378–409, DOI:10.1017/S0008197310000516; Thomas Papadopoulos, "Privatizations, Golden Shares, Investment Screening and Bailout Agreements in the Context of Article 345 TFEU: The Limits of Internal Market Law," in *The Law and Geoeconomics of Investment Screening*, vol. 4 of *Springer Studies in Law & Geoeconomics*, ed. J. H. Pohl, Stephan Hindelang, Thomas Papadopoulos, and Johannes Wiesenthal (Cham: Springer, 2025), https://doi.org/10.1007/978-3-031-75554-5_1. Thomas Papadopoulos, "Privatized Companies, Golden Shares and Property Ownership in the Euro Crisis Era: A Discussion After *Commission v. Greece*," *European Company and Financial Law Review* 12, no. 1 (2015): 1–18, DOI:10.1515/ecfr-2015-0001.

5.2. Advocate General's Opinion

After assessing that the preliminary questions referred in the joined cases C-52/16 and C-113/16 are admissible, Advocate General Saugmandsgaard Øe develops his analysis around three key aspects: determining the applicable freedom of movement, the existence of a restriction on the free movement of capital, and whether the restriction is justified by analyzing the arguments put forward by the Hungarian government. Regarding the alleged violation of Articles 17 and 47 of the Charter, the Advocate General's opinion refers to the limits established by Articles 51 and 52 of the Charter and holds that when a national regulation is examined in relation to the freedoms of movement, the violation of a fundamental right guaranteed by the Charter cannot be invoked independently of the issue of violating those freedoms.

Although the usufruct rights in dispute were established before Hungary's accession to the European Union, the Advocate General recognizes the Court's competence to answer the questions referred, since the administrative decisions to remove the rights from the land register were issued after May 1, 2004 (the date of entry into force of Hungary's 2003 Accession Treaty).

Regarding the applicable freedom, the right to acquire, exploit, and dispose of real estate in another Member State generates capital movements when exercised. Real estate investments are classified as capital movements according to the Directive of June 24, 1988, which includes „*usufruct, servitude, and superficies rights*" in this category. The Advocate General recalls that, according to the explanatory notes in Annex I to Directive 88/361, the notion of real estate investments refers to „the acquisition of buildings and land and the construction of buildings by private individuals *for profit or personal use*" Therefore, no distinction is made based on whether the land is used for private or professional purposes.

The Hungarian government primarily invoked Article 345 TFEU, which states that the Treaties do not affect the system of property ownership in Member States. Indeed, this principle grants Member States considerable freedom regarding the content and acquisition of property-related rights, such as usufruct, with the sole limitation that acquisition must not be rendered impossible or discriminatory. The Advocate General emphasizes that while Article 345 TFEU expresses the neutrality of the Treaties concerning property ownership regimes in Member States, this neutrality does not mean that national measures regulating the acquisition of agricultural land are exempt from fundamental EU law provisions, particularly those on non-discrimination, freedom of establishment, and free movement of capital[56].

According to the Advocate General, the measure adopted constitutes indirect discrimination based on the nationality/citizenship of the usufructuary or the origin of the capital, as Hungarian citizens can more easily meet the conditions set out in national legislation compared to nationals of other Member States. Moreover, the potential option for the holders of such rights to claim financial compensation does not eliminate the effects of this indirect discrimination.

[56] Opinion of Advocate General in *SEGRO* case, ECLI:EU:C:2017:410, para. 66.

None of the overriding reasons of public interest invoked by the Budapest administration to justify the contested legislation (the exploitation of agricultural land, the need to sanction violations of national foreign exchange control laws, and combating abusive acquisition practices in the name of public order) were deemed by the Advocate General to be capable of guaranteeing the fulfillment of the objectives pursued. The reasoning developed by the Advocate General will be fully reflected in the Court's approach when providing its response to the preliminary questions.

5.3. CJEU Ruling in SEGRO Case

Given that nationals of other Member States are deprived of the use of the assets in which they have invested capital and, implicitly, of the possibility of disposing of them, the regulation in question constitutes an obstacle to the free movement of capital. The fact that, over time, the acquisition of agricultural land by persons who are not Hungarian nationals has successively been subject to a prior authorization system and, later, to a prohibition regime is likely to have reduced the possibility for such land to become the property of foreign nationals and, implicitly, the likelihood that a foreign holder of a usufruct right would meet the requirement of having a close family relationship with the landowner[57].

However, it is well-known that derogations from the freedoms of movement are not a priori prohibited. The Court has consistently ruled that restrictive measures on the freedoms of movement adopted by Member States can only be accepted if they are justified based on objective reasons, independent of the origin of the capital involved, by imperative public interest grounds, are suitable to guarantee the achievement of the legitimate objective pursued, and do not exceed what is necessary to achieve it. However, the contested national legislation has no connection to the objectives invoked and, therefore, is not necessary to achieve them.

Regarding the existence of a justification based on a general interest objective related to the exploitation of agricultural land:

Condition of the adequacy of the measure. In order to be justified, the restrictive measure must be capable of ensuring the achievement of the objective pursued. It is the responsibility of the Member State invoking the justification of the restriction to prove the reasons why the adoption of the measure is necessary for achieving the stated objective. National legislation can guarantee the achievement of the invoked objective only if it truly addresses the concern of achieving it in a coherent and systematic manner. Adopting the opinion expressed by the Advocate General, the Court held that the existence of a family relationship does not guarantee that the usufructuary will personally exploit the respective land. Furthermore, a person with no familial relationship to the owner, who acquires a usufruct on agricultural land, can exploit the land for speculative purposes.

In this case, it is noted that the case files do not provide specific elements from which it can be concluded that the requirement of a close family relationship between

[57] *SEGRO*, cit., para. 69.

the owner and the usufructuary would contribute to the development of a viable and competitive agriculture by preventing land fragmentation. Moreover, the imposed condition does not, by itself, guarantee the achievement of the stated objective of preventing rural exodus and depopulation of rural areas. Consequently, the criterion chosen by the Hungarian legislator has no connection to the objective of maintaining the population in rural areas as long as the close family relationship between the usufructuary and the owner does not necessarily imply that the usufructuary lives near the agricultural land in question[58].

The proportionality condition. The measure adopted by the Member State must not exceed what is necessary to achieve the pursued objective. In other words, the Member State that adopts the restrictive regulation must prove that the objective cannot be achieved through less restrictive measures on the free movement than the one adopted. In checking the proportionality test in the *SEGRO* case, the Court develops a very pertinent critical analysis supporting the idea that other measures could have been adopted that would affect the free movement of capital less than those provided for in the contested regulation, in order to ensure that the existence of the usufruct right over agricultural land would not result in the cessation of its exploitation by the person holding it, or that the acquisition of the right does not aim at purely speculative purposes and does not lead to use or fragmentation that would present a risk of incompatibility with the sustainable use of the land for agricultural needs. As the Advocate General also indicated, it would have been sufficient to require the usufructuary to maintain the agricultural use of the land, ensuring their own and effective exploitation, in conditions capable of guaranteeing its viability. Given that the explanations provided by the Hungarian government show that such a requirement was preferred in the case of acquiring full ownership of agricultural land or long-term leasing of it, such a solution could have been considered in relation to the acquisition of usufruct as well[59].

Complementing the comparative approach, while the Court of Justice of the European Union applies a uniform proportionality test, the United States Supreme Court operates with a tiered scrutiny framework. The applicable test varies depending on the nature of the case and the right involved. *Strict scrutiny* requires that the measure be narrowly tailored, represent the least restrictive means of achieving the objective, and that the government action be justified by a compelling state interest. *Intermediate scrutiny* requires that the government measure substantially further an important governmental interest. Finally, the most lenient, *rational basis review*, only requires that the measure be rationally related to a legitimate governmental interest[60]. While, under the division of competences, the CJEU interprets the provisions of the Treaties and leaves it to national courts to resolve rights conflicts (in light of the preliminary ruling), the US Supreme Court itself rules on the case at hand - applying either strict or more relaxed scrutiny - without its interpretation being mandatorily binding on state courts.

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[58] *Idem*, para. 87-89.
[59] *Ibidem*, para. 92 and 93.
[60] Tamas Szabados, *op. cit*., p. 581.

Regarding the existence of a justification based on the violation of national regulations on foreign exchange control. The same criterion of family relationship has no connection with the regulation on foreign exchange control. Assuming that the adoption of the legislation conditioning the maintenance of the usufruct right on the existence of a close family relationship between the usufructuary and the owner was, at least in part, guided by the intention to sanction violations of foreign exchange control regulations[61], it is evident that other measures with less effect than the abolition of the real rights in question could have been adopted, such as, for example, administrative fines.

Regarding the existence of a justification based on the prevention of abusive practices. The Hungarian government argues that the restriction in question would be justified by the goal of fighting against artificial arrangements intended to circumvent the prohibition on foreign nationals acquiring ownership rights over agricultural land. The Court finds that, at the time of the establishment of the usufruct rights in favor of the claimants in the main case, the acquisition of these rights was not prohibited by national legislation. Furthermore, assuming that each foreign person unrelated to the owner's family acted abusively at the time the usufruct right was established, the criticized regulation effectively establishes a general presumption of abusive practices. However, the application of such a presumption cannot be accepted.

In any case, to combat these abusive practices, other measures could be provided that would affect the free movement of capital less, such as sanctions or specific actions for annulment before the national courts to combat any proven deviations from the applicable national legislation, provided these measures comply with the other requirements arising from Union law. Moreover, the Court also finds that the Hungarian government's argument based on budgetary considerations and judicial resource economy cannot be accepted. Indeed, according to established case law, purely economic reasons cannot constitute imperative grounds of public interest that justify a restriction on a fundamental freedom guaranteed by the Treaty.

In the absence of a justified and proportional nature of the measure, the Court concludes that the regulation which provides for the extinguishment of usufruct rights over agricultural land if the holders are not close relatives of the landowners, as well as the deletion of such rights from the land register, is incompatible with the principle of free movement of capital provided by Article 63 TFEU. Furthermore, *infringement* proceedings have been initiated against Hungary for breaching its obligations under the treaties as a result of adopting this legislation. As a novelty, in *Commission v. Hungary*, the incompatibility of the national regulation with Article 17 of the Charter of Fundamental Rights of the European Union was also discussed.

[61] Regarding the prudential supervision of financial institutions and the fight against tax fraud as grounds that may justify derogations from the free movement of capital, see Nadia-Cerasela Aniței and Roxana-Elena Lazăr, "Aspects of Cooperation in Detecting and Combating Tax Evasion Between the Anti-Fraud Department (DLAF) and the European Anti-Fraud Office (OLAF)," *Jurnalul de Studii Juridice* 17, no. 1–2 (2022): 35–47, https://doi.org/10.18662/jls/17.1-2/98; Nadia-Cerasela Aniței and Călina-Andreea Gardikiotis, "Money Laundering. National and European Regulations," *Jurnalul de Studii Juridice* 10, no. 1–2 (2015): 13–23.

6. Justification of the Restriction on the Free Movement of Capital and the Applicability of Article 17 of the Charter Concerning the Right to Property

6.1. The Opinion of the Advocate General: The Court's Lack of Jurisdiction to Autonomously Find a Violation of Article 17 of the CDFEU

According to Article 51(1) of the CDFEU, the provisions of the Charter apply to Member States „only when they are implementing Union law." When national regulations are examined by the Court in relation to the freedoms of movement, fundamental rights whose protection is guaranteed by Union law can be invoked in two situations that are related to the existence of a justification[62]:

- the first is the situation where a Member State invokes a justification directly based on the protection of a fundamental right, or the "Schmidberger" hypothesis (which was referenced in the introductory considerations of the article).

- the second concerns the rejection of a justification invoked by a Member State due to an infringement of a fundamental right; this is the situation established by the ERT judgment, which was prompted by a Greek regulation that granted a national operator a monopoly over radio and television to the detriment of broadcasts from other Member States. The Court held that Member States can rely on the exceptions provided by the Treaty (for reasons of public order, public security, and public health) only insofar as the national regulation in question complies with the fundamental rights whose respect is ensured by the Court, including the freedom of expression[63] enshrined in Article 10 of the ECHR, integrated into the European legal order as a general principle of law.

In a pragmatic approach, the Advocate General notes that the Hungarian Government did not invoke Article 17 of the Charter concerning the right to property to justify the national measures in question (the "Schmidberger" hypothesis), and their interpretation is not necessary to reject the justifications invoked by the Hungarian Government (the "ERT" hypothesis). In reality, the referring court asks whether these measures violate Article 17 of the Charter *independently* of the infringement of the free movement of capital. However, the Court has never considered that an alleged violation of a fundamental right could be examined *independently* of the infringement of the freedoms of movement. To accept the opposite would imply that all national regulations, even those that do not restrict these freedoms, could be scrutinized in relation to the Charter when they are raised in a factual situation that falls within the scope of those freedoms, namely in any cross-border situation. To give a concrete example, this would mean that a regulation prohibiting night work in bakeries, with regard to which the Court has ruled that it does not restrict the free movement of goods, could now be examined in relation to the provisions of the Charter (particularly Articles 15 and 16)[64].

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[62] Koen Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights," *European Constitutional Law Review* 8, no. 3 (2012): 375-403, DOI: https://doi.org/10.1017/S1574019612000260.
[63] CJEC, 18 June 1991, *ERT/DEP*, C-260/89, ECLI:EU:C:1991:254, para. 43-45.
[64] Opinion of Advocate General in *SEGRO* case, para.137, and in *Comisia/Ungaria*, para 76.

Such an interpretation is difficult to reconcile with Article 6(1) TEU and Article 51(2) of the Charter, according to which the provisions of the Charter do not in any way extend the competences of the Union as defined in the Treaties. This persuasive dialectic initiated in the *SEGRO* case will be repeated in *Commission v. Hungary*, with the clarification that Advocate General Saugmandsgaard Øe anticipates that the Court's reasoning could move in the opposite direction.

6.2. Incompatibility of the Extinction of Usufruct Rights with Article 17 CDFEU

According to Article 52 (3) of the Charter, the right to property recognized in Article 17 (1) has the same meaning as that guaranteed in Article 1 of Protocol No. 1 to the ECHR. The contested regulation involves an interference with the fundamental right to property[65] of the holders of usufruct rights affected by the legislative measure in question, which is analyzed as a deprivation of property.

Indeed, following the *ex lege* extinguishment of usufruct rights, the attributes of ownership (*usus* and *fructus*) over agricultural land were *transferred* or, more precisely, reverted to the landowners. The fact that this transfer benefited not the state itself, but the private individuals – the respective owners – is irrelevant. The abolition of usufruct rights amounts to *deprivation of property*, which means it can only occur „in cases and conditions provided by law and in exchange for fair compensation paid in a timely manner for the loss [suffered]".

However, the criticized regulation does not contain any provision that provides for compensation to the holders of the usufruct rights deprived of them, nor the methods for determining this compensation. The defenses of the Hungarian state referring to general civil law provisions regarding expropriation[66] cannot be accepted, as they do not allow for certainty about whether compensation will be effectively obtained following such procedures (which are typically long and costly), nor can the nature and extent of this compensation be known. Given that the extinction of usufruct rights had an unexpected and unpredictable character, without providing for the necessary transitional period, and considerably shortening the previously granted twenty-year period (from January 1, 2033 – the initially foreseen date for the extinction of usufruct rights to May 1, 2014 – the later established date), the violation of the right to property is all the more apparent for the 5000 foreign investors affected by the regulation's effects. The chilling effect on foreign investments is not limited to isolated cases but has a systemic character, resulting from the retroactive modification of the legal framework governing investments without ensuring effective protection. Moreover, it occurs in a field that falls outside the scope of the so-called *police power doctrine*, which was developed in consideration of the state's right to regulate in areas

[65] Regarding a Redefinition of the Conceptual Paradigms of Property Law see Irina Sferdian, "Is Property a Super-Right?" *Romanian Review of Private Law*, no. 2 (2019): 17–34.

[66] For extensive commentary on the case law in this area of the Constitutional Court of Romania, Marieta Safta, "The Limits to the Exercise of Property Rights in the Case Law of the Constitutional Court of Romania," *Romanian Case Law Review*, no. 2 (2024): 225–245.

where a significant public interest exists - such as taxation, public health, and environmental protection. States are not required to pay compensation for bona fide, non-discriminatory measures that pursue a legitimate public policy objective[67].

7. Consequences post-*SEGRO* and *Commission v. Hungary* (*Usufruct on Agricultural Land*)

The limitations imposed by Article 51 (1) of the Charter, in the sense that its provisions apply to the Member States "only when they are implementing Union law," have often been reaffirmed in the case law[68].

However, the trend toward an autonomous interpretation of the Charter's provisions, as discerned in *SEGRO*, was subsequently reaffirmed in the judgment delivered on June 18, 2020, in the case *Commission v. Hungary* (*Transparency of Associations*), which concerned the restrictive conditions imposed by the Hungarian state regarding the funding of civil organizations from abroad. The differential treatment based on the national or „foreign" origin of the financial support granted to associations and foundations established in Hungary led the Commission to initiate the infringement procedure, with the Court sanctioning these as restrictions on the free movement of capital, incompatible with EU law. Moreover, the national regulation imposing registration, declaration, and publicity obligations, accompanied by sanctions, on associations receiving financial aid from other Member States or third countries was deemed incompatible with the provisions of Articles 7 (right to respect for private life), 8 (right to the protection of personal data[69]), and 12 (freedom if assembly and of association) of the Charter. We are witnessing a consolidation of the legal approach proposed in *SEGRO* for addressing the interaction between fundamental rights and fundamental economic freedoms. Doctrine immediately noted that „these legal choices are firstly concerned with the CJEU's reinforcement of free movement law as an important 'hook' to bring the Charter on board. Thereby, free movement law does not function as a constraining factor for the protection of fundamental rights, but is rather used as a foundation for strengthening fundamental rights"[70].

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[67] See Maryam Malakotipour, "The Chilling Effect of Indirect Expropriation Clauses on Host States' Public Policies: A Call for a Legislative Response," *International Community Law Review* 22, no. 2 (2020): 235–270, DOI:10.1163/18719732-12341428.

[68] CJEU (Grand Chamber), 26 February 2013, C-617/10, *Åkerberg Fransson*, EU:C:2013:105, para. 19-21; CJEU (Grand Chamber), 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, para. 63-64.

[69] Daniel Mihai Șandru, "Some Considerations on the Relationship Between Data Protection (Especially the General Data Protection Regulation) and Intellectual Property," *Romanian Review of European Law*, no. 3 (2019): 21; Daniel Mihai Șandru, "Artificial Intelligence and Personal Data Protection in the European Union", *Romanian Review of European Law*, no. 1 (2023): 84; Carmen Tamara Ungureanu, "Legal Remedies for Personal Data Protection in European Union," *Logos, Universality, Mentality, Education, Novelty. Section: Law* 6, no. 2 (2018): 26–47, DOI: https://doi.org/10.18662/lumenlaw/10.

[70] Ulla Neergaard and Sybe A. de Vries, "The Interaction between Free Movement Law and Fundamental Rights in the (Digital) Internal Market," in *New Directions in Digitalisation: Perspectives from EU Competition Law and the Charter of Fundamental Rights*, ed. Annegret Engel, Xavier Groussot, and Gunnar Thor Petursson (Springer, 2024), 106.

Furthermore, a few months later, in its judgment of October 6, 2020, the Court accepted another action for a failure to fulfill obligations brought against Hungary for the restrictive regime imposed on foreign higher education institutions outside the Union[71]. Although seemingly a commercial dispute – through the violation of WTO law (Article XVII of the General Agreement on Trade in Services), the freedom to provide services (Article 56 TFEU), and the freedom of establishment (Article 49 TFEU) – the case provided an opportunity to express a „new form of subtlety in using Union law to protect fundamental rights"[72]. The Court also found a violation of the provisions related to academic freedom, the freedom to establish educational institutions, and the freedom to conduct business [Articles 13, 14 (3), and 16 CDFEU][73]. In practice, the ruling carries at its core a subtle procedure through which individuals can overcome the boundaries set by the Court when they are not allowed to invoke WTO agreements (for the purpose of annulling EU acts or requiring compensation for the damage caused by EU institutions). Even though WTO agreements cannot be used by individuals as a standard of control over EU law, the Charter represents a valid benchmark, against which national measures violating WTO rules can be censured[74].

8. Conclusions

Recent jurisprudential developments confirm that the „youngest"[75] of the freedoms of movement is developing its experiences and requires not only a more comprehensive space for analysis than the one traditionally assigned to it, but also a more flexible adjustment of the classical reasoning approaches. This is especially true as disputes increasingly tend to go beyond the realm of purely economic interests, involving social, political, and even cultural aspects.fundamental freedoms.

Although Article 345 TFEU affirms the principle of neutrality of the treaties regarding the property regime in the Member States, real estate investments (made by foreign residents or those made by non-residents in the territory of a Member State) fall under the rules governing the free movement of capital. Member States are thus

[71] In fact, through the legislative changes made in April 2017 by the Hungarian Parliament to the Higher Education Law, for foreign universities from outside the European Economic Area (EEA) to operate on Hungarian territory, they must provide proof of: i) *the existence of a prior international agreement between Hungary and their country of origin*, and ii) *the actual organization of higher education activities in their country of origin.*

[72] Csongor István Nagy, "Case C-66/18 Commission v. Hungary (Central European University)," *The American Journal of International Law* 115, no. 4 (2021): 701, DOI: https://doi.org/10.1017/ajil.2021.45.

[73] CJEU (Grand Chamber), 6 October 2020, C-66/18, *Commission v Hungary (Enseignement supérieur*), EU:C:2020:792, point 243.

[74] For details, see Gina Orga-Dumitriu, "Relationship between Infringement Proceedings Applied by the European Commission and the WTO Law," in *Building an Adapted Business Law*, ed. Sónia de Carvalho and Anton Petričević (Bucharest, Paris, Calgary: Adjuris - International Academic Publisher, 2022), 322–323.

[75] Ondrej Hamuľák, "Unveiling the Overlooked Freedom – The Context of Free Movement of Capital and Payments in the EU Law," *International and Comparative Law Review* 12, no. 2 (2012): 129–145, DOI:10.1515/iclr-2016-0091.

bound by the obligation not to adopt regulations that could impede, restrict, or discourage the movement of capital[76]. Derogatory measures are only permitted insofar as they fall within the scope of the legal exceptions provided for in the treaty or are justified by imperative requirements of general interest recognized in the Court's case law. Conditioning the acquisition of real property on prior administrative authorization for purposes related to land use and population maintenance or the statutory extinguishment of usufruct rights without proving the close family relationship with the landowner can only be justified subject to verifying the necessity and proportionality of these measures.

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[76] See Thomas Papadopoulos, "Privatizations of State-Owned Companies and Justifications for Restrictions on EU Fundamental Freedoms: Past, Present and Future Perspectives," in *Regulation of State-Controlled Enterprises: An Interdisciplinary and Comparative Examination*, ed. Julien Chaisse, Jędrzej Górski, and Dini Sejko (Springer, 2022), 223-270, http://dx.doi.org/10.2139/ssrn.4226161.

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