

# Anonymised version

Translation

C-419/23 – 1

## Case C-419/23

### Request for a preliminary ruling

**Date lodged:**

6 July 2023

**Referring court:**

Győri Törvényszék (Hungary)

**Date of the decision to refer:**

21 June 2023

**Applicant:**

CN

**Defendant:**

Nemzeti Földügyi Központ

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Győri Törvényszék (Győr High Court, Hungary)

In proceedings concerning a dispute relating to transactions in land between CN ([...] Sternenfels, Germany [...]), as applicant, and the Nemzeti Földügyi Központ (National Land Centre, Hungary) [...] Budapest, [...]), as defendant, represented by [...], and GW ([...] Szóce, Hungary [...]), as intervener in support of the claims of the defendant ('the Intervener'), the Győr High Court [...] issues the following

#### Decision

The referring court [...] refers the following question to the Court of Justice of the European Union for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union:

Must Article 63 of the Treaty on the Functioning of the European Union and Article 17 of the Charter of Fundamental Rights of the European Union be

interpreted as meaning that they do not preclude legislation of a Member State that, on reinstatement of a usufruct right, ordered following proceedings for failure to fulfil obligations – subsequent to the deletion of a usufruct right whose registration was unlawful but final –, does not provide for a mandatory examination of whether the usufruct right was registered lawfully?

[...] [matters of national procedural law]

Grounds:

## 1. Facts

On 30 December 2001, Readiness Kft., which owned arable land in registered plot 0380/1 in the Kőszeg (Hungary) area, concluded an agreement with the Intervener under which a usufruct right was created over that property in favour of the Intervener.

The Intervener's usufruct right over that property was registered in the land register on 29 January 2002. The registration decision was not contested in either administrative or judicial proceedings.

The applicant's document of title to that property was registered on 18 May 2012.

By decision [...] of 27 July 2015, the Vas Megyei Kormányhivatal Szombathelyi Járási Hivatal (Szombathelyi District Registry, part of the Vas Region Administrative Department, Hungary) deleted the Intervener's usufruct right, in accordance with Paragraph 108(1) of *mező-és erdőgazdasági földek forgalmáról szóló 2013. évi CXXII. törvénnyel összefüggő egyes rendelkezésekről és átmeneti szabályokról szóló 2013. évi CCXII. törvény* (Law No CCXII of 2013 laying down various provisions and transitional measures concerning Law No CXXII of 2013 on transactions in agricultural and forestry land, 'the 2013 Law on transitional measures') and Paragraph 94(1) and (3) of *ingatlan-nyilvántartásról szóló 1997. évi CXLI. törvény* (Law No CXLI of 1997 on the land register).

In its judgment in Case C-235/17, the Court held that, by adopting Paragraph 108(1) of the 2013 Law on transitional measures and thereby cancelling by operation of law the rights of usufruct over agricultural and forestry land located in Hungary and which were held directly or indirectly by nationals of other Member States, Hungary failed to fulfil its obligations under Article 63 TFEU interpreted in conjunction with Article 17 of the Charter of Fundamental Rights of the European Union ('the Charter').

The Intervener then requested the defendant to declare that he could apply for reinstatement of his usufruct right, under Paragraph 108/B(1), which had been in force since 1 January 2022, of the 2013 Law on transitional measures.

By decision [...] of 30 November 2022, the defendant ordered reinstatement in the register of the Intervener's deleted usufruct right over the property owned by the applicant. In its decision, the defendant stated that the applicant was not considered to be in good faith within the meaning of Paragraph 108/F(7) of the 2013 Law on transitional measures because her property right already existed when the usufruct right was deleted.

In her application, the applicant is seeking deletion of the reinstatement of the usufruct right in the land register, on the grounds that the right in question was registered unlawfully since, from 1 January 2002, by virtue of Paragraph 11(1) of termőföldről szóló 1994. évi LV. törvény (Law No LV of 1994 on productive land, 'the 1994 Law on productive land') its registration was no longer permitted.

The defendant and the Intervener have applied that the application be dismissed, claiming that there was no legal obstacle to the reinstatement decision because, in relation to reinstatement decisions, the 2013 Law on transitional measures does not require examination of whether registration of the usufruct right was lawful.

## **2. European Union law**

### ***Article 63(1) TFEU***

'Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.'

### ***Article 17(1) of the Charter***

'Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.'

## **3. National legislation**

### ***Paragraph 108/B(1) of the 2013 Law on transitional measures***

'Any natural or legal person whose usufruct right has been deleted from the land register by virtue of the provisions of Paragraph 108(1) hereof in force on 30 April 2014 ('the holder of a deleted usufruct'), or a successor in title to that person, may apply under this subsection to have the deleted usufruct right reinstated in the land register and for any compensation to which that person is entitled under this subsection.'

***Paragraph 108/F(6) of the 2013 Law on transitional measures***

‘A declaration should be made that the deleted usufruct right may be reinstated where:

- (a) any of the persons referred to in subparagraph (7) is not considered to be in good faith; and
- (b) there is no legal obstacle within the meaning of subparagraph (8).’

***Paragraph 108/F(7) of the 2013 Law on transitional measures***

‘The following persons shall, between the parties, be considered not to be in good faith in relation to the property in question:

- (a) the owner, if that person’s property right already existed when the usufruct right was deleted;
- (b) the owner, where that person’s property right arose, either under a contract concluded after 6 March 2018 or before that date if it was submitted to the competent authorities after that date in a procedure compliant with the Law on transactions in land, including the registration procedure, or by a disposition on death occurring after 6 March 2018;
- (c) the owner, where that person’s property right arose after 6 March 2018 in any manner other than by contract or inheritance;
- (d) the owner, if that person, despite being considered to be in good faith in accordance with point (b) or (c), created a usufruct over the property after 6 March 2018;
- (e) the usufructuary, where that person’s right was created by a contract or disposition on death subsequent to 6 March 2018 or where, in a transaction transferring a property right after that date, the transferor reserved a usufruct right;
- (f) the owner, where that person acquired the property right by inheritance from one of the owners referred to in points (a) to (d).’

***Paragraph 108/F(8) of the 2013 Law on transitional measures***

‘The fact that the property in question has been expropriated or that the property right over it has been transferred by a sale and purchase agreement in lieu of expropriation shall be regarded as a legal obstacle to reinstatement.’

#### 4. Reasons for the reference for a preliminary ruling:

##### 4.1 *Precedents: judgments of the Court*

In its judgment in Cases C-52/16 and C-113/16 (*SEGRO*), the Court held that Article 63 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings [in those cases], 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 that land are extinguished by operation of law and are, consequently, deleted from the property registers.

In the grounds of the *SEGRO* judgment, the Court stated that ‘first of all, it should be noted that, as has been stated in paragraphs 6 and 7 above and is apparent from the referring court’s explanations relating to national law, after the legislative amendments made in 1991 and 1994 for the purpose of preventing natural persons not possessing Hungarian nationality and legal persons from acquiring agricultural land, any person remained free, on the other hand, to acquire a right of usufruct over such land. According to those explanations, it was only from 1 January 2002 that the 1994 Law was amended so as also to preclude a right of usufruct over agricultural land from being created by contract in favour of those natural and legal persons’ (paragraph 109).

‘Thus, as is indeed explicitly clear from the particulars supplied by the Hungarian Government that are set out in paragraphs 16 and 30 above, it is not in dispute that the usufructs at issue in the main proceedings were created before 1 January 2002, that is to say, at a time when the creation of such usufructs was not prohibited by the national legislation in force. Nor is it in dispute that those usufructs were entered in the property registers by the competent public authorities’ (paragraph 110).

‘According to the Hungarian Government, the continuance of situations of that kind was contrary to public policy and it was therefore incumbent upon the State to remedy them. It states that the Hungarian legislature, instead of having recourse to the most classical approach, consisting in declaring, following a judicial examination on a case-by-case basis, that the contracts at issue were void, decided to remedy by force of law the deficiencies of the legal rule previously laid down or, indeed, the absence of any relevant rule of law’ (paragraph 112).

‘In order to comply with the principle of proportionality, a measure pursuing such a specific objective of combating wholly artificial arrangements should enable the national court to carry out a case-by-case examination, having regard to the particular features of each case and taking objective elements as a basis, in order to assess the abusive or fraudulent conduct of the persons concerned (see, to that effect, judgment of 17 September 2009, *Glaxo Wellcome*, C-182/08, EU:C:2009:559, paragraph 99)’ (paragraph 117).

‘Thus, other measures less restrictive of the free movement of capital such as penalties or specific actions for a declaration of invalidity before the national courts in order to combat any circumventions of the applicable national legislation that are established could, provided that they comply with the other requirements arising from EU law, be prescribed for the purpose of combating those abusive practices’ (paragraph 122).

In its judgment in Case C-235/17, the Court held that ‘in addition, it should be borne in mind that the fundamental rights guaranteed by the Charter are applicable in all situations governed by EU law and that they must, therefore, be complied with inter alia where national legislation falls within the scope of EU law (see, in particular, judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 19 to 21, and of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraph 62)’ (paragraph 63).

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

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

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

On the basis of those considerations, in its judgment in Case C-235/17 the Court held in relation to Paragraph 108(1) of the 2013 Law on transitional measures that Hungary had also failed to fulfil its obligations under Article 17 of the Charter.

#### ***4.2 The Hungarian law in force at the time the usufruct right was registered***

Since 1 January 2002, by virtue of the 1994 Law on productive land, no rights of usufruct over agricultural land could be created in favour of foreign persons.

Earlier case-law had also interpreted Paragraph 11(1) of the 1994 Law on productive land, holding that, from 1 January 2002, that Law meant that a right of usufruct could not be registered in favour of foreign persons over agricultural land (judgments of principle EBH2004.1173 and EBH2005.1277).

In the case that gave rise to judgment of principle EBH2005.1277, the contract creating the usufruct had been concluded in 2001, but the usufruct was not registered in the land register until 2002. The court held that such a registration of the usufruct right was unlawful.

According to the factual background of this case, the contract creating the usufruct was concluded on 30 December 2001 but the right was not registered until 2002. Registration of the usufruct right was, therefore, unlawful. The registration decision nevertheless became final because it was not contested.

In paragraph 109 of *SEGRO* and paragraph 10 of the judgment in Case C-235/17, the Court is referring to the legislative provision as amended with effect from 1 January 2002.

#### ***4.3 The Hungarian legislation in force at the time the usufruct right was reinstated***

Subsection 20/F, in force from 1 January 2022, of the 2013 Law on transitional measures, is entitled: ‘Specific provisions to implement the judgment of the Court of Justice of the European Union delivered in Case C-235/17, *European Commission v Hungary*, on the extinguishment by operation of law of usufruct rights over agricultural land’.

Accordingly, in order to implement the Court’s judgment in Case C-235/17, the Hungarian legislature enacted a series of legislative provisions that came into force on 1 January 2022. That purpose is also referred to in the preamble of the Law, according to which ‘the judgment of the Court of Justice of the European Union delivered in Case C-235/17 ordered the restoration of usufruct rights cancelled by Law No CXXII of 2013 on transactions in agricultural and forestry land. In order to implement that judgment – after consultation with the European Commission – the law is required to regulate the ensuing process, which comprises two phases and involves three administrative procedures: (a) an administrative procedure for reinstatement of the usufruct right in the register,

which entails, first, examining whether the right can be reinstated and, secondly, in the event of a decision in the affirmative, the reinstatement of that right in the land register; (b) an administrative procedure to determine the compensation, in which the appropriate compensation to be paid by the State to the usufructuary would be determined.’

According to Paragraph 108/F(6) of the 2013 Law on transitional measures, a declaration must be made that the deleted usufruct right may be reinstated where the owner or usufructuary is not considered to be in good faith in accordance with Paragraph 108/F(7).

Under Paragraph 108/F(7) of the 2013 Law on transitional measures a usufructuary is treated as being in bad faith (that is to say, in terms of the legislation, is not treated as being in good faith) in one scenario: where that person’s usufruct right was created by contract or by a provision on death subsequent to 6 March 2018 or where the transferor reserved a usufruct right in a transaction transferring a property right after that date; (6 March 2018 was the date on which the Court handed down its judgment in *SEGRO*).

The other five scenarios in Paragraph 108/F(7) of the 2013 Law on transitional measures relate to bad faith on the part of the owner.

Accordingly, a situation in which the usufruct right was registered at a time when the provisions of the Hungarian legislation no longer permitted that registration is not contemplated as an instance of bad faith under Paragraph 108/F(7) of the 2013 Law on transitional measures. The legislature did not take the view that such a circumstance should be considered in relation either to the owner or the usufructuary for the purposes of the reinstatement of the deleted usufruct right, even though paragraphs 112, 117 and 122 of *SEGRO* prescribed a procedure in the Member State in order to examine in each case whether or not the usufruct rights had been registered lawfully.

#### ***4.4. Issues relating to an uncontested registration decision that has become final***

It is beyond doubt that the Intervener’s usufruct right was registered at a time when the legislation did not so permit.

The competent authority nevertheless registered the Intervener’s usufruct right in the land register. It is clear that the registration was not contested either by the owner or the usufructuary.

In its judgment in Case C-177/20, *Grossmania*, the Court addressed the relationship between, on the one hand, the principle of legal certainty – embodied in the finality of administrative decisions – and, on the other, the principle of effectiveness and the duty of sincere cooperation.

In that judgment the Court held in essence that ‘particular circumstances may be capable, by virtue of the principles of effectiveness and sincere cooperation arising from Article 4(3) TEU, of requiring a national administrative body to review an administrative decision that has become final. In that context, it is necessary to take 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 (see, to that effect, judgment of 20 December 2017, *Incyte*, C-492/16, EU:C:2017:995, paragraph 48 and the case-law cited)’ (paragraph 54).

Referring to the judgment in Case C-235/17, the Court held that the Hungarian legislation infringed Article 17(1) of the Charter since ‘by definition, it deprives the persons concerned – in a compulsory, complete and definitive manner – of those rights of usufruct, without it being justified on the ground that it is in the public interest; nor were any arrangements in place whereby fair compensation is paid in good time’ (paragraph 56).

‘It follows that, if it were to be confirmed that Hungarian law does not make it possible, in an action brought against the rejection of a request for reinstatement of rights of usufruct, to contest the measure deleting those rights, which has since become final, that impossibility cannot reasonably be justified by the requirement for legal certainty and therefore ought to be rejected by that court as being contrary to the principle of effectiveness and the principle of sincere cooperation arising from Article 4(3) TEU’ (paragraph 62).

It can be inferred from the judgment in Case C-177/20 that the principle of legal certainty, embodied in the finality of an administrative decision, may conflict with the principle of effectiveness and the duty of sincere cooperation. Where that occurs, the finality of the administrative decision must not prevent a Member State court from taking all the measures necessary to guarantee the effectiveness of EU law.

In the present case, however, EU law is embodied in the principle, flowing from *SEGRO* and from the judgment in Case C-235/17, that usufruct rights may only be deleted if the national legislature has enabled the national courts to examine in each case whether or not the usufruct right was registered lawfully.

In this case, the national court would have to conclude from that examination that the usufruct right was not registered lawfully; Paragraph 108/F(7) of the 2013 Law on transitional measures, however, precludes the national court from reaching that conclusion.

#### **4.5 *Infringement of Article 63 TFEU and Article 17(1) of the Charter***

As regards the free movement of capital, the referring court notes, first, that the applicant lives in Germany and the judicial review proceedings concern the lawfulness of reinstatement of a usufruct right over a property belonging to the

applicant in Hungary (in that context the referring court also mentions paragraph 54 of the judgment in Case C-235/17).

According to point II.A of Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, the nomenclature of capital movements includes investments in real estate on national territory by non-residents.

As a result of deletion of the Intervener's usufruct right, the applicant had complete enjoyment of full ownership until the usufruct right at issue was reinstated. Real property encumbered by a usufruct right has an appreciably lower market value than other, unencumbered, property. The applicant could therefore expect that the market value of her property would increase following deletion of the unlawfully registered usufruct right and that she would be able to manage her agricultural land herself free of any usufruct or to conclude a lease for its cultivation.

It is important to emphasise that the agreement creating the usufruct right was not concluded between the applicant and the Intervener. This is therefore not a situation in which the applicant is seeking to release her property from a usufruct right notwithstanding conduct in bad faith on her part. The applicant acquired the property encumbered with the usufruct right from its former owner, Readiness Kft.

As a result, when an unlawfully registered usufruct right was reinstated, the national legislation at issue in these proceedings deprived the applicant of full ownership without requiring any examination of whether the usufruct right had been registered lawfully.

The national legislation unequivocally runs counter to the free movement of capital.

The fundamental rights guaranteed by the Charter are applicable in all situations governed by EU law and must, therefore, be complied with where national legislation falls within the scope of EU law (judgment in Case C-235/17, paragraph 63). That is inter alia the case where national legislation is such as to obstruct one or more of the fundamental freedoms guaranteed by the Treaty (judgment in Case C-235/17, paragraph 64).

Since the national legislation at issue in these judicial review proceedings is such as to obstruct exercise of the fundamental freedom guaranteed by Article 63 TFEU, Article 17(1) of the Charter must also apply.

Application of the Charter is also justified by the fact that the national legislature did not, by means of Paragraph 108/F(6) and (7) of the 2013 Law on transitional measures, comply in a satisfactory manner with *SEGRO* and the judgment in Case C-235/17, because it did not regard the fact that registration of the usufruct right was unlawful as a circumstance that had to be considered in relation to

reinstatement of the right (*SEGRO*, paragraphs 112, 117 and 122). Accordingly, when implementing the judgment in Case C-235/17, the national legislature disregarded the EU law embodied in those judgments of the Court.

Under Article 17(1) of the Charter, everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. Once the unlawfully registered and then deleted usufruct right was reinstated, the applicant could neither enjoy or use her property without obstruction nor dispose of it without restriction. Paragraph 5:147(1) of polgári törvénykönyvről szóló 2013. évi V. törvény (Law No V of 2013 establishing the Civil Code) provides that the usufruct right entitles the usufructuary to possess, exploit and collect revenue from a thing owned by a third party. Reinstatement of the usufruct right would deprive the applicant of those rights.

#### **4.6 Assessment of bad faith**

In the light of the foregoing, the bad faith scenarios regulated in Paragraph 108/F(7) of the 2013 Law on transitional measures need in any event to be supplemented, as regards the holder of the deleted usufruct, at least by an examination of whether registration of the usufruct right was permitted by the legal provisions in force at the time it was registered.

Examination of that circumstance would be an objective criterion for assessing whether or not there was bad faith on the part of the usufructuary.

All the scenarios under Paragraph 108/F(7) of the 2013 Law on transitional measures are also based on objective facts. For that reason too, in relation to the usufructuary, the referring court finds it imperative that it should examine the objective fact consisting of when the deleted usufruct right was registered, that is to say, whether the registration took place while the legal provisions in force permitted it or expressly prohibited it.

[...] [matters of national procedural law]

Győr, 21 June 2023

[...] [signatures]