

# SEGro AND ITS AFTERMATH: BETWEEN ECONOMIC FREEDOMS, PROPERTY RIGHTS AND THE ‘ESSENCE OF THE RULE OF LAW’

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*The Court of Justice of the European Union’s (CJEU, Court) SEGRO judgment is more than just a recent addition to the debate on the so-called rule of law crisis in the European Union. As this case note shows, SEGRO touches on the most fundamental aspects of the European Union and its relation to the Member States. From an economic perspective, the Court in SEGRO’s treatment of property rights and the ability of economic actors to rely on their lawfully concluded contracts forms the undercurrent of economic investment in the Union. From a functional perspective, the case is perhaps indicative of a wider change in the role of the Court with respect to national courts’ margin of discretion. From a normative perspective, SEGRO gives rise to an important discussion on the difference between fundamental rights and economic freedoms in the EU since the entering into force of the Lisbon Treaty in 2009, as well as ‘constitutional homogeneity’ in the EU after Hungary’s legislative reforms. Finally, from an evolutionary perspective, SEGRO marks another iteration in perhaps a wider shift in the trajectory of the Court with respect to questions that menace the integrity of the functioning of the European Union. This case note first examines the background (I) and facts of the case (II). Then it analyses the Opinion of the Advocate General (III) and the findings of the Court (IV). It concludes with a discussion based not only on an analysis of the SEGRO case (V), but also going beyond the case by analysing the most recent jurisprudential developments concerning Hungary and the issue of the (non-respect) of the Rule of Law in the European Union (VI).*

The Rule of Law is one star in a constellation of ideals that dominate our political morality: the others are democracy, human rights, and economic freedom. We want societies to be democratic; we want them to respect human rights; we want them to organize their economies around free markets and private property to the extent that this can be done without seriously compromising social justice, and we want them to be governed in accordance with the Rule of Law.<sup>1</sup>

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<sup>1</sup> Jeremy Waldron, ‘The Rule of Law and the Importance of Procedure’, Public Law and Legal Theory Research Paper Series, Working paper 10-73 (2010) NYU School of Law, 1.

## 1 BACKGROUND TO THE CASE

On the 25<sup>th</sup> of April 2011, the New Fundamental Law of Hungary was passed, not long after the conservative-national Fidesz party led by Victor Orban won the general election in April 2010.<sup>2</sup> These events formed the ‘trigger’ for what some deem the “Hungarian problem”.<sup>3</sup> The lead-up to this point, however, not even a decade ago, is complex, multifaceted and historical in nature. Some point to the fact that Hungary’s accession to the European Union created problematic expectations for an improved standard of life that were not met.<sup>4</sup> Hungary has stagnated economically and its historically traditional values played a role in the rise of the new government.<sup>5</sup> While a full discussion of the text of the New Hungarian Fundamental Law is beyond our scope here, suffice to say that according to some scholars “neither democracy nor the rule of law emerges intact [...]”.<sup>6</sup> The text makes a distinction between Hungarians living on Hungarian soil or Hungarians living abroad and other nationalities living in Hungary, puts in place the so-called “cardinal laws” via which the government has quickly entrenched new provisions in various sectors, and finally directs some duties towards the national community rather than towards other individuals.<sup>7</sup>

The European Union has been grasping for a way to intervene in this new political and legal order without risking backlash; some question whether the EU is structurally capable to deal with such a situation.<sup>8</sup> In light of the above, the Commission has taken action. Through soft law, the Commission issued a Communication on a New EU Framework to Strengthen the Rule of Law in 2014.<sup>9</sup> The Commission also has the ‘nuclear’ option at its disposal, via Article 7 TEU. However, the triggering of Article 7 in September 2018 by the European Parliament is unlikely to yield a substantive outcome. Part of the reason for this is that Hungary is not a ‘lone wolf’ with regard to state behaviour that could be seen as threatening traditional notions related to the rule of law.<sup>10</sup> Remarkably, the Vice-President of the Commission even called a meeting of the Network of the Presidents of the Supreme Judicial Courts of the EU in order to deal with problems related to the independence of the judiciary in Hungary.<sup>11</sup>

*SEGRO* is also not the first CJEU case touching on the rule of law in Hungary. On April 25, 2012, the Commission brought infringement proceedings against Hungary for lowering the retirement ages of judges, prosecutors and notaries to 62.<sup>12</sup> The Court found that the scheme gave rise to a difference in treatment which was incompatible with Council

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<sup>2</sup> Editorial comments, ‘Hungary’s new constitutional order and European unity’ (2012) 49 CML R, 871-883.

<sup>3</sup> *ibid.*

<sup>4</sup> *ibid.*

<sup>5</sup> *ibid.*

<sup>6</sup> *ibid.*

<sup>7</sup> *ibid.*

<sup>8</sup> Andreas Hofmann, ‘Resistance against the Court of Justice of the European Union’ (2018) *Intl J of L in Context* 258.

<sup>9</sup> Commission, Communication, “A New EU Framework to Strengthen the Rule of Law” (2014).

<sup>10</sup> Poland and even France have come under fire in the rule of law context. See, for example, Tomasz Tadeusz Koncewicz, ‘The Capture of the Polish Constitutional Tribunal and Beyond: Of institution(s), Fidelities and the Rule of Law in Flux’ (2018) 43 *Review of Central and East European Law*; for the French example, see Amnesty International, *A Right Not A Threat – Disproportionate Restrictions on Demonstrations under the State of Emergency in France* (2017).

<sup>11</sup> See (n 2).

<sup>12</sup> Case C-286/12, *Commission v. Hungary* EU:C:2012:687.

Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, noting Hungary's failure to provide evidence establishing that more lenient provisions could *not* have achieved the same objective.<sup>13</sup> Similarly, in a judgment rendered in February 2017, again, infringement proceedings brought by the Commission, the Court ruled that by making nationality a condition necessary to access the notarial profession, Hungary had not performed its Article 49 TFEU freedom of establishment obligations.<sup>14</sup> Finally, on July 19, 2018, the Commission sent a letter of formal notice to the Court of its decision to refer Hungary to the Court for infringement proceedings relating to Hungary's non-compliance with asylum law.<sup>15</sup>

## 2 THE FACTS OF SEGRO

SEGRO is a land development company, seated in the United Kingdom, with investors who are not Hungarian nationals.<sup>16</sup> SEGRO acquired 'usufruct' rights — rights to fruitfully use land, (in contrast to full ownership rights) — over land in Hungary in the early 2000s.<sup>17</sup> The district property registry deleted those rights on the basis that they were rights acquired against laws passed in 2013 (law on transitional measures and law on property registry).<sup>18</sup> Specifically, the 2013 laws mandated that usufruct rights had to be obtained by people who had a 'close family relationship' with Hungarians.<sup>19</sup> SEGRO brought an action in the Administrative and Labour Court contending that those 2013 laws infringed Hungarian law as well as EU law. The Administrative and Labour Court referred the issue to the Constitutional Court of Hungary which dismissed the request but declared that the 2013 laws were unconstitutional in that they did not offer compensation for the deprivation of validly acquired land-use rights.<sup>20</sup> However, the Hungarian government did not change the laws subsequent to the Constitutional Court's ruling. It instead claimed that the rules of civil law were enough to ensure compensation.<sup>21</sup> The Administrative and Labour Court then referred the matter to the Court of Justice in Luxembourg for a preliminary ruling.

The referring court took the view that the 2013 laws restricted freedoms of movement—of establishment and of capital—of EU nationals who are not Hungarians because they ran the risk of causing an untimely dispossession of valid contractual rights.<sup>22</sup> In that regard, the Hungarian legislature did not sufficiently establish the necessity nor the proportionality of the 2013 laws. The 2013 laws' indiscriminate cancelation of contractual land-use rights, given that the laws reduced 20 year usufruct rights to only a few months, was not justified.<sup>23</sup> However, the Constitutional Court upheld the objective of the 2013 laws that

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<sup>13</sup> *ibid* paras 71-73.

<sup>14</sup> Case C-392/15, *Commission v. Hungary* EU:C:2017:73.

<sup>15</sup> European Commission Press Release, Migration and Asylum: Commission takes further steps in infringement procedures against Hungary, 19 July 2019, accessed from, [http://europa.eu/rapid/press-release\\_IP-18-4522\\_en.htm](http://europa.eu/rapid/press-release_IP-18-4522_en.htm)

<sup>16</sup> Joined Cases C-52/16 and C-113/16 *SEGRO and Horváth v. Vas Megyei Kormányhivatal* EU:C:2018:157, [15].

<sup>17</sup> *ibid*, para 16.

<sup>18</sup> *ibid*, para 17.

<sup>19</sup> *ibid*, para 8.

<sup>20</sup> *ibid*, paras 20-21.

<sup>21</sup> *ibid*, para 22.

<sup>22</sup> *ibid*, para 23.

<sup>23</sup> *ibid*, para 26.

productive land can only be owned by the natural persons who work it—which is guaranteed under the New Fundamental Law—in rejecting the request.<sup>24</sup> More generally, the stated objectives of the laws were to prevent speculation of land, depopulation of the rural countryside, practices which attempted to circumvent national law and to penalize infringements concerning exchange controls.<sup>25</sup>

The questions referred to the Court of Justice raised a multitude of issues. First, the 2013 laws constituted a deprivation of legally created contractual rights. By linking the requirement of a close family relationship with the usufruct rights, the Administrative and Labour Court wanted a definitive answer as to the compliance with EU law of this national requirement.<sup>26</sup> Next, the referring court asked whether the national legislation was lawful in light of the fundamental freedoms. Moreover, the referring court had doubts as to whether the Charter of Fundamental Rights (hereinafter ‘the Charter’) might come into conflict with these national provisions<sup>27</sup>; specifically, the right to a fair trial and the right to property. Finally, while the laws impacted both Hungarian nationals and nationals of other Member States, there was also an element of discrimination due to the fact that, in the majority of cases, the close family relationships would privilege Hungarian nationals resulting in indirect discrimination.<sup>28</sup> The way the Court answered these questions sheds light on complex dimensions of EU law.

### 3 ADVOCATE GENERAL SAUGMANDSGAARD ØE’S OPINION

The Advocate General (hereinafter AG) Saugmandsgaard Øe came to five major conclusions in his Opinion.<sup>29</sup> First, he found that the request for a preliminary ruling was admissible. Second, the AG established that the freedom of capital should apply to the case of usufruct land rights. Third, the AG delved into whether there was a breach of the free movement of capital despite Article 345 of the Treaty on the Functioning of the European Union (hereinafter TFEU). Fourth, the AG raised the difficult question of whether or not the laws were justified. Finally, the Opinion laid out an intriguing argument for why the Court should not respond to the question of whether there is a violation of Article 17 and Article 47 of the EU Charter of Fundamental Rights.

The AG concluded that the Court would have jurisdiction regardless of if the usufruct rights were created before May 1, 2004, the date on which Hungary entered the European Union, since the case concerns administrative decisions which took place after May 1, 2004.<sup>30</sup> Moreover, any national court may refer questions of EU law for preliminary rulings. Contrary to the Hungarian government’s argument that the Constitutional Court of Hungary’s judgment is binding on the referring court, “[...] national courts have the widest discretion in referring questions to the Court [...] and that discretion and that obligation are an inherent part of the system of cooperation between the national courts and the Court of

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<sup>24</sup> *ibid.*

<sup>25</sup> *ibid* paras 24-25.

<sup>26</sup> *ibid*, para 29.

<sup>27</sup> *ibid.*

<sup>28</sup> *ibid*, para 33.

<sup>29</sup> See *SEGRO* (n 16); Opinion of Advocate General Saugmandsgaard Øe in *SEGRO* EU:C:2018:157.

<sup>30</sup> *ibid*, para 47.

Justice established by Article 267 TFEU [...].”<sup>31</sup> Thus, the Constitutional Court’s stance did not bar the request’s admissibility.

The AG found a restriction of the free movement of capital despite Article 345 TFEU’s *principle of neutrality* towards the rules of ownership being left to the Member States.<sup>32</sup> Article 345 TFEU does not exclude national measures relating to the acquisition of agricultural land from the purview of the fundamental rules of the EU’s legal system – particularly the fundamental freedoms and the rules on non-discrimination.<sup>33</sup> To the AG, the national measures constituted indirect discrimination according to the source of the capital due to the fact that Hungarian nationals can more easily satisfy the conditions laid out in the Hungarian law as compared with citizens of other Member States. The standard to use in this determination is whether the proportion of other Member State nationals affected is greater than the proportion of Hungarian nationals.<sup>34</sup> Finally, this finding of indirect discrimination cannot be influenced by whether the holder of such rights can obtain financial compensation from the other party to the contract.<sup>35</sup>

According to the AG, none of the Hungarian government’s three arguments to justify the restriction of the free movement of capital could pass muster. First, the extinction of the usufruct rights by the Hungarian legislation was disproportionate to the objective of penalizing infringements of the national legislation on exchange control because the Hungarian laws are neither narrowly tailored nor necessary to achieve its stated goals.<sup>36</sup> Second, although the prevention of abusive practices is a legitimate reason to curtail one of the four freedoms, the laws assumed a general occurrence of abusive practices, which was not necessarily the case and, even so, could not be used to justify such a restriction. Third, the AG disagreed with Hungary that the justifications based on the public interest were linked to the use of agricultural land because, again, the measures were neither appropriate nor necessary to achieve such objectives.<sup>37</sup> Finally, the AG asked the Court to clarify whether discriminatory measures can ever be justified by public interest objectives; he believed they could not.<sup>38</sup>

On the applicability of the Charter to the case, the AG found that the Court should refrain from answering that question where the measures at issue “do not implement provisions of EU secondary law”<sup>39</sup> but do infringe on the economic freedoms. In this respect, the AG saw two different situations concerning the use of a justification by a Member State to restrict the free movement provisions: (i) the *Schmidberger* situation<sup>40</sup>, where a fundamental right serves as a justification for the restriction and, (ii) the *ERT* situation<sup>41</sup>,

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<sup>31</sup> *ibid*, para 45.

<sup>32</sup> *ibid*, para 66.

<sup>33</sup> *ibid*.

<sup>34</sup> *ibid*, para 80.

<sup>35</sup> *ibid*, para 84.

<sup>36</sup> *ibid*, paras 90-118.

<sup>37</sup> *ibid*, para 114.

<sup>38</sup> *ibid*, para 118.

<sup>39</sup> *ibid*, para 122.

<sup>40</sup> Case C-260/89, *Schmidberger* EU:C:2003:333. In this case, the Government of Austria, in order to justify a restriction of the free movement of goods resulting from a demonstration which had entailed the closure of a major transit route, had relied on the protection of the demonstrators’ rights to freedom of expression and freedom of assembly (see paragraphs 17 and 69 et seq. of that judgment).

<sup>41</sup> Case C-260/89, *ERT* EU:C:1991:254. In this case, ERT, a Greek radio and TV company had a concentration of exclusive rights to broadcast its own programmes and the exclusive right to receive and

where the breach of a fundamental right nullifies the justification for the restriction.<sup>42</sup> The AG found that *SEGRO* falls within the latter case.<sup>43</sup> Nonetheless, it was not necessary to interpret the Charter to reject Hungary's justifications. Moreover, taking the opposite view—that infringing the Charter could be examined independently of any violation of the economic freedoms—would lead to a scenario where all national legislation affecting cross-border situations might be challenged in light of the Charter.<sup>44</sup> This would run counter to Articles 6(1) Treaty on European Union (hereinafter TEU) and Article 51(2) of the Charter in that it might increase the powers of the Union as laid out in the Treaties.<sup>45</sup>

## 4 FINDINGS OF THE COURT

### 4.1 PRELIMINARY QUESTIONS: JURISDICTION, DIRECT EFFECT, AND NATIONAL COURTS HIERARCHY

The Court rejected Hungary's jurisdictional arguments stating that Hungary's 2004 (after the usufruct rights were acquired) accession to the EU has no bearing on the Court of Justice's ability to examine the facts in relation to laws from 2013.<sup>46</sup> Because Articles 49 and 63 TFEU are directly applicable, they can render national law inconsistent with them inapplicable. Recognizing that the referring court and the Constitutional Court of Hungary clearly disagree over the substance of the case, the Court agreed with the AGs Opinion and disregarded the fact that the lower court was side-stepping the Constitutional Court's dismissal of the case. Courts, at any level of the national hierarchy in the EU, have wide discretion to utilize the preliminary reference procedure laid out in Article 267 TFEU.<sup>47</sup>

### 4.2 SUBSTANCE: AN OVER-RELIANCE ON ECONOMIC FREEDOMS OR CAUTION WITH FUNDAMENTAL RIGHTS?

The Court first dealt with the issue of which freedom was applicable to the situation at hand—the freedom of establishment or the free movement of capital. While it was *prima facie* possible to examine it under either, the Court ultimately examined the question under the free movement of capital.<sup>48</sup> Looking at the purpose of the national legislation, the Court held that, in light of prior case law connecting capital and land-use as well as the fact that non-Hungarian EU citizens were deprived of an acquired contractual land right in Hungary due to a change in national law, the situation ought to be examined under the free movement of capital.<sup>49</sup>

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retransmit programmes from other Member States (see paragraphs 21 to 23 of that judgment). The Court held that Member States can rely on derogations provided for in the Treaty on grounds of public policy, public security and public health only insofar as the national rules at issue are compatible with the fundamental rights, in particular freedom of expression (see paragraphs 43 to 45 of that judgment).

<sup>42</sup> *SEGRO* Opinion (n 29), paras 128-133.

<sup>43</sup> *ibid.*

<sup>44</sup> *ibid.*

<sup>45</sup> *ibid.*, para 138.

<sup>46</sup> *SEGRO* (n 16).

<sup>47</sup> *ibid.*, para 45.

<sup>48</sup> *ibid.*, para 58.

<sup>49</sup> *ibid.*, paras 50-60.

The Court found outright that the national legislation here would be a restriction on the free movement of capital.<sup>50</sup> Compensation for the extinguishment of the rights would not affect this finding.<sup>51</sup> The mere fact that the national restrictions would likely discourage non-residents from making investments in the Member State was enough to be caught by Article 63.<sup>52</sup> However, with respect to the question of discrimination, the Court was less concrete. Tying the land-use rights to ‘close family ties’, the national legislation was not considered to be directly discriminatory because the criteria was deemed to be possibly independent of national origin.<sup>53</sup> Nonetheless, the Court ruled that the 2013 laws likely constitute indirect discrimination in that they disadvantage nationals of states other than Hungary, despite the statistics submitted which showed that merely 5% of the usufruct holders were nationals of states other than Hungary.<sup>54</sup> However, ultimately, such a finding would be for the national court to determine.<sup>55</sup>

The remaining part of the Court’s judgment in *SEGRO* assessed whether the national legislation was objectively justified and whether the means used were proportional in light of its objectives.<sup>56</sup> The justifications given were deemed to be consistent with common agricultural policy goals in Article 39 TFEU. Therefore, the Court had to analyse their proportionality. Placing the burden of proof on Hungary, the Court found that the legislation was not appropriate because it had no direct connection with its objective.<sup>57</sup> The Court relied on practical arguments, such as the fact that family ties do not guarantee that the usufruct holder will farm the land (and vice versa), in addition to the lack of a foreseeable connection between the measure and preventing land fragmentation, rural migration and working the land you own.<sup>58</sup> Moreover, the Court examined Hungarian Civil law and found that the burden on victims would be lengthy and expensive, and compensation was far from-assured.<sup>59</sup> This combined with the fact that it could have been achieved by less restrictive measures meant the national legislation went beyond what was necessary.<sup>60</sup>

The Court then turned to the stated objective of preventing the infringement of exchange control legislation. Again, the Court stated that Hungary’s legislation requiring a close family relationship was, from the available evidence, unrelated to exchange control legislation.<sup>61</sup> The Court spun the prior statistics submitted by the Hungarian government by arguing that the fact that 95% of all those affected by the law are Hungarian constituted proof to that effect.<sup>62</sup> Finally, as pointed out by the Advocate General, a myriad of other more tailored and less restrictive legislative possibilities exist to achieve such goals.

The Court finished its thorough examination by considering the justification put forward by the Hungarian government of preventing practices designed to circumvent

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<sup>50</sup> *ibid*, para 66.

<sup>51</sup> *Ibid*, para 62.

<sup>52</sup> *ibid*.

<sup>53</sup> *ibid*, para 67.

<sup>54</sup> *ibid*, paras 71-72.

<sup>55</sup> *ibid*, para 79.

<sup>56</sup> *Ibid*, paras 81-126.

<sup>57</sup> *ibid*, para 85.

<sup>58</sup> *ibid*.

<sup>59</sup> *ibid*, para 91.

<sup>60</sup> *ibid*, para 94.

<sup>61</sup> *ibid*, para 105.

<sup>62</sup> *ibid*, para 104.

national law.<sup>63</sup> Rejecting the Hungarian government's claim, the Court found that a narrowly tailored analysis which permits the flexibility that a case-by-case analysis provides is necessary in this context to comply with the proportionality requirement.<sup>64</sup> It then emphasized that the presumption of general abusive practices of owning land goes too far when there are, again, many other less restrictive options available.<sup>65</sup> Finally, the Court recalled that it is "settled case-law that grounds of a purely economic nature cannot constitute overriding reasons in the public interest justifying a restriction of a fundamental freedom guaranteed by the Treaty."<sup>66</sup> Having found an unjustified breach of the free movement of capital, the Court sidestepped addressing the questions related to Articles 17 and 47 of the Charter, finding those questions unnecessary "to resolve the disputes in the main proceedings."<sup>67</sup>

## 5 ANALYSIS OF THE CASE: ECONOMIC, FUNCTIONAL AND NORMATIVE PERSPECTIVES

### 5.1 ECONOMIC PERSPECTIVE: PROPERTY RIGHTS — AN EVOLUTIONARY AND COMPARATIVE VIEW

"What could be clearer and more necessary for the ordering of society than rules that say 'this is mine' and 'that is yours'?"<sup>68</sup> Humans tend to think about property rights as a given thing; the possession of property is somehow inherent to the human mind.<sup>69</sup> "The manifest necessity for property rules together with their seemingly common sense nature makes it natural to think of property law as consisting of rules that are stable and fixed for all time."<sup>70</sup> This makes the human mind think that property rules, as they are today, have been there forever and will be fixed for all time. Of course, as history makes clear, property rules are not fixed and they can change in a rapid manner; often in connection with social upheavals.

The *SEGRO* and *Commission v Hungary*<sup>71</sup> cases bring about an important discussion concerning the economic context behind the economic freedoms and fundamental rights as they relate to land use in the European Union. While the *SEGRO* case involves a deprivation of usufruct rights, the violation of the free movement of capital concerns the ability of European investors to acquire land-use rights in other Member States and reasonably rely on the fact that those rights will not be arbitrarily taken away with no process or compensation. There is a clear connection between property rights and economic activity, including, foreseeability, the ability to rely on lawfully concluded contracts, and the legislature's desire to encourage investment by Europeans within the EU as it relates to the smooth and efficient

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<sup>63</sup> *ibid*, paras 108-126.

<sup>64</sup> *ibid*, para 117.

<sup>65</sup> *ibid*, para 122.

<sup>66</sup> *ibid*, para 123.

<sup>67</sup> *ibid*, para 128.

<sup>68</sup> Ronald A. Cass and Keith N. Hylton, *Laws of Creation: Property Rights in the World of Ideas* (Harvard University Press, 2013), 13.

<sup>69</sup> See generally, Jeremy A. Blumenthal, "To Be Human': A Psychological Perspective on Property Law" (2009) *Tulane LR*, 83.

<sup>70</sup> *ibid*.

<sup>71</sup> Case C-235/17, *Commission v. Hungary* EU:C:2019:432. The follow-up case to *SEGRO*, in which the Commission brought infringement proceedings against Hungary based on the violation of the free movement of capital found in *SEGRO* and alleging a violation of the EU Charter.



functioning of the internal market. A brief look at several philosophic and economic theories of property rights informs the tension over property law in the EU that underpins the *SEGRO* judgement and how EU economic freedoms interact with Article 17's right to property in the post-Lisbon Treaty legal landscape.

Adam Smith, the founder of modern economics, saw property rights as developing through four stages: hunter-gatherer, pastoral, agricultural and commercial societies.<sup>72</sup> Smith argued that property rights would become more complex depending on the stage of evolution of the commercial society.<sup>73</sup> On the other hand, John Locke developed a property rule which was based on labour.<sup>74</sup> His basic argument was that something belongs to someone if that person puts labour into it and thereby refines it.<sup>75</sup> "Locke chose to make a 'good for all times' argument because he wanted to contest Thomas Hobbes's view that property rights were in all instances dependent on the whim of the government."<sup>76</sup> Locke, shaped by the political developments in the seventeen hundreds, observed that governmental authority might arbitrarily deprive citizens of their property. Accordingly, "Locke saw government as sufficiently prone to invasions of interest in property – and with those invasions, impositions on related forms of liberty – that he sought a theory that would make property prior to, not dependent on, government."<sup>77</sup> In contrast, the utilitarian theory, brought forward by Locke's coeval Jeremy Bentham, focuses on property in connection to investment and benefit *ie* the more rivalrous a good is, the stronger the property rights for that good should be.<sup>78</sup> For utilitarians, only the one who invested to refine or to produce a certain good should be entitled to the property rights associated with that good. Society is thus encouraged to produce and refine more goods, since the individual will be encouraged to invest in certain goods in order to gain property rights over those goods. Finally, Kantian theorists claim that property rights respect and augment the autonomy of the individual by allowing him or her to realize and extend their desires and plans through property.<sup>79</sup> From that perspective, property plays a part in the natural autonomy of the individual, which is a fundamental value of society.

Some scholars see a tension in the EU with respect to the history of property under the different European treaties.<sup>80</sup> The commitment under the Treaty of Lisbon to implement the economic freedoms may, given time and within the wider European integration project, demand a rethinking or Europeanization of the current property structures, which are today still left to the Member States.<sup>81</sup> In this sense, the philosophical and social goals that took root in Europeans' minds well before the idea of the EU came to fruition may manifest themselves in the EU in the form of economic rights protected by the four freedoms.

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<sup>72</sup> (n 69), 15. The subsequently explained property theories are seen through the eyes of Ronald Cass and Keith Hylton in their monograph 'Laws of Creation: Property Rights in the World of Ideas'.

<sup>73</sup> *ibid.*

<sup>74</sup> *ibid.*, para 17.

<sup>75</sup> *ibid.*

<sup>76</sup> *ibid.*, para 18.

<sup>77</sup> *ibid.*

<sup>78</sup> *ibid.*, para 19 et seq.

<sup>79</sup> *ibid.*, para 26.

<sup>80</sup> See eg Daniela Caruso, 'Private Law and Public Stakes in European Integration: The Case of Property' (2004) 10 *Eur LJ*, 751; (n 83), 65.

<sup>81</sup> See Gerwyn Griffiths, 'The Bastion Falls? The European Union and the Law of Property' (2003) 8 *Conveyancing & Prop LJ*, 39; (n 83).

However, the brief overview of the philosophical underpinnings surrounding property rights in Europe illustrates the difficulty of one single approach to property rights under Article 17 of the Charter. Interpreting Article 17 will necessarily make the Court of Justice choose to value certain theoretical underpinnings of property rights in Europe over others. In the United States, this judicial ‘valuation’ took place nearly 100 years ago.

In the US Declaration of Independence, the right to life, liberty, and the pursuit of happiness originally included property rather than happiness.<sup>82</sup> It was not until the Bill of Rights was passed 15 years later that the ‘takings clause’ in the 5<sup>th</sup> Amendment was recognized.<sup>83</sup> In the 18<sup>th</sup> and 19<sup>th</sup> centuries however, regulatory ‘takings’, whereby people’s use of land was affected by government regulations, were not recognized. It was not until later—after the growth of cities and change brought about by the industrial revolution—that the US Supreme Court recognized regulatory ‘takings’ by the government as potential deprivations under the 5<sup>th</sup> Amendment in the famous *Pennsylvania Coal* case.<sup>84</sup> In Europe, the French revolutionaries were influenced, as were their American counterparts, by the philosophies of rights put forward by Locke and Rousseau which affected the legal protections ultimately adopted.<sup>85</sup> Indeed, the 17<sup>th</sup> of the rights listed in the Declaration of the Rights of Man and Citizen of 1789, the right to property, contained many of the same elements as the US Bill of Rights’ 5th Amendment.<sup>86</sup> Moreover, the proposed but ultimately rejected European Constitution’s Article II-77 may look familiar. This is because it is the exact same as Article 17 of the Charter.<sup>87</sup> A transition in European property rights is ripe to occur under the Lisbon Treaty. A case similar to the US’s *Pennsylvania Coal* could push the Court of Justice towards a stronger recognition of the fundamental right to property in the EU, thereby enmeshing Lockian and Kantian property theories in the jurisprudence of the Court of Justice. *Commission v Hungary*<sup>88</sup> could be the first step in that direction.

## 5.2 FUNCTIONAL PERSPECTIVE: THE FUNCTION OF THE COURT AND THE PRELIMINARY REFERENCE PROCEDURE—A RULE OF LAW PERSPECTIVE

If we think about the Member States as a group of Labradors all on leashes held by the Court, Hungary in the *SEGRO* case would be on a very tight leash indeed. The margin of discretion allowed to the Hungarian courts is slim with respect to their potential domestic analysis. The Court seems to go through all possible justifications that the national court might put forward to possibly come out the other way on the issue. The evidentiary requirement indicated by the Court provides a prime example. Despite stating several times that they have

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<sup>82</sup> Harvey M. Jacobs, ‘The Future of the Regulatory Takings Issue in the United States and Europe: Divergence or Convergence?’, *The Urban Lawyer*, Vol. 40, No. 1 (Winter 2008) 51-72.

<sup>83</sup> US Const. amend. V.

<sup>84</sup> *Pennsylvania Coal Co. v. Mabon*, 260 U.S. 393 (1922).

<sup>85</sup> Jacobs (n 83), 58.

<sup>86</sup> *ibid.* It states: “Property being an inviolable and sacred right, no one may be deprived of it except when public necessity, certified by law, obviously requires it, and on the condition of a just compensation in advance.”

<sup>87</sup> *ibid.* It states: “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 insofar as is necessary for the general interest.”

<sup>88</sup> (n 16).

little facts with which to make a full judgment, the Court then takes what little evidence they have and uses it to rule that the 2013 laws' justifications are neither connected to their objectives nor proportionate. The Court utilizes the statistics that 95% of those affected by the 2013 law were Hungarian to find that, since the measure primarily affects Hungarian nationals, it could not have been related to exchange controls.<sup>89</sup> At the same time, the Court claims that despite the fact that merely 5% of the affected parties were non-Hungarian, the law was still likely indirectly discriminatory in that it disadvantaged non-Hungarians.<sup>90</sup> The tight leash is indicative of the fact that the Court is wary of Hungarian courts spinning the reasoning against the desired protection of the free movement of capital. Because of the Court's extensive response, it would be difficult for the national courts to subsequently not reach the same result as the Court on remand. By giving such extensive 'guidance', the Court is leaving the issue to the national court while doing its best to ensure the outcome.

The *SEGRO* judgment indicates that if a Member State is trying to justify national laws that infringe one of the four freedoms and raises questions in regard to the rule of law, the Court is going to need a high standard of proof that speaks to the law's non-discriminatory and tailored nature in relation to the objectives pursued. Moreover, the burden of proof therein falls on the Member State that passed the laws. In another sense, the Court may be teeing up further potential avenues for legal action, either in Hungary or elsewhere, where economic freedoms and rule of law issues intersect. By giving such a detailed proportionality analysis, *SEGRO* indicates that the Court sought to avoid discord in the national hierarchy.<sup>91</sup> Since "Member States can be held financially liable for the costs incurred by citizens and companies on account of a failure to correctly implement or apply EU law",<sup>92</sup> perhaps the Court is setting up a possible state liability claim in the event that the Constitutional Court of Hungary decides to stick to its original interpretation.

One scholar notes, "(a)s in all international legal orders, the implementation of EU law essentially relies on the willingness of its subjects to comply [...] a necessary condition for this system to work is that national courts actually follow the CJEU's interpretations."<sup>93</sup> The *SEGRO* case is indicative of the Court trying to walk the fine line between issuing a strong judgment while also attempting to ensure compliance. While non-compliance with infringement proceedings brought by the Commission can carry sanctions, the preliminary reference procedure technically has no enforcement mechanism.<sup>94</sup> Given that in addition to *SEGRO* and *Mr. Horvath* there are over 5000 other potential non-Hungarian plaintiffs in this case who might pursue damages against the Hungarian state for having deleted their

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<sup>89</sup> *SEGRO* (n 16); by using evidentiary data to analyze the effect of the Hungarian legislation, the Court uses a socio-legal methodology similarly seen by the United States Supreme Court in the subsequent case law on school segregation to *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), see relevant chapters in Bruce Ackerman, *We the People, Volume 3: The Civil Rights Revolution*.

<sup>90</sup> *ibid.*

<sup>91</sup> For an interesting case on the matter, see, Cour de cassation (18 nov. 2016) n°15-21.438, illustrating interesting example where French Courts disagreed over application of EU law principle and clarity of contours of the Court's prior case law, thus invoking potential state liability.

<sup>92</sup> Hofmann, (n 8).

<sup>93</sup> *ibid.*

<sup>94</sup> See, Sim Haket, 'The Danish Supreme Court's Ajos judgment (Dansk Industri): Rejecting a Consistent Interpretation and Challenging the Effect of a General Principle of EU Law in the Danish Legal Order', *Rev. of Europ. Admin. L.* (2017) 135-151.

usufruct rights in violation of EU law, the Hungarian courts certainly have an incentive to follow the Constitutional Court's reasoning rather than that of the Court of Justice.

### 5.3 NORMATIVE PERSPECTIVE: ECONOMIC FREEDOMS VERSUS FUNDAMENTAL RIGHTS IN THE CONTEXT OF PROPERTY

There are substantive differences between the fundamental rights and fundamental freedoms; the 'delicate balance' between these protections is a vital question in EU law.<sup>95</sup> Economic freedoms are recognized in the Treaty while fundamental rights are primarily based on the common constitutional traditions of the Member States and, after Lisbon, on the incorporation of the Charter articles into the Treaty by Article 6 TEU.

Finding this 'delicate balance' is no easy task for the Court. While economic freedoms confer rights on the individual with respect to the internal market, fundamental rights are rights with no prerequisites. They concern every individual and are applicable universally regardless of the economic status of the person concerned. Indeed, economic freedoms only apply in cross-border economic situations. Nonetheless, the four economic freedoms have become used as a means to protect the rights of individuals with regard to the free movement of persons and services since workers are protected when they work or provide services abroad. Thus, while initially the economic freedoms were thought to protect the coherence of the internal market,<sup>96</sup> in certain situations they also serve to protect social and individual rights. Today, many of the economic freedoms clearly overlap with the fundamental rights.<sup>97</sup> Nonetheless, the way they interact with each other and their relative weight when brought in one claim together remains an open question.

The Court in *SEGRO* limited its analysis to the economic freedoms, preferring not to delve into the realm of fundamental rights because they had already found a violation of EU law. While the Court has been tasked with balancing fundamental rights and economic freedoms in a number of landmark cases, *Commission v Hungary*, the follow-up case to *SEGRO*, represents the first time where the Commission has asked the Court to rule on a failure to comply with the Charter.<sup>98</sup> The Court must thus answer the normative and legal question it refrained from broaching in *SEGRO*, *ie* can and should the Court delve into the realm of failure of Member States to comply with the Charter?

In his Opinion in *Commission v Hungary*,<sup>99</sup> Advocate General Saugmandsgaard Øe treads a careful line in finding that the Court is not competent to pronounce on Article 17 of the Charter, that such an analysis would be superfluous and finally that the 2013 laws are incompatible with the right to property enshrined in Article 17 of the Charter.<sup>100</sup> The AG

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<sup>95</sup> See Vassilios Skouris, 'Fundamental Rights and Fundamental Freedoms: The challenge of Striking a Delicate Balance', *EUROPEAN REVIEW OF BUSINESS LAW* (2006).

<sup>96</sup> On a side note, the Fundamental Freedoms not only protect the internal market, together with EU's competition law provisions and the economic rights enshrined in the Charter they could be thought of as the Constitution of the Internal Market. See eg. Christian Joerges, 'The European Economic Constitution and Its Transformation Through the Financial Crisis' (February 4, 2015), ZenTra Working Paper in Transnational Studies No. 47/2015.

<sup>97</sup> For example, one could imagine how Article 14 of the Charter's freedom to found educational establishments might interact in diverse ways with several of the economic freedoms.

<sup>98</sup> (n. 29) 64.

<sup>99</sup> Opinion of AG Saugmandsgaard Øe in Case C-235/17, *Commission v. Hungary* EU:C:2018:971.

<sup>100</sup> AG Saugmandsgaard Øe makes these arguments in the alternative.

aply characterizes what is at stake, saying, “at issue is the extent to which the *Court of Justice*, as the highest court, has the jurisdiction to take the place of national constitutional courts and the European Court of Human Rights in monitoring the legislation and actions of the Member States in the light of fundamental rights.”<sup>101</sup> Under Article 51 of the Charter, the provisions therein are applicable only when “Union law is being implemented”.<sup>102</sup> The Commission thus forced the issue on the Court to make a choice between two different theories with regard to how to apply the fundamental rights in situations where a violation of primary EU law has already been found.

The logical connection that the Court made in *Associação Sindical dos Juizes Portugueses*<sup>103</sup> —where the Court based its competence on a combination of Article 19 TEU and Article 47 of the Charter — is a similar leap to what the Commission is asking the Court to base its competence on in *Commission v. Hungary*. A robust argument exists that this is an important normative leap to make in terms of ensuring the *effet utile* of the fundamental rights in the Charter, which the Court is tasked with ensuring. Although the rights enshrined in the economic freedoms overlap and intertwine in many ways with those of the fundamental rights, they are in fact *different* sources and forms of legal protection. The Court has effectuated a balancing exercise between the economic freedoms and rights before, delimiting the scope of the freedoms versus the rights in a coherent manner. Limiting the ability to vindicate obstructed EU rights which would have resulted from following the Advocate General’s reasoning would have meant that the Court had failed to fulfil its role under the *Hauer* case law.<sup>104</sup> Further, SEGRO resolves the textual conundrum with respect to the field of application of Article 51 of the Charter, when EU law is being implemented —an affirmative violation could be considered a failure to implement. Article 51’s positive field of application, nonetheless, supports the inapplicability of independently brought Charter claims. The Court in *Commission v. Hungary*<sup>105</sup> puts this conundrum with respect to Article 51’s scope of application to rest. The rationale of the Court — following the *AGET Iraklis* judgment — is that since Hungary is actively invoking 65(1)b TFEU, which is a limitation on the free movement of capital and gives Member States the possibility to effectively target illegal capital movements, Article 17 of the Charter applies.<sup>106</sup> This finding is not to be understood as a general affirmation that the Charter applies to all situations in which a Member State is justifying a national measure. However, as soon as a Member State tries to justify a restriction on the four freedoms by invoking EU law provisions, the Charter becomes applicable. This could give rise to creative litigation strategies of avoiding the ‘implementation of EU law’ by simply neglecting to justify restrictions and thereby not invoking EU law. Yet, the Court seems to anticipate such litigation strategies in cases similar to the factual scenario presented by SEGRO by implying that a Member State necessarily invokes EU law when it passes legislation regulating land-use in the public interest.<sup>107</sup>

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<sup>101</sup> *ibid*, para 68.

<sup>102</sup> Charter of Fundamental Rights of the European Union, (2000/C 364/01), accessed from, [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf).

<sup>103</sup> Case C-64/16, *Associação Sindical dos Juizes Portugueses* EU:C:2018:117.

<sup>104</sup> Case C-44/79, *Liselotte Hauer v. Land Rheinland Pfalz* EU:C:1979:290.

<sup>105</sup> (n 72).

<sup>106</sup> *ibid*, paras 62-66.

<sup>107</sup> *ibid*, para 89.

From a value-based perspective, the AG notes in *Commission v Hungary* that rule of law issues are equally as important as the division of competences between the EU and the Member States, and that Union citizens can have their fundamental rights vindicated at the ECtHR (after having exhausted national remedies). While practically speaking such lines of reasoning may carry some weight, from a legal perspective neither argument is persuasive. The equality with which the AG sees the rule of law issues and division of competences issues speaks rather to the normative need of the Court to rule in this area of law. Moreover, simply because a remedy is possible in another forum does not mean that a claim should not be accepted. Given the setup in the Treaties, it is hardly possible to forum shop at the Court. The Court has an important duty to shut the door on frivolous, redundant and legally unjustified Charter-based claims while staying true to its duty to ensure fundamental rights for Union citizens given the new status of the Charter under the Lisbon Treaty.

Before the *Commission v Hungary* judgment, it was far from clear that the situation presented in *SEGRO* would run afoul of Article 17 of the Charter. A narrow ruling on the Article 17's right to property — utilizing a more lenient proportionality approach than that used in *SEGRO* regarding the standard of proof needed to show narrowly tailored means— would have refrained from favouring the free movement of capital over the right to property or vice versa. The evidentiary requirement to show that Article 17 of the Charter had been violated could, based on a purely textual reading, be higher. Indeed, the wording of Article 17 indicates that it might be a more lax justification analysis than that carried out with respect to the free movement of capital employed in *SEGRO*. Certainly, the public interest of preventing land speculation is at stake and property may be regulated by law if necessary for the general interest. Therefore, dependent on Hungary's evidence and justifications as to the law's objectives necessary for the general interest, it was not a foregone conclusion that the analysis under Article 17 of the Charter would lead to an identical result to the free movement of capital analysis the Court carried out in *SEGRO*. Nonetheless, the Court in *Commission v Hungary* found that Article 17 must be read in conjunction with Article 52(1).<sup>108</sup> The result of this emphasis is that the relevant analysis with respect to finding a violation of the right to property as guaranteed by the charter is virtually the same as the proportionality test employed with respect to the four freedoms.

## 6 ANALYSIS BEYOND THE CASE: CONTEXTUALIZING THE NORMATIVE PERSPECTIVE AND THE 'ESSENCE OF THE RULE OF LAW' IN THE EU

The previous discussion on the right to property and economic freedoms raises a crucial question: what is the essence of the rule of law after *SEGRO* and *Commission v Hungary*? So far, the discussion of *SEGRO* and *Commission v Hungary* has focused only on economic freedoms and economic (fundamental) rights.<sup>109</sup> Yet, these two cases put in a broader context also concern the need of stopping the inflation of 'illiberal legislation' and are thus about the need to protect the rule of law in the EU. But *quid* rule of law? This is the one billion Euro question. Are we dealing with the protection of an economic rule of law founded on the

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<sup>108</sup> *ibid.*

<sup>109</sup> See (n 16) and (n 72).

sacrosanct economic freedoms and the right to property? Or is it about the protection of a substantive rule of law through the application of the EU Charter and its Article 17? Or is it both? Could it be something else?

In *SEGRO*, we have already analysed and stressed in the previous section the importance of the economic rule of law through the economic freedoms and the application of Article 17 of the EU Charter. Yet, a question worth asking in the context of this normative discussion is whether the economic rule of law constitutes the essence of the EU rule of law.<sup>110</sup> Looking at *SEGRO* and *Commission v Hungary*, such a conclusion is fully plausible. Similar to the situation in the US, the right to property may be seen as a core aspect of the rule of law. Yet, by looking at the broader and recent jurisprudential context on economic freedoms, the EU Charter and Article 19 TEU, it appears that such a conclusion would not entirely characterize the nature of the rule of law in the EU.

In *Commission v Hungary*, the Court has taken the opportunity to define and enforce a thick and substantive understanding of the rule of law.<sup>111</sup> By doing so, it has aligned with the recent jurisprudence on the rule of law as a substantive concept.<sup>112</sup> After the Opinion of the AG in *Commission v Hungary*, the Court was in fact at a normative cross-roads. It could follow the restrictive Opinion of the AG<sup>113</sup> regarding the scope of the Charter, thus observing its prior jurisprudence according to which the right to property (and other rights) as a matter of general principle of Union law can only be enforced against Member States to the extent that they ‘implement Union law’. Or, it could follow a very progressive road by applying the Charter independently and in surplus to the claim based on economic freedoms. *Viva la vida local!* The CJEU decided not to follow the Opinion of the AG on this matter<sup>114</sup> and correctly framed the matter as a fresh and substantive one by utilizing a systemic approach to Member State duties similar to its methodology relied in *Associação Sindical dos Juízes Portugueses*.<sup>115</sup> Under this methodology, the respect for the right to property is not ‘simply’ an additional commitment of Member States but a *partie intégrante* of its duties to an EU legal order based on the (substantive) rule of law, *ie* the Charter and, more specifically, article 17 of the Charter.<sup>116</sup> It is therefore possible to contend that when the Union’s political institutions are unable to act (in our case in relation to the impasse of the Article 7 procedure against Poland or Hungary), the CJEU is inclined to step in, and the enforcement of substantive rule of law is no exception. The merging of the rule of law and the Court’s rights-based enforcement as framed for the first time in *Commission v Hungary* seems almost unavoidable in retrospect. As discussed in the previous section, the logical construction that the Court established for instance in *Associação Sindical dos Juízes* is an analogous jump to what the Commission was requesting the CJEU to base its competence on in *Commission v Hungary*. In light of this

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<sup>110</sup> *ibid.*

<sup>111</sup> (n 72) paras 49-66.

<sup>112</sup> See Xavier Groussot and Johan Lindholm, ‘General Principles: Taking Rights Seriously and Waving the Rule of Stick in the European Union’ in Katja Ziegler et al, *Constructing Legal Orders in Europe: General Principles of EU Law*, Edward Elgar, *Forthcoming*, Lund University Legal Research Paper No. 01/2019.

<sup>113</sup> See Opinion of AG Saugmandsgaard Øe in Case C-235/17 *Commission v. Hungary* (n 82), para 89; see also Opinion of AG Saugmandsgaard Øe in Joined Cases C-52/16 and C-113/16 *SEGRO and Horváth*, (n 29), paras 119-142.

<sup>114</sup> See Case C-235/17 *Commission v. Hungary* (n 72), paras 49-66.

<sup>115</sup> (n 104).

<sup>116</sup> Lisa M. Austin, ‘Property and the Rule of Law’, *Legal Theory* vol. 20 pp. 79–105 (2014) (on the relationship between the common law of property and the rule of law).

analysis, *Commission v Hungary* exemplifies the rise of the substantive rule of law by allowing the application of Article 17 of the Charter in addition to the provision on free movement of capital, the economic freedom.

Yet, the logic of *Associação Sindical dos Juizes Portugueses* is not only based on a substantive approach, but is also strongly anchored within a procedural understanding of the rule of law. Importantly, the CJEU already made this procedural construction very clear many years ago. For instance, in *Opinion 1/91* the CJEU ruled that the Treaties ‘constitutes the constitutional charter of a Community based on the rule of law’ and connects this to other, core principles of the EU law order, such as supremacy, direct effect and loyalty.<sup>117</sup> The judgment in *Opinion 1/91* echoes the wording of *Les Verts* where the Court first voiced its claim of a rule-of-law-based Union and associated this to the central role of the Union’s judicial system.<sup>118</sup> It is worth keeping in mind that *Les Verts* concerned the application of the rule of law against the Union and it was the rule of law that, according to the Court, entailed that the Union’s judicial system must be able to indirectly review the legality of acts by the European parliament through the system of preliminary rulings. The CJEU has persistently upheld that line in later cases, ensuring that the Union judicial systems can review the legality of Union acts.<sup>119</sup> Thus, much of this case law has focused on the realization of the value of the rule of law, as set out in Article 2 TEU, through the ‘complete’ system of institutions and remedies set out in Article 19 TEU in addition to evolving around the capability of upholding the rule of law in relation to Union measures. Yet, the CJEU has been particularly energetic in recent times in noting that the nature of the Union legal order absolutely requires that the Member States uphold their duty under Article 19(1) TEU to ‘ensure effective legal protection in the fields covered by Union law.’<sup>120</sup> This connection was repeated and confirmed in *Associação Sindical dos Juizes Portugueses* and even more recently in *Vindel* and *Commission v. Poland*.<sup>121</sup> The message is crystal clear: the procedural Rule of Law must also be respected by the Member States when ‘implementing’ Union law.

Thus, stemming from the above discussion on the methodology used by the CJEU in its rule of law-case law, the rule of law as shaped by the CJEU appears to be not only substantive but also clearly procedural. There is a constant jurisprudential reliance on the need to ensure an effective judicial review of both the acts of Union and the acts of the Member States falling within the scope of Union law. In that respect, one should also not forget that the CJEU’s case law on economic freedoms encrypted the procedural rule of law on economic freedoms a long time ago. It is now important to take a brief look at the procedural rule of law in the jurisprudential matrix of the CJEU, which is closely related to the *SEGRO* case and the free movement of capital.

In the context of the economic freedoms, the procedural rule of law is rooted in the free movement of goods case law on additives in foodstuff from the eighties. In fact, this

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<sup>117</sup> Opinion 1/91 EU:C:1991:490, para 166.

<sup>118</sup> Case 294/83, *Les Verts* [1986] EU:C:1986:166, para 23.

<sup>119</sup> See eg Case C-50/00 P *Unión de Pequeños Agricultores* EU:C:2002:462, paras 40-41; and Case C-583/11 P, *Inuit* EU:C:2013:625, para 94.

<sup>120</sup> *Associação Sindical dos Juizes Portugueses* (n 104), para 32 (‘Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals’).

<sup>121</sup> Case C-159/18 *Vindel*, EU:C:2019:106, paras 61-67; and Case C-619/19 *Commission v. Poland* EU:C:2019:325.



obligation can be traced back to the CJEU's judgments in the *Muller*<sup>122</sup> and the *German Beer* case.<sup>123</sup> In *Muller*, the Court decided whether the French ban on food additives for cakes was in breach of the free movement of goods. The Court considered that since the prevailing Directive<sup>124</sup> was intended to achieve only partial harmonization as regards these additives, the conditions governing the use of these additives having not yet been determined at the Community level, the power of the Member States to adopt rules related to foodstuffs is not unlimited.<sup>125</sup> Apart from the substantive limits imposed by the Treaty rules on the free movement of goods, AG Marco Darmon pointed out that “the harmonization for which [the directive] provides, even though embryonic, has the [effect that a] Member State must follow [a certain] Community procedure in order to prohibit the use of an additive previously authorized”.<sup>126</sup> In other words, the Member State has neither unlimited substantive discretion nor unlimited procedural discretion to ban an additive in foodstuffs. The CJEU, in the *German beer* case, which concerned a ban on additives for beer, built on the *Muller* case<sup>127</sup>. It considered that by virtue of the principle of proportionality, traders must be able to apply, under a procedure which is easily accessible to them and can be concluded within a reasonable time, for the use of specific additives to be authorized by a measure of general application.<sup>128</sup>

Several procedural safeguards in administrative procedures emerged in relation to the justification of measures restricting free movement.<sup>129</sup> In *Greenham Abel*, for instance, the CJEU considered whether the national rules could be justified provided that they fit the requirements of Article 34 TFEU. The first of these requirements, before the analysis of proportionality, is the availability of an accessible and speedy procedure and judicial review in case of rejection.<sup>130</sup> An example beyond the scope of prior authorization is *Laval*.<sup>131</sup> More recently, in *Noria Distribution*,<sup>132</sup> the CJEU clarified its *Greenham Abel* case law on the need to respect the procedural requirements in the context of free movement of goods. In this case, the Court assessed French legislation prohibiting the marketing of food supplements whose content in nutrients exceeds the upper limits set by that legislation without providing for any procedure for the placing on the market of that type of food supplement. The legislation was found to constitute a measure having an effect equivalent to a quantitative restriction for the purposes of Article 34 TFEU that could be justified provided that it complied with the double ‘requirements’ of Article 36 TFEU as interpreted in paragraph 34 of the *Greenham*

<sup>122</sup> Case 304/84 *Muller* EU:C:1986:194.

<sup>123</sup> Case 178/84 *Germany v. Commission (German Beer Case)* EU:C:1987:126.

<sup>124</sup> Council Directive 74/329 of 18 June 1974 on the approximation of the laws of the Member States relating to emulsifiers, stabilizers, thickeners and gelling agents for use in foodstuffs (OJ 1974, L 189, p. 1).

<sup>125</sup> *Muller*, (n 124), paras 12-15. In fact, in merely specifying the emulsifiers, stabilizers, thickeners and gelling agents 'for use in foodstuffs', this directive allowed the Member States to lay down their own rules on the use of such agents, particularly as regards the foodstuffs in which they may be used and the conditions for their use. Nevertheless, it is clear from the scheme of the directive and from other rules of Community law that the power of the Member States to adopt such rules is not unlimited, as the existence of harmonizing directives does not exclude the operation of the treaty provision on free movement.

<sup>126</sup> Opinion of Advocate General Darmon in *Case 304/84 Muller* EU:C:1986:80.

<sup>127</sup> *German Beer Case* (n 125).

<sup>128</sup> *ibid*, para 45.

<sup>129</sup> Sacha Prechal, 'Free Movement and Procedural Requirements: Proportionality Reconsidered' (2008) 35 *Legal Issues of Economic Integration*, 201, 208.

<sup>130</sup> *ibid*.

<sup>131</sup> Case C-341/05 *Laval* EU:C:2007:809, para 110.

<sup>132</sup> Case C-672/15 *Noria Distribution* EU:C:2017:310.

*Abel* case.<sup>133</sup> In that light, the CJEU considered that, despite the existence of a procedure as to the placing on the national market of certain food supplements, the procedure is inapplicable to food supplements whose content in nutrients exceeds the maximum doses set by that legislation and which are lawfully manufactured or marketed in another Member State.<sup>134</sup> Therefore, the French legislation was not compatible with EU law since it did not provide a procedure in the circumstances of the case.<sup>135</sup> The importance of the procedural rule of law has now made its way into all the free movement provisions. In this regard, one need not look further than the recent and spectacular *TopFit & Biffi* case delivered in June 2019 by the CJEU in the context of free movement of persons and citizenship.<sup>136</sup>

It appears clear from this short overview that the procedural rule of law is strongly present in the economic freedoms and free movement case law of the CJEU. The same phenomenon appears true if one looks at the most recent case law of the CJEU with regard to the interpretation of the EU Charter, such as *Egenberger* or *Cresco*.<sup>137</sup> In those two Grand Chamber cases, the CJEU tied the application of substantive provisions of the Charter (*in casu* Article 21 of the Charter) to the respect of the principle of effective judicial protection under Article 47 of the EU Charter). This is, in our view, no coincidence. It is the result of a judicial will to reinforce the procedural rule of law by relying on the Charter. The reinforcement is therefore both procedural and substantive as it is founded on the substantive provisions of the EU Charter in the procedural context.<sup>138</sup> Arnall offers a critical analysis of the current state of the procedural law of the Union and queries how it might develop in the future, using the conventional narrative sparingly to elucidate changing patterns in the case law.<sup>139</sup> The author shows that the default position is shifting from national procedural autonomy (effectiveness) to the duty to ensure effective judicial protection of Union law rights. In other words, the default position is becoming increasingly substantive and Charter-based. According to Sacha Prechal, effective judicial protection is a fundamental right, which demands a higher intensity of scrutiny compared to the principle of effectiveness often relied in the CJEU case law (*Rewe*-effectiveness).<sup>140</sup> The author suggests redefining the relationship between ‘*Rewe*-effectiveness’ and effective judicial protection by contrasting the two principles in four sets.<sup>141</sup> First, the principle of effectiveness appears to be a less demanding standard of judicial review. Second, the general test of effectiveness (practical impossibility’-, or the ‘excessiveness’ tests) is formulated in a negative manner that brings, in turn, a negative obligation – whereas effective judicial protection implies both a negative and positive obligation.<sup>142</sup> Third, the principle of effectiveness is described as operating at the

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<sup>133</sup> *ibid*, para 21.

<sup>134</sup> *ibid*, para 25.

<sup>135</sup> *ibid*, para 28.

<sup>136</sup> Case C-22/18 *TopFit and Biffi* EU:C:2019:497, para 65.

<sup>137</sup> See Case C-404/16 *Egenberger* EU:C:2018:257; and Case C-193/17 *Cresco Investigation* [2019] EU:C:2019:43.

<sup>138</sup> This development is in line with cases, such as *Unibet*, *DEB*, *Allassini*, which see the court employing Article 47 of the Charter and effective judicial protection in the context of national procedural autonomy. See cases: C-279/09 *DEB* EU:C:2010:811; Case C-432/05 *Unibet* EU:C:2007:163; Joined Cases C-317/08 to C-320/08 *Allassini* EU:C:2010:146.

<sup>139</sup> Anthony Arnall, ‘Remedies before National Courts’ in Robert Schütze and Takis Tridimas, *Oxford Principles of EU law*, (OUP, 2018), 1011.

<sup>140</sup> Sacha Prechal, ‘Redefining the Relationship between ‘*Rewe*-effectiveness and Effective Judicial Protection’ (2011) 4, *Rev. of Europ. Admin. Law* 31, 39-44.

<sup>141</sup> *ibid*.

<sup>142</sup> *ibid*.

Member State – not individual – level. Lastly, Prechal explains that justifications applied with regard to the two principles do indeed differ.<sup>143</sup>

*Commission v Hungary* should also be understood as epitomizing the importance of the procedural rule of law as it is our view that the substantive rule of law and the procedural rule of law often work in tandem. This point is exemplified by paragraph 102 of the judgement in *Commission v Hungary* where the CJEU ruled that:

Article 65(1)(b) TFEU states that the provisions of Article 63 TFEU are to be without prejudice to the right of Member States to take all requisite measures to prevent infringements of national law and regulations, to lay down procedures for the declaration of capital movements for the purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security. In accordance with Article 65(3) TFEU, such measures or procedures are not, however, to constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63 TFEU.<sup>144</sup>

This paragraph shows once again the close link between the application of the economic freedoms and the procedural rule of law. In a similar vein, this procedural logic permeates the recent CJEU case law on the independence of judges in the European Arrest Warrant (EAW) context. As noted by Gutman, the Court in *LM*:<sup>145</sup>

[R]eiterated that the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law, and that maintaining the independence of national courts and tribunals is essential for ensuring effective judicial protection, as confirmed by the second paragraph of Article 47 of the Charter, as well as the proper functioning of the preliminary ruling procedure and the European arrest warrant mechanism.<sup>146</sup>

The procedural rule of law may thus be seen as the ‘essence’ of the rule of law. In that sense, it is worth noting that the CJEU in *Torubarov* in July 2019 went as far as to state that the requirements of effectiveness and effective judicial protection as enshrined in Article 47 of the Charter constitutes the ‘very essence of EU law’.<sup>147</sup> This case is of utmost importance for the rule of law debate and also concerns new Hungarian legislation on administrative procedure which is said to establish certain procedures and remedies whose purpose is to enable the administrative courts to require administrative bodies to comply with their judgments except where its application deprives individuals of an effective remedy in practice.<sup>148</sup> The CJEU ruled that the national court must set aside any provision of a national

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<sup>143</sup> *ibid.*

<sup>144</sup> See *Commission v. Hungary* (n 72).

<sup>145</sup> Case C-216/18 PPU *Minister for Justice and Equality* EU:C:2018:979, paras 51-58.

<sup>146</sup> Kathleen Gutman, ‘The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?’ *German Law Journal* (2019), 20, 884-903, 900.

<sup>147</sup> Case C-156/17 *Torubarov* EU:C:2019:626, para 73. See also for the same wording Joined Cases C-188/10 and C-189/10 *Melki* EU:C:2010:363, para 44. See for a similar approach (but different wording) to effectiveness; Case C-573/17, *Popławski* EU:C:2019:530, paras 52-62.

<sup>148</sup> *ibid.*, *Torubarov*, paras 71-72.

legal system and any legislative, administrative or judicial practice that might impair the effectiveness of EU law by withholding, from the national court with jurisdiction to apply that law, the power to do everything necessary at the moment of its application that might prevent EU rules having direct effect.<sup>149</sup> So far, the CJEU explicitly considers that the essence of the EU rule of law is procedural.<sup>150</sup> In light of the previous discussion, this is a very far-reaching conclusion given the importance of the economic rule of law and substantive rule of law both within the EU and at a more theoretical level.<sup>151</sup> *La fin justifie-elle les moyens* or is this evolution a deeper marker of the very nature of the rule of law in the EU as a procedural rule of law.

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<sup>149</sup> *ibid*, paras 73-74.

<sup>150</sup> See also in that respect, two pending cases considering Hungarian legislation that may refer to the importance to respect procedural requirements. First, Case C-66/18 *Commission v Hungary*, the Commission claims that the legislation, by requiring foreign higher education institutions to offer higher education in their country of origin, is in breach of inter alia Articles 49 TFEU and 56 TFEU as well as from Article XVII of the GATS and its obligations under Article 13, 14 and 16 of the EU Charter. Second, Case C-78/18 *Commission v Hungary*, the Commission claims that the national legislation imposing obligations of registration, declaration and transparency on certain categories of civil organizations, and also making it possible for penalties to be imposed on organizations that do not fulfil such obligations, has failed to fulfil its obligations under Article 63 TFEU and Articles 7, 8 and 12 of the EU.

<sup>151</sup> See Jeremy Waldron (n 1), at p.1 and at p. 20. Waldron underlines that the procedural aspect of the rule of law is often hidden by the doctrine and given less importance than the other facets of the rule of law. According to him, legal philosophers tend to emphasize formal elements of the rule of law. Whereas he thinks a fallacy of modern positivism is its exclusive emphasis on the command-and-control aspect of law, or the norm-and-guidance aspect of law, without any reference to the culture of argument that a legal system frames, sponsors and institutionalizes.

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