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19 The Compensation for Agricultural Land Confiscated by the Beneš Decrees in the Light of Free Movement of Capital

Ágoston Korom and Laura Gyeney***

19.1 Introduction

Due to the disputes flared up in connection with the second Juhász Petition regarding the Beneš decrees,[1] and to the resolution issued by the Legal Affairs Committee of the European Parliament (JURI)[2], in the institutional arena of the European Union, the question once again came to the fore how the Beneš Decrees declaring the principle of collective guilt can still be kept in force in an EU Member State such as Slovakia, which fully embraces the requirement of the rule of law and shares the general European values.[3]

* Assistant professor, National University of Public Service. E-mail: Koromagoston@freemail.hu.

** Associate professor at the Pázmány Péter Catholic University, Faculty of Law; Director of the De Gasperi Institute. E-mail: gyeney.laura@jak.ppke.hu.

1 Petition No. 0070/2012 by Imre Juhasz (Hungarian), bearing two signatures, on a request for the repeal of Resolution 1483/2007 of the Slovak National Council concerning the inviolability of the Beneš Decrees. Summary of Petition: 'The petitioner refers to Resolution 1487/2007 of the Slovak National Council, which established that the Beneš Decrees issued between 1944 and 1948 were inviolable and incontestable. The petitioner points out that discrimination against the Hungarian and German minorities in Slovakia constitutes contravention flagrant violation of Arts. 2 and 6 of the Treaty on European Union (TEU), the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. He therefore asks the European Parliament to take action to have the above Resolution repealed and calls for Slovakia's membership of the EU to be suspended if it continues its policy of violating human rights.'

2 The draft opinion adopted by JURI on 11 February 2014 breaks away from the existing line carried by the European Commission according to which the Beneš Decrees are considered as historical documents on the basis of the Frowein report, thus it no longer has a legal effect and it does not fall into the field of competence of the European Union. The document of the Committee on Legal Affairs of the EP is the first legal opinion, which states that the presence of the Decrees causes uncertainty in the Slovak legal order, and therefore, it would be desirable to further investigate the case.

3 *See* more on the requirement of the rule of law in the European Union: Jürgen, SCHWARZE: L'État actuel et les perspectives du droit administratif européen – L'entrée en matiere, In L'état actuel et les perpectives du droit administratif européen. Analyses de droit comparé Bruylant, Bruxelles, 2010, 15.

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It is well known that Edvard Beneš, president of the Czechoslovak Republic, issued the decrees directly after the World War II.[4] Hungarians[5] declared collectively guilty[6] were affected directly by thirteen and indirectly by 20 of the 143 Presidential Decrees.

For many – including the authors of this study – it is inconceivable that these decrees should be even slightly compatible with EU law and in general with the values conveyed by the European Union.

In the present document, we will attempt to examine the compatibility of the decrees with EU law in relation to the fundamental economic freedoms, which may be surprising given that legal acts applying collective guilt appear to belong prima facie to the group of questions related to minority rights, and fundamental rights protection, rather than the internal market freedoms.

We would also like to state, as a preliminary point, that neither the fundamental economic freedoms nor the 'legal development' occurred in respect of the property rights declared in the European Union's Charter of Fundamental Rights[7] does not require the massive restitution of property confiscated by the decrees, so we do not think that this study would start a landslide and lead to an 'unmanageable' situation.

4 *See* Attila, HORVÁTH: A Beneš-dekrétumok és a hozzá kapcsolódó diszkriminatív intézkedések Csehszlovákiában 1945 és 1948 között, In: Sui Generis vagy politikai megfontolások? A szlovákiai magyar kisebbségekkel kapcsolatos intézkedések az uniós jog tükrében, különös tekintettel az Európai Unió Bizottsága álláspontjára. A Magyar Jogász Egylet Európai Unió Joga Szakosztálya által 2013. Január 22-én szervezett konferencián elhangzott előadások, Szerkesztette: Dr. Korom Ágoston – Dr. Gyeney Laura, Budapest, 2013 Kisebbségi Jogvédő Intézet.

5 'On the basis of the Decrees, it had to be determined who counted as Hungarian. This was particularly difficult in areas of mixed population. Not only Hungarian native speakers were thus categorized, or those who identified themselves as Hungarians during the census, or members of some Hungarian party, but people were also categorized according to subjective criteria, for example, who was considered to be Hungarian by their environment.' *See* HORVÁTH, *Ibid*., p. 44.

6 No. 71 of the Decrees, dated 19 September 1945 ordered Hungarian men between fourteen and sicty and women between 15 and 50 years of age, deprived of their citizenship, to community service. The infamous presidential decree No. 88 was released on 1 October 1945, which introduced a general obligation to work.' *See* HORVÁTH, *ibid*., p. 45.

7 The European Union Charter of Fundamental Rights Art. 17 (1): 'Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions.' Charter of Fundamental Rights of the European Union, OJ C 83, 30 March 2010, pp. 389-403.

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It is well known, that, in an EU context, the enforceability of the fundamental rights[8] and in particular minority rights, is in general very limited.[9] However, the case-law of the Court of Justice of the European Union relating to the fundamental economic freedoms and to EU citizenship can be invoked effectively in some cases, where the Member States' legal provisions that are detrimental to national minorities, or their official practice are contrary to the EU law and practice. We believe, therefore, that the fundamental economic freedoms and rights arising from EU citizenship can be invoked effectively in case of eventual political resistance sensible at EU level, coming from the Member States. The sine qua non of the existence of the economic community is the consistent application of EU law[10]; what is more, the rights resulting from the EU civil rights instruments established to promote the development of a European identity cannot reach their goal by a 'selective application of law.' As far as the exercise of rights arising from EU citizenship is concerned, the case-law of the Court of Justice shows a much more extensive practice than what the founding Treaty and the secondary law contain. Due to the complex and technocratic nature of this significant legal development, sometimes even lawyers have difficulty to understand it, so the selective approach would obviously undermine the uniform application of law.[11]

When it comes to the EU 'assessment' of the decrees, first and foremost the political and legal aspects must be clearly separated. We consider the decisions[12] in which the accession of a State is decided, without imposing the repeal of legislation similar to the

8 For us the application of the principle of collective guilt is clearly inadmissible, however, from the aspect of the assessment of EU law, it is clear that despite legal developments occurring in this area, EU law – at least in its current state – is not capable of effectively sanction situations of this kind. Although the Court of Justice of the European Union has been respecting fundamental rights during its jurisprudence for decades – in accordance with the case-law of the European Court of Human Rights as far as possible –, it is greatly weakened by the fact that fundamental rights are only 'taken into account' in the frame of the application of EU law.
These criteria of applicability were not changed substantially by giving legally binding powers to the Charter of Fundamental Rights of the European Union. CRAIG, Paul and DE BURCA, Grainne: EU Law, Text, Cases and Materials, 5th edition, 2011, Oxford, p. 397.

9 VIZI, Balázs: Európai Kaleidoszkóp- Az Európai Unió és a Kisebbségek, L Harmattan, Budapest, 2013, p. 13-25.

10 Edouard, DUBOUT: L'invocabilité d` évinction des directives dans les litiges horizontaux Le "bateau ivre" a-t-il sombré?', 2 RTDE (2010), p. 295.

11 *See* N. Nic Shuibhne, 'The Resilience of EU Market Citizenship', 47(6) *Common Market Law Review* (2010), p. 101, Laura Gyeney, 'Uniós polgárság – a piacorientált szemlélettől való elszakadás', 2 *IAS* (2012), pp. 20-21. Ágoston Korom, 'Selye János Egyetem és uniós polgárság, Sui Generis vagy politikai megfontolások? A szlovákiai magyar kisebbségekkel kapcsolatos intézkedések az uniós jog tükrében, különös tekintettel az Európai Unió Bizottsága álláspontjára. A Magyar Jogász Egylet Európai Unió Joga Szakosztálya által 2013. január 22-én szervezett konferencián elhangzott előadások', *Szerkesztette: Dr. Korom Ágoston – Dr. Gyeney Laura, Budapest*, Kisebbségi Jogvédő Intézet, (2013), p. 23-28.

12 The report of the European Parliament's Foreign Affairs Committee by Elmar Brok concerning the Czech Republik – based on the conclusions of the Frowein report – concluded that the decrees were not an obstacle to the accession of the country.

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decrees as a condition of accession as falling under political judgment. In some ways, the decision about a petition to the European Parliament is considered to be primarily a political decision, despite the obvious legal elements.

It should be stressed, however, that the decision of the EU institutions, and ultimately of the Member States, under which the candidate state can become an EU Member State despite keeping the decrees, or similar legislation, in force, does not mean that after the accession of that State, the compatibility of legal acts[13] within the temporal scope of EU law and the EU law should not be examined. Even a European Parliament petition,[14] essentially closed, on that topic cannot change[15] this.

However, as already mentioned above, it is necessary to draw attention to the purely legal considerations, which should not be ignored in the case of the functioning of a community held together by law, in contrary to the arguments opposing the EU assessment of the decrees. Maintaining the European Union, which is an economic community[16] mainly held together by law even to this day, requires the fullest and consistent application of the EU 'law', without political criteria. As a result, the arguments according to which the application of EU law can be excluded simply because it would change the conditions eventually created after the Second World War or at least could be perceived as such, are inadmissible. The main assurance and pledge of maintaining the peace between the nations of Europe is the uniform and consistent application of EU regulations in all Member States, even in cases where eventual political conflicts of interest may arise. Thus, to ensure the European Union and its long-term goals, such as peace and prosperity,[17] EU law must be complied with and enforced without any political interest.

The argument often voiced by the Slovak Republic that not only Slovakia and the Czech Republic had adopted similar legislation to the decrees, but also the 'old Member States', does not change much the above.[18] This argument is irrelevant in terms of EU law, and what is more is absolutely unacceptable. Contrary to international public law, EU law does not accept the principle of reciprocity – it is not possible for any Member State to justify their practice of violating EU law by pointing out that examples in other Member States' practice can be found.

13 Legal acts – as later will be discussed – can constitute both administrative practice and judicial interpretation.

14 Imre Juhász has reached out to the Petitions Committee prior to 2007 as well. At the conclusion of the case, the Petitions Committee essentially used the argumentation by the European Commission, according to which the decrees have no legal significance, they are merely considered as historical documents.

15 Considering that the CJEU has the monopoly of authentic interpretation of EU law, a parliamentary resolution is not legally binding.

16 The European Union is still mainly based on economic considerations, despite all efforts pointing in the opposite direction.

17 The Union's aim is to promote peace, its values and the well-being of its peoples. TFEU Art. 3(1).

18 The position of the Slovak Republic, Art. 9.

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Finally, another frequently voiced argument is that the matter of the Beneš decrees had been discussed prior to accession.[19] It is true that prior to the enlargement in 2004, as the closure of the decree debates related to the accession reports, the above mentioned Frowein report[20] was ordered, which clearly states that the decrees shall not prevent the accession of the Czech Republic. This opinion was based on the assumption, *inter alia*, that from the moment of the accession, every EU citizen would enjoy equal rights in the Czech Republic. However, the position of the Slovak Republic makes it clear[21] that the Frowein report was confined to the analysis of the conditions in the Czech Republic, and drew conclusions on that basis with regard to the Slovak national law as well. This also implies that the overall examination of the Slovak national law was neglected.

The present study aims to analyse the Compensation Law adopted after Slovakia's EU accession,[22] more specifically its central provision, which allows only persons of Slovak nationality and permanent residents of Slovakia for the submission of claims for compensation.[23] The provision examined above will be reviewed from the aspect of the fundamental economic freedoms, more specifically the free movement of capital.

Finally, we will attempt to answer as to whether the infringing nature of the judicial and administrative practices after the EU accession of Slovakia, allowing the survival of the Beneš decrees, can be determined even in the absence of any cross-border element.

Thus, in the above investigation, it is necessary to discuss the temporal scope of application of EU law, the questions regarding the effects of the property autonomy of Member States as stipulated in Article 345 of the TFEU, the justification of the contested provisions

19 A particularly sensitive issue wast he compatibility of the so-called Benes decrees with the EU's accession requirement. As the Czech Constitutional Court held in 1995 that they still formed the part of the Czech legal order, the question arose whether the EU could accept a new Member State with such a legacy. Frank Hoffmeister, 'The Contribution of EU Practice to International Law', in Marise Cremona (Ed.), *Developments in EU External Relations Law*, Oxford University Press, 2008, p. 113.

20 The work of the three-member committee of experts examining the relation between the Decrees and the EU accession was led by Professor Johen Frowein, the author of the study underlying the EU sanctions against Austria. The final judgment of the report is that the EU membership of the Czech Republic did not require the repeal of the Decrees and other related laws.

21 *Ibid*., Art. 17. This confirms that the relevant materials were associated with the Czech Republic according to the Slovak Government's position, and that the accession of the Czech Republic – as originally planned – would have taken place earlier.

22 Act No. 503/2003 Coll. on the Restitution of Land Ownership (the full name of the law: Act No. 503/2003 Coll. on restitution of ownership to land and on the change and complementing of the Act of the National Council of the SR Nr 180/1995 Coll. on Certain Measures for the Settlement of Ownership Rights to Land as amended).

23 Act No. 503/2003 on the Restitution of Land Ownership, § 2(1) Under this act, the right to the restitution of land shall be exercised by the person who is a Slovak national and has permanent place of residence in the territory of the Slovak Republic, and whose land and property were transferred to the State or other legal person as defined in § 3, during the period between 25 February 1948 and 1 January 1990 (hereinafter referred to as 'relevant period').

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by a derogation period granted in the Act of Accession, the so-called 'Moratorium', and the applicability of the principle of free movement of capital in non cross-border situations.

19.2 The ratione temporis of EU Law

The principle of the primacy of EU law over national law[24] clearly shows that the legislation based on an act which were adopted before the Member State's accession but are not compatible with the provisions of EU law, have to be amended in order to respect the acquis to the fullest.

In accordance with the position often stated by Slovakia and the EU institutions,[25] it really cannot be disputed that, in the Benes decrees are a 'legislative package' created prior to the accession of the Member State, the analysis of the Decrees' compatibility with EU law is fundamentally unnecessary.

The situation is completely different, however, when it comes to the analysis from an EU approach of the legislative, administrative and judicial practice adopted as a consequence of the decrees and in relation to them after Slovakia's accession, where the above reasoning referring to the temporal scope of EU law cannot stand up to scrutiny.

The correctness of our view seems to be supported by the principle crystallized in the constant practice of the Court of Justice of the European Union, according to which EU law[26] should be applied to the actual consequences[27] of legal acts adopted before the accession of a Member State. This is also reinforced by José Manuel Barroso, President of

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24 The principle of primacy of EU law means that in the case of conflict, EU law prevails over national law. The case-law of the Court of Justice of the European Union: Judgment of the Court of 15 July 1964 in the *Costa v. ENEL* case, Case 6/64, ECR 1964, p. 1141; Judgment of the Court of 17 December 1971 in the *Internationale Handelsgesellschaft* case, Case C-11/70, ECR 1970, p. 1125; Judgment of the Court of 9 March 1978 in the *Simmenthal* case, Case C-35/76, ECR 1976, p. 1871.

25 At this point it is necessary to mention the Slovak Republic's position concerning the Juhász petition, repeated almost as a mantra, that the decrees are exempt from the temporal scope of EU law. The Slovak party wishes to support their position by invoking the case-law of the European Court of Justice. The judgment of the Court of 10 January 2006 in the *Ynos* case C-302/04 invoked by the Slovak Republic, the Court confirmed that its jurisdiction extended only to facts subsequent to the accession of a Member State to the European Union (ECR 2006 I-00371, Para. 37). The Slovak government also invoked the judgment of the Court in the *Gennaro Curra* case. The Slovak government also relied on the judgment of the Court *Gennaro Curra* case (C-466/11, *Gennaro Curra and Others v. Bundesrepublik Deutschland* [2012] ECR 0000), where in the central case, Italian citizens demanded compensation from the German State for their grievances suffered during their deportation in the Second World War, which the European Court of Justice did not consider to fall within the temporal scope, nor to fall within the scope of EU law. The regulation adopted as a consequence of the Decrees and its judicial application, contrary to the foregoing, falls undoubtedly within the scope (free movement of capital) and temporal scope of EU law (those were created after the accession), as opposed to the fundamental cases of the above mentioned judgments, where these conditions are obviously not met.

26 Among other things, the judgment of the Court of Justice of the European Union of 12 July 2012 in the *Marie-Nathalie D. Hoop* case, Case C-224/98, ECR 2002 I-06191, Para. 25.

27 Currently this means a date following the accession of the Member State to the European Union.

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the EU Commission, who also declared in his written answer to a question[28] 'all new Member States are bound by the treaties and the case-law of the Court.'[29]

It is therefore important to state that the facts of the situations violating EU law that we will later examine in detail have occurred after 1 May 2004, i.e. after the EU accession of the Slovak Republic.

Article 345 of the TFEU ensuring the right to autonomous property, and the free movement of capital

According to the Article 345 of the TFEU, 'The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.' The issues relating to property and the system of property ownership, therefore, as a rule, are the responsibility of the Member States. This leads to the conclusion that the Member States enjoy complete freedom with regard to their legislation and application of law when it comes to determining who is entitled to compensation and to what extent.

We must not forget, however, the consistent case-law of the Court of Justice of the European Union,[30] according to which the Member States may not invoke Article 345 on property ownership[31] to oppose the economic freedoms – which also include the free movement of capital.[32]

This requirement has been strengthened in the principled answer to the written question Commission of the European Union,[33] in which the Commission clearly states that

> although the system of property ownership remains within the competence of each Member State under Article 345 TFEU, the said provision does not mean that the system would be exempt from the fundamental principles of the Treaty.[34]

28 Answer to written question: E-009825/2012.

29 In the context of the adoption of the Lisbon Treaty, the Member States have formally confirmed the supremacy of EU law: 'The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.' (Declaration number 17 concerning the primacy of EU law.) As for new Member States, they are bound by the Treaties and the case-law of the Court of Justice. Consequently, the legislation that has been adopted in a Member State before joining the EU, and which is incompatible with the provisions of EU law, should be amended in order to respect the EU acquis.

30 Judgment of the European Court of Justice in Case C-182/83, *Robert Fearon & Company Limited v. Born Irish Land Commission* [1984] ECR 03677 Art. 7; Judgment C-302/97 in the *Klaus Konle* case, 1 June 1999, ECR 1999 I-03099.

31 Arts. 295 and 222 of the TEC, in the versions of the founding treaties no longer in force.

32 Louis Dobouis and Claude Blumann, *Droit matériel de l'Union européenne*, Montchrestien, 2012, p. 496.

33 Internal Market Commissioner Michel Barnier's response to Tamás Deutsch's written question, 25 May 2012 reply E-003419/2012.

34 This statement of the Commission clearly refers to the fundamental economic freedoms, as still the most important part of the founding Treaties, despite every effort to the contrary.

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The position of the Slovak Republic[35] is not correct: according to this, the founding treaty provisions concerning property ownership exclude the European Union's competence, so that the Member States invoking those are exempt from the otherwise unavoidable requirement of enforcing the fundamental principles of economic freedoms – in particular the free movement of capital –, such as non-discrimination.

The free movement of capital is one of the main fundamental economic freedoms of the European law.[36] The objective of full liberalization was formulated in 1985 in the White Paper adopted on the European Community's legislative programme. The result of the legislative programme, the Directive 88/361/EEC[37] provided the complete liberation of capital movements, while in the Annex I the cases of capital movement were listed non-exhaustively. This includes direct investment and real estate investment as well.

In the case-law of the Court of Justice – *inter alia* in the *Festersen* judgment[38] – it has been established that cross-border real estate sales is realizing capital movement. Cross-border receipt of inheritances, according to the judgment of the Court in the *Hans Eckelkamp* case,[39] is also considered to be movement of capital. As we mentioned above, the list in Annex I is not exhaustive, so even the restitution of confiscated property can constitute capital movement, as it has also been confirmed by the European Commission's answer to a written question.[40]

Furthermore, it is important to point out that according to the case-law of the Court of Justice of the European Union relating to cases of free movement of chapital, the unlawfulness of national legislation can be determined if that law hinders the free movement of capital between Member States.

Furthermore, in the *Festersen* case, the Court – referring to former cases – made it clear which were the measures that had a restrictive effect on the freedom of movement of capital. This includes any rule adopted by a Member State, which is liable to discourage

35 Position of the Slovak Republic, Art. 15.

36 The fundamental nature of the free movement of capital was further strengthened by the massive case-law developed by the CJEU. Jacques Pertek, *Matériel de L'Union européenne*, Thémis droit, puf, Paris, 2005, p. 131.

37 Council Directive 88/361/EEC of 24 June 1988 for the implementation of Art. 67 of the Treaty (OJ L 178, p. 5).

38 Judgment C-370/05 of the Court of Justice of the European Union of 25 January 2007 in the *Uwe Kay Festersen* case, ECR 2007 I-01129, Para. 23.

39 Judgment C-11/07 of the European Court of Justice of 11 September 2008 in the *Eckelkamp* case, ECR 2008 I-06845, Para. 41.

40 The Commission admitted in its response (E-008448/2013) that 'the restitution of confiscated property is considered a capital movement, and that the same is true for the receipt of inheritances in accordance with the 1988 Council Directive on the movement of capital. The Commission also confirmed that when Member States enforce the prohibition of citizenship-based discrimination in respect of the free movement of capital and the prohibition of restrictions affecting this freedom, they must also observe the provisions of the Charter of Fundamental Rights of the European Union relating to the right to property and to the general prohibition of discrimination.'

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foreigners from investing in a Member State, and the residents of that Member State from investing in other Member States.[41]

Thus, regardless of discrimination, any provisions that discourage capital owners from investing in other Member States are considered unlawful, and the Court of Justice of the European Union will not recognize the legitimacy of these.[42]

19.3 The Slovak Compensation Law in the Light of the Derogation Provisions

Following the rebuttal of the Slovak arguments regarding property ownership, it is necessary to examine whether the discriminatory provisions of the Slovak Compensation Act can be justified by the derogation period allowed by the Accession Treaty. As we know, during the so-called derogation period after accession, new Member States may maintain their legislation in force at the date of their accession.

Similarly to the majority of the Member States which joined the EU in 2004, the Treaty of Accession of the Slovak Republic allowed that, in spite of the obligations arising from the treaties, for seven years[43] after the date of accession, this Member State maintain its provisions going against non-Slovak residents concerning the acquisition of ownership of agricultural land and forests, contained by the amended versions of Acts 180/1995 and 229/1991.[44]

The question arises whether the provisions of Act 508/2004, in the focus of our research, that allow discrimination on the basis of nationality after the accession of the Slovak

41 […] it follows from settled case-law that the measures prohibited by Art. 56(1) EC, as restrictions on the movement of capital, include those which are likely to discourage non-residents from making investments in a Member State or to discourage that Member State's residents to do so in other States. *See Festersen* case Para. 24.

42 The fundamental idea behind the expansion of the protective scope of the freedoms is that the prohibition of discrimination in cross-border movements is insufficient to reduce and ultimately to abolish the existing national restrictions in order to integrate the different European economies into one Common Market. This idea carries equal weight with respect to free movement of capital. In the Golden Shares I case the Court made it reasonably clear that it was also prepared to apply a non- hindrance test in the ambit of free movement of capital. The Court found that a national measure is subject to Art. (56(1) EC – even though the rules may not give rise to unequal treatment- if it is capable of impeding capital movements and dissuading investors in other Member States from investing and thus, capable of rendering the free movement of capital illusory. Steffen Hindelang, *The Free Movement of Capital and Foreign Direct Investment. The Scope of Protection in EU Law*, Oxford University Press, 2009, pp. 119-120; Leo Flynn, 'Free Movement of Capital', in C. Barnard and S. Peers (Eds.), *European Union Law*, Oxford University Press, pp. 456-466; Louis Dobouis and Claude Blumann, *Droit matériel de l'Union européenne*, Montchrestien, 2012, p. 492. Marcel Szabó et al., *ibid*., p. 304.

43 The possibility of extending the derogation period provided by the Accession Treaty by three more years must be added to the seven years.

44 Act No. 180/1995 Coll. on Certain Measures for the Settlement of Ownership Rights to Land, Act No. 229/1991 Coll., on the Provision of Ownership in Relation to Land and Other Farming Property.

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Republic – for the period between 1 May and 31 December 2004[45] – with regard to the restitution of agricultural property[46] can be justified by referring to the derogation period[47] concerning agricultural land defined in the Treaty of Accession of the Slovak Republic.

We can answer the above question by examining the derogation periods from a European aspect, on the basis of which it can be clearly determined, therefore, in which cases the Member States may invoke those derogation periods.

Similarly to the primacy of EU law, the principles concerning the legal effect and the interpretation of the derogation periods have been developed by the case-law of the Court of Justice of the European Union through its law developing activity.

From a European aspect, the derogation periods facilitate the preparation and adaptation of a Member State in the first post-accession period, so they help the new Member State through the transition leading to the full application of the acquis. However, it is important to stress that the scope of the Member States is not unlimited even during the transition (derogation) period provided by the accession treaties: derogation periods typically allow to keep the legislation in force at the accession of the Member State for a longer time.

As for the 503/2003 Compensation Act, subject to inquiry in the present study, it was adopted on 24 October 2004, while the Accession Treaty of the Slovak Republic and ten other Member States was signed on 16 April 2003, so in no way could it constitute existing legislation at the accession, therefore, as a rule, it is not subject to the derogations granted to the Member State, stipulated in the Accession Treaty.

The judgment[48] of the Court of Justice of the European Union in the *Klaus Konle* case specified 'the concept of the legislation in force.' Accordingly, the national provisions adopted during the derogation period are not excluded automatically from the scope of the derogation period.[49]

If the enacted modification merely facilitates the exercise of a fundamental economic freedom guaranteed by the founding treaties, the derogation period covers the amended

45 Under the Compensation Act, claims could be submitted during this period could be submitted to the demands. Act No. 503/2003 on the Restitution of Land Ownership, Para. 5(1): The right to reclaim land property can be invoked by the person entitled to do that until 31 December 2004 at the district land registry where the land in question belongs, and if they present the reference to the facts set out in Para. 3. If the entitled does not invoke their right before that date, the right is lost.

46 Act No. 503/2003, as noted above, only allows for Slovak citizens to submit claims for restitution.

47 Hungary, and, like the Member States which joined in 2004, but with some differences in the stipulated derogation period.

48 The judgment of the Court of Justice of the European Union of 1 June 1999 in the *Klaus Konle* case, C-302/97, cited above, ECR 1999 I-03099. Klaus Konle, German national acquired ownership of land at a Tyrolean auction, which, however, was considered as conditional acquisition, given that it depended of the decision of the Austrian land registry office. The Court ruled that the fact that the acquisition of ownership depended on the discretion of the Austrian authorities included the possibility of discrimination on grounds of nationality.

49 *See* judgment *Konle*, points 52-53.

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regulation itself as well.[50] If, however, the amendment of the regulation enacted during the transitional period is based on a different logical order compared to the one in force, or if it introduces new procedures, that legislation will not be deemed to be covered by the derogation stipulated in the Accession Treaty, applying to the existing national regulations. In this case, the Member State cannot invoke the derogation period, and instead of the Accession Treaty, the provisions of the founding treaties should be applied to it. It is also important to point out that the rules concerning the legislation in force at the time of accession must be interpreted strictly in accordance with the case-law of the Court of Justice of the European Union.

Indeed, while in the Accession Treaties[51] of other Member States – such as Hungary or the Republic of Austria – the accession treaty expressly stated that the derogation period for agricultural land and real estate applies to the extension of the applicability of the existing legislation of the Member State at the time of accession, the Accession Treaty of the Slovak Republic stipulates that the amended rules of Acts 180/1995 and 229/1991 on agricultural land and forest land acquisition can be maintained for a period of seven years from the date of accession.[52] This textual difference, however, does not mean that the Accession Treaty of the Slovak Republic would lead to different conclusions than the above.

The Accession Treaty, by letting the provisions specifically set out in the amended versions of said acts remain in force, actually arrives at the same result as if it allowed the extension of the applicability of the legislation in force at the time of signature of the Accession Treaty.[53]

We can state, however, that the provisions of the 503/2004 Compensation Act do not facilitate the exercise of rights of other Member States' citizens arising from the European law in any way, since the legislation does not point to that direction by its nature.[54] Moreover, the provisions disadvantaging nationals of other Member States and persons whose principal place of residence is not in Slovakia – for example Slovak nationals working in the United Kingdom, being residents of that country – exclude the possibility that the law in question could be interpreted as the promotion of the European fundamental freedoms. Thus, the principle developed by the Court and detailed above may not be invoked to justify the provisions in question.

50 That is, during the derogation period, the Member States shall only change its existing legislation if the enacted changes are aimed at facilitating the privileges of citizens of other EU Member States.

51 Treaty of Accession of the Republic of Austria does not apply to agricultural land, but to secondary real estate. However, this has no relevance to the principles relating to the existing legislation.

52 To which the three-year extension option stipulated by the Treaty of Accession has to be added.

53 Our argument is further strengthened by the fact that, under the other related provisions of the Treaty of Accession of the Slovak Republic, nationals of other Member States' shall in no way be treated less favourably than in which position they were on the date of signature of the Accession Treaty.

54 The restitution of assets lost before the accession of a Member State does not facilitate the economic freedoms directly.

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In addition to this, we have to see that the provisions of the Accession Treaty of the Slovak Republic enabling the derogation period concerning the agricultural land and forestland apply to the acquisition of property. The compensation law, on the other hand, applies to the restitution of property that was confiscated or lost in unfair circumstances, eventually to the compensation for those. Consequently, given the strict interpretation of advantages provided for the Member States in the derogation periods in the case-law of the Court of Justice of the European Union, excluding property confiscated in unfair conditions from the compensation after the accession of a Member State does not appear to be justified, even if the compensation provisions are considered to be existing legislation. An 'advantage' provided in the Accession Treaty of a Member State that allows that, for a certain period of time after that Member State's accession, it should maintain legislation that prohibits nationals of other Member States to acquire property ownership, could in no way be interpreted as authorization for that Member State to exclude nationals of other Member States from the restitution process of property confiscated or lost before the accession.

19.4 The European Commission's Assessment of the Slovak Compensation Act, in the Light of the European Regulations on the Free Movement of Capital

The reflections above constituted the assumption of the main subject of investigation of present study, thus, the analysis of the question of the compatibility of said Compensation Act with EU law. Thus, below we wish to focus solely on the question whether the central provisions of the Slovak Compensation Act,[55] adopted after the country's accession, that allow only persons of Slovak nationality who are also residents of Slovakia to submit claims for compensation, is compatible with EU law. That law of the Slovak Republic, currently in force, made it possible to submit claims for restitution of land confiscated or lost in unfair conditions on different grounds in the period between 25 February 1948 and 1 January 1990. As an exception, the regulation provided for the submission of compensation claims in respect of land confiscated on the basis of the Decree of the Slovakian National Council 104/1945 T.t. on the confiscation and quick redistribution of agricultural property of Hungarians, Germans, traitors and the enemies of the Slovak nation, and on the basis of the Decree of the President of the Republic 108/1945 on the nationalisation of enemy property.[56]

55 Act No. 503/2003 on the Restitution of Land Ownership.

56 Presidential Decree No. 108/1945 concerning the confiscation of enemy property and the National Renewal Fund.

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As mentioned above, at the same time, the regulation ruled out the possibility of claims being submitted by non-Slovak nationals and persons who are not residents of Slovakia.

Knowing the European Commission's – in general restrained – position concerning national minorities or similar sensitive political issues, and its opinion previously expressed about the decrees, according to which those can be considered as historical documents, consequently not violating EU law, the affirmation of the connection between the compensation process within the temporal scope of the EU law and the free movement of capital arises as a serious challenge. This challenge, however, did not deter those MEPs who turned to the Commission of the European Union with a written question[57] on the compatibility of the above-mentioned provisions of the Compensation Act and EU law.

In response to the petition 'founding' this issue,[58] the European Commission has previously recognized[59] that the post-accession restitution of property confiscated before the accession of the Member state constitutes capital movement – including the receipt of inheritances –, so the EU Directive[60] on capital movements should be applied in such cases, and the provisions of the European Union's Charter of Fundamental Rights[61] on property rights and the general prohibition of discrimination[62] must also be taken into account. In the reply, the Commission also drew attention to the fact[63] that the case-law of the Court of Justice of the European Union established exceptions concerning the free movement of capital, but these can only be applied on the basis of objectives set out in the founding treaties or overriding public interest. In order to comply with EU law, restrictions applied by Member States must take into account the principle of proportionality as well.

After the Commission adopted a principled resolution, another question[64] to the Commission also addressed specificities and was focusing on the question whether it was compatible with EU law to exclude non-Slovak nationals and persons who are not residents of Slovakia from the compensation between 1 May 2004 and 31 December 2004,[65] which is a post-accession period.

In practical terms, the question formulated in the same petition has a great significance: if it is established that the exclusion of nationals of other Member States from the restitution

57 Alajos Mészáros and Zoltán Bagó MEPs.
58 Written question: E-118448/2013.
59 In response to the question of Philippe Boulland EP representative, the Commission acknowledged that the restitution of confiscated property constitutes capital movement, and the same is true for the receipt of inheritance, under the Council Directive on capital movements adopted in 1988, Answer to written question E-008448/2013.
60 *See* Directive 88/361/EK cited above.
61 The Charter of Fundamental Rights of the European Union, Art. 17.
62 Art. 12 of the Charter of Fundamental Rights of the European Union on non-discrimination specifies belonging to a national minority, although only within the scope of the founding Treaties.
63 Written question: E-008448/2013.
64 E-011 857/13, written question, Alajos Mészáros and Zoltán Bagó.
65 Only Slovak nationals and residents of Slovakia could submit compensation claims.

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process is in breach of EU law, does it follow from the obligation[66] of Member States to correct situations violating EU law that the possibility of submitting claims for compensation should be ensured for only those European citizens who were effectively excluded from the compensation on the basis of the nationality or the place of residence– that is, who can actually prove it –, or for every potentially discriminated person? The answer to this question is of particular importance, given that the national legislation specified a limitation period ending on 31 December 2004.

Viviane Reding, Vice-President of the Commission of the European Union, explained in her response[67] that under Article 345 of the TFEU, EU law – having regard to the competency of the Member States to develop their property ownership system – does not require Member States to provide compensation for property confiscated prior to accession.

Furthermore, according to Reding's view, Member States also have the competency to decide to what extent and under what conditions they resituate confiscated property. However, the Commission has stressed the important point that 'when determining the conditions for the restitution of property to former owners, Member States must comply with the rules contained by the EU Treaties and secondary legislation – in particular the free movement of capital – if the restitution measures fall within the temporal scope of the Treaties.

According to current EU law, we consider the Commission's response to be entirely correct, there is no bias in this regard. It is necessary to note, however, that the Commission has not given an exhaustive answer to the question, when it failed to comment expressis verbis on the issue whether, during the period in question,[68] the criteria of place of residence and Slovak nationality set out in the Compensation Act are in breach with the fundamental freedom of the movement of capital.[69] The European Commission also failed to answer the question mentioned above whether only the persons rejected on the basis of these criteria should be provided legal remedy, or whether all persons potentially affected should be able to re-submit their claims for compensation. The Commission may justify its 'incomplete' response by the fact that an investigation concerning the legislation of a Member State may take several months, which exceeds the time within which the Commission must provide an answer to the written question of the Members of the European Parliament. The Commission – not knowing the opinion of the Member State – will

66 Judgment of the Court of Justice of the European Union of 16 December 1960 in the *Humblet v. Belgium* case, No. C-6/60, ECR 1960 01125.

67 E-011857/1013, answer to written question, Viviane Reding, 20 January 2014.

68 Between 1 May 2004 and 31 December 2004.

69 In our view, the provisions of the Compensation Act in question clearly infringe the free movement of capital. In principle, such limitations – as the Commission also mentioned – may be limited in order to promote the public interest. We strongly doubt, however, that in this case it would be possible to 'find' an appropriate compelling public interest, also acceptable for the European Court of Justice. Economic interests should not be acceptable public interest, and we do not see any social public interest to justify this situation either.

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probably refrain from formulating a specific legal position concerning the issue set out above. However, in the future, the Commission cannot avoid giving a specific answer to the clarifying question that will certainly be repeated by the MEPs.

19.5 Non Cross-Border Situations

The above arguments seem to clearly confirm that the provisions of the Compensation Act violate the free movement of capital, as well as the requirement of non-discrimination on the basis of nationality at the heart of it, since the period from 1 May 2004 to 31 December 2004 falls under the temporal scope of EU law, and the provisions in question are disadvantaging nationals of other Member States, so the cross-border nature is undoubtedly confirmed.

Removed from the discriminatory provisions of the Compensation Act presented above and the analysis of those provisions on a European level, you might want to consider whether the principles applying to the economic freedom of the free movement of capital are implemented in the compensation process even when the cross-border nature cannot be detected – based on EU criteria –, but the stakeholders are discriminated in property ownership issues. To resolve this issue, the analysis of the jurisprudence concerning the free movement of capital is necessary.

As has been pointed out above, the general perception[70] – confirmed by the case-law of the Court of Justice of the European Union – is that the Article of the Founding Treaties[71] that guarantees property ownership autonomy for the Member States should not be interpreted in a way that would allow the limitation of economic freedoms.[72] In our view, this provision in this context should be interpreted in a way to ensure principally the private autonomy of the Member States, that is, the Member States are themselves entitled to create their own system of private law and determine other rules related to property records.

Unfortunately, the case-law of the Court of Justice of the European Union does not really provide an example strictly in the field of the private autonomy of Member Sates for EU 'investigation' that would aim at determining the compliance of private law or other institutions related to real estate records with the free movement of capital. At the same time, we do not find any example of the Court of Justice of the European Union that

70 Ágoston Korom, 'A földpiacra vonatkozó kettős jogalap tételének bírálata', 3 *Magyar jog* (2011), pp. 152-159.
71 *See* TFEU Art. 345.
72 The property ownership autonomy (ex 295, now Art. 345 TFEU,) cannot be interpreted as unconditional right of the Member States: the requirements of free movement and competition strictly set the limits for the interpretation of this article. Louis Dubouis and Louis-Claude Blumann, *Droit de l'Union européenne matériel, Montchrestien*, 6th edn, Paris, 2012, p. 611.

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would automatically exempt administrative or civil institutions and principles related to real estate records from investigations related to fundamental economic freedoms.[73]

We believe that, as the development of EU law stands at present, Member States may continue to invoke Article 345 of the TFEU 'in case of general investigations', which may be intended eventually to determine when a Member State's civil and land registration principles are excessively and unnecessarily restrictive in relation to the fundamental economic freedoms.

The fact that the safety of real estate sales was indicated as one of the most important aspects in the case-law of Court of Justice of the European Union relating to the land registration system of the Member States has major significance for the answer to this question.[74] The case-law of the Court of Justice has developed the principle according to which the compatibility of a Member State's regulation with the fundamental economic freedoms is questionable even in the case where the national authorities have discretionary powers – not defined duly by legislation – for issuing licences,[75] eventually discouraging nationals of other Member States from investing in that particular Member State.

It can also be generally stated that the case-law of the Court of Justice of the European Union is increasingly permissive[76] in respect of cross-border nature. Thus, even in the absence of cross-border nature, the case-law of the Court replies to the question asked during the preliminary ruling, as it greatly facilitates the uniform interpretation of EU law, and at the same time, significantly reduces the future possibilities of future discrimination against nationals of other Member States.

On the whole, it can be stated that – having regard to the more and more tolerant case-law of the Court regarding cross-border nature, ant to the primary implementation of the safety of real estate sales emerging from the case-law of the Court –, if, after the EU accession of the Slovak Republic, an administrative and judicial practice that discriminates

73 Moreover, as a new element, the Court examines the institution of European citizenship with respect of real estate buying and selling, and ong-term leases. *See* the judgment of the Court of Justice of the European Union of 8 May 2013, in Case No. C-197/11, *Libert et al.* This process contradicts the existing case-law that until recently, if the Court has examined a national regulation from the aspect of the free movement of capital – the strongest of freedoms –, it has not been reviewed with regard to other fundamental freedoms. European Citizenship in such situations only came into play as an additional element. The Court looked at a situation from the point of view of citizenship if it was impossible to apply the provisions of fundamental economic freedoms in that area. As for out subject, relevance of the question is whether the extension of the EU freedoms goes together with the weakening of the criteria restricting the free movement of capital?

74 It is clear that neither the primary, nor the secondary EU legislation do not require Member States to enforce the safety of real estate sales. However, the criterium of security, as one of the most important applicable aspects in this field, is taken into account by the European Court of Justice in the case of the limitation of fundamental economic freedoms.

75 Judgment of the Court of Justice of the European Union of 4 June 2004 in Case No. C 483/99, *Commission v. France*, ECR 2002 I-04781.

76 Judgment of the European Court of Justice of 15 May 2003 in the *Salzmann* case, C-300/01, ECR 2003 I-04899.

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against the stakeholders – even against Slovak nationals and residents of Slovakia – of the decrees in property ownership issues, it is conceivable that the latter successfully invoke the free movement of capital.

19.6 Summary

Since the current state of development of EU law does not provide effective protection for national minority rights, and the protection of fundamental rights does not necessarily require – legally – the repeal of provisions declaring collective guilt, adopted prior to the accession of given Member State, therefore our investigation of the decrees' compatibility with EU law were based on fundamental economic freedoms.

EU law does not require – or only in very exceptional cases – the restitution of property expropriated or confiscated in unfair circumstances before the accession of a Member State. Consequently, we find the concerns that the decrees could not be repealed because that would lead to landslide changes in property ownership unfounded.[77]

However, it must be emphasized that, when a Member State opts for compensation[78] after accession, it should be done taking into account the fundamental economic freedoms, in particular, the criteria relating to the free movement of capital, which expressly prohibits the discrimination on the basis of nationality. Therefore, the Compensation Act 503/2003 – since the submission of compensation claims was only allowed for persons of Slovak nationality for the period between 1 May 2004 and 31 December 31 – is most likely contrary to the fundamental economic freedom of the free movement of capital.

In our analysis, we came to the conclusion that a judicial practice – even in the absence of any cross-border element – that allows for different application of private law and land registration rules relating to property ownership in the national legislation regarding persons, who had obtained property through the decrees, also questions its consistency with fundamental economic freedoms. However, these issues need further investigation on conceptual level and case-specific level as well.

Maybe it was the above mentioned questions regarding fundamental economic freedoms that lead to the recently adopted position of the Legal Affairs Committee of the European Parliament (JURI)[79] that the further investigation of the decrees is justified because they have a legal effect even today, in contrast with former European opinions, among others the opinion of the European Commission concerning the Juhász petition, according to

77 EU law would not in any case require a change with such consequences.

78 The conditions and stakeholders are also determined by the Member States, as is clear from the Commission's response.

79 11 February 2014.

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which the decrees should be seen as a historical document with no detrimental effect to EU law.

We believe that, in order to close the questions regarding the decrees, further exhaustive examination of the related regulations, administrative and judicial practice is necessary. Closing the petition without a thorough investigation would cause serious damage to the European Parliament's authority, however, it would not prevent that even private individuals – through direct law enforcement – or MEPs, invoking the monopoly of the Court of Justice of the European Union in the interpretation of EU law, continue to turn to the EU forums regarding the decrees' effects violating EU law.