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RESTITUTION FOR IMMOVABLE PROPERTY: THE BENEŠ-DECREES FROM THE PERSPECTIVE OF EUROPEAN UNION LAW – THE LEGAL STATUS OF CLAIMANTS FOR CONFISCATIONS PRIOR TO 1948 ON THE GROUNDS OF THE PRINCIPLE OF *LEX SPECIALIS*

1 Introduction

The subject of the present study is Slovak Act NO. 503/2003 Coll. on the Restitution of Agricultural Property[1] (hereinafter the Slovak Restitution Act or the Restitution Act) and the Slovak administrative and judicial practice interpreting it, which in our view is incompatible with the requirements of EU law since it essentially disregards the special provisions of the law in question, highlighting the general provisions. Indeed, while the above-mentioned act allowed, as a general rule, restitution for immovable property confiscated only during „the decisive period", i.e. between 25 February 1948 and 1 January 1990, the explanatory provisions of the act, exceptionally, in the context of special proceedings also offer the opportunity to seek to recover agricultural land confiscated by way of the 1945 decrees. However, the latter option only applies to persons who had not previously been convicted of fascist crimes by the court.

It will be explained in detail below why the Restitution Act 2003 falls within the scope of *ratione materiae* and *ratione temporis* of EU law. As a preliminary point, it should be noted that requests for restitution

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[1] Slovak Act NO. 503/2003 Coll. on Restitution Concerning Agricultural Property.

could be submitted for a further eight months after the accession of the Slovak Republic to the EU, i.e. from 1 May 2004 to 31 December 2004, thus leaving no doubt as to the applicability of EU law. Moreover, the legislation contained directly discriminatory provisions concerning nationality and residence, in breach of EU law, given that only persons of Slovak nationality and those residing in Slovakia could submit claims for compensation. Over the last decade and a half, the Slovak public administration and the courts, including the Slovak Supreme Court, have taken different views as to whether the scope of the legislation in question extends to persons whose agricultural property was confiscated before "the decisive period", i.e. 25 February 1948.[2] At the same time, it is a disquieting development that the practice of lower courts and administrative bodies now seems to be consolidating following the latest decisions of the Slovak Supreme Court, which are in our view highly questionable. According to this practice, under Slovak law, apart from any action taken before the Constitutional Court, it is not possible to reclaim agricultural land confiscated before „the decisive period", i.e. 25 February 1948.

The main purpose of this paper is to examine whether EU law requires an interpretation of the „explanatory provision" of the legislation in question in such a way that, contrary to the case law of the Slovak Supreme Court, it allows the reclaim of confiscated agricultural land before the above-mentioned „decisive period". At first sight, this interpretation seems highly questionable, as EU law does not require a Member State to provide restitution for immovable property confiscated before its accession to the EU, nor does it specify the period during which a property was confiscated for which a Member State should compensate. At the same time we need to see that, if a Member State still decides on restitution after joining the EU, the rules of EU

[2] Two different interpretations have emerged in relation to the provisions of the legislation in question: according to the first view, exceptionally, persons from whom property had been taken before 1948 may also request the return of their property. According to the second interpretation, the exception in the explanatory provision of the Act means persons from whom their property was confiscated under the 1945 legislation but after 1948.

law will apply to the restitution. Thus, agricultural property will be governed by specific internal market rules relating specifically to the free movement of capital.[3]

In our view, as already mentioned above, it is beyond dispute that the legislation in question falls within the scope of *ratione materiae*[4] and *ratione temporis* of EU law, given that applications could be submitted up to eight months after accession but only with the discriminative restriction described above. This is confirmed by the position of the European Commission, which has been expressed on several occasions in its answers to questions for written answer.

In the following, after a brief historical introduction to the Beneš Decrees and the circumstances surrounding the birth of the legislation in question, we will first scrutinize the criteria on which the legislation on the free movement of capital and the general principles of EU law may be based as regards the reclaiming of land. In doing so, we will carry out an in-depth analysis of the relationship between the legal institution of restitution and EU law, the Commission's position on the legislation in question and, finally, the applicability of general principles of EU law, including the *lex specialis*.

[3] According to the case law of the CJEU, measures of Member States relating to immovable property must be examined primarily in relation to the free movement of capital. According to the Court, Directive 88/361 / EEC, which provides for an indicative list of the operations covered by the free movement of capital, has retained its dominant position, despite its repeal by the Treaty of Amsterdam. Although Annex I to the Directive does not expressly mention the institution of restitution in the list, as stated above, its contents do not constitute a taxative list which would exhaustively define the types of movement of capital. See Court of Justice of the European Union, Judgment C-370/05, Uwe Kay Festersen, ECLI: EU: C: 2006: 635; Judgment in Case C-452/01, Margarethe Ospelt and Schlössle Weissenberg Familienstiftung, ECLI: EU: C: 2003: 493.

[4] Question for written answer: E-011857/2013. On 20 January 2014, Viviane Reding, on behalf of the European Commission explained that Member States are free to decide whether they want to compensate for goods confiscated before their accession to the EU. However, where restitution measures fall within the temporal scope of Union law, the Member State must take into account the provisions on the free movement of capital when applying them.

2 Historical background: the Beneš decrees and their legal aftermath

President of the Czechoslovak Republic, Eduard Beneš blamed the „overly lenient" ethnic policy between the two world wars for the break-up of Czechoslovakia.[5] He saw the solution in the creation of the nation-state and the unilateral expulsion of national minorities. The emigrant government and the Slovak National Council thus voluntarily began to prepare the deportation of Hungarians after the signing of the ceasefire agreement in January 1945. On April 4, 1945, the so-called Košice government program was announced in Košice, which provided for particularly severe measures for the Hungarian and German minorities who were considered war criminals.[6] As a result of this program, they soon disbanded their associations, ordered the confiscation of their properties, the closure of Hungarian schools, and the banning of the Hungarian language from public life. The first mass deportations took place in May, and in August the Hungarians were collectively deprived of their citizenship. The implementation of the government program in Košice was ensured by the subsequent presidential decrees and the laws issued by the Slovak National Council (hereinafter: SNC). Between 14 May and 27 October 1945, Eduard Beneš as President of the Republic issued 143 decrees, of which about thirteen directly and twenty indirectly affected Hungarians and Germans adversely, who had been found collectively guilty.[7] For the purposes of our analysis the most important one is decree 104/1945, which provided, among other things, for the confiscation of the agricultural property of Hungarians and Germans.

[5] The first disintegration of the Czechoslovak Republic.

[6] Horváth Attila: A Beneš-dekrétumok és a hozzá kapcsolódó diszkriminatív intézkedések Csehszlovákiában 1945 és 1948 között.(The Beneš Decrees and related discriminatory measures in Czechoslovakia between 1945 and 1948.) In: Attila Horváth – Ágoston Korom (ed.): *A Benes-dekrétumok az Európai Parlamentben. ('*The Beneš decrees in the European Parliament') Budapest: NKE. 2014, 20–23.

[7] *Ibid.*

The issue of the Beneš Decrees had already been on the table before the enlargement of the European Union in 2004. Prior to the accession of Slovakia and the Czech Republic to the EU, the Sudeten Germans opened discussions on the decrees, particularly in connection with the accession of the Czech Republic. The legal opinion issued by the European Commission in the form of the "Frowein Report" was commissioned to close the decree disputes, in which it was clearly stated that the decrees did not constitute an obstacle to the accession of the Czech Republic,[8] to which the European Commission still refers in its legal resolutions on the decrees.[9] At the same time, we have to see that the report was limited to the Czech Republic and drew conclusions from it as to the Slovak legal system, i.e. it did not examine Slovakia's situation with regard to the decrees at all but merely „made assumptions" that they did not constitute an obstacle to Slovakia's accession to the EU.[10]

At this point, we consider it important to make a clear distinction between the requirements that can be imposed as a political or legal expectation of the accession of a candidate country to the EU and the strict EU legal requirements that each Member State must enforce in its own legal system once the accession process is completed in accordance with the principle of loyalty enshrined in the Treaties.[11] The mere fact that legislation in breach of EU law had already been in force in the

[8] This opinion is based, inter alia, on the assumption that, from the moment of accession, all EU citizens will enjoy equal rights in the Czech Republic.

[9] Anikó Mészáros – Ágoston Korom: A Benes-dekrétumok tegnap és ma az Európai Parlamentben. (The Benes decrees in the European Parliament yesterday and today.) In: *Ibid*., 29–34.

[10] This paper takes a different EU law approach from the one of the II. Juhász petition concerning the decrees.

[11] Pursuant to Article 4 (3) TEU, the Union and the Member States shall, in accordance with the principle of sincere cooperation, mutually respect and assist each other in carrying out tasks which flow from the Treaties. Member States have a specific and general obligation to take action to implement their EU obligations, based on the principle of loyalty, while refraining from any conduct that runs against EU objectives and rules. László Blutman: *Az Európai Unió joga a gyakorlatban – a Brexit után*. (The law of the European Union in practice - after Brexit). Budapest: HVG-ORAC For rent. 2020, 50.

legal system of a Member State at the time of its accession cannot in any event justify the infringement itself.[12]

However, it should be emphasized that the decrees or other legislation adopted before the accession of the Member State in question to the EU are not contrary to EU law, provided that during their application after the accession of the Member State to the EU no decisions are taken in breach of EU law,[13] in accordance with the principles of *ratione temporis* of the Court of Justice of the European Union (hereinafter referred to as CJEU).[14]

As is well known, the accession of a State to the EU, does not require it to provide restitution under EU law for immovable property taken before accession unless the accession criteria themselves so require.

Moreover, the EU legal order does not lay down criteria as to which periods of confiscation of immovable or other property should the restitution process concern if it eventually takes place. This position was also confirmed in the European Commission's response to a 2014 written question.[15] In its reply mentioned above,[16] the Commission also emphasized that if a Member State nevertheless opted for restitution after its accession to the EU, it would fall within the scope of EU law, in particular the economic freedom of movement of capital, whose prohibiton criteria concerning the prohibition of discrimination on grounds of nationality must be complied with.

The Slovak Restitution Act 2003, which we examine here, made it possible to submit claims for restitution after the accession of the Slovak Republic to the EU, i.e. for the period from 1 May to 31 December 2004,

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[12] Court of Justice of the European Union, 6/64, Flaminio Costa v E.N.E.L. judgment, ECLI: EU: C: 1964:34.

[13] This holds true if the legislation does not in itself impede the functioning of the internal market ie it does deter citizens of other Member States from investing in real estate.

[14] A policy decision prior to the accession of the Member States would have been best suited to eliminate legislation declaring collective guilt, which would therefore no longer have adverse legal consequences under EU law.

[15] Question for written answer: E-011857/2013. See footnote 4.

[16] *Ibid*.

subject to a time-limit provided, inter alia, that the persons concerned must have Slovak citizenship and permanent residence.

At this point, it is necessary to address the applicability of EU law to this rule. With regard to the 2003 Law on Restitution for Agricultural Property, the applicability of EU law was essentially based on two factors:[17] on the one hand, as emphasized earlier, the Slovak Republic acceded to the European Union on 1 May 2004, while the legislation provided for the possibility to submit a claim for restitution until 31 December 2004. Those eight months therefore established the temporal scope of the applicability of EU law.[18] On the other hand, as is well known, a cross-border element is always required in order to enforce the rights deriving from the EU legal order with regard to fundamental

[17] More about the EU legal requirements for the free movement of capital in relation to real estate: Szilágyi János Ede: Agricultural Land Law – Soft law in soft law, In: *Hungarian Yearbook of International Law and European Law 2018,* 189-211.; János Ede Szilágyi: Az Egyesült Államok és szövetségi államainak mezőgazdasági földtulajdon szabályozása a határon átnyúló földszerzések viszonylatában. ('The regulation of agricultural land ownership in the United States and its federal states in relation to cross - border land acquisitions'). In: *Miskolci Jogi Szemle* (Miskolc Legal Review) 2017/2. special number; Szilágyi János Ede - Raisz Anikó - Kocsis Enikő Bianka: New dimensions of the Hungarian agricultural law in respect of food sovereignty. In: *Journal of Agricultural and Environmental Law* 22/2017. Mihály Kurucz: Gondolatok a magyar földforgalmi törvény uniós feszültségpontjainak kérdéseiről. ('Thoughts on the issues of EU tensions in the Hungarian Land Transaction Act.') In: József Szalma (ed.): *A Magyar Tudomány Napja a Délvidéken*. ('The Day of Hungarian Science in the South'). Novi Sad: Hungarian Scientific Society of Vojvodina. 2015, 120–173. Mihály Kurucz: *A mezőgazdasági ingatlanok agrárjogi szabályozása*. ('Agricultural law regulation of agricultural real estate'). Budapest: Mobil Kiadó. 2001, 240; Mihály Kurucz: *Az európai agrárjog alapjai*. ('Fundamentals of European Agricultural Law.') Budapest: Mobil Kiadó. 2004, 304.

[18] The Court has also addressed the issue of the temporal scope of EU law with respect to the applicability of EU law in relation to a number of references for a preliminary ruling, specifically regarding the Member States acceding later. Of these, the Ynos case, in which the Court's wording on the applicability of EU law referred back to Article 2 of the Act of Accession, which states that the provisions of the original Treaties and Community acts adopted before accession are binding on the new Member States and subject to conditions applicable in the new Member States from the date of accession. It should be noted here that, unlike in the present case, the facts of the main proceedings in the Ynos case preceded the accession of a newly acceded Member State, namely Hungary to the European Union. See Court of Justice of the European Union, C-302/04, Ynos judgment, ECLI: EU: C: 2006: 9.

economic freedoms, such as the free movement of capital. This is provided for all persons who were nationals of another Member State at the time in question. The latter, the cross-border element coming into existence by the persons having the nationality of a different Member State therefore also justifies the applicability of EU law.

Although the European Commission acknowledged in its reply[19] that EU law was applicable to restitution law and that the above provisions undoubtedly infringed EU law, it nevertheless did not wish to launchan infringement procedure *ex officio* at the request of more than a thousand complainants. He based his decision, inter alia[20] on the fact that the persons concerned were able to assert their rights under EU law before the Slovak courts. However, that recognition applied only to immovable property seized during the decisive period laid down in the Restitution Act 2003, that is to say, after 1948.

In the followings, during an examination of Slovak law and the Slovak administrative practice and that of the general principles of EU law we seek to answer the question whether the remedy available under EU law applies to persons outside "the decisive period", i.e. victims of nationalization in the application of the decrees.

3 The relevant Slovak legislation

As mentioned above, Article 2(1) of the Slovak Act NO. 503/2003 Coll. On Restitution of Agricultural Property,[21] in addition to the provisions for Slovak citizenship and permanent residence, which clearly violate EU law, provides for an additional set of criteria for claimants. It thus

[19] Answer of the European Commission: CHAP (2017) 02055. Response of the European Commission to a complaint lodged by the Institute for the Protection of Minorities (KJI).

[20] Answer of the European Commission: Ref.Ares (2019) 5420001-27 / 08/2019. The European Commission's response to a complaint lodged by the Institute for the Protection of Minorities (KJI), in which it complained about the Commission's failure to initiate *ex officio* proceedings which would facilitate the enforcement of the rights of several hundred of people under EU law.

[21] See: Restitution Act S 2 (1).

allows, as a general rule, the return of land to persons whose property was nationalised between 25 February 1948 and 1 January 1990, i.e. as the legislation states, during "the decisive period".

At the same time, Article 3(2) of the 2003 Act further extends the scope of those entitled to reclaim when it provides that „… those persons shall also be deemed entitled to the exception of confiscation of land in accordance with specific provisions …[22] who meet the criteria of nationality and domicile". Consequently, while maintaining the nationality and domicile criteria, as set out in the explanatory provision of the legislation, those persons are also covered by the law and thus the right to recover confiscated property, from whom the land was confiscated on the basis of Decree No 104/1945 of the SNC on the "confiscation and expedited distribution of agricultural assets of Germans, Hungarians and enemies of the Slovak nation" and decree No 108/1945 of the President of the Republic on the "confiscation of the enemy's property". However, this entitlement exists only if the above mentioned persons had not been convicted of a "war crime" in accordance with specific requirements.

It can therefore be concluded from the foregoing that the legislation in question contains in its content seemingly contradictory provisions in respect of the same immovable property as regards the conditions which determine the scope of the rightholders to recover.

Thus, in our view, it defines, on the one hand, a general provision for the decisive period and a specific provision for properties confiscated under decrees No 104/1945 and 108/1945.

[22] See ibid. Article 3 (2).

4 Applicable principles of the legal order of the EU

As is well known, when acting within the scope of EU law[23] Member States have to bear in mind its general principles.[24] What is more, László Blutman states:

> "The fact that the general principles of law recognized in European Union law constitute the yardstick for the assessment of the measures taken by Member States to implement Community law also renders those principles enforceable in the courts of the Member States"[25]

The question arises as to whether the legislation we are reviewing applies to EU law. The European Commission's point of principle is clear in this regard. In its written answer E-004016/2020, it made it clear when it stated:

> „When a Member State takes measures on the restitution of property that falls within the scope of the application of EC law, it has to take into account any relevant provision, including the general principles of EC law".

[23] Question for written answer, E-004016/2020. The European Commission, recorded the above on behalf of Executive Vice-President Vladis Dombrovskis on 4 September 2020.

[24] Court of Justice of the European Union, Judgment C-135/13, Szatmári Malom Kft., ECLI: EU: C: 2014: 32765.

[25] Blutman 2020, ibid. 446; See also Court of Justice of the European Union, C-2/92, Bostock, EU: C: 1994: 116, 16.

Although the above position of the European Commission[26] does not appear to be clearly justified in the light of current case-law,[27] a number of arguments can be put forward in support of it.[28] At the same time, a

[26] There is still a serious debate in legal literature as to when a Member State acting within the scope of EU law. As the relationship between EU law and national law can be diverse and it is not possible to draw sharp boundaries, the Court has set up the „sufficiently close relationship" test as an ancillary principle, which is also increasingly supported in legal literature. This is well illustrated by the position of Ludovic Pailler, who, in examining the limited material scope of the Charter, concluded that there are essentially two interpretations: the first is a grammatical interpretation under Article 51 of the Charter, which seeks to limit the Charter to cases where the Member State also strictly implements or transposes EU law. By contrast, the second, broad interpretation requires the Charter to be applied in all situations where the relationship between the legal situation to be assessed and EU law is sufficiently close. According to Pallier, the vast majority of French legal literature supports this second, broader interpretation. It also emphasizes that, in the current practice of the CJEU, there is no criterion that would provide a definite definition in this regard. See Pailler, Ludovic: L'invocabilité de la Charte des droits fondamenteux. In: Clément-Wilz, Laure (dir.): *Le rôle politique de la Cour de justice de l'Union européenne*. Bruxelles: Bruylant. 2019, 125–126, 142; Rondu, Julie: *L'individu, sujet du droit de l'Union européenne*. Bruxelles: Bruylant. 2020, 260; Blutman 2020 *op. cit*., 430; László Blutman: Az Alapjogi Charta és az uniós jog határai. (The Boundaries of the Charter of Fundamental Rights and EU Law.) In: Mária Homoki-Nagy (chief ed.): *Ünnepi kötet Dr. Czúcz Ottó egyetemi tanár 70. születésnapjára*. (Ceremonial volume for the 70th birthday of Dr. Ottó Czúcz.) University of Szeged ÁJK. 2016, 103–109.

[27] Indeed, the legislation we are analysing does not, in principle, include any of the three cases „recognised" by the jurisprudence or the relevant legal literature in the implementation of EU law by the Member States: i.e. the Member State does not directly apply a source of EU law, furthermore, there is no EU provision authorizing the Member State to implement it, and lastly, the Member State does not make use of the possibility of derogations or restrictions from EU rules, i.e. we cannot talk about a derogation case (Advocate General's Opinion, C-298/16, points 32 to 35). However, in view of the arguments that we have put forward below, the second case cannot be ecxluded as essentially ‚empowering the Member State' to enforce the requirements of the free movement of capital when applying the restoration measures it has set up under its competence, thereby controlling member states' actions in this area.

[28] Thus, first of all, the findings of Advocate General Michal Bobek in Teodor Ispas (C-298/16) may serve as an argument in support of the position of the European Commission. In this case, too, the Advocate General examined when and to what extent a Member State implements EU law in relation to the fundamental rights enshrined in the Charter. In particular, it states in its proposal that, on the basis of objective criteria, the proximity between EU law and the rule of the Member States can be established even if the rule of the Member State does not reflect EU law and the Member State has a wide room for manoeuvre in the area. However, according to the Advocate General, the rule of „functional necessity" is a kind of limitation of the

detailed examination of this issue would go beyond the framework of this writing, and more importantly, it would only be the decisions of the Court of Justice of the European Union to give a point of reference; therefore in the followings we will focus solely on the enforcement of the rights of persons who have suffered an actual wrong.

Indeed, in the case of persons whose rights under the EU legal order have been infringed by the legislation we are investigating, it is already clear in the light of the relevant practice of the CJEU, whether the Member State implements EU law. The Court's judgment in DEB removes any doubt in this regard.[29] In the case on which the

general rule. According to the former, any rule of a Member State which contributes to the effective implementation of a Member State's obligation under EU law is subject to EU law, unless the adoption of a rule of a Member State is not reasonably necessary for the enforcement of relevant Union law.

As regards the restitution, we can conclude on the above stated that the Member State clearly has ample room for manoeuvre in this area and that the restitution measures of the member states do not reflect EU law.

The functional necessity is supported by the position of the Commission itself, in which it is stated that Article 17 of the Charter of Fundamental Rights of the European Union protects property by creating the right to restitution for confiscated property taken away in the public interest and under the conditions laid down by law (E-004016/2020). This interpretation cannot be ruled out as in a number of cases (see Cases No.C 66/18 and C-78/18, Commission v. Hungary), the provisions of the Charter seem increasingly detached from economic freedoms. Accordingly, the above criteria will be examined by the court of the Member State on a case-by-case basis and a degree of decentralisation is therefore inevitable.

Finally, it is worth noting that the cross-border element in the scope of the free movement of capital is not always necessary for the realisation of EU control. Thus, in Hans Reisch (C-515/99), the Court examined the legislation of the Member State in question, even though all the elements of the case were linked to a Member State. According to the Opinion of the Advocate General in the case, the examination of the legislation of Member States is justified because it may potentially obstruct the citizens of other Member States from exercising fundamental economic freedoms. These reasons also apply in the case of the restitution rules of the member states, in relation to the entitlements of citizens of otherMember States and the enforceability of cross-border inheritance issues.

[29] It is clear from points 1 and 2 of the judgment and its normative part that the procedures for determining the liability of a State under EU law must be supervised in accordance with the criteria of European Union law, which must be determined by the national court in individual cases. This is done, inter alia, in the light of the articles of the Charter, which confirms that a Member State implements EU law in this type of procedures. Court of Justice of the European Union, Judgment C-279/09, DEB, ECLI: EU: C: 2010: 811.

decision in question was based, the provisions of the Member States in question are not specifically aimed at the implementation of EU law. However, proceedings relating to actions to establish the liability of a Member State under EU law fall within the scope of EU law.[30] It should be stressed that in the case of the legislation we are examining the European Commission has also recognised that persons affected by discrimination can assert their rights under the EU legal order before the Slovak courts.[31]

To sum up, the position of the European Commission as indicated above, that each restitution measure taken by a Member State falling within the scope of EU law implements EU law and thus the general principles of EU law and the provisions of the Charter have to be taken into account in its implementation, is currently not fully supported by case-law. On the other hand, where a restitution law is contrary to EU law, in this case the provisions on the free movement of capital, and the persons concerned request that the responsibility of the Member State under EU law be established or that the equal treatment required by the founding Treaties be restored,[32] the procedures of the Member States for the enforcement of those claims will no doubt implement EU law. Consequently, when applying it, the Member State should take into account the general principles of EU law, including the *lex specialis* principle. In this regard, it cannot be emphasized enough, as Denys Simon did in his famous commentary on Community law, that the general principles of EU law can in a sense be regarded as "superlegality", which the EU institutions must take into account in their work.[33]

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[30] Opinion of the Advocate General in the case C-298/16. Point 50. In his Opinion, the Advocate General stated that in such cases it is necessary for the procedural rules of the Member States, namely the determination of the conditions for legal aid to be governed by EU law, even if the legislation at issue in the main proceedings is not expressly intended to implement EU law.

[31] See footnote 20.

[32] Court of Justice of the European Union, C-628/15, points 46 and 52.

[33] Simon, Denys: *Le systeme juridique communautaire*. Paris: Presses Universitaires de France – P.U.F. 2003, 126.

Among the general principles of law, the *lex specialis derogat legi generali* principle deserves special attention from the point of view of our issue; a principle which is relatively rarely applied in practice and thus has not been exhaustively processed by the literature itself.[34] In the followings, we will attempt to analyse the relevant judgments of the CJEU[35] and the Opinions of its Advocates-General in the application of this principle. However, before we get to that, it is necessary to make some preliminary remarks on the nature of EU law and the place of general principles of law in the EU legal order. First of all, it is well known that according to the case-law of the CJEU EU law prevails over national law, whether it was adopted before or after the entry into force of the EU legal standard or whether we are talking about a written or unwritten legal standard.[36] Furthermore, as Lamprini Xenou, as many other authors point out,[37] compliance with the general principles is, naturally, only in cases where the legislation of a Member State falls within the scope of EU law, is considered by the CJEU strictly to be a measure of the lawfulness of the law of the Member State.[38] According to the above practice of the CJEU, which enforces the principle of supremacy, the obligation of a Member State also covers, accordingly, the interpretation of the laws of the Member States, at least in so far as the legislation of that Member State constitutes the implementation of

[34] Thus, for example, some authors distinguish general principles of a fundamental nature from other legal principles.

[35] The general principles of EU law play a very important role in the EU legal order, in particular in the case law of the Court of Justice of the European Union: Schwarze, Jürgen: Droit administratif européen. Brussels: Bruylant. 2009, 76.

[36] Court of Justice of the European Union, Flaminio Costa v E.N.E.L. C- 6/64, ECLI:EU:C:1964:34.

[37] Xenou, Lamprini: *Les principes généraux du droit de L'Union européenne et la jurisprudence administrative francaise*. Paris: sous la dir de Prof. Fabrice PICOD. 2014.

[38] Judgment of the Court of Justice of the European Union in Case C-5/88 Judgment of Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft, ECLI: EU: C: 1989: 321; Case C-260/89 Judgment of Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and Others, ECLI: EU: C: 1991: 254; Case C-299/95 Judgment of Friedrich Kremzow v Republik Österreich, ECLI: EU: C: 1997: 254; Case C-112/00 Judgment of Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich, ECLI: EU: C: 2003: 333.

EU law. In other words, the individual forums of each Member State should provide an interpretation of their legislation that meets, inter alia, the criteria laid down by the general principles of EU law.[39]

5 The principle of *lex specialis derogat legi generali*

As mentioned above, this principle of law is very rarely applied in practice. Consequently, the literature studying the grouping of the general principles of EU law and the legal literature dealing with the determination of the actual "weight" of each principle[40] does not in effect[41] cover the principle we are examining. This certainly does not mean that the principle of law in question does not appear in the jurisprudence of the CJEU, even if dispersed, both in the judgments themselves and in the related Opinions of the Advocate General. In the following, we review the emergence of the principle of *lex specialis derogat legi generali* in case law through the examples of some legal cases, and then examine the applicability of the principle to the 2003 Slovak Restitution Act.

The reference to the principle of *lex specialis* as a general principle of law appears in the case-law of the Court in a number of cases. The first of these is the Opinion of the Advocate General in the Heinrich Stefan case.[42] In that case, a dispute had arisen in the field of the common agricultural policy concerning the interpretation of secondary EU legislation by the Court, in particular EU regulations in the field of

[39] Court of Justice of the European Union, C-277/11, M.M. and Minister for Justice, ECLI: EU: C: 2012: 744, point 93.

[40] Some of the general principles of EU law have been „codified" by the Charter of Fundamental Rights of the European Union. Thus, for example, the right of judicial review developed by the CJEU in the Heylens and Johnston cases is also enshrined in Article 47 of the Charter of Fundamental Rights as the right to an effective remedy.

[41] Tridimas, Takis: *The General Principles of EU Law.* Oxford*:* Oxford University Press. [2]2007.

[42] Court of Justice of the European Union, C-285/06 Judgment of Heinrich Stefan Schneider v Land Rheinland-Pfalz, ECLI: EU: C: 2008: 164.

oenology, concerning the use of wine quality labelling. In his Opinion[43], Advocate General Trstenjak concludes that for the purposes of interpreting the principle of *lex specialis derogat legi generali* the specific rules of the secondary EU measure in question[44] take precedence over the secondary EU measure laying down general rules.[45] While the latter contains a general prohibition of deception in respect of all the possible data under the Regulation, the former limits it to a specific category of data. However, according to the general principle of the *lex specialis derogat legi generali*, the special rule takes precedence over the general rule. At this point, it is important to emphasize that the Advocate General expressly referred to the principle of *lex specialis derogat legi generali* as a general principle of EU law.[46]

In European Commission v Otis NV[47], the Court of Justice delivered its preliminary rulingon the right of the European Union to represent it before national courts in proceedings for restitution for damage caused to the European Union by a prohibited cartel. The applicants argued that, in comparison with the general rule conferring on the Commission the power to represent the European Union (formerly the Community) in proceedings before a court,[48] the rule that the institution concerned has the right of representation in all cases regarding the protection of the Union's financial interests must be regarded as a *lex specialis*.[49]

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[43] Case C-285/06 Heinrich Stefan, Opinion of the Advocate General, point 72.

[44] Article 24 of Commission Regulation (EC) No 753/2002 of 29 April 2002 laying down certain rules for applying Council Regulation (EC) No 1493/1999 as regards the description, labelling, presentation and protection of certain wine sector products (OJ L 118,. , P. 1).

[45] Council Regulation (EC) No 1493/1999 of 17 May 1999 on the common organization of the market in wine, OJ L 179, 14.7.1999, pp. 1-84. She. Article 48

[46] Case C-285/06 Heinrich Stefan, Opinion of the Advocate General, point 72.

[47] Court of Justice of the European Union, C-199/11 Judgment in Europese Gemeenschap v Otis NV and Others, ECLI: EU: C: 2012: 684.

[48] Under Article 282 EEAS, the Commission represents the Union exclusively before the courts of the Member States.

[49] However, according to the defendants, the provision in Article 282 is only a general rule, with the exception of the specific provisions for the protection of the Community's financial interests (Articles 274 EC and 279 EC), which are implemented by Regulation No 1605/2002 Euratom. According to the defendants, under that

If that principle were to be applied in European law, it would have been for the individual institutions themselves to bring actions or, at the very least, to confer on the Commission a power of representation before the courts.

In his Opinion in that case, Advocate General Villalón examined, inter alia, the applicability of the principle of *lex specialis derogat legi generali* to the given case.[50]

In doing so, the Advocate General concluded that the principle of the lex *specialis derogat legi generali* has practical significance in cases where two legal provisions with the contrary contents pursue the same objective.[51] Given that the provisions in question were intended for different purposes in the particular case,[52] the principle of law cannot be applied in the present case.

In its action for annulment in the sphere of state aid for employment in the Kingdom of Belgium v Commission[53] case, the Court of Justice of the European Union itself refers to that principle of law in finding that contrary to the arguments of the Belgian Government, the scope of the contested regulation is not ambiguous.[54] The Court explains this reasoning in its judgment by stating that, within the scope of the principle of *lex specialis derogat legi generali*, as long as

regulation, it is for the Community institution concerned to implement the assigned budget line, which includes the possibility for each institution to recover sums paid in the event of irregularities or fraud. C-199/11, Otis NV and Others, Opinion of the Advocate General.

[50] Opinion of the Advocate General to Case C-199/11, Otis NV an others.

[51] See *ibid*. Point 26.

[52] The Advocate General observes that Articles 274 EC and 279 EC relate to the implementation of the budget, whereas Article 282 EC concerns the Community's legal capacity, which is vested in the Commission. Thus, while the former lays down the powers of each institution to determine the guarantees applicable to the financial instruments to which they are entitled, the latter defines and entrusts the Commission with the task of representing the Community.

[53] Judgment of the Court of Justice of the European Union, Kingdom of Belgium v Commission of the European Communities, Judgment C-110/03, ECLI: EU: C: 2005: 223.

[54] *Ibid*., Point 39.

> "Article 1 of the contested regulation defines its general scope, whereas Article 4(3) thereof concerns only schemes for employment creation in the regions and sectors eligible for aid for regional purposes."

This case is therefore expressly concerned with two provisions of the same act which are in a special relationship with each other, such as a general provision and a special provision.

Last but not least, the Advocate General's Opinion in Établissements Rimbaud SA v Directeur général des impots[55] and the judgment of the CJEU following its substantive findings, which are of particular relevance to our subject-matter as, unlike in the above cases, it concerns fundamental economic freedoms. In his Opinion within the framework of a preliminary ruling, the Advocate General focused, inter alia, on the general principle of the *lex specialis* in a dispute which had arisen specifically in the field of the free movement of capital.

In the main proceedings concerning property taxes, a Member State, namely the French tax authorities, levied an annual tax of 3% on the turnover of property owned by legal persons. However, while it exempted companies established in the territory of other Member States from the payment of the disputed tax, it made it conditional on the existence of a reciprocal convention against tax evasion and avoidance between that Member State and a non-member country in the case of companies having shares in the European Economic Area (hereinafter referred to as EEA) but established in a non-member country. However, the relevant legislation, the Agreement on the European Economic Area,[56] did not contain rules similar to those of

[55] Court of Justice of the European Union, C-72/09 Établissements Rimbaud SA v Directeur général des impôts and Directeur des services fiscaux d'Aix-en-Provence judgment, ECLI: EU: C: 2010: 645.

[56] Agreement on the European Economic Area, OJ L 1, 3.1.1994, pp. 3-522.

Article 57 (1) of EC and Article 58 EC.[57, 58] The former provides that the general rule on the free movement of capital is without prejudice to the application to third countries of restrictions on existing national law relating to the movement of capital to or from third countries in connection, inter alia, with investment in immovable property. Nevertheless, the Advocate General considers that the obligations of the Member States to the Member States of the EEA Agreement cannot be more severe than those arising from the EC Treaty. However, in his Opinion he stated that "the principle of *lex specialis derogat legi generali* precludes the application of Article 57 (1) EC in relation to the Member States and the Principality of Liechtenstein". As indicated above, the Advocate General's Opinion was considered to be governing by the Court itself, therefore reaching the same conclusion in its decision.

6 Applicability of the principle of *lex specialis derogat legi generali* to the Restitution Act 2003

As we have seen, the legal principle of the lex specialis has been referred to in a number of opinions and judgments of the Advocate General. Although the principle has not always been applicable to the cases in question, it is safe to say that the principle of lex specialis now unquestionably constitutes part of the general principles of EU law.[59] As far as particular cases are concerned, in the Heinrich Stefan case, in the sphere of common agricultural policy two secondary EU acts, namely the general and specific provisions with conflicting content of

[57] The provisions of Article 56 shall not affect the right of Member States to apply the relevant provisions of their tax law which discriminate between taxpayers on the basis of their place of residence or the place where their capital is invested.

[58] Case C-72/92 Établissements Rimbaud SA, Opinion of the Advocate General, point 28.

[59] Without wishing to be exhaustive, the following decisions may be included here: T-123/99, JT's Corporation Ltd v. European Commission, EU: T: 2000: 230, paragraph 50; T-60/06, RENV II - Italy v Commission, EU: T: 2016: 233, pp. 52-58. points; C-280/13 Barclays Bank, EU: C: 2014: 279, paragraph 44; T 307/12 and T 408/13 Mayaleh v Council, EU: T: 2014: 926, paragraph 198.

two EU regulations, covered the same field. In accordance with the principle of lex specialis derogat legi generali, priority had to be given to the specialis provision. In EUB Otis NV, the principle of lex specialis could not be applied primarily because the two contractual provisions invoked did not pursue the same objective. In Belgium v Commission, the question of the applicability of the principle of lex specialis arose in relation to different provisions of the same secondary act. Although the provisions of the EU act were seemingly contradictory, the Court ultimately did not accept the Belgian Government's argument concerning the ambiguity of the regulation precisely because they were general or specific provisions of the legislation, respectively. And, in accordance with the principle of lex specialis derogat legi generali, the special provision takes precedence over the general provisions. Finally, in Établissement Rimbaud, which is of particular relevance to the subject-matter of this study, given that it arose in the context of the free movement of capital, the principle of lex specialis appears both in the Advocate General's opinion and indirectly in the CJEU judgment by its adopting the statements in the Opinion itself, thus playing an-important role in the interpretation of the provisions in question.

As regards the applicability of the CJEU practice concerning the principle of lex specialis to the issue of this analysis, the Restitution Act 2003 and the related case law of the Member States, the following can be said. The law in question contains both a general and a special provision for "the decisive period", which apply to the same area with conflicting content. However, in contrast to the above judgments, in this case it is not the provisions of primary or secondary EU law but the provisions of the legislation of the Member States that are "in conflict". However, the case law of the Court of Justice of the European Union is clear: if a legislation of a Member State is deemed to be one to implement EU law,[60] the requirements of the general principles of EU law must be taken into account . The principle of lex specialis

[60] The legislation in question falls within the scope of EU law because the Slovak Republic was already a member of the European Union by the deadline of 1 May to 31 December 2004 for submitting claims for compensation. See footnotes 24 and 25, respectively.

derogat legi generali thus requires that the legislation of a Member State implementing EU law, in particular in the case of the Slovak Restitution Act, if two provisions with contradictory content relate to the same field, which is undoubtedly the case here, provision should take precedence over the general provisions of the law.

7 Summary

EU law does not, as a general rule, require Member States to provide restitution for immovable property confiscated before their accession to the EU. Moreover, the Member States are also free to decide on the periods during which the property was confiscated, and the persons and property to which they are granting restitution for.

With all this translated into Slovak law on restitution, the current state of development of EU law and the resolutions of the European Commission, EU law does not, as a general rule, require that legislation on restitution for agricultural property confiscated before "the decisive period" in the Slovak Republic should provide for restitution. However, where a Member State takes measures to return confiscated property within the scope of *ratione temporis* of EU law, it must do so in accordance with, inter alia, EU rules on the free movement of capital. In other words, measures taken within the scope of the fundamental economic freedoms must, in all cases, comply with the general principles of EU law, given that they constitute the implementation of EU law. The Restitution Act 2003 falls within the scope of EU law because the Slovak Republic was already a member of the European Union during the period from 1 May to 31 December 2004, which was open for claims. If the 2003 Law had set e.g. 30 April 2004 as the final date for the submission of claims for restitution as in, the EU legal order, in particular the rules on the free movement of capital, would not lay down any criteria as to the restitution of agricultural property.

As we have seen above, the settled case-law of the CJEU renders the principle of lex specialis derogat legi generali to be applied as a general

principle of EU law. Thus, the general provisions of the restitution legislation under scrutiny, which are set out in the preamble and in the legislation itself and which only allow for the recovery of immovable property confiscated during "the decisive period", are deemed to be general rules. By contrast, the provision(s) which allow for the recovery of confiscated property subject to certain criteria, even if they had been confiscated before "the decisive period", can be categorized as lex specialis. In a possible dispute it is for the courts of the Member States to give an interpretation of the legislation of the Member States which complies with the general principles of EU law, including the principle of lex specialis, thus ensuring that the legislation is applied in accordance with EU law. That obligation appears to be fully justified in the case of persons who bring an action for damages against the Member State concerned under the EU legal order. In the present case this means that the Slovak courts must give priority to the special provision of the 2003 Restitution Act, which also allows for the recovery of confiscated property in respect of the period prior to "the decisive period".[61] Otherwise, the application of the law does not meet the criteria set by the general principles of EU law, i.e. it is considered incompatible with EU law.

[61] In this article we have not addressed the question of which, according to the European Commission's position, what procedural EU and Slovak frameworks can persons who have been unable to bring claims for damages as a result of discriminatory provisions in breach of EU law bring their claims before Slovak courts.

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