EUROPEAN COMMISSION

Brussels, 14 October 2002

THE CZECHOSLOVAK PRESIDENTIAL DECREES IN THE LIGHT OF THE *ACQUIS COMMUNAUTAIRE*

SUMMARY FINDINGS OF THE COMMISSION SERVICES

1. BACKGROUND

On 11 April 2002, Commissioner G. Verheugen and the then Prime Minister of the Czech Republic M. Zeman agreed that some of the Czechoslovak Presidential Decrees ("Beneš Decrees", henceforth "Decrees"), including related aspects of the restitution legislation of the early 1990s, would be carefully examined in the light of EU/EC law.

Subsequently, Commission officials from the Directorate-General for Enlargement and the Legal Service conducted a series of consultations with Czech officials co-ordinated by the Czech Ministry of Foreign Affairs. In the course of these discussions, the Commission side raised a large number of questions in order to ascertain what is the state of affairs related to EU/EC law, both as regards legislation in force and legal practice. The Czech officials provided detailed information and their legal views on the issue, supporting their oral presentations with a number of information papers.[1]

The summary findings based upon these discussions which are presented below presuppose a certain knowledge of the subject matter and its complex international historical background.

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[1] See Annex 1

2. ANALYTICAL FINDINGS

2.1. On the penal aspects of the Decrees

Decree No. 16/1945 of 19 June 1945 ("Great Retribution Decree")[2]

The Decree remained in effect until 31 December 1948 when it was repealed by Law No. 33/1948. Therefore, no new trial could take place under the Decree today.

However, under the Penal Code of 1961, sentences previously passed under the Decree may theoretically still be executed, including those passed for acts which are no longer considered as crimes under current criminal law. Law No. 175/1990 removed this problem insofar as execution of jail sentences is concerned and reduced the maximum length of criminal sentences, but it is not totally clear if persons condemned under the Decree benefit from this measure. Therefore, two separate issues were analysed:

a) Where, under the Decree, persons were tried *in absentia*, the period that the condemned remains outside the country does not count towards prescription. However, the Criminal Register of the Czech Republic only records four cases of individuals sentenced under the Decree by the Popular Courts; it is unknown whether these persons are still alive. That further cases might come to light seems unlikely. Even if this were the case, the individuals concerned could have the case re-tried under modern penal law by a normal criminal court, given the right to a fair trial under Czech constitutional human rights provisions and relevant international conventions. There is thus no risk of 'continued effects' of such sentences.

b) Sentences under the Decree depriving individuals of their right to exercise civic liberties have never been formally revoked. However, the democratic Czech State no longer has any legal tools to implement such decisions, since these have been superseded by the human rights provisions of the Czech Constitution. Such sentences are thus non-executable.

Main findings:
This Decree has been repealed and cannot lead to new trials. Sentences passed under it, including those passed in absentia, *can no longer be enforced.*

Law No. 115/1946 of 8 May 1946 (often erroneously called "Amnesty Law")[3]

This law addresses acts committed during two distinct periods of history: the period prior to 4 May 1945, and the subsequent period until the establishment of the Czechoslovak National Assembly on 28 October 1945. The "explanatory memorandum" (*exposé des*

[2] Decree No. 16/1945 of 19 June 1945 "on the punishment of Nazi criminals, traitors and their collaborators and on the Extraordinary People´s Courts".

[3] Law No. 115 of 8 May 1946 "concerning the legality of actions related to the fight for renewed freedom of the Czechs and Slovaks and the exemption of certain crimes from the statute of limitations".

motifs) and the records of the parliamentary debate on this law indicate that regarding the first period, the aim of the law was clearly to give legal standing to the acts of resistance fighters who did not qualify as combatants under the international law of war. In relation to the second period, the law also intended to legalise certain actions by individuals entrusted with authority in the intermediate, chaotic months prior to the formal re-establishment of regular administrative institutions of the Czechoslovak State. In both instances, the documentation on the legislative debate clearly indicates that any act falling under this law would have to have been carried out for "honourable motives" (e.g., the struggle for freedom). The law does not provide for a blanket legalisation of acts otherwise subject to criminal penalties, but required individual proof of the exculpating circumstances. The often-used description of "amnesty law" is clearly wrong; a better qualification would be "impunity law". The wording "just retribution" contained in the law has certainly contributed to the public perception that the Law was an instrument of revenge more than an act of justice. It has to be explained in its historical context.

The Czech side does not deny numerous acts of violence against members of the German population. In the 1997 Czech-German Declaration, the Czech Republic deplored these excesses that were inconsistent with elementary humanitarian principles as well as the legislation in place at the time. Already during the first post-war years, violence evidently not covered by "honourable motives" caused a considerable degree of political concern within the Czechoslovak Government and Parliament, as is evident from the work of a special Committee of the Parliament created in 1947. Overall, it seems that at least 79 persons[4] were prosecuted for such offences, even if not all were actually tried and only a handful were actually found guilty and sentenced. In the political debate, the notion of "gestapism" (Gestapo-like conduct by Czechoslovaks) appeared and such acts were publicly condemned.

However, subsequent to 1948, the Communist system perverted the criminal as well as civil law system with negative consequences on the intended application of Law 115/1946. As Article III of the Czech-German Declaration of 1997 reflects, during the Communist period, the authorities seem to have wrongly declined to prosecute an undetermined number of criminal cases by inappropriately invoking Law 115/1946, effectively granting impunity to perpetrators of genuine atrocities against Germans.

As regards allegations of more recent misapplications of the Law, documents of the Czech prosecutors' offices regarding cases against individuals investigated after the fall of the Communist regime were examined. These documents refer to the atrocities committed in Tušť/Schwarzbach on 24 May 1945 and Tocov/Totzau in June 1945. These documents make evident that the respective prosecutors' offices, in final instance, declined to prosecute the respective crimes not on the basis of Law 115/1946, but for other reasons: lack of evidence, prescription of acts that they qualified as multiple murder, or the fact that the suspected perpetrators could not be identified or had since died. In the Tušť/Schwarzbach case, the prosecutor specifically considered whether the act was a crime against humanity (genocide), but in the end decided, legally plausibly, that it was not.

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[4] Cf. report by Minister of Justice Drtina to the Czechoslovak National Assembly on 2 July 1947.

Law 115/1946 – as the explanatory memorandum makes clear – never intended to legalise dishonourable acts. According to explanations provided by the Czech officials, any acts that qualify as crimes against humanity or war crimes thus remain prosecutable to this day, also in view of the fact that the New York Convention on the Non-Prescription of War Crimes and Crimes against Humanity of 1968 applies in the Czech Republic on the basis of Article 10 of the Constitution stating priority of international over domestic law. Under the 1961 Penal Code, other crimes are subject to prescription (e.g., 20 years regarding murder). Thus, the legal situation regarding the continued empowerment to prosecute war crimes and crimes against humanity committed during and immediately after the Second World War matches *grosso modo* that in other European democracies.

Main findings:
The Law was not intended as a blanket exculpation of atrocities committed against Germans or Hungarians, although it may have been applied as such on occasion in the past. It does not stand in the way of the Czech Republic prosecuting war crimes and crimes against humanity still today.

2.2. On the property-related aspects of the Decrees

Decrees No. 5/1945, 12/1945, 108/1945 [5]

These Decrees remain valid today, but according to Czech legal doctrine they fully spent their effect in 1945; no new expropriations could be based upon them. The reasoning is that the expropriations took place *ex lege* (through the Decrees themselves, rather than through individual implementing decisions) and instantaneously (i.e., at the moment the Decrees were issued, rather than at the moment that expropriated owners were notified).

Application was in the hands of District National Committees (DNCs). Under Decree No. 12/1945, these were not under the obligation to notify expropriated German and Hungarian owners; under Decree No. 108/1945, individual notification was not mandatory, publication of summary lists sufficed. In view of the large number of cases, this process of summary general notification took time; combined with the fact that compulsory displacements took place during that period, many affected persons are likely not to have seen these notifications. It also cannot be ruled out that not all notifications were in fact served, even in the form of summary lists. However, according to Czech legal doctrine, in view of the fact that the confiscations applied *ex lege* and instantaneously, the absence of (individual or summary) notification does not detract from the validity of the confiscation.

[5] Decree No. 5/1945 "on invalidity of certain property-related acts performed in the period of occupation and concerning the national administration of the property of Germans, Hungarians, traitors and collaborators and certain organisations and institutions".

Decree No. 12/1945 "concerning the confiscation and prompt distribution of the agricultural property of Germans, Hungarians as well as traitors and enemies of the Czech and Slovak nations".

Decree No. 108/1945 "concerning the confiscation of enemy property and the National Renewal Funds".

The Decrees applied generally to "Germans and Hungarians, as well as to traitors and enemies of the Republic".[6] Under the Decrees, individuals could be exempted if they had been victims of the Nazi regime, or fought for the liberation of Czechoslovakia. Decisions on exemptions were made by the DNCs, and a number of these have indeed been taken and promulgated. However, during the period of compulsory displacements, it is doubtful that all those who could have claimed an exemption were capable of doing so in practice. Nor is it clear that given the post-war situation the DNCs were always able to follow due process for those exemptions that were claimed.

In a number of cases, appeals were lodged against DNC decisions. For some of these, the procedure was still pending at the time of the Communist take-over in Czechoslovakia in 1948. Some of these cases were closed during the Communist period; some never were brought to formal closure. In many cases, the Communist administrative practice deprived the individuals of their claim to their property even under the Decrees, in line with the collective ideology that was also the base of new Communist-era expropriation laws.

The above-mentioned Decrees were adopted and implemented in the immediate post-war period. It is clear that anything similar would be inconceivable in the Czech Republic today. Expropriation without compensation is today unconstitutional, and cursory administrative procedures would be equally unacceptable.

Main findings:
The Decrees exhausted their purpose in 1945. New expropriations cannot take place under these Decrees today.

3. THE RESTITUTION LEGISLATION OF THE 1990S

A separate set of issues that have also come under scrutiny relate to the restitution legislation of the 1990s. Only as far as relevant to the Decrees, selected aspects of the much more complex restitution legislation were investigated.

3.1. Restitution laws No. 243/1992, 87/1991 and 229/1991 [7]

After the end of the Communist era, the Czech(oslovak) Parliament passed a series of restitution laws to alleviate the wrongs of collectivisation of property in the period between 1948 and 1990. In the case of most restitution legislation, the legislator did not intend the

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[6] In addition to its confiscation provisions, Decree No. 5/1945 also aimed at restituting property to the Nazi victims.

[7] Act No. 87/1991 "concerning extrajudicial rehabilitations".

Act No. 229/1991 "to regulate the ownership of land and other agricultural property".

Czech National Council Act No. 243/1992 "concerning certain issues related to Act No. 229/1991 to regulate the ownership of land and other agricultural property".

law to affect any confiscation under the Decrees of 1945. The main aim of the laws was to remedy some of the effects of the Communist policy of collectivisation and arbitrary expropriation decisions taken on ideological grounds against individual proprietors. This limitation is in itself reasonable and does not conflict with EU/EC law.

The only exception is Law No. 243/1992. This law reaches back beyond the "1948 barrier", since it is intended precisely to restitute the properties confiscated under Decree No. 12/1945 or Decree No. 108/1945 to persons who remained in Czechoslovakia after the war and were loyal to the Czechoslovak State.[8] Law No. 243/1992 was subsequently extended by jurisprudence to apply to Czech nationals who did not recover citizenship by 1953 because they had never lost it after 1945, but also restrictively and controversially amended in 1996 by an act adding a requirement of continuous citizenship up until 1990, thus excluding émigrés who lost citizenship under the Communist regime. The Constitutional Court ruled out retroactive application of this amendment to claims lodged prior to its entry into force.

With regard to the other two restitution laws, the Czech judiciary substantially widened their application; in the end they also covered those cases in which the individual administrative procedure under the Decrees was still pending or newly initiated after February 1948 and where the Decrees were misused in Communist times.

The restitution laws do not call the confiscation Decrees into question. They opened a possibility of restitution or compensation in specific cases, including those where the Decrees were wrongly applied (i.e. individuals who should have been exempted but were not). The Czech authorities are conscious that a number of such cases occurred.

Beside the above-mentioned restitution laws, there were or still are several other instruments available aimed at solving some specific situations:

- International compensation agreements signed by the former CSSR with a number of countries in the 1970s and 1980s, providing lump-sums to the counterpart States to compensate their citizens;

- An Endowment Fund for Victims of the Holocaust, established in 1998, to compensate persons whose property had been expropriated by the Nazis and who had missed the deadlines to claim the property under post-war restitution legislation; there is no citizenship requirement for compensation from this fund;

- A more recent law No. 212/2000 on the restitution of objects of art to the victims of the Holocaust, also without any citizenship requirement, with a deadline of 2006.

In recent years, a number of plaintiffs have appealed to the Supreme and Constitutional Courts of the Czech Republic, after exhausting the lower-instance judiciary process with their respective restitution claims. Invariably, the cases brought to the courts of last instance are legally complex. It is fair to observe that the Czech judiciary is still struggling

[8] Law 243/1992 also aimed at restituting properties of the Nazi victims in cases where, in the post-war period, this restitution should have taken place under the relevant provisions of Decree N. 5/1945 or Law 128/1946.

with the particular legal complexity that arises from the restitution of property in cases where its confiscation had been allegedly illegal under the provisions of the Decrees of 1945.

The nature of the investigation to be undertaken by the courts includes the need to establish if the plaintiff rightfully claims exemption from the application of the Decrees. Consequently, the Czech judiciary needs to decide, as a prerequisite legal question relevant to the criteria for restitution, upon the validity of the acts of confiscation undertaken in the immediate post-war period. To this end, the files from any administrative procedure of the time serve as documentary evidence. By its very nature, the purpose of any such administrative procedure is to establish the existence of exempting facts under the provisions of the Decrees and to pass a decision of declaratory nature, declaring the individual claimant as being exempt from the blanket confiscation.

It is of key importance to recognise that the process undertaken by the Czech courts in application of the 1990s restitution laws is an act of gathering evidence and judging a prerequisite question on acts of the past that might not have been in accordance with the Decrees. This, however, does not represent a renewed application of the Decrees.

A number of decisions of the Supreme and Constitutional Courts which have been referred to in the course of the ongoing political debate on the Presidential Decrees of 1945 were studied in the course of the consultations.[9] Due to the limited number of cases decided in final instance, a firm Czech judicial practice has not yet been established on all of the various legal points involved. Some cases currently pending at lower-instance courts might only be decided after the envisaged Czech accession to the European Union in 2004. These cases might see further legal recourse to the European Court of Justice after Czech accession.

It was found that, in a few singular cases, the Czech appeal courts ruled to order administrative instances to complete an administrative procedure that had remained formally pending since the early years of the Communist era.[10] It seems that this jurisprudence is not well established, but remains highly exceptional. Although such an order might, in the investigated cases, favour the plaintiff, it might be argued that any new decision would amount to a present-day application of procedural provisions of or related to the Decrees. Nonetheless, according to the Czech side, even a new decision would be only of a declaratory nature, establishing whether the original owner was exempt from the blanket instantaneous effects of the respective Decree or not. It could not be established if any administrative instance might actually have re-opened a case.

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9 See Annex 2.

10 See Annex 3.

Main findings:
The restitution laws of the 1990s were mainly intended to address expropriations under Communism (1948-1989). This limitation is in itself unproblematic. Complex issues arise because the limitation is not absolute. However, the fact that the 1990s laws have opened some restitution possibilities for confiscation under the Decrees does not mean that the Decrees are being applied anew.

3.2. On the citizenship requirement

The citizenship requirement in the restitution legislation would probably not have been in accordance with the non-discrimination requirements of the EC-Treaty, if the Czech Republic had already been a Member State. However, today, all deadlines for filing new restitution claims under legislation containing the citizenship requirement have expired. In this light, at the time of actual Czech accession, there will no longer be any *acquis*-driven need to align this legislation with EC law to establish equal rights also for non-Czech EU citizens.

The only challenge that the Czech Republic will most probably face in this context could arise from those rare concrete cases still pending before Czech courts where the Czech citizenship status of the claimant is in dispute, and which could be brought before the European Court of Justice after Czech accession. Even if the respective plaintiffs win their cases on the basis of the non-discrimination argument, the Czech Republic will only be compelled to remedy the injustice done to them, but not to amend the restitution legislation in itself or to reopen the time limits for filing applications.

Main findings:
The non-discrimination provisions of EU law, which will fully apply in the Czech Republic from accession, do not require changes in the restitution legislation because no new claims can be introduced anymore. For cases that might still be pending after accession these provisions might become relevant.

3.3. On the human rights-related aspects of the issue

The questions below were addressed because, under Art. 49 TEU, the European Parliament, the Council, the Commission and the Member States need to make a political assessment whether candidate countries respect the principles set out in art. 6 (1) TEU: "the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States".

In the light of repeated findings of the United Nations Committee on Human Rights against the nationality requirement of the Czech restitution legislation[11], the Commission participants were also informed of the formal position taken by the Czech Republic by Government Resolution No. 527 of 22 May 2002 and subsequently communicated to the

[11] On the other hand, in its views on communications no. 669 and 670/1995 (Malik and Schlosser v. the Czech Republic), the Committee did not find discriminatory the 1948 time limit in restitution legislation.

appropriate instance of the United Nations Organisation. The Czech Republic maintains that valid reasons can be argued for limiting restitution claims to Czech citizens.

The Czech Republic could successfully defend this position in cases introduced before the European Court of Human Rights because this Court has no jurisdiction over stand-alone discrimination claims but can look into them only insofar as the measure impinges (also) on other fundamental rights. The Court has furthermore constantly held that expropriation is an "instantaneous act" which, having occurred in the past (i.e. prior to the date when the Convention became effective for a state), cannot be challenged under the Convention. More recently, it ruled that the refusal to grant restitution of previously (even unlawfully) expropriated property does not violate Article 1 of the (first) Additional Protocol to the Convention, because a possible right to restitution is not "property" in the meaning of the Protocol.[12]

The Commission side took note of the official position of the Czech Republic. It also noted, however, that the Czech Government might consider other means to arrive at a settlement of specific individual cases where the Committee ruled against the Czech Republic, such as possibly offering an *ex gratia* payment in lieu of compensation.

Main findings:
There have been different outcomes of proceedings before international human rights fora relating to property restitution. The Commission services did not find any convincing reason not to pass a positive judgement as far as the requirements of Art. 6 (1) TEU are concerned.

4. CONCLUSION

These findings do not show any obstacles to the Czech Republic's accession in the light of the *acquis communautaire*.

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[12] Grand Chamber Decisions of 10 July 2002, as to the admissibility of applications no. 38645/97 and 39794/98 - Polácek and Gratzinger v. the Czech Republic. The cases are not related to the Decrees, but to expropriations effected during the communist regime against people who "deserted the Republic" (political refugees).

Annex 1

INFORMATION PAPERS SUBMITTED BY THE CZECH OFFICIALS

- "Law No. 115/46, dated 8 May 1946, its genesis and implementation, and criticism", by Jan Hon and Jirí Šitler
- "Decrees of the President of the Republic from the Contemporary Perspective"
- "Enforceability of sentences imposed under Decree of the President of the Republic No. 16/1945 of June 1945 on the punishment of Nazi criminals, traitors and their collaborators and on the Extraordinary People's Courts (Great Retribution Decree)"
- "Act No. 115/1946 of 8 May 1946 concerning the legality of actions related to the fight for renewed freedom of the Czechs and Slovaks and the exemption of certain crimes from the statute of limitations"
- "Additional information on the Tocov/Totzau case"
- "Additional information on the Tušt' case"
- "Confiscation of German Property in Czechoslovakia and International Agreements", by Jirí Šitler
- "Confiscation Decrees of the President of the Republic, administrative proceedings concerning confiscation and the present situation"
- "The nationality requirement in the Czech Republic´s restitutions legislation in relation to the principle of non-discrimination enshrined in Community law."

Annex 2

COURT RULINGS CONSIDERED

Constitutional Court

- IV. ÚS 56/94 of 22 June 1995 on a constitutional complaint against a 26 October 1993 judgement of the Regional Court in Usti nad Labem (Aussig);
- Pl. ÚS 14/94 on a petition seeking the annulment of Decree No. 108/1945;
- ÚS 23/97 of 18 February 1998 with regard to the qualifying period of 25 February 1948 to 1 January 1990 under restitution law No. 87/1991;
- ÚS 397/98 of 30 May 2000 on the war-time confiscation of Jewish property to the benefit of the German Reich and the application of the restitution law No. 87/1991 in view of an inappropriate decision, in 1946, according to Decree No. 5/1945;
- Pl. ÚS 45/97 on the qualifying date of 25 February 1948;
- ÚS 39/95 of 12 October 1995 on the relationship between an administrative decision on confiscation under Decrees No. 12/1945 and No. 108/1945 and an administrative decision on loyalty to the State according to Decree No. 33/1945 of a Czech citizen who had declared himself as a German under duress during the period of German occupation, with regard to the restitution law's citizenship requirement;
- ÚS 14/95 of 15 November 1995 on a constitutional complaint against a lower-court judgement regarding confiscation under Decree No. 108/1945 and a related administrative decision of 10 February 1948 as well as subsequent administrative decisions and their relevance with regard to applying restitution law No. 87/1991;
- ÚS 205/97 of 20 November 1997 on a constitutional complaint regarding the legal plight of an inheritance in regard of restitution law No. 87/1991;
- ÚS 117/96 of 11 September 1997 regarding the qualifying period of 25 February 1948 to 1 January 1990 of the Land Act No. 229/1991 in relation to a confiscation under Decree No. 12/1945 and related lower-court decisions.

Supreme Court

- 3 Cdon 199/96 on the status of the administrative decision on the confiscation of property under the Decrees with regard to the restitution law No. 87/1991.

Other Appeals Court

- Rs 360 29 Ca 229/95 on the invalidity of transfers of property to the wartime Central Office for Jewish Emigration according to Decree No. 5/1945.

Annex 3

COURT RULING CONTAINING A SUPREME COURT ORDER TO FINALISE AN ADMINISTRATIVE PROCEDURE

- 33 Cdo 2398/98, decision of the Supreme Court of 29 June 2000, on the absence of a valid District National Committee decision regarding the conditions for the confiscation of property according to Decree No. 108/1945 with regard to a *hereditas iacens*.