

Volume 22, Issue 2  
December 2024

ISSN 1731-8297, e-ISSN 6969-9696  
<http://czasopisma.uni.opole.pl/index.php/osap>

ORIGINAL ARTICLE  
received 2024-02-28  
accepted 2024-09-20  
published online 2024-12-13



**European Union law requirements  
related to the restitution of properties**  
*– does or under what conditions does the EU law require  
in practice the payment of a market-based compensation,  
and can that be enforced by EU law?*

**Wymogi prawa Unii Europejskiej w kwestii zwrotu majątku**  
*Czy i pod jakimi warunkami prawo UE wymaga w praktyce  
wyłaty rekompensaty rynkowej, i czy można to narzucić prawem unijnym?*

RÓBERT SZUCHY

Károli Gáspár University of the Reformed Church in Hungary  
ORCID: 0009-0001-7592-0827, [Szuchy.Robert@kre.hu](mailto:Szuchy.Robert@kre.hu)

ÁGOSTON KOROM

Károli Gáspár University of the Reformed Church in Hungary  
ORCID: 0009-0005-0121-3432, [korom.agoston@kre.hu](mailto:korom.agoston@kre.hu)

**Citation:** Szuchy, Robert. Agoston Korom. 2024. European Union law requirements related to the restitution of properties – does or under what conditions does the EU law require in practice the payment of a market-based compensation, and can that be enforced by EU law? *Opolskie Studia Administracyjno-Prawne* 22(2): 159–175. DOI: 10.25167/osap.5430.

**Abstract:** The present paper addresses a specific issue, and analyses a concrete example in that regard, which issue arises almost exclusively in the former socialist countries: what requirements are determined by EU law in relation to the restitution of property expropriated in the concerned countries between 1945 and 1990?

The principle of the free movement of capital particularly prohibits discrimination based on nationality. The general principles of EU law and the provisions of the Charter of Fundamental Rights of the European Union determine further requirements which Member States must take into account where the restitution measures they introduce implement EU law.

In principle, EU law does not require that the compensation paid in the framework of restitution measures take the market value of the concerned real property into account. In its response given to the question of a written answer, the European Commission outlined

also the manner in which the general principles and property rights should be considered where restitution measures are taken. The present paper covers also the analysis of whether the Romanian measure used as an example herein is compatible with the requirements prescribed by EU law, i.e. whether or not EU law requires the payment of market-based compensation in certain cases. This paper addresses also the access to and possible hindrances of the enforcement of the rights of the applicants deriving from EU law.

**Keywords:** EU requirements for the restitution of immovable property, requirements laid down by general principles of EU law, principle of legitimate expectations, principle of equal treatment, *ratione temporis* scope of EU law, requirement of a cross-border element, European Commission's answer to a written question

**Abstrakt:** Niniejszy artykuł zajmuje się szczególnym obszarem oraz analizuje powiązany z nim konkretny przykład, a mianowicie problemem, który prawie wyłącznie powstaje w byłych krajach socjalistycznych: Jakie wymagania są określone przez prawo Unii Europejskiej w związku ze zwrotem majątku wywłaszczonego w tych krajach między 1945 a 1990?

Zasada nieskrępowanego przepływu kapitału, w sposób szczególnie zakazuje dyskryminacji ze względu na narodowość. Ogólne zasady prawa unijnego i założenia Karty Praw Podstawowych Unii Europejskiej określają dalsze wymogi jakie państwa członkowskie muszą wziąć pod uwagę tam, gdzie warunki zwrotu własności, jakie wprowadzają, wcielają w życie prawo Unii Europejskiej.

Z zasady, prawo Unii Europejskiej nie wymaga żeby rekompensata wypłacana w ramach środków określających zwrot majątku miała brać pod uwagę wartość rynkową danej nieruchomości. W swojej odpowiedzi na prośbę o pisemną wykładnię, Komisja Europejska określiła również sposób w jaki ogólne zasady i prawa własności powinny być rozważane kiedy podejmowane są kroki w kwestii zwrotu majątku. Niniejszy artykuł zawiera także analizę przypadku Rumunii, w odpowiedzi na pytanie czy środki jakie zastosowano w tym przykładzie są kompatybilne z wymaganiami zaleconymi w prawie UE, tj. czy prawo unijne wymaga wypłacenia rynkowej wartości rekompensaty w niektórych wypadkach. W pracy rozważa się również dostęp do i możliwe utrudnienia egzekwowania praw wnioskodawców, które wywodzą się z prawa UE.

**Słowa kluczowe:** wymogi UE związane ze zwrotem nieruchomości, wymogi zawarte w ogólnych zasadach prawa UE, zasada uprawnionych oczekiwań, zasada równego traktowania, zakres *ratione temporis* prawa UE, wymóg elementu transgranicznego, odpowiedź na piśmie Komisji Europejskiej

## 1. Introduction

The answer that may be given to the question posed in the title above highlights the complexity of and unique approach to the subject. In principle, EU law does not require that the Member States provide compensation for the real property expropriated before they acceded to the European Union. In our opinion, neither does EU legislation prescribe any criteria regarding what property,

expropriated in which period should be covered by the possibly introduced compensation measures. In principle, partial compensation or compensation covering just a fraction of the expropriated properties does not violate EU law. Nevertheless, certain conditions may exist under which subsequent modification of the calculation of sums paid as compensation does not fulfil the requirements posed by EU law. In the present paper, we analyse a Romanian example in that regard. This paper will also address the enforcement in national jurisdiction of any possible claims of the applicants deriving from EU law.

## 2. Which EU Law provisions cover the restitution of property?

In its answer given to a written question (Reding, *E-011857/2013, answer to the question for a written answer*, 20 January 2014), the European Commission pointed out that the Member States are not bound by EU law to provide compensation for properties expropriated before they acceded to the European Union.

Nevertheless, according to the position of the European Commission, if a Member State, following its accession to the European Union, decides to provide compensation for properties expropriated before the accession, such a Member State must comply with EU law, particularly with the requirements of free movement of capital laid down in Article 63 TFEU<sup>1</sup> in the course of introducing the measures<sup>2</sup> aiming at the restitution.

Regarding the Member State's measures that fall within the scope of the EU law, national laws, as well as administrative practice and case-law, lie under EU control, yet when it comes to the issue of compensation, the answers provided by the European Commission seem to differentiate between laws, administrative practice, and case-law. According to the settled EU case-law, Member States cannot rely on Article 345 TFEU, which provides autonomy to the Member States regarding the regulation of ownership if they fail to comply with economic fundamental freedoms.

### 2.1. Applicability of the general principles of EU law as regards restitution

When implementing EU law, Member States must consider its general principles and the provisions of the Charter of Fundamental Rights of the

---

<sup>1</sup> Settled case-law treats Directive 88/381/EEC as governing, even though it was repealed by the Treaty of Amsterdam. C-370/05.

<sup>2</sup> The present paper considers only the restitution measures related to real property.

European Union.<sup>3</sup> In such cases, the most important test of whether or not the measures taken (Pailler 2018: 126-127) by a Member State are lawful is the application of the general principles of EU law which may be enforced also before Member State courts (Blutman 2016: 103-109). In its response to the question for a written answer,<sup>4</sup> the European Commission stated that Member States, in relation to their measures aiming at the restitution of real property, must comply with the general principles of EU law,<sup>5</sup> and consider the right to property laid down in Article 17 of the Charter of Fundamental Rights of the European Union.<sup>6</sup> The issue of why the restitution measures of Member States would qualify as the implementation of EU law was not addressed in the European Commission's response.

Based on EU case-law, the European Commission's position cannot be clearly underpinned; however, several arguments can be put forward to support that restitution measures do constitute a specific case of implementing EU law. The present paper does not address this issue in any further detail, since a definitive answer thereto could only be given by a decision rendered by the Court of Justice of the European Union.

Restitution regulations covering real property do not fall under any of the three categories of situations recognised by settled case-law, where a Member State implements EU law. In the case of a Member State law on restitution, no source of EU law is applied directly, no EU law enables its implementation by the Member State, and there is no derogation or restriction justified by EU law that national law would introduce (i.e. the so-called derogation scenario can also be excluded).<sup>7</sup>

Nevertheless, it might still be maintained that a Member State implements EU law when introducing restitution regulations. In his opinion provided for the Teodor Ispas case,<sup>8</sup> Advocate General Michal Bobek analysed when and to what extent Member States implement EU law. The Advocate General explained that, based on objective criteria, the proximity between EU law and national law may be established also if the national law does not reflect EU law and the Member State enjoys wide discretion in the given field. Nonetheless, the Advocate General stressed<sup>9</sup> that the rule of the so-called functional necessity serves

---

<sup>3</sup> Opinion of the Advocate General, points C-489/10, 14-15.

<sup>4</sup> Request for a written answer: E-004616/2020.

<sup>5</sup> *Ibid.*

<sup>6</sup> A precondition of applying EU law is that the restitution regulation is adapted in the Member State following its accession to the European Union.

<sup>7</sup> Opinion of the Advocate General, C-298/16, 23-43.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

as a certain limitation to the general rule. Accordingly, all national regulations instrumental to the effective realisation of an EU law-based obligation on the national level will fall within the scope of EU law, unless that national rule is not reasonably necessary to enforce the relevant EU law.

In the case of restitution regulations, Member States clearly have a wide range of discretion, and the restitution laws do not reflect EU law. Functional necessity may be supported by the Commission's position stating that Article 17 of the Charter of Fundamental Rights of the European Union protects the right to property by establishing a right to compensation for the deprivation of property in the general interest and under the conditions provided for by law.<sup>10</sup> This interpretation is underpinned also by that the provisions of the Charter seem increasingly to pull away from economic fundamental freedoms in the case-law of recent years.<sup>11</sup>

As mentioned before, it falls within the discretion of Member States to pay compensation that covers only a fraction of the market value of the expropriated real property. If the Commission's position stating that the Member States implement EU law when taking restitution measures is correct, then the general principles of EU law and the relevant provisions of the Charter of Fundamental Rights of the European Union must be taken into account in the course of taking those measures.

## 2.2. The analysed Romanian restitution measure

In our present example, we analyse a Romanian restitution measure. In principle, Romanian law aims at restitution of expropriated real property in kind, failure of which may result in application of a monetary compensation. The value assessment of real property was regulated by an act of 2013, which also determined the sum of the payable compensation as a fraction of the market value of the real property.

In contrast, the act adopted in 2020 determined the payable compensation as a sum nearly at "market value". The applicability of this act was suspended by an emergency government decree for almost one year, and the act of 2013 became applicable to the payments concerned by the amendment.<sup>12</sup> We find it justified to examine the said amendment having regard to the EU principles

---

<sup>10</sup> Request for a written answer, E-004016/2020.

<sup>11</sup> *European Commission v Hungary*, Court of Justice of the European Union, 06.10.2020, C-66/18; *European Commission v Hungary*, Court of Justice of the European Union, 18.06.2020, C-78/18..

<sup>12</sup> *Legea pentru modificarea și completarea 29.10.2020, Legii nr. 165/2013.*

of legitimate expectation and equal treatment, as well as to the requirements posed by the property rights guaranteed in the Charter.

Based on the principle of equal treatment, comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified. Based on the principle of legitimate expectation, the prospective amendment of existing laws must be examined. Property rights, *inter alia*, protect properties already acquired.

A Member of the European Parliament filed a request for a written answer to the European Commission<sup>13</sup> as regards the compliance of the legislative amendment outlined in the above example with EU law, specifically with the requirements of the general principles of Union law.

In its written answer,<sup>14</sup> the European Commission stressed that Article 17 of the Charter of Fundamental Rights of the European Union protects property also in cases where a Member State protects property by “establishing a right to compensation”. This finding of the Commission leaves no doubt that if the applicants rely on EU law, the Member State court hearing the case must examine the amendment of law concerning property rights.

However, in its answer,<sup>15</sup> the Commission explained that “any modification of the national legislation on the calculation of compensation for the deprivation of property does not in itself constitute a breach of EU law.” In that regard, the Commission relied on the judgement rendered in the *Planatol* case,<sup>16</sup> where the Court of Justice of the European Union established that in connection with existing conditions that can be altered within the scope of a Member State’s discretion, the general principle of legitimate expectation cannot be relied on. Thus, to decide whether the findings of the Court of Justice established in the *Planatol* case can be applied to our present example, with particular regard to the circumstances of the case and the Member State’s discretion, the CJEU judgement relied on by the European Commission must be examined in detail.

The applicant manufactured a fuel of special composition which was used mainly in public transport. The field concerned is subject to Directive 2003/30. The legislator of the Member State terminated the reduced rates of tax as regards the product type produced by the manufacturer. Basically, the CJEU established its findings regarding two questions: Is the withdrawal of the tax exemption of the product manufactured by the plaintiff company compatible with the

---

<sup>13</sup> Request for a written answer, E-004016/2020.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Plantanol GmbH & Co. KG v Hauptzollamt Darmstadt*, Court of Justice of the European Union, 10.09.2009, C-201/08.

Directive regulating the field, and does the withdrawal of tax exemption before its expiry date comply with the requirements posed by the principles of EU law?

With respect to the first question, the CJEU pointed out that although Directive 2003/30 does provide that the Member States should promote the use of biofuels, it also leaves them a wide discretion<sup>17</sup> regarding the measures to be adopted to attain the indicative targets.<sup>18</sup> In its judgement, the CJEU found that the Directive does not require the Member States to provide the concerned tax exemption, and noted that, in principle, the Member States are required to tax a product such as the one at issue; however, the Directive empowers the Member States to apply an exemption of taxation.<sup>19</sup>

According to settled case-law, as to the principles of legitimate expectation and legal certainty, it is for the court hearing the original case to determine whether the Member State laws are compatible with EU law.<sup>20</sup> The principles of legitimate expectation and legal certainty require the Member State laws to be clear and precise, and that their application is foreseeable to those subject to them.<sup>21</sup> According to the interpretation of the CJEU, the requirements of clarity, precision, and foreseeability were not violated, since the amendment was only for the future and therefore did not undermine the exemption obtained by the applicant, i.e. the amendment introduced did not concern the tax allowance the applicant had already taken advantage of.<sup>22</sup>

The principle of legal certainty does not prohibit legislative amendments, but it requires the legislator to take into account the particular situation of traders in case of modifying the legal instruments.<sup>23</sup> In the *Planatol* case,<sup>24</sup> it is for the Member State court hearing the original case to assess whether the new system introduced concurrently with the withdrawal of tax exemption provides sufficient advantages for the product in question.

Case-law allows any economic operator to rely on the principle of legitimate expectation, however, economic operators are not justified in having a legitimate expectation that an existing situation that is capable of being altered by

---

<sup>17</sup> *Ibid.*, para 35.

<sup>18</sup> *Ibid.*, para 36.

<sup>19</sup> *Ibid.*, paras 39-40.

<sup>20</sup> *Ibid.*, paras 44-47.

<sup>21</sup> *Ibid.*, para 46.

<sup>22</sup> *Ibid.*, para 46.

<sup>23</sup> *Vereniging voor Energie, Milieu en Water and Others v Directeur van de Dienst uitvoering en toezicht energie* Court of Justice of the European Union, 07.06.2005, C-17/03.

<sup>24</sup> *Plantanol GmbH & Co. KG v Hauptzollamt Darmstadt*, Court of Justice of the European Union, 10.09.2009, C-201/08, para 50.

the national authorities in the exercise of their discretionary power will be maintained.<sup>25</sup> Member States enjoy wide discretion in the field of taxation, thus, concerning the principle of legitimate expectation, the withdrawal of the tax exemption at issue cannot be considered as unforeseeable.<sup>26</sup>

Based on the above, according to the CJEU, the legislative amendment at issue is compatible with EU law, since the objectives set by the Directive may be attained also by other means, and the requirements posed by the general principles of EU law were not violated either. Nonetheless, the CJEU,<sup>27</sup> just as in the judgement rendered in the *Goed Wonen* case,<sup>28</sup> found that it is for the national court to determine, in the course of an overall and specific assessment, whether the legitimate expectation of the economic operators covered by the rules concerned was duly respected.

### **2.3. Effects of the Plantanol judgment and comparability of the law at the issue**

To summarize the relevant facts of the judgement rendered in the *Plantanol* case: the secondary Union act regulating the field requires Member States to promote the use of the product at issue, yet, it does not require the objective to be attained by tax relief. On the contrary, Member States are required to tax products such as the one at issue in principle, but, under certain conditions, they may provide tax exemption.

EU law does not require that the Member States provide compensation, yet, if a Member State decides to provide compensation within the scope of *ratione materiae* of EU law, it must comply with the requirements of the free movement of capital,<sup>29</sup> the general principles of EU law,<sup>30</sup> and the right to property prescribed in Article 17 of the Charter.

The withdrawal of tax exemption before its expiry date is compatible with the principle of legal certainty if the introduced legislative amendment is clear, precise, and complies with the requirement posed by the principle of foreseeability. In the *Plantanol* case, the requirements of precision and clarity were met because, *inter alia*, the legislative amendment did not undermine the obtained

---

<sup>25</sup> *Ibid.*, para 53.

<sup>26</sup> *Ibid.*, paras 53-55.

<sup>27</sup> *Ibid.*, para 57.

<sup>28</sup> *Stichting "Goed Wonen" versus Staatssecretaris van Financiën*, Court of Justice of the European Union, 26.04.2005. C-376/02.

<sup>29</sup> Request for a written answer, E-011857/2013.

<sup>30</sup> Request for a written answer, E-004016/2020.



results, i.e. the tax relief provided by the Member State and taken advantage of by the economic operators. However, the principle of legal certainty requires that the court hearing the original case examine whether the altered, new system provides sufficient advantages to the economic operators covered by it.

In our viewpoint, the requirements of precision and clarity are not met regarding the applicants to whom a reduced sum was paid due to the application of the emergency government decree, since that decree withdrew the payment of a higher amount of compensation ensured by the act adopted in 2020. As to our knowledge, no compensation is provided by the legislator for the amounts reduced by the emergency government decree.<sup>31</sup>

In its judgement rendered in the *Planatol* case, the CJEU confirmed that the principle of legitimate expectation may be relied on by any economic operator. In the fields where Member States enjoy a wide range of discretion, legislative amendments cannot be considered unforeseeable.

In its written answer,<sup>32</sup> the European Commission stressed that the protection of property rights provided by Article 17 of the Charter must be applied also to situations where a Member State decides to introduce laws regulating restitution. In the situations protected by the right to property and covered by the Charter of Fundamental Rights of the European Union, the range of Member States' discretion is much narrower than the rather wide range of discretion they enjoy in the field of taxation. Consequently, in this field, legislative amendments cannot be considered unforeseeable by legal entities. Thus, the application of the principle of legitimate expectation cannot be precluded in these situations. The national court hearing the case, as explained in the *Planatol* case, must carry out an overall and specific assessment, including the examination of whether the legitimate economic interests of those concerned were duly respected by the legislative amendment.

In the light of the foregoing, it is worth reflecting on the answer of the European Commission concerning the application of the principle of legitimate expectation.<sup>33</sup> As mentioned earlier in this paper, according to the Commission, any modification of the national legislation on the calculation of compensation for the deprivation of property does not in itself constitute a breach of EU law. One has to agree with this statement, since for drawing any conclusions as regards legislative amendments, the circumstances and objectives, and the

---

<sup>31</sup> This requirement posed to Member States is not related to the principle of legal certainty exclusively, but may partially arise from the Directive covering the field.

<sup>32</sup> Request for a written answer, fn. 35.

<sup>33</sup> Request for a written answer, *ibid.*

situation of those covered by the amendment must be analysed, as well as the EU law concerning the given field.

However, in Footnote 1 of the Commission's answer, we find a reference to the judgement of the CJEU rendered in the *Planatol* case, formulated as follows: "On the absence of legitimate expectations following the prospective alteration of an existing situation by the national authorities in the exercise of its discretionary power, see" the judgement of the CJEU. In the footnote, the Commission, based on the judgement rendered in the *Planatol* case, first pointed out that reliance on the principle of legitimate expectation can be precluded in the case of alterations falling within the scope of the discretion of national authorities. The Commission's answer does not cover, *inter alia*, the examination of the extent to which the discretion of the Member State is reduced in the given situation due to the application of the right to property recognised also by the Commission.

Secondly, even though the Court of Justice of the European Union did not find that the legislative amendment introduced by the Member State violates the principle of legitimate expectation, it established that it is for the national courts to specifically assess whether the economic interests of those concerned were duly respected.

## 2.4. Principle of equal treatment

According to the Commission's answer, the amendment of laws related to the calculation of compensation must be assessed on the basis of the principle of legitimate expectation. However, the application of other general principles was not precluded by the Commission.<sup>34</sup>

In our viewpoint, it is particularly justified to analyse the legislative amendment at issue with regard to the requirements posed by the principle of equal treatment. Based on case-law, in applying the principle of equal treatment "the elements that characterise different situations and, accordingly, their comparability must in particular be determined and assessed in the light of the subject-matter and purpose of the EU act that makes the distinction in question."

In its judgement rendered in the *Industrie du bois de Vielsalm* case,<sup>35</sup> where the compliance of the support scheme regarding cogeneration plants with the principle of equal treatment was examined, the Court of Justice of the Europe-

---

<sup>34</sup> It should be noted that requests for written answers must comply, *inter alia*, with strict length requirements which may also be the reason why the Commission did not address the principle of equal treatment.

<sup>35</sup> *Industrie du bois de Vielsalm & Cie (IBV) SA v Région Wallonne*, Court of Justice of the European Union, 16.09.2013, C-195/12, para 50-53.

an Union found that the principle of equal treatment is violated by a different treatment if the situations concerned are comparable, having regard to all the elements which characterise them.

The CJEU found<sup>36</sup> that the elements which characterise different situations, and hence their comparability, must, in particular, be determined and assessed “in the light of the subject-matter and purpose of the European Union act which makes the distinction in question,” having regard also to the principles and objectives of the field.

As regards the justifiability of different treatment, the one-year suspension of the payment of the market price may be related to economic reasons.<sup>37</sup> However, based on settled case-law, reasons of a purely economic nature cannot constitute overriding reasons justifying a restriction of fundamental economic freedoms.<sup>38</sup> Accordingly, we do not see how the regulation examined in this paper could comply with the principle of equal treatment which precludes the different treatment of comparable situations.

Summarizing the above, the following can be ascertained: based on the answer given by the European Committee, the national court hearing the given case must examine whether the government decree at issue complies with the requirements posed by the right to property prescribed in Article 17 of the Charter.

The European Commission did not answer the question for a written answer concerning equal treatment or non-discrimination; however, it does not follow therefrom that the government decree examined in this paper would comply with this principle, particularly if the same concerned person received the payment of the market price or, when applying the government decree, only a fraction of the market price.

As regards the principle of legitimate expectation, the European Commission found that any modification of the national legislation on the calculation of compensation for the deprivation of property does not in itself constitute a non-compliance with the requirements posed by the principle of legitimate expectation. According to the Commission's position, those concerned cannot rely on the principle of legitimate expectation in connection with alteration of existing conditions if the Member State enjoys a wide range of discretion in the given field. The Commission relied on the judgement rendered in the

---

<sup>36</sup> *Ibid.*

<sup>37</sup> OUG 72/2020 - pentru a preîntâmpina impactul financiar negativ asupra bugetului de stat prin aplicarea de sancțiuni de către instanțele de judecată naționale și internaționale, pentru a permite statului român să își poată distribui într-un mod previzibil resursele financiare pe fondul situației determinate de răspândirea coronavirusului Sars-Cov-2,).

<sup>38</sup> *Andreas Ingemar Thiele Meneses v Region Hannover*, Court of Justice of the European Union, 24.10.2013, C-220/12, para 43.

Planatol case as an example, where the concerned Member State did enjoy a wide range of discretion.

In the example analysed in this paper, the Member State, unlike in the Planatol case, did not enjoy a wide range of discretion, all the less so as, according to the Commission's interpretation, property rights must be considered with restitution laws already introduced, which rights protect applicants where a Member State introduces restitution laws. According to the case-law of CJEU, the national court hearing the case must carry out a specific assessment of whether the legitimate interests of the applicants were duly respected also if the legislative amendment complies with the requirements posed by general principles based on the tests of the CJEU.

### 3. Enforceability of the rights deriving from EU Law

If it appears supportable that the legislative amendment analysed in this paper does not comply with the requirements posed by the general principles of EU law, and the national court hearing the case must carry out specific assessment based (Woehrling 2010: 297) on the criteria established by case-law, the enforcement of claims deriving from EU legislation may face further difficulties.

In its response to the request for a written answer, the European Commission,<sup>39</sup> in relation to the enforceability of rights related to restitution, explained that “national courts have a primary responsibility to ensure the adequate and effective enforcement of the rights stemming from EC law”. In practice, national courts prove to be the most suitable fora for enforcing the application of EU law in national legal systems.<sup>40</sup> However, the enforcement of rights before national (Loïc 2009: 14) courts is not without difficulties (Naomé 2010: 12). As regards our example, we address the following issues: application of the general principles before the national courts, enforcement of rights in the absence of a cross-border element, and the expanded interpretation of the *ratione temporis* scope of EU law.

#### 3.1. Enforcement of rights in reliance to the general principles of EU law

Even though the founding principles contain references to the general principles (Xenou 2017: 66-69) neither the primary nor the secondary Union acts

---

<sup>39</sup> Request for a written answer, E-005839/2018.

<sup>40</sup> Although public administration bodies must also do their utmost to enforce EU law (316/81), national courts are more suitable to enforce the primacy of EU law also due to their independence.

include the principles specifically.<sup>41</sup> Such absence may lead to difficulties in the enforcement of rights before the national courts. Thus, the analysis of legal literature and the relevant case-law bears particular significance.

When implementing EU law,<sup>42</sup> Member States must take the general principles of EU law into account.<sup>43</sup> According to Denys Simon, the general principles of EU law may, in a certain sense, be considered those of super normative nature and must be taken into account also by bodies of the European Union (Symon 2003:126) introducing or implementing the law.

According to the case-law of the Court of Justice of the European Union, EU law prevails over Member State law, regardless of whether the latter was introduced before or after the taking effect of the Union act, and of whether it is a written or unwritten act.<sup>44</sup> Lamprini Xenou points out (Xenou 2017: 265) that the compliance with the general principles is held as a test for assessing the lawfulness of Member State law by the Court of Justice of the European Union in each case.<sup>45</sup>

Lamprini Xenou (Xenou 2017: 300) adds that the enforcement of the general principles of EU law against national law may cause difficulties in practice. French courts started to take the general principles into account with decades of delay (Xenou 2017: 106-111). According to the case-law of the Court of Justice of the European Union, Member States must also seek an interpretation of national law that is in accordance with the general principles of EU law.<sup>46</sup> Lamprini Xenou notes that all Union acts must also be interpreted in the light of the general principles of EU law (Xenou 2017: 31), including all secondary Union acts and the provisions of the founding treaties.<sup>47</sup> The compliance of

---

<sup>41</sup> Basically, the general principles are not codified due to that reason, in order to, inter alia, maintain their flexibility.

<sup>42</sup> fn. 35.

<sup>43</sup> *Åklagaren v Hans Åkerberg Fransson*, Court of Justice of the European Union, 13.02.2013. C-617/10.

<sup>44</sup> *Flaminio Costa c/E.N.E.L.* 6/64, Court of Justice of the European Union, *Flaminio Costa c/E.N.E.L.* C-15.07.1964. 6/64.

<sup>45</sup> *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, Court of Justice of the European Union, 13.07.1989, C-5/88; *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, Court of Justice of the European Union, 18.06.1991, C-260/89; *Friedrich Kremzow v Republik Österreich*, Court of Justice of the European Union, 29.05.1997, C-299/95, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, Court of Justice of the European Union, 12.06.2003, .C-112/00.

<sup>46</sup> *M.M. v Minister for Justice, Equality and Law Reform, Ireland*, Court of Justice of the European Union, 22.11.2012. C-277/1.

<sup>47</sup> *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, Court of Justice of the European Union, 14.10.2024. C-36/02, *Eugen Schmidberger, Internationale*

a Member State's law with the requirements posed by the general principles of EU law may also be subject to the preliminary ruling procedure (Simon-Soulard-Rigaux-Rodolphe 2011: 19-87).

### 3.2. Cross-border element

In the scope of implementing the economic fundamental freedoms, a precondition of the application of EU law, inter alia, is that the concerned case includes a cross-border element. In principle, the absence of such element precludes the reliance on EU law in the concerned legal dispute.

In the case-law of the Court of Justice of the European Union,<sup>48</sup> at least one exception is known to the "requirement" of a cross-border element. In its judgement rendered in the Hans Reisch case, the CJEU assessed a Member State law on real property based on the EU requirements posed by the free movement of capital. It should be stressed that even though all the elements of the original case were situated within the same Member State, the national court hearing the case turned to the CJEU with a request for a preliminary ruling, and the CJEU gave a relevant answer to the question posed.

In his opinion prepared for the case, Advocate General M.L.A. Geelhoed referred to that the CJEU assesses also the cases where no cross-border element can be found.<sup>49</sup> In his opinion, the Advocate General also mentioned that<sup>50</sup> the answer given by the CJEU may be useful in such cases since these judgements facilitate the exercise of their rights deriving from EU law for those residents in another Member State. Furthermore, the Advocate General<sup>51</sup> referred to the reverse discrimination,<sup>52</sup> which would have a negative impact on the Member State's residents if EU law was not applied in their case in the absence of a cross-border element.

It should be noted that at the time the judgement was rendered in the Reisch case, the Austrian Republic had just become a Member State of the EU a

---

*Transporte und Planzüge v Republik Österreich*, Court of Justice of the European Union, 12.06.2003, .C-112/00.

<sup>48</sup> *Hans Reisch and Others (joined cases C-515/99 and C-527/99 to C-540/99) v Bürgermeister der Landeshauptstadt Salzburg and Grundverkehrsbeauftragter des Landes Salzburg and Anton Lassacher and Others (joined cases C-519/99 to C-524/99 and C-526/99) v Grundverkehrsbeauftragter des Landes Salzburg and Grundverkehrslandeskommission des Landes Salzburg*, Court of Justice of the European Union, 05.03.2002. C-515/99.

<sup>49</sup> Opinion of the Advocate General, C-515/99, paras 21-23.

<sup>50</sup> *Ibid.*, paras 82-88.

<sup>51</sup> *Ibid.*, para 87.

<sup>52</sup> The case of discrimination a rebour is also addressed by literature (Bluman-Dubouis 2019: 127).

few years earlier, and Austria, just like Hungary, was concerned about buyers arriving from other countries due to lower real estate prices. The same can be said as regards Romania: the high proportion of foreign citizens amongst the owners of agricultural lands is well known, and foreign acquisitions have most likely not come to an end yet.

### 3.3. *Ratione temporis*

One of the most important preconditions of the application of Article 63 TFEU guaranteeing the free movement of capital is that the Member State laws on restitution take effect following the accession to the European Union.<sup>53</sup>

However, there are significant exceptions to the above general rule in EU case-law. For example, the judgement rendered by the CJEU in the *Stephen Austin Saldanha* case,<sup>54</sup> when the court hearing the original case rendered a decision<sup>55</sup> before Austria's EU accession, which did not comply with the criteria posed by EU law. Following the accession of Austria, the applicant filed an appeal against that decision, after which the court hearing the case turned to the Court of Justice of the European Union.

It should be stressed that all the elements of the procedure had occurred before Austria's accession, including the decision of the Austrian court which obligated the applicant of the original case to pay a *cautio judicatum solvi* not compliant with EU law. However, the fact that all elements of the legal dispute had occurred before the accession of the given Member State to the EU did not hinder the CJEU in the application of EU law. The CJEU pointed out that EU law applies to the future effects of situations arising before the new Member State acceded to the European Union.<sup>56</sup>

As regards Romania, we know of many cases that have been pending for decades,<sup>57</sup> and in a significant number of which cases proceedings had started before Romania acceded to the EU. By analogy with the above judgement, in the case of applications that had been filed before the Member State acceded

---

<sup>53</sup> In its responses to requests for written questions, the European Commission repeatedly confirms the requirement of temporal scope.

<sup>54</sup> *Stephen Austin Saldanha and MTS Securities Corporation v Hiross Holding AG*, Court of Justice of the European Union, 02.10.1997. C-122/96.

<sup>55</sup> On 22 November 1994; the Austrian Republic became a Member State of the European Union on 1 January 1995.

<sup>56</sup> *Stephen Austin Saldanha and MTS Securities Corporation v Hiross Holding AG*, Court of Justice of the European Union, 02.10.1997. C-122/96, para 13.

<sup>57</sup> Based on the conference held by KJI on the subject.



to the European Union, yet where the administrative or court decisions are rendered after the EU accession, EU law applies.

#### 4. Summary

The measures introduced on the restitution of real property, following the EU accession of a Member State, fall within the scope of free movement of capital which precludes primarily any discrimination based on nationality. According to the European Commission's position, as regards the restitution measures introduced by Member States, the right to property prescribed in Article 17 of the Charter must be applied, as well as the general principles of EU law.

The example analysed in this paper shows that, in certain situations, as a derogation from the general rule, EU law may require payment of market-based compensation. A definitive answer to the question of whether the legislative amendment analysed in this paper complies with the right to property prescribed in Article 17 of the Charter, and with the principles of equal treatment and legitimate expectation, could be given by a judgement rendered by the Court of Justice of the European Union.

The complexity and the novelty in the jurisdiction of the relationship between restitution and EU law, as well as the difficulties arising in connection with the enforceability of the general principles before courts (Coutron 2014: 17-19), does not make the applicants' situation any easier in procedures pending before Romanian courts. Based on EU case-law, the applicability of EU law in the cases where applications had been filed before Romania acceded to the EU but are adjudged after that appear to be clear. Case-law has not yet been settled as regards the cross-border element, thus, only a judgement rendered by the CJEU could decide whether only Romanian citizens may rely on EU law.

#### References

- Blumann, Louis and Claude Dubouis. 2019. *Droit matériel de L'Union européenne*. Paris: Montchrestien.
- Blutman, László. 2016. Az Alapjogi Charta és az uniós jog határa. In. *Ünnepi kötet Dr. Czucz Ottó egyetemi tanár 70. születésnapjára*, 103-109. Szeged: Szegedi Tudományegyetem ÁJK.
- Coutron, Laurent. 2014. *L'irrénisme des cours européennes, rapport introductif, L'obligation de renvoi préjudiciel à la Cour de justice: une obligation sanctionnée?*. Bruxelles: Bruylant.
- Denys, Simon. 2003. *Le système juridique Communautaire*. Paris: Presses Universitaires de France – P.U.F.
- Azoulai, Loïc. 2009. Por un droit de l'exécution de l'Union européenne. In *Pour un droit de l'exécution de l'Union européenne, L'exécution du droit de l'Union, entre mécanismes*



- communautaires et droits nationaux*, (ed.) Jacqueline Duheil de la Rochere, 14. Bruxelles: Bruylant.
- Kurucz, Mihály. 2015. Gondolatok a magyar földforgalmi törvény uniós feszültségpontjainak kérdéseiről. In: *A Magyar Tudomány Napja a Délvidéken*, (ed.) János Szalma. Novi Sad.
- Naomé, Caroline. 2010. *Le renvoi préjudiciel en droit européen*,. Bruxelles: Larcierm.
- Pailler, Ludovic. 2018. L'invocabilité de la Charte des droits fondamentaux. In *Le rôle politique de la Cour de justice de l'Union européenne*, (ed.) L. Clément-Wilz, 126-127. Bruxelles: Bruylant.
- Woehrling, Jean-Marie. 2010. *L'état actuel et perspectives du droit administratif européen*. (ed.) Jürgen Schwarze, 297. Bruxelles: Bruylant.
- Simon, Denys, Christophe Soulard, Anne Rigaux, and Rodolphe Munoz (eds.). 2011. *Contentieux de l'Union européenne* 3. France: Sa Lamy. 19-87.
- Szilágyi, János Ede. 2016. Acquisition of the ownership of agricultural lands in Hungary, taking the EU's and other countries' law into consideration. *Zbornik Radova* 50.
- Szilágyi, János Ede. 2019. The changing concept of rural community and its importance in connection with the transfer of agricultural land. *Zbornik Radova* 53: 633.
- Xenou, Lamprini. 2017. *Les principes généraux du droit de l'Union européenne et la jurisprudence administrative française*. Paris:Larcier.

