

**OBSERVATIONS ON
THE BENES DECREES AND
THE ACCESSION OF THE CZECH REPUBLIC
TO THE EUROPEAN UNION**

1. The Benes Decrees are a series of decrees that were issued during World War II and the period immediately following liberation by the then President of Czechoslovakia, Edvard Benes.
2. The question to be considered is whether the Benes Decrees could prevent the accession of the Czech Republic to the European Union.

The Benes Decrees

3. There are nine decrees which have been highlighted as potential obstacles to the Czech Republic's accession to the EU. These are as follows:

Decrees relating to property and its confiscation

- (a) Decree 5/1945 (19.5.45) – Invalidity of certain property-related acts effected in the period of non-freedom
- (b) Decree 12/1945 (21.6.45) – Confiscation and expedited distribution of agricultural properties of Germans, Hungarians, traitors and collaborators and certain organisations and institutes
- (c) Decree 28/1945 (20.7.45)
- (d) Decree 108/1945 (25.10.45) – Confiscation of enemy property and the national renewal funds

Decree relating to citizenship

- (e) Decree 33/1945 (2.8.45) – Citizenship of Persons of German and Hungarian Nationality

Decrees relating to criminal law and procedure

- (f) Decree 16/1945 (19.6.45) – “Great Retributions Decree” – Punishment of Nazi criminals and their accomplices and concerning extraordinary people's courts

- (g) Decree 138/1945 (27.10.45) – “Small Retributions Decree” – Punishment of certain offences against the national honour
- (h) Decree 71/1945 – Forced labour for persons who had lost Czechoslovakian citizenship as a result of Decree 33/1945
- (i) Act No. 115/1946 (8.5.46) – “The Amnesty Act” – Exclusion of criminal responsibility for acts committed as reprisals against occupation forces

The validity of the Benes Decrees

4. Questions have been raised as to the validity of the Benes Decrees. Some critics have argued that they were issued by an executive authority (the President) whose exercise of power conflicted with the constitutional legislation that was operative at the time.
5. The Munich Agreement of 1938 and the invasion and subsequent occupation of Czechoslovakia in 1939 brought about a political state of affairs that had not been envisaged by, or legislated for, in the Czechoslovakian Constitution. Following an initial period of uncertainty from July 1940, the Czechoslovakian Government was recognised by the British Government by July 1941 as being the Government in exile that was operating in London by presidential decree.¹ Whilst the view taken by the British Government at the time is not conclusive on the validity of the decrees, it is representative both of a common sense view and the view of the allied powers on the legitimacy of the Czechoslovakian government in exile.
6. During war-time, the Heads of State for other occupied territories were governing through similar mechanisms. Examples are the Queen of the Netherlands, the King of Norway or the King of Yugoslavia.² In Poland, where the constitution did provide powers for governing in war-time, similar measures were utilised.³ As mentioned previously, the fact that similar mechanisms of government were employed by the Heads of State of other occupied territories does not validate the mechanisms used by Czechoslovakia. However, it demonstrates that rule by decree is considered a viable mode of ruling where a Head of State is faced with trying to rule whilst in exile.
7. After the war, the Benes Decrees were ratified by Constitutional Act No. 57/1946 of 28 March 1946.

¹ The opinion on the Benes Decrees drafted by the Czech Foreign Office, page 10.

² Ibid, page 9.

“The Provisional National Assembly passed this Act to approve and declare as law the presidential decrees, thus finally sanctioning the *rathabitio*. Article 1 of this Act provides that the Provisional National Assembly approves and declares as law the constitutional and presidential decrees issued on the basis of the Constitutional Decree on the Provisional Exercise of Legislative Power of 15 October 1940, including the said decree. All presidential decrees were to be regarded as laws from the very beginning and constitutional decrees were to be regarded as constitutional acts.”⁴

8. Further, it should be noted that the government of the Czech Republic view the Benes Decrees as the basis of post-war Czechoslovak legislation:

“With regard to the successful *rathabitio*, the debate surrounding the decrees, their potential declaration null and void from the very beginning or their amendment or repeal, in effect questions the very foundations of post-war Czechoslovak legislation.”⁵

9. The Constitutional Court of the Czech Republic (“CCCR”) is the final, determinative tribunal on matters of constitutional law in the Czech Republic. Its opinion is binding on all people and authorities in Czechoslovakia. This is clearly established by Article 89 of the Constitution of the Czech Republic:

“Article 89

- (1) A ruling of the Constitutional Court shall become effective as soon as it has been promulgated in the manner prescribed by law, unless the Constitutional Court has decided otherwise about its effectiveness.**
- (2) Effective rulings of the Constitutional Court shall be binding for all authorities and persons.”**

10. The CCCR found that the Benes decrees were valid and constitutional. In its opinion stated in Finding No. 55/1995 of 8 March 1995 it states:

“...since the enemy occupation of the Czechoslovak territory by the armed forces of the Reich had made it impossible to assert the sovereign state power which sprang from the Constitutional Charter of the Czechoslovak Republic, introduced by Constitutional Act No. 121/1920, as well as from the whole Czechoslovak legal order, the provisional Constitutional Order of the Czechoslovak Republic, set up in Great Britain, must be looked upon as the internationally recognised legitimate constitutional authority of the Czechoslovak state. In

³ Ibid, page 10.

⁴ Ibid, page 9.

⁵ Ibid, page 9.

consequence thereof and as a result of their ratification by the Provisional National Assembly by Constitutional Act No 57/1946 of 28 March 1946, all normative acts of the Provisional Constitutional Order of the Czechoslovak Republic are expressions of legal Czechoslovak (Czech) legislative power, so that as a result thereof the striving of the nations of Czechoslovakia to restore the constitutional and legal order of the Republic was achieved.”⁶

11. In my view, it is for the CCCR to determine whether the Benes Decrees were valid when they were issued and what their status is today. In light of the ratification of the Benes Decrees by a properly constituted parliament shortly after the war and the finding of the CCCR that the Decrees are valid, I consider these Decrees to be valid and I do not consider that any other Member State has jurisdiction to challenge or determine their validity.

Criteria for accession to the EU

12. Article 47 of the Treaty on European Union [YEAR] (“TEU”) states the criteria for accession to the EU:

“1. Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.”

“2. ...the conditions of admission and the adjustments to the Treaties on which the Union is founded which such admission entails shall be the subject of an agreement between the Member States and the Applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.”

13. Article 6(1) of the TEU states:

“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.”

14. Additional requirements for accession, known as the Copenhagen Criteria, were established by the Copenhagen European council of June 1993. These provide:

⁶ Ibid, page 3.

“membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities...”⁷

15. In its paper “Making a success of enlargement” [SEC (2001) 1744 to 1753], the European Commission states at page 5:

“The conditions for membership, set out by the Copenhagen European Council in 1993 and further detailed by subsequent European Councils, provide the benchmarks for assessing each candidate’s progress. These conditions remain valid today and there is no question of modifying them.”⁸

16. It is clear therefore that these are the principles on which accession should be determined.

Decrees relating to property and its confiscation

17. Decree 5/1945 annulled certain property transactions made by Nazi Germans during the period of occupation. It provided:

“any form of property transfer and transaction affecting property rights in terms of movable and immovable assets and public and private property shall be invalidated, if it was adopted after September 29, 1938, under pressure of the Nazi occupation or national, racial or political persecution”⁹

“The property of persons upon whom the country cannot place reliance, being within the territory of the Czech Republic will be placed under national administration in accordance with the further provisions of this edict.”¹⁰

18. Decree 12/1945 related to **“the confiscation and accelerated allocation of agricultural property of the German and Hungarian persons and of those having committed treason and acted as enemies of the Czech and Slovak people”**. It provided for the expropriation, with immediate effect, and without compensation, of agricultural property, for the purposes of land reform. It concerned agricultural property, including *inter alia* buildings and movable goods on such property, in the ownership of all persons of German and Hungarian nationality irrespective of their citizenship status.¹¹

⁷ Opinion by the Legal Service of the European Parliament: Harry Tebbens, Antonio Caiola and Gregorio Clariana, page 7.

⁸ Making a success of enlargement – Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries [SEC (2001) 1744 to 1753] /* COM/2001/0700 final */ , page 5.

⁹ The Presidential Decrees of 1945, further information on the Benes decrees by the Czech Foreign Office, 14/06/2002.

¹⁰ Opinion by the Legal Service of the European Parliament, at page 9, op.cit. footnote 7.

¹¹ Case of Prince Hans-Adam II of Liechtenstein v. Germany, application number: 42527/98, 12/07/2001

19. Decree 108/1945 related to the confiscation of property of Germans, Hungarians, traitors and collaborators and **“persons with an unreliable attitude to the state”**. However, the properties of people (including Germans and Hungarians) who **“took an active part in the fight for the preservation of territorial integrity and liberation of the Czechoslovak Republic”** were not confiscated.¹²

20. These decrees were directly linked to the retributions decrees and decisions on the retention of Czechoslovakian citizenship under Decree 33/1945 were to be taken into account.¹³ Further exemptions to these decrees related to the majority of persons returning from concentration camps and persons who demonstrably provided active support to the Czech nation in the fight against Nazism. The decrees only applied to a specified time period. The CCCR is of the opinion that as this time period has expired and no new legal relations can be created, these decrees cannot be reviewed.

21. In particular, the CCCR notes the following regarding Decree 108/1945:

“In view of the fact that this normative act has already accomplished its purposes and for a period of more than four decades has not created any further legal relations, so that it no longer has any constitutive character, in the given situation its inconsistency with constitutional acts or international treaties...cannot be reviewed today.”¹⁴

22. It is important to note that whilst the CCCR is of the opinion that this Decree is no longer applicable in establishing legal relations, it does not state that the Decrees are no longer effective today. In fact, these Decrees were the basis on which new property rights were established and have subsequently been relied on by individuals for over 50 years. In my view, to seek to alter this position would be contrary to principles of legitimate expectation and legal certainty.

23. It may be true that the expropriation of property by virtue of the Benes Decrees, if done today, would probably constitute a breach of the European Convention on Human Rights (“ECHR”). However, the CCCR makes the following point:

“...it is true in principle that that which emerges from the past must, face to face with the present, pass muster in respect to

¹² Opinion on Benes Decrees by Czech Foreign Office, at page 12.

¹³ Op.Cit. footnote 12, page 12.

¹⁴ Op.Cit. footnote 12, page 5.

values; nevertheless, this assessment of the past may not be merely the present passing judgment upon the past. In other words, the present order, which has been enlightened by subsequent events, draws upon those experiences, and looks upon and assesses a great many phenomena with the advantage of hindsight, may not sit in judgment upon the order which has prevailed in the past.”¹⁵

24. I agree with the view of the CCCR. These Decrees may seem nationalistic and/or discriminatory when viewed in the current political climate. However, these Decrees must be understood in the context of the aftermath of World War II. They should not affect accession as they have no effect on rights today.

25. Further, the expropriation of property under these decrees was part of an internationally approved scheme. Firstly, it was closely linked to the transfer to Germany of German populations. This transfer was expressly provided for by the Allies as documented in the Protocol of the Potsdam Conference, 1 August 1945.¹⁶ Secondly, it was consistent with the Allied international agreements relating to reparations after the war. The Agreement on Reparation from Germany of 1946 had 18 signatories including Czechoslovakia and Great Britain. Article 6 of this agreement relates to German external assets. It states the following:

“A. Each Signatory Government shall, under such procedures as it may choose, hold or dispose of German enemy assets within its jurisdiction in manners designed to preclude their return to German ownership or control and shall charge against its reparation share such assets...

“E. The German enemy assets to be charged against reparation shares shall include assets which are in reality German enemy assets, despite the fact that the nominal owner of such assets is not a German enemy.”¹⁷

26. Under Article 6A of the Agreement, Czechoslovakia had a duty under an international agreement endorsed by the Allies to expropriate German enemy assets within its jurisdiction. Under Article 1 of the Agreement, Czechoslovakia is entitled to a shares in German reparation. The Czechoslovak government accepted its expropriation of German enemy property as being in lieu of any reparation shares and so never enforced this right.

¹⁵ Op.Cit. footnote 12, page 4.

¹⁶ The Berlin (Potsdam) Conference, July 17-August 2, 1945, (a) Protocol of the Proceedings, August 1, 1945, XII

¹⁷ Agreement on Reparation From Germany, on the Establishment of an Inter-allied Reparation Agency and on the Restitution of the Monetary Gold, Paris 14/01/1946.

27. In addition, it should be noted that that the government of the Czech Republic accept that immediately after the war there incidences of violence, damage to property and transfers of assets without proper legal grounds. It admits that there is no legal justification for such actions. This is a point that has been made recently in the German-Czech Declaration on Mutual Relations and their Future Development of 21 January 1997. The following Articles are particularly relevant:

“Article II: The German side is also conscious of the fact that the National Socialist policy of violence towards the Czech people helped to prepare the ground for post-war flight, forcible expulsion and forced resettlement.”¹⁸

“Article III: The Czech side regrets that, by the forcible expulsion and forced resettlement of Sudeten Germans from the former Czechoslovakia after the war as well as by the expropriation and deprivation of citizenship, much suffering and injustice was inflicted upon innocent people, also in view of the fact that guilt was attributed collectively.”¹⁹

28. This agreement, at the very least, implies acceptance by Germany of the expropriation of property under the Benes Decrees.

29. In any event, Article 295 of the Treaty of the European Community (“TEC”) provides:

“This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.”

30. This expressly excludes the expropriation of property from the jurisdiction of Europe. These issues remain the jurisdiction of individual Member States insofar as they are not inconsistent with the attainment of the objectives of the TEC or the ECHR.

31. For all the above reasons, I do not consider that the decrees relating to expropriation of property should form any obstacle to the Czech Republic’s accession to the EU.

Case of Prince Hans-Adam II of Liechtenstein v Germany (12 July 2002, Application No. 42527/98)

32. In this case, the applicant initiated a claim in the German courts for restitution of property, namely a painting confiscated by the former Czechoslovakia in 1946 under Decree 12/1945 from his father, the former Monarch of Liechtenstein. The German courts ruled that they did not have jurisdiction to hear his case so the applicant applied to the ECHR. He alleged

¹⁸ German-Czech Declaration on Mutual Relations and their Future Development, 21/01/1997, at page 1.

¹⁹ Ibid, at page 2.

that he had been deprived of his right to a fair trial and of his right to access to a court in the determination of his property rights. He also claimed that his right to property had been violated. In particular, he invoked Article 6(1) of the ECHR and Article 1 of the First Protocol.

33. The ECtHR pointed out that the right of access to the courts secured by Article 6(1) is not absolute but subject to limitations. To be compatible with Article 6(1), a limitation must pursue a legitimate aim and be proportionate. The ECtHR found that, in the circumstances of World War II and Germany's resulting particular status under public international law, the limitation on access to a German court, as a result of the Settlement Convention, had a legitimate objective. Thus, the ECtHR accepted the finding of the German courts that they had no jurisdiction to hear the claim and found that this was not in breach of the Article 6(1) of the ECHR.

34. In so finding, the ECtHR noted that:

“66. ... The genuine forum for the settlement of disputes in respect of these expropriation measures was, in the past, the courts of former Czechoslovakia and, subsequently, the courts of the Czech or of the Slovak Republic. Indeed, in 1951 the applicant's father had availed himself of the opportunity of challenging the expropriation in question before the Bratislava Administrative Court.”²⁰

35. The ECtHR also dismissed the applicant's argument that his property rights under Article 1 of the First Protocol had been violated, the ECtHR stated:

“83. ...the hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively cannot be considered as a “possession” within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition (see the recapitulation of the relevant principles in the...Malhous decision...)”²¹

“85. ...the Court observes that the expropriation had been carried out by authorities of former Czechoslovakia in 1946, as confirmed by the Bratislava Administrative Court in 1951, that is before 3 September 1953, the entry into force of the Convention,

²⁰ Op.Cit. footnote 11, at page 23.

²¹ Op.Cit. footnote 11, at page 27.

and before 18 May 1954, the entry into force of Protocol No. 1. Accordingly, the Court is not competent *ratione temporis* to examine the circumstances of the expropriation or the continuing effects produced by it up to the present date (see *Malhous v. the Czech Republic* (dec), no. 33071/96, 13 December 2000, ECHR 2000-XII and e.g. *Mayer & Others v Germany* (application no.s 18890/91, 19048/91, 19342/92 and 19549/92, Commission decision of 4 March 1996, Decisions and Reports 85, pp 5-20).”

36. The ECtHR thus determined that this expropriation of property that had taken place under the Benes Decrees was not and could not be in violation of the ECHR. It held that expropriations made in 1945/1946 under the Benes Decrees cannot be subject to challenge on the basis of Article 6(1) of the ECHR or Article 1 of the First Protocol. In light of this decision, it seems unlikely that future challenges to the Benes Decrees relating to expropriation of property on the basis that they breach the ECHR will be successful.

37. Unfortunately, I have been unable to locate the case of *De Fours Walderode v The Czech Republic*. In any event, I do not think that it is directly relevant as it determines whether or not restitution measures are compatible with the CFRF. As the CFRF is not incorporated into EU law and as the *Prince of Liechtenstein v Germany* has ruled that the expropriation measures were not in breach of the ECHR, I do not consider that the decision in *De Fours Walderode* will be of direct relevance to the Czech Republic’s accession to the EU.

Citizenship

38. Section 1, paragraph 1 of Decree 33/1945 provides that:

“Czechoslovak citizens having German or Hungarian nationality who have acquired German or Hungarian nationality under the regulations of a foreign occupying power, have lost their Czechoslovak citizenship with effect from the date of acquisition of such citizenship.”²²

39. However, citizenship would be retained by persons who had demonstrated “their loyalty to the Czechoslovak Republic, had never committed any offence against the Czech and Slovak nations, and who had either actively participated in the struggle for the liberation of the country, or had suffered under Nazi or fascist terror”.²³ Citizenship was also retained by Germans and Hungarians who “in the period of increased threat to the Republic officially

²² Op.Cit. footnote 1, at page 5.

²³ Op.Cit footnote 10, at page 4

registered as Czech or Slovaks”.²⁴ A further category provided for people who could apply to recovery of citizenship within 6 months from the date of the publication of the relevant Interior Ministry regulation. This group included German “opponents of Nazism and Fascism”.²⁵ Applications for recovery of Czechoslovak citizenship were to be filed with the district National Committee between 10 August 1945 and 10 February 1946.²⁶

40. Decree 33/1945 is to be understood in the context of the transfers of minority German and Hungarian populations that took place following the end of the war. The decree was not signed by Benes until the conclusion of the Potsdam Conference to ensure that it was in line with the Allies decision.²⁷

41. This decree, in the same way as those decrees relating to expropriation, has a limited applicability. It deprived certain people of Czechoslovak citizenship at a certain time. This decree cannot operate to deprive people who currently have citizenship of the Czech Republic of their citizenship. Nor does it prescribe who can obtain citizenship or how citizenship can be obtained in the Czech Republic today.

42. Further, nowadays, express protection is given to those who have Czech citizenship under Article 12 of the Constitution of the Czech Republic:

“Article 12

- (1) The ways of acquiring and losing the state citizenship of the Czech Republic shall be regulated by law.**
- (2) Nobody may be deprived of the state citizenship against his will.”**

43. In any event, Article 17 of the TEC states:

“1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.”

44. It is therefore for each individual Member State to decide who is eligible for national citizenship and how such citizenship is to be obtained. In my view, the decree on citizenship is irrelevant in the context of the Czech Republic’s accession to the EU.

²⁴ Ibid at page 35.

²⁵ Ibid.

²⁶ Ibid at page 36.

²⁷ Ibid at page 33.

The Decrees relating to criminal acts and procedure

45. Act No. 115/1946 provides:

“Any act committed between September 30, 1938 and October 28, 1945, the object of which was to aid the struggle for liberty of the Czechs and Slovaks or which represented just reprisals for actions of the occupation forces and their accomplices, is not illegal, even when such acts may otherwise be punishable by law.”²⁸

46. This Act clearly still has legal effects today as it prevents the investigation or trial of certain criminal acts, many of which may also have been inhumane. Whilst this may be justifiable and reasonable where such acts were done in the struggle for liberty from occupation, I do not think this can be justified or reasonable where such acts were reprisals. The word “just” in this context seems to me to be arbitrary and contrary to principles of legal certainty. However, the repeal of a law that has exonerated people from criminal consequences for over 50 years with the result that these people may now be prosecuted could also be criticised as being contrary to principles of legitimate expectation and legal certainty.

47. Act No. 115/1945 is viewed as one of the key problems in the context of Czechoslovakian post-war legislation impeding or preventing the Czech Republic’s accession to the EU. The key proponent of this view is Professor Christian Tomuschat, a former member of the United Nations Committee under the Covenant for Civil and Political Rights, but as his writing is in German, I am unable to comment on it first hand. Professor Tomuschat proposes that this Act would have to be repealed by the Czech Republic.²⁹ He points out that in Germany, people do stand trial for war crimes which they committed during World War II, even if they are not discovered until many years later.³⁰ Professor Frowein draws attention to the difference between Germany, where there was never any question that the Germans would have to take responsibility for the crimes committed during the war and where no legitimate expectation that they would be precluded from responsibility could have arisen, and the Czech Republic.

48. The Czech government makes the point that, as a matter of fact, many perpetrators of post-war crimes against persons belonging to the German minority were convicted, although not all offenders were tried and punished and not all sentences may seem adequate today.³¹

²⁸ Legal opinion concerning Benes Decrees and relating issues prepared by Prof. Dr. Dres h.c. Jochen A. Frowein, at page 19.

²⁹ Ibid at page 23.

³⁰ Ibid at page 24.

³¹ Op.Cit. footnote 1, at page 28.

Further, many administrative decisions and general legal standards were amended in the following period by subsequent legislation as well as through administrative and judicial proceedings in which bodies such as the Supreme Administrative Court often had the last word. Guidelines instructing the Czechoslovakian population to “respect those German citizens who remained loyal to the Republic, took an active part in the fight for the liberation of the Republic or suffered under the Nazi and Fascist terror” were adopted by the Government as early as 15 June 1945.³²

49. In the Czech-German Declaration 1997, formal expressions of regret for Act 115/1945 were made :

“III. The Czech side...particularly regrets the excesses which were contrary to elementary humanitarian principles as well as legal norms existing at that time, and it furthermore regrets the excesses which were contrary to elementary humanitarian principles as well as legal norms existing at that time, and it furthermore regrets that Law No. 115 of 8 May 1946 made it possible to regard the these excesses as not being illegal and that in consequence these acts were not punished.”

50. This declaration indicates acceptance by Germany of the effects of Act 115/1945 and strongly implies that a repeal is not considered necessary by Germany.

51. The effect of the remaining decrees; 16/1945, 137/1945 and 71/1945 is more difficult to assess. In the opinion of the European Parliament Legal Service at paragraph 62, all three of these decrees have now been repealed by virtue of Act 33/1948 of 25 March 1948; Act 87/1950 of 1 August 1950 and Act 65/1966 of 1 January 1966 respectively.³³ With regard to 71/1945, this decree will no longer have any legal effect. However, with regard to 16/1945 and 137/1945, this is not necessarily the case. Professor Frowein makes the valid point that it is not clear to what extent convictions made on the basis of these decrees will still be valid and enforceable in the Czech legal order. Professor Frowein cites the provisional opinion of a Czech lawyer who states that:

“Sentences imposed under Great Retributions Decree No. 16/1945 are not enforceable today, for legal and factual reasons. The Decree itself was repealed and cannot conflict with the acquis communautaire.”³⁴

³² Ibid at page 28.

³³ Op.Cit. footnote 10, at page 10.

52. The European Commission makes reference to a radical reform of the Criminal Proceedings Code³⁵ which has been adopted by the Czech Republic. This Code may have provisions that affect this issue. Unfortunately, I do not have this Code available to me.

53. The Charter of Fundamental Rights and Freedoms (“CFRF”) is incorporated into the Constitution of the Czech Republic by virtue of Constitutional Act of 9 January 1991 and by virtue of Article 3 of the Constitution which provides:

**“Article 3
The Charter of Fundamental Rights and Freedoms shall form
part of the Czech Republic’s constitutional order.”**

54. Article 40(6) of the CFRF provides:

“The question whether an act is punishable or not shall be considered and penalties shall be imposed in accordance with the law in force at the time when the act was committed. A subsequent law shall be applied if it is more favourable for the offender.”

55. It seems to me that by virtue of Article 40(6) of the CFRF, even if the decrees 16/1945 and 137/1945 have been repealed, any convictions based on those decrees will still be valid and enforceable. Therefore, clear evidence that convictions established under these decrees are not enforceable would be required to meet EU requirements.

56. I note that Articles 62 and Articles 87 of the Constitution could provide ways of removing the effect of these decrees:

**“Article 62
The President of the Republic shall:
g) forgive and mitigate sentences imposed by courts, order that criminal proceedings should not be instituted, or if they have been instituted, that they should be discontinued, and allow judicial sentences to be deleted from personal records...”**

**“Article 87
(1) The Constitutional Court shall decide
b) about the annulment of laws or of their individual provisions, if they are in contradiction with a constitutional law or with an international treaty according to article 10...”**

³⁴ Op.Cit. footnote 28, at page 19.

³⁵ Op. Cit. footnote 8, at page 5.

57. In my view, the President could use his power under Article 62 to pardon anyone convicted under the relevant Benes Decree. Alternatively, any such conviction could be challenged in the Constitutional Court who could exercise their power under Article 87 to annul the relevant decree if it conflicted with either the CFRF or the ECHR.

58. Notwithstanding my comments in paragraph 57 above, the Czech Republic should ensure that there is a clear and unequivocal means of ensuring that any unsound convictions made under the Benes Decrees cannot be enforced.

The supremacy of EU law

59. It is worth noting the decision of the European Court of Justice in the Case of *Amministrazione della Finanze dello Stato v Simmental SpA* [1978] 3 CMLR 263 (Case 106/77) which establishes the supremacy of EU law. In particular, the following paragraphs are of relevance:

“17. Furthermore, in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law...”

“21. It follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.”

60. Following this decision and given well established principles regarding the supremacy of EU law, even if the Czech Republic should have Decrees in place that are inconsistent with EU law, these will be rendered ineffective by the application of EU law.

61. Article 10 of the Constitution of the Czech Republic provides:

**“Article 10
The ratified and promulgated international treaties on human rights and fundamental freedoms, by which the Czech Republic is bound, shall be directly binding regulations having priority before the law.”**

62. By virtue of Article 10 of the Constitution of the Czech Republic, on its accession to Europe, the ECHR would be directly binding law in the Czech Republic and so any inconsistent law would cease to have application.

The estoppel argument

63. I consider that there is a strong argument that Germany is estopped from questioning the Benes Decrees both in the public international forum and, more pertinently, in relation to the accession to Europe.

64. In the case of *Prince of Liechtenstein v Germany*, the German courts cited Chapter 6, Article 3 of the Convention on the Settlement of Matters Arising out of the War and the Occupation of 23 October 1954 (“the Settlement Convention”). Chapter 6, Article 3 provides as follows:

“1. The Federal Republic of Germany shall in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of agreements concluded, or to be concluded, by the Three Powers with other Allied countries, neutral countries or former allies of Germany.”

“3. No claim or action shall be admissible against persons who shall have acquired or transferred title to property on the basis of the measures referred to in paragraph 1...of this Article, or against international organisations, foreign governments or persons who have acted upon instructions of such governments.”³⁶

65. In my view, Germany’s agreement to these terms estops it from raising issues related to the Benes Decrees on expropriation.

66. The Czech-German Agreement of 1997 strengthens an argument based on estoppel and extends such an argument to cover the other Decrees and war-related acts:

“IV Both sides agree that injustice inflicted in the past belongs in the past, and will therefore orient their relations towards the future. Precisely because they remain conscious of the tragic chapters of their history, they are determined to continue to give priority to understanding and mutual agreement in the development of their relations, while each side remains committed to its legal position and respects the fact that the

³⁶ Op.Cit. footnote 20, at page 12.

other side has a different legal position. Both sides therefore declare that they will not burden their relations with political and legal issues which stem from the past.”³⁷

67. With regard to the EU in particular, it must be remembered that the fundamental and underlying principle of the EU was the unification of Europe following World War II. Any attempt by Germany to preclude the Czech Republic from membership based on actions taken in the immediate aftermath of the war is clearly contrary to the whole basis on which the EU was founded and to its continuing aims and obligations.

68. In particular Article 307 of the TEU provides:

“The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.”

69. The Czech-German Declaration of 1997 should be read as an agreement to eliminate incompatibilities. Germany should be estopped from preventing the Czech Republic from accession for reasons which might equally have applied to Germany had they been raised prior to the accession of Germany.

Conclusions

70. The Decrees relating to the expropriation of property and to citizenship are no longer capable of creating new legal relations. Their effect has been established and property rights have been based on these Decrees for over 50 years. A legitimate expectation has

³⁷ Op.Cit. footnote 18, at page 2.

arisen that these Decrees are good law and rights to property which would now be protected by the ECHR have been established. In any event, they are irrelevant in the context of the Czech Republic's accession to the EU.

71. The Decree relating to forced labour has no legal effect today and so should not affect the Czech Republic's accession to the EU.
72. The Decrees precluding liability for crimes committed by Czechoslovakians as reprisals against Germans after the war are unfortunate. However, individuals have relied on these provisions for over 50 years and as such have a legitimate expectation that they will not now be prosecuted for these actions. In my view, these provisions should not operate as an obstacle to accession.
73. The Decrees enabling arbitrary or *in absentia* trials for crimes committed during the war may well still have effect in the sense that convictions on this basis could still be enforced. The Czech Republic should ensure that there is legal provision for ensuring that any convictions made under these Decrees cannot be enforced today without a proper and sound trial that conforms with modern day principles of legal procedure and human rights.
74. Any question of incompatibility of the Benes Decrees with modern day EU law and principles should not prevent accession as any incompatible legal provisions will be rendered inapplicable on the basis of the supremacy of EU law once the Czech Republic has acceded to the EU.
75. There is a strong argument that any country is estopped from raising issues relating to legislation that arises out of the particular circumstances of World War II and which has the approbation of international agreements. In particular, it should be estopped from using these issues to prevent accession to the EU as this would undermine the whole basis on which the EU is founded.

The Rt. Hon. Lord Kingsland Q.C.
1 October, 2002