

European Parliament
Directorate General for Research
Attention Mr Klaus H. Offermann
L-2929 Luxembourg

Re: Study no IV/2002/Conf.Prés./01

Please find enclosed my Opinion on the study by Professor Dr Jochen A. Frowein, called
Legal Opinion concerning Benes-Decrees and related issues.

Stockholm Sept. 30th, 2002

Ulf Bernitz

Jur Dr, Dr jur h.c., Professor of European Law at Stockholm University, Senior Research
Fellow, Balliol College, Oxford

LEGAL OPINION

On the Study by Professor Dr Jochen A. Frowein, Heidelberg of September 12, 2002
Called Legal Opinion concerning

Benes-Decrees and Related Issues

Prepared by

Professor Dr Ulf Bernitz

Professor of European Law at Stockholm University
Senior Research Fellow, Balliol College, Oxford

September 30, 2002

1. The Mandate

The European Parliament, Directorate General for Research, has given me the mandate to submit my legal opinion on the compliance of certain aspects of the legislation of the Czech Republic with the *acquis communautaire*.

The Parliament has given Professor Dr Jochen Abr. Frowein, Max Planck Institute for Foreign Public Law and International Law, Heidelberg the task to elaborate a basic study on the subject. I have been asked to submit my opinion on this study. Another person, Lord Kingsland, London has been given a similar task.

The mandate for Professor Frowein's study and my opinion has been defined as follows:

- focus on today's validity and legal effects of the so-called Benes Decrees and the restitution laws related to them, and on their status in the context of compliance with EU law with the criteria of Copenhagen and international law relevant for accession;
- give due consideration to available legal opinions, in particular of the legal services of the European institutions;
- indicate whether any action from the candidate countries concerned ought to be taken in view of their accession.

In the end of August 2002 I received a draft version of Professor Frowein's study. In a letter to Professor Frowein of early September I raised a couple of important points. These points were clarified between Professor Frowein and me via telephone and E-mail and are covered in the final version of Professor Frowein's study.

2. Scope and Limitations of my Opinion

What I have been asked to do is to submit my opinion on the study prepared by Professor Frowein. Thus, this study constitutes the background for my opinion and I have based my conclusions on the documentation presented in the study.

During recent months letters and documentation related to the Benes Decrees and their application has been sent to me from different persons and organisations, primarily in Germany and Hungary, all previously unknown to me. However, I have chosen not to take any contact with these persons or organisations until my opinion has been submitted to the Parliament.

Like Professor Frowein, I find the scope of the subject we have been asked to study to be limited to problems related to the forthcoming EU accession of the Czech Republic. Thus, problems related to the Slovak Republic, which primarily concern relations to Hungarians, have been left out. However, these problems seem largely to be of a very similar nature. Thus, most of the discussion and conclusions in Professor Frowein's study would seem to be applicable to the Slovak/Hungarian situation *mutatis mutandis*. Naturally, this does not apply to special Czech-German agreements.

I would also like to point at another limitation. The Europé Agreement between the EU and the Czech Republic, presently in force, seems to fall outside the mandate of the study and has in any case not been touched upon by Professor Frowein. Thus, I will not discuss the situation under the Europé Agreement. However, in short I would like to mention that the European Court of Justice (ECJ) has found certain provisions in the Europé Agreements to have direct effect within the EU and, consequently, possible to invoke by private individuals and undertakings in court proceedings in the Member States. These provisions having direct effect concern, i.a., freedom of establishment and free movement of workers.¹ Whether or not the Czech Republic applies the Europé Agreement in a similar way and thus permits individuals and firms to invoke the Agreement before the Czech courts is not fully known to me. This issue is related to the general status of international treaties in Czech internal law. However, to the extent such direct effect is recognised by the Czech courts, there should be a possibility already today for, e.g., Germans having a Sudeten background, to have issues related to economic and personal interests in the Czech Republic tried before the Czech courts on the basis of the provisions of the Europé Agreement.

¹ Case C-63/99, Gloszczuk, [2001] ECR I-6369 (recognition of the right of a Polish contractor to conduct business in the United Kingdom), case C-268/99, A.M.Jany et al v. Staatssecretaris van Justitie, [2001] ECR I-8615 (recognition of the right of a Czech prostitute to work professionally in Amsterdam).

3. *The Fundamental EU Law on Citizenship, Discrimination and Minorities*

Before commenting specific points, I find it important to recall the fundamental EU law on citizenship, discrimination and minorities. These principles should form the fundamental basis for the assessment of the problems treated.

When studying the problems and discussions related to the subject of the Benes Decrees it is obvious that this topic still is particularly sore, considering that the events took place more than 55 years ago. The atrocities of the Nazi time should certainly be remembered and in no way excused, but on the other hand we are since long building for the European future in peace and it is most important that accession of new Member States takes place in an atmosphere of reconciliation and trust.

It should be recalled that the very basic aim of the European Union, according to Article 1 of the EU Treaty, is to create an ever closer union between the *peoples* of Europe. Also, every person holding the nationality of a Member State is a citizen of the Union, a European citizen. Basically, according to Article 18 of the EC Treaty every European citizen has been given the right to move and reside freely within the territories of all the Member States. In its recent landmark decision in the *Baumbast* case,² the European Court of Justice has clearly stated that Article 18 has direct effect. Thus, a person can base individual rights directly on his/her European citizenship.

Further, as discussed by Professor Frowein in his study, Article 12 of the EC Treaty contains a general prohibition of a constitutional nature of any discrimination on grounds of nationality. In its case law, the European Court of Justice has developed this non-discrimination principle into a general principle of equal treatment and applied it to a great variety of measures having indirect discriminatory effects. Recently, the Council, acting after consulting the Parliament, has used its powers under Article 13 of the EC Treaty to take appropriate action against, i.a., discrimination based on ethnic origin, by issuing special equal treatment directives.³

² Case C-413/99, *Baumbast and R*, decision 17 September 2002.

³ Directive 2000/43/EC, OJ 2000 L 180/22 and directive 2000/78/EC, OJ 2000 L 303/16.

These principles are also enshrined in the new Charter of Fundamental Rights of the European Union. In particular, Article 21 of the Charter prescribes: “Any discrimination based on any ground such as ... ethnic or social origin,... language,... membership of a national minority,... shall be prohibited”.

In short, the European Union is not only a union of national states, it is also a union of all the different peoples living within the Union including all its ethnic and linguistic minorities, offering every individual being a citizen of a Member State the special status of a European citizen. However, also such transitory provisions should not have discriminatory effects for minorities or other special groups of European citizens.

Thus, the Union is based on fundamental values which are completely different from nationalistic ideologies of Europe of the past. It is of paramount importance that these core values are fully respected in relation to the new Accession Treaties with, i.a., the Czech Republic, albeit transitory provisions might be necessary for a limited time period.

4. General Assessment of the Study

As a general statement, I find the study by Professor Frowein admirably clear and very well written. However, his treatment of the relevant Czech legislation (the Benes Decrees) is very cautious, perhaps too tactful. From the viewpoint of modern standards of humanitarian law, this legislation and its application deserves harsh criticism.

I appreciate the ambition in Professor Frowein’s study to reach firm conclusions, taking into regard the difficulties involved. On most issues, I find the reasoning and the conclusions convincing.

On certain points, however, I find it proper to make some comments and reservations.

5. The Legality of the Benes Decrees

Professor Frowein's study clearly demonstrates the well-known fact that there is a very close link between the developments in and around Czechoslovakia shortly before and during the second World War and the Benes Decrees and the expulsion of the Sudeten in 1945-1946. As is pointed out by Professor Frowein, the expulsion was accepted by the occupation powers in Germany and, basically, was regarded at the time as a consequence of what had taken place previously. The confiscations were closely linked to the expulsion.

However, the ways in which the execution of the confiscations and the physical expulsion of the people were conducted seem to have been particularly harsh and radical in many instances. The measures taken show the characteristics of collective punishment. Presumably, they hit many individuals who were innocent. It is unclear to what extent, if at all, the individuals were given the possibility to defend their particular case and have it investigated impartially, preferably by the courts.

In his study, Professor Frowein comments on the legality of the Benes Decrees under the international law of its time (para 16 and foot-note 9). Personally, I have very strong doubts on this point. Truly, many of the most basic principles of international law had been manifestly set aside during the Second World War. On the other hand, the United Nations Charter, proclaiming a number of very important principles of international humanitarian law in the Charter's first Articles on fundamental aims and principles, had taken effect on October 24, 1945, i.e. before the full enforcement of the Decrees. The provisions of this Charter was an expression of the revival and nearly universal recognition of international law which took place already immediately after the War.

However, in relation to the present EU accession issue one has to accept Professor Frowein's point of departure that we have to look at the present situation at hand. In this context, the Benes Decrees, evaluated as a historic event, can be left aside. I will come back to the question of possible remaining effects of the Decrees. For the EU, created and successively reshaped at a later date, the developments of the 1940s belong to Europe's historic background which the EU was never able to influence and for which it carries no responsibility. Also, the European Convention of Human Rights was concluded and started to take force at a later date.

Thus, the view of Professor Frowein that Articles 49 and 6 of the EU Treaty should be interpreted in a manner which looks to the future and not the past can be accepted (paras 6 and 16). I also support Professor Frowein's conclusion number 1 (page 30) that the Czech confiscations in 1945/46 cannot be challenged on the basis of present EU law.

6. The Restrictive Czech Rules on Restitution

After the fall of the communist system, a possibility of restitution of non-movable property, primarily land, was introduced in 1992 for certain persons who had lost their property on the basis of the Benes confiscation decrees (para 26 in Frowein's study). However, the restitution was limited to citizens of the Czech Republic and the deadline for restitution claims lapsed on June 30, 2001. In 1996, the legislation was changed, retroactively, to require uninterrupted citizenship as a requirement for restitution. Thus, many persons who remained loyal to the state of Czechoslovakia during the War but fled abroad during the War years or soon afterwards as a consequence of the events in the early post-War years, seem to have been denied their right of restitution. As is pointed out by Professor Frowein (paras 29 and following) the restrictive Czech legislation on restitution has been severely criticized by the UN Human Rights Committee in a number of cases. Surprisingly, the Czech Republic does not seem to have honoured the views of the UN Human Rights Committee and has not changed its legislation.

It is well-known that a different approach to the issue of restitution of land ownership has been taken in other post-communist countries. E.g., a comparison can be made with the situation in Estonia and Latvia, two countries from which many citizens fled during and immediately after the War. After the fall of the communist system, the ambition of these countries has been to restore the land ownership situation of 1939 as part of the restoration of a society based on the market economy system. Thus, Estonians and Latvians who had been living in other countries (e.g. Canada or Sweden) since the mid 1940s and their descendants have been offered the right to reclaim their property. This right seems to have been widely used in practice. The difference in comparison to the Czech situation is striking.

In his analysis of the views taken by the UN Human Rights Committee, primarily in the De Fours Walderode case, Professor Frowein finds that a distinction can be drawn between

persons who have shown loyalty to the state of Czechoslovakia during occupation and others. He does not find it correct to deduce from the view of the Committee that there should be a general claim for restitution for the latter, in reality the Germans and Hungarians who were forced to leave in 1945-46 (para 37). Obviously, a different view taken on this point would have far-reaching consequences.

In his conclusion nr 3 (page 30) Professor Frowein states:

“Even if one takes into account the views expressed by the United Nations Human Rights Committee, the Czech legislation, distinguishing as to restitution between those having shown loyalty to Czechoslovakia and therefore retaining citizenship, and others, cannot be put into question under European Union law, because the distinction is based on reasonable grounds.”

In my opinion, a few points should be added to this conclusion. Firstly, the cases on Czech restitution issues dealt with in international organs, e.g. the UN Human Rights Committee and the European Court of Human Rights, are quite recent and do not clarify all the issues involved. It seems very likely that new cases will come up in the future, possibly also in Czech courts, which will contribute to further clarification of the issues involved. Thus, I do not find it necessary, or even recommendable, for political institutions of the EU, to take any firm view on the reasonableness of the Czech restitution legislation.

Secondly, I would like to draw the attention to a particular point. Even if one accepts the distinction between those who showed loyalty to the Czechoslovak state during the War and others as a valid one in relation to restitution claims, the question remains if it possible under human rights law in force to accept the summary procedures practiced in Czechoslovakia in 1945 as the final word in all circumstances. As I have indicated in section 5 of my Opinion, *supra*, the harsh and radical enforcement of the Benes Decrees makes it very likely that persons, who did not fulfil the requirements to be covered by the decrees, also were hit by the confiscations and the expulsion.

EU law, as underlined in section 3, *supra*, is based on the rule of law and respect of the individual and his/her rights and access to courts. In the present context, it is not clarified if, and if so to what extent, there is or have been established in the Czech Republic adequate possibilities for individuals, who claim the Benes Decrees should not have been applied to their situation, to have their case impartially reexamined, preferably by courts. However, the

general information on the Czech restitution legislation of the 1990s, available to me, seems to indicate that there has not been established any such procedures. Rather, the ambition seems to have been to retain the full effects of the execution of these Decrees. I find this situation unsatisfactory.

In his conclusion nr 2 (page 30) Professor Frowein states:

“The limited Czech rules concerning restitution as to property confiscated under the Benes-Decrees cannot be put into question on the basis of European Union law because application for restitution is no longer possible today and European Union law applies only from the date of accession”.

In my opinion, this conclusion would need some qualification. Certainly, in line with previous accession treaties, the Accession Treaty with the Czech Republic will not give retroactive effect to the EU Treaties and the secondary *acquis communautaire*. However, the European Convention on Human Rights is fully applicable already today to the EU and the Member States as well as to the Czech Republic. In addition, fundamental humanitarian law is also embodied in the UN system (as demonstrated in the cases already heard by the UN Human Rights Committee, mentioned above) and in the common legal heritage of the European states. Thus, I cannot see that the forthcoming Accession Treaty would exclude the possibilities to put forward restitution claims based on human rights principles.

To conclude, in my opinion there is no need to link the forthcoming Accession Treaty to the restitution issues as a condition. I recommend the Treaty should neither exclude, nor affirm the existence of remaining restitution claims.

7. The Decrees on Criminal Law and Procedures

Based on the reasoning in paras 42-44 in his study Professor Frowein draws the conclusion nr 5 that:

“It must be ensured that in absentia judgements on the basis of the specific Decrees adopted in 1945 and thereafter cannot be enforced against persons who enter the Czech Republic after accession. If necessary, legislation must be adopted in that context.”

I fully support this view for the reasons given. In addition to the obvious fundamental rights problems involved one can point at the fact that the rules function as an obstacle to free movement of persons. Also, they lack proportionality.⁴

8. *The Exclusion of Criminal Responsibility on the Basis of the 1946 Law*

In the Czech Republic there is still in force a law of 1946 which prevents criminal proceedings to be taken against persons who have taken “just reprisals” for actions during the occupation. After careful consideration Professor Frowein comes to the conclusion that it would not be necessary for the EU to demand the repeal of the law as a condition for accession (conclusion nr 6).

According to the study it seems disputed within Czech legal circles whether the statute would cover crimes against humanity, e.g. especially brutal violations. However, as far as I can find from the information available, no cases of prosecution of such violations have been reported.

The very existence today of such a law in the statute book demonstrates the same hesitation to clean up the past as does certain aspects of the restitution legislation of the 1990s. This makes the situation unnecessarily sore. However, I am willing to accept the reasoning of Professor Frowein that there would not be necessary, 56 years later, to link firm demands for repeal of the law to the Accession Treaty as a condition.

9. *Minority Protection*

Within EU law and different international treaties standards of minority protection are clearly laid down. As Professor Frowein states in his conclusion nr 7, the Czech Republic as a member of the EU has to comply with these standards.

⁴ In case C-348/96, Donatella Calfa, [1999] ECR I-11, the ECJ has found Greek legislation non-acceptable under which expulsion for life followed automatically (except where there were strong family reasons) from the conviction of a non-national of a drugs offence, without any account taken to personal circumstances or the offenders' possible danger to public policy.

In my opinion, it is absolute obvious that this is the case. I refer to what I have written in section 3, *supra*, about the fundamental EU law on citizenship, discrimination and minorities.

It should be added that in case of accession to the EU of the Slovak Republic, that country will be under the same obligations, e.g. in relation to its Hungarian minority.

10. *Right to Return*

Expulsion in the proper sense includes not only a duty to leave but also a prohibition to return. Obviously the expulsion in 1945-46 was based on the principle that the people who were forced to leave should not be permitted to return. The harsh way in which the expulsion was executed and the following transition of Czechoslovakia into a communist state situated behind the “iron curtain” certainly reduced the interest in returning greatly. However, under present conditions and in the light of the forthcoming accession, it is an important issue whether or not the Benes Decrees still have remaining effects, restricting the possibilities for individuals belonging to the relevant groups or their descendants to return to the Czech Republic in order to settle there, work there, purchase real property in the country or establish business activity.

On this important point, the study by Professor Frowein does not contain information about the present situation. Most probably, it has not been available to him, as he states in his study that he has not had access to specific information about the state of the accession negotiations (para 12). However, I find it very important to stress that this matter must be fully investigated before an accession treaty is concluded. In this context I want to underline that discriminatory measures do not need to have the shape of outright prohibitions but also can find their expression in different restrictive measures taken. As is well-known there is full freedom within the EU to move between the Member States and to work, purchase real property and set up business activities in the other Member States.

In para 12 of his study Professor Frowein writes:

“The questions put in the mandate formulated by the European Parliament do not in any way indicate that the accession negotiations could envisage any distinction among citizens of the European Union after accession. Indeed, it should be stressed that this would be a fundamental breach with European Union traditions and might even give rise to legal challenge as a discriminatory provision not in line with the general constitutional principles on which the European Union has been established.”

In conclusion 8 Professor Frowein states that his opinion is based on the understanding that from accession all European Union citizens have equal rights in the territory of the Czech Republic.

I share these conclusions. It is possible to agree on proportionate transitory provisions in the Accession Treaty on limitations in the rights of EU citizens from other Member States to settle, work, conduct business and purchase real property in the Czech Republic. However, it is absolutely necessary that these provisions are non-discriminatory, e.g. do not put any particular group of European citizens in a special, unfavourable position.

11. *Conclusions*

In my opinion I give a very favourable general assessment of Professor Frowein’s study (section 4).

I recall that the study and my opinion do not cover the Europé Agreement presently in force.

I also recall the fundamental EU law on citizenship, discrimination and minorities and its importance in the present context (section 3).

I strongly question the legality of the Benes Degrees under international law but support Professor Frowein’s basic conclusion (nr 1). See Section 5.

I discuss the restrictive Czech rules on restitution. I make certain additions, which I find important, to Professor Frowein’s conclusions n:ris 2 and 3. My viewpoints relate primarily to the relation to fundamental humanitarian law. I refer to section 6 of my opinion. I see no need to link the forthcoming Accession Treaty to the restitution issues as a condition. I recommend the Treaty should neither exclude, nor affirm the existence of remaining restitution claims.

I support Professor Frowein’s conclusion nr 5 on the decrees on criminal law and procedures and his conclusion nr 6 on the exclusion of criminal responsibility on the basis of the 1946 law.

I support his conclusion nr 7 on minority protection.

I want to draw special attention to Professor Frowein's final conclusion nr 8 and what I have written in my opinion on this point in section 10. The provisions of the forthcoming Accession Treaty have to be non-discriminatory, e.g. must not put any particular group of European citizens in a special, unfavourable position.

Stockholm, Oct. 1, 2002

Ulf Bernitz