

The Beneš Decrees and the EU Charter of Fundamental Rights

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Introduction

Within the last week, the President of the Czech Republic has raised the question as to whether the entry into force of the Treaty of Lisbon, in particular the binding force of the EU's Charter of Fundamental Rights, could lead to legal challenges against Czech laws dating from the 1940s concerning confiscation of property (the 'Beneš Decrees'). The question of the European Court of Justice's jurisdiction over such claims has also been raised. Finally, there has also been discussion of the form any legal guarantee relating to this issue might take.

To address these points, this analysis therefore addresses four issues in turn:

- 1) What is the scope of the EU Charter of Fundamental Rights?
- 2) Does the scope of EC law include the Beneš Decrees?
- 3) Does the jurisdiction of the European Court of Justice extend to direct claims against Member States?
- 4) What legal method could be used to confirm that the Beneš Decrees cannot be challenged pursuant to the Charter of Rights?

Summary

The conclusions on the four key points are as follows:

- 1) The EU Charter of Fundamental Rights only applies where there is a link to EC/EU law; therefore it does not apply to all potential human rights claims;
- 2) The Beneš Decrees clearly fall outside the (temporal) scope of EU law, given that they were adopted nearly sixty years before the Czech Republic joined the EU; they can therefore not be challenged in light of the EU Charter of Fundamental Rights;
- 3) The European Court of Justice has no jurisdiction over direct claims by individuals against Member States, even as regards human rights;
- 4) The legal position regarding the Beneš Decrees can be confirmed by a Decision of the Heads of State and Government of the EU, which would be valid and legally binding; the substance of this Decision could subsequently be added to the Treaties in the form of a Protocol, which could take retroactive effect (ie, from the date of entry into force of the Treaty of Lisbon).

1) What is the scope of the EU Charter of Fundamental Rights?

The EU Charter of Fundamental Rights was agreed in December 2000. It contains fifty Articles recognising certain human rights, along with four 'general provisions'

(Arts 51-54) concerning the scope and interpretation of the Charter. As it currently stands, the Charter is not legally binding.

However, there are already rules relating to human rights protection within the scope of EU law. Human rights form part of the 'general principles' of EU law, as first recognized in the case law of the EU's Court of Justice. Since 1993 this has been expressly recognized in the EU Treaty (current Article 6(2)):

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

According to the consistent case law of the Court of Justice, the general principles apply to the validity and to the interpretation of EU law, and also to the Member States, but only when they are acting within the scope of EU law, either to implement an EU obligation or to derogate from an EU obligation. The Court of Justice has many times refused to rule on human rights arguments that are not sufficiently linked to EU law (see further below).

The Lisbon Treaty would, if ratified, make the Charter of Fundamental Rights, as amended in 2007, legally binding, by means of the amended Article 6(1) of the Treaty on European Union (OJ 2008 C 115):

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter **shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter**, that set out the sources of those provisions [*emphasis added*].

The amended version of the Charter of Rights would not change the substance of the rights set out in the first fifty Articles of the Charter. However, there would be some amendments to the 'general provisions' of the Charter. It should also be noted that, according to the revised TEU, the Charter would have to be interpreted in accordance with these general provisions (see the underling words above).

The most important general provision is Article 51 of the Charter, which defines its scope. Article 51 of the **current** Charter reads as follows (OJ 2000 C 364):

Article 51

Scope

1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the

Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

Article 51 of the revised Charter would read, as follows, after amendments (OJ 2007 C 303):

Article 51
Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

The new words which would be added to the Charter have been underlined. It can be seen that the revised Charter would not widen its scope, but rather confirms its application to Member States ‘only when they are implementing Union law’. Moreover, the revised wording of Article 51 would clarify that the Charter does not ‘extend the field of application of Union law’ beyond the EU’s powers.

Furthermore, as seen above, the revised Article 6(1) of the TEU provides that the revised Charter ‘shall be interpreted...with due regard to the explanations referred to in the Charter.’ The explanations relating to Article 51 of the revised Charter provide that (OJ 2007 C 303):

[Article 51] seeks to establish clearly that the Charter **applies primarily to the institutions and bodies of the Union**, in compliance with the principle of subsidiarity. This provision was drafted in keeping with Article 6(2) of the Treaty on European Union...

As regards the **Member States**, it follows unambiguously from the case-law of the Court of Justice that **the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law** (judgment of 13 July 1989, Case 5/88 *Wachauf* [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 *ERT* [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 *Annibaldi* [1997] ECR I-7493). The Court of Justice confirmed this case-law in the following terms: ‘In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules ...’ (judgment of 13 April 2000, Case C-292/97 [2000] ECR I-2737, paragraph 37 of the grounds).

Paragraph 2, together with the second sentence of paragraph 1, confirms that the Charter may not have the effect of extending the competences and tasks which the Treaties confer on the Union... The fundamental rights as guaranteed in the Union do not have any effect other than in the context of the powers determined by the Treaties.

Paragraph 2 also confirms that the Charter may not have the effect of extending the field of application of Union law beyond the powers of the Union as established in the Treaties. The Court of Justice has already established this rule with respect to the fundamental rights recognised as part of Union law (judgment of 17 February 1998, C-249/96 *Grant* [1998] ECR I-621, paragraph 45 of the grounds). In accordance with this rule, it goes without saying that the reference to the Charter in Article 6 of the Treaty on European Union cannot be understood as extending by itself the range of Member State action considered to be ‘implementation of Union law’ (within the meaning of paragraph 1 and the above-mentioned case-law) [*emphasis added*].

The explanations to the Charter clearly confirm that its scope of application is identical to that of the general principles, namely that the Charter, like the general principles, only applies to Member States where they are implementing or derogating from EU law. In other words, the Charter does not apply to all acts of Member States. There must be a link to EU law in order for the Charter to apply.

In fact, the question of the scope of the current Charter has already been interpreted by the Court of Justice on a number of occasions. In Case C-328/04 *Attila Vajnai* ([2005] ECR I-8577), a Hungarian court asked the Court of Justice whether a national ban on wearing symbols linked to Communism breached EC law, in particular as regards fundamental rights. The Court of Justice replied that it had no jurisdiction to deal with the case (emphasis added):

10 In order to verify whether the Court has jurisdiction it is necessary to consider the subject-matter of the question.

11 By its question, the national court asks, essentially, whether the principle of non-discrimination, Article 6 EU, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22) or Articles 10, 11 and 12 of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1) preclude a national provision, such as Article 269/B of the Hungarian Criminal Code, which imposes sanctions on the use in public of the symbol in question in the main proceedings.

12 According to settled case-law, where national provisions fall within the field of application of Community law the Court, on a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of those provisions with the fundamental rights whose observance the Court ensures (Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 15).

13 By contrast, the Court has no such jurisdiction with regard to national provisions outside the scope of Community law and when the

subject-matter of the dispute is not connected in any way with any of the situations contemplated by the treaties (see *Kremzow*, paragraphs 15 and 16).

14 It is clear that Mr Vajnai's situation is not connected in any way with any of the situations contemplated by the provisions of the treaties and the Hungarian provisions applied in the main proceedings are outside the scope of Community law.

15 In those circumstances, it must be held, on the basis of Article 92(1) of the Rules of Procedure, that the Court clearly has no jurisdiction to answer the question referred by the Fővárosi Bíróság.

In Case C-361/07 *Polier* (order of 16 Jan. 2008, unreported), a French court asked the Court of Justice whether EC law, including the Charter (see para. 7 of the order), precluded French rules on unfair dismissal. The Court ruled that this issue was outside the scope of EC law (the text of the order is not available in English):

10 Il est de jurisprudence constante que, lorsqu'une réglementation nationale entre dans le champ d'application du droit communautaire, la Cour, saisie à titre préjudiciel, doit fournir tous les éléments d'interprétation nécessaires à l'appréciation, par la juridiction nationale, de la conformité de cette réglementation avec le droit communautaire dont elle assure le respect (arrêt du 29 mai 1997, *Kremzow*, C-299/95, Rec. p. I-2629, point 15; ordonnances du 6 octobre 2005, *Vajnai*, C-328/04, Rec. p. I-8577, point 12, et du 25 janvier 2007 *Kovalský*, C-302/06, non publiée au Recueil, point 19).

11 En revanche, la Cour ne dispose pas d'une telle compétence lorsque, d'une part, l'objet du litige au principal ne présente aucun élément de rattachement au droit communautaire et, d'autre part, la réglementation dont l'interprétation est demandée ne se situe pas dans le cadre du droit communautaire (voir arrêt *Kremzow*, précité, points 15 et 16, ainsi que ordonnances précitées *Vajnai*, point 13, et *Kovalský*, point 20).

12 Or, la juridiction de renvoi n'a nullement explicité la raison pour laquelle la situation de M. Polier serait susceptible de se rattacher au droit communautaire.

13 Bien que la protection des travailleurs en cas de résiliation du contrat de travail soit l'un des moyens pour atteindre les objectifs fixés par l'article 136 CE et que le législateur communautaire soit compétent dans ce domaine, selon les conditions fixées à l'article 137, paragraphe 2, CE, des situations qui n'ont pas fait l'objet de mesures adoptées sur le fondement de ces articles ne relèvent pas du champ d'application du droit communautaire.

14 En effet, contrairement aux situations prévues notamment par la directive 80/987/CEE du Conseil, du 20 octobre 1980, relative à la protection des travailleurs salariés en cas d'insolvabilité de l'employeur (JO L 283, p. 23), telle que modifiée par la directive 2002/74/CE du Parlement européen et du Conseil, du 23 septembre 2002 (JO L 270, p. 10); ainsi que par les directives 91/533/CEE du Conseil, du 14 octobre 1991, relative à l'obligation de l'employeur d'informer le travailleur des conditions applicables au contrat ou à la relation de travail (JO L 288, p. 32); 98/59/CE du Conseil, du 20 juillet 1998, concernant le rapprochement des législations des États membres relatives aux licenciements collectifs (JO L 225, p. 16), et 2002/14/CE du

Parlement européen et du Conseil, du 11 mars 2002, établissant un cadre général relatif à l'information et la consultation des travailleurs dans la Communauté européenne (JO L 80, p. 29), la situation du demandeur au principal, telle que décrite par la juridiction de renvoi, caractérisée par la rupture du contrat de travail de ce dernier en l'absence de communication du motif de son licenciement ainsi que par le non-respect de la procédure ordinaire de licenciement, n'est pas régie par le droit communautaire.

This order is striking because the Court points out that the Community has the competence to adopt rules on the dismissal of workers, and had even exercised that competence as regards several specific aspects of labour law. Nevertheless, the Community had not exercised its competence in order to adopt *general* rules on the dismissal of workers, and Mr. Polier's case did not fall within one of the specific areas where the EC had legislated on this issue. Therefore it was outside the scope of EC law, and the Court had no jurisdiction to give a ruling on the general principles or the Charter.

In Case C-217/08 *Mariano* (order of 17 March 2009, unreported), an Italian court asked the Court of Justice if EC anti-discrimination rules, **including the Charter** (see para 9 of the order), precluded national law drawing a distinction between different types of beneficiaries following death. Having ruled that the issue was outside the scope of EC anti-discrimination law, the Court of Justice referred to the Charter as follows (again, there is no English version available):

29 L'évocation de la charte des droits fondamentaux ne saurait pas davantage venir au soutien d'une conclusion tendant à faire entrer la présente affaire dans le champ d'application du droit communautaire. À cet égard, il suffit de rappeler que, conformément à l'article 51, paragraphe 2, de ladite charte, cette dernière ne crée aucune compétence ni aucune tâche nouvelles pour la Communauté européenne et pour l'Union et ne modifie pas les compétences ainsi que les tâches définies par les traités. De même, conformément à l'article 52, paragraphe 2, de la même charte, les droits reconnus par celle-ci qui trouvent leur fondement dans les traités communautaires ou dans le traité sur l'Union européenne s'exercent dans les conditions et limites définies par ceux-ci.

In this case the Court explicitly relies upon Article 51(2) of the Charter to rule that since the issue is outside the scope of Union law, it is therefore also outside the scope of the Charter. Although this case concerns the current Charter, it should be recalled that the amended version of the Charter, which would come into force if the Lisbon Treaty is ratified, has even stronger wording in this respect (see above).

Other recent cases which have confirmed the limits to the scope of the general principles (and, by analogy, the Charter), are Case C-287/08 *Savia* (order of 3 Oct. 2008, unreported), Case C-535/08 *Pignataro* (order of 26 March 2009, unreported), and Case C-302/06 *Kowalsky* (order of 25 Jan. 2007, unreported), a reference from a Slovakian court on the right to property (again, the text of the order is not available in English):

18 Selon une jurisprudence constante (voir, notamment, avis 2/94 du 28 mars 1996, Rec. p. I-1759, point 33), les droits fondamentaux font partie intégrante des principes généraux du droit dont la Cour assure le respect. La convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales revêt, à cet égard, une signification particulière (voir,

notamment, arrêts du 18 juin 1991, ERT, C-260/89, Rec. p. I-2925, point 41, et du 29 mai 1997, Kremzow, C-299/95, Rec. p. I-2629, point 14, et du 18 décembre 1997, Annibaldi, C-309/96, Rec. p. I-7493, point 12). Ces principes ont, au demeurant, été repris à l'article 6, paragraphe 2, UE, aux termes duquel l'Union respecte les droits fondamentaux, tels qu'ils sont garantis par ladite convention, et tels qu'ils résultent des traditions constitutionnelles communes aux États membres, en tant que principes généraux du droit communautaire.

19 Il est de jurisprudence constante que, lorsqu'une réglementation nationale entre dans le champ d'application du droit communautaire, la Cour, saisie à titre préjudiciel, doit fournir tous les éléments d'interprétation nécessaires à l'appréciation, par la juridiction nationale, de la conformité de cette réglementation avec les droits fondamentaux dont elle assure le respect (arrêt Kremzow, précité, point 15, et ordonnance du 6 octobre 2005, Vajnai, C-328/04, Rec. p. I-8577, point 12).

20 En revanche la Cour n'a pas cette compétence à l'égard d'une réglementation qui ne se situe pas dans le cadre du droit communautaire et lorsque l'objet du litige ne présente aucun élément de rattachement au droit communautaire (voir arrêt Kremzow, précité, point 16, et ordonnance Vajnai, précitée, point 13).

21 Or, il ressort de la décision de renvoi, que les questions posées ne concernent nullement l'interprétation du traité, ni celle d'un acte pris par une institution de la Communauté.

22 De même, la situation des requérant et intervenants au principal ne relève aucunement du champ d'application du droit communautaire. En effet, le juge national n'a pas établi en quoi la situation d'un propriétaire, dont le terrain est occupé par des installations électriques et qui, en contrepartie de cette occupation, demande le versement d'une somme à titre de compensation, peut se rattacher au droit communautaire.

23 Dans ces conditions, il y a lieu de constater, sur le fondement de l'article 92, paragraphe 1, du règlement de procédure, que la Cour est manifestement incompétente pour répondre aux questions posées par le Krajský súd v Prešove.

The *Kowalsky* case confirms that the Court's rulings on the limited scope of the general principles and the Charter are equally relevant as regards disputes concerning the right to property.

In conclusion, it can be seen that the EU Charter of Fundamental Rights does not have a universal scope, but rather applies only where a dispute falls within the scope of EC law.

This is furthermore the interpretation of the Czech constitutional court, in its Nov 2008 ruling on the Lisbon Treaty, at para 191:
<http://angl.concourt.cz/angl_verze/doc/pl-19-08.php>

Therefore, the obvious next question is whether the Beneš Decrees fall within the scope of EC law.

2) Does the scope of EC law include the Beneš Decrees?

A decision by a Member State after its membership of the European Union to expropriate the property of nationals of other Member States would undoubtedly fall within the material scope of EC law as regards the free movement of capital, and probably also the freedom of establishment.

The obvious question however, is whether such a decision taken before a Member State joined the EU falls within the temporal scope of EU law.

The Court of Justice has ruled several times on this issue. As regards the 1995 enlargement (of Austria, Sweden, and Finland), the Court was asked whether it had jurisdiction to rule on acts which occurred in Sweden before that State acceded to the EU, and also whether Sweden was bound by EC law when the relevant acts occurred (Case C-321/97 *Andersson* [1999] ECR I-3551). The Court ruled as follows:

31. The jurisdiction of the Court of Justice covers the interpretation of Community law, of which the EEA Agreement forms an integral part, as regards its application in the new Member States with effect from the date of their accession.

32. In this case, the Court has been asked to rule directly on the effects of the EEA Agreement, within the national legal system of which the referring court forms part, during the period prior to accession.

33. Accordingly, the Court has no jurisdiction to reply to the first question. ...

43. In view of the fact that in the main case those two events occurred prior to the accession of the Kingdom of Sweden to the European Union, since the last of them, that is to say the declaration of insolvency, occurred on 17 November 1994, individuals cannot rely on Directive 80/987 in order to set aside the application of certain provisions of national law (*Suffritti*, paragraph 12). Similarly, they cannot rely on a breach of Community law in order to establish liability on the part of the State.

44. The Court has held that it is only where a Member State has not correctly implemented a directive on the expiry of the period prescribed for its implementation that individuals may, on certain conditions, assert before the national courts rights which they derive directly from the provisions of that directive (*Suffritti*, paragraph 13).

45. Likewise, it is only where the events giving rise to the operation of the guarantee provided for in Directive 80/987 occurred after the expiry of the time-limit for transposing the directive that incorrect, or late, transposition may be relied on in order to found liability on the part of the State for damage caused to individuals.

46. The reply to the third question must therefore be that Community law does not enable individuals to rely before the courts or tribunals of an EFTA State which has acceded to the European Union on rights derived directly from Directive 80/987, or for that State to be held liable for damage caused to them by failure to transpose the directive correctly, where the events

which give rise to the operation of the guarantee provided for in the directive occurred prior to the date of accession.

This case was followed, as regards Austria, by Case C-300/01 *Salzmann* [2003] ECR I-4899, in which the Court of Justice ruled that it did not have jurisdiction to answer the questions relating to the application of EC law in Austria before membership of the EU.

Subsequently, following the enlargement of the EU in 2004 to include a further ten Member States, including the Czech Republic, a Hungarian court similarly asked the Court of Justice about the interpretation of an EC Directive as regards acts which occurred before that Member State joined the EU (Case C-302/04 *Ynos* [2006] ECR I-371). The Court of Justice replied as follows:

- 34 According to the order for reference, by its first and second questions the Szombathelyi Városi Bíróság is seeking an interpretation by the Court of Article 6(1) of the Directive for the purposes of assessing the scope of rules of national law.
- 35 It must, however, be pointed out that the order for reference states that the facts in the main proceedings occurred before the Republic of Hungary acceded to the European Union.
- 36 The Court has jurisdiction to interpret the Directive only as regards its application in a new Member State with effect from the date of that State's accession to the European Union (see, to that effect, Case C-321/97 *Andersson and Wåkerås-Andersson* [1999] ECR I-3551, paragraph 31).
- 37 In this case, as the facts of the dispute in the main proceedings occurred prior to the accession of the Republic of Hungary to the European Union, the Court does not have jurisdiction to interpret the Directive.
- 38 In the light of the foregoing, the answer to the third question referred for a preliminary ruling must be that, in circumstances such as those of the dispute in the main proceedings, the facts of which occurred prior to the accession of a State to the European Union, the Court does not have jurisdiction to answer the first and second questions.

Further case law of the Court of Justice relating to the temporal scope of EC law following new accessions includes Case C-64/06 *Telefonica* ([2007] ECR I-4887) a reference from the Czech courts, in which the Court ruled that it had jurisdiction because acts adopted prior to accession were followed up by post-accession acts, which were the subject of the case. On the other hand, the Court did not have jurisdiction to rule on disputes concerning Polish or Hungarian application of EC law before those States' accession to the EU: see *the orders of 6 March 2007 in Case C-168/06 Ceramika Paradyż* and of 9 Feb. 2006 in Case C-261/05 *Lakep* (both unreported).

It must be concluded that any dispute concerning the Beneš decrees is outside the temporal scope of Community law, and therefore outside the scope of the Charter of Fundamental Rights (whether or not it is given legal effect by the Treaty of Lisbon) as well as the general principles of Community law. It follows that the Charter cannot be used in order to challenge the legality of the Beneš decrees.

It should be added that the European Court of Human Rights has also found that the Beneš decrees are outside the temporal scope of its jurisdiction, in the judgment of *Prince Hans Adam II v Germany* (Reports of Judgments and Decisions 2001-VIII):

85. As regards this preliminary issue, the Court observes that the expropriation had been carried out by authorities of the former Czechoslovakia in 1946, as confirmed by the Bratislava Administrative Court in 1951, that is before 3 September 1953, the date of entry into force of the Convention, and before 18 May 1954, the date of 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*, cited above, and the Commission's case-law, for example, *Mayer and Others v. Germany*, nos. 18890/91, 19048/91, 19049/91, 19342/92 and 19549/92, Commission decision of 4 March 1996, DR 85-A, p. 5).

The Court would add that in these circumstances there is no question of a continuing violation of the Convention which could be imputable to the Federal Republic of Germany and which could have effects as to the temporal limitations of the competence of the Court (see, *a contrario*, *Loizidou* (merits), cited above, p. 2230, § 41).

Finally, it should be noted that the substantive rights set out in the Charter are largely, if not entirely, found in the general principles of Community law. This has been confirmed by the Court of Justice, for instance in Case C-540/03 *EP v Council* [2006] ECR I-5769:

38 The Charter was solemnly proclaimed by the Parliament, the Council and the Commission in Nice on 7 December 2000. While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter. Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court ... and of the European Court of Human Rights'.

The right to property is already recognized as a right protected within the context of the general principles of EC law: see, for instance Case C-84/95 *Bosphorus Airways* [1996] ECR I-3953.

It therefore follows that in any event the entry into force of the Treaty of Lisbon (making the Charter legally binding) **would not alter the current legal position has regards the protection of the right to property in the EC legal order.** In other words, if a dispute concerning the Beneš Decrees fell within the scope of EU law, the **Court of Justice would already have jurisdiction to rule on the Beneš Decrees** as regards the general principles of EC law, so the Court **would not get any greater jurisdiction** if the Charter became legally binding following the entry into force of the new Treaty. So the **non-ratification of the Treaty of Lisbon**

would not ensure any greater protection for the Beneš Decrees from legal challenge. But of course, as already pointed out, the Beneš Decrees do not fall within the scope of EC/EU law, whether the Treaty of Lisbon comes into force or not.

3) Does the jurisdiction of the Court of Justice extend to direct claims against Member States?

It has apparently been suggested that following the entry into force of the Treaty of Lisbon, the Court of Justice would have jurisdiction to hear claims brought against the Czech Republic in respect of the Beneš Decrees, bypassing the national courts. This is clearly not correct.

As matters stand, the EU courts have no jurisdiction to hear claims brought by an individual directly against a Member State. All claims by an individual against a Member State must be brought through the national courts of each Member State, which have the possibility to refer questions raised in such cases to the Court of Justice (Article 234 EC). Member States can only be sued directly in the EU courts by each other, or by the Commission (Articles 226 and 227 EC).

There are several cases a year brought before the EU courts where individuals are suing Member States, but the EU's Court of First Instance always rules these cases inadmissible. For example, just examining cases brought by individuals against Member States so far in 2009, the following cases have all been ruled inadmissible in recent months:

T-48/09	<i>Poleev v Germany</i>	order of 21 April 2009
T-66/09	<i>Ayyanarsamy v Germany</i>	order of 19 March 2009
T-75/09	<i>Sălăjan v Romania</i>	order of 6 March 2009
T-100/09	<i>Ali v HM Treasury [UK]</i>	order of 30 April 2009
T-105/09	<i>Polanec v Slovenia</i>	order of 31 March 2009
T-185/09	<i>Bennett v France</i>	order of 5 June 2009
T-187/09	<i>Kissi v Belgium</i>	order of 2 June 2009
T-252/09	<i>Dehn v UK</i>	order of 13 July 2009
T-266/09	<i>Ivanov v Italy</i>	order of 17 July 2009
T-267/09	<i>Searson v Ireland</i>	order of 24 July 2009
T-334/09	<i>Roman v Romania</i>	order of 11 Sept 2009

The Treaty of Lisbon would make a number of changes to the jurisdiction of the EU courts, but it would not in any way give the EU courts jurisdiction over claims by individuals against Member States. Individuals would still have to bring claims against Member States through national courts (see Articles 251-281 TFEU, and particularly Article 267 TFEU).

The amendments to Article 6 of the TEU which would be made by the Treaty of Lisbon, and the parallel amendments to the Charter, do not give any special jurisdiction to the Court of Justice to hear direct claims against Member States as regards human rights. This is confirmed by the explanation of Article 47 of the Charter:

The inclusion of this precedent in the Charter [concerning the right to a fair trial] has not been intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to admissibility for direct actions before the Court of Justice of the European Union. The

European Convention has considered the Union's system of judicial review including the rules on admissibility, and confirmed them while amending them as to certain aspects, as reflected in Articles 251 to 281 of the Treaty on the Functioning of the European Union, and in particular in the fourth paragraph of Article 263. Article 47 applies to the institutions of the Union and of Member States when they are implementing Union law and does so for all rights guaranteed by Union law.

It must therefore be pointed out that neither the existing treaties nor the Treaty of Lisbon give any jurisdiction to the Court of Justice to hear direct claims against Member States, in particular as regards human rights. Moreover, even if the Court did gain such jurisdiction over such claims, it would not, for the reasons explained above, have jurisdiction to rule on the Beneš Decrees.

4. What legal method could be used to confirm that the Beneš Decrees cannot be challenged pursuant to the Charter of Rights?

Following the vote against the Treaty of Lisbon in the first Irish referendum of 2008, the EU leaders' summits (the European Council) decided to address the issues which were described by the Irish government as giving concern to the Irish people. Legally, the measures taken to give effect to these 'guarantees' took several different forms:

- a) a **political commitment** by the European Council to take a decision, once the Treaty of Lisbon comes into force, to provide that each Member State has a Commissioner;
- b) a **declaration** by the European Council relating to workers' rights, social policy and public services;
- c) a **declaration by Ireland** relating to defence; and
- d) a **Decision of the Heads of State and government (NOT a declaration)**, meeting within the European Council, relating to three specific issues: the right to life, family and education; tax issues; and defence.

While political commitments and declarations are not legally binding, the EU leaders on the other hand explicitly stated that the **Decision** on issues of abortion, neutrality and taxation **was legally binding**, in paragraph 5(iii) of the conclusions of the June 2009 European Council:

(iii) the Decision is legally binding and will take effect on the date of entry into force of the Treaty of Lisbon...

They also made a political commitment to attach the substance of this Decision to the Treaties at the time that the next EU accession treaty is ratified. Since the EU has in the meantime relaunched accession talks with Croatia, it seems likely that the next accession treaty will be signed in 2010, and will enter into force in 2011 or early in 2012.

In a separate analysis of the guarantees offered to Ireland, it is observed that:

- a) the Decision is legally binding;
- b) the Decision forms a type of simplified international treaty;
- c) that the Decision did not amend the main Treaties (since it was not adopted in the form of a Treaty amendment); and

- d) that therefore in the event of conflict between the Treaties and the Decision, the main Treaties would take precedence.

However, in the case of the Irish guarantees, there was no issue of conflict between the Treaties and the Decision, because the Decision was consistent with the Treaties.

Equally, a **Decision of the Heads of State and Government** of the Member States, meeting within the European Council, could **confirm that:**

- a) **the Charter of Fundamental Rights would not apply to acts carried out before Member States joined** the European Union; and
- b) the Treaty of Lisbon and the Charter **would not confer jurisdiction** upon the EU courts to hear **claims by individuals directly against Member States.**

Just like the Decision relating to Ireland, such a Decision would be legally binding. While the Treaties would take precedence over such a Decision in the event of conflict, for the reasons set out above, there **would be no conflict** between such a Decision and the Treaties, since this Decision would confirm the legal position that would anyway apply.

It could also be agreed, as in the Irish case, to **attach the substance of such a Decision to the Treaties in the form of a Protocol**, when the next accession treaty is ratified.

There might be a concern about a possible legal gap, given that there would be some time in between the entry into force of the Treaty of Lisbon and the entry into force of the amending Protocol. To address that concern, **the Protocol could take effect retroactively**, ie as from the date from when the Treaty of Lisbon enters into force. (So could the Protocol relating to the Irish guarantees, for that matter).

Finally, if the view is strongly held that the Decision of the Heads of State and Government is legally insufficient, **the agreement to sign and ratify the Protocol with retroactive effect would nevertheless be sufficient** to address **any possible legal concerns** about this issue.

It would also be possible to agree to sign and begin the process of ratifying this Protocol **before the next accession Treaty is signed**, and to set a **deadline for ratification** of the Protocol, although the deadline itself would not be legally binding.

If there is any remaining doubt about the legal effect of a Decision and/or a Protocol, or of the position as regards the legality of the Beneš Decrees if the Charter of Rights became binding, it might be possible as a matter of Czech constitutional law to ask the **national constitutional court** to rule definitively on the issue. The constitutional court could also possibly be asked to confirm that if the EU courts did ever rule against the legality of the Beneš Decrees, that the EU would have exceeded its competence and such a decision could not be recognised in the Czech Republic (see by analogy para 120, third indent, of the Nov 2008 judgment of the Czech constitutional court on the Lisbon Treaty, as regards EU competences, online at: http://angl.concourt.cz/angl_verze/doc/pl-19-08.php)

The constitutional court could also, if necessary, and if it is possible as a matter of national constitutional law, be asked to address the question of whether, once a treaty is approved by the national parliament, the President is under an obligation to ratify it - and what the consequences are if he does not do so.

Sources:

Analysis of Irish Treaty guarantees, June 2008:

<http://www.statewatch.org/news/2009/jun/lisbon-ireland.pdf>

Treaty guarantees for Ireland, June 2008:

<http://www.statewatch.org/news/2009/jun/ireland-june-2009.pdf>

Treaty of Lisbon:

<http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML>