| Chapter 1 |

Human Rights Aspects of the Acquisition of Agricultural Lands With Special Regard to the ECtHR Practice Concerning the So-Called "Visegrád Countries", Romania, Slovenia, Croatia, and Serbia

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ABSTRACT

The aim of the current study is to examine how the national legal rules and judicial practice regarding the acquisition and holding of agricultural land are, in the case law of the European Court of Human Rights, linked to the right to property and the right to fair trial, as granted by Article 1 of the First Protocol to the European Convention on Human Rights and Article 6 (1) of the Convention. The study is focused on the land-related issues of the so-called "Visegrád Countries"—Czech Republic, Hungary, Poland and Slovakia—and some other selected neighboring countries, namely Romania, Slovenia, Croatia, and Serbia, all of which are member states of the Council of Europe. The author identified two main categories of legal issues, which are relevant in the selected countries or constitute a distinctive feature of these countries. The category of compensation-related cases can be divided into three main subcategories: cases where the compensation system established by the state after the change of regime displayed systematic shortcomings; cases where the earlier proprietors' or their heirs' interests clashed with those of third parties who acquired the property in good faith; and the so-called Slovakian "Gardener cases," as the author named them, which display similarities with the second subcategory. The other main category is the issue of agricultural land acquisition by foreign natural or legal persons. However, the ECtHR's case law is not that elaborated in this question as the case law of the Court of Justice of the European Union, since, contrary to EU law—which as a rule obliges member states to provide the free disposal of agriculture land—Article 1 of Protocol No. 1 does not create a right to acquire property. However, a national legislation that, alone among the CoE member states, implemented land reform programs with some blanket restrictions on the sale of agricultural land is incompatible with the provisions of Article 1 of Protocol No. 1.

KEYWORDS

agricultural land, right to property, compensation, legal entity, foreigners

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Introduction

The aim of the current study is to examine how the national legal rules and judicial practice regarding the acquisition and holding of agricultural land are, in the case law of the European Court of Human Rights (hereinafter: ECtHR), linked to two human rights, namely the *right to property* and the *right to fair trial,* as granted by Article 1 of the *First Protocol* (hereinafter: Article 1 of Protocol No. 1) to the European Convention on Human Rights (hereinafter: ECHR) and Article 6 (1) of the ECHR. The study is focused on the land-related issues of the so-called "Visegrád Countries"—Czech Republic, Hungary, Poland, and Slovakia—and some other selected neighboring countries, namely Romania, Slovenia, Croatia, and Serbia (hereinafter: the selected states), all of which are member states of the Council of Europe (hereinafter: CoE).

Studying this topic in relation to the selected states can be relevant for certain reasons. For example, up to this date, selected states have already implemented a thorough revision of their land regimes twice: first, after the change of regime, they implemented a market-oriented land model based on private property; second, some 10–15 years later, they had to legislate again to ensure the conformity of their agricultural land-related rules with the law of the European Union (hereinafter: EU). The latter reform process is still in progress in some of the selected countries.[1] Another reason that renders the topic worth studying is that institutions and bodies of the EU, as well as scholars and international institutions, are involved in a—to say the least—vivid debate about the sustainability of the current market-oriented regulation of the EU. Some argue that it would be better if the member states had larger space to maneuver, so that they can decide on the conditions of trading in their arable lands.[2] The author of the current study believes that an analysis focused on the ECtHR case law may contribute to this debate, even though the debate is rather an EU-level one.

After studying the agricultural land-related case law of the ECtHR regarding the selected countries, the author identified two main categories of legal issues that are relevant in the selected countries or that constitute a distinctive feature of these countries. The first main category comprised compensation-related cases that constitute the vast majority of agricultural land-related cases in the selected countries. This is attributable to the common historic heritage[3] of such countries, namely that after World War II they all became part of what became known as the Eastern Bloc under communist control, imposed on them by the Soviet Union. Sooner or later private agricultural lands were nationalized in each of these countries either by *de jure* confiscation of the

1 Papik, 2017, pp. 146–159.

2 ECOSOC, NAT/632, Brussels, 21 January 2015.; Directorate-General for Internal Policies of the Union: Extent of Farmland Grabbing in the EU, 2015.; EP: Report on the state of play of farmland concentration in the EU: how to facilitate the access to land for farmers; Szilágyi, 2015, pp. 96–102.; European Commission Interpretative Communication on the Acquisition of Farmland and European Union Law (2017/C 350/05).

3 See, among others, Raisz, 2014.

ownership title or by *de facto* deprivation. The latter meant that while the owners were allowed to retain their title as owners, in practice, they were deprived of the possibility to dispose of their lands. The category of compensation-related cases can be divided into three main subcategories: (i) cases where the compensation system established by the state after the change of regime displayed systematic shortcomings and, in some instances, triggered the so-called "pilot judgment procedure," as in the *Maria Atanasiu and Others v. Romania* and the *Manushaqe Puto and Others v. Albania cases*; (ii) cases where the earlier proprietors' or their heirs' interests clashed with the interests of third parties who acquired the property in good faith, as in the *Pincová and Pinc* case; and (iii) the so-called Slovakian "Gardener cases," as the author named them, which display similarities with the second subcategory. The *Urbárska obec Trenčianske Biskupice v. Slovakia* case marked the emergence of several cases with almost identical statement of facts, including the *Šefčíková v. Slovakia*, the *Salus v. Slovakia*, the *Silášová and Others v. Slovakia*, and the *Jenisová v. Slovakia* cases.

The other main category is the issue of agricultural land acquisition by foreign natural or legal persons. However, the ECtHR's case law is not that elaborated in this question as the case law of the *Court of Justice of the European Union* (hereinafter: CJEU). This is attributable to the fact that while the right to acquire, use, or dispose of agricultural land falls under the free movement of capital principles set out in Article 63 of the *Treaty on the Functioning of the European Union* (hereinafter: TFEU), thus EU law, as a rule, obliges member states to provide the free disposal of agriculture land, and Article 1 of Protocol No. 1 (as it is elaborated on in detail below) does not create a right to acquire property. Thus, as a rule, a possible application claiming that a violation of Article 1 of Protocol No. 1 occurred due to a certain legal entity not being allowed to acquire agricultural land under national law would be inadmissible under the established case law of the ECtHR. However, in the *Zelenchuk and Tsytsyura v. Ukraine* case, the ECtHR stated that a national legislation that—alone among the CoE member states—implemented land reform programs with some blanket restrictions on the sale of agricultural land is incompatible with the provisions of Article 1 of Protocol No. 1. Although this ban has already been lifted by a novel legislation,[4] the author found the case interesting enough to make an exception and introduce it, even though, originally, Ukraine was not selected in the scope of countries covered by the research.

1. Brief Introduction to the regulations of the Visegrád Countries, Romania, Slovenia, Croatia, and Serbia

In its recent *Zelenchuk and Tsytsyura v. Ukraine* case, the ECtHR provided a valuable comparative law analysis on the regulation of 32 CoE member states' agricultural land-related regulation, which served as a starting point for the author to introduce the legislation of the selected member states. To comply with the scope and purpose

4 On the novel legislation, see Buletsa, Oliynyk and Sabovchyk, 2019, pp. 89–93.

of the current chapter, the author dispenses with the introduction of the regulation of countries other than Hungary, Slovakia, Czech Republic, Poland, Romania, Slovenia, Croatia, and Serbia, that is to say, the selected countries. The findings of the ECtHR's analysis are supplemented by sources from the scientific literature. As a result of the research, the author concluded that none of the selected member states—even those that had undergone a thorough land reform program since 1990[5]—introduced a general ban on the trade in agricultural land. Slovenia is currently undergoing a reform.[6]

Restrictions and conditions may apply in the selected member states, however.

By enacting the *Act on Transactions in Agricultural and Forestry Land*,[7] the Hungarian legislator imposed several limitations on the acquisition of agricultural land.[8] These restrictions, which were accepted by the European Commission as being in conformity with EU law, include (i) the procedural role of the local land committee, (ii) the cap on the size of acquisition of lands and for the ownership of property, (iii) the system of the right of preemption to buy and lease, or (iv) the statutory minimum and maximum duration of leasehold. On the other hand, the CJEU—first in a preliminary decision procedure,[9] then in an infringement procedure[10]—held that depriving persons of their right of usufruct if they do not have a close family tie with the owner of agricultural land in Hungary is contrary to EU law.[11] In the ongoing infringement procedure, the European Commission continues to dispute the conformity of certain Hungarian legal institutions with EU law,[12] such as (i) the inability of legal persons to acquire ownership of agricultural land (with a few exceptions) and the prohibition of their transformation; this may be considered as one of the basic pillars of the current Hungarian land regime, as pointed out by some authors.[13] Furthermore, the Commission disputes the EU law conformity of (ii) the skills requirements of farmers, (iii) the non-recognition of experience acquired abroad, and (iv) the personal obligation to cultivate. Lastly, the European Commission doubts (v) the objectivity of the provisions on the prior consent required in the cases of sale and purchase contracts.[14] As some

5 Including Croatia, the Czech Republic, Estonia, Hungary, Poland, Romania, and the Slovak Republic.

6 Avsec, 2021, pp. 24–39.

7 Act CXXII of 2013 on Transactions in Agricultural and Forestry Land

8 For an analysis of the law, see Csák, 2017, pp. 1125–1136.; Hornyák, 2021, pp. 86–99.; Hornyák, 2017, pp. 124–136.; Szinay and Andréka, 2019, pp. 28–39.

9 CJEU, 'SEGRO' Kft. v. Vas Megyei Kormányhivatal Sárvári Járási Földhivatala and Günther Horváth v Vas Megyei Kormányhivatal, para. 129.

10 CJEU, European Commission v. Hungary

11 The author forecasted the result already in a 2018 article; see Marinkás, 2018, pp. 99–116.

12 For the details please see: Commission's Interpretative Communication on the Acquisition of Farmland and European Union Law; see, furthermore, Raisz, 2017, pp. 434–443.; Szilágyi, 2018, pp. 193–194.; Szilágyi, 2017a, pp. 107–124.

13 Andréka and Olajos, 2017, pp. 410–424.

14 For an analysis on the presumed discrimination between "old" and "new" member states in the practice of the European Commission, see Szilágyi, 2017b, pp. 1055–1072.

authors noted, "Hungary can be considered a 'bad cop' who acts against the principle of the free movement of capital."[15]

It is not only the Hungarian legislator that imposed restrictions on the acquisition of agricultural land, however. Most of the selected states make a distinction between citizens of the European Union and third-country nationals when it comes to the acquisition of agricultural land. While—as a rule—those who belong to the former category are eligible to acquire agricultural land provided that they comply with certain criteria (and in some cases, provided that a certain time-limited transitional period has passed), those belonging to the latter category must comply with more severe restrictions to acquire agricultural lands. In some instances, they are even prohibited from acquiring agricultural land, except for a few statutory exemptions. As an example, as a rule, agricultural land cannot be sold to foreign persons in Croatia as the law requires reciprocity with the buyer's state and also the approval of the Croatian Minister of Justice.[16]

Similar rules are in force in other countries of the region: the Serbian regulation, in practice, renders it impossible for legal entities registered outside the EU to purchase agricultural land in Serbia; it requires reciprocity with the buyer's state, and the buyer must prove that the real estate is necessary for the activity it conducts in Serbia.[17] The latter criterion is to be determined by the Ministry of Commerce. In Poland, only private persons are entitled to acquire agricultural land, and legal entities must fulfill additional conditions, such as obtaining a permission from the authorities.[18] In Romania, the Constitutional Court *(Curtea Constituțională a României)* held with a majority decision[19] that *Law. No. 175/2020* on the modification of certain agricultural land-related rules is constitutional.[20] As the majority of the Constitutional Court stated: "[...]

> the criticised texts do not forbid or exclude the right of natural or legal persons from outside the national territory to buy such lands [...] the legislator did not operate with the criterion of citizenship/nationality, but with a set of objective criteria aimed at the buyer's ability to maintain the category of use of extra-urban agricultural land and to work it effectively."

Contrary to this, one of the two separate opinions emphasized that, in practice, the national legislation does have an effect of a quasi-criterion of citizenship/nationality.[21]

15 Csirszki, Szinek Csütörtöki and Zombory, p. 49.
16 Josipović, 2021, pp. 107-108.
17 Dudás, 2021, p. 68.
18 For a detailed analysis of the Polish regulation, see Blajer, 2022, pp. 9–39.; Tschopp, 2018, pp. 51–63.; Suchoń, 2021, pp. 34–46.
19 Romanian Constitutional Court (RCC), No. 586/2020.
20 Veress, 2021, pp. 155–173.
21 Separate Opinion of Mona-Maria Pivniceru.

The other separate opinion[22] emphasized that, Law. No. 175/2020 does not comply with EU law and especially with the *Treaty of Accession of Romania*. The problem is well illustrated by the fact that some 40% of arable land in Romania belongs to foreigners, as a scholar argues in this regard: possession of arable land in such large proportion by foreign nationals may exclude the prevalence of state's sovereignty.[23] It is not all about sovereignty; arable land is also a valuable resource that provides food security for the state, and thus, several member states grant its protection on constitutional level.[24] As an example Article 'P' (1) of the Fundamental Law of Hungary states that "natural resources, in particular arable land, [...] shall form the common heritage of the nation, it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations."

Several member states require qualifications or prior experience from the potential buyers (e.g., Hungary, Poland, the Slovak Republic, and Slovenia). However, the Polish,[25] Slovakian,[26] and Slovenian regulations require preliminary authorisation, except for buyers who are already engaged in farming or their family members. An EU national who would like to acquire ownership of agricultural land in Serbia is required by the law (i) to reside in the territory of the same municipality in which the agricultural land is located, (ii) to cultivate that same land for at least 3 years, (iii) to prove that they have had a registered family farm in Serbia without interruption for at least 10 years, and (iv) to prove that they own the necessary agricultural machines and equipment.[27]

The Czech Republic, Hungary, Poland, Romania,[28] Serbia, the Slovak Republic, and Slovenia have preemption laws, securing a right of first refusal mostly to neighboring or other farmers, tenants, close family members, agricultural enterprises, or municipalities—and in some cases, the state.

In certain cases, restrictions exist on the maximum amount of land that the same person may own; for example, the Hungarian legislator set a 300 hectares cap in Hungary. Some states also limit the minimum size of land parcels, seeking to prevent the excessive subdivision of land below a certain size. Last but not least, special restrictions also exist in certain sensitive areas such as border areas and areas adjacent to military installations, such as Serbia.[29]

However, these issues, namely the foreign natural and legal persons' right to acquire agricultural land, emerge mainly in the EU context and not in the CoE context.

22 Separate Opinion of Livia Doina Stanciu and Elena-Simina Tinisescu.
23 Anghel, 2017, pp. 77–104.
24 For a comparative analysis, see Hojnyák, 2019, pp. 58–76.; See furthermore: Orosz, 2018, pp. 178–191.
25 For a detailed analysis on the Polish regulation see: Zombory, 2020, pp. 282–305.
26 For a detailed analysis on the Slovakian regulation see: Szinek Csütörtöki, 2021, pp. 160–177.; Szinek Csütörtöki, 2022, pp. 126–143.
27 Dudás, 2021, p. 68.
28 The question of interpretation of the new Romanian regulation, please see: Veress, 2021, pp. 159–163.
29 Dudás, 2021, p. 68.

First, the established case law of the ECtHR on Article 1 of Protocol No. 1 does not grant the right to acquire property. The violation of the said right only comes into question when a CoE member state treats persons in a comparable situation differently without an objective reason. In some cases, such as the *Luczak v. Poland* case of the ECtHR, the Court had to decide on a national legislation that practically made it impossible for foreign citizens to buy and use agricultural land in a way such a land is regularly used. While the complainant of the case was allowed to buy a farm, they were prevented from engaging in agricultural activity due to the state imposed restrictive rules based solely on nationality. As it is clear from this short statement of facts, this case was not a "straightforward" acquisition case. As mentioned in the introductory part, mainly compensation-related cases emerged before the ECtHR in relation to the selected countries due to their shared historic similarities, which may be regarded as one of their distinctive features.

2. The case law of the ECtHR and the ECHR

2.1. A brief introduction of the ECtHR's Article 1 of Protocol No. 1 and Article 6 of the ECHR's related case law

2.1.1. Article 1 of Protocol No. 1-related ECtHR case law

First, as a starting point, it must be emphasized that Article 1 of Protocol No. 1 does not guarantee the right to acquire property, as stated in *Kopecký v. Slovakia*[30] in accordance with the established case law of the ECtHR,[31] and neither is it possible to consider the hope of recognition of a property right for which it has been impossible to effectively exercise "possession" within the meaning of Article 1 of Protocol No. 1. Nationalized agricultural land may fall within this category, that is to say, while expecting restitution of long-lost family lands is an understandable wish of a human being, based on the ECtHR's case law, a difference exists between mere hope of restitution and legitimate expectation. The latter must be of a nature more concrete than mere hope and be based on a legal provision or on a judicial decision.[32] The temporal scope of the ECHR and its protocols cannot be interpreted as imposing any general obligation on the contracting states for past, instantaneous act. Deprivation of ownership or of another right *in rem* is an instantaneous act in the light of the ECtHR's case law[33] and does not produce a continuing situation of

30 ECtHR, Kopecký v. Slovakia, para. 35.
31 ECtHR, Van der Mussele v. Belgium, para. 48.; ECtHR, Slivenko v. Latvia, para. 121.; ECtHR, Kopecký v. Slovakia, para. 35.
32 ECtHR, Gratzinger and Gratzingerova v. the Czech Republic, para. 73.; ECtHR, Von Maltzan and Others v. Germany, para.112.
33 ECtHR, Kopecký v. Slovakia, para. 35.; ECtHR, Preußische Treuhand GmbH & Co. KG a.A. v. Poland, para. 57.; see, furthermore, ECtHR Guide, para. 395.

"deprivation of a right."[34] As a conclusion, Article 1 of Protocol No. 1 in the ECtHR's case law[35] cannot be interpreted as imposing any general obligation on the contracting states to return property that had been transferred to them before they ratified the Convention.[36] However, once the state has gone beyond its obligations under Articles of the ECHR—a possibility under Article 53 of the Convention—it cannot apply that right contrary to the Convention.[37] That is to say, in case the state grants a right to restitution, (i) it must obey the established case law of the ECtHR on Article 1 of Protocol No. 1 and of the ECHR Article 6 (1); furthermore (ii) as the ECtHR noted in the *Pincová and Pinc v. the Czech Republic* case, the state must ensure that "the attenuation of those old injuries does not create disproportionate new wrongs."[38] As another consequence of Article 1 of Protocol No. 1, having ratified the ECHR (including Protocol No. 1), the related case law of the ECtHR, once a contracting state, enacts legislation providing for the full or partial restoration of property confiscated under a previous regime, and such legislation may be regarded as generating a new property right protected by Article 1 of Protocol No. 1 for persons satisfying the requirements for entitlement. The same may apply in respect of arrangements for restitution or compensation established under pre-ratification legislation, if such legislation remained in force after the contracting state's ratification of Protocol No. 1.[39] However, the legislator still retains a high degree of freedom to determine the scope of property restitution and to choose the conditions under which they agree to restore property rights of former owners.[40] In particular, the exclusion of certain categories of former owners from such entitlement falls within the state's margin of appreciation. Claims excluded from the scope of restitution in this way do not create a "legitimate expectation" eligible for the protection under Article 1 of Protocol No. 1.[41]

Second, it is worth introducing the three elements of the right to property under the ECHR's case law[42] as Article 1 of Protocol No. 1 comprises three distinct rules.[43]

34 Marinkás, 2015, pp. 191–196.
35 ECtHR, Jantner v. Slovakia, para. 34.; ECtHR, Van der Mussele v. Belgium, para. 48.
36 The same statement can be made regarding EU law: as Ágoston Korom writes that the goals of the CAP do not affect the member states' margin of appreciation on the restitution, that is to say, member states are free to impose restitution measures concerning the properties confiscated before the accession. See Korom, 2021, p. 102.
37 ECtHR, ECHR v. Belgium (Case relating to certain aspects of the laws on the use of languages in education in Belgium'); see, furthermore, ECtHR, E.B. v. France, para. 49.
38 ECtHR, Pincová and Pinc v. the Czech Republic, para. 58.
39 ECtHR, von Maltzan and Others v. Germany, para. 74.; ECtHR, Kopecký v. Slovakia, para. 35.; ECtHR, Broniowski v. Poland, para. 125.; see, furthermore, ECtHR Guide, para. 398.
40 ECtHR, Maria Atanasiu and Others v. Romania, para. 136.
41 ECtHR, Gratzinger and Gratzingerova v. the Czech Republic, para. 70–74.; ECtHR, Kopecký v. Slovakia, para. 35.; ECtHR, Smiljanić v. Slovenia, para. 29.; see, furthermore, ECtHR Guide, para. 396.
42 ECtHR, Zvolský and Zvolská v. the Czech Republic, para. 63.
43 In this regard, see also ECtHR, Szkórits v. Hungary, para. 34.

The first sentence of the first paragraph[44]—as the first rule—outlines the principle of peaceful enjoyment of property with a general nature. The second sentence of the same paragraph contains the second rule, which regulates the deprivation of property and subjects it to certain conditions.[45] The third rule is contained by the very same sentence and recognizes that the contracting states are entitled, among other things, to control the use of property in accordance with the public interest. When it comes to judging a possible infringement, the Court first must ensure that the last two rules are applicable before determining whether the first one has been complied with. The three rules are not, however, unconnected (or in other words, "distinct"): the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property. Thus, they must be interpreted "through the optics" of the general principle established in the first rule.[46]

Third, it must be mentioned that states not only have a negative duty, that is to say, a duty to abstain from interfering with the right of peaceful enjoyment of property, but Article 1 of Protocol No. 1 may entail positive obligations[47] inherent in ensuring the effective exercise of the rights guaranteed by the Convention. In the context of Article 1 of Protocol No. 1 and with regard to Article 1 of the Convention, each contracting party "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention," which may require the state to take the measures necessary to protect the right of property.[48] However, the boundaries between the state's positive and negative obligations cannot be demarcated under Article 1 of Protocol No. 1 with "surgical precision."[49] The author considers that this fact is worthy of comparison with the Article 8-related case law of the ECtHR.

Fourth, as it was stated by the ECtHR in the *Karaivanova and Mileva v. Bulgaria* case, a domestic law that prescribes that issues arising from the very same factual starting point should be resolved in separate procedures places individuals in a state of lengthy uncertainty,[50] which amounts to a violation of Article 1 of Protocol No. 1. While states should enjoy a wide margin of appreciation in regulating important social and economic reforms, such as the ones introduced in Bulgaria after the fall of communism, states are nevertheless required to organize their judicial and administrative systems in such a way so as to guarantee the rights provided for under the Convention.[51] As it was in the *Karaivanova and Mileva v. Bulgaria* case, by requiring a restitution procedure and then launching a "*rei vindicatio*" judicial proceeding aimed at specifying the

44 Article 1 of Protocol No. 1.: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions."
45 Article 1 of Protocol No. 1.: "No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."
46 ECtHR, Iatridis v. Greece, para. 55.; ECtHR, Elia S.r.l. v. Italy, para. 51.
47 ECtHR, Szkórits v. Hungary, para. 36.
48 ECtHR Sovtransavto Holding v. Ukraine, para. 96.
49 ECtHR Broniowski v. Poland, para. 144.
50 ECtHR, Sivova and Koleva, paras. 115–16.; ECtHR, Nedelcheva and Others, paras. 78–82.
51 ECtHR, Sivova and Koleva, cited above, para. 116.

rights recognied in the restitution procedure, the authorities unjustifiably delayed the effective exercise of the applicants' restitution rights.[52] Interestingly enough, this was elaborated from Article 1 of Protocol No. 1. by the ECtHR and not from Article 6 (1).

Fifth, it must be stated that several cases in the field of the restitution of property concerned the domestic authorities' failure to enforce the final judicial (or administrative) decisions. This issue, as elaborated on in details below, is often scrutinized "through the optics" of Article 6 of the ECHR as well. Once a final judgment that is not subject to any ordinary appeal is delivered, the applicant is entitled with an enforceable claim that constitutes a "possession" within the meaning of Article 1 of Protocol No. 1[53]; therefore, the concept of "legitimate expectation" can come into play.[54] Non-enforcement of final decisions, either in individual cases or because of systematic shortcomings in the system of restitution of property, gave rise to a violation of Article 1 of Protocol No. 1. and may trigger a "pilot judgment procedure" as it happened in the *Maria Atanasiu and Others v. Romania* and the *Manushaqe Puto and Others v. Albania* cases.[55]

Sixth, as the ECtHR noted in the *Pincová and Pinc v. the Czech Republic* case, the state must ensure that "the attenuation of [...] old injuries does not create disproportionate new wrongs." To avoid such scenarios, the ECtHR, in its case law, emphasized that legislation should make it possible to take into account the particular circumstances of each case, so that persons who acquired their "possessions" in good faith were not made to bear the burden of responsibility for the wrongdoings of their states.[56] In accordance with this, in the *Katz v. Romania* case,[57] the ECtHR held that a violation of Article 1 of Protocol No. 1 had occurred due to the legislation's fault in the restitution of nationalized buildings which, in the meantime, had been sold by the state to third parties who had purchased them in good faith. Similar decision was made by the ECtHR in the *Zvolský and Zvolská v. the Czech Republic*[58] and the *Velikovi and Others v. Bulgaria* cases.[59] The latter dealt with the proportionality of measures which, with the aim to compensate persons from whom property had been arbitrarily taken under the communist regime, had deprived other individuals of property they had purchased from the state in good faith.[60]

52 ECtHR, Karaivanova and Mileva v. Bulgaria, para. 81.
53 ECtHR, Jasiūniene v. Lithuania, para. 44.
54 ECtHR, Driza v. Albania, para. 102.
55 In *Beshiri and Others v. Albania*, the Court reviewed the new domestic scheme/remedy introduced in Albania in response to that pilot judgment. Noting the state's wide margin of appreciation as regards the choice of forms of redress for breaches of property rights, the Court found the new remedy to be effective having regard to the following considerations: (a) appropriateness of the form of redress, (b) adequacy of the compensation, and (c) accessibility and efficiency of the remedy. See Beshiri and Others v. Albania, paras. 188, 189–203, 204–214.
56 ECtHR, Pincová and Pinc v. the Czech Republic, para. 58.
57 ECtHR, Katz v. Romania, paras. 30–36.
58 ECtHR, Zvolský and Zvolská v. the Czech Republic, paras. 72–74.
59 ECtHR, Velikovi and Others v. Bulgaria, paras. 181, 190.
60 See, furthermore, ECtHR, Guide, paras. 410–411.

Seventh, as to the adequacy of the compensation in general, Article 1 of Protocol No. 1 requires that compensation in return for property taken by the state should be "reasonably related" to its value.[61] A compensation amounts to 10% of the current value of the original property could be considered reasonable in the specific context of the case[62]; in this regard, the ECtHR is prone to accept the aim of serving public interest until the awarded compensation appears to be unreasonably low.[63] It is worth mentioning that the cases related to compensation were examined thoroughly by *Anikó Raisz*, who made valuable statements regarding the awkwardness of the ECtHR's compensation-related case law in certain aspects.[64] Namely, the ECtHR applies a double standard based on the "Western–Eastern" division when it comes to awarding compensation for the loss of ownership of agricultural lands: the Court awards multiple times higher compensation prices for a "Western" plot of land, and the disproportion in value is not justified by the market price of land.[65]

2.1.2. Article 6-related ECtHR case law

First, as mentioned in the above section related to the Article 1 of Protocol No. 1 case law of the ECtHR, the authorities' failure to execute a final and binding judgment is contrary either to the right to property—as guaranteed by Article 1 of Protocol No. 1—and to the right to access to court as guaranteed by Article 6 (1), since the right to the execution of a court decision is one of the aspects of the latter right as stated by the ECtHR in the *Popescu v. Romania*[66] case. In certain agricultural land-related cases, the ECtHR held that administrative bodies have no discretion to "override" a final court judgment because they consider it erroneous or otherwise contrary to law, that is to say, administrative bodies as a rule cannot refuse to enforce a final judgment on these grounds,[67] save for reasons of a substantial and compelling character.[68]

Secondly, certain types of extraordinary appeal procedures may be tantamount to a violation of Article 6 (1) of the Convention as they are eligible to infringe the principle of legal certainty. The right to a fair hearing under Article 6 § 1 of the Convention—interpreted in the light of the principles of the rule of law and legal certainty—encompasses the requirement that, where the courts have finally determined a dispute between given parties, their ruling should not be called into question.[69] As an example, in a land-related case, namely the *Urbanovici v. Romania*, the ECtHR held that Article 6 § (1) had been violated; the Supreme Court of Justice had examined the extraordinary appeal of the Procurator General and set at naught an entire judicial

61 ECtHR, Broniowski v. Poland, para. 186.
62 ECtHR, Guide, para. 402.
63 ECtHR, Serbian Orthodox Church v. Croatia, paras. 62, 65–68.
64 Raisz, 2014.
65 Raisz, 2010, pp. 245–246.
66 ECtHR, Popescu v. Romania, para. 66.; ECtHR, Hornsby v. Greece, para. 40.
67 ECtHR, Mutishev and Others v. Bulgaria, para. 129.; ECtHR, Mancheva v. Bulgaria, para. 59.
68 ECtHR, Brumărescu v. Romania, para. 61.; ECtHR, Ryabykh v. Russia, para. 52.
69 ECtHR, Brumărescu v. Romania, para. 61.

process, which had ended in a judicial decision that was res judicata and which had, moreover, been executed. The ECtHR paid particular attention to the fact that this extraordinary appeal procedure was opened only to the prosecutor general and not for the parties.[70] The aim and scope of these extraordinary procedures is of paramount importance when it comes to the scrutiny of the ECtHR. The diverging views on the subject shall not serve as a ground for reexamination; in other words, no party should be entitled to seek review of a final and binding judgment merely for the purpose of obtaining a rehearing and fresh determination of the case. Otherwise, the extraordinary appeal procedures may infringe the principle of legal certainty and respect for the res judicata effect of final judgments.[71] As for the scope, higher courts' power should only cover the correction of judicial errors and miscarriages of justice and should not involve a novel factual investigation, that is to say, the extraordinary review cannot be a disguised appeal procedure. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character.[72]

Third, as established in the Court's case law—e.g., in the *Csepyová v. Slovakia case*[73]—when it comes to the assessment of the reasonableness of the length of proceedings, particular attention must be paid to the following factors: (i) complexity of the case, (ii) the conduct of the applicant and of the relevant authorities, and (iii) what was at stake for the applicant in the dispute.

2.2. Cases related to compensation

The current section deals with concerns related to compensation grouped into three categories: (i) the systematic shortcomings of the regulation and the practice of state authorities related to compensation, (ii) the infringement of the rights of those who acquired their property in good faith—that is to say, where the state created new wrongs, when tried to remedy old ones—and last but not least, (iii) cases related to the prevailing public interest against the rights of those eligible for compensation (i.e., the Slovakian "gardener cases.")[74]

2.2.1. The systematic shortcomings of a compensation case

The ECtHR's two pilot judgments, the *Maria Atanasiu and Others v. Romania* and the *Manushaqe Puto and Others v. Albania* cases, dealt with the shortcomings of the compensation systems by Romania and Albania, respectively.

As explained by the ECtHR in the *Maria Atanasiu and Others v. Romania*,[75] the primary aim of the "pilot judgment procedure" is to assist the CoE member states

70 ECtHR, Urbanovici v. Romania, para 28.
71 ECtHR, Ryabykh v. Russia, para. 52.; ECtHR, Sivova and Koleva, para. 66.; ECtHR, Karaivanova and Mileva v. Bulgaria, para. 44.
72 ECtHR, Ryabykh v. Russia, para. 52.
73 See furthermore: ECtHR, Frydlender v. France, para. 43.
74 Denomination made by the author.
75 ECtHR, Maria Atanasiu and Others v. Romania, paras. 212–214.

in the resolution of a dysfunction that detrimentally effects the protection of the Convention right in question in the national legal order.[76] Several repetitive cases may indicate a structural or systemic problem and trigger the designation of a pilot case to help rectify problems at the national level, thus (i) securing the rights and freedoms as required by the Convention, (ii) offering a more rapid redress for those concerned, and, lastly, (iii) easing the burden on the Court.[77] Because of the structural or systemic nature of the issue, a "pilot" case necessarily extends beyond the individual applicant's interests. Consequently, the Court needs to identify both (i) the roots of the structural or systemic problem and (ii) the general measures that need to be taken in the interest of other potentially affected persons.[78] In the *Maria Atanasiu and Others v. Romania* case—contrary to the *Broniowski and Hutten-Czapska* cases, which highlighted the shortcomings of the domestic legal system for the first time—the ECtHR considered the activation of the "pilot judgment procedure" after it delivered several judgments,[79] holding the shortcomings of the Romanian legal framework on compensation tantamount to a violation of Article 6 (1) of ECHR and Article 1 of Protocol No. 1.

The ECtHR, after reiterating its established case law on similar cases,[80] identified six problems that may have led to the structural and systematic shortcomings in the Romanian system.[81] First, throughout the years, the Romanian legislator gradually extended the scope of the reparation laws to all nationalized immovable property, while, except for a short period,[82] dispensing with placing a cap on compensation. Secondly, the legislative provisions grew complex—or rather, chaotic—due to the several modifications, which resulted in an inconsistent judicial practice regarding the interpretation of the core concepts in relation to the rights of former owners, the state, and third parties that acquired nationalized properties and in a general lack of legal certainty.[83] Thirdly, as an answer to the second problem, the domestic authorities, although they were already faced with the complexity of the issue, responded by enacting Law no. 247/2005, which established a single administrative procedure for claiming compensation that was applicable to all the properties concerned, be it an agricultural land or a flat. Fourthly, the state clearly lacked sufficient human

76 For some theoretical issues regarding the legal base of the "pilot judgment procedure," please read the partly concurring and partly dissenting opinion of Judge *Zupančič* and the partly dissenting opinion of Judge *Zagrebelsky*!

77 ECtHR, Broniowski v. Poland, para. 35.; ECtHR, Hutten-Czapska v. Poland, pp. 231–234.

78 ECtHR, Wolkenberg and Others v. Poland, para. 35.; ECtHR, Olaru and Others, para. 54.

79 ECtHR, Brumărescu v. Romania, paras. 34–35; ECtHR, Străin and Others v. Romania, para. 19; ECtHR, Păduraru v. Romania, paras. 23–53; ECtHR, Viaşu v. Romania, paras. 30–49; ECtHR, Faimblat v. Romania, para. 16–17; ECtHR, Katz v. Romania, para. 11; ECtHR, Tudor Tudor v. Romania, para. 21; ECtHR, Matieş v. Romania, paras. 13–17.

80 ECtHR, Maria Atanasiu and Others v. Romania, paras. 134–141.

81 ECtHR, Maria Atanasiu and Others v. Romania, paras. 219–227.

82 Although law no. 112/1995 introduced a cap on compensation, this was abolished by Law no. 10/2001. See para. 10.

83 ECtHR, Păduraru v. Romania, para. 94.

and material resources to satisfy every claim. This shortage was manifested in the Central Board's practice, which, after facing with a substantial workload from the outset, dealt with files in random order. By May 2010, the Central Board managed to decide on only one third of all the registered cases being awarded a "compensation certificate." [84] Fifthly, the lack of a time limit for the processing of claims by the Central Board was identified as another weak point of the domestic compensation mechanism. This was stated by the ECtHR in the *Faimblat v. Romania* case and acknowledged by the *High Court of Cassation and Justice of Romania (Înalta Curte de Casație și Justiție)*.[85] The ECtHR considered the lack of a time limit as a factor that renders the right of access to a court theoretical and illusory. Sixthly, the Court noted that the legislation on nationalized property represented a considerable burden on the state budget from the outset.

Similarly to the *Maria Atanasiu and Others v. Romania* case, in the pilot judgment *Manushaqe Puto and Others v. Albania*, the Court held that Article 1 of Protocol No. 1 of the Convention had been violated on account of the non-enforcement of a final decision that had awarded the applicants compensation in lieu of restitution of their property.[86] In the "follow-up" case, the *Beshiri and Others v. Albania*, the Court reviewed the new domestic remedy vehicle introduced in Albania in response to the pilot judgment. Taking into consideration the state's wide margin of appreciation as regards the choice of forms of redress for breaches of property rights, the Court took the view that the new remedy was effective having regard to the following considerations: (i) appropriateness of the form of redress, (ii) adequacy of the compensation, and (iii) accessibility and efficiency of the remedy.[87]

However, in the *Vrabec and Others v. Slovakia* case, the Court found a violation of Article 6 (1) of the ECHR due to the deficiencies in the compensation system, and the case did not attract a "pilot judgment procedure." In 1951, the state authorities nationalized three hectares of land from a relative of the applicants without paying compensation to the late owner. The applicants claimed restitution of the land under Law no. 503/2003 without success. In a 2006 judgment, the Supreme Court (*Najvyšší súd Slovenskej republiky*) held that the legal interpretation of lower levels of jurisdiction was right, namely that those lands that had been formally transferred to the state pursuant to Ordinance 15/1959 did not fall under the scope of Law no. 503/2003, and thus, the applicants were not entitled to compensation. Based on Law no. 403/1990, they would have been eligible for compensation, but they had never applied for it.[88] While the government admitted that the domestic courts' practice was not uniform regarding certain issues, it was not the case with the interpretation Law no. 503/2003.

84 Only some 21,260 out of a total of 68,355 cases were dealt with and the total payments that were carried out did not reach 4000 total. – ECtHR, Maria Atanasiu and Others v. Romania, para. 224.

85 ECtHR, Maria Atanasiu and Others v. Romania, paras. 76.

86 ECtHR, Manushaqe Puto and Others v. Albania, paras. 110–118.

87 ECtHR, Beshiri and Others v. Albania, paras. 188, 189–203, 204–214.

88 ECtHR, Vrabec and Others v. Slovakia, paras. 5–7, 9.

Namely, the government alleged that, based on their practice, Law no. 503/2003 did not cover land expropriated under Ordinance no. 15/1959, and it stated that the two judgments, in which the courts took an opposite view and on which the applicants relied, were exceptional at that time. The ECtHR reiterated that under its established case law,[89] it is not its task (i) to call into question the national courts for their interpretation of domestic law or (ii) to compare different decisions of national courts, even if the proceedings are apparently similar. The ECtHR must respect the independence of the national courts. However, acute and persistent variations in the practice of the highest domestic court may in itself be contrary to the principle of legal certainty. This principle is implied in the ECHR and constitutes one of the basic elements of the rule of law.[90] In the case at hand, taking each and every circumstance of the case into consideration, the ECtHR was not convinced that the domestic courts' practice was coherent enough to be in conformity with the ECHR. Accordingly, Article 6 § 1 of the Convention had been violated.[91]

Contrary to the above cases, the ECtHR did not find a systemic error in the *Čadek and Others v. the Czech Republic* case as the country's *Land Ownership Act* of 1991 entitled the restitution claimants to ask either (i) a "restitutio in integrum" of land that had been confiscated from them before 1990, or—if it was not possible for reasons indicated in the law—(ii) to a compensatory land of equivalent value ("restitution claim"). Some original restitution claimants transferred their claims to other persons, which was a practice allowed by the then valid law. The restitution claims had a nominal value, which was based on the 1991 price of the confiscated land. As a result of a 2003 amendment to the Land Ownership Act, if the Land Fund (*pozemkový fond*) did not succeed in providing a substitute land by December 31, 2005—or within 2 years if the claim had been purchased after entry into force of the Amendment Act—the claim would be extinguished. The restitution claimant then would be entitled only to a financial compensation equivalent to claim's nominal value determined in 1991 based on its then value. The Court observed that most of the applicants bought the restitution claims after the Amendment Act had been enacted; therefore, they were aware that their claims to substitute plots of land were precarious and would expire by the end of 2005. Thus, the ECtHR concluded that they would have accepted the element of risk that is inherent in business activities, such as dealing in property. In this regard, the ECtHR considered that, for farmers, the negative consequences of the Amendment Act were mitigated by the decision of the Supreme Court (*Nejvyšší soud České republiky*), which exempted farmers (those cultivating land for a living under the law) from the scope of the act, even if they were not original restitution claimants.[92] Accordingly, the ECtHR held that Article 1 of Protocol No. 1 had not been violated.

89 ECtHR, Nejdet Şahin and Perihan Şahin v. Turkey, paras. 49–50.
90 ECtHR, Beian v. Romania (no. 1), paras. 37–39.
91 ECtHR, Vrabec and Others v. Slovakia, paras. 24, 25, 27, 29, 35.
92 ECtHR, Čadek and Others v. the Czech Republic, paras. 5, 6, 43, 55, 70.

2.2.2. The acquisition of the land in good faith either as a buyer or as someone eligible for compensation

In the *Pincová and Pinc* case, the heir of the former proprietary of a confiscated house launched successful proceedings against the applicants in 1992.[93] The applicants alleged the infringement of their property rights; since they concluded the contract in good faith, the national court did not grant them compensation proportionate to the value of the lost property.[94] In the case at hand, the ECtHR found that the interference with the right to property amounted to "deprivation of possessions" within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1. The Court reiterated its earlier case law and stated that the deprivation of property should be based on law, should pursue a legitimate aim, and should be proportionate, that is to say, it must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. In the present case, none of the parties disputed that the state's acts were based on laws.[95] Regarding the legitimate aim, the ECtHR reiterated its earlier findings in the James case: "Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest [...] unless that judgment is manifestly without reasonable foundation."[96] Arising from this, the notion of "public interest" is necessarily extensive.[97] The Court examined whether the law succeeded in striking a fair balance between the general interest of the community and the requirements of the protection of the individual's fundamental rights. In this regard, the Court examined the amount of the compensation, which must be reasonably related to the market value of the lost property. On the other hand, legitimate objectives of "public interest" may call for less than the reimbursement of the full market value. Having regarded the fact that in the case at hand, compensation received by the applicants amounted to one-fifth of the current market value of the house, the state failed to strike the abovementioned fair balance; thus, property rights were infringed.[98]

In the *Szkórits v. Hungary* case, the applicant had a joint title to a plot of land in the value of 4.59 "golden crowns" (*aranykorona*), which became the possession of socialist "collective farms" during the communist regime. Following the change of regime, based on Act no. II of 1993 on Land Settlement and Land Distribution Committees, the Pest County Land Registry adopted a plan on the division of such properties. The applicant was granted a plot of land in 2000; however, he could not take possession of it because the plot that had been granted was apparently occupied and being used by the owners of the neighboring plots due to severe insufficiencies in the land register. It was only in 2006 that the authorities took steps to remedy the situation by

93 ECtHR, Pincová and Pinc, paras. 9–32.
94 ECtHR, Pincová and Pinc, paras. 42.
95 ECtHR, Pincová and Pinc, paras. 47–51.
96 ECtHR, James and other v. the United Kingdom, para. 46.
97 ECtHR, James and other v. the United Kingdom, para. 46.
98 ECtHR, Pincová and Pinc, paras. 52–64.

designating a new plot for him. During the 6-year period, the applicant was unable to use, or dispose of, his property.[99]

In the course of examining the merits,[100] the ECtHR noted a disagreement between the parties whether the applicant's claim is a property interest eligible for protection under Article 1 of Protocol No. 1. Accordingly, the Court first had to determine the legal position of the applicant.[101] As the ECtHR reiterated, Article 1 of Protocol No. 1 protects "possessions" that can be either "existing possessions" or a "legitimate expectation" of obtaining the effective enjoyment of a property right. Article 1 of Protocol No. 1 does not, however, guarantee the right to acquire property.[102] Applying these principles of the established case law on the case at hand, the issue that needed to be examined was whether the decision of the authority to confer a plot of land to the applicant constituted a substantive interest protected by Article 1 of Protocol No. 1 in case (i) the applicant did not enter into possession, and (ii) his trespass claim was dismissed on the ground that he had never been in possession of the property, since it did not actually exist due to a malfunction of the property register (i.e., the plot of land had been incorporated by the neighbouring lands). Having regarded these facts, in the Court's view, the applicant had a proprietary interest protected by Article 1 of Protocol No. 1. As the ECtHR noted, the applicant had a legitimate expectation of taking possession of the plot of land and thus had an interest constituting a "possession" for the purposes of Article 1 of Protocol No. 1. The Court reiterated that, as mentioned earlier in the chapter, Article 1 of Protocol No. 1 comprises three distinct rules and that its essential objective is to protect a person against unjustified interference by the state with the peaceful enjoyment of possession. The ECtHR also reiterated that Article 1 of Protocol No. 1 entails not only such a negative duty but also positive obligations to ensure the effective exercise of the rights guaranteed by the Convention, that is to say, to take the measures necessary to protect the right of property.[103] Since the boundaries between the state's positive and negative obligations under Article 1 of Protocol No. 1 do not lend themselves to a precise definition,[104] the key question regarding both is whether the authorities succeeded in striking a fair balance between the competing interests of the individual and of the community as a whole. An overall examination of the various interests at stake is necessary to assess proportionality, and one must bear in mind that the Convention is intended to safeguard rights that are "practical and effective." Regarding the proportionality, the Court, contrary to the government, saw no reason to query the applicant's good faith in considering themselves as the rightful owner; furthermore, nothing in the statement of facts suggests that he must have known that the land register system suffered from malfunctions, which would render his claims invalid. The Court also observed that years had passed between

99 ECtHR, Szkórits v. Hungary, paras. 6–9, 37.
100 ECtHR, Szkórits v. Hungary, paras. 26, 27, 28, 31, 32, 33, 34, 45, 36, 38, 40, 41–46.
101 ECtHR, Beyeler v. Italy, para. 98.
102 ECtHR, Kopecký v. Slovakia, para. 35.
103 ECtHR, Sovtransavto Holding v. Ukraine, para. 96.; ECtHR, Öneryıldız v. Turkey, para. 134.
104 ECtHR, Broniowski v. Poland, para. 144.

the authority's decision and the first time that the applicant was able to exercise any property rights, and 10 years had elapsed before he was eventually able to take possession of the newly designated, substitute land, which was not of the same value as that originally designated to him. In the Court's evaluation, the applicant suffered serious frustration for his property rights, which was attributable to the mistakes of a state authority. Based on the ECtHR's case law, the state is not allowed to remedy its own mistakes at the expense of the individual concerned,[105] that is to say, the oversight of the land register system should not have resulted in the long-lasting, *de facto* denial of the applicant's property rights; therefore, the Court concluded that the authorities made the applicant bear a disproportionate and excessive burden, and accordingly, Article 1 of Protocol No. 1 of the Convention had been violated.

2.2.3. Land lease, or the Slovakia Gardener Cases

A peculiar category of compensation cases is that of the Slovakian "Gardener cases," as the author named them. The *Urbárska obec Trenčianske Biskupice v. Slovakia* case, though not officially designated as a "pilot judgment," marked the emergence of several cases with almost identical statement of facts: *Šefčíková v. Slovakia*, *Salus v. Slovakia*, *Silášová and Others v. Slovakia*, and *Jenisová v. Slovakia*.

The "cumulated statement of facts" that one may derive from the above cases is the following: under the former communist regime of the then Czechoslovakia, owners of lands were either *de jure* confiscated of their property or obliged to put their land at the disposal of state-owned or cooperative farms, which amounted to a *de facto* deprivation of property. In the latter case, while they formally remained owners of the land, in practice, they were deprived of the peaceful enjoyment of property. Some of the land affected by the nationalization was not cultivated by the farms. The state promoted the use of such land for gardening, which resulted in the establishment of allotment gardens (*záhradkové osady*) mainly in the vicinity of urban agglomerations, and individual plots of lands were granted to persons belonging to the national gardeners' association (*Slovenský zväz záhradkárov*), who were allowed to cultivate the land as a leisure activity. Following the fall of the communist regime, the then Czechoslovakian[106] Parliament adopted the Land Ownership Act of 1991, which sought to mitigate certain past wrongdoings. In case of those who were *de jure* deprived of their possessions, the legislator gave precedence to legal certainty, that is to say, the users' existing rights prevailed over the rights of the former owners. The legislator considered this to be of greater public interest than restoring the land *in natura* to its original owners. In the second category of cases, that is, where the original owners namely maintained their ownership rights (*nuda proprietas*), the act established the conditions enabling the owners to enjoy their property rights to a greater extent, including the possibility to retrieve the original plot of land from

105 ECtHR, Lelas v. Croatia, para. 74.

106 Czechoslovakia only split into the two sovereign states of the Czech Republic and Slovakia on 1 January 1993.

the tenants. However, Act 64/1997 limited the possibility of terminating the lease; in other words, this was allowed only if the tenant failed to comply with legal obligations (e.g., failed to pay the lease fee). Furthermore, the tenants were entitled to apply for acquiring ownership of the land they used for gardening. If the request was granted, the owners were offered the right to obtain either a different plot of land or pecuniary compensation.[107]

As regard the alleged violation of Article 1 of Protocol No. 1 by mandatory transfer of ownership of the land, the ECtHR stated that the applicant was deprived of its possessions within the meaning of the second sentence of Article 1 of Protocol No. 1, which has not been disputed between the parties. The ECtHR accepted the government's argument that having regarded the wide margin of appreciation that the contracting states enjoyed in similar matters, protecting the interest of the gardeners was in the public interest within the meaning of the second sentence of Article 1 of Protocol No. 1. However, when it came to scrutiny of proportionality, the Court noted that the value of land was established based on a regulation that disregarded the actual value of the land at the latter time. The land's value—some SKK 6.1–6.9 per square meter—was calculated based on its 1982 market value, when the tenancy was established, without taking into account that the value of real property increased significantly in Slovakia following the change of regime and the establishment of a market-oriented economy. The documents available indicate that the market value of the applicant's land transferred to the gardeners was between SKK 295 and 300 per square meter in 2002, when the transfer took place, that is to say, the 1982 market value corresponds to less than 3% of the market value of the property in 2002. In the ECtHR's view, the state failed to raise any argument that would serve as a valid reason for this disproportionation: it was not proven that the aim of consolidation—which only effected some 0.22% of the agricultural land in Slovakia—or the socially weak or particularly vulnerable situation of the gardeners would require it. Thus, the Court was not persuaded that the declared public interest was sufficiently broad and compelling to justify the substantial difference between the real value of the applicant's land and that of the land obtained in compensation. In the Court's view, the state failed to strike a fair balance between the interests at stake and made the applicant association bear a disproportionate burden contrary to its right to peaceful enjoyment of possessions. Accordingly, Article 1 of Protocol No. 1 had been violated on account of the deprivation of the applicant association's property.[108]

Regarding the alleged violation of Article 1 of Protocol No. 1 by the compulsory letting of land, the ECtHR noted that it is not disputed between the parties and that the compulsory letting of the applicant's land amounted to a control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1. The restriction had a statutory basis, namely Act 64/1997. The interference undoubtedly contributed to the legal certainty of the persons concerned, and the Court saw

107 ECtHR, Urbárska obec Trenčianske Biskupice v. Slovakia, paras. 7–13.
108 ECtHR, Urbárska obec Trenčianske Biskupice v. Slovakia, paras. 116, 120, 123–124, 131–133.

no reason to doubt that the interference pursued a "legitimate aim" in the "general interest." On the other hand, the ECtHR was off the view that the general interest was not sufficiently strong to justify such a low level of rent, bearing no relation to the actual value of the land. Accordingly, Article 1 of Protocol No. 1 had been violated on account of the deprivation of the applicant association's property.[109]

2.3. Cases related to the acquisition of agricultural lands by legal persons and by foreign nationals

2.3.1. General rules

The applicant of the ECtHR's *Luczak v. Poland* case was a French national of Polish origin who had moved to Poland in the 1980s and whose wife was a Polish citizen. As a result of his employment in Poland, he was affiliated with the general social security scheme as the relevant law governing the scheme did not exclude the participation of foreign nationals. In 1997, the applicant and his wife jointly bought a farm; subsequently, the applicant terminated his employment to concentrate on the farm, which he expected to provide them with a living. The applicant and his wife requested the "Częstochowa branch of the Farmers' Social Security Fund" (*Kasa Rolniczego Ubezpieczenia Społecznego*) to admit them to the farmers' social security scheme. While his wife's application was granted, the fund refused the applicant's request on the ground that the Farmers' Social Security Act of 20 December 1990 (*ustawa o ubezpieczeniu społecznym rolników*) required Polish nationality for admission to the scheme. As a result, the applicant did not have the right to social security cover and to pay contributions toward his old-age pension.[110]

Before examining the case in detail, the ECtHR reiterated[111] that, as a general rule, "very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention." On the other hand, when it comes to general measures of economic or social strategy, the case law[112] grants a wide margin of appreciation to the CoE member states. The ECtHR further stated that it is not its role to substitute itself for the legislator. Due to fact that national authorities have direct and better knowledge of their society and its needs, they are, in principle, better placed than the international judge to appreciate what is in the public interest on social or economic grounds. As a result, the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation."[113]

Regarding the applicability of the findings in the above paragraph to the case at hand, the ECtHR noted that in respect of admission to the farmers' scheme, the 1990

109 ECtHR, Urbárska obec Trenčianske Biskupice v. Slovakia, paras. 140, 144, 145.
110 ECtHR, Luczak v. Poland, paras. 8–13.
111 ECtHR, Gaygusuz v. Austria, para. 42; ECtHR, Koua Poirrez v. France, para. 46.
112 ECtHR, James and Others v. the United Kingdom, para. 46.; ECtHR, National and Provincial Building Society and Others v. the United Kingdom, para. 80.
113 ECtHR, Luczak v. Poland, para. 48.

Act established a difference in treatment based on nationality. The ECtHR considered that the applicant was in a similar position to other persons who, as Polish nationals, applied for admission to the farmers' scheme, since he was (i) a permanent resident in Poland, (ii) affiliated to the general social security scheme, and (iii) contributed as a taxpayer to the funding of the farmers' scheme. The respondent government claimed that the particular rules governing the agricultural sector are aimed to protect Polish farmers, who are a vulnerable group. While the ECtHR considered that that state's regulation could be regarded as pursuing an economic or social strategy falling within the state's margin of appreciation, the Court reiterated that legislation regulating access to such a scheme must be compatible with Article 14 of the Convention. It noted that in the instant case, the applicant's admission to the farmers' scheme was refused solely on the ground of his nationality, whereas for all practical purposes, he was in a comparable position to Polish nationals who applied for admission having previously been affiliated with the general social security scheme. It underlines that the applicant, as other Polish employees, supported the farmers' scheme by paying taxes when he was employed. In this connection, the Court observes that the 1982 Act—the predecessor of the 1990 Act—did not establish a nationality condition in respect of social security cover for farmers. The Court also noted that, while the government argued that social and economic policies pursued prior to 2004 justified the difference in treatment, after Poland's EU accession, their public policy goals governing farmers' scheme suddenly changed. In the ECtHR's view, the government failed to provide any convincing arguments in this regard, namely the causes of the sudden change. Furthermore, the Court noted that based on an estimation made by the government, amendments to the 1990 Act aimed at providing the EU citizens with the possibility that the admission to the farmer's scheme would not generate additional budget expenditure. Therefore, the ECtHR found that the government failed to provide any reasonable and objective justification for the distinction such as to meet the requirements of Article 14 of the Convention, even having regarded the margin of appreciation granted for member states in the area of social security. Accordingly, Article 1 had been violated.[114]

The applicant of the *Stephen Ogden v. Croatia* case was a British national with British permanent residence. In 2005, the applicant bought an old stone house and the surrounding land plot on the Pelješac peninsula and requested the consent of the minister of justice for the acquisition of ownership of the real property in question, in accordance with the then valid rules on the acquisition of real property by foreigners. The minister dismissed the applicant's request on the ground that the property in question was located in a "protected significant natural landscape" area where, unless otherwise provided for by an international agreement, foreigners —either natural persons or legal entities—could not acquire ownership of real property. The applicant's attempts to require permission through judicial proceedings were unsuccessful. It was only Croatia's accession to the European Union in 2013 that brought a

114 ECtHR, Luczak v. Poland, paras. 49, 51, 55–60.

change in the applicant's situation. The new EU conformity law lifted the ban on the acquisition of ownership of real property in the protected areas of nature for foreign nationals or legal entities. In 2014, the applicant successfully lodged an application with the Land Registry Division of the Korčula Municipal Court (Općinski sud u Korčuli) seeking to be recorded in the land register as the owner of the real property in question on the basis of the sale and purchase agreement from 2005, in which the court granted and recorded the applicant's ownership of that property.[115] In his claim for just satisfaction, the applicant specified that the denial of entering his ownership into the registry had deprived him of the possibility of spending summer holidays in the house he bought and that had he had to pay for private accommodation, which had cost him 3,000 euros. The Court reiterated that under Article 37 § 1 (b) of the Convention, it may "[...] at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that [...] the matter has been resolved [...]." In this regard, the Court noted that, in 2014, the applicant's ownership of the property at issue became registered, and thereby, he became its legally recognized owner. The Court further noted that even if he had not been formally recognized as the owner of the property in question for some 8 years, he could have used the property as he wished, namely spending his free time there. To the Court, it was evident from the applicant's submissions that his intention had never been to rent or sell the property; it if had, it would have led to another conclusion. Having regarded these considerations, the Court was not persuaded that the applicant had suffered any disadvantage as a result of the alleged violation(s).[116]

2.3.2. The Ukrainian case

The factual and legal background of the case can be summarized as follows: under the laws of the former Ukrainian Soviet Socialist Republic, individuals and non-state entities could not own land as this was owned by the state. The enactment of the Land Code of December 18, 1990 (hereinafter: 'the Land Code') authorised local councils to transfer land to individuals and non-state entities. At the same time, the Land Code introduced a 6 year-long moratorium on selling or otherwise disposing of the land, except that (i) the owners were allowed to transfer the property back to their local council and that (ii) courts were authorised to shorten this period in case a valid reason existed for such a decision. When the Land Code entered into force, the majority of the country's agricultural land was held by the former Soviet collective and state-owned farms. A statutory Act of 1992 renamed them "collective agricultural enterprises" (hereinafter: CAEs). Three years later, a presidential decree implemented a gradual reform of the CAEs by issuing shares of land to their current and former members and to some workers employed in the social sector. In this context, "share" meant a number expressed in hectares but without defining a specific physical location or defined boundaries. Even though the decree allowed

115 ECtHR, Stephen Ogden v. Croatia, paras. 1, 4–7, 10–13.
116 ECtHR, Stephen Ogden v. Croatia, paras. 29–32.

members of the CAEs to withdraw from their associations with their shares, it was not until 1999 that the large-scale dissolution of the CAEs started. A presidential decree of 1999 accelerated the land reform by requiring the dissolution of all CAEs and the conversion of shares into physical plots of land until April 2000. Based on a summary approved by the Parliament, some 6.87 million Ukrainians obtained shares of land, and 3.17 million had converted their shares into plots of land. Some 107,000 shares were sold or otherwise disposed of by their new owners, contrary to the statutory ban on disposing the land reinforced by the Transitional Provisions of the new Land Code, which provided that until January 1, 2005, individuals and non-state entities could not sell or otherwise transfer title to (i) plots zoned for individual farming enterprises or for other commercial agricultural production and (ii) shares of land. Only swap transactions, inheritance cases, and expropriation for public needs were exempted. The ban was subsequently extended and modified and commonly referred to in Ukraine as the "the land moratorium." Based on the legislator's initial intentions, the moratorium was introduced only as a temporary measure until a land market with "adequate" prices evolved. The *travaux préparatoires*[117] of the New Land Code show that the legislator was afraid of the possibility that dispensing with the moratorium would lead to a scenario where a few large landowners could acquire the majority of agricultural land and cheap agricultural labour force from the rest of the population.[118]

Despite the legislator's good intentions, the law failed to achieve their aim. An advisory corporation, EasyBusiness, acting as an intervener, submitted that two-thirds of Ukraine's agricultural land was transferred into private ownership and 94% of the rural population converted their shares of land into land plots from 1996 to 2009; thus, legally, the land was fragmented into small parcels. However, in practice, the land market became fairly monopolized with the 100 biggest players renting 6.5 million hectares, which created a non-transparent land market, where the control over land concentrated in the hands of agricultural holding companies. The latter ones, as the most common tenants, had disproportionate power over small landowners, who had no choice but to accept abnormally low rents. As EasyBusiness pointed out, international experience shows that—contrary to what was feared by the legislator—in most countries, the creation of a free land market had induced an increase in the value of land. This trend renders it less likely that financial resources of international financial entities would suffice to buy up the land in quantities that would threaten a state's sovereignty or food security. High land fragmentation is also a mitigating factor in this regard. Lastly, EasyBusiness argued that lifting the moratorium would strengthen the farmer's bargaining position. However, the ECtHR noted that the applicants did not submit any evidence that would support the allegations of EasyBusiness regarding the abuse of market power by tenants in their particular cases.[119]

117 Preparatory works.
118 ECtHR, Zelenchuk and Tsytsyura v. Ukraine paras. 6–20.
119 ECtHR, Zelenchuk and Tsytsyura v. Ukraine, paras. 93–96, 141.

When addressing the case, the ECtHR noted that while the moratorium and its extensions clearly had their basis, which had never been declared unconstitutional, in domestic law, the uncertainty created by the repeated extensions of the moratorium and the repeated failure of Parliament and the government to respect self-imposed deadlines for the creation of a sales market in agricultural land rendered the relevant legislation unforeseeable. As the ECtHR noted, these omissions led to a situation where the moratorium was treated as indefinite. Regarding the ban on the transfer of agricultural land, the ECtHR noted that it is not its role to substitute itself for the legislator and decide whether a state that has decided to transfer land back into private hands should or should not then allow the new owners to sell it and under what conditions.[120] Under the Court's well-established case law, its task is to determine whether the manner in which it was applied to—or affected—the applicants gave rise to a violation of the Convention.[121]

In the proceedings before the Court, the government argued that the moratorium was needed to avoid certain key risks, namely (i) the impoverishment of the rural population, (ii) the excessive concentration of land in the hands of wealthy individuals or hostile powers, and (iii) the withdrawal of agricultural lands from cultivation. Regarding the first argument, the ECtHR made two observations. First, not every applicant lived in rural areas and did farming for a living, meaning that this argument did not concern those applicants—not few in number—who lived in cities. Second, as to the risk of impoverishing the rural population generally, the ECtHR noted how the legislator also acknowledged that the absolute prohibition on sales was not needed but was only for a definite time period, which would enable the development of a stable land market. As for the second and third argument, the Court ECtHR observed that Ukrainian law already contained certain provisions aimed at and seemingly eligible to achieve the same result. These measures among others included the taxation regime, which would penalize the agricultural land's withdrawal from cultivation; the restrictions on the categories of those able to own land; and the caps on the maximum amount of land owned. Lastly, the ECtHR found it relevant that no other Council of Europe member state had implemented land reform programs with some blanket restrictions on the sale of agricultural land. Again, the ECtHR reiterated that it was not for the Court to determine whether the legislation chose the best solution, having regarded the margin of appreciation granted for the legislator by the Convention.[122] Still, the legislator is required to provide a reasoning for the choice of a more restrictive solution—over less restrictive solutions—and how it strokes a "fair balance" between the interests of the parties. This is the core element of scrutinising proportionality. When it comes to assessing the severity of the burden imposed on the applicants, the ECtHR found the following factors to be relevant: (i) the length of time the restrictions remained in place (17 years overall), (ii) the broad scope of

120 ECtHR, Zelenchuk and Tsytsyura v. Ukraine, paras. 105, 106, 110, 117 118.
121 ECtHR, Garib v. the Netherlands, para. 136.
122 ECtHR, Bečvář and Bečvářová v. the Czech Republic, para. 66.

restrictions, namely that they practically prevented the applicants from alienating their lands and using them for any other purpose than agriculture, and (iii) the blanket and inflexible nature of the restrictions, which are not subject to any individual review or exception. As a result of these, the applicants' ownership rights were rendered, in practical terms, precarious and defeasible. In this regard, the ECtHR reiterated that ECHR should be interpreted and applied in a manner that renders its guarantees practical and effective rather than theoretical and illusory.[123] Finally, the Court concluded that the state made the applicants bear the burden of the authorities' failure to meet their self-imposed goals and deadlines. In view of all the relevant factors of the case, the Court considered that the burden imposed on the applicants was excessive and the respondent state overstepped its wide margin of appreciation in this area and failed to strike a fair balance between the general interest of the community and the property rights of the applicants. Thus, accordingly, Article 1 of Protocol No. 1 had been violated.[124]

Summary

The author identified two main categories of agricultural land-related legal issues that show up often in the ECtHR's case law related to the selected countries, that is to say, which constitute a distinctive feature of the selected countries in this respect. The first main category comprised compensation-related cases, which constitute the vast majority of agricultural land-related ECtHR cases in the selected countries. The author reiterates the shared historic characteristics of the selected countries and their decisions to provide compensation—either fully or partially—for the properties confiscated during the communist era either *de jure* or *de facto*. In doing so, these states have gone beyond their obligations under articles of the ECHR and its protocols, since Article 1 of Protocol No. 1 cannot be interpreted as imposing any general obligation on the contracting states to return property, which was transferred to them before they ratified the ECHR. However, once a CoE member state has granted the right to compensation, it is obliged to grant this right through a national law that obeys the established case law of the ECtHR on both Article 1 of Protocol No. 1 and ECHR Article 6 (1). The common problem of the selected countries' agricultural land-related legislation and judicial practice arose from the non-compliance with the abovementioned ECtHR case law. A national regulation that suffers from systemic deficiencies (e.g., because the state tried to remedy a complex situation with one-size-fits-all regulation and at the same time failed to provide sufficient resources for the authorities vested with the task) is clearly not in conformity with ECtHR case law, as identified in the *Maria Atanasiu and Others v. Romania* and the *Manushaqe Puto and Others v. Albania* cases. Similarly, legislators of the selected countries often failed to strike a

123 ECtHR, Paposhvili v. Belgium, para. 182.
124 ECtHR, Zelenchuk and Tsytsyura v. Ukraine, paras. 124–129, 144, 147–149.

fair balance between the interests of those who were made eligible for compensation and those who acquired the ownership or the tenancy rights of the once nationalized property from the state in good faith. That is to say, the strive to remedy old injuries created disproportionate new wrongs, as stated by the ECtHR in the *Pincová and Pinc v. the Czech Republic* case, where those who acquired agricultural land in good faith suffered disproportionate burden, and in the Slovakian "Gardener cases," where those entitled to compensation were obliged to bear the prevalence of the rights of tenants, who—if they wished so—may become the new owners of land. In these cases, the ECtHR paid special regard to the fact that either the statutory land purchase prices or the lease prices were well below the actual market prices.

The other main category is related to the issue of acquisition of agricultural lands by foreign natural or legal persons. However, as mentioned above, the ECtHR's case law is not as "rich" in this issue because Article 1 of Protocol No. 1 does not create a right to acquire property. Thus, under the established case law of the ECtHR, a possible claim submitted by a legal entity on the ground that it was not allowed to acquire agricultural land would be declared inadmissible by the ECtHR with a high probability. In the *Zelenchuk and Tsytsyura v. Ukraine* case, however, the ECtHR took the view that a national legislation that prescribes some blanket restrictions on the sale of agricultural land is incompatible with the provisions of Article 1 of Protocol No. 1. In this regard, the Court paid particular attention to the fact that that (i) the state made the applicants bear the burden of the authorities' failure to meet their self-imposed goals and deadlines, thus creating a situation where the moratorium was deemed indefinite; and (ii) the regulation excluded the possibility of any individual review or exception. It must be mentioned that an intervener, EasyBusiness, submitted evidence that the moratorium was rather counterproductive, that is, big agricultural holders succeeded in renting neighboring lands and creating "quasi-*latifundia*" and at the same time reached extra profit due to the absurdly low renting prices to the detriment of the owners. Although the ECtHR practically disregarded these findings, the author firmly believes that legislators of the selected countries should at least read them before deciding to impose wide-ranging restrictions on disposing and acquiring agricultural land, even if restrictions on acquiring agricultural land may be deemed a tool for protecting national sovereignty.

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