

REIMBURSEMENT OF VALUE OF EXPROPRIATED PROPERTY UNDER CZECH LAW IN LIGHT OF EUROPEAN LEGAL STANDARDS

Kateřina Frumarov *
Toms Grygar **

ABSTRACT

This article deals with the provision of reimbursement (restitution) of expropriated property, which is not only in the Czech Republic, one of the basic, obligatory, and constitutional legal conditions of expropriation. According to European requirements, the reimbursement of the value of the expropriated property should always be fair, and adequate, and should fully compensate for the damage caused to the person subject to the expropriation by the interference with his property rights. The basic research question of this article will therefore be, whether the Czech legislation and decision-making practice meet European requirements as well. In means: Does the Czech regulation present a truly full-fledged replacement, respectively reimbursement for the damage caused by expropriation - both in terms of the types of reimbursement and the manner of determination of their amount? Reimbursement of the value of the expropriated property is obligatorily determined in expropriation proceedings based on an expert opinion. Several questions to be answered arise here too, such as ensuring the impartiality and objectivity of the expert valuation, or the method of resolving the collision of several expert opinions with different conclusions. Also, it is not always entirely clear which rights of third parties expire as a result of expropriation and for which ones it is appropriate to provide reimbursement. The aim of the following text will therefore be to analyze the current legislation and decision-making practice in the given field, in the context of European and Czech constitutional requirements, identify potential problematic aspects and formulate proposals for solutions de lege ferenda.

KEYWORDS: *Property Right, Expropriation, Reimbursement, Czech Constitution, Expropriation Costs*

* Kateřina Frumarov Palacky, University in Olomouc Faculty of Law, Olomoc, Czech Republic; katerina.frumarova@upol.cz.

** Toms Grygar, Palacky University in Olomouc Faculty of Law, Olomoc, Czech Republic; Tomas.Grygar@usoud.cz.

1. INTRODUCTION

One of the basic constitutional conditions for expropriation in the Czech Republic is the provision of restitution of expropriated property. At the same time, it is a requirement arising from European documents and standards of protection of property rights,¹ which is typical for the legal regulation of expropriation in other European countries enshrining the basic limits (assumptions) of expropriation directly in the constitutions. In Central Europe, in addition to the Czech Republic, it concerns Slovakia,² Poland³, Germany,⁴ and Switzerland⁵. A more complicated situation then prevails in Austria.⁶ It should be emphasized at the outset that reimbursement of the value of the expropriated property is a specific, separate legal category, which cannot, in any case, be identified or included under the institute of damages.⁷

¹ The Charter of Fundamental Rights of the EU (Article 17), Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 1).

² Article 20 (4) of the Constitution of the Slovak Republic: "Expropriation or restrictions of right in property may be imposed only to the necessary extent and in the public interest, based on the law and for a valuable consideration."

³ The Constitution of Poland provides that expropriation is possible only for public purposes and for fair compensation (Wywłaszczenie jest dopuszczalne jedynie wówczas, gdy jest dokonywane na cele publiczne i za słusznym odszkodowaniem). Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997, Art. 21.

⁴ Cf. Article 14 (3) of the German Basic Law (Grundgesetz - GG), according to which expropriation is permissible only in the public interest, by law or on the basis of law and for compensation.

⁵ Article 26 (2) of the Swiss Constitution only provides for a requirement for reimbursement for expropriation or for a restriction of the right of ownership in respect of a measure comparable to expropriation. This reimbursement shall be full ("voll").

⁶ In Austria, it has long been problematic whether the granting of compensation constitutes a constitutional condition for expropriation. Unlike Paragraph 365 of the ABGB, Paragraph 5 of the StGG does not expressly mention reimbursement. The case-law has long held that a constitutional obligation to pay cannot be inferred from Paragraph 5 of the StGG, either for expropriation or for restrictions on property. Only in some cases has it argued that a law which does not provide for compensation for expropriation may infringe the principle of equality - Mayer, H.: *Das österreichische Bundes-Verfassungsrecht: B-VG, F-VG, Grundrechte, Verfassungsgerichtsbarkeit, Verwaltungsgerichtsbarkeit: Kurzkomentar*. 4. Auf, Wien, 2007, p. 594: Opinions have changed, mainly under pressure from the Convention and the decision-making activity of the ECtHR, which calls for a fair settlement. Later, legal doctrine came to the conclusion that if expropriation is carried out without providing adequate reimbursement, it is a disproportionate interference with the right to property - Bezemek, Ch. et al.: *Europäisches und öffentliches Wirtschaftsrecht II*. 8. Auf, Wien, 2015, p. 113. Therefore, the order to provide reimbursement may be considered one of the elements of the principle of proportionality, i.e. the constitutional limit.

⁷ Feoese, J. In Depenheuer, O. et al.: *Die Enteignung: Historische, vergleichende, dogmatische und politische Perspektiven auf ein Rechtsinstitut*, Berlin, 2018, p. 257.

The claim for reimbursement is not a modern condition for expropriation. It appeared in Europe together with the French Revolution and the Declaration of the Rights of Man and the Citizen of 1789.⁸ In the Czech lands, a claim for reimbursement (compensation) can already be found in the General Civil Code of 1811. Reimbursement should be provided in a reasonable amount to compensate for any loss of property; at the same time, the transfer of ownership was tied to it.⁹ However, expropriation without reimbursement was also allowed,¹⁰ which was in a way followed by the First Republic Constitution of 1920. This constitutional regulation allowing expropriation even without reimbursement was strongly influenced by the land reform in Czechoslovakia shortly after the First World War.¹¹ The Constitutional Charter of 1920 in Section (§) 109, Subsection 2 provided that expropriation is possible only based on the law and for reimbursement, unless the law provides or stipulates that reimbursement is not available. Even during the communist regime, Czechoslovak law paid attention to reimbursement for expropriation. The Civil Code of 1950¹² and 1964¹³ mentioned reimbursement (restitution) as well, it was also mentioned in the Constitution of 1948 (Section (§) 9, Subsection 2), which allowed expropriation again without reimbursement, but only based on law and exceptionally. However, the practice during this period was often different and reimbursement was often not provided to the owner at all. The Czechoslovak constitution of 1948 was the so-called fictitious constitution in this respect because the state *de iure* in the vast majority of cases differed from the situation *de facto* when there was a mass nationalization and a substantial restriction of private property.

After the events of 1989, when the Czech Republic became a democratic state governed by the rule of law again, the condition of reimbursement found its enshrinement in the Charter of Fundamental Rights and Freedoms, which is part of the constitutional order of the Czech Republic. At present, the provision of reimbursement is one of the basic, obligatory, and constitutional legal conditions of expropriation.

⁸ Hoetzel, J.: Vyvlastnění. In Slovník veřejného práva československého. Svazek V, Praha, 2000, p. 478.

⁹ For more details see Rouček, F. & Sedláček, J.: Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a v Podkarpatské Rusi. Díl 2, Praha, 1935, p. 275.

¹⁰ Hanák, J.: Vyvlastnění z environmentálních důvodů: současný stav a perspektivy, Brno, 2015.

¹¹ Pavlíček, V.: O české státnosti. Úvahy a polemiky. 1. díl. Češi a Němci, Praha, 2004, p. 330.

¹² Cf. Section (§) 108 of Act No. 141/1950 Sb., Civil Code.

¹³ Provision of Section (§) 131, Subsection 2 of Act No. 60/1964 Sb., Civil Code (as amended until 31st December 1991).

As it will be explained below, the basic criteria and requirements for reimbursement of the value of the expropriated property, including the determination of its amount, have been defined within the framework of the European standards for the protection of property rights, adopted documents as well as administrative practice (especially the decision-making activities of courts). The basic research question of this article will therefore be, whether the Czech legislation and decision-making practice meet these European requirements as well. Reimbursement of the value of the expropriated property should always be fair, and adequate and should fully compensate for the damage caused to the person subject to the expropriation by the interference with his/her property rights. Does the Czech regulation present a truly full-fledged replacement, respectively reimbursement for the damage caused by expropriation - both in terms of the types of reimbursement and the manner of determination of their amount? Problems in Czech practice are also caused by the question of determining the usual price, which is primarily used to determine the amount of reimbursement. Reimbursement of the value of the expropriated property is obligatorily determined in expropriation proceedings based on an expert opinion. Several questions to be answered arise here too, such as ensuring the impartiality and objectivity of the expert valuation, or the method of resolving the collision of several expert opinions with different conclusions. The aim of the following text will therefore be to analyze the current legislation and decision-making practice in the given field, in the context of European and Czech constitutional requirements, identify potential problematic aspects and formulate proposals for solutions *de lege ferenda*.

Regarding the methodology of the article, it is worth noting that we first approach the content of the right to compensation for expropriation and its interpretation by the ECtHR, and only in connection with this do we explain the position of the Czech Constitutional Court. Without an analysis of this interpretation, the functioning of this legal institute cannot be evaluated in any way - as Arthur Kaufmann, a prominent German legal theorist, and representative of the phenomenological branch of legal hermeneutics, put it, "law does not exist before interpretation".¹⁴ Moreover, many legal concepts in this area are vague or even fall, in the words of L. A. Hart, into the linguistic shadow¹⁵ (in the original: "a penumbra of the term's meaning"). Let us add that in some places of the article there is also used a historical interpretation and a compar-

¹⁴ Kaufmann, A. Problemgeschichte der Rechtsphilosophie. In Kaufmann, A., Hassemer, W. et al. Einführung in Rechtsphilosophie und Rechtslehre der Gegenwart, Heidelberg, 1985, p. 122.

¹⁵ See Hart, L. A. Positivism and the Separation of Law and Morals. Harvard Law Review, 1958, p. 493-529.

ative interpretation, especially concerning other Central European countries. This has its origins in the fact that Czech administrative law has its roots in the German administrative district (Verwaltungsrecht), which is a source of inspiration for the Czech legislator, especially after the “Velvet Revolution” in 1989 and the fall of the communist regime.¹⁶

2. REIMBURSEMENT OF EXPROPRIATED PROPERTY FROM THE POINT OF VIEW OF THE EUROPEAN STANDARDS OF PROTECTION OF PROPERTY RIGHTS

The provision of the adequate reimbursement of the value of the expropriated property is considered a standard and necessary condition for this forced (involuntary) interference with property rights. It follows, among other things, from the basic documents adopted within Europe. The guarantee of property rights follows from international legal contractual obligations, in particular from Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms. However, it also admits the possibility of interference with the property right when it stipulates that no one shall be deprived of their possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. As regards reimbursement, it, therefore, leaves room for national legislation, but it is clear from practice that it tacitly includes the request for reimbursement. However, according to British Professor T. Allen, “*it took nearly thirty years for the situation to become clear, and we can now say that the Protocol contains an implied right to compensation.*”¹⁷ The ECtHR therefore also assesses the fulfillment of the requirement to provide reimbursement for expropriation in connection with expropriation.

The ECtHR in particular assesses whether a fair balance between the interests of the protection of individual property and wider societal interests has been achieved.¹⁸ In addition to pursuing a legitimate aim, States shall also have a reasonable relationship of proportionality between the means employed and the legitimate aim, i.e. a “fair balance” shall be maintained.¹⁹ As the ECtHR stated in the case of *The Holy Monasteries against Greece*, “*a fair balance will*

¹⁶ Hendrych, D. In Hendrych, D. et al. *Správní právo*. 8. vyd. Praha, 2012, p. 16–19.

¹⁷ Allen, T.: *Compensation for Property Under the European Convention on Human Rights*, *Michigan Journal of International Law*, 2, 2008, p. 288.

¹⁸ Bobek, M. In Kmec, J., Kosař, D., Kratochvíl, J., Bobek, M.: *Evropská úmluva o lidských právech*. Komentář, Praha, 2020.

¹⁹ Judgement of the ECtHR in the case *Pincová and Pinc v. the Czech Republic*, dated 5th November 2002, no. 36548/97.

be disturbed whenever a person bears an individual and excessive burden."²⁰

According to the court, an equilibrium will in principle be reached if the reimbursement paid to the owner of the expropriated property is in a reasonable proportion to the market value of the property at the time it was confiscated (e.g. the ECtHR Judgement in the case *Lallement v. France*, or the case *Motais de Narbonne v. France*²¹). However, a "reasonable proportion to the value of the assets" does not always necessarily mean the market value itself. The assessment in a particular case will depend on the strength of the legitimate interest that the State invokes as a ground for confiscation.²² The ECtHR states that there is a kind of indirect relationship between the two factors: the more urgent the public interest exercised by the State is, the lower reimbursement for the expropriated property may be provided.²³ Therefore, Article 1 of Protocol No. 1 does not guarantee the right to full reimbursement in all circumstances, as legitimate public interest objectives may justify a lower reimbursement than full market price reimbursement.²⁴ In exceptional circumstances, the ECtHR is willing to accept forfeiture of property without providing any reimbursement. However, these are really exceptional situations, which arise only in the case of fundamental systemic changes, such as changes in the overall social order in the transition from communism to democracy (cf. the judgment of the Grand Chamber of the ECtHR in the case of *Jahn and Others v. Germany*²⁵).

If the owner of the expropriated property is entitled to reimbursement for the expropriated property with a prospect of achieving a fair balance in the case, then part of the requirement of Article 1 of Protocol No. 1 is to provide such reimbursement within a reasonable period.²⁶ Finally, according to the court, the requirement of individualization of reimbursement and the method of its

²⁰ Judgement of the ECtHR in the case *The Holy Monasteries v. Greece*, dated 9th December 1994, no. 13092/87 and 13984/88.

²¹ Judgement of the ECtHR in the case *Lallement v. France*, dated 11th April 2002, No. 46044/99, ECtHR judgement in the case *Motais de Narbonne v. France*, dated 2nd July 2002, no. 48161/99.

²² Bobek, M. In Kmec, J., Kosař, D., Kratochvíl, J., Bobek, M.: *Evropská úmluva o lidských právech. Komentář*, Praha, 2012.

²³ Judgement of the ECtHR in the case *Urban village Trenčianské Biskupice v. Slovakia*, dated 27th November 2007, no. 74258/01.

²⁴ Judgement of the ECtHR in the case *The Holy Monasteries v. Greece*, dated 9th December 1994, no. 13092/87 and 13984/88.

²⁵ Judgement of the Grand Chamber of the ECtHR in the case *Jahn and Others v. Germany*, dated 30th June 2005, no. 46720/99, 72203/01 and 72552/01.

²⁶ Judgement of the ECtHR in the case *Guillemin v. France*, dated 11th February 1997, No. 19632/92, ECtHR Judgement in the case *Kirilova and Others v. Bulgaria*, dated 2nd June 2005, no. 42908/98.

calculation is substantial as well. For example, in the case of *Kozacıoğlu v. Turkey*,²⁷ the Grand Chamber concluded infringement of Article 1 of Protocol No. 1 because the Turkish State had granted reimbursement for the expropriated architecturally rare building, without taking into account the unique historical and cultural value of the property when calculating the amount of reimbursement. In summary, therefore, the general rule is always that the protection of property rights requires the provision of adequate reimbursement and the achievement of a fair balance between the public interest and the rights of the owner.²⁸

The case law of the ECtHR has concluded that reimbursement is appropriate not only for expropriation *de iure* but also for expropriation *de facto*, including the so-called hidden expropriation. In particular, the Judgement in *Papamichalopoulos and Others v. Greece*,²⁹ in which the ECtHR defended the applicant, who owned land on beaches occupied by the Greek Navy, acts as a memento. The Greek navy subsequently built a military base and recreational facilities on these lands without initiating expropriation or other similar proceedings at any time. Even in the case that expropriation *de iure* did not take place, the ECtHR awarded the complainant reimbursement. On the other hand, it should be noted that the mere temporary confiscation of property lacking a sign of permanence is not considered a deprivation of property within the meaning of Protocol No. 1 to the European Convention on Human Rights, which in some cases does not preclude the application of the so-called residual clause in the form of other interventions into the peaceful enjoyment of possessions.³⁰

²⁷ Judgement of the Grand Chamber of the ECtHR in the case *Kozacıoğlu v. Turkey*, dated 30th February 2009, no. 234/03.

²⁸ Judgement of the ECtHR in the case *James and Others v. the Czech Republic*, dated 21st February 1986, No. 8793/79, Judgement of the European Court of Human Rights dated 26th November 2009 in the case *Pešková v. the Czech Republic*, No. 22186/03. Cf. see also Pomačač, R.: *Evropský soud pro lidská práva: Přiměřenost náhrady za vyvlastnění*, *Právní rozhledy*, 9, 2010, p. 339., or Hanák, J.: *Vyvlastnění z environmentálních důvodů: současný stav a perspektivy*, Brno, 2015, p. 135.

²⁹ Judgement of the ECtHR in the case *Papamichalopoulos and Others v. Greece*, dated 24th June 1993, Complaint No. 14556/89.

³⁰ Cf. ECtHR Judgement in the case *Forminster Enterprises Limited v. the Czech Republic* dated 9th October 2008, Complaint No. 38238/04 or the Judgement of the ECtHR in the case *Air Canada v. The United Kingdom* dated 5th May 1995, Complaint No. 18465/91 concerning the issue of compensation for the restriction of the right of ownership consisting in the temporary impossibility of the use of a transport aircraft on the board of which smuggled marijuana is found.

The provision of fair reimbursement is also required by the EU Charter of Fundamental Rights. Article 17 (2) provides that no one may be deprived of his or her possessions, except in the public interest and the cases and under the conditions provided for by law, subject to fair reimbursement being paid in good time for their loss. Thus, in contrast to the Czech Charter of Fundamental Rights and Freedoms, the EU Charter of Fundamental Rights, in addition to a more detailed description of reimbursement (“fair compensation”), also emphasizes the requirement to provide reimbursement within a reasonable time. While the European Convention on Human Rights is often taken as a benchmark for judicial review of expropriation concerning the issue of reimbursement for expropriation, the same is far from the case with the EU Charter of Fundamental Rights. The reason, in our opinion, lies mainly in the limitation clause (Article 51) of the EU Charter of Fundamental Rights itself, according to which this Charter applies only in situations where the Member States apply European Union law. However, the issue of expropriation is generally not regulated by EU or international law apart from the area of international investment protection. The applicability of Article 17, Subsection 2 of the EU Charter of Fundamental Rights is therefore severely limited. On the other hand, even in the Czech legal doctrine, opinions have already begun to emerge that the scope of the EU Charter of Fundamental Rights must be understood “*as maximally extensive*”,³¹ while in this case, it is not possible to “*interpret*” the principle of subsidiarity “*in such manner that national provisions related to human rights apply primarily and the Charter secondarily... Moreover, it is not excluded that the Charter may be used as a benchmark for the Member States within their purely national competence.*”³²

3. REIMBURSEMENT OF THE VALUE OF EXPROPRIATED PROPERTY IN CZECH LAW AND PRACTICE

As mentioned above, the requirement to provide reimbursement for the expropriated property is constitutional, as it follows from the Charter of Fundamental Rights and Freedoms, which is part of the constitutional order of the Czech Republic. The implementation and fulfillment of this condition in practice are ensured by law - the Expropriation Act. This Act in Section (§) 10 et seq. stipulates that the owner of expropriated property, as well as some other persons, is entitled to reimbursement for expropriation, further specifying what should be compensated for (what should be reimbursed), in what amount and how the reimbursement is determined (established). Among other things, the Act em-

³¹ Arnold, R. In Tichý, L. et al.: *Evropské právo*. 4. Vyd., Praha, 2011, p. 138.

³² *Ibid.*

phasizes as a basic rule that reimbursement shall be determined in such a way and such a manner as to correspond to the pecuniary damage suffered by the owner of the expropriated property as a result of the expropriation. There are reservations about this wording, as it is very general and vague and it does not make it entirely clear what all must be compensated for during expropriation (what material or non-material damage).

3.1 CONSTITUTIONAL LIMITS OF EXPROPRIATION

The Czech Republic, together with Slovakia and Austria, is one of the few countries in Europe that has a semi-legal constitution.³³ The constitutional matter is therefore not concentrated in a single legal act (mono-legal constitution),³⁴ but it is scattered in several different documents of constitutional power. The constitutional limits of expropriation in the Czech Republic thus do not follow directly from the Constitution of the Czech Republic (Constitutional Act No. 1/1993 Sb.) but from the Charter of Fundamental Rights and Freedoms (Constitutional Act No. 23/1991 Sb.).

The Charter of Fundamental Rights and Freedoms (hereinafter referred to as “the Charter”) in Article 11 (4) provides that expropriation or forced restriction of ownership rights is possible in the public interest based on law and for reimbursement. The provision of reimbursement is therefore one of the three constitutional legal conditions for expropriation,³⁵ whereas, in contrast to historical legislation, a legal exception to this condition is no longer possible (i.e. to expropriate without reimbursement). According to the former Czech Constitutional Judge and current ECtHR Judge K. Šimáčková, this is a request for “adequate or also fair reimbursement”.³⁶ However, it is possible to argue with respect to this conclusion. The constitutional order of the Czech Republic does not comment on the nature of this reimbursement, in contrast to several foreign amendments. While the Slovak Constitution (Article 20 (4)) stipulates that reimbursement shall be “reasonable”, the Swiss Constitution (Article 26

³³ For more details see: Krošlák, D.: *Ústavné právo*, Bratislava, 2016, p. 42.

³⁴ The vast majority of constitutions in the world are mono-legal, including Germany and the United States. *Ibid.*

³⁵ Other conditions for expropriation are already enshrined at the statutory level and it specifically concerns the principle of the subsidiarity of expropriation, the principle of proportionality, the statutory expropriation title (purpose of expropriation) and compliance of the purpose of expropriation with the goals and tasks of spatial planning (Section (§) 3 et seq. of the Expropriation Act).

³⁶ Šimáčková, K. In Wagnerová, E. et al.: *Listina základních práv a svobod. Komentář*, Praha, 2012, p. 314.

(2)), for example, explicitly mentions the requirement of “full” reimbursement. If the constitutional regulation in the Czech Republic remains silent on this, then a more favorable alternative for the owner of expropriated property, i.e., the requirement of full (and not only adequate) reimbursement, should be inferred. This conclusion also corresponds better to the rule of interpretation *favor libertate*, respectively Article 4 (4) of the Charter, according to which the application of the provisions of fundamental rights and freedoms shall respect their substance and meaning.

The right of ownership as one of the fundamental rights is therefore restrictable, however, the limits and conditions stipulated by law, one of which is the provision of reimbursement, shall be respected as well. As the Constitutional Court of the Czech Republic stated, “*like other fundamental rights, the ownership right is also restrictable in the event of a conflict with another fundamental right or in the event of the necessary enforcement of a constitutionally approved public interest. Given that ownership rights have - unlike other fundamental rights - a relatively clearly expressible material economic value and their realization is the basis of social market transactions, their possible restriction requires the provision of reimbursement (compensation).*”³⁷

In the past, the Constitutional Court dealt with several borderline cases in the case of which it was necessary to assess whether they constituted expropriation at all and whether the persons concerned should be compensated. The relatively relevant judgment of the Constitutional Court³⁸ which assessed the constitutionality of the amendment to the Food Act is a memento. It introduced a contractual obligation for food business operators placing food on the market in an establishment with a sales area of more than 400 m² in the form of donating non-hazardous but otherwise unsatisfactory food to privileged non-profit organizations.³⁹ To the surprise of many, the Constitutional Court did not repeal this legislation based on the unreliable argument that “*the obligation to provide food cannot be equated with a compulsory donation or, more precisely, a contractual obligation*”,⁴⁰ while the non-profit organization does not have to accept these foods and the revocation of the right of ownership does not take place based on an administrative decision. Even before issuing the judgment of

³⁷ Judgement of the Constitutional Court of the Czech Republic dated 9th January 2008, file no. II. ÚS 268/06.

³⁸ Judgement of the Constitutional Court of the Czech Republic dated 9th December 2018, file no. Pl. ÚS 27/16.

³⁹ Cf. Section (§) 11, Subsection 2 of Act No. 110/1997 Sb., regulating Food and Tobacco Products and on Changes and Amendments to Certain Related Acts, as amended.

⁴⁰ Judgement of the Constitutional Court of the Czech Republic dated 18th December 2018, file no. Pl. ÚS 27/16.

the Constitutional Court, the domestic jurisprudence⁴¹ had pointed out that the transfer of ownership right occurs *de iure* under a private law contract, but the contract is free of charge and the entity affected by the legal norm is obliged to conclude such a contract under the threat of considerable sanctions. This obligation is tantamount to a forced giving up of property with the same effects in the sphere of property as expropriation. In other words, the legislation, in our view, introduced covert expropriation without reimbursement. In any case, we believe that the approach of the Czech Constitutional Court to possible covert expropriation is significantly more benevolent than in the case of the ECtHR.

Likewise, in an earlier (and, in our opinion, considerably less problematic) judgment, the Constitutional Court came to the conclusion that the so-called squeeze-out of minority shareholders cannot be seen as a manifestation of expropriation.⁴² Squeeze-out is primarily a traditional institute of private (commercial) law. According to the Constitutional Court, it applies that *“If the state fulfills its protective function in favor of the majority shareholders, this does not mean that it may be attributed with an interference with the rights of minority shareholders as in the case of expropriation.”*⁴³ However, even this case was judged inconsistently by the domestic legal doctrine and there were also opinions that it may be a matter of *de facto* expropriation.⁴⁴ Unlike forced food donation, although the squeezed-out shareholder is entitled to reimbursement, the law only talks about “reasonable” money consideration, the amount of which will be determined by a General Meeting based on an expert opinion, which it will itself commission to be processed.⁴⁵ This is a relatively low standard of the required level of reimbursement in comparison with, for example, the 60-year-old case law of the German Federal Court,⁴⁶ according to which in these cases it is necessary to provide “full reimbursement”, which fully offsets the loss of shareholder rights. At the same time, the price for the loss of shares of minority shareholders shall not be below the level of the last known rate on tradable markets.⁴⁷

⁴¹ Grygar, T.: Expropriace prostřednictvím kontraktační povinnosti? Aneb k novele zákona o potravinách, *Právní rozhledy*, 12, 2018, p. 444-449.

⁴² Judgement of the Constitutional Court of the Czech Republic dated 27th March 2008, file no. Pl. ÚS 56/05.

⁴³ *Ibid.*

⁴⁴ Cf. e.g. Škop, M.: Některé ústavněprávní rysy úpravy vytlačení menšinových akcionářů, *Právní rozhledy*, 24, 2005, p. 883.

⁴⁵ Section (§) 376, Subsection 1 of Act No. 90/2012 Sb., regulating Business Companies and Cooperatives (Act regulating Business Corporations),

⁴⁶ Cf. in particular 1 BvL 16/60 dated 7th August 1962 in the case *Feldmühle*.

⁴⁷ Škop, M.: Některé ústavněprávní rysy úpravy vytlačení menšinových akcionářů, *Právní rozhledy*, 24, 2005, p. 883.

3.2 DETERMINATION OF THE AMOUNT OF REIMBURSEMENT - USUAL PRICE VERSUS OFFICIALLY DETERMINED (FOUND) PRICE

The Expropriation Act provides that the owner of expropriated property belongs to the reimbursement for expropriation in the amount of the usual price of land or building (which is the subject of expropriation). At the same time, however, it adds that if the usual price was lower than the price determined according to the valuation regulation, reimbursement in the amount of this officially set price is due. Until the adoption of the Expropriation Act in 2007, the situation in relation to determining reimbursement for expropriation in the Czech Republic had been completely unsatisfactory and had not reflected the above-mentioned requirements arising from European standards for the protection of property rights. The reimbursement was determined by the valuation regulations⁴⁸ and often differed from the usual local price (from the market price).

Reimbursement is now primarily set upon the determination of the so-called usual price. Its definition may be found in the Act regulating Valuation of Property (AVP). According to this Act, the usual price is understood as “*the price that would be achieved by selling the same, or similar assets or in the case of the provision of the same or similar service in the usual course of domestic business in the country on the date of valuation.*” Similarly, the usual price is defined by the case law, according to which it is “*the price at which a replacement item of the same quality can be purchased in a given place and time is the market price, which is influenced by the supply and demand in the given place, as well as time.*”⁴⁹

3.3 INDIVIDUAL TYPES OF REIMBURSEMENT FOR EXPROPRIATION

3.3.1. IN GENERAL

The primary type of reimbursement is, of course, reimbursement for land or building if the ownership right to this land or building has been revoked. In such a case, as mentioned above, reimbursement is granted at the amount of the usual price. Only if the usual price is lower than the recorded price, reimbursement at the amount of the officially determined price is granted. The

⁴⁸ The procedure was in accordance with a subordinate legislation No. 122/1984 Sb., regulating Reimbursement for Expropriation of Buildings, Land, Vegetation and Rights to Them and Applicable Price Regulations.

⁴⁹ For example, the Judgement of the Constitutional Court of the Czech Republic dated 21st November 2007, file no. 25 Cdo 376/2006.

Czech legislation stipulates the rule that the price of the land or building shall always be determined according to their real wear and tear on the date of the application for expropriation, while doing so their material improvement or deterioration in connection with the proposed purpose of expropriation shall not be taken into account. This means that the fact that, for example, planning permission was issued allowing to implement the purpose of expropriation on the land (to build a wastewater treatment plant, motorway, or implement flood protection measures, etc.), which may increase or decrease the value of land or buildings, is not considered. The rule that the amount of purchase price, respectively reimbursement, should not reflect the value that can only be realized by the expropriator (the so-called special suitability), is also applied, for example, in England and the same consideration may be found in the USA, where the “Scope of The Project Rule” applies, which expresses that it should not be required to apply the increase in the market value of the land caused by its plan.⁵⁰ Other reasons to justify this limit include the exclusion of possible speculations, injustice to other owners, or the difficulty of determining such a price. This limitation is not in conflict with the case-law of the ECtHR.⁵¹

The Czech legislation also knows an alternative to the above-mentioned monetary reimbursement for an expropriated land or building in the form of the so-called natural reimbursement. Instead of monetary reimbursement, the owner of the expropriated property will be provided with another land or building if the expropriated party agrees with the expropriator. At the same time, the owner of expropriated property retains the right to adjust the difference in the price of the expropriated land/building and the replacement land/building. The condition of this procedure, however, is an agreement between the owner of the expropriated property and the expropriator. Given this, this is a legally unenforceable claim. However, this provision is not without legal consequences. According to the Supreme Administrative Court, there is really no legal right to a replacement, but if the expropriator has suitable land for replacement and does not do so, they will not fulfill another of the conditions of expropriation - namely subsidiarity (and expropriation is not possible). Therefore, if there is a choice of both monetary reimbursement and the possibility of exchanging land (buildings), the right of choice is up to the owner of the expropriated property, not the expropriator, who is obliged to approach and reflect on the choice of the expropriated. It is undoubtedly possible to identify oneself with this attitude

⁵⁰ [http://www.drdni.gov.uk/lps_marketing_-_compensation_for_business_owners_guide_-_sept_2012.pdf], accessed on 14/05/2021.; Kanner, G.: *Scope Of The Project Rule Gets Time Limits, Right of Way*, 10, 1980, p. 41.

⁵¹ Cf. e.g. the ECtHR Judgement in the case *Bistrovič v. Croatia*, dated 31st May 2007, no. 25774/05.

and interpretation of the law because the possibility of choice from several completely equivalent variants is one of the few reimbursements for the fact that the owner of expropriated property alienates their land involuntarily.⁵²

However, expropriation often affects real estate or parts thereof that have not been expropriated. Unfortunately, reimbursement for expropriated land or construction does not include, respectively does not take into account the decrease in the value of the remaining expropriated property. A certain way to prevent this is the request of the owner of the expropriated property to extend the expropriation, however, it is necessary to meet the legal conditions and reasons under which the expropriation may be extended to land or buildings that are not necessary to achieve the purpose of the expropriation (cf. Section (§) 4 of the Expropriation Act). In its decision-making activity, the ECtHR also addressed this issue, i.e. whether it is also necessary to compensate for the material deterioration of property for which the property right of the owner of the expropriated property is not directly taken away. It can be deduced from its case law that where expropriation has a very intense and direct effect on reducing the price of the remaining assets, such damage should be compensated for.⁵³ Abroad, these aspects are reflected and reimbursed, for example, in the USA or Great Britain.⁵⁴ On the contrary, in some countries, similar shortcomings are pointed out, for example, in Poland. E. Kucharska-Stasiak states that the Polish reimbursement scheme does not provide full reimbursement for all losses caused by expropriation, including reimbursement for the reduction in the value of the remaining (not expropriated) property.⁵⁵ It may be considered that it would also be *de lege ferenda* appropriate to adopt this in the Czech Republic as well and in the event of intense damage which is causally related to the expropriation, to compensate for the deterioration of the expropriated real estate of the owner of the expropriated property. Of course, an expert opinion on the determination of the amount would be necessary here as well. For the time being, some consideration of these facts can currently only take place within the framework of the application of the court's moderation law (see more detail below).

⁵² Judgement of the Supreme Court of the Czech Republic dated 13th October 2014, file no. 7 As 174/2014–44.

⁵³ Cf. e.g. the ECtHR judgement in the case *Bistrovič v. Croatia*, dated 31st May 2007, No. 25774/05, or the ECtHR judgement in the case *Ouzounoglou v. Greece*, dated 24th November 2005, no. 32730/03.

⁵⁴ Hanák, J.: *Vyvlastnění z environmentálních důvodů: současný stav a perspektivy*, Brno, 2015, p. 162.

⁵⁵ Kucharska-Stasiak, E.: *Uncertainty of Valuation in Expropriation Processes - the Case of Poland*, *Nordic Journal of Surveying and Real Estate Research*, 30, 2008, p. 90.

Reimbursement is also provided in cases where an easement is forcibly established, canceled, or reduced - even this is considered expropriation in the sense of Czech law. The Expropriation Act stipulates that the owner of the expropriated property is entitled to reimbursement in the amount of the price of the right corresponding to the easement, referring to the above-mentioned AVP, which also regulates the valuation of easements (respectively servitudes) - the so-called yield method is used. If according to it, the value of the right cannot be determined, the law stipulates that it will be valued at CZK 10,000. It is doubtful whether such a strict determination of a single price (albeit in a supportive manner) corresponds to fair reimbursement for expropriation.

3.3.2 REIMBURSEMENT OF EXPROPRIATION COSTS

Unlike some foreign legal regulations, the Czech Expropriation Act (Section (§), 10 Subsection 2) also grants the owner of the expropriated property entitlement to reimbursement of costs caused by expropriation. The owner of the expropriated property is entitled to reimbursement of costs of moving, costs related to the change of the principal place of business, and other similar costs which expediently arise as a result and in connection with expropriation. It follows from the wording of the Act that this is a demonstrative list of costs, which can undoubtedly be considered a positive aspect of the Czech legislation. The Expropriation Act in the first place states the reimbursement of costs of moving. It is clear that there may be a large number of different movables on the expropriated land or in the expropriated building that will have to be moved, which will undoubtedly require certain costs. The costs of the temporary storage of things should also be reimbursed if they cannot be moved immediately.

The Act also explicitly provides for the reimbursement of costs for changing the principal place of business. This may involve very diverse costs (e.g. change of documents, etc. associated with the change of registered office, making modifications to a new building or land necessary to operate and maintain the same business activities, etc.). Other possible reasons include transaction costs (for finding and acquiring new, replacement real estate), reimbursement for failed investments, or, above all, reimbursement of legal representation costs.⁵⁶

Under the current regulation, the costs of representation by an attorney in expropriation proceedings are not reimbursed, which can be considered a defect of the regulation, especially in cases where entities acting on behalf of the expropriator often have knowledge in the area and move there daily. In Eu-

⁵⁶ Ibid., 167-169.

rope, on the other hand, this replacement is common and recommended as a standard.⁵⁷ In the case of all these other costs, the owner of the expropriated property has to prove that they have been incurred efficiently, in connection with the expropriation, and also in a reasonable amount. It bears a subjective (procedural) burden of proof in this respect.

3.3.3 REIMBURSEMENT FOR THE TERMINATION OF THIRD-PARTY RIGHTS

From the constitutional requirement for reimbursement for expropriation or restriction of property rights (Article 11 (4) of the Charter of Fundamental Rights and Freedoms), it is also possible to deduce a requirement for reimbursement for the termination of rights of the so-called third parties. The category of third-party rights is not only known to the Czech expropriation law but also e.g. The German law [Section (§) 97 BauG], which refers to these persons as “Nebenberechtigte Personen”.

According to Czech law, “expropriation consists in the deprivation of ownership right to land or construction, while all rights of third parties to the expropriated land or building expire, unless provided for otherwise” [Section (§) 6 Expropriation Act]. It is precisely for the termination of these rights that it is necessary to provide reimbursement to so-called third parties. However, it seems to be very problematic that it is not clear what is meant by these terminating rights. In particular, the question is whether these rights concern only rights in rem or, under certain conditions, also the law of obligations. In our opinion, these can be both rights in rem (e.g. land servitudes, security interest, or lien) and purely law of obligation (e.g. lease or rent - especially the one that is not registered in the Land Registry), provided that they burden the expropriated land or building. From our perspective, the meaning and purpose of the legal regulation are to ensure the “legal purity” of the expropriated land or building - i.e., that these rights are not bound by any rights that may limit the exercise of the expropriator’s property right in the future.

The initial provisions for reimbursement for the termination of the rights of third parties are, in particular, included in Sections (§§) 12 and 14 of the Expropriation Act. The provision of Section (§) 12 of the Expropriation Act stipulates that “if the easements attached to the land or building terminate due to expropriation, the beneficiary of the easement is entitled to reimbursement in the amount of the price of this right.” In principle, we find the provision to

⁵⁷ [<http://www.fig.net/resources/publications/figpub/pub54/figpub54.pdf>], accessed on 13/06/2021.

be unnecessary, if not downright undesirable, as it may lead to an (incorrect and constitutionally non-conforming) interpretation that an authorization under rights (other than easements) that have lapsed as a result of expropriation does not create an entitlement to reimbursement in the amount of the price of this right. Most of the rights of third parties attached to an expropriated land or building are valued in accordance with the Property Valuation Act and the so-called Valuation Decree.

In practice, third parties are most often reimbursed for the termination of various land servitudes (*servitutes praediorum*). According to the Property Valuation Act, these are valued using the so-called yield method⁵⁸ based on the annual benefit taking into account the rate of limitation of services at the usual price regardless of whether the service had been established as remuneration or free of charge.⁵⁹ This shall not apply in the case when the annual benefit of the contract or the decision of the competent authority may be established, provided that the annual benefit of that burden was stated when the servitude arose and is not more than one-third lower than the usual price. According to the Property Valuation Act, the so-called annual benefit is multiplied by the number of years of using the right, but not more than five years and if the right belongs to a certain person for the whole of their life, it is valued using ten times the annual benefit [Section (§) 16b, Subsection 1 of the Property Valuation Act].

A specific situation occurs with reinsurance legal institutes that burden an expropriated real estate or building (especially concerning a lien, a security transfer of rights, and advance payment), which are affected by the very problematic wording of the provision of Section (§) 14, Subsection 1 of the Expropriation Act. This stipulates that “the expropriator shall grant the owner of the expropriated property designated reimbursement in full unless there are rights in rem tied to the expropriated land or building which terminate upon expropriation and outstanding receivables are not to be reimbursed to the pledgee, sub-pledgee, or beneficiary of the security transfer of rights from the reimbursement. The expropriator shall provide the specified reimbursement to the party entitled upon the easement which shall always be terminated upon expropriation separately. “The conditions as formulated in the provision of Section (§) 14, Subsection 1 of the Expropriation Act shall be met cumulatively. However, the requirement that they are “rights in rem” is *de lege ferenda* meaningless, as all the rights of third parties in any way burdening the expro-

⁵⁸ For more details see: Dušek, D.: *Základy oceňování nemovitostí*. 3. vyd., Praha, 2010, p. 71-89.

⁵⁹ In our opinion, the judgement of the Supreme Court dated 2nd February 2010, file no. 22 Cdo 82/2008 cannot be applied in the issue, because the Expropriation Act refers directly to the Property Valuation Act.

priated land or building regardless of their character based on rights in rem or law of obligations terminate upon expropriation unless stated otherwise.⁶⁰

However, in addition to the above-mentioned servitudes and the right of lien, as a result of expropriation, several other rights of third parties who need to be compensated expire.⁶¹ For example, there might be mentioned a lease, real estate loan, pre-emption right, reservations on the repurchase of land or a building, etc. Most of these rights are valued in the same way as servitudes, but the valuation method is not determined for some of them and determining the value of reimbursement for them is quite complicated. The situation is also complicated by the ambiguity of legal doctrine and case law in relation to the question of whether the assessment of the valuation method should be considered a legal or factual issue. Personally, we rather conclude that it is a legal issue, following the case-law of the German courts.⁶²

3.4. DECISION ON REIMBURSEMENT IN EXPROPRIATION PROCEEDINGS AND POSSIBILITIES OF ITS REVIEW

Reimbursement and its amount are decided within the framework of the expropriation procedure. The expropriation office shall always, by law, base the amount of reimbursement on an expert report; it cannot be replaced by any other means, such as an expert opinion or a judgment of the expropriation office itself on the price of the expropriated real estate. If the reimbursement is determined without an expert report, it will be considered a material procedural defect and the decision will be illegal. It is the expert report that should guarantee that the amount of reimbursement will be determined professionally, objectively and by a person qualified to do so and that it will meet the requirements of law and general justice.⁶³ The valuation must therefore always be performed by an expert or expert institute.⁶⁴

⁶⁰ The derogation is stipulated by law in relation to rent and sublease, which do not expire upon expropriation. Likewise, the rights of third parties for whom the public interest requires their duration do not terminate either. For more details see: Grygar, T.: *Expropriace a práva třetích osob*, *Jurisprudence*, 2, 2020, p. 26-39.

⁶¹ A complete overview of rights terminating due to expropriation is given in: Grygar, T.: *Expropriace a práva třetích osob*, *Jurisprudence*, 2, 2020, p. 33.

⁶² See in particular the judgement of the German BGH, dated 25th November 1998, file no. XII ZR 84/97.

⁶³ Cf. see also the judgement of the Supreme Court dated 16th November 2016, file no. 21 Cdo 5247/2015.

⁶⁴ Prior to the adoption of the Expropriation Act, the legislation did not stipulate the obligation to follow exclusively an expert opinion, however, the administrative bodies usually did so in accordance with the procedure under the Administrative Procedure Code.

From the perspective of ensuring the impartiality and objectivity of the procedure, when determining the amount of reimbursement, it is very important that the report is prepared by an expert who is impartial (objective). The possibility of excluding an expert for bias is, therefore, an important institute. The main problem in practice is the fact that the owner of expropriated property or expropriator often considers the expert selected by the other party to be biased. In expropriation proceedings, the owner of the expropriated property has a stronger position in terms of selection of the expert, as the reimbursement is determined based on an opinion prepared at the request of the owner of the expropriated property; based on an expert report prepared at the request of the expropriator, only if the party subject to expropriation agrees with it. Judicial practice in this regard and our opinion quite rationally states that *“the relationship of an expert to another party, which could result in doubts as to their impartiality and the objectivity of the expert report, cannot be inferred automatically from the fact that the expert prepared the report at the request of that party. If such an opinion was accepted, then such a conclusion on purposefulness and bias should be readily inferred from all expert opinions submitted by the parties to the proceedings.”*⁶⁵ However, the literature points to a certain danger of quite common practice, where expert opinions are processed for the expropriator or expropriation office by one or a limited circle of experts, as such an expert may *“gain a greater understanding of the interests of the client ordering the report or become in a certain way financially dependent on them over time.”*⁶⁶

Another problem associated with this issue is the situation when several expert opinions which do not comply with each other are submitted in expropriation proceedings. As a rule, the preferred solution is that the expropriation office appoints another expert itself and instructs them to prepare an audit expert report, which will comment on the accuracy of the reports already submitted and based on this, determine the reimbursement for expropriation.⁶⁷ In connection with this issue, the case-law of the Supreme Administrative Court rightly states that if an administrative body has two equivalent opinions at its disposal, it is not for it to decide which one to use, as it does not have the necessary expertise.⁶⁸ Conflicts shall always be resolved in a qualified manner; in addition

⁶⁵ The Judgement of the Supreme Court of the Czech Republic dated 29th March 2011, file no. 11 Tdo 1216/2010.

⁶⁶ Hanák, J.: *Vyvlastnění z environmentálních důvodů: současný stav a perspektivy*, Brno, 2015, p. 181.

⁶⁷ Ambrusová, E.: *Vyvlastňovací řízení od A do Z*, Olomouc, 2009, p. 57.

⁶⁸ Judgement of the Supreme Court of the Czech Republic dated 1st July 2010, file no. 7 Afs 53/2010–55.

to ordering an audit expert report, the case law (of the Supreme Court) recommends that inconsistencies be resolved by questioning the relevant experts.⁶⁹ We may thus summarize that the expropriation office should primarily hear both experts and if this does not lead to the removal of doubts, order an audit expert report.

The expropriation office decides on the reimbursement, it is a part of the statements of the law contained in a judgment. The determination of reimbursement for expropriation may be reviewed. The primary means of defense is an appeal as a proper remedial measure. If no remedy has been arranged and protection has been provided within the system of public administration (i.e. through an appeal), it is possible to claim concerning the determination of reimbursement for protection before the courts. Judicial protection in matters of expropriation in the Czech Republic is relatively complex and unusually conceived, as it is the so-called dual judicial protection, where, in relation to expropriation decisions, both administrative courts provide judicial protection if judgments on expropriation (revocation or restriction of property rights) are challenged, as well as civil courts if judgments on reimbursement are challenged. The question of reimbursement for expropriation is considered a private matter and therefore the jurisdiction of the civil courts is given. If the court concludes that the decision on reimbursement should have been different, it will replace the previous decision of the expropriation office with its judgment. An important specificity of judicial protection is then the power of the court to grant under certain circumstances and for statutory reasons higher reimbursement for the owner of the expropriated property than it may be determined by the administrative body within the expropriation proceedings (this is the so-called moderation right of the court). The court may take into account the extraordinary circumstances of the case and in addition to the reimbursement provided for in the Expropriation Act, increase the reimbursement for expropriation by up to 40% for reducing the severity of the expropriation (e.g. the length of the ownership of the land or buildings more than 15 years), up to 10 % in the case of the special architectural or historical value of the land or building or the case of its location in a built-up area, or by 20 % if the land or building is important for business activities. This is an exhaustive list of reasons for an extraordi-

⁶⁹ Judgement of the Supreme Court of the Czech Republic dated 16th November 2016, file no. 21 Cdo 5247/2015, Judgement of the Supreme Court dated 24th April 2012, file no. 21 Cdo 4562/2010, or Judgement of the Supreme Court dated 17th March 2016, file no. 29 Cdo 4153/2015. In another of its Judgements, the Supreme Court has stated that: "If the expert report submitted by the party to the proceedings meets the preconditions stipulated in Section (§) 127, Subsection 2 and Section (§) 127a of the Civil Procedure Code, it is considered an expert report required by the court and this applies even in the case when it concerns an audit expert report." Judgement of the Supreme Court dated 22nd January 2014, file no. 26 Cdo 3928/2013.

nary judicial increase of reimbursement only for the owner of the expropriated property. In the case of third parties whose rights expire upon expropriation, the court does not have a similar right to these persons. In a situation where there are several reasons for increasing the reimbursement by the court in a given case, we consider that the increase is added up for individual reasons.⁷⁰

It should be added that reimbursement is always paid in a one-off manner, in cash, and within the period specified in the expropriation decision. The time limit is determined in the decision by the expropriation office and it may not be longer than 60 days from the legal force of the decision. Failure to pay reimbursement to the owner of the expropriated property is one of the reasons why the owner of the expropriated property may propose that the expropriation office cancel the expropriation.⁷¹

4. CONCLUSION

Reimbursement is one of the basic conditions for expropriation with a long tradition both in the Czech Republic and in Europe. From the point of view of the Czech legislation, this is a constitutional and legal condition enshrined in the Charter, the fulfillment of which is specified in the Expropriation Act. However, it follows from the above analysis that it would be desirable *de lege ferenda* to remove the shortcomings of the current Czech regulation or application problems:

1. The basic rule concerning the very essence of reimbursement and its purpose is formulated both in the Charter and in the Expropriation Act very generally and indefinitely, without further classification that the owner of the expropriated property is entitled to full reimbursement (the amount corresponding to the actual interference with their property right)

In this respect, from a practical point of view, the deficiency may be eliminated by applying another law, namely the Civil Code. Although it is a private-law regulation, it also regulates the institute of expropriation and stipulates, among other things, that the owner is entitled to full reimbursement to the adequate extent to which their property was affected by these measures (Section (§) 1039) for restriction of the ownership right or the expropriation of the thing. Although there are different opinions on the relationship between the regulations in the Expropriation Act and Civil Code, we believe that the provisions

⁷⁰ For the same opinion, see Handrlica, J.: *Řízení o odnětí nebo omezení vlastnických práv k nemovitostem nově*, Právní rozhledy, 7, 2013.

⁷¹ In details: Grygar, T.: *Zrušení vyvlastnění dle části šesté vyvlastňovacího zákona*. Bulletin advokacie, 4, 2020, p. 33-38.

of the Civil Code on reimbursement for expropriation cannot be considered a superfluous (duplicate) declaration. We believe that the Civil Code goes in a way beyond the scope of the Charter and the Expropriation Act in terms of the extent of reimbursement (in favor of the owner of the expropriated property). J. Večeřa comments in more detail on the idea in the sense that if the reimbursement determined based on a public-law regulation (the Expropriation Act) was too low, it could be demanded in the amount specified in Section (§) 1039 of the Civil Code.⁷² In practice, however, there has not been any experience with this procedure yet and from the point of view of legal certainty of the persons subject to expropriation, it would be a more appropriate measure *de lege ferenda* to clarify the diction of the Expropriation Act following the model of the legal regulation in the Civil Code and to fully reflect the requirement of full reimbursement for expropriation.

2. Reimbursement of expropriated property should always be fair, and adequate and should fully compensate for the damage caused to the owner of the expropriated property by the interference with their property rights. At the same time, it should be provided within a reasonable time. This is where the problem arises in the Czech regulation in connection with calculating the usual price, which in many cases is ambiguous and may even lead to the fact that instead of the market price, the reimbursement shall be determined according to the set price officially (i.e. usually lower). The second problem is whether the damage is really compensated for completely. We believe that not, because reimbursement for expropriated land or construction does not include, respectively does not consider the decrease in the value of the remaining property of the owner of the expropriated property.

The Czech legislation introduced the determination of reimbursement according to the usual price only with the adoption of the Expropriation Act in 2007. Until then, its regulation in this respect was significantly in conflict with the case-law of the ECtHR and the requirements arising from it. However, problems persist even after the adoption of the Expropriation Act. In particular, it concerns the formulation of the calculation of the usual price (and the methods for its calculation), as well as the unclear relationship between the Expropriation Act and the Property Valuation Act (which regulates the calculation of the usual price). From the point of view of possible solutions, it would probably be most appropriate to enshrine the calculation of the usual price directly in the Expropriation Act. This could be adapted to the specifics of expropriation and the problems described above could be eliminated. We also consider the fact that reimbursement for expropriated land or construction does not include,

⁷² Večeřa, J. In Švestka, J. et al.: *Občanský zákoník: komentář. Svazek III.*, Praha, 2014, p. 124.

respectively does not take into account the decrease in the value of the remaining property of the owner of the expropriated property a problem. It may be deduced from the European case law that where expropriation has a very intense and direct effect on reducing the price of the remaining property, such damage should be compensated for.⁷³ Abroad, these aspects are reflected and compensated, for example, in the USA or Great Britain.⁷⁴ It may be considered that it would also be *de lege ferenda* appropriate to adopt this in the Czech Republic as well and in the event of intense damage which is causally related to the expropriation to compensate for the deterioration of the expropriated real estate of the owner of the expropriated property. Of course, an expert report on the determination of the amount would be necessary here as well.

3. Another European standard in the field of reimbursements is the requirement of the individualization of reimbursement as well as its calculation. From this point of view, we find only the optional possibility of natural reimbursement and also the impossibility to take into account some specifics of land or construction already in the expropriation proceedings (but only within the framework of judicial review) problematic.

Undoubtedly, the advantage of the Czech regulation is that it also allows for an alternative to monetary reimbursement for expropriation in the form of reimbursement in kind. Unfortunately, so far, it is only a legally unenforceable claim, while the agreement of both parties is assumed. *De lege ferenda*, it would be appropriate to consider whether this procedure should not be mandatory in situations where the expropriator has suitable replacement land/buildings and the expropriated prefers the exchange option. This, too, would undoubtedly contribute to the fulfillment of the principle of individualization. A related shortcoming of the Czech regulation is the fact that the Expropriation Act does not regulate the implementation of the exchange of land or buildings at all. A fundamental shortcoming is the fact that the law allows some specifics of the case to be taken into account (e.g., the architectural value of the property, the length of its ownership, the importance of the land or building for business) only within the framework of judicial review. Only the court may increase the reimbursement for expropriation for these specific reasons. Again, *de lege ferenda* it would be appropriate to consider whether this extraordinary increase could be entrusted to the expropriation authorities. The given measure could also reduce the frequency of litigation.

⁷³ Cf. e.g. the ECtHR judgement in the case *Bistrovič v. Croatia*, dated 31st May 2007, No. 25774/05, or the ECtHR Judgement in the case *Ouzounoglou v. Greece*, dated 24th November 2005, no. 32730/03.

⁷⁴ Scheiderich, W.: *Eminent domain: a handbook of condemnation law*, Chicago, 2014, p. 33.; Barnes, M.: *The Law of Compulsory Purchase and Compensation*, United Kingdom, 2004.

4. Apparently, in the Czech legislation related to reimbursement for expropriation, reimbursement for the termination of the rights of the so-called third parties may be considered the most problematic

First of all, it is not always entirely clear which rights of third parties expire as a result of expropriation and for which ones it is appropriate to provide reimbursement. In addition to this, in many cases, it is not clear which method of valuing certain rights is to be selected. Unfortunately, the valuation of certain rights of third parties terminated as a result of expropriation has not been clarified even by the case-law of the Czech courts. Therefore, it is even the more true that it is not beyond the agreement of individual entities (the owner of the expropriated property and third parties) in what proportion they will divide the reimbursement for expropriation.

LITERATURE

1. Allen, T.: Compensation for Property Under the European Convention on Human Rights, Michigan Journal of International Law, 2, 2008.
2. Ambrusová, E.: Vylvlastňovací řízení od A do Z, Olomouc, 2009.
3. Bezemek, Ch. et al.: Europäisches und öffentliches Wirtschaftsrecht II. 8. Auf, Wien, 2015.
4. Depenheuer, O. et al.: Die Enteignung: Historische, vergleichende, dogmatische und politische Perspektiven auf ein Rechtsinstitut, Berlin, 2018.
5. Dušek, D.: Základy oceňování nemovitostí. 3. vyd., Praha, 2010.
6. Grygar, T.: Expropriace prostřednictvím kontraktační povinnosti? Aneb k novele zákona o potravinách, Právní rozhledy, 12, 2018.
7. Grygar, T.: Expropriace a práva třetích osob, Jurisprudence, 2, 2020.
8. Grygar, T.: Zrušení vylvlastnění dle části šesté vylvlastňovacího zákona. Bulletin advokacie, 4, 2020.
9. Hanák, J.: Vylvlastnění z environmentálních důvodů: současný stav a perspektivy, Brno, 2015.
10. Handrlica, J.: Řízení o odnětí nebo omezení vlastnických práv k nemovitostem nově, Právní rozhledy, 7, 2013.
11. Hart, L. A. Positivism and the Separation of Law and Morals. Harvard Law Review, 1958.
–DOI: <https://doi.org/10.2307/1338225>
12. Hendrych, D. et al. Správní právo. 8. vyd. Praha, 2012.

13. Hoetzel, J.: Vyvlastnění. In Slovník veřejného práva československého. Svazek V, Praha, 2000.
14. Kanner, G.: Scope Of The Project Rule Gets Time Limits. Right of Way, 10, 1980.
15. Kaufmann, A. Problemgeschichte der Rechtsphilosophie. In Kaufmann, A., Hassemer, W. et al. Einführung in Rechtsphilosophie und Rechtstheorie der Gegenwart, Heidelberg, 1985.
16. Kmec, J., Kosař, D., Kratochvíl, J., Bobek, M.: Evropská úmluva o lidských právech. Komentář, Praha, 2012.
17. Krošlák, D.: Ústavné právo, Bratislava, 2016.
18. Kucharska-Stasiak, E.: Uncertainty of Valuation in Expropriation Processes - the Case of Poland, Nordic Journal of Surveying and Real Estate Research, 30, 2008.
19. Mayer, H.: Das österreichische Bundes-Verfassungsrecht: B-VG, F-VG, Grundrechte, Verfassungsgerichtsbarkeit, Verwaltungsgerichtsbarkeit: Kurzkommentar. 4. Auf, Wien, 2007.
20. Pavlíček, V.: O české státnosti. Úvahy a polemiky. 1. díl. Češi a Němci, Praha, 2004.
21. Pomahač, R.: Evropský soud pro lidská práva: Přiměřenost náhrady za vyvlastnění, Právní rozhledy, 9, 2010.
22. Rouček, F. & Sedláček, J.: Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a v Podkarpatské Rusi. Díl 2, Praha, 1935.
23. Scheiderich, W.: Eminent domain: a handbook of condemnation law, Chicago, 2014, p. 33.; Barnes, M.: The Law of Compulsory Purchase and Compensation, United Kingdom, 2004.
24. Škop, M.: Některé ústavněprávní rysy úpravy vytlačení menšinových akcionářů, Právní rozhledy, 24, 2005.
25. Švestka, J. et al.: Občanský zákoník: komentář. Svazek III., Praha, 2014.
26. Tichý, L. et al.: Evropské právo. 4. Vyd., Praha, 2011.
27. Wagnierová, E. et al.: Listina základních práv a svobod. Komentář, Praha, 2012.

